



Planning Ahead . . . enduring power of attorney

A guide to assist in planning for your future

The information in this pamphlet is to help you plan for the future management of your property and financial affairs. It is not legal advice.

What is an enduring power of attorney?

An enduring power of attorney is a legal document which you can use to appoint a person to make decisions about your property or financial affairs if you lose mental capacity. The person who makes an enduring power of attorney is known as ‘the principal’. The person who you appoint to make decisions for you is known as ‘the attorney’.

Why make an enduring power of attorney?

By making an enduring power of attorney, you are choosing who you want to manage your financial affairs if you lose the mental capacity to do this for yourself. If you do not have an enduring power of attorney and you lose mental capacity, there may be no one with legal authority to manage your financial affairs. This may mean that the Guardianship Tribunal or the Supreme Court will need to appoint a financial manager for you.

What is the difference between a ‘general’ power of attorney and an ‘enduring’ power of attorney?

A general power of attorney ceases to have effect after you lose the mental capacity to make financial decisions. An enduring power of attorney will continue even after you lose mental capacity (eg. if you develop dementia, have a stroke or sustain a brain injury in a car accident).

Can the attorney make any decisions apart from financial ones under an enduring power of attorney?

The attorney can make decisions about your property or financial affairs. This means that they can operate your bank accounts, pay your bills, and sell or buy property (such as your house or shares) on your behalf. An enduring power of attorney cannot be used to make medical or lifestyle decisions for you. However, you can appoint an enduring guardian to make these decisions. The Guardianship Tribunal can give you information about enduring guardianship.

Who can make an enduring power of attorney?

Anyone can make an enduring power of attorney if they have the mental capacity to understand the nature and effect of the power of attorney. People of any age (not just older people) can make an enduring power of attorney. It is a safeguard for anyone who would like to choose who can manage their financial affairs if they lose their mental capacity.

What level of capacity does someone need to make a valid enduring power of attorney?

To make a valid enduring power of attorney, the person making it must have mental capacity when they sign the document. At that time, the person must be capable of understanding the nature and effect of the enduring power of attorney. They must be capable of understanding the range of decisions which the attorney can make on their behalf. They should also understand that the attorney can make decisions without consulting them.

What if it is unclear whether a person has the mental capacity to make an enduring power of attorney?

If it is not clear if a person has the required mental capacity to make an enduring power of attorney, it is best to seek advice from a lawyer and health professionals. The lawyer may suggest that the person's capacity be assessed by a professional (such as a neuropsychologist or geriatrician) before the enduring power of attorney is made.

Who should I appoint as my attorney?

An attorney can have enormous power over your financial affairs. You should choose an attorney whom you trust and who will manage your finances in a responsible way. If your financial affairs are complicated, you should appoint an attorney who has the skills to deal with complex financial arrangements. You may wish to appoint a family member or a close friend as your attorney. You can also appoint the Public Trustee or a trustee company but fees will apply. You should contact these organisations for more information.

How many attorneys can I appoint?

You can appoint more than one attorney. When appointing more than one attorney, you should choose people who can cooperate with each other and who you trust to work together in your best interests. You can appoint your attorneys to act:

- jointly and severally (this means that the attorneys can make decisions together or separately),
- severally (this means that any one of the attorneys can make decisions independently of the other attorneys),
- jointly (the attorneys must agree on all decisions).

What if one of my attorneys dies or cannot continue for some reason?

Your power of attorney may be affected if one of your attorneys dies or cannot continue in their role. This depends on how you appointed the attorneys. If you appointed them to act jointly and one of them is no longer willing or able to carry out their duties, then this will automatically end the enduring power of attorney. However, if you appointed your attorneys to act jointly and severally or severally then the enduring power of attorney will continue, even when one of them can no longer act. The remaining attorneys can keep making decisions for you.

What powers can I give an attorney under an enduring power of attorney?

You can give your attorney the power to make any decision or do anything about your finances or property which you could do yourself. These broad powers include selling, buying or leasing property (such as your house), making investments, accessing cash (including bank accounts) and buying or selling shares. You can control the power you give to the attorney by placing limits or conditions in the enduring power of attorney. For example, you can give the attorney limited authority to do specific tasks, such as paying regular bills but not selling property. If you wish to limit your attorney's powers you should seek legal advice about the best way to do this.

What are the duties and responsibilities of an attorney?

An attorney is in an important position of trust. The attorney is legally responsible to you and must:

- always act only in your best interests;
- avoid doing anything as an attorney which would mean that their interests conflict with your interests;
- obey your instructions while you are mentally capable and any directions you make in the enduring power of attorney;
- act according to any limits or conditions placed on their authority;
- not give gifts or give themselves or others a benefit using your finances unless you specifically authorise this;
- keep their finances and money separate from yours;
- keep accurate and proper records of their dealings with your finances or property.

If your attorney abuses their position of trust, legal action can be taken to protect your interests.

When does an enduring power of attorney start?

You can choose when you would like your enduring power of attorney to start. You may want the enduring power of attorney to start immediately after you appoint the attorney or at some future date. When you make an enduring power of attorney, you should make it clear when you want it to start. If you do not make this clear, then the enduring power of attorney will start when the attorney accepts the appointment by signing the enduring power of attorney.

When does an enduring power of attorney end?

An enduring power of attorney ends:

- when you revoke it (so long as you have mental capacity at that time);
- on your death;
- when you have only appointed one attorney and that attorney dies or can no longer act as your attorney;
- when you have appointed two or more attorneys to act jointly and one of them dies or can no longer act as your attorney.

The enduring power of attorney may also end for more complex legal reasons such as bankruptcy. You should seek legal advice about these matters.

If your enduring power of attorney has ended and you no longer have the mental capacity to make a new one, the Guardianship Tribunal may be able to make orders so the enduring power of attorney can continue. For example, if your enduring power of attorney has ended because a jointly appointed attorney has died, the Tribunal has the power to reinstate the enduring power of attorney so that it can continue in your best interests.

How do I make an enduring power of attorney?

A form is attached to this guide which you can use to make an enduring power of attorney. You must sign the form and have your signature witnessed. Your attorney(s) must sign the form before they can act as your attorney/s. If the form does not meet your needs you may wish to contact your legal adviser who can prepare a form for you.

Who can witness an enduring power of attorney?

An enduring power of attorney must include a witness's certificate completed and signed by an appropriate witness. The witness must be present when you sign your enduring power of attorney. The **only witnesses who can witness your signature** on an enduring power of attorney and complete the certificate are:

- an Australian solicitor or barrister
- a registrar of a NSW Local Court
- a licensed conveyancer or an employee of the Public Trustee/private trustee company who has completed an approved course
- a qualified overseas lawyer.

Your enduring power of attorney cannot be witnessed by someone who you are also appointing as your attorney (for example if you are appointing your solicitor as your attorney then he or she cannot also be your witness).

Do I need to register the enduring power of attorney?

If your attorney needs to use the enduring power of attorney to deal with any real estate you own in NSW, then, in most cases, the enduring power of attorney must be registered with Land and Property Services NSW. There is a fee charged for registering an enduring power of attorney. Even if there is no requirement to register the enduring power of attorney, you may choose to do so because that means the enduring power of attorney:

- will be on record as a public document;
- will be kept safe from loss or destruction;
- may be more easily accepted as evidence that your attorney has authority to deal with your property or financial affairs.

After registration, your original enduring power of attorney will be returned to you with a registration number stamped on it. Your attorney should use this number when signing any documents on your behalf.

If your enduring power of attorney is registered but you later revoke it, you should also register the revocation. Contact Customer Service at Land and Property Services NSW on (02) 9228 6666 or visit their website at www.lands.nsw.gov.au for more information about registration requirements.

How do I revoke my enduring power of attorney?

You can revoke your enduring power of attorney at any time so long as you have mental capacity to understand what you are doing when you revoke it. You should notify the attorney(s) that you have revoked the enduring power of attorney either by telling them or in writing.

It is clearer for everyone if you revoke the enduring power of attorney in writing, especially if it is registered at Land and Property Services NSW. If you do not tell the attorney about the revocation, the attorney can keep dealing with your finances and property. After revocation, you should destroy the original and any copies of the enduring power of attorney.

Can an interstate enduring power of attorney be used in NSW?

Yes.

If an enduring power of attorney was made in another Australian state or territory then it is automatically recognised in NSW. This does not apply to enduring powers of attorney which are made overseas.

Can a NSW enduring power of attorney be used interstate or overseas?

If you want your attorney to use your NSW enduring power of attorney in another state or overseas, you should make enquiries in that state or country. Every state and country has different laws about powers of attorney.

What is the Guardianship Tribunal's role in relation to enduring powers of attorney?

If there is a problem with how the enduring power of attorney is working, an application can be made to the Guardianship Tribunal or the Supreme Court for a review of the enduring power of attorney. The Guardianship Tribunal and the Supreme Court have the power to make a wide range of orders about enduring powers of attorney. For example, the Guardianship Tribunal could order the replacement of an appointed attorney if it was satisfied the attorney is not acting in the best interests of the person who appointed them.

You should seek legal advice if you are considering this and explore other options of resolving the problem. You can also contact the Guardianship Tribunal for information and brochures about reviews of enduring powers of attorney.

Where can I get legal assistance?

An enduring power of attorney is an important legal document. You should seek legal advice if you have any questions or concerns about enduring powers of attorney as this is a complex legal area.

- Community legal centres — some community legal centres will assist you for free or at low cost.
- Private solicitors — many private solicitors will prepare a power of attorney for a reasonable fee.
- The Public Trustee — the Public Trustee will prepare a power of attorney at no cost if they are appointed as the attorney.
- Registrar of a Local Court — a registrar of a Local Court can witness an enduring power of attorney. This service is free.

THE FORM ATTACHED TO THIS GUIDE SHOULD NOT BE RETURNED TO THE GUARDIANSHIP TRIBUNAL.

After the form is completed there is no requirement to formally lodge it anywhere unless the attorney needs to deal with land. To register with Land and Property Services NSW call (02) 9228 6666 or visit their website at www.lands.nsw.gov.au. However, it is a good idea to keep the completed appointment form in a safe place.

Tell someone else where it is.

Give a copy to your appointed attorney(s).

More information

If you require additional information please contact the Guardianship Tribunal's Enquiries Service

Guardianship Tribunal

Website: www.gt.nsw.gov.au

Telephone: (02) 9556 7600

Toll free 1800 463 928

TTY (telephone typewriter) (02) 9556 7634

Fax: (02) 9555 9049

Email: gt@gt.nsw.gov.au

Address: Level 3, 2a Rowntree Street, Balmain 2041

Postal address: Locked Bag 9, Balmain 2041