

Responsibilities of the Nominated Attorney

The person who holds Power of Attorney has a legal obligation to act in the donor's best interests at all times. Furthermore, they must:

- maintain proper records of any dealing on behalf of the donor;
- keep their money and property separate from the donor's; and
- avoid any conflicts between their interests and the donor's.

Guardianship

Where an attorney has not been appointed and a person becomes incapacitated, application can be made to appropriate State or Territory Government authorities for guardianship. Generally a family member would be appointed. If for some reason this was not appropriate, the Public Guardian may be appointed.

Costs

The cost of preparing an Enduring Power of Attorney will differ depending on who is used to prepare the document. Do it yourself documentation is available for ordinary Powers of Attorney.

If self preparation of an Enduring Power of Attorney is undertaken be sure the document is prepared and signed in accordance with any specific state legislative requirements, otherwise it may be invalid and to no avail. Stamp duty may apply in some jurisdictions.

Legal Advice

The information contained in this leaflet is of a general nature only. While it is possible to draft an Enduring Power of Attorney, legal advice should be sought if there are any doubts or if the situation is considered complex.

Where to obtain legal assistance

- Community Legal Centres
- Practicing Solicitors
- Public Trustee
- Chamber Magistrates

Glossary

Attorney - the person appointed or empowered to transact any business on behalf of the donor.

Donee - the person appointed as attorney.

Donor - the person granting the Power of Attorney.

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Enduring Power of Attorney



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Power of Attorney

A Power of Attorney is a legal document that provides authority to a person (attorney) to act on behalf of another person (donor). That authority can be as broad as to give the attorney (donee) total power to act as if they were the donor or it can be restricted to a single transaction or timeframe such as selling a specified asset or operating a bank account while away on holidays.

Authority under a general Power of Attorney ceases immediately the donor or donee becomes mentally incapable of managing their own affairs or giving instruction.

Enduring Power of Attorney

An Enduring Power of Attorney continues to be valid even if and after the donor loses mental capacity. However, it must be granted while the donor still has capacity. To have effect, the original document must be witnessed, usually by two adults and in the prescribed form. Requirements and documentation usually vary between states and compliance with relevant legislation is vital. Separate documentation may be required for health and medical matters. Additionally Enduring Powers of Guardianship may also be required.

Who to Appoint

Enduring Powers of Attorney provide many benefits in managing the donor's affairs. However, care is needed in appointing an attorney as there have been instances of abuse. Understand the implications of appointing an attorney and ensure the Enduring Power of Attorney has been prepared correctly. Attorney's powers can be revoked or suspended through each State's or Territory's Guardianship Tribunal if shown that the attorney has acted inappropriately.

As the attorney can do anything the donor can in relation to dealing with their assets and financial affairs it is important to appoint a person who is trusted implicitly. If the donor is not able to find someone they consider trustworthy to appoint, a professional trustee company or the Public Trustee can be appointed. Be aware of the costs that would apply.

More than one attorney can be appointed to act either jointly or individually. Legal advice should be obtained in this regard.

An Enduring Power of Attorney does not confer authority on an attorney until the attorney accepts the appointment by signing the Power of Attorney.

Often legislation requires certification by a solicitor or legal authority that the terms of an Enduring Power of Attorney have been explained and appear to be understood.

Features

- Ensures donor's affairs can be managed by a chosen party in the event of incapacity;
- Can be established to come into effect on the occurrence of a specified event (illness or incapacity) or operate on specific affairs;
- Authority may be granted to make decisions about medical treatment, accommodation etc. Requirements in States and Territories vary;
- Possible to revoke (cancel) and to appoint another attorney;
- Does not interfere with donor's right to make decisions while they have capacity.

But Remember...

- Administration of donor's affairs, including management of investments, vests totally in the donee;
- It may be difficult to prove the attorney has acted dishonestly or improperly so choose the attorney carefully;
- If cancelling the Power of Attorney inform all organisations (financial institutions, government departments etc.) that have dealt with the attorney. Otherwise they may continue to allow the attorney to act on behalf of the donor;
- Registration of an Enduring Power of Attorney may be required in some States or Territories or for certain transactions.