Power of attorney

There have been changes to legislation on powers of attorney. Prescribed forms for powers of attorney are now found in Schedule 2, Powers of Attorney Regulation 2011. There are two separate forms: Form 1 is a general power of attorney, Form 2 is an enduring power of attorney. Factsheet and forms can be downloaded from the NSW Land & Property Information website [2].

A power of attorney, like a will, is a way of preparing and planning for the future.

A power of attorney is a legal document that appoints and authorises someone to act on your behalf in the areas of property and financial management. It does not authorise anyone to make other decisions, such as those relating to lifestyle, health or personal affairs; these are covered by appointing an enduring guardian [3].

The person who makes the power of attorney is known as the principal; the person appointed to act for them is known as the attorney. Sometimes the word ‘attorney’ is used to refer to a lawyer, but in this case ‘attorney’ simply means your authorised representative, who may or may not be a lawyer. In fact, the attorney is usually a family member or close friend.

While you may be able to look after your financial affairs at present, this may change in the future.

You can appoint an attorney for:

- a limited period, or
- an indefinite period.

You might draw up a limited power of attorney to enable your attorney to act for you when you are overseas, or to deal with a specific situation in another state or overseas.

A power of attorney that is unlimited as to time applies until you die or revoke it.

If you want your power of attorney to still be valid even if you lose your mental capacity after you make it, you must make an enduring power of attorney. In this case, the power of attorney must be explained to you by a prescribed person such as a lawyer, and that person must sign a certificate stating that you understood the effect of giving an enduring power of attorney – that is, that the power of attorney will still be valid if you lose your mental capacity.

Appointing an attorney

Because the attorney has full authority to deal with your affairs, it is important that you appoint someone you trust and who will act responsibly. The attorney must act with good faith and tell you of any conflict of interest that may influence their ability to act responsibly and genuinely on your behalf.

Preparing a power of attorney

It is advisable to have an enduring power of attorney prepared by a lawyer, as it must be witnessed by a prescribed person, who may be a lawyer. It is also advisable to see a lawyer to make a power of attorney that puts limits or conditions on the attorney, or allows the attorney to make gifts or confer benefits.

Ending a power of attorney

A power of attorney will operate until:

- you cancel it
- the attorney no longer wants to act
- the Civil and Administrative Tribunal (Guardianship Division) or Supreme Court makes an order affecting the power of attorney.

It also ceases if either the attorney or the principal becomes bankrupt or dies or if the attorney loses their mental capacity (unless it is an enduring Power of Attorney). If the power of attorney has been registered, a written revocation of that power should also be registered.

**The importance of having an enduring power of attorney**

As a power of attorney can only be made while you are of sound mind, having an enduring power of attorney is a safeguard against the possibility of not having anyone with authority to manage your property and finances if you suffer loss of mental capacity.

Having an enduring power of attorney is an important consideration for everyone, not only people who are old or with an illness that may affect mental capacity. If you have an accident that affects your mental capacity, nobody will be able to have access to your assets, such as your bank accounts or superannuation, unless you have made an enduring power of attorney. If you have not made one, your family or a close friend will have to apply to be appointed as your financial manager, either through the Civil and Administrative Tribunal or the Supreme Court, which may take a considerable time. It is much simpler if you have given someone an enduring power of attorney.

**The Powers of Attorney Act**

The Powers of Attorney Act 2003 came into effect on 16 February 2004. All powers of attorney made before that date are still valid. That Act and its regulations were amended from 13 September 2013 to create two different forms for a Power of Attorney. A General Power of Attorney which is automatically terminated if you lose mental capacity and an Enduring Power of Attorney which will remain valid if you lose mental capacity. A General Power of Attorney may be useful if you are away for a short time. It does not need to be witnessed by a prescribed person.

Any power of attorney made before that date is still valid.

The Act allows the person appointing an attorney (the principal) to give the attorney specific directions on how the attorney is to act on behalf of the principal.

Particularly, the Act confirms that an attorney cannot use the principal’s assets for any purpose other than the benefit of the principal, unless the instrument expressly authorises it.

**Acceptance of enduring power of attorney**

Before an attorney can use an enduring power of attorney, it must be ‘accepted’ by the attorney. That means that the attorney must sign the power of attorney. The attorney’s signature does not have to be witnessed, and the attorney does not have to sign at the same time as the principal.

**Information for principals and attorneys**

The forms include important information for principals and attorneys, such as that the attorney must always act in the best interests of the principal. Forms and information are found on the [NSW Land & Property Information website](https://www.nswlandinfo.nsw.gov.au).

**Registering a power of attorney**

A power of attorney need only be registered at NSW Land and Property Information if it is to be used to sign a document relating to land. The current cost of registration is $136.30 as at July 2016.

**When does a power of attorney take effect?**
The principal can now elect when the power of attorney comes into effect.

This could be:

- immediately
- when the attorney accepts the appointment
- at a particular date
- when the principal's attorney considers that the principal needs assistance managing their financial affairs.

Alternatively, the principal can stipulate that the power of attorney does not take effect until the principal lacks capacity.

**Prescribed witnesses**

If the power of attorney is to be enduring, it must be witnessed by one of the following:

- a registrar of a Local Court
- a barrister or solicitor admitted in any Australian state or territory
- a licensed conveyancer, an employee of the NSW Trustee and Guardian
- or an employee of another trustee company who has completed an approved course of study
- someone qualified as a lawyer in a country other than Australia.

**Authorising an attorney to give gifts**

The forms allow the principal to authorise the attorney to:

- give gifts to certain people in certain circumstances
- confer benefits on the attorney. The benefits are limited to housing, food, education, transportation, medical care and medication
- confer benefits on named third parties. The benefits are the same as the benefits attorneys can confer on themselves.

If you wish your attorney to be able to give gifts or confer benefits, it is suggested that you use a lawyer to draw up your power of attorney. If you are making an enduring power of attorney, you would normally use a lawyer to witness your signature, or the registrar at the local court can be a witness.