

Powers of Attorney in New South Wales

Explanation of terms

Principal:	Person who makes a power of attorney giving someone else the authority to look after his or her money and assets (sometimes also called 'the donor').
Attorney:	Person with the principal's authority to look after the principal's money and assets (sometimes also called 'the donee').
Power of Attorney:	A document signed by the principal that gives the attorney the authority to look after the principal's money and assets.
Loss of mental capacity:	When a person cannot manage his or her affairs or cannot understand a document that they is signing. (If there is any doubt, seek medical advice.)

Powers of Attorney Act 2003

The *Powers of Attorney Act 2003*, which commenced on 16 February 2004, makes changes to the law governing powers of attorney in New South Wales, especially enduring powers of attorney.

What is a power of attorney?

A power of attorney is a legal document made by one person, who is called the 'principal', that allows another person to do things with the principal's money, bank accounts, shares, real estate and other assets. This can include spending and managing the principal's money, buying or selling shares for the principal or buying, selling, leasing or mortgaging the principal's house or other real estate. The person who does these things for the principal is called the 'attorney'. A principal is sometimes called the 'donor' and an attorney is sometimes called 'the donee'.

The word 'attorney', when used in the expression 'power of attorney', does not mean that the person appointed has to be a solicitor or lawyer. The person appointed as attorney can be any person over the age of 18 years who is able to assist the principal with money or property – a relative, friend or professional adviser.

A power of attorney only authorises an attorney to act in relation to financial matters. It does not allow the attorney to make personal (including medical) decisions for the principal. Anyone who wants another person to make personal decisions for them should appoint an enduring guardian under the *Guardianship Act 1987*. See **Guardianship Tribunal** below for information on enduring guardians.

There are two types of powers of attorney: General Power of Attorney (also called an ordinary power of attorney) and Enduring Power of Attorney. The same form can be used to create both.

General (or ordinary) power of attorney

A general (or ordinary) power of attorney will terminate if the principal loses mental capacity. It can be useful for a short term appointment, for example if the principal is going overseas for a short period.

To make an ordinary power of attorney the principal's signature need only be witnessed by a person over the age of 18 (other than the attorney being appointed).

Enduring power of attorney

An enduring power of attorney is one which continues to operate after the principal has lost mental capacity.

An enduring power of attorney can be made on the same form as an ordinary power of attorney. However, an enduring power of attorney has some additional requirements.

- It must say that the principal wants it to continue after they have lost mental capacity.
- The attorney has to sign the form to show that they consent to act. This can occur at the same time as the principal signs or at a later time. However, the enduring power of attorney will not begin to operate until the attorney has signed. (This is not required for an ordinary power of attorney).
- The principal's signature must be witnessed by a special witness (called a 'prescribed witness').
- The prescribed witness must sign a certificate on the form stating that they explained the enduring power of attorney to the principal and that the principal appeared to understand it.

A 'prescribed witness' is:

- a solicitor, barrister, Registrar of a Local Court
- a licensed conveyancer, employee of the Public Trustee or employee of a trustee company who has completed an approved course of study.

Should I make a power of attorney?

A power of attorney can help if you cannot look after your finances for yourself. For example, if you become ill, are confined to hospital, go overseas, or become unable to go to banks, government offices or real estate agencies, then you may need someone else to do things for you.

By appointing an attorney, there will be someone who is legally authorised to do things for you when the need arises. It is possible that a bank might simply accept a letter of authority from you, but you should check this with the bank. If a letter of authority is not sufficient then a power of attorney will be necessary.

If you want someone to be able to sign documents on your behalf buying, selling or dealing with real estate, then a power of attorney is essential.

Should I make an enduring power of attorney?

An enduring power of attorney can be useful because you may become unable to look after things for yourself at some stage in the future. This could be due to physical problems, loss of mental capacity or something unforeseen such as an accident. Making an enduring power of attorney is a cheap, easy and practical step to prepare for the future. Once you have lost the mental capacity to understand what you are doing, it is impossible to make a power of attorney.

By making an enduring power of attorney, there will be another person who can quickly and easily look after your money and property if you become unable to do so. Another advantage of making an enduring power of attorney is that you can choose the person who you want to be your attorney. Also, you can make special directions in the power of attorney document about what you want your attorney to be able to do or impose limits on what they can do.

Do I lose my rights?

Making someone your attorney does not mean that you lose your right to operate your bank account, deal with your real estate or affect any other rights that you have. You can continue to look after your money and property while you still have mental capacity to do so.

When should I make a power of attorney?

It is important to make a power of attorney *before* you need it. This is particularly true for enduring powers of attorney. Once you have lost mental capacity, you cannot make a power of attorney because for a power of attorney to be effective, you must be able to fully understand what you are signing.

A power of attorney usually starts as soon as it is signed and given to the attorney. If, however, you do not want your attorney to start using the power of attorney straight away, you can state on the power of attorney form when you want it to start. If you do this, then making your power of attorney early does not mean that you are handing over control to your attorney straight away.

Who can I appoint as my attorney?

Any person over the age of 18 can act as your attorney. It can be a close family member or a friend who you trust. You should ask the person you want to appoint if they will agree to be your attorney and look after your money and property.

If you do not want to appoint a relative or friend, you can appoint the Public Trustee, a trustee company or a professional such as a solicitor or accountant, but they will be entitled to charge a fee for acting as your attorney.

If you appoint more than one attorney you need to indicate on the form whether you want your attorneys to act jointly (that is, only when they all agree, in which case they all must sign any document) or jointly and severally (any one attorney will be able to act independently of the others).

Prescribed Form

The *Powers of Attorney Act 2003* introduced a new prescribed form for powers of attorney. It can be used to make either an ordinary power of attorney or an enduring power of attorney. The form contains information for both principals and attorneys, particularly about the duties of an attorney. Also, by requiring the principal to make choices about such things as when the power of attorney is to start operating and what powers the attorney is to have, the form helps to clarify the authority being given to the attorney.

The old prescribed form cannot be used to create a power of attorney after the commencement of the *Powers of Attorney Act 2003* on 16 February 2004. However, powers of attorney on the old form dated before that date remain valid and may be registered.

What can my attorney do?

With some exceptions, and depending on what limits you impose, your attorney can do all the things that you can do with your money and assets. For example, an attorney can sell, lease or mortgage your house, sell your personal belongings, take money out of your bank accounts and sell your shares. The prescribed form allows you to impose limits or conditions on the attorney's authority.

More generally, an attorney cannot vote in an election or make health or other personal decisions for you. See **What about medical decisions?** below for personal and health decisions. Also, your attorney cannot carry out your duties as trustee for someone else.

Attorney's authority to use principal's money for gifts

One area that used to cause confusion was whether an attorney could use the principal's money to give gifts. The *Powers of Attorney Act 2003* aims to clarify this issue.

An attorney cannot make any gift of the principal's money or property unless the power of attorney form specifically allows the attorney to do so. The prescribed form contains a clause (Clause 5) authorising an attorney to give reasonable gifts. If that clause is not crossed out, the attorney will be able to use the principal's money to make only certain types of gifts. Allowable gifts are gifts to a relative or close friend of the principal of a seasonal nature (for example, birthday, Christmas or other religious occasion) or because of a special event (for example, birth or marriage). Also permitted are donations of the kind that the principal made or might reasonably be expected to make (for example, to a favourite charity). However, the value of the gift or donation must be reasonable having regard to the principal's financial circumstances and the size of the principal's estate.

If you do not want your attorney to have the power to make such gifts, you should cross out Clause 5 on the form.

Attorney's authority to use the principal's money for their own benefit or the benefit of others

As with gifts, an attorney cannot use the principal's money for the attorney's benefit, or the benefit of any other person, unless the power of attorney form specifically allows the attorney to do so. There are clauses in the form (Clauses 6 and 7) which, if not crossed out, will allow an attorney to use the principal's money for housing, food, education, transportation and medical care for the attorney or a person nominated in the power of attorney (for example, the principal's children). Again, the amount of the benefit must be reasonable having regard to the principal's financial circumstances and the size of the principal's estate. If you do not want your attorney to have these powers you should cross out the relevant clause on the form.

What are my attorney's obligations?

An attorney is under a duty to act in the best interests of the principal, except as specifically authorised in the power of attorney document (for example, if clauses 5, 6 or 7 on the prescribed form are not crossed out).

An attorney must:

- keep the attorney's money and assets separate from the principal's money and assets (unless they are joint owners or operate joint bank accounts)
- keep proper accounts and records of how the attorney handles the principal's money and assets. The Public Trustee, or anyone interested in the principal's welfare, can require the attorney to produce these accounts and records.

If the attorney does not carry out the obligations properly, they may have to compensate the donor. It is also possible that a transaction by the attorney may be cancelled, or that the power of attorney will be terminated or the attorney replaced. See **What happens if there is a dispute?** below for information on disputes.

Except where the power of attorney document says otherwise, the attorney cannot be paid for his or her work as attorney, although they can claim any out-of-pocket expenses directly connected with carrying out the power of attorney duties. The attorney should keep receipts to prove these costs. If a solicitor, the Public Trustee or a trustee company is appointed as attorney, the power of attorney document will usually contain a clause allowing them to charge a fee for acting.

Can I change my mind and cancel a power of attorney?

A power of attorney can be revoked (that is, cancelled) at any time as long as the principal still has mental capacity.

There is no set or prescribed form for revoking a power of attorney – a letter will do. However, a suggested form for Revocation of Power of Attorney is attached at the end of this fact sheet.

Whether you use a form or just a letter you **must** give a copy to the attorney to ensure that they knows that the power of attorney has been revoked.

There is no obligation to register the revocation, but if the power of attorney has been registered it is advisable to register the revocation. You should also inform your bank, and anyone else who might be expected to act on the faith of the power of attorney, that it has been revoked.

What about medical decisions?

In NSW, a power of attorney only authorises an attorney to act in connection with financial matters such as bank accounts, shares or property. It cannot be used to make medical or lifestyle decisions. If you want someone to make medical, treatment and other personal or lifestyle decisions for you, you should appoint an enduring guardian. There is a separate form for appointment of an enduring guardian.

For more information on enduring guardianship, you should contact the Guardianship Tribunal. They can send you explanatory material that also includes a blank enduring guardianship form. See **Guardianship Tribunal** below for contact details.

What happens if there is a dispute?

If there is a dispute involving a power of attorney and the people involved cannot settle it, they will have to go to either the Guardianship Tribunal or the Supreme Court. Under the *Powers of Attorney Act 2003* both the Supreme Court and the Guardianship Tribunal have the power to review enduring powers of attorney. The Guardianship Tribunal should provide a faster and cheaper alternative to the Supreme Court for resolving disputes.

The Supreme Court retains the sole right to review certain types of ordinary powers of attorney.

Anyone seeking to review a power of attorney or challenge an attorney's authority should seek legal advice.

Where can I get power of attorney forms?

A power of attorney form is available at the end of this fact sheet.

Printed forms are also available from some newsagents, Australia Post shops, stationers and law stationers. Law stationers are listed in the Yellow Pages under *Legal Stationery*.

Do I have to register my power of attorney?

You must register your power of attorney if your attorney is going to sell, mortgage, lease or otherwise deal with your real estate. Otherwise, it is not necessary to register it. However, by registering your power of attorney it will be:

- on record as a public document
- safe from loss or destruction
- more easily accepted as evidence that your attorney is allowed to deal with your money and assets.

Powers of attorney are registered at the Sydney office of the Department of Lands. Anyone can lodge it for registration – either you, your attorney or someone else. You cannot post or fax it. The original power of attorney and a photocopy of it should be taken to:

Department of Lands
Land and Property Information Division
1 Prince Albert Road
Queens Square
Sydney NSW 2000

You will also need to pay the current registration fee.

At the Department of Lands, the staff will stamp a number on the original power of attorney and return it to you. This number is evidence that the power of attorney has been registered. Your attorney should use this number when they sign a document on your behalf. Your power of attorney will be digitally scanned and placed on public record, for anyone to see.

What about stamp duty?

In NSW, it is not necessary to pay stamp duty on ordinary or enduring powers of attorney.

Can I use a power of attorney in NSW if it is made interstate or overseas?

Ordinary powers of attorney

As a general rule, it is possible to use an ordinary power of attorney in NSW even if it was made interstate or overseas. The power of attorney must, however, have certain basic features.

It must:

- be in English, or translated into English by a qualified translator
- show the date that it was made, the name of the principal and the name of the attorney
- have a statement that gives the attorney the power to act for the principal
- be signed by the principal
- be witnessed by any adult person.

Enduring powers of attorney

Each state and territory of Australia has different requirements for making enduring powers of attorney. Previously, if a person made an enduring power of attorney in another state, it could not be used in NSW if it did not comply with NSW requirements. Under the *Powers of Attorney Act 2003*, enduring powers of attorney made in another state or territory of Australia will be recognised as valid in NSW.

However, in order to be registered in NSW an interstate enduring power of attorney must be accompanied by a certificate from a lawyer from the state or territory where it was made saying that it was made in accordance with the laws of that state or territory, and stating that they:

- have been admitted to legal practice in that state or territory
- hold a practising certificate in that state or territory
- practise in that state or territory.

Can I use a NSW power of attorney outside NSW?

If you want to use a NSW power of attorney outside NSW, you should check what the requirements are in the place where you want to use it. This applies to both ordinary and enduring powers of attorney. Some Australian states and foreign countries have different requirements. You should also check whether they have such a thing as an enduring power of attorney and what their requirements are for making and registering one.

Where can I get more information?

Department of Lands

The Department of Lands provides a telephone inquiry service that can answer questions on the requirements and fees for registering a power of attorney.

Department of Lands
Land and Property Information Division
1 Prince Albert Road
Queens Square
Sydney NSW 2000
T: 02 9228 6713
F: 02 9233 4357
E: feedback@lands.nsw.gov.au
www.lands.nsw.gov.au

Private Solicitors

Most private solicitors can prepare a power of attorney. They can also give you advice on making a power of attorney, the obligations of the attorney and disputes involving powers of attorney.

Public Trustee and trustee companies

The Public Trustee and other trustee companies will prepare a power of attorney at no cost on condition that they are appointed as the attorney. They will then charge a fee for acting as attorney. See *Trustee Services* in the Yellow Pages.

The Public Trustee
19 O'Connell Street
Sydney NSW 2000
T: 02 9252 0523
Toll Free 1300 364 103
www.pt.nsw.gov.au

Chamber Magistrates

Chamber magistrates are found at most Local Courts. They can give advice about powers of attorney and other legal matters. The Registrar of the Court can explain the effect and give the certificate necessary to make an enduring power of attorney. This service is free. You should telephone the court office to check when they are available.

Guardianship Tribunal

Information on enduring guardianship or making an application for the appointment of a guardian or financial manager is available from the Guardianship Tribunal.

Guardianship Tribunal
Locked Bag 9
Balmain NSW 2041
T: 02 9555 8500
Tollfree 1800 463 928
www.gt.nsw.gov.au

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Disclaimer

Information contained herein is of a general nature and is not intended to address the circumstances of any particular individual or entity. Advice from a professional adviser (eg a solicitor or licensed conveyancer, as appropriate) should be sought if there is doubt as to the applicability of this information to individual circumstances.

Department of Lands
1 Prince Albert Road
Queens Square
Sydney NSW 2000
T: 02 9228 6666
F: 02 9233 4357
www.lands.nsw.gov.au

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General Power of Attorney

Part 1: General

This power of attorney is made on the day of 20... by-

..... (“the principal”)
(Name)

of
(Street address)

1. I appoint—

.....
(Name)

of
(Street address)

and I appoint—

.....
(Name)

of
(Street address)

to be my attorney(s). My attorney may exercise the authority conferred on my attorney by Part 2 of the *Powers of Attorney Act 2003* to do on my behalf anything I may lawfully authorise an attorney to do. My attorney’s authority is subject to any additional details specified in Part 2 of this document.

2. I give this power of attorney with the intention that it will continue to be effective if I lack capacity through loss of mental capacity after its execution.

Note to clause 2: You can cross out clause 2 if you do not want it to apply. If you want clause 2 to apply, then you need to see a solicitor, barrister, registrar of a Local Court or other prescribed witness referred to in section 19 of the Powers of Attorney Act 2003 who must complete the certificate that is required under that section.

3. This power of attorney operates—

- immediately
- when my attorney accepts (or as each of my attorneys accept) the appointment
- on and from
- up to and including
(specify dates)
- when my attorney considers that I need assistance managing my affairs
- other

If no option is selected or the options chosen are unclear or inconsistent, I intend that the power of attorney will operate immediately or, if clause 2 is not crossed out, when my attorney accepts, or each of my attorneys accepts, the appointment.

Note to clause 3: Cross out the options that you do not want. If you include clause 2 above, the power of attorney will not operate to confer any authority on any attorney until the attorney accepts the power of attorney by signing this document.

4. If I appoint more than one attorney, then I appoint them jointly and severally.

Note to clause 4: Cross out “and severally” if you want your power of attorney to operate only when both attorneys act together and are both living. You should get legal advice on changing this clause.

Part 2: Additional Powers and Restrictions

5. I authorise my attorney to give reasonable gifts as provided by section 11(2) of the Powers of Attorney Act 2003.

Note to clause 5: Cross out if you do not want to confer this authority.

6. I authorise my attorney to confer benefits on the attorney to meet the attorney's reasonable living and medical expenses as provided by section 12(2) of the Powers of Attorney Act 2003.

Note to clause 6: Cross out if you do not want to confer this authority.

7. I authorise my attorney to confer benefits on—

.....
(Name)

of
(Street address)

and

.....
(Name)

of
(Street address)

to meet their reasonable living and medical expenses as provided by section 13(2) of the Powers of Attorney Act 2003.

Note to clause 7: Cross out if you do not want to confer this authority.

8. This power of attorney is subject to the following conditions and limitations—

.....
.....
.....
.....
.....
.....
.....
.....
.....
.....

*Note to clause 8: Specify conditions and/or limitations.
Cross out if you do not want to add conditions or limitations.*

Signed, sealed and delivered by

.....
(Principal's signature)

In the presence of

.....
(Witness's signature)

.....
(Witness's name)

.....
(Witness's address)

Certificate under section 19 of the Powers of Attorney Act 2003

Note: This certificate is to be completed only if clause 2 is retained and you want to create an enduring power of attorney.

I.....
(Name)

of.....
(Street address)

certify the following—

1. I explained the effect of this power of attorney to the principal before it was signed;
2. The principal appeared to understand the effect of this power of attorney;
3. I am a witness prescribed by section 19(2) of the *Powers of Attorney Act 2003*;
4. I am not an attorney under this power of attorney;
5. I have witnessed the signing of this power of attorney by the principal.

Dated.....

.....
(Signature)

- Solicitor
- Barrister
- Licensed conveyancer
- Registrar of a Local Court
- Employee of the Public Trustee
- Employee of a trustee company within the meaning of the *Trustee Companies Act 1964*
- Other (specify).....

Note: Delete inappropriate categories.

Acceptance by Attorney

Note: To be used for enduring powers of attorney only. It must be signed before the power of attorney can be used by the attorney.

I accept my appointment as an attorney under this enduring power of attorney.

Dated.....
(Attorney's signature)

Dated.....
(Attorney's signature)

<p>Lodged for registration at the Department of Lands, Land and Property Information Division (LPI) by—</p> <p><i>(see paragraph 7 in the publication "Important Information for Principals and Attorneys" provided with this form)</i></p>	
LPI Document Collection Box No.	Name, Address or DX and Telephone Number

Important Information for Principals and Attorneys

1. A power of attorney is an important and powerful legal document. You should get legal advice before you sign it. A power of attorney gives the attorney the authority to buy and sell real estate, shares and other assets for the principal, to operate the principal's bank accounts, to spend the principal's money on behalf of the principal and to exercise many other powers. It is not to be used after the principal dies.
2. A power of attorney cannot be used for health or lifestyle decisions. The principal should appoint an enduring guardian under the *Guardianship Act 1987* if the principal wants a particular person to make these decisions. For further information, contact the Guardianship Tribunal (toll free 1800 463 928 or www.gt.nsw.gov.au) or the Public Guardian on (02) 9265 3184 or 1800 451 510 or www.lawlink.nsw.gov.au/opg.
3. Part 2 of the power of attorney will permit the attorney to use the principal's money and assets for the attorney or anyone else as provided by clauses 5, 6 and 7. If the principal does not want this to happen, then the principal should delete the powers from Part 2 that the principal does not want to give the attorney.
4. An attorney must always act in the best interests of the principal. Unless the attorney is expressly authorised, the attorney cannot gain a benefit from being an attorney.
5. This power of attorney is for use in New South Wales only. If you need a power of attorney for interstate or overseas, you may need to make a power of attorney under their laws. The laws of some other States and Territories in Australia may give effect to this power of attorney. However, you should not assume this will be the case. You should confirm whether the laws of the State or Territory concerned will in fact recognise this power of attorney.
6. An attorney should keep the attorney's own money and property separate from the principal's money and property, unless they are joint owners, or operate joint bank accounts. An attorney should keep reasonable accounts and records about the principal's money and property.
7. If the attorney is signing documents that affect real estate, the power of attorney must be registered at the Department of Lands, Land and Property Information Division (LPI).

For information on powers of attorney, the attorney's duties and registration, contact LPI on (02) 9228 6713 for a fact sheet or www.lands.nsw.gov.au or a solicitor, a trustee company or the Public Trustee (www.pt.nsw.gov.au).

Revocation of Power of Attorney

I
(Name of principal/donor in the power of attorney)

hereby revoke the Power of Attorney dated
(Insert the date of the power of attorney)

appointing
(Insert the name(s) of the attorney(s))

Registration number of the power of attorney is Book No.
(Complete only if the power of attorney is registered)

Signature of principal/donor:

Dated:

Signature of witness:

Name of witness:

Address of witness:
.....

Notes

1. You **must** give a copy of this revocation to your attorney to notify him or her that the power of attorney has been revoked.
2. Any adult may witness the principal's/donor's signature. The witness does **not** have to be a justice of the peace, solicitor or other "prescribed witness".
3. There is no requirement to register this revocation, but if the power of attorney being revoked has been registered it is advisable to do so. If you wish to register this revocation, you must lodge it at the Department of Lands, Land and Property Information Division (LPI), Queens Square, 1 Prince Albert Rd, Sydney 2000 together with a completed Deed Index Particulars form available from the Lands website at www.lands.nsw.gov.au. If you require further information call LPI's Customer Inquiries Section on 02 9288 6713 or visit the Lands website.