

Setting up a power of attorney to help manage your banking needs

Sometimes unexpected things happen, such as an injury from an accident or being unable to work because of an illness or you may be on holiday or working overseas for a short time, and need someone to look after your financial and legal affairs. A power of attorney is a way to control who makes decisions for you if you're not able to do so. This fact sheet provides information about powers of attorney and when they might be appropriate for managing your financial and legal needs.

What is a power of attorney?

A power of attorney is a legal document that gives another person the authority to make financial and/or legal decisions on your behalf. You can give this person (your 'attorney') the authority to do one thing or a range of things such as:

- using your bank account to pay for your everyday expenses and loan repayments (financial transactions)
- making investment decisions such as selling your property (real property transactions)
- paying your taxes.

Two types of power of attorney arrangements are appropriate for managing your finances:

A **general power of attorney** operates for a particular period of time or for a particular purpose. This is useful if you want to put in place a temporary formal arrangement for a specific purpose (for example, if you're away from home and need someone to manage your financial affairs). A general power of attorney automatically terminates if you lose capacity to make financial decisions.

An **enduring power of attorney** can be designed to commence once the attorney has accepted his/her appointment or at a later time you specify. Unlike a general power of attorney, this type of authority remains valid even when you can no longer make your own decisions.¹ This means the person you choose can take control of your financial and legal affairs if you ever lose the capacity to do so.

¹ It is most likely your attorney will decide when you lose capacity. However, only a medical practitioner can give a professional opinion on whether someone has lost the capacity to make their own decisions.

Did you know? In Queensland and Australian Capital Territory you can set up an enduring power of attorney to also make lifestyle and/or medical decisions on your behalf, such as a medical decision to agree to or refuse surgery, in case you can't make these decisions in the future. These are called an 'enduring power of attorney (medical treatment)'.

Who can create a power of attorney?

To appoint someone as your attorney, you need to be at least 18 years old and have sufficient capacity to make the appointment² – 'capacity' is a technical term that means you have the ability to reason and can understand things like:

- what sort of powers and decisions the attorney will have the authority to make
- when and for how long they have the authority to exercise that power
- the effects their power could have on you and the things that are important to you
- how to cancel (revoke) or change the arrangement in the future.

When you're considering setting up a power of attorney, you must weigh up the risks and benefits and make a decision based on what matters most to you, without pressure from anyone else. Importantly, you need to choose your attorney carefully because these arrangements can be misused.

Who can be an attorney?

² You don't have to take a test to determine your capacity. The law assumes that you've got capacity once you turn age 18. However, when creating an enduring power of attorney, a witness is required to verify that you've understood the document you're signing and the powers you're giving your attorney.

An attorney doesn't have to be a lawyer. It can be anyone you trust to make decisions on your behalf, like a family member or friend.

You can appoint more than one attorney. This can help ensure you get a balanced viewpoint and may protect your affairs. For example, you might appoint one person who knows what you would want, such as a friend or a relative, and one person who can make good financial decisions, such as an accountant.

If you appoint more than one decision-maker, you'll need to choose whether they can make decisions:

- **jointly**, which means all attorneys must all agree to any decisions and every document must be signed by all of them; or
- **jointly and severally**, which means that any one of them can make a decision and sign documents together or without the other attorneys.

If you appoint more than one attorney jointly and they can't come to an agreement, they may need to apply to a court to resolve disagreements.³

When making decisions for you, your attorney must:

- act in your best interests
- make the same decision you would make wherever possible
- keep accurate records of dealings and transactions
- avoid situations where there is a conflict of interest
- keep your money and property separate from their own.

Did you know? You don't need to pay your attorney for the power to be effective. Normally, payment is only made if your attorney is a trust company or professional person, such as an accountant. If you appoint a friend or family member, and you believe they should be paid for their service, you should ask a lawyer to prepare the documentation.

Setting limits and conditions on the authority

You have control over when your attorney's powers begin and end. Once you have signed the form, the power of attorney takes effect on the start date you specify and ends when the document indicates. For example, if you need someone to pay your bills while you're on holidays, you can make a power of attorney only for the period that you're away.

Importantly, you can limit and place conditions on how you want your attorney to carry out their authority. For example, you could limit their authority so that they can only pay your bills and access your bank accounts (financial transactions), but not deal with your real estate (property transactions).

Keep in mind that if you don't specify any limits, your attorney can make any financial and legal decisions on your behalf until the appointment is changed or

³ You can also appoint an **alternative attorney**, so that if the first person can't carry out the role, someone else can step in.

cancelled (or in the case of a general power of attorney, you lose capacity).

Did you know? Banks can encounter problems with some powers of attorney because they weren't set up correctly to cover different types of transactions. If you think you'll need someone to make decisions about financial transactions and property transactions, such as the sale of your home, you should make sure the power of attorney allows both types of decisions.

How to create a power of attorney

Creating a power of attorney is straightforward and doesn't have to be prepared by a lawyer. However, if your financial or legal affairs are complex or you don't feel confident doing this on your own, you should seek legal advice.

You will need to obtain the appropriate forms from your State or Territory agency (see 'Where to go for more information' on the last page of this fact sheet). Your lawyer can also provide you these forms.

Keep in mind that you'll need certain kinds of witnesses for some of the powers of attorney and there are typically restrictions on your relatives and the attorney being witnesses, so you should carefully check the instructions on each form.

Managing your banking needs

Once you've created a power of attorney, you or your attorney will need to provide certified copies of the authority to your bank if you want the attorney to act on your behalf. You will need an authorised person to certify your power of attorney. While you can photocopy the original power of attorney, the copy will not be recognised unless it is certified.^{4,5}

Once your bank has received the certified copy and verified the authority, it will record the appointment or authority on your account or credit facility. Your attorney will be given the level of access specified in the authority and will be able to act in place of you.

For example, this may include the power to open and close accounts, perform and stop financial transactions, payments or transfers, or make changes to banking products and services. You might give your attorney the power to access your transaction account to pay bills, withdraw cash for you, and set up direct debits.

Your bank will continue to act according to the limits and conditions detailed in the authority, until the authority expires or you or your attorney provide the bank with a new authority.

How to change or cancel a power of attorney

⁴ An authorised person will be outlined in State or Territory law. These are typically a justice of the peace, a legal practitioner or a public notary.

⁵ You will need to follow the same process when you or your attorney deals with any other business or organisation.

If you appoint a general power of attorney and then lose legal capacity at a later stage, the document will no longer be valid. The person you appoint will not be able to make decisions on your behalf.

Your attorney's powers also stop if the arrangement no longer meets the requirements of the relevant law (for example, the time period specified has passed, you become bankrupt, they resign or you die).

Keep in mind that you can change or cancel a general power of attorney at any stage. You can also change your attorney if you change your mind.

For example, you might decide to change your attorney if:

- your relationship with the attorney has changed
- you now know someone who would be more suitable for the role
- your circumstances have changed and the person you appointed is no longer suited to making decisions on your behalf
- your wishes have changed and you want to update your attorney's instructions.

You may revoke a power of attorney at any time, as long as you have capacity. Depending on your needs, this could mean appointing a different person or the same person again with different responsibilities.

If you decide to change the attorney and/or their powers, you'll need to tell any organisations or people that are relying on the existing documents, such as your bank or other businesses.

How does the law work across Australia?

State and Territory legislation allows a competent adult to appoint another person to make decisions and take action for them. The laws in each jurisdiction and the processes for appointing powers of attorney are broadly similar, but there are some differences. For example, the laws in States and Territories may have different names for different powers, and different formats and execution processes.

However, if you set up a power of attorney to manage your banking needs and you need to rely on the authority in different parts of the country, your bank will generally recognise the authority.

A power of attorney needs to be tailored to the unique circumstances of each individual. This means the organisations you deal with, including banks, may take some time to process and verify these authorities. You should consider planning ahead so these delays don't inconvenience you.

Administration and guardianship

Similar to powers of attorney, court or tribunal-appointed administrators (or financial managers) are authorised to make certain financial or legal decisions for an adult with a decision-making disability (i.e.

those who have lost capacity). Guardians, on the other hand, cannot make financial or legal decisions. A court or tribunal authorises a guardian to make personal, medical and/or lifestyle decisions.

Administration and guardianship enables someone to be legally appointed to make decisions in the best interests of an adult who isn't capable of making reasoned decisions for themselves. This may be due to certain conditions, such as dementia, intellectual disability, mental illness, an acquired brain injury or other cognitive or capacity challenges.

The main difference between a power of attorney and an administrator or guardian is that you appoint the attorney, and a court or tribunal appoints the administrator or guardian after you have lost capacity.

Did you know? *If you're a carer for a child who doesn't have capacity and they turn 18 years of age, under the law they're now deemed an adult. This can create complications for certain arrangements, including conducting banking transactions on their behalf. To avoid any difficulties, you should put in place suitable alternative arrangements prior to their 18th birthday.*

Know and exercise your legal rights

Your money and property belong to you. You maintain control over your property and how your money is spent, until you decide to give control to someone else. You may make a different decision from other people who are in similar situations to you, and that's fine.

As far as the law is concerned, the important thing is that you understand the nature of your decision and you made that decision freely and without undue pressure or coercion.

If you're considering sharing control of your money and property with another person, it's always a good idea to speak to a lawyer first.

A lawyer can help you set up a power of attorney, and explain contracts and other legal documents so you're aware of, and understand, the consequences of what you're agreeing to, what rights you retain and what rights you're giving up.

Where to go for more information

The Australian Guardianship and Administration Council website at www.agac.org.au/links has links to State and Territory agencies with information on power of attorney documents and other guardianship issues. Ph: (02) 6270 9800.

ABA contact: Director, Communications and Government Relations Nic Frankham on 02 8298 0423.

Document amended - December 2014