AUSTRALIAN BANKERS' ASSOCIATION INC.

Industry guideline

Responding to requests from a power of attorney or court-appointed administrator

This industry guideline does not have legal force or prescribe binding obligations on individual banks. While the ABA's industry guidelines are voluntary, this industry guideline has been developed with input from, and agreed to by, member banks. The ABA encourages member banks to follow this industry guideline and incorporate it into their internal processes, procedures and policies.

Purpose of the industry guideline

This industry guideline:

- Explains how powers of attorney and court-appointed administrator arrangements apply to banks' relationships with their customers; and
- Outlines a framework that banks can use to consistently deal with requests from attorneys and administrators.

This industry guideline provides guidance for banks. However, customers and other interested parties may find this industry guideline provides them with useful information about how banks deal with attorneys and administrators.

Background – powers of attorney

A power of attorney is a legal document that gives someone (called an 'attorney') the power to act on behalf of the person who grants that power (the 'donor') during the donor's lifetime. It allows the attorney to sign most documents or do most things that the donor can do legally, subject to any conditions or limitations in the document.

An adult can give an attorney the authority to do one thing or a range of things on their behalf. These include:

- accessing the donor's bank accounts to pay for everyday expenses and make loan repayments (financial transactions)
- making investment decisions such as selling property (real property transactions)
- paying taxes.

The level of access an attorney has over a bank customer's account can vary because a power of attorney can be tailored to certain types of decisions or transactions.

Banks typically see two types of powers of attorney that are appropriate for managing a person's finances: general and enduring.

What is a general power of attorney?

A **general power of attorney** operates for a particular period of time or for a particular purpose. This is useful if a customer wants to put a temporary formal arrangement for a specific purpose in place, or an arrangement for a defined period of time (for example, if they plan to be away from home for an extended period and need someone to manage their financial affairs).

What is an enduring power of attorney?

An **enduring power of attorney** can be designed to commence once the attorney has accepted his/her appointment or at a later time specified. Unlike a general power of attorney, this type of authority remains valid even when the customer may no longer be capable of making their own decisions. This means the attorney can manage the customer's financial and legal affairs if they ever lose capacity (it is possible for an enduring power of attorney to specifically state that it is to take effect when the donor loses capacity).

An attorney's role, authority and responsibilities

Who appoints an attorney and where do they get their authority from?

State and Territory legislation allows a competent adult (at least 18 years) to appoint someone to make decisions and take actions for them. To appoint an attorney, an adult needs to have sufficient capacity to make the appointment.

'Capacity' means an adult has the ability to reason and 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 the attorney's power could have on the donor and the things that are important to them
- how to cancel (revoke) or change the arrangement in the future.

The State and Territory-based acts that apply to powers of attorney are:

Australian Capital Territory:	*Powers of Attorney Act 2006*
New South Wales:	*Powers of Attorney Act 2003*
Northern Territory:	*Powers of Attorney Act 2011*
Queensland:	*Powers of Attorney Act 1998*
South Australia:	*Powers of Attorney and Agency Act 1984*
Tasmania:	*Powers of Attorney Act 2000*
Victoria:	*Instruments Act 1958*
Western Australia:	*Guardianship and Administration Act 1990*

Who determines capacity?

It is not the role of bank staff (or a bank) to determine a customer's capacity.

An adult setting up a power of attorney is not required to take a test to determine their capacity. The law assumes that an adult has capacity once they turn 18. However, when creating an enduring power of attorney, a witness is required to verify that the donor understands the document they are signing and the powers they are giving to their chosen attorney(s).

Unfortunately, while powers of attorney arrangements are an important tool for protecting future financial circumstances, they can be used inappropriately, so it is critical for donors to select their chosen attorney(s) carefully.

Under an enduring power of attorney, it is most likely to be the attorney who will decide when the donor loses capacity. However, only a medical practitioner[1] can give a professional opinion on whether someone has lost capacity to make their own decisions.

For this reason, it is important for an attorney to demonstrate that the donor has lost capacity by presenting sufficient evidence to the bank (such as a certified copy of a medical report).

Importantly, the enduring power or attorney document would need to be examined closely to see when it comes into effect. If the document expressly states that it comes into effect immediately, then investigations on capacity should not be needed. If the document states that it comes into effect when the donor loses capacity, a bank would need to be satisfied that incapacity has been demonstrated.

[1] For the purposes of Court or Tribunal Orders (see Administrator and Guardian section) psychologists also routinely make assessments of capacity.

Note: If there is any doubt about the claim of capacity from an enduring power of attorney, or there is concern that the customer is being exploited, banks should consider delaying or refusing the request until there has been further consideration. This might be particularly important if the attorney is attempting to make large transactions from the donor's account(s). Importantly, even where a customer has a power of attorney arrangement in place, they are entitled to know how their affairs are being managed, and that the power of attorney is operating to their instructions. This is ultimately a challenging area for banks, but one the industry should be sensitive to.

Who can be an attorney?

An attorney does not have to be a lawyer. It can be anyone the customer trusts to make decisions on their behalf, like a family member or friend. An adult can appoint more than one attorney to help ensure they get a balanced viewpoint. For example, they might appoint one person who knows what they would want, such as a friend or a relative, and one person who can make good financial decisions, such as an accountant.

If a customer appoints more than one attorney, they need to decide whether the attorneys can make decisions:

- jointly, which means they 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 others.

If a customer appoints more than one attorney and the attorneys subsequently cannot come to an agreement, the attorneys may need to apply to a court to resolve disagreements.[2]

What does a power of attorney document (instrument) contain?

Although each State or Territory agency form may vary in its requirements, a typical power of attorney will contain the following details:

- the represented person's (donor) details
- the attorney's (or attorneys') details
- whether the donor wants the attorney(s) to act solely, jointly, or jointly and severally
- an alternative attorney's (or attorneys') details, in case the nominated attorney(s) die, lose capacity or become unavailable
- the appointment's duration
- the extent of authority – sometimes referred to as 'conditions or restrictions' (e.g. the donor may specify that the attorney(s) can make only some or all financial decisions)
- the donor's authorisation – a declaration by the donor that they are providing power to the attorney(s)
- a declaration of when the power of attorney is to start
- the donor's signature and an authorised witness's signature
- a declaration from the attorney(s) that they accept the power subject to the relevant laws.

Note: Once a power of attorney is created, either the donor (or their attorney) will need to provide certified copies of the authority to their bank if they want to rely on the powers conferred.

While the attorney or donor can photocopy the original power of attorney, the copy will not be recognised (or have evidentiary effect) unless it is certified by an authorised person.[3]

A power of attorney will remain in force until:

- it is revoked under the relevant state-based Act
- it is terminated by the customer's death, bankruptcy or insolvency in accordance with the relevant state-based Act
- it is terminated if the customer loses capacity (if it is a general power of attorney)
- the purpose or time for which it was created has been fulfilled or passed.

[2] A donor can also appoint an alternative attorney(s), so that if the first person(s) is unable to carry out the role, there is someone else who can step in. This will be detailed in the power of attorney (document).
[3] An 'authorised person' will be outlined in the relevant State or Territory law. These are typically a justice of the peace, a legal practitioner or a public notary.

What are an attorney's responsibilities?

An attorney must:

- act in the donor's best interests, except as otherwise specified in the power of attorney
- make the same decision that the donor would make
- keep accurate records of interactions and transactions
- avoid situations where there is a conflict of interest
- keep the donor's property and money separate from their own.

An attorney must not exceed the authority given under the power of attorney. If the attorney(s) exceeds their authority, they may be liable for any damages suffered by the donor.

What decisions can an attorney make?

A donor appoints a general power of attorney or an enduring power of attorney (financial) to make financial decisions on their behalf, such as managing their banking, paying bills or selling property. The limitations on the power will be detailed in the power of attorney document (instrument).

It is up to the donor to ensure their attorney(s) has the right powers to look after the matters they require.

What can an attorney do on behalf of a bank customer?

This depends on the power provided to the attorney and the limitations placed on their power. Generally, an attorney is accorded many of the same powers as the customer (donor) for whom they are acting. For banks, this means the attorney can usually transact as if they are the represented customer.

This may include the power to open and close accounts, perform and stop financial transactions or payments, or make changes to the customer's banking products and services. Some attorneys are provided with the power to make financial transactions, but not the power to make property transactions (i.e. sell property). These limitations are important for customers to consider and for banks to note when relying on the instrument.

Importantly, the attorney does not become the owner of the account – this must remain the account holder (donor).

Access to information

Depending on the powers provided, an attorney may have the right to all the information that the donor is entitled to.

Background – administration and guardianship

If someone is unable to manage their financial and legal affairs due to mental incapacity and does not have a valid enduring power of attorney (a general power of attorney will not be valid if the donor does not have capacity), it may be necessary for a court or tribunal to appoint an administrator or guardian to make decisions for them.

Administration and guardianship involves legally appointing someone to make decisions for an adult who is not capable of making reasoned decisions themselves, due to conditions such as dementia, intellectual disability, mental illness, an acquired brain injury or other cognitive or capacity challenges. These conditions are referred to as 'decision-making disabilities'.

An administrator or guardian's decisions have the same legal force as if the person they are acting for had made the decision themselves.

What is administration?

Administration (or financial management) is related to financial decision making. A court or tribunal authorises an administrator to make certain financial decisions, such as purchasing or selling property or assets, paying debts and investing money.

What is guardianship?

Guardianship involves making personal, medical and lifestyle decisions. A court or tribunal authorises a guardian to make decisions about a person's work, living arrangements or medical care and treatment.

In Queensland, South Australia, Tasmania, Victoria, New South Wales and Western Australia, a guardian cannot make financial decisions for the person they represent.

In the Australian Capital Territory and the Northern Territory[4], a guardian can also apply to make financial decisions for the represented person.

An administrator's role, authority and responsibilities

Who appoints an administrator and where do they get their authority from?

A State or Territory court or tribunal will appoint an administrator. An administrator derives their authority from the relevant state-based Act:

Australian Capital Territory:	*Guardianship and Management of Property Act 1991*
Queensland:	*Guardianship and Administration Act 2000*
New South Wales:	*Guardianship Act 1987*
Northern Territory:	*Adult Guardianship Act 1988*
South Australia:	*Guardianship and Administration Act 1993*
Tasmania:	*Guardianship and Administration Act 1995*
Victoria:	*Guardianship and Administration Act 1986*
Western Australia:	*Guardianship and Administration Act 1990*

An administrator's authority will be detailed in their 'administration order'. Typically, a court or tribunal will appoint an administrator for a set period.[5] After this time, the court or tribunal will review and may renew the order.

What does an administration order contain?

The administration order outlines the details of the administrator's authority, including:

- the represented person's details
- the appointment's duration
- the extent of the authority (e.g. the administrator may make some or all financial decisions)
- the number of administrators and the nature of the appointment; that is, whether the administrators will make decisions together or separately.

Who can be an administrator?

A court or tribunal can appoint an:

- individual, such as a relative, friend, solicitor or accountant
- organisation, such as State Trustees Limited, or a private trustee company.

A court or tribunal must appoint an administrator who can competently manage the represented person's affairs, and will act in their best interests.

What are the administrator's responsibilities?

An administrator must make decisions that:

- protect the represented person from abuse, exploitation and neglect
- are in the represented person's best interests
- take into account the represented person's wishes
- encourage the represented person to make their own decisions, where possible.

What decisions can an administrator make?

An administrator can make financial decisions for the represented person, such as managing their banking transactions, paying bills or selling property. The administrator must act in the person's best interests, for example, ensuring that the person lives within their means.

[4] In the NT, the Adult Guardian can be appointed to be the manager of the finances and estate as per section 16 of the *Adult Guardianship Act* (this can be on the one order).
[5] The term will differ in each State or Territory. For example, in Queensland the term is usually five years. In Victoria, the maximum term is three years. Banks should ensure the administration order is current.

What can an administrator do on behalf of a bank customer?

Unless the authority specifies otherwise, an administrator 'replaces' the account holder they are representing. The administrator is treated in a similar way as the account holder and is generally accorded with the same powers. They can open and close accounts, perform and stop financial transactions or payments, and make changes to banking products and services.

Just like a power of attorney, an administrator does not become the owner of the account – this must remain the account holder (represented person).

Access to information

Administrators have the right to all the information that the represented person is entitled to when that person is making decisions. To ensure they are provided with the information necessary for them to make a sound decision, administrators can show banks copies of the court order as evidence of their role.

Industry guidance for banks

Recognising the authority of an attorney or an administrator

Banks have a contractual obligation to act in accordance with the customer's mandate. If a customer has set up a power of attorney, or a court has appointed an administrator to represent a customer's interests, then these authorities are considered to be in line with the customer's mandate. It is important to recognise and respond to requests from these authorities as if they were made from the customer themselves.

Before an attorney or administrator can access information about a customer's account or credit facility, banks should ask for written proof of their status, such as certified copies of the power of attorney or administration order.

Once the power of attorney or administration order is verified, banks should record the appointment or authority on the customer's account or credit facility. Importantly, banks should also ensure they are responding to the right authority according to the powers specified.

Where an enduring power of attorney arrangement is in place that specifies that the document takes effect when the donor has lost capacity (or the document authorises some change when capacity is lost) and the attorney presents with a claim that the donor has lost capacity; the attorney should provide evidence of this from a medical practitioner. Banks should verify that the power of attorney document allows for the attorney to operate when the donor loses capacity, and should be satisfied that sufficient documentation around the loss of capacity has been provided.

When recording the authority, the following steps should be key priorities:

- Ensure that the bank has been provided with a certified copy of the appointment.
- Note the type of authority (general power of attorney, enduring power of attorney, administrator or guardianship order) to determine the extent of the authority and how to respond to it.
- Determine whether the attorney or administrator can act solely, jointly, or jointly and severally.
- Look for any limitations on the power granted to the attorney or administrator, such as whether:
  - the power is only valid for a specific time
  - the instrument or order expires on a review date
  - the power is limited to specific accounts or types of transactions
  - whether the power is limited to specific actions or decisions.
- Record the correct type of attorney or administrator on each customer account for which they have authority to sign. For example, make sure that the type of power of attorney is recorded on the customer's account(s).

- Record the extent, duration and limitations to the attorney or administrator's power (time period, authorities, conditions or restrictions, and specified instructions) when adding them as a signatory to the customer's account. For example, note whether an attorney is authorised to make financial transactions only, and not property transactions. Allowing an attorney to exceed their authority may have legal complications for both the attorney and potentially the bank if it has done so knowingly.[6]
- Ensure the account remains in the name of the account holder for legal or tax reasons. Banks should make it clear the funds in the account are legally owned by the account holder and reported as such (i.e. banks should not replace, or make attestations to the effect of replacing, the account holder's ownership).[7]
- Continue to act according to the conditions or restrictions detailed in the instrument when responding to requests from the attorney or administrator, until the authority expires, is revoked, or is replaced with a new authority. If an expiry date is set as a limitation, consider implementing a system that will indicate when this occurs.

Note: It is up to the customer, or the person authorised to represent them, to update the bank if the authority is revoked or replaced. It is also up to the customer or court to ensure the authority covers the powers that are appropriate for the customer. Sometimes a bank may not be able to process a request if the authority has not been set up to allow particular transactions. For example, an attorney may be expected to deal with the sale of a customer's property, but the authority was set up to limit the attorney's powers to financial transactions only. In these circumstances, the bank needs to operate within the limits of the power and explain to the attorney why it must do so. A revised authority may need to be created.

Note: Depending on a bank's systems and identification requirements, when a new signatory is added to an account the signing instructions might need to be updated.

Dealing with inconsistent laws

The laws in each jurisdiction and the processes for appointing attorneys and administrators are broadly similar; however, there are some important differences that banks should be aware. For example, the laws in States and Territories may have different names for different powers, and different formats and execution processes (e.g. the instrument may or may not need to be registered with the appropriate State or Territory agency to take effect).

Typically, a customer relying on a power of attorney to manage their banking needs in different parts of the country can use the one authority with their bank. Likewise, in all but unusual circumstances, an administrator that needs to deal with a bank in different jurisdictions can rely on one authority.[8]

It may take a while for banks to process and verify authorities because of the differences in how each State and Territory requires authorities to be presented and executed, and because administrator and power of attorney appointments need to be tailored to each customer's unique circumstances.[9] It is important for banks to balance the need for consistency and efficiency with legal and compliance requirements.

Banks should consider informing customers if it will take some time to verify authorities and any consequences. If there are delays in processing requests, customers may be exposed to financial abuse or find that their bills are not being paid on time or not at all.

The Australian Bankers' Association has prepared consumer fact sheets about financial abuse and setting up powers of attorney that banks can share with their customers. These can be accessed at www.bankers.asn.au.

[6] An attorney or administrator must not exceed the authority given to them under their specific instrument or order. If they do so, they may be liable for any damages suffered by the customer for whom they are acting. Likewise, if a bank knowingly allows an authority to exceed their power, they are breaching the customer's mandate and could be liable for claims.

[7] Banks should not add attorneys or administrators to the account's title or amend the account to say 'trustee for', 'behalf of' or any other such words. These references raise uncertainty around the ownership of the funds in the account and may potentially result in the funds being reported as belonging to the attorney or administrator, which has legal or tax implications.

[8] This is partly because most banks are national organisations with national systems, and because the laws are broadly consistent when it comes to the actual powers and abilities of attorneys and administrators.

[9] Delays also happen because the laws change from time to time, with flow-on effects on transition times. This often results in overlapping requirements at any one time, so keeping internal policies, processes and systems up to date is challenging.

Dealing with a request from an attorney or administrator to set up or amend an account, or release funds from an account or facility

Most requests from an attorney or administrator should be treated the same way as requests from the account holder (donor or represented person). For example, banks should process the request if the attorney or administrator asks (and has the authority to do so) to open an account or facility for the account holder; or to make changes to existing accounts or facilities, such as changing direct debits, redirecting funds, stopping transactions or transferring between accounts. Similarly, if an attorney or administrator with the authority to do so asks for funds to be released, banks should process the request.

Dealing with joint bank accounts where one account holder has an authority in place

When one account holder has an authority in place, how attorney or administrator requests are managed depends in part on the way the joint account was initially set up:

- if the terms and conditions of the account holder's contract specify that both joint account holders have the authority to make transactions independently, banks should treat an attorney or administrator as they would the account holder
- if the joint account requires joint signatures for transactions or payments to occur, banks should require the attorney or administrator and the other joint account holder to authorise the process.[10]

Dealing with a 'stop' request by an authority

An attorney or administrator may order a stop on transactions to protect the funds in an account. The administrator may also do this when investigating claims of financial abuse.

For joint accounts where account holders can act independently of each other, banks do not need the permission of the other account holder to stop transactions. Banks deem it the requesting account holder (or attorney or administrator's) responsibility to inform the other account holder of a stop order. This means the attorney or administrator could put a stop on an account without the other account holder's permission.

When there are joint account holders and the authority of both is required for transactions to proceed, banks should put a stop on the account pending further instructions from the attorney or administrator, and/or after they consider the circumstances. It is rare for banks to receive a stop request on a joint account where an attorney or administrator has been appointed. Sometimes, bank staff may not know what to do because the authority is new or there is a complication around the operation of the customer's accounts or facilities. In these circumstances, bank staff should refer the matter to their supervisor or branch manager.

Banks should recognise that each request and customer situation will be unique, and different account holders may want different things. Therefore, banks should ask the attorney or administrator to provide the context for a stop request by explaining the background, their authority and the reasons for the request.

Dealing with a dispute between account holders

If there is a dispute between joint account holders (or between attorneys and/or administrators and account holders), banks may require both account holders to authorise changes if the account allows both to operate separately. Banks may also put a stop order ('hold' or 'freeze') on the account while the case is resolved.

Summary

It is important that:

- bank staff are aware of the attorney or administrator's authority and are trained in how to respond to customers and other parties who present these requests
- banks have adequate and well-documented policies, procedures, processes and systems across their businesses (e.g. from frontline employees and staff in legal and compliance areas) for dealing with attorney or administrator requests, so they are consistent for customers and other parties who rely on them, and to reduce unnecessary delays.

[10] With joint accounts, the other account holder may not be permitted to transact on the account without the attorney, guardian or administrator's permission and vice versa. Depending on how a bank meets its internal customer identification processes, and the joint account's arrangements, a bank may decide to set up a new joint account authority.

The following is a summary of key points from this industry guideline:

For all accounts

- Check that the power of attorney or administration orders are acceptable by verifying the attorney(s) or administrator(s) in accordance with accepted identification procedures.
- Banks should ask attorneys and administrators to present a certified copy of the instrument or order and other documents that identify them as the authority. Banks should retain copies of all documents.
- Clearly note the authority's powers, limitations and instructions on the customer's account(s).
- Do not replace the customer's authority over their account(s) with an attestation or any other indicator that suggests the customer is no longer the legal owner of their account.
- Treat the attorney or administrator as if they were the account holder (i.e. in line with the authority's powers, limitations and instructions). Banks must comply with requests from the authority when operating the customer's accounts or facilities.
- If there is any uncertainty about the attorney or administrator's authority, bank staff should speak to their supervisor or branch manager.

For joint accounts

- Record the new authority operating on the account, and comply with the authority in accordance with internal customer identification procedures and the way the account terms and conditions were set up.
- If there is uncertainty or a dispute between account holders, a bank should put a stop order on the account (if necessary) until it has carefully considered the circumstances and pending further instructions from the attorney, administrator, or account holder.

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.
- The Australian Network for the Prevention of Elder Abuse website at www.anpea.com.au/Links.aspx has links to relevant State and Territory elder abuse services.
- The Seniors Rights Victoria website at www.seniorsrights.org.au, which has information and resources available for older Victorians as well as the broader community.

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