

attorney

Estate Planning & Trusts
Powers of Attorney
A brief introduction



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WHAT IS A POWER OF ATTORNEY?

A Power of Attorney is a document in which you ('the Principal') give another person ('the Attorney') the power to deal with your assets and financial/business affairs during your life. You can appoint more than one attorney.

There are 2 types of Powers of Attorney in New South Wales:

- A General or ordinary Power of Attorney which ceases to have effect when you lose legal capacity (i.e. become of unsound mind).
- Enduring Power of Attorney which will continue to operate even when you lose legal capacity. There are strict guidelines relating to the form and execution of an Enduring Power of Attorney.

WHY APPOINT AN ATTORNEY?

If you create an Enduring Power of Attorney it can act as an effective safeguard against ill health and mental incapacity adversely affecting your financial affairs, as your Attorney can continue to make decisions for you.

An ordinary Power of Attorney can be useful in the event of overseas travel, temporary physical incapacity or if you require an Attorney to act for you in relation to a specific asset/transaction for a specified period of time.

DO MY ATTORNEYS HAVE TO WORK TOGETHER?

A Power of Attorney can be granted to Attorneys to act jointly. This means they must act together and that their authority will cease upon vacancy (e.g. death or legal incapacity) of one of the Attorneys.

Alternatively, the Power of Attorney may be granted severally which means they can exercise their powers together or separately as they see fit. Where there is a several appointment the death or legal incapacity of one Attorney will not effect the ability of the remaining Attorneys to exercise their powers.

Ultimately this is a question for you and will require a balance between protecting your assets and creating a flexible, workable structure.

POWERS OF ATTORNEY LEGISLATION

On 16 February 2004 new legislation came into effect that changed some aspects of the law of Powers of Attorney.

A Power of Attorney created in NSW prior to that date is still valid, can still be registered (if necessary), and can benefit from the new interstate recognition provisions.

WHAT ARE MY ATTORNEY'S DUTIES?

Attorneys are under the following duties:

- to take care of your property;
- to avoid conflicts of interest;
- to prove their authority where necessary;
- to consider your interests.



WHAT ARE MY ATTORNEY'S POWERS?

Appointing an attorney does not take away your power to deal with your own assets or manage your affairs, whilst you retain capacity.

The general rule is that your Attorneys may make binding decisions on your behalf concerning your property and affairs. Your Attorneys could, for example:

- exercise complete authority over your financial affairs;
- buy or sell your assets including your main residence, shares, car etc;
- mortgage real estate; and
- authorise cash withdrawals from your bank account.

An Attorney cannot:

- make decisions for you where the exercise of a personal discretion is essential - such as the decision to marry, divorce or vote;
- cannot appoint another person as a sub attorney for you without having that specific power set out in your Power of Attorney;
- apply for a passport on your behalf;
- undertake your personal roles such as trusteeships and company directorships;
- give medical or dental consents or make lifestyle choices on your behalf;
- make gifts to third parties or benefit from their attorneyship unless specifically authorised by the Power of Attorney.

WHEN IS THE POWER EFFECTIVE?

General Powers of Attorney are immediately effective. Enduring Powers of Attorney only take effect once your Attorney has signed to say that they accept the role.

Subject to those provisions you can decide when the Power should take effect, either immediately, when you become incapable of managing your affairs or some other specified time.

HOW LONG DOES THE POWER OF ATTORNEY LAST?

The Power of Attorney will be terminated as a result of the following events:

- Revocation;
- Your death;
- Your bankruptcy;
- Death or incapacity of one of your joint Attorneys;
- Order of the Court.

WHAT ARE THE RISKS?

A Power of Attorney is a very powerful document and the risk associated with granting the Power of Attorney is proportional to the integrity and trustworthiness of the person you choose as your Attorney.



An institution, such as a bank, will accept a validly executed and Power of Attorney as authority to alter your investment, make withdrawals etc.

You also indemnify the Attorney in their actions, provided those actions are within the scope of their authority.

A Power of Attorney is open to abuse, if the person you choose is of a mind to abuse it.

WHAT ARE YOUR ONGOING POWERS AND DUTIES?

Whilst you are capable of managing you can (a) still act in your own right and (b) terminate the Power of Attorney at any time.

CAN THE POWER OF ATTORNEY OPERATE IN OTHER JURISDICTIONS?

A Power of Attorney granted overseas can operate in Australia. It is desirable that it is attested by a Notary here, and possibly even changed to reflect the formal requirements of the jurisdiction. It will not operate as Enduring Power of Attorney.

A Power of Attorney granted in Australia for use overseas may be valid, but should be legalised in the country of use and that validity is dependent on the law of the particular country.

A Power of Attorney granted in another State or Territory of Australia is valid in NSW provided that it is valid under the laws of the State or Territory it was made in and the interstate recognition procedure is followed.

A Power of Attorney granted in NSW and sought to be used in another State or Territory of Australia should be valid but you should be aware that the interstate recognition procedure applies in most but not all States and Territories.

HOW CAN TEECE HODGSON & WARD ASSIST?

If you require further information or advice concerning the above please contact Richard Neal, Deborah Linwood or John Maitland using the following contact details.

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This Information sheet is intended to provide general information about current law relating to Powers of Attorney. It is not intended to be comprehensive or to provide any specific legal and / or tax advice and should not be acted or relied upon as doing so.

Professional advice appropriate to a specific situation should always be obtained.

