

INFORMATION SHEET ENDURING POWERS OF ATTORNEY

What is a Power of Attorney?

A Power of Attorney is a document that enables you to give another person or persons the legal power:

- to act on your behalf (including signing documents on your behalf);
- in relation to your assets and your financial affairs;
- while you are still living.

A Power of Attorney is automatically cancelled if you lose legal capacity.

What is an Enduring Power of Attorney?

An Enduring Power of Attorney is the same as a Power of Attorney **except that** it remains in force even if you become legally incapacitated, ie, mentally incapable of looking after your own financial affairs.

Why have an Enduring Power of Attorney?

There may be times when you might want another person to be able to act on your behalf, for example:

- you are on holidays overseas and you want someone to be able to sign for you whilst you are away;
- you need to sign a contract but it is inconvenient for you to do so;
- you are in an accident and must stay in hospital;
- you are sick and confined to bed;
- you become mentally incapacitated by reason of age, disease, accident, etc.

Your attorney can make decisions on your behalf (and sign documents for you) in relation to matters concerning your assets and your financial affairs.

In Western Australia your attorney **cannot** make decisions on your behalf regarding lifestyle, medical treatment or other guardianship matters.

What happens if you don't have a valid Enduring Power of Attorney?

Without a valid Enduring Power of Attorney there may be no-one who is authorised to handle your financial affairs on your behalf.

In the event that authority is required, then an administrator may be appointed by the State Administrative Tribunal. Normally, it is the person who thinks it

necessary that they be appointed administrator who will apply to the Tribunal. More information regarding those applications can be obtained from the Tribunal website: www.sat.justice.wa.gov.au.

Can you make a joint Enduring Power of Attorney?

No. Each person must make a separate Enduring Power of Attorney.

Can an Enduring Power of Attorney be used in other States or Territories of Australia or overseas?

Probably not. The laws relating to Enduring Powers of Attorney are different in each State and in other countries.

Some other States or Territories of Australia may recognise an Enduring Power of Attorney made in Western Australia, but they may not. You should check with the authorities concerned and if necessary complete another Enduring Power of Attorney valid for the relevant State or Territory.

If you may need an Enduring Power of Attorney for use in another country, you should complete another Enduring Power of Attorney that is valid in that country.

When does an Enduring Power of Attorney stop?

An Enduring Power of Attorney will automatically be cancelled when you die.

You can cancel your Enduring Power of Attorney at any time, provided that you have legal capacity at that time. It is strongly recommended that you notify your attorney of the cancellation in writing. Your attorney's actions will continue to be binding upon you until your attorney is advised of the cancellation.

If you have registered the Enduring Power of Attorney at Landgate, you can only cancel it in writing.

Your Enduring Power of Attorney will also stop operation if:

- your attorney dies;
- your attorney becomes legally incapable;
- your attorney decides that he/she does not wish to act for you (but if you are already legally incapacitated then your attorney has to apply to the State Administrative Tribunal to have someone else appointed);
- the State Administrative Tribunal revokes the Enduring Power of Attorney;
- you become bankrupt.

Some of these circumstances may be avoided by appointing a substitute attorney.

A special circumstance arises where someone loses legal capacity and then regains capacity, eg, they are in a coma after an accident and then make a full recovery. In this situation it is recommended that you seek legal advice. A new Enduring Power of Attorney may be required.

Marriage and divorce do not change your Enduring Power of Attorney. It is strongly recommended that you review your Enduring Power of Attorney, should either event take place because it may no longer be suitable for you.

What Powers does your Attorney have?

The Enduring Power of Attorney gives your attorney the power to do anything that you are able to do in relation to your assets and your financial affairs. For example:

- withdraw money from your bank account;
- open and close your bank accounts;
- pay your bills;
- sign contracts in your name;
- sell your house.

The Enduring Power of Attorney available from this website is designed to give your attorney **full power** to act on your behalf. If you wish to restrict your attorney's power, please make an appointment to speak with us.

Your attorney cannot do everything that you can do. For instance, they cannot make medical or lifestyle decisions or vote for you. If you have any queries we suggest that you seek our advice.

What are your Attorney's legal duties?

Your attorney is obliged to act in a way to protect your interests. This means that your attorney must act honestly and exercise reasonable care to ensure that your affairs are handled the way that you would wish.

Your attorney must:

- exercise his/her power honestly and with reasonable care to protect the interests of the person who gave them the power ("donor");
- not enter into any transaction that might involve a conflict between their interests and the donor's interests;
- keep his/her money and property separate from the donor's money and property;
- keep proper accounts of how he/she handles the donor's money and property.

Although it is against the law for your attorney to misuse his/her power, no authority automatically checks on them and there may be no good way to remedy any damage or loss that they cause. So it is important to choose someone trustworthy.

Who Can be Your Attorney?

Your attorney must be over the age of 18 and of sound mind.

There are no other rules, but you should choose someone that you trust and who is good at managing their own money and keeping records.

It may be prudent to not choose someone who is elderly or infirm.

You may also appoint a private trustee company, such as the Public Trustee, but be aware that those companies charge fees for their services. If you are considering appointing a private trustee company, it may be prudent to contact that company and discuss the prospective appointment with them.

Can There be More than 1 Attorney?

You may do any of the following:

- appoint 1 person only;
- appoint 1 person and 1 substitute;
- appoint 1 person and 2 substitutes;
- appoint 2 persons only;
- appoint 2 persons and 1 substitute;
- appoint 2 persons and 2 substitutes.

Where 2 persons are appointed (either at first instance or as substitutes) then you must decide whether they are to act “jointly” or “jointly and severally”.

“Jointly” means that the 2 persons you appoint must act together. But if one of them cannot act (eg, dies) then the other cannot act either.

“Jointly and severally” means that each of the 2 persons you appoint can act independently of the other.

If you intend to appoint 2 persons, either at first instance or as substitutes, we recommend that you contact us for legal advice. Otherwise your Power of Attorney may not be legally effective.

You can nominate the events that will cause the substitute/s to take over from the person/s originally nominated as your attorney/s. If you intend to specify any event other than death or incapacity, we recommend that you contact us for legal advice.

The Enduring Power of Attorney Form

An Enduring Power of Attorney must be in writing.

It must be witnessed by 2 authorised witnesses (see attached list). Any person named in the Enduring Power of Attorney may not be a witness in the same document.

Your witnesses must both watch you sign the Enduring Power of Attorney form. You must then watch them sign.

Only a document with all of the original signatures (or a certified copy) is valid. You can sign more than one Enduring Power of Attorney form if you wish.

If the Enduring Power of Attorney is to be used in relation to real estate, eg, the sale of a property, then it must first be registered at Landgate.

We recommend that you contact us or Landgate for advice if you wish to register the Enduring Power of Attorney.

Do not make any changes to the Enduring Power of Attorney after it is signed and witnessed. Complete another new document instead.

LIST OF PERSONS WHO CAN WITNESS SIGNING A POWER OF ATTORNEY OR ENDURING POWER OF ATTORNEY

- Academics (post-secondary institution)
- Accountants
- Architects
- Australian Consular Officers
- Australian Diplomatic Officers
- Bailiffs
- Bank managers
- Chartered secretaries
- Chemists
- Chiropractors
- Company auditors or liquidators
- Court officers
- Defence force officers
- Dentists
- Doctors
- Electorate officers of a Member of the WA State Parliament
- Engineers
- Industrial organisation secretaries
- Insurance brokers
- Justices of the Peace
- Landgate officers
- Lawyers
- Local Government CEOs or deputy CEOs
- Local government councillors
- Loss adjusters
- Marriage celebrants
- Members of Parliament
- Ministers of religion
- Nurses
- Optometrists
- Patent attorneys
- Physiotherapists
- Podiatrists
- Police officers
- Post office managers
- Psychologists
- Public notaries
- State & Commonwealth public servants
- Real estate agents
- Settlement agents
- Sheriffs or Deputy Sheriffs
- Surveyors
- Teachers
- Tribunal officers
- Veterinary surgeons

And anyone authorised under the *Commonwealth Statutory Declarations Act 1959* to take a statutory declaration.