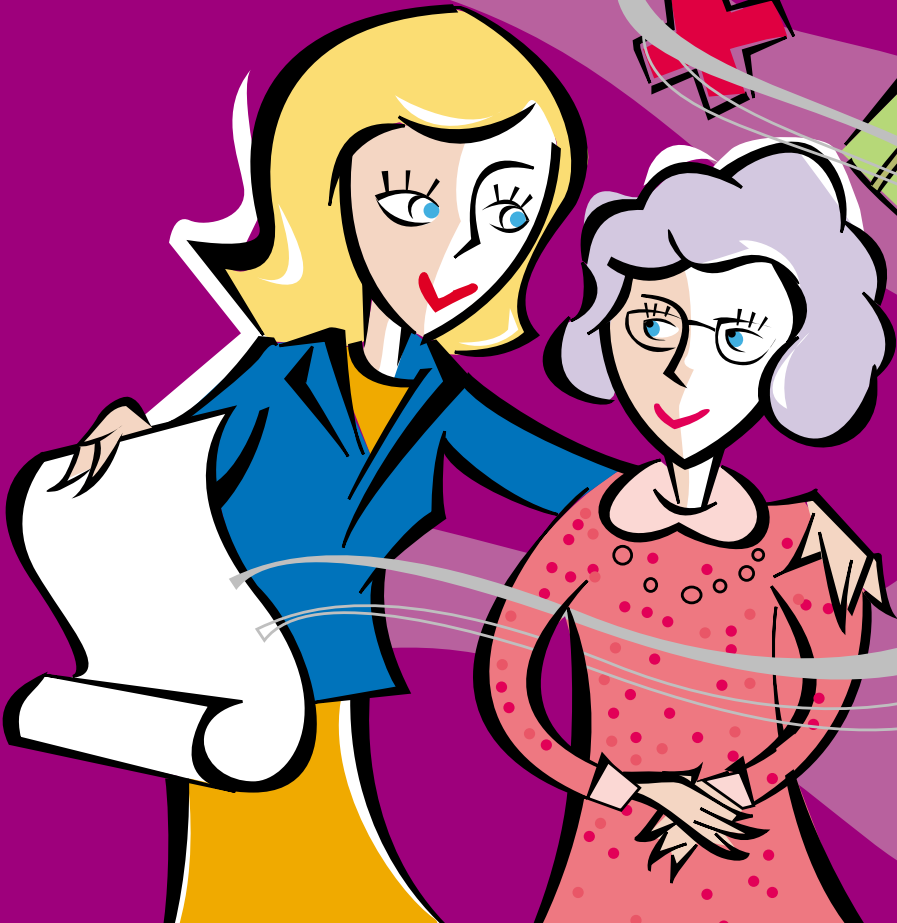


Powers of Attorney

Making Your Own Decisions



Note

The information in this guide is general in nature and is not designed to be an alternative to professional advice. It does not and cannot take into account individual circumstances. Information was current at 1 March 2002.

For further information about powers of attorney, contact the agencies listed at the end of this guide or see a lawyer.

While we have checked everything in this booklet, you should not rely or act on the information without making your own inquiries or obtaining advice from a qualified person.

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Introduction

A power of attorney is a practical and useful legal solution for times when you are unable to make decisions for yourself.

Making a power of attorney is a relatively straightforward process and not only does it give you peace of mind, by knowing that you are choosing the person to make decisions on your behalf, it also can avoid costly and complex legal problems if you cannot make decisions yourself.

It is easy to think that a power of attorney is not necessary, but with the increasing onset of Alzheimer's disease in our ageing population and an increase in motor and other accidents, a power of attorney is a simple way of minimising stress for both ourselves and our relatives.

Powers of Attorney – Making Your Own Decisions is a useful and practical guide

that explains the law in this very fundamental part of your life.

What is a power of attorney?

A power of attorney is a legal document that enables another person to make decisions on your behalf.

The type of decision that can be made depends on the power of attorney that is signed and the law in your State or Territory.

In general, an attorney can make financial decisions for you, and in most States and Territories an attorney can make health and lifestyle decisions.



Do I need a power of attorney?

A power of attorney is a practical legal solution for situations where you either cannot make decisions, or you believe that you may not be able to make these decisions in the future.

For example, if you're travelling overseas you may want to make a general power of attorney. The person you appoint as attorney can then make financial decisions for you while you are away. This could include selling property or shares or signing a legal agreement.

Another example is where a power of attorney is used as a precautionary measure.

You may be about to enter hospital for an operation.

There may be some risk that after the operation you may be unable to make decisions for yourself. In this case you could appoint an attorney to make financial and/or medical decisions (depending on the State/Territory that you live in) for you before the operation.

Finally, none of these events may be likely, however you just want to plan for the future. By making and signing a power of attorney you can appoint someone to make decisions on your behalf **just in case** you are unable to make decisions yourself.



Case study

Francis applied for a loan so that she could buy a car to get to university. The credit union agreed to the loan but asked for a guarantor, as she was a student.

Her parents, Paula and Tony, were happy to help Francis but they were about to go overseas on a holiday. The problem was that the paper work would not be ready before they left.

Francis rang the credit union. The staff member suggested that her parents could make a power of attorney so that the documents could be signed while they were away.

Paula and Tony saw their lawyer and both signed a power of attorney. They asked the lawyer to check the guarantee agreement and sign it on their behalf if she was happy with it.

Types of power of attorney

There are different types of power of attorney and unfortunately, this is where it gets complicated.

There are **general** powers of attorney and **enduring** powers of attorney.

A general power of attorney is only valid while you are legally competent – this means you are able to make decisions for yourself.

An enduring power of attorney is valid even if you become legally incompetent. In other words, it **endures** after the time that you are unable to make decisions for yourself.

The main advantage of an enduring power of attorney is that you can discuss your plans as well as the type of decision you would like made in advance. This could cover important decisions, such as the financial arrangements you would like to make for your spouse or where you would like to live if you were unable to live at home. It could also cover practical decisions, such as who would take furniture etc., if you have to move into residential care.

As well as this distinction between a general and enduring power of attorney, the law also allows for different types of power of attorney depending on the decision involved. The table on the following page lists the types of power of attorney that are available in each State and Territory. In simple terms, the decisions that are covered by powers of attorney are:

- Financial.
- Health and medical.
- Lifestyle.



Types of power of attorney by State/Territory

	Australian Capital Territory	New South Wales	Northern Territory	Queensland	South Australia	Tasmania	Victoria	Western Australia
General	General power of attorney	General power of attorney	General power of attorney	General power of attorney	General power of attorney	General power of attorney	General power of attorney	General power of attorney
Enduring financial	Enduring power of attorney (enduring)	General power of attorney	Enduring power of attorney	Enduring power of attorney	Enduring power of attorney	Enduring power of attorney	Enduring power of attorney	Enduring power of attorney
Enduring medical	Enduring power of attorney	Appointment of enduring guardian-ship	Nil	Enduring power of attorney	Medical power of attorney or Enduring power of guardian-ship	Instrument appointing enduring guardian-ship	Enduring power of attorney (Medical Treatment)	Nil
Enduring lifestyle	Enduring power of attorney	Appointment of enduring guardian-ship	Nil	Enduring power of attorney	Enduring power of guardian-ship	Instrument appointing enduring guardian-ship	Enduring power of guardian-ship	Nil

Deciding which power of attorney you need

- General powers of attorney are usually used for commercial or more immediate purposes when there are specific decisions that you want made, for example, selling property. You can limit the power that you give to the attorney by writing conditions that specify the decisions that can be made.
- An enduring power of attorney is used to help you plan for the future. Depending on the State or Territory in which you live, you can make a financial, health and/or lifestyle power of attorney. The choice is yours. Of course you can make powers of attorney to cover all these areas if you wish.

Who can make a power of attorney?

In general, a person must be:

- 18 years of age; and
- legally competent.

What does "legally competent" mean? To put it simply it means that the person who is giving the power of attorney understands the nature and effect of the power of attorney, ie they understand:

- what the attorney can do;
- when the attorney can make decisions and the type of decision the attorney can make; and
- the effect of this type of decision making.



Choosing an attorney

Once you've decided that you need a power of attorney, the first question to ask is – who do you want as your attorney?

There are a few legal requirements which vary, depending on your State/Territory and the type of power of attorney. For example, in some States/Territories an attorney must be at least 18 years of age.

The one standard requirement is that your attorney must be legally competent.

Ultimately, the choice is yours. This is an important choice as you are giving the

person that you appoint considerable powers over your affairs. Do not make this decision lightly.

People often appoint relatives, a close friend or an independent person such as their accountant, lawyer or doctor. You can also appoint a trustee company, but check whether there are fees if you do this.

There are no clear-cut rules about how to choose an attorney, although it is a good idea to read these tips.

Tips for choosing an attorney

- Do you trust the person you appoint? It is important that the person knows you and understands the decision you would be likely to make in certain circumstances.
- Will the person be available when they are needed? Enduring powers of attorney are often used as precautionary measures and the attorney may not do anything for many years. In these circumstances an older person or a friend who may be leaving the country may not be available when the time is right.
- Don't make assumptions! A family member or close friend may not be an appropriate person to make decisions on your behalf. It may be difficult for a person such as this to be objective, especially in relation to making decisions about health care.
- Check that the person you want to appoint is happy to be your attorney. There is no point selecting an attorney who does not want to take on this role.
- Check whether you can appoint more than one attorney. In most States/Territories you can choose two attorneys, who can act either:
 - jointly (both attorneys must agree for the decision to be valid);
 - severally (either attorney can make the decision independently of the other); or
 - as an alternative (the alternate attorney can make a decision if the original attorney is unavailable).
- Check that the person has the appropriate skills. The person you appoint as an attorney to make your financial decisions may not be the same person you appoint to make your medical decisions.

A financial power of attorney is used for making financial and legal decisions. For example:

- doing your banking;
- deciding how to invest income;
- signing legal documents;
- collecting or paying rent;
- transferring assets etc.

A financial power of attorney can be a general power of attorney or an enduring power of attorney.

As we have already mentioned, a general power of attorney is used for specific purposes and will often have clear conditions, such as:

- limiting its duration, for example, while you are in hospital or overseas; or
- limiting the decisions that can be made, for example, allowing the attorney only to pay your bills and access a particular bank account.

Case study

Joe has Alzheimer's disease. His wife, Edna, had been caring for him for three years and had been making all the family decisions herself.

When Edna died, Joe could no longer live at home and he moved into residential care.

Unfortunately, his children could not agree about who should make financial decisions on Joe's behalf.

They ended up in the Tribunal that deals with guardianship and administration, fighting over who should be appointed as administrator to make financial decisions for Joe. The Tribunal appointed the State Trustees as administrator because of the tension and disagreement between the children.

If Joe had made an enduring financial power of attorney before he got Alzheimer's, this problem would have been avoided. He could have chosen the person to make financial decisions on his behalf and his family would have avoided the emotional and financial costs involved in having the matter dealt with by the legal system.

A medical or lifestyle power of attorney is used for making health and lifestyle decisions. Both types of decision making are covered by the one power of attorney except in Victoria, where you need one power of attorney for medical decisions and another for lifestyle decisions. Note: powers of attorney for health and/or lifestyle decisions are not available in Western Australia and Northern Territory.

Examples of medical/lifestyle decisions are:

- deciding where you will live and who you will live with;
- consenting to medical treatment;
- approving a care or management plan;
- deciding about leisure activities, such as a holiday;
- deciding whether you can work, etc.

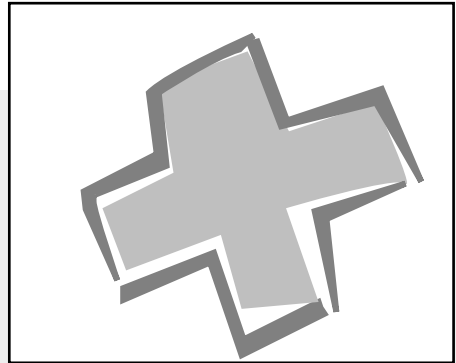
Case study

John suffered a minor stroke when he was 73. Following medical treatment he was admitted to a rehabilitation centre and nursing home.

After his four week stay he vowed that should he ever suffer a more serious stroke, he would prefer to be in the care of his daughter June, even if he would receive better medical care in a nursing home.

He told June about his decision, and she agreed that she would take care of him if this was possible. They decided not to tell his other daughter Ruth in case it hurt her feelings.

A year later John suffered a more serious stroke. Although doctors agreed that he could live in June's home, her sister



adamantly refused to agree with this because the medical care would be better in the nursing home. Since the stroke left John unable to communicate his wish to live with June, the case ended up in the Guardianship Tribunal. An independent guardian was appointed. The guardian placed John in a nursing home to preserve family harmony and optimise his medical care. If John had signed an enduring power of guardianship when he was legally competent, he would have lived with his daughter June, as he wished.

The formalities

Although a power of attorney is not a particularly complex document, State and Territory laws set out specific requirements covering issues such as:

- the number of witnesses required to sign the document;
- who can be a witness – in some States/Territories the attorney cannot be the witness;
- the need for one or more witnesses to be a Justice of the Peace or a person who can sign a statutory declaration;
- a statement verifying the competence of the person who is making power of attorney;
- a statement by the attorney accepting their role etc.

What to do

Now that you understand what a power of attorney is and how it can help you, the next step is to create and sign the document. There are three options:

1. Forms for each type of power of attorney are freely available through either newsagents or legal stationers. Some forms are also available on the Internet. It is possible to obtain a form and simply fill it in and sign it. However this is not a good idea without some

legal guidance. The technical aspects of the form vary depending on the type of power attorney and the State/Territory that you live in. If the form is not completed and signed correctly it will not be valid.

2. Another option is to use a do-it-yourself kit. These are available in some States at a minimal cost and provide information about the power of attorney as well as guidance in completing and signing the forms.
3. The final option is to have the document prepared by a solicitor. This ensures that you fully understand the implications of the power of attorney and the document is properly prepared and signed. Fees for this should not be expensive. It is reasonable to ask the lawyer for a quote.



Cancelling and changing a power of attorney

Changing

You may want to change your power of attorney by:

- appointing another person to act as your attorney;
- limiting the power by adding conditions; or
- increasing the power by deleting conditions.

It is not a good idea to simply change the original document. It is better to cancel the power of attorney that you want to change and make a new power of attorney.

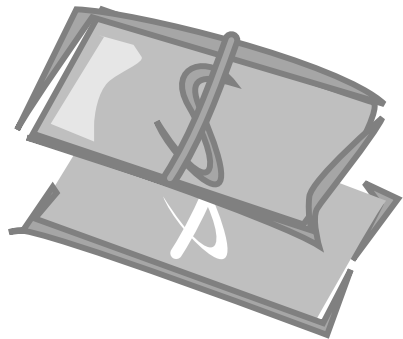
Cancelling

Apart from some general powers of attorney that cover dealings in land or shares, most powers of attorney can be cancelled by the person who gave the power of attorney.

In some cases, the law requires the cancellation (often called a revocation) to be in a specific form. In some cases the cancellation must be registered.

Remember, you cannot cancel a power of attorney unless you are legally competent to do this.

If you have a power of attorney that you want to cancel, contact the agencies mentioned at the end of this booklet for further information about what is required.



Regulating powers of attorney

Because a power of attorney gives the attorney considerable power, ie. how to make important decisions on your behalf, it is possible for that power to be abused.

This applies to anyone who makes a power of attorney and is particularly relevant to older members of the community who may not be able to effectively control their financial affairs by themselves.

There is no single agency or government department that actively monitors the use of powers of attorney. If you decide to make a power of attorney it is important to understand this.

However, in most States/Territories, the Board or Tribunal that deals with guardianship and administration powers can cancel a power of attorney if it is not being used in the best interests of the person who gave the power of attorney.

If you are aware of a situation where a power of attorney is being abused, contact the agencies mentioned at the end of this booklet for further information.



Substitute decision making without a power of attorney

So what happens if I don't have a power of attorney and, for some reason, I am unable to make decisions for myself?

The law is complex in this area and the possibilities depend on the law in your State/Territory, the type of decision and whether there is an emergency.

In most cases, the law has established a process, called guardianship and administration to allow for legally appointed persons to make decisions on your behalf.

A **guardian** is a person who makes health and lifestyle decisions.

An **administrator** is a person who makes financial decisions.

What would usually happen is:

- * A person who has some interest in you, for example, a relative or friend would apply to your State/Territory Board or Tribunal that deals with guardianship and administration.
- * A process of investigation and/or a hearing takes place to decide whether it is necessary to appoint a guardian or administrator.
- * A guardian and/or an administrator would be appointed.



What happens to the power of attorney when I die?

Any power of attorney which is signed during your life ends on your death. It has no effect after you die.

What is the difference between a will and a power of attorney?

A power of attorney is a document that is used to appoint another person to make decisions while you are alive. A will is a document that allows you to choose who to leave your assets to after you die.

I am moving from Queensland to South Australia. Can I use the power of attorney that I made in Queensland?

Powers of attorney are regulated by State and Territory laws. Unfortunately this means that there are different rules about whether a particular State or Territory recognises a power of attorney made in another State or Territory. If in doubt get legal advice.

Do I have to register my power of attorney?

Registration is not necessary in some States and Territories, although it is required in others. Some general powers of attorney that allow the attorney to make decisions about dealings in land/shares must be registered. Get legal advice.

Can I cancel a power of attorney?

Yes. You can withdraw or revoke your power of attorney, provided you are legally competent at the time. Note, some general powers of attorney that are given as security cannot be cancelled.

What are the responsibilities of an attorney?

Your attorney must act in your best interests, ie make decisions that benefit you not someone else.

If I make an enduring power of attorney, when does it begin?

Some powers of attorney allow you to write the commencement date on the document, others start when you can no longer make decisions for yourself and others start on the day that you sign the document. Make sure you check the power of attorney to see what applies in your case.

Are there any decisions that cannot be made by an attorney?

Yes. These fall into three broad categories.

- * Decisions which are prohibited under the law. For example, an attorney cannot make a decision about personal issues such as who you are to marry.
- * Decisions outside the terms of the power of attorney. For example, you may make a financial power of attorney, but indicate that the attorney is not to loan money to a particular relative.
- * Decisions prohibited by the law. For example, some State/Territory laws require approval of decisions about medical procedure such as a termination of pregnancy.

What happens if my attorney dies?

It is a good idea to make another power of attorney. If you appointed an alternate attorney, this person will probably be able to make decisions until your new power of attorney is signed.

Do you have to pay your attorney?

This is up to you. Usually you don't, unless you appoint a professional person who would charge as they would for any service.



Technical Words (glossary)

Administrator a person who is legally appointed to make financial and legal decisions on behalf of another person who is unable to make those decisions.

Attorney a substitute decision maker appointed in a power of attorney.

Enduring powers of attorney a power of attorney that continues to operate even though the person giving the power of attorney is no longer legally competent.

General powers of attorney a legal document that appoints one person to make financial decisions on behalf of another person.

Guardian the person who is legally appointed to make health and lifestyle decisions on behalf of another person who is unable to make those decisions.

Legally competent in the case of powers of attorney, the ability to understand the nature and effect of a power of attorney.



Australian Capital Territory

- Powers of Attorney Act 1956
-

New South Wales

- Conveyancing Act 1919
 - Guardianship Act 1987
-

Northern Territory

- Powers of Attorney Act 1980
-

Queensland

- Powers of Attorney Act 1998
-

South Australia

- Consent to Medical Treatment and Palliative Care Act 1995
 - Guardianship and Administration Act 1993
 - Powers of Attorney and Agency Act 1984
-

Tasmania

- Guardianship and Administration Act 1995
 - Powers of Attorney Act 2000
-

Victoria

- Instruments Act 1958
 - Medical Treatment Act 1988
-

Western Australia

- Guardianship and Administration Act 1990
 - Property Law Act 1969
-

Agencies

Australian Capital Territory

Office of the Community Advocate
3rd Flr, GIO House, City Walk,
Canberra 2608

Tel: (02) 6207 0707

New South Wales

Office of the Public Guardian
Level 15, Piccadilly Tower,
133 Castlereagh St, Sydney 2000

Tel: (02) 9265 3184

Toll free: 1800 451 510

Northern Territory

Office of the Adult Guardian
Grd Floor, Casuarina Plaza, Vanderlin Drive,
Casuarina, Darwin 0811

Tel: (08) 8922 7461

Queensland

Adult Guardian
Level 14,15 Adelaide Street,
Brisbane 4000

Tel: (07) 3234 0870

Toll free: 1300 653 187

South Australia

Office of the Public Advocate
Level 8, ABC Building,
85 North East Road,
Collinswood 5081

Tel: (08) 8269 7575

Toll free: 1800 066 969

Tasmania

Guardianship and Administration Board
99 Bathurst Street,
Hobart 7000

Tel: (03) 6233 3085

Victoria

Office of the Public Advocate
5th Floor, 436 Lonsdale Street,
Melbourne 3000

Tel: (03) 9603 9500

Toll free: 1800 136 829

Western Australia

Office of the Public Advocate
Level 1, Hyatt Centre
30 Terrace Road,
East Perth 6004

Tel: (08) 9278 7300

Toll Free: 1800 807 437

Australian Capital Territory

<http://www.oca.act.gov.au/>

New South Wales

Law for you – www.law4u.com.au

Northern Territory

Attorney General's Department - <http://www.nt.gov.au/>

Queensland

Law for you – www.law4u.com.au

Department of Justice – www.justice.qld.gov.au

South Australia

Legal Services Commission – www.lsc.sa.gov.au

Tasmania

Department of Justice - <http://www.justice.tas.gov.au>

Victoria

Law for you – www.law4u.com.au

Department of Justice – www.justice.vic.gov.au

Western Australia

Department of Justice – www.justice.wa.gov.au

South Australia

Legal Services Commission and Information SA

77 Grenfell Street, Adelaide 5000

Tel: (08) 8204 1900

Toll free: 1800 182 234

- *Enduring Power of Attorney Kit (\$13.75)*
 - *Enduring Power of Guardianship Kit (\$13.75)*
-

Victoria

Office of the Public Advocate

5th Floor, 436 Lonsdale Street, Melbourne 3000

Tel: (03) 9603 9500

Toll free: 1800 136 829

- *Take Control – A Guide to Powers of Attorney and Guardianship (free)*

Also available on the Internet– www.publicadvocate.vic.gov.au

Western Australia

State Law Publisher

10 William Street, Perth 6000

- *Enduring Power of Attorney Kit (\$4.95)*

Also available on the Internet free of charge –

www.justice.wa.gov.au

Note: The phone numbers and Internet addresses in this guide were correct at the time of printing.

You're not alone

Anyone can join a credit union.

More than 3.6 million Australians have chosen credit unions to help them take control of their finances. The numbers just keep growing.

Whether it's assistance with saving and investing, buying a house or car, or budgeting, credit unions are there to help.

Powers of Attorney – Making Your Own Decisions is one of a series of information booklets supplied by the credit union movement as part of the commitment to keeping their members and the general community well-informed about financial issues and management. The free booklets can be viewed and downloaded from the Australian Credit Union Network website at www.cu.net.au or ordered through your local credit union.

Phone 131128
to find your closest credit union.





www.cu.net.au