



# An Explanation of Powers of Attorney

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## New Law in NSW from 16 February 2004 - and a new form

The Powers of Attorney Act 2003 (NSW) became effective on 16 February, 2004 and it introduced a new prescribed form for Powers of Attorney. You must ensure you use the new form as any Powers of Attorney in the "old" form signed on or after Monday 16 February 2004 are unlikely to be valid and will not be registrable at the Land Titles Office

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### What is a Power of Attorney?

A Power of Attorney is a legal document signed by a person (the "Principal") which authorises a specified person [or persons] (the "Attorney") to do things with the Principal's assets and act on behalf of the Principal - either generally or for specific purposes, such as entering into contracts.

The Principal may want the Attorney to carry out only one specified transaction on their behalf (such as buying a house), or they may want to give the Attorney an unlimited power to act on their behalf in relation to any assets.

However, even with an unlimited power the Attorney is **not** able to:

- (a) carry out unlawful acts;
- (b) carry out the Principal's duties to act as a company director or a trustee (subject to very limited exceptions); and
- (c) do anything which would confer a benefit on them, *unless the Power of Attorney expressly permits this.*

### Overriding Obligation

The overriding obligation of the Attorney is to only do things in the best interests of the

Principal.

### No Medical Decisions

A Power of Attorney does not allow the Attorney to make personal decisions (eg. Voting) or medical decisions for the Principal. [Medical decisions are a matter for the next of kin of the Principal or for an Enduring Guardian appointed by the Principal].

### The 2 Types of Powers of Attorney

There are 2 types of Powers of Attorney:

- (a) The first type is an Ordinary Power of Attorney - this ceases to have effect if the Principal loses their mental capacity.
- (b) The second type is an Enduring Power of Attorney - this will remain effective after the Principal has lost their mental capacity.

You should consider whether you, or a relative or friend need an Enduring Power of Attorney while you or the relative or the friend are in good physical and mental health. It may be too late to create any Power of Attorney if the proposed Principal becomes too ill to sign. Also, there is always the possibility of a challenge to a Power of Attorney after the Principal ceases to have full mental capacity on a permanent basis.

## Cessation on Death

All Powers of Attorney cease to have effect if the Principal dies. From the date of death only an Executor may act for the deceased Principal.

## Do you need a Power of Attorney?

The need for a Power of Attorney generally arises in situations where you will be absent (eg, at an auction for the purchase of a house or absent at an important stage of a business transaction).

It is generally recommended that all business people who travel frequently and people of more senior years should have a Power of Attorney in place on a permanent basis.

## People and Companies can give a Power of Attorney

Any person can give a Power of Attorney provided they have the mental capacity, at the time that it is granted, to understand both the act of the appointment and the nature of the transaction(s) the Attorney is to carry out.

Those in business who use a company should note that a company can also give a Power of Attorney, subject to any restrictions contained in the Constitution of the company.

## Who should you appoint as your Attorney?

Most people appoint a relative or close friend as their Attorney. If the Power of Attorney relates to your business, you may consider appointing a business associate.

An Attorney must understand the nature of the Power and the nature of the acts they are to carry out under the Power so it is preferable to choose someone who is at least 18 years of age.

## How many Attorneys should you appoint?

You only need to appoint one Attorney. However, many people are concerned about giving only one person the legal capacity to

undertake acts on their behalf, especially if the Power of Attorney gives the Attorney unlimited or very wide powers.

An alternative is to appoint two or more people as joint Attorneys, so that the two (or more) people must act together on your behalf. You could go further and ensure the joint Attorneys are from different backgrounds; for example, one family member and your solicitor.

## Should you limit the scope of your Power of Attorney?

You should carefully consider what powers you wish to give to your Attorney. The powers may be limited to one transaction (eg, the sale or purchase of a particular property), to a particular function (eg, the signing of specified documents), or to a particular time (eg, whilst you are in hospital or overseas); or they may be general and unlimited.

## Does a Power of Attorney need to be registered?

A Power of Attorney does not need to be registered **unless** it is to be used to sign a document which itself has to be registered (eg, a land Transfer dealing). If you revoke a Power of Attorney which enables the Attorney to deal with your land then it is advisable to register the revocation.

## Can you continue to carry out the acts which you authorise your Attorney to do?

The fact you have granted a Power of Attorney does **not** stop you from continuing to do the same acts on your own behalf.

## When does a Power of Attorney end?

A Power of Attorney given for a certain period of time or to a certain date will automatically cease when that time has elapsed or that date is reached.

A Power of Attorney given for a specific purpose will cease when that specific purpose has been carried out or if performance of the specified purpose becomes impossible (eg, due to the destruction of the particular item of

property).

Other more common circumstances of termination are:

- (a) the Principal or the Attorney dies;
- (b) the Principal gives the Attorney notice of revocation of the Power;
- (c) the Attorney gives the Principal notice of renunciation of the Power (ie that they no longer wish to act);
- (d) the Principal becomes mentally incapable of managing their own affairs (unless it is an Enduring Power of Attorney);
- (e) the Attorney becomes mentally incapable of understanding their actions;
- (f) the Principal becomes bankrupt (but the termination is only to the extent of property which falls within the bankrupt estate).

### How to revoke your Power of Attorney

You can revoke your Power of Attorney in writing, orally or even implicitly but the safest course is to evidence the revocation by a Deed or written document; **and** you should give notice of the revocation to your Attorney.

### Non Revocable Powers of Attorney

A non-revocable Power of Attorney may be given but they are normally given only in special situations and there are special legal rules; so you should consult your solicitor if you intend to give or receive this type of Power of Attorney.

### How the Attorney should sign documents

If Bill Brown is signing as Attorney for Betty Blue, he should write:

*"Betty Blue by her attorney Bill Brown"*

and then he should sign his usual signature.

[If the Power of Attorney has been registered he should add the registered number].

### Does an Attorney have to show the Power of Attorney?

An Attorney should have a signed original of the Power of Attorney in their possession and they should produce that document whenever required as evidence of their authority to act for the Principal.

### What formalities do you need to follow to make a valid Power of Attorney?

- (a) *Ordinary Power of Attorney:* You should specify whether you want to grant an unrestricted Power in relation to all your affairs or a Power only in relation to specific matters or for a specific period.

The Power of Attorney must be signed by you and be witnessed by a person other than an Attorney.

If you wish the Attorney to have authority to act if they will benefit personally from a transaction, you must include a clause giving that authority otherwise they cannot personally benefit.

- (b) *Enduring Power of Attorney:* In addition to the requirements for a General Power of Attorney, the document must state that you intend the Power to continue in effect, notwithstanding that after its execution you suffer loss of mental capacity.

The Power must be attested by an authorised person (a Clerk of the Local Court, a solicitor or a Barrister).

The person attesting must also certify that they explained the effect of the Power of Attorney to you before it was signed by you.

The Attorney must sign to accept the appointment.

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**Do you need to consult a Solicitor?**

No, but it is advisable that you do. You should be properly advised as to what kind of Power is suitable for your needs. If you are granting only specific powers, these

must be carefully worded to ensure your Attorney will be able to do everything you intend them to do, and nothing further. If you are granting a Protected Power of Attorney, you will need to have it certified, which a solicitor can do.

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**Additional Notes:**

1. You can sign a bank authority for a nominated person to operate your account(s) without needing a Power of Attorney.
2. Powers of Attorney are exempt from Stamp Duty.
3. If a Power of Attorney is to be used in overseas countries or in other states of Australia there may be special rules in those countries or states which you may need to check.

**Please note that this is a summary and it is not a detailed statement of the law. You should obtain legal advice if you have any questions.**

With Compliments  
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16 February 2004  
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