

# **ENDURING POWER OF ATTORNEY**

**WHAT IS AN ENDURING POWER OF ATTORNEY?  
CAN WE HELP YOU?**

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## **Enduring power of attorney (financial)**

Maintaining financial control of your life is all-important, but sometimes things happen to lessen that control. It may be as simple as being unable to attend to your finances because you're overseas, or something more serious like mental illness or dementia. Either way, organising an enduring power of attorney is a smart way to control your financial and legal affairs when you aren't in a position to make decisions yourself.

## **Enduring power of attorney (financial) – a legal and financial life planner**

An enduring power of attorney is a life planning tool that lets you, the donor, choose someone as an attorney to decide financial and legal matters for you – such as managing your banking and income, paying bills, signing contracts or handling your assets. While you retain capacity, your attorney must act in accordance with your directions and wishes. It also provides you with ongoing control that continues even if you lose your legal capacity\*. But remember, an enduring power of attorney (financial) can't be used for making medical treatment or guardianship decisions. For more information about these powers contact the office of the public advocate.

*\*Legal capacity, or capacity, means you understand the main consequences of a decision, can take responsibility for making a choice based on the risks and benefits important to you. See your lawyer if you aren't sure whether you have legal capacity.*

## **Why arrange an enduring power of attorney (financial)?**

None of us know what the future holds. Having an enduring power of attorney provides peace of mind in relation to financial and legal matters by anticipating unforeseen circumstances. For example, you may be in a car accident that leaves

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you unable to talk, write or make important decisions. Without having an enduring power of attorney in place, even something as simple as paying a bill may become difficult and the consequences could overwhelm you, your family and friends.

### **Maintaining control with an enduring power of attorney (financial)**

If you lose legal capacity without an enduring power of attorney in place, someone acting in your best interests, such as a family member or the public advocate, would have to apply to the Victorian Civil and Administrative Tribunal (VCAT) to appoint someone with the legal authority to make decisions for you. This may result in VCAT appointing an independent third party to manage your affairs, in order to avoid conflict amongst family and friends. Organising an enduring power of attorney ahead of time can avoid this situation and ensure legal and financial decisions are made in your best interests by someone you have chosen yourself.

### **Who can appoint an attorney?**

You can appoint an attorney if you are over 18 years of age and understand what you are doing by making the appointment. This means you understand the powers your attorney will have, the decisions they will be allowed to make and when and how they will be able to exercise their powers. It also means you appreciate the effect your attorney's actions may have on you and things important to you, as well as your options to cancel or change the arrangement in future. If you don't have sufficient capacity, the guardianship list of VCAT can appoint an administrator to make financial and legal decisions for you.

### **Choosing your attorney – make the right choice**

It is extremely important to choose your attorney carefully because he or she will assume financial and legal decision-making responsibilities on your behalf, either immediately or whenever you have specified – such as when you go overseas or

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lose legal capacity. Whether the person you are considering is a family member or a close friend, they must be someone competent whom you trust and respect and who feels similarly towards you. Essentially, you want your attorney to look after you the way you'd look after yourself. You must also be sure they are prepared to take on the role as your attorney, and that they fully understand your future needs and expectations. To ensure this, and because our opinions and priorities may change over time, it's a good idea to talk about important matters with them on a regular basis. Remember that once the power to make a decision begins, your attorney will have full control over that decision unless you have clearly spelt out limitations on that power in your enduring power of attorney form.

### **Who can be my attorney?**

When appointing your attorney it is important to remember that they must be over 18 years of age and have legal capacity. You can choose to appoint any person or organisation, as long as they agree to take on the role. An attorney should be someone you trust to manage your affairs and who will respect your best interests. You may decide to appoint more than one person as your attorney. In this case, their power can be exercised in different ways: *"jointly"* (which means they must make decisions together and all sign any documents), *"jointly and severally"* (which means they can make decisions and sign documents together or independently), or *"alternatively"* (the alternate attorney can only make decisions when the first attorney is unable to act). Remember that it is important that your attorney(s) formally accept their appointment.

### **Duties of your attorney**

Your attorney must be someone who always acts in your best interests and, wherever possible, make decisions you would have made. They must keep accurate records of dealings and transactions made for you under the power,

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avoid any conflict of interest, and keep your property and money separate from theirs.

## **Enduring power of attorney changes – more choice, protection & control**

Recent changes to Victorian law means setting up an enduring power of attorney is now more comprehensive and secure for everyone involved – especially donors. If you already have an enduring power of attorney in place it will continue to be valid and these new changes will automatically apply to your current arrangements. The changes include the following:

- **An easy to understand form**

The new look enduring power of attorney form allows you more choice in setting out how your affairs are to be managed. Questions are in plain English and you can choose from a range of straightforward options so the result fits your own circumstances.

- **Choose when your enduring power of attorney starts**

As the donor, you can now determine when your enduring power of attorney begins (previously it began immediately once the form was drawn up). You can indicate on the form whether it should begin immediately, or on a particular date, or on a particular occasion. Even if you want the enduring power of attorney to start immediately, you can continue to make all decisions yourself while you have legal capacity. While you retain capacity, your attorney must act in accordance with your directions.

- **Detailed instructions for your attorney**

You can now specify exactly how your attorney(s) should carry out their responsibilities. For example, if you have large capital assets, like property

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or shares, you can leave clear instructions as to how your attorney(s) must deal with them. But restricting an attorney's power may make it difficult for them to make decisions for you, so it's a good idea to get legal advice before doing this.

- **A required statement of acceptance**

Every enduring power of attorney must now include a statement of acceptance that is signed and dated by the attorney. This ensures that the attorney is aware of, and accepts his or her role and responsibilities.

- **More specific requirements for witnesses**

There are new requirements for witnessing an enduring power of attorney. In order to ensure that a donor has made an enduring power of attorney of their own free will, the form includes a certificate which must be signed by each of two adult witnesses certifying that the donor signed freely and voluntarily in the presence of the witness and that, at the time, the donor appeared to have the capacity necessary to make the appointment. The witness must sign and date the certificate in the presence of the donor and each other. A witness cannot be the donor, or the person appointed as attorney, and only one of the witnesses can be a relative of the donor or of the attorney. One of the witnesses also must be authorised by law to witness the signing of statutory declarations – such as a justice of the peace, a member of the police force, a councillor of a municipality, a pharmacist, or a school principal.

### **What if I change my mind?**

You can change or cancel (revoke) your enduring power of attorney at any time as long as you have legal capacity. You may decide to do this

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because you or your attorney are moving away, or your relationship has changed and the attorney is no longer the best person to look after your interests. You can do this simply by telling your attorney that their power is withdrawn, by destroying the document and any copies, or in writing. For example, you may choose to use the revocation form.

- **VCAT – a user friendly forum**

The other main area of change is the extension of the jurisdiction of VCAT in relation to enduring powers of attorney. VCAT will now have the power to make declarations, orders, directions, recommendations or advice in relation to enduring powers of attorney. VCAT is considered an informal and accessible alternative to going to court. It provides an easier and less expensive forum for making legal decisions and resolving issues about your enduring power of attorney. These powers conferred on VCAT will operate concurrently with the powers of the supreme court.

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## **Our people**

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