

ENDURING POWER OF ATTORNEY (Financial)

This is a booklet prepared by the Victorian Government Department of Justice to provide information to:

- Part 1 - The person appointing an attorney ("the donor").
- Part 2 - The persons witnessing the donor's signature on the document appointing an attorney.
- Part 3 - The person appointed as attorney.
- Part 4 - The donor revoking the appointment of an attorney.

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The booklet does not constitute legal advice and is provided for general information only.

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PART 1: For the person appointing an attorney

By completing an enduring power of attorney, you can give a person of your choice the power to make decisions on your behalf about financial and legal matters.

These pages explain what you need to know to complete the document properly.

Because you are the person making or donating the enduring power of attorney, you are referred to as 'the donor'.

What is an enduring power of attorney?

This is a legal document that appoints another person (or persons) to make financial and legal decisions for you. Unlike a general power of attorney, an enduring power of attorney continues to be valid even if you lose legal capacity in the future. 'Enduring' simply means that the power continues even if the person giving it loses the capacity to make decisions. It is useful as a means of ensuring that someone, chosen by you, takes control of your financial and legal affairs if and when you are ever unable to do so yourself.

Why give someone enduring power of attorney?

There are some circumstances in which you may be unable to make decisions about matters that concern you. For example, you may be overseas, or you may be too ill.

If you give someone a general power of attorney, for instance, to sign documents for you in your absence, that power will come to an immediate end if for some reason you lose legal capacity to make decisions. This could be very awkward if your attorney is in the process of conducting business for you.

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Giving an attorney an enduring power means that the attorney is able to continue to act for you when you have lost capacity to make decisions for yourself.

Can I appoint more than one attorney?

Yes. Several options are provided for in the Instruments Act 1958. For example, you may choose to appoint a single attorney; or two or more "joint" attorneys; or two or more "joint and several" attorneys; or an "alternative" attorney.

The appointment of "joint" attorneys means that all the attorneys can only act if they all agree, and any documents must be signed by all of them.

The appointment of "joint and several" attorneys means that all the attorneys can act together if they all agree, or any of the attorneys can act and sign documents together or alone.

The appointment of an "alternative" attorney means that an alternative attorney can only act in the event of the death or during the absence or legal incapacity of the attorney for whom the alternative attorney has been appointed.

It is important that your intentions be expressed clearly.

Whom should I appoint as my attorney?

You should appoint someone you trust to manage your property and financial affairs in your best interests. Many people choose their spouse or an adult child, but you may prefer to appoint another family member, a friend with expertise in the area, an accountant, a lawyer, State Trustees Limited, or a trustee company. You should also feel confident that the person or agency is competent to deal with the management decisions that may arise and capable of keeping accurate

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records of all dealings and transactions. The attorney you choose must be willing to take on the responsibility on your behalf.

Your attorney must be over 18 years of age and must not be a bankrupt or insolvent.

Should I pay my attorney?

You do not need to pay your attorney for the power to be effective. Normally, payment is not made unless a trust company is acting as attorney.

Can I limit my attorney's powers?

Yes, you can specify how you want your attorney(s) to carry out their responsibilities to you and any special conditions you want to apply in the decisions they make on your behalf. You can also include particular instructions about what you would like your attorney to do. Your attorney must act in accordance with your instructions.

Once the power to make a decision begins, your attorney will have full control over that decision unless you have explicitly limited that power in this document.

Where you have large capital assets, such as property or shares, you should leave clear instructions for your attorney(s) as to how to deal with or distribute or dispose of these assets.

Note: It is better not to place too many restrictions on your attorney's power, as this may make it difficult for your attorney to make decisions on your behalf. If you choose to impose conditions or restrictions on the power you are giving to your attorney(s), it is recommended you seek legal advice.

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When does the attorney's power begin?

You may nominate when your attorney's power is to begin. Under clause 4, you should indicate whether you want the attorney to assume power:

- immediately; or
- on a specified date; or
- on a specified occasion.

If you do not complete clause 4, the power begins immediately.

Note: Even if you give your attorney power immediately, you may also continue to make decisions yourself while you are able to do so. While you retain capacity, your attorney must act in accordance with your directions.

How long does the power continue?

The power continues until it is revoked, or upon your death.

(See also part 4 of this package: "For revocation of the power by the donor").

How can I be sure that my attorney will act in my interests?

While (if ever) you are unable to oversee your attorney's decisions, the public advocate, the Victorian Civil and Administrative Tribunal (VCAT) and the court have the power to protect your interests. Your attorney may be required to produce a summary of receipts and expenditure or more detailed accounts, and these may be audited. An attorney who does not adequately protect your interests can be removed or replaced.

Can I change or revoke an enduring power of attorney?

Yes, you may change it or revoke it at any time, so long as you are capable of understanding what you are doing. In other words, so long as you have the

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capacity to make an enduring power of attorney, you also have capacity to change it or revoke it.

How can I change or revoke an enduring power of attorney?

You can change or revoke an enduring power of attorney in exactly the same way as you can change or revoke a general power of attorney. There are different reasons why you may want to change or revoke your power. Maybe your relationship with the attorney has changed, or your own circumstances are different, and the person you appointed is no longer appropriate for the role. It may be simply that either the attorney or you have moved.

Unlike a general power of attorney, however, it is likely that you will still need to appoint someone new to take control of your finances and legal affairs in the event of you no longer being able to make decisions for yourself. Remember - this is something that can happen to anyone.

There are a number of ways you can revoke the power. One way is by telling the attorney that their power is withdrawn, and by destroying the enduring power of attorney document and any copies. Another way is by filling out a 'revocation of enduring power of attorney' and giving a copy of this to your attorney. You should also ask your attorney to return the enduring power of attorney document. It is also a good idea to notify your bank or any other relevant groups, such as financial institutions or businesses, with which your attorney might have been dealing.

Note: Your attorney's actions may be binding unless you notify the attorney that their power has been withdrawn.

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If you lose legal capacity in the future, you will not be able to revoke an enduring power of attorney while you lack capacity.

If and when you do not have legal capacity, the guardianship list of VCAT can revoke an enduring power of attorney if the tribunal believes that the attorney is acting improperly, or against your best interests.

Is there anything else that will end this power?

Yes, several other circumstances will bring this enduring power of attorney to an end:

- **If you die.** If you die, the enduring power of attorney is revoked in its entirety.
- **If you make an inconsistent document.** This power is revoked to the extent of any inconsistency with any later document you complete. Where the power is inconsistent with a later enduring power of attorney, then the later power overrides the first.
- **If your attorney resigns.** Your attorney may resign by giving you a signed notice or by getting leave to resign from VCAT or the court.
- **If your attorney becomes incapable.** Your attorney's power is revoked if he/she becomes incapable of understanding the nature and foreseeing the effects of a decision, and of communicating that decision.
- **If your attorney becomes bankrupt or insolvent.**
- **If your attorney dies.**

Prerequisites for appointing an attorney?

In order to be able to appoint someone with a power of attorney (either general or enduring), the law expects two things of you.

First, you must be 18 years of age or over.

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Secondly, you must have sufficient capacity to make the appointment.

Capacity is a legal term that means:

- you understand the main consequences of a decision;
- you are able to take responsibility for making a choice;
- and you are able to make a choice based on the risks and benefits important to you.

This means that at the time of making the appointment of the enduring power of attorney, you must be able to understand things such as:

- what sorts of powers the attorney will have, and what sorts of decisions they will have the authority to make;
- when and how they will have the authority to exercise that power;
- the effects that their power could have on you and on the things that are important to you; and
- what options are open to you to cancel or change the arrangement in the future.

On the basis of understanding these sorts of issues, you then need to be able to make your own decision. This means that you make the decision:

- without pressure from anyone else; and
- weighing up the pros and cons on the basis of what matters most to you.

When you make a decision in this way, you have made an informed decision or have given informed consent.

Who is involved in completing this document?

At least four people:

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- **You**, as the donor, complete enduring power of attorney clauses 1 to 6 in Form 1.

If you have a physical disability which prevents you from signing, you may instruct another person to sign for you, but you must give the instruction in front of the witnesses, and the signing must be done in your presence. This person must be 18 years old or more, and must not be a witness or your attorney. He/she must complete the statement beside the place for his/her signature.

- **The two witnesses** must sign the certificate of witnesses in form 1.

One of the witnesses must be authorised by law to witness the signing of statutory declarations. The following is a list of persons who are authorised by law to witness statutory declarations:

- a justice of the peace or bail justice
- a notary public
- a barrister and solicitor of the Supreme Court
- a clerk to a barrister and solicitor of the Supreme Court (including a barrister's clerk)
- the prothonotary or a deputy prothonotary of the Supreme Court
- the registrar or deputy registrar of the Supreme Court
- the principal registrar of the Magistrates' Court
- the registrar of probates or an assistant registrar of probates
- the associate to a judge of the Supreme Court or the County Court
- the secretary of a master of the Supreme Court or the County Court
- a person registered as a patent attorney under part XV of the Patents Act 1952 (Cth)

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- a member of the police force
- the sheriff or a deputy sheriff
- a member or former member of either house of the parliament of Victoria or the Commonwealth
- a councillor of a municipality
- a senior officer of a council as defined in the Local Government Act 1989
- a registered medical practitioner within the meaning of the Medical Practice Act 1994
- a registered dentist within the meaning of the Dental Practice Act 1999
- a veterinary practitioner
- a pharmacist
- a principal in the teaching service
- the manager of an authorised deposit-taking institution
- a member of the Institute of Chartered Accountants in Australia or the Australian Society of Accountants or the National Institute of Accountants
- the secretary of a building society
- a minister of religion authorised to celebrate marriages (not a civil celebrant)
- a person who holds an office in the Victorian Public Service or a statutory authority that is prescribed as an office to which this section applies
- a fellow of the Institute of Legal Executives (Victoria).

The witnesses must not be either yourself as the donor, or your attorney. At least one of the witnesses must not be a relative of yours or of the person(s) you appoint as your attorney(s).

The witnesses must sign the certificate together in your presence and must choose one of the available options by crossing out the option (a) which does not apply:

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- either (a) that you signed the document freely and voluntarily in the presence of the witnesses;
- or alternatively (a) that the document was signed in the presence of the witnesses by another person at your direction which was given freely and voluntarily;

and (b) at the time of signing you appeared to understand what you were doing, that is, you had sufficient capacity.

If a witness is not sure that you understand the nature and effect of the document, he/she should refuse to sign the document.

- **The attorney** must sign and date the statement of acceptance.

Your attorney must be at least 18 years old.

Where can I go for advice?

The office of the public advocate, your local community legal centre or a solicitor can advise you about the enduring power of attorney and how to complete this document.

What happens to this document when it is completed?

You should leave the original in a safe place, such as with your bank, but it is important to keep a copy to refer to. You should also give a copy to anyone else who may need to be involved, such as:

- your attorney
- your doctor
- your solicitor

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- your accountant
- your stockbroker.

You may also wish to carry a card in your purse or wallet, stating that you have made an enduring power of attorney and giving details of that appointment.

PART 2: For the witnesses

Your role goes beyond ensuring that the signature of the donor (the person giving the power) is genuine. You certify that the donor has signed the document freely and voluntarily in your presence, that is, without any undue influence or duress. You also certify that the donor appeared to understand the nature and effect of the document. For example, the donor should show an understanding of the nature and effect of his/her estate as far as this is practicable. This means you should make allowance for circumstances in which a donor may not reasonably be expected to have this knowledge, for example, where one member of a domestic relationship has not been responsible for, or involved in decision-making for, their estate during his/her lifetime.

In examining the capacity of the donor, you should respect the privacy of the donor and therefore do not need to know the specific details of the estate, such as the balance of the donor's bank accounts or exactly how many properties the donor may own. Rather, you should make sure that the donor understands that he/she is giving the attorney the same power that the donor has to deal with any of the donor's assets, but only in the donor's best interests.

In the future, you may have to provide information about the donor's capacity to understand these matters when giving the power. If you are doubtful about the donor's capacity, you should make appropriate inquiries with the consent of the

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donor, for example from the donor's doctor. (See page 8 of this package for an explanation of "capacity".)

Where it is possible that there may be some doubt in the future as to the donor's capacity at the time of signing the document, then a medical certificate confirming capacity at the time of signing should be obtained by the donor and attached to the document.

Where an interpreter is required, it is important that you are satisfied that the document has been explained in a language that the donor understands.

It is strongly recommended that, if you are in any doubt, you make a written record of the proceedings and of any questions you asked to determine the donor's capacity. Otherwise, if you are not satisfied that the donor understands the nature and effect of the document you should refuse to sign the document. You should also refuse to sign the document if the donor appears to be signing the document under duress or undue influence.

PART 3: For the attorney

Important notice

The donor in choosing you to be his/her enduring power of attorney is entrusting you to act in his/her best interests. If you accept this trust and the enduring power of attorney, you will be taking on serious responsibilities. If you fail to observe these responsibilities, you could be removed as attorney or even convicted of an offence and required to pay compensation.

Besides the particular responsibilities mentioned in part 1 of this document, there are responsibilities imposed by the Instruments Act 1958 and under the common law.

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What are these responsibilities?

They are both general and specific.

General responsibilities (to guide you in decision-making)

You must exercise the power given to you honestly and with reasonable care. It is an offence not to do so, and you may also be required to compensate the donor.

You must comply with the terms of the enduring power of attorney and any other requirement of the court or VCAT. In addition, you must abide by the general principles on which the Act is based.

General principles include:

- presuming that the donor has the capacity to make a particular decision until there is conclusive evidence that this is not the case;
- recognising his/her right to participate in decisions affecting his/her life to the maximum extent for which he/she has capacity;
- respecting the donor's human worth and dignity and equal claim to basic human rights, regardless of his/her capacity;
- recognising the donor's role as a valued member of society and encouraging his/her self-reliance and participation in community life;
- taking into account the importance of the donor's existing supportive relationships, values and cultural and linguistic environment, ensuring that your decisions are appropriate to the donor's characteristics and needs;
- recognising the donor's right to confidentiality of information.

Specific responsibilities

- **Duty to keep records.** You must keep accurate records of dealings and transactions made under the power as VCAT or the court or the public

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advocate may require you to produce them. You must keep these records separate from your own affairs where possible.

For example, if you dispose of an asset you should keep records about the disposal.

Where there are joint attorneys, then it is sufficient that by agreement one of the attorneys will retain a record or account of transactions or dealings.

- **Duty to keep property separate.** You must keep your property separate from the donor's property unless you and the donor own the property jointly.

If the donor's capacity to make decisions is impaired, you must also get approval from VCAT or the court for any transactions that have not been authorised in this document.

- **Duty to avoid transactions that involve conflict of interest.** You must not enter into transactions that could or do bring your interests (or those of your relation, business associate or close friend) into conflict with those of the donor.

However, you may enter into such a transaction if it has been authorised in this document or by VCAT or the court.

How do I complete a document for the donor?

If you have the power to execute (complete) a document for the donor, you do so in the ordinary way, but you must note on the document that you are executing it as the donor's attorney under enduring power of attorney (e.g. 'John Smith, by his duly appointed attorney, Mary Jones').

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Proof of your authority

It is recommended that you keep the enduring power of attorney document in a safe place. Sighting of the document may be a requirement of your authority by financial institutions, banks etc.

When does my power to make decisions begin?

The donor may nominate in this document when your power to make financial decisions begins. If the donor does not nominate a date or event or occasion when a power becomes exercisable, then your power begins immediately. However, while the donor retains capacity, you must act in accordance with the donor's directions.

When does my power end?

Though there is no time limit on enduring powers of attorney, certain actions by you or the donor or VCAT or the court can bring your power to an end.

Your actions:

- **Your resignation.** So long as the donor is capable of using the power given to you, you can resign by giving the donor a signed notice. However, if the donor is incapable of using the power, then you may only resign by getting leave of VCAT or the court.
- **Becoming incapable.** Your power is revoked if you become incapable of understanding the nature and foreseeing the effects of a decision, and communicating that decision.
- **Becoming bankrupt or insolvent.** If this happens, your power is revoked.
- **Your death.**

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The donor's actions:

- **Revoking your power.** The donor may revoke your power at any time, so long as he/she has the capacity to revoke it, that is, the donor understands the nature and effect of revoking the power.

If the donor revokes your power, the donor has an obligation to inform you. If the donor neglects to advise you that the power is revoked and you continue to exercise the power in good faith, then you will be protected under the legislation.

- **Appointing a new attorney exclusively to have your powers.** If the donor completes a new document giving your powers to another attorney exclusively, your powers are revoked to that extent. Because the new document has a later date and is inconsistent with your powers, it overrides the earlier document.
- **The donor's death.** If the donor dies, your enduring power of attorney is revoked in its entirety.

Actions by the court or VCAT

- Your power may also be changed or revoked by the court or VCAT if you have failed to act in the donor's interests.

Can I be held liable?

Yes, you can be held liable if you use the enduring power of attorney knowing that it has been changed or revoked, or knowing of an event that effectively revokes it, or even if you have reason to believe that it has been revoked.

The court, VCAT and the public advocate have the power to protect the donor's interests. You may be required to produce a summary of receipts and expenditure

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or more detailed accounts, and these may be audited. You may also be required to give evidence in relation to the exercise of your powers. If VCAT, the court or the public advocate believes that you have not adequately protected the donor's interests, you may be removed or your enduring power of attorney may be revoked, and you may be required to compensate the donor.

Where can I go for advice?

The public advocate, a community legal centre, a solicitor, VCAT, the court, State Trustees Limited or a trustee company can advise you about this document and your power and responsibilities under it.

VCAT and the court can also make a declaration about the validity of this document or whether your power to make a decision for the donor has begun.

PART 4: For revocation of the power by the donor

You may change or revoke the power at any time, so long as you are capable of understanding what you are doing, that is, so long as you have capacity.

You can revoke the power by telling the attorney that their power is withdrawn, and by destroying the enduring power of attorney document and any copies.

You can further formalise this by filling out the revocation of enduring power of attorney form and giving a copy of this to your attorney. You should also ask your attorney to return the enduring power of attorney document. It is also a good idea to notify your bank or any other relevant groups, such as financial institutions or businesses, with which your attorney might have been dealing.

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There are also several other circumstances will bring the power to an end:

- If you die, the enduring power of attorney is revoked in its entirety.
- The power is revoked to the extent of any inconsistency with any later document you complete. Where the power is inconsistent with a later enduring power of attorney, then the later power overrides the first.
- Your attorney may resign by giving you a signed notice or by getting leave to resign from VCAT or the court.
- Your attorney's power is revoked if he/she becomes incapable of understanding the nature and foreseeing the effects of a decision, and of communicating that decision.
- Your attorney's power is revoked if your attorney becomes bankrupt or insolvent.
- If your attorney dies.

Note: Your attorney's actions are binding unless you notify the attorney that their power has been withdrawn.

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Directors

- Peter Wilson
- Paul Stephens

Senior Lawyers

- Cathy Drake
- Viv Stephens
- Kent Mallinson

Lawyers

- Rebecca Hanley
- Meaghan Smyth

Legal Executive

- Paul James

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