

## Powers of Attorney

This is a "plain English" summary of the main sections of the *Powers of Attorney Act 2003 (NSW)* ("**Act**"). This summary is not a substitute for the terms of the Act itself, but may serve as a useful reference source. Recourse should always be had to the exact terms of the Act.

This summary does not consider powers of attorney not made under the Act,<sup>1</sup> powers of attorney not made in NSW,<sup>2</sup> or irrevocable powers of attorney.<sup>3</sup>

The information contained in this summary was current as at 22 October 2012, but may have changed since then.

You should check the most recent version of the Act which can be found at:

<http://www.legislation.nsw.gov.au/>

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<sup>1</sup> See Sn 7

<sup>2</sup> See Sn 25

<sup>3</sup> For irrevocable powers of attorney see Sns 15, 16, & 28

## Contents

Operation of the Powers of Attorney Act 2003 (NSW).....	3
Who can be an attorney .....	3
Creating a "Schedule 2" power of attorney ("prescribed power of attorney").....	3
Scope of a "Schedule 2" power of attorney.....	3
Limitations on a "Schedule 2" power of attorney contained in the Act .....	4
Ordinary power of attorney .....	4
Enduring power of attorney.....	4
Creating an enduring power of attorney .....	5
Accepting an enduring power of attorney.....	5
Scope of an enduring power of attorney.....	5
Dealing with assets in your will.....	5
Marriage and other circumstances .....	5
Review.....	6
Directions .....	6
How to use a power of attorney .....	6
Registration .....	6
Cancelling a power of attorney.....	7
Spare copies .....	7
Other information.....	7

### ***Operation of the Powers of Attorney Act 2003 (NSW)***

The Act is *in addition to* and *not in substitution of* the general law relating to powers of attorney.<sup>4</sup>

Accordingly, a "Schedule 2" power of attorney, (or a "prescribed power of attorney"), created under part 2 of the Act, is but one specific (and special) form of a power of attorney.

### ***Who can be an attorney***

You can appoint any legal adult<sup>5</sup> to be your attorney.<sup>6</sup>

Your appointed attorney will not (at the relevant time) to be your attorney if:

1. You cancel their appointment;
2. A Court or Tribunal cancel's their appointment;
3. They chose to stop acting;
4. They die (or if a corporation, it is dissolved);
5. They become bankrupt (or if a corporation, it is wound up<sup>7</sup>); or
6. They do not have sufficient mental and/or physical capacity to act as an attorney.<sup>8</sup>

### ***Creating a "Schedule 2" power of attorney ("prescribed power of attorney")***

In order to create what the Act calls a "prescribed power of attorney", and what I have termed a "Schedule 2" power of attorney, the document must:

1. Be "in or to the effect of the form set out in Schedule 2"; and
2. Be properly signed and witnessed.<sup>9</sup>

These requirements will also, necessarily, require that a "Schedule 2" power of attorney be given in writing.

### ***Scope of a "Schedule 2" power of attorney***

Your attorney will be able to deal with your property and assets, and enter into financial transactions and agreements on your behalf.<sup>10</sup>

You can place any conditions or limitations on your attorney's power by specifying those conditions or limitations in the power of attorney document.<sup>11</sup> You can also extend (as well as restrict) the operation of your power of attorney by specifically stating so in the power of attorney document.

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<sup>4</sup> Sns 6(1), & 7(1)

<sup>5</sup> i.e. a corporation, or an individual over the age of 18

<sup>6</sup> See Sn 3 definition of "attorney"

<sup>7</sup> See Sn 3 definition of "bankruptcy"

<sup>8</sup> Sn 5

<sup>9</sup> Sn 8 (see also section 38 of the Conveyancing Act)

<sup>10</sup> Sn 9(1)

<sup>11</sup> Sn 9(2)

If you do not state any conditions or limitations in the power of attorney document your attorney will have a broad power and authority to do anything that you could, according to law, authorise an attorney to do, subject only to the limitations contained in the Powers of Attorney Act.<sup>12</sup>

### ***Limitations on a "Schedule 2" power of attorney contained in the Act***

If you have any functions as a trustee, an attorney is not authorised to act in your place for any of those functions.<sup>13</sup>

Unless *the power of attorney document* states so, an attorney is not authorised to use your property to give gifts to any person.<sup>14</sup>

Unless *the power of attorney document* states so, an attorney is not authorised to be paid or obtain any other benefit from your property.<sup>15</sup>

Unless *the power of attorney document* states so, an attorney is not authorised to pay, or give any other benefit to, any other person (other than as a result of a commercial transaction entered into for your benefit).<sup>16</sup>

The Act (and Schedules 2 and 3) sets out certain phrases that may be used to give the attorney a limited authority in relation to these matters. If any of those phrases are used you should read Schedule 3 of the Act to understand the extent and limits of the powers given.

The Act contains other limitations, some of which are dealt with in this document.

### ***Ordinary power of attorney***

Under an ordinary (non-enduring) power of attorney, an attorney is only authorised to take any actions on your behalf if those actions are within your capacity to understand them *at the time the actions are taken*. In other words, the attorney is, at law, an identical copy of you at all times, and accordingly subject to any limitations in capacity that you suffer at any particular time.<sup>17</sup>

### ***Enduring power of attorney***

An enduring power of attorney is a special type of a "schedule 2" power of attorney that continues to operate even when you do not have the ability to understand what your attorney is doing. In other words, the attorney is, at law, a complete substitute for you at all times, and accordingly is only subject to any limitations in capacity that they suffer at any particular time.<sup>18</sup>

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<sup>12</sup> Sn 9(1)

<sup>13</sup> Sn 10

<sup>14</sup> Sn 11(1)

<sup>15</sup> Sn 12(1)

<sup>16</sup> Sn 13(1)

<sup>17</sup> Sn 18

<sup>18</sup> Sn 21

### ***Creating an enduring power of attorney***

In order to create an enduring power of attorney:

1. The power of attorney document must state that it was intended to continue even if at some time in the future you lack the mental capacity to understand the nature of the acts it authorises the attorney to undertake;
2. It must be witnessed by a properly qualified witness;
3. Its effect must be explained to you by the witness, and understood by you; and
4. It must have a certificate of advice, provided by the witness.<sup>19</sup>

### ***Accepting an enduring power of attorney***

An enduring power of attorney is not effective until it is accepted by the attorney, *by signing the power of attorney document*.<sup>20</sup>

### ***Scope of an enduring power of attorney***

An enduring power of attorney authorises the attorney to take any action that is within the scope of the power granted<sup>21</sup>, even if you are unable, (through mental incapacity), to understand the nature of the action at the time it is taken.<sup>22</sup> You can place any conditions or limitations on your attorney's enduring power by specifying those conditions or limitations in the power of attorney document.<sup>23</sup>

### ***Dealing with assets in your will***

If your will gives anyone any rights in relation to any property, and prior to your death your attorney takes any action that affects those rights or that property, the beneficiary retains an equivalent interest in any property arising from that action (to the extent that any such property remains at the time of your death).<sup>24</sup> The effect of this may (on request) be amended by the Supreme Court if it is unintentionally unjust or disproportionate<sup>25</sup>, however the application must be made within 6 months of the grant of probate.<sup>26</sup>

### ***Marriage and other circumstances***

A power of attorney (ordinary or enduring) will continue to operate even after you marry, and even if there are significant changes in your personal circumstances. Unless the power of attorney document states otherwise, the power will continue to be valid until it is revoked by you, or otherwise terminated by a change in the circumstances *of the attorney*.

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<sup>19</sup> Sn 19

<sup>20</sup> Sn 20(1) (see the remainder of section 20 for more information on this)

<sup>21</sup> see "Scope of a "Schedule 2" power of attorney", and "Limitations on a "Schedule 2" power of attorney contained in the Act" above

<sup>22</sup> Sn 21(1)

<sup>23</sup> Sn 21(3)

<sup>24</sup> Sn 22

<sup>25</sup> Sn 23(1)

<sup>26</sup> Sn 23(3)

## **Review**

A power of attorney can be reviewed by either the Guardianship Tribunal or the Supreme Court.<sup>27 28</sup>

An application may be brought by you, an attorney, your guardian, or any other person with "a proper interest in the proceedings or a genuine concern for the welfare of the principle".<sup>29</sup>

When making orders relating to the "operation and effect" of the power, the tribunal must be satisfied "that it would be in the best interests of the principal to do so or that it would better reflect the wishes of the principal",<sup>30</sup> however see the Act for other orders the tribunal may make.<sup>31</sup>

## **Directions**

An attorney may seek advice or direction from the tribunal if the attorney is unsure how to discharge their duty, and is protected against liability for breach of duty by obtaining such a direction.<sup>32</sup>

The Supreme Court's powers extend to making decisions when you cannot be contacted.<sup>33</sup>

## **How to use a power of attorney**

An attorney is authorised to execute documents on your behalf with their own signature and in their own name.<sup>34</sup>

If you want your attorney to be able to delegate any powers you have given them this must be stated in the power of attorney document.<sup>35</sup>

If more than one attorneys are appointed as "joint attorneys", the power can only be exercised by them all in agreement, and the loss of one attorney accordingly terminates the power of attorney.<sup>36</sup>

Alternatively, if more than one attorneys are appointed "severally, or jointly and severally", then the power is exercisable by any one of them alone, and is not terminated by the loss of any one attorney.<sup>37</sup>

## **Registration**

You are not required to register your power of attorney, however a power of attorney can be registered with the Land and Property Information Division (LPI) of the NSW Department of Lands,

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<sup>27</sup> Sn 26

<sup>28</sup> Sns 26-42, see esp Sns 31, 32, 33, 35, 36, and 42

<sup>29</sup> Sn 35(1)

<sup>30</sup> Sn 36(4)

<sup>31</sup> Sns 26-42, see esp Sns 29, 30, 31, 36, 37 and 42, as to appeals see Sns 40 & 41

<sup>32</sup> Sn 38

<sup>33</sup> Sn 42

<sup>34</sup> Sn 43

<sup>35</sup> Sn 45

<sup>36</sup> Sn 46

<sup>37</sup> Sn 46

(in which case a number will be given and recorded on the power, which can be checked, and a revocation can be registered against that number).<sup>38</sup>

A power of attorney must be registered for an attorney to act on transactions affecting land.<sup>39</sup>

### ***Cancelling a power of attorney***

If you do cancel ("revoke") your power of attorney you must notify your attorneys, as they may continue to act in reliance on the power given to them if not notified.<sup>40</sup>

If you are at all concerned about your attorney continuing to act even after notified, you should *register the power and the revocation*, as unaware third parties are entitled to rely on the power, even if revoked.<sup>41</sup>

Attorneys should also be aware that acting on a power that they know is terminated or suspended is punishable by imprisonment of up to 5 years.<sup>42</sup>

### ***Spare copies***

For instructions on how to authenticate a copy of the power of attorney document, see section 44 of the Act.

### ***Other information***

You should also read and understand the notes to the standard power of attorney found in schedule 2 of the Act, and if any prescribed terms are used, the notes to those terms found in schedule 3 of the Act.

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<sup>38</sup> Sn 51

<sup>39</sup> Sn 52

<sup>40</sup> Sn 47

<sup>41</sup> Sn 48

<sup>42</sup> Sn 49

***Some specific things to think about***

Why do you want/need a power of attorney?

What do you want/need your attorney(s) to be able to do?

What *don't* you want/need your attorney(s) to be able to do?

How and in what areas are your views different to or likely to be different to those of your attorney(s)?

How will you ensure that your attorney(s) put your interests (and preferences) first?