

ENDURING POWERS OF ATTORNEY

FACT SHEET

What is an enduring power of attorney

A power of attorney is a legal document which allows you to choose another person to make property and financial decisions for you and act on your behalf. An enduring power of attorney authorises your attorney to make these decisions even if you are no longer able to make them for yourself. An attorney cannot make personal, medical or lifestyle decisions for you, but for this purpose you can appoint an enduring guardian. For more information on an enduring guardian you need to contact the Guardianship and Administration Board on 6233 3085 or go to; www.guardianship.tas.gov.au.

Why make an enduring power of attorney

Decision making debilities – caused by illness, accident or disabilities such as dementia – are affecting an increasing number of Australians. Many people mistakenly think that if they lose mental capacity, a family member will automatically be able to make substitute decisions for them and manage their financial affairs. This is not legally the case.

If, however, you have made an enduring power of attorney, your attorney can immediately commence to make legal and financial decisions on your behalf. Making an enduring power of attorney is now a simple procedure and is just as important as making a will.

The time to consider an enduring power of attorney is when you are healthy, aware and still have capacity to manage your own legal and financial affairs. Once you lose mental capacity an enduring power of attorney cannot be signed, and it may be necessary to have an appointed administrator to make those decisions for you.

The advantages of an enduring power of attorney

There are a number of important benefits of an enduring power of attorney;

- It is a cheap and relatively easy alternative to other forms of financial management;
- It provides continuity of management of your financial affairs, thereby minimising immediate financial hardship if your decision making ability is suddenly impaired;
- It enables you to 'tailor-make' the power by imposing conditions or restrictions on its exercise;
- It provides confidentiality in respect of your property and financial affairs.

Who should I appoint as my attorney?

Subject to any conditions or restrictions contained in the enduring power of attorney, your attorney will be able to do anything you could lawfully do, including operating your bank account and selling your house and other assets. It is therefore essential that the person you appoint as attorney is trustworthy, honest and will act at all times in your best interest. The choice of attorney is up to you. It may be your spouse or your partner, another family member, your accountant or lawyer, or a trustee company such as the Public Trustee or a private trustee company.

You can appoint more than one attorney who can act either jointly (both attorneys must agree about a decision and must both sign any relevant document) or jointly and severally meaning jointly together or individually (either attorney can act independently of the other, that is without the consent of the other).

Whatever your decision, the most important rule in selecting an attorney is to choose carefully! You are giving this person significant powers, which are not normally subject to checks or monitoring, so it must be someone you trust and is also competent to deal with your financial affairs.

Who can make an enduring power of attorney?

Any person who is 18 years of age or over and understands the nature and effect of an enduring power of attorney can make an enduring power of attorney. The person creating the enduring power of attorney is called the donor.

A suggested test as a way of assessing whether a person has the capacity or competence to grant an enduring power of attorney is available with this Fact Sheet.

If the donor does not have the capacity at the time the enduring power of attorney is made, it will be invalid. If there is any doubt about the donor's capacity to sign the enduring power of attorney legal advice should first be obtained.

What powers does my attorney have?

An enduring power of attorney may confer general authority that is an authority to manage all the donor's property and financial affairs, or confer only a limited authority, for example the attorney's power may be limited to selling or disposing of the donor's property and investing the proceeds of sale.

If you have conferred a general authority on your attorney, you will have authorised your attorney 'to do on my behalf anything that I may lawfully authorise an attorney to do.'

An attorney cannot make guardianship or lifestyle decisions on your behalf, or delegate his or her powers or functions as attorney to another person. However, an attorney can appoint the Public Trustee in his or her place if he or she no longer wishes to act as attorney.

Can my attorney's powers be subject to conditions?

Yes, you can instruct your attorney about the exercise of the power that is you can impose conditions and restrictions on your attorney.

For example;

- "That my attorney provide copies of all records and accounts to my son and daughter";
or
- "That my attorney is to consult with members of my immediate family before agreeing to the sale of my home."

However by imposing too many conditions on your attorney you may make it difficult for your attorney to properly carry out his or her duties.

When does my enduring power of attorney start and how long does it last?

An enduring power of attorney has no effect in Tasmania unless it has been registered in the Power of Attorney register administered by the Recorder of Titles. It is recommended that once you have executed your enduring power of attorney you have it registered. In the event of you not being able to carry on your affairs by searching the Power of Attorney register any person will be able to confirm your attorney and what conditions if any are imposed.

Even though you have executed and registered your enduring power of attorney you can still carry on your own affairs until such time as you may wish to hand them over to your attorney or you lose mental capacity.

Normally an enduring power of attorney lasts until the death of the donor or attorney; or

- You decide to cancel it by revocation;
- You become bankrupt or insolvent;
- An order is made by the Guardianship and Administration Board to revoke it due to; for example, improper or careless misuse.
- **Can I cancel my power of attorney?**

You can revoke your enduring power of attorney at any time provided you have the necessary mental capacity 'the same capacity as required for the execution of an enduring power of attorney.' If your enduring power of attorney has been registered you are required to give notice to the Recorder of Titles in the form of a 'Revocation' by lodging the appropriate forms and paying the prescribed fee. You also need to notify the attorney of your intention to revoke your enduring power of attorney.

This will protect you and your assets in the event that the attorney continues to use the enduring power of attorney.

What are the duties & responsibilities of my attorney?

An attorney under an enduring power of attorney is taken to be a trustee of the property and affairs of the donor according to the tenor of the power; and must exercise his or her powers as attorney to protect the interests of the donor and if he or she fails to do so, is liable to compensate the donor for any loss occasioned by the failure.

The attorney must manage the donor's estate responsibly while also ensuring that the donor enjoys as good a standard of living as his or her estate can provide. The attorney should keep and preserve accurate records and accounts of all dealings and transactions made under the enduring power of attorney.

How can I make an enduring power of attorney?

An enduring power of attorney must comply with the requirements of the *Power of Attorney Act 2000*. You may make an enduring power of attorney by deed or by using one of the forms set out in the act. Forms are also available from the Land Titles Office during normal working hours or through the web site; www.dpipwe.tas.gov.au and follow the links, '*Property, Titles & Maps*', '*Land Titles Office*', '*Powers of Attorney*'. An enduring power of attorney is a document which can be completed only by one donor. It is recommended that if you wish to create an enduring power of attorney you should obtain professional advice to ensure your legal requirements and obligations are clearly met.

Do I need to register my enduring power of attorney?

Yes, an enduring power of attorney has no legal effect unless it has been registered. The original of the enduring power of attorney together with a registration application (form 5) and the prescribed fee is to be lodged with the Recorder of Titles at the Land Titles Office, Level 1, 134 Macquarie Street Hobart, Tas. 7000.

On registration the enduring power of attorney will be given a distinctive number and have stamped on it the time and date of registration. A copy will be kept on the power of attorney

register for any person wanting to search the register. The original will be returned to the person who lodged it.

The distinctive number given to the enduring power of attorney is evidence that the enduring power of attorney has been registered. The attorney should use this number when signing any document on behalf of the donor.

Interstate powers of attorney.

As there is no uniformity of Acts governing enduring powers of attorney throughout Australia it is recommended that residents with assets outside the State should seek legal advice as to whether a Tasmanian enduring power of attorney is recognised in the jurisdiction where the assets are held and if not, whether you are required to execute an enduring power of attorney under the laws of that jurisdiction.

Similarly, people wanting to use in Tasmania an enduring power of attorney executed under the laws of another jurisdiction need to seek legal advice as to whether or not it is recognised under the governing laws of Tasmania as prescribed in the *Powers of Attorney Act 2000*.

Acceptance of your enduring power of attorney.

After you have registered your enduring power of attorney it is a good idea to tell those who most likely will be effected by it and have dealings with your attorney, e.g. family members, associates, your local bank branch, village community management, doctor, accountant, government authorities (pension, rates, water, gas, electrical, telephone). Many of these people and organizations before dealing with your attorney may require an authority from yourself and want to sight the original document.

With Australia's population rapidly aging, and increasing rates of dementia and other disability, enduring powers of attorney have the potential to provide benefits to even more Tasmanians in the future. Having an enduring power of attorney will empower more Tasmanians to make plans for the future, in the knowledge that their rights will be protected.

TEST FOR ASSESSING COMPETENCE FOR GRANTING AN ENDURING POWER OF ATTORNEY

To be capable of granting an enduring power of attorney, a person (the donor) must understand the nature and effect of the document creating the power. The donor is taken to understand the nature and effect of the document if he or she understands the following matters:

- That the donor may, in the document, specify or limit the power to be given to the attorney and instruct the attorney about the exercise of the power.
- That the power begins when authorised by the donor or when the donor loses his or her mental capacity.
- That subject to any directions contained in the power, the attorney will be able to do anything with the donor's property which the donor could have done.
- That the donor may revoke the enduring power of attorney at any time while he or she has mental capacity to do so.
- That the power the donor has given continues even if the donor subsequently loses his or her mental capacity.
- That the donor is unable to oversee the use of the power if he or she subsequently loses mental capacity.

Notes:

1. In assessing the donor's mental capacity, questions which can be answered 'yes' or 'no' may be inadequate for the purpose of assessing capacity. For example, if the matters set out above were mentioned to the donor and he or she was asked, 'Do you understand this?' a 'yes' answer would be unlikely to satisfy the tests. However, if the donor was asked 'What will your attorney be able to do?' and 'What will happen if you become mentally incapable?' the donor's answers should indicate whether he or she understands the nature and effect of the power.
2. Where there is any doubt about the donor's mental capacity to make the enduring power of attorney it is advisable that you seek legal advice before continuing.
3. The assessment of a donor's mental capacity may take place at a time when the donor is in a vulnerable situation – for example, because of a recent illness or because the donor has been advised that he or she can no longer live at home independently. Special care should be exercised in these situations to make certain the donor in fact understands the nature and effect of an enduring power of attorney and is not being subjected to pressure or influence from others.