



Legal and Taxation Services

GIVING A POWER OF ATTORNEY

What is a Power of Attorney?

It is a formal document which empowers a person or persons "the attorney(s)" to act in the name of and on behalf of the person giving the power, the "donor" or "principal". The power may be to act generally or in limited circumstances. It can also provide expressly that it is to "continue to be effective" even though the principal subsequently suffers unsoundness of mind.

Who can give a Power of Attorney?

Anyone who is mentally sound and is at least 18 years old can give a power of attorney; subject to its Memorandum and Articles of Association, a company can also give a power of attorney.

Who can be an attorney?

Anyone who is willing to be appointed, is at least 18 years of age and is not a Bankrupt may act as attorney under a power of attorney; subject to its Memorandum and Articles of Association, a company may be appointed to act as an attorney.

When does a Power of Attorney cease to have effect?

In general terms the power of attorney ceases to have effect:

- By notice of revocation from the principal, preferably in writing, which takes effect when received by the attorney (if the power of attorney was registered in the Land Titles Office, the revocation should also be registered); or
- During any period of management of the principal's property and affairs under the Protected Estates Act 1983, although the Supreme Court may by order restore the power at any time subject to any conditions the Court imposes (the Court may also make other orders for the benefit of the principal); or
- Upon the death or bankruptcy of either the principal or the attorney, or upon the liquidation of a company which is either a principal or the attorney; or
- If the attorney notifies the principal that he/she or it will no longer act under the power; or
- Where two persons have been appointed to act jointly (together) as attorneys and one dies or becomes bankrupt, unless the power of attorney also appoints a substitute in the event of the death or bankruptcy of either of the attorneys appointed first in the power of attorney; or
- In the event of the principal or the attorney becoming mentally incapacitated, unless the power of attorney makes provision for it to "continue" if the principal suffers unsoundness of mind. This is generally referred to as the "protected" power of attorney.

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What is a protected Power of Attorney?

Unlike an ordinary power of attorney, a protected power of attorney (sometimes called "an enduring power of attorney") is one given by persons; who are usually elderly or becoming steadily disabled, who wish to anticipate further mental incapacity. The power continues to have effect if the principal at some time after signature loses the capacity to understand through unsoundness of mind.

Is there any special procedure to make a protected Power of Attorney effective?

Yes, to be effective as a "protected" power of attorney, the document must contain the proscribed wording which is in the form appearing in Schedule 7 to the Conveyancing Act. The document has to be endorsed with a certificate by the attesting witness, not being an attorney under the power, that he or she explained the effect of the document to the principal before it was signed. The prescribed class of witnesses includes the Clerk of a Local Court, a barrister and a solicitor.

Is it possible for a protected Power of Attorney to provide that it is not to come into effect until the principal loses reasoning capacity?

Yes, but expert medical opinion will also be required to establish that the principal has lost capacity through unsoundness of mind.

How can a Power of Attorney be limited?

There are four main ways:

- It can be limited to a particular area, such as New South Wales.
- It can be limited to specific acts and/or in respect of specific property.
- It can be limited to a particular time or event, such as 1 year or the period of absence of the principal outside Australia.
- It may also provide that the attorney is not to derive any benefit from acting as attorney.

Should an intending principal consult a solicitor?

Yes, the management of a person's property and affairs by an attorney is an important decision. It is important to consult a solicitor before the power of attorney is prepared, to avoid any risk and to ensure the principal is fully aware of its terms and consequences.

To arrange an appointment to discuss your needs, call us on **02 9602 8488**.

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