



# Setting up a power of attorney to help manage your banking needs

Sometimes unexpected things happen. You may have been injured in an accident, you may be on holiday or working overseas for a short time and need someone to look after your financial and legal affairs or you might be planning for the future – for example entering aged care. This fact sheet provides information about powers of attorney and when they might be appropriate. It does not deal with medical powers of attorney.



## What is a power of attorney?

A power of attorney is a legal document that gives another person the authority to make financial and/or legal decisions on your behalf or help you in making those decisions. Your attorney can do things such as:

- use your bank account to pay for your everyday expenses and loan repayments;
- make investment decisions such as selling your property; or
- pay your taxes.

There are two main types of powers of attorney that are appropriate for managing your finances:

A **general power of attorney** operates for a particular period of time or for a particular purpose. For example, if you're away from home and need someone to manage your financial affairs, you can appoint an attorney for the period you are away. A general power of attorney automatically terminates if you lose capacity to make financial decisions.<sup>1</sup>

An **enduring power of attorney** can be designed to commence once the attorney has accepted his/her appointment or at a later time you specify. Unlike a general power of attorney, an enduring power of attorney remains valid even if you lose capacity to make financial decisions.

In Victoria, you can also appoint a **supportive power of attorney**. If you do so, you continue making your own financial and personal decisions but the attorney will help you in making those decisions by collecting information and giving effect to your decisions. The attorney does not make decisions on your behalf.

1. It will most likely be your attorney who decides when you lose capacity. However, only a medical practitioner can give a professional opinion on whether someone has lost capacity.



### Who can create a power of attorney?

To appoint an attorney, you must be at least 18 years old and have sufficient capacity to make the appointment.<sup>2</sup> ‘Capacity’ means you have the ability to reason and understand things like:

- what sort of powers the attorney has;
- when they can exercise the power;
- what effects their power could have on you and the things that are important to you; and
- how to cancel the arrangement in the future.

If you’re considering setting up a power of attorney, you must weigh the risks and benefits and decide based on what matters most to you, without pressure from anyone else. You must choose your attorney carefully as these arrangements can be misused.



### Who can be an attorney?

An attorney can be anyone you trust to make decisions on your behalf, like a family member or friend.

You can appoint more than one attorney. For example, you might appoint one person who knows what you would want, such as a relative, and one person who can make good financial decisions, such as an accountant.

If you appoint more than one attorney and they have the power to make decisions on your behalf, you’ll need to choose whether they can make decisions:

- **jointly**—which means all attorneys must agree to a decision and must sign every document; or
- **jointly and severally**—which means that any one of them can make a decision and sign documents with or without the other attorneys.

If you appoint multiple attorneys jointly and they can’t agree on a decision, they may need to apply to a court to resolve the disagreement.<sup>3</sup>

**Did you know?** You don’t need to pay your attorney for the power to be effective. Normally, payment is only made if your attorney is a trust company or professional person, such as an accountant. If you appoint a friend or family member and you believe they should be paid, you should ask a lawyer to prepare the documentation.



### What obligations do attorneys have?

When making decisions for you, your attorney must:

- act in your best interests and make the same decision you would make if possible (or in the case of supportive attorneys, they must discuss anything about a decision to help you to make the decision);
- keep accurate records of dealings and transactions;
- avoid situations where there is a conflict of interest;
- keep your money and property separate from theirs.

If the attorney breaches their duties, they could be required to compensate you for loss caused by their breach.



### Setting limits and conditions on the authority

When making decisions for you, your attorney must:

- act in your best interests and make the same decision you would make if possible (or in the case of supportive attorneys, they must discuss anything about a decision to help you to make the decision);
- keep accurate records of dealings and transactions;
- avoid situations where there is a conflict of interest;
- keep your money and property separate from theirs.

**Did you know?** Banks encounter problems with some powers of attorney because they weren’t set up to cover different types of transactions. If you need someone to make decisions about financial and property transactions, such as the sale of your home, you should make sure the power of attorney allows both types of decisions. In Victoria, a supportive attorney will not be able to make decisions on your behalf, or act on your decisions in relation to significant financial transactions (such as the sale of your house, or making or continuing an investment of \$10,000 or more in interest bearing bank accounts).

2. You don’t have to take a test to determine your capacity. The law assumes that you’ve got capacity once you turn age 18. However, when creating an enduring power of attorney, a witness is required to verify that you’ve understood the document you’re signing and the powers you’re giving your attorney.

3. You can also appoint an alternative attorney, so that, if the first person can’t carry out the role, someone else can step in.



### How do I create a power of attorney?

A power of attorney need not be prepared by a lawyer. However, if your financial or legal affairs are complex or you don't feel confident doing this on your own, you should seek legal advice. Your local community legal centre may be able to help.

You'll need to obtain the appropriate forms for your State or Territory (see 'Where to go for more information'). You may also need certain kinds of witnesses. You should check the instructions on the form. Typically, relatives and the attorney cannot be witnesses.



### How does the law work across Australia?

Each jurisdiction's laws are broadly similar, but there are some differences. For example, State and Territory laws may have different names for different powers<sup>6</sup> and you can only appoint a supportive attorney in Victoria.

However, if you set up a power of attorney and you need to rely on the authority in different parts of the country, your bank will generally recognise the authority.



### Managing your banking needs

You or your attorney will need to provide certified copies of the authority to your bank.<sup>4,5</sup> Once your bank verifies the certified copy, it will record the appointment on your account or credit facility.

Your bank will give the attorney the level of access set out in the authority until the authority expires or you or your attorney provide a new authority.



### Administration and guardianship

Similar to powers of attorney, administrators are authorised to make financial or legal decisions for an adult who lacks capacity. By contrast, guardians cannot make financial or legal decisions (except in the Australian Capital Territory and Northern Territory). They can only make personal and medical decisions.

The main difference between a power of attorney and an administrator/guardian is while you appoint the attorney, a court/ tribunal appoints the administrator/ guardian after you have lost capacity.



### How do I change or cancel a power of attorney?

A power of attorney will automatically be cancelled if:

- you lose capacity (for general powers of attorney); or
- the arrangement no longer meets the requirements of the relevant law (for example, you become bankrupt, the attorney resigns or you die).

Otherwise, you may cancel and replace a power of attorney at any time, as long as you have capacity. You might decide to cancel your power of attorney if:

- your relationship with the attorney has changed;
- you've met someone more suitable for the role; or
- you want to update your attorney's instructions.

If you decide to change the attorney or their powers, you'll need to tell any organisations or people relying on the existing documents, such as your bank.

**Did you know?** If you care for a child who doesn't have capacity and they turn 18 years of age, legally they're an adult. This can complicate things, including conducting banking transactions on their behalf. To avoid difficulties, you should put in place suitable arrangements before their 18th birthday.



### Know and exercise your legal rights

Your money and property belong to you. You maintain control until you decide to give control to someone else.

If you're considering sharing control of your money and property with another person, you must understand the nature of your decision and make it freely and without pressure or coercion.

It's a good idea to speak to a lawyer first. A lawyer can help you set up a power of attorney and explain legal documents so you're aware of the consequences of what you're agreeing to, what rights you retain and what rights you're giving up.



### Where to go for more information

The Australian Guardianship and Administration Council website at [www.agac.org.au/links](http://www.agac.org.au/links) has links to State and Territory agencies with information on power of attorneys.

Ph: (02) 6270 9800.

Web: [www.ausbanking.org.au](http://www.ausbanking.org.au)

4. An authorised person will need to certify your power of attorney. This may include a justice of the peace, legal practitioner or public notary.

5. You will need to follow the same process when you or your attorney deals with any other business or organisation.

6. In Victoria, a general power of attorney is known as a general non-enduring power of attorney.

