

Enduring Power of Attorney - Fact Sheet

What is an Enduring Power of Attorney (EPA)?

An EPA is a formal legal document that allows you (the donor) to choose someone else (the enduring attorney) to make property and financial decisions on your behalf, even when you no longer have mental capacity to make those decisions yourself. Unless you restrict their powers, your enduring attorney can do anything you can lawfully do, such as operate your bank accounts or sell your house and other assets. An EPA does not give your attorney the authority to make personal, lifestyle and treatment decisions.

How is an Enduring Power of Attorney different from a Power of Attorney?

When you, as the donor, give someone a Power of Attorney, that person has the same power as a person with an EPA. The only difference is this that if you lose your capacity, the person with a Power of Attorney cannot act any more, while a person with an EPA can continue to act even after you have lost your capacity.

How is an Enduring Power of Attorney different from an Enduring Power of Guardianship?

An Enduring Power of Guardianship (EPG) is a legal document that allows you to appoint a person of your choice (your enduring guardian) to make *personal, lifestyle and treatment decisions* on your behalf if (and while) you lose capacity and become incapable of making these decisions for yourself.

The authority of the person appointed under each power is very different. Under an EPA, your enduring attorney is only authorised to make property and financial decisions. Under an EPG your enduring guardian is only authorised to make personal, lifestyle and treatment decisions.

If you want to ensure future decision-making in all areas of your life is covered, you may wish to make both enduring powers.

When can I make an Enduring Power of Attorney?

If you are over 18, you can make an EPA at any time, as long as you have mental capacity.

Can I restrict the power I give to my enduring attorney/power of attorney?

Yes, you can place restrictions on your enduring attorney. However, it is not possible to include any condition or restriction which would in some way prevent your attorney from being able to properly manage your property and financial matters.

You must also state when your EPA comes into effect: either as soon as you and your enduring attorney sign it or after the State Administrative Tribunal finds you no longer have mental capacity.

In an EPA you can state how long the authority to use that power will last.

Can I continue to take care of my financial and property matters even after I've made an Enduring Power of Attorney?

As long as you have mental capacity, you can carry on managing your own financial affairs. However, if your EPA has immediate effect, your attorney may also act for you but while you have mental capacity, they should only do so in accordance with your wishes and directions.

Who can I appoint as my enduring attorney?

You can appoint anyone over 18 who has mental capacity. You should choose someone who you believe is trustworthy, and will always act in your best interests. They could be someone like your spouse/partner, child, or another family member. You should get their permission beforehand to act as your enduring attorney.

Giving someone else the authority to manage your finances who will continue in this role if you ever lose capacity is a very important and serious

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decision. You should choose carefully and make sure the person you appoint as your attorney is someone you know well and can trust to look after your finances in your best interests.

How many enduring attorneys can I appoint?

You can appoint a maximum of 2 main enduring attorneys and a maximum of 2 substitute enduring attorneys.

Can my enduring attorneys act together?

Yes, they can act together if you appoint them to be joint enduring attorneys. You can choose to appoint your enduring attorneys to act jointly (together) or jointly and severally (together and/or independently).

If you appoint more than one attorney (joint or joint and several attorneys), think about whether they will be able to work together to manage your property and financial affairs.

How does a joint appointment work?

If you wish to appoint joint attorneys, consider how practical that will be as they must always make decisions together. Think about how easy it will be for your joint attorneys to discuss things and meet up to sign documents. If this is difficult, there may be delays in financial transactions or decisions being made in a timely way.

Also, if you appoint joint attorneys and one of them dies, unless you have also appointed a substitute attorney to act jointly with the remaining attorney, the EPA can no longer be used. If at that time you have lost capacity, the remaining joint attorney will need to make an application to the State Administrative Tribunal to either vary the terms of the EPA or to be appointed as the administrator.

When does my Enduring Power of Attorney take effect?

When you make an EPA, you must choose from 2 options for when your EPA comes into effect:

1. Immediately. In this case, both you and your enduring attorney will have legal authority to manage your finances. However, while you have capacity, your attorney must act in accordance with your instructions. You can continue to manage your financial affairs but if in the future you lose capacity, your attorney can start making these decisions for you.
2. If the State Administrative Tribunal (SAT) declares that you do not have legal capacity. This means that you continue to manage your financial affairs while you have capacity. Your attorney will only ever have authority to make property and financial decisions for you if the SAT determines you have lost capacity. If in the future your attorney believes you are no longer able to make decisions about your property and finances, they will need to apply to the SAT to have it determine the matter. The application to SAT is free but there is a formal legal process and hearing for that. It can be a stressful and time consuming process.

Signing and witnessing the Enduring Power of Attorney

To make your EPA legal, it needs to be signed by you and your enduring attorney. Your signature must be witnessed by 2 independent witnesses.

One witness must be someone who can legally witness a statutory declaration, such as a Justice of the Peace, lawyer, doctor, teacher, police officer, pharmacist, or nurse. The other witness can be anyone who is over 18.

Each person appointed as an enduring attorney or substitute enduring attorney must then sign and date the Acceptance at the end of the document. Their signature does not need to be witnessed. They should sign the Acceptance as soon as possible after you sign the EPA. You and your attorney/s can sign the EPA at the same time or your attorney/s can sign the Acceptance later

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and/or at different times but the EPA document is not valid and cannot be used until all parties have signed.

Do I have to register my Enduring Power of Attorney?

There is no special repository or register for EPA documents. You should keep your document in a safe place with your other important papers.

However, if you want your enduring attorney/s to be able to buy or sell real estate for you, 2 original signed EPAs must be registered at Landgate (they will retain one original for their records and return the other to you). A registration fee is payable to Landgate.

If you register the EPA at Landgate within 3 months of the date it was signed, you only need to lodge the 2 original signed EPAs and a Landgate EPA cover sheet. If you register the EPA with Landgate more than 3 months after it is made, a statutory declaration of non-revocation or variation made by the enduring attorney/s (or made by you if you have legal capacity at that time) must also be lodged. If a statutory declaration is needed, you should contact Landgate to confirm their requirements for the content of the declaration or seek legal advice. Most property lawyers, settlement agents and conveyancers will be familiar with these requirements.

We recommend that unless you know your enduring attorney will need to sign a real estate dealing for you in the next 3 months, *you only lodge the EPA at Landgate if/when the enduring attorney needs to sign a real estate dealing for you*. Often an EPA never needs to be used for real estate transactions and so you may save yourself the time and expense of lodging the EPA at Landgate unnecessarily.

Further, if your EPA only has effect when a declaration by the State Administrative Tribunal that you do not have legal capacity is in force, a

copy of the SAT declaration must also be lodged at Landgate with the original EPAs.

You may want to seek further legal advice if this applies to you.

Can I revoke (cancel) my Enduring Power of Attorney?

Yes, you can cancel or revoke your EPA at any time, as long as you have mental capacity. You have to inform your enduring attorney and any authority that has a copy of your EPA that you have revoked it. If you've registered your EPA at Landgate, you must fill out and lodge a form to revoke it. Your enduring attorney can also revoke their appointment, but you must have mental capacity when they do this.

Note that making a new EPA, marriage, separation, divorce or entering into or ending a de facto relationship will not in itself revoke or affect the validity of any existing EPA you may have made. If you no longer want the person you appointed to act as your enduring attorney or substitute enduring attorney and you have mental capacity, you should revoke the relevant EPA in writing and make a new one. Your existing EPA will continue to apply if you do not.

You should seek legal advice if any of these apply.

If you have lost mental capacity, the EPA can only be amended or revoked by making an application to the State Administrative Tribunal.

How long does an Enduring Power of Attorney last?

Unless it is revoked or specifies an end date or event, an EPA lasts as long as you're alive. However, when you die, the power of your attorney/s ceases and the executor of your Will (if you have made a Will) or administrator of your estate (if you haven't made a Will) takes over the organisation of your affairs and estate.

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Does anyone oversee Enduring Powers of Attorney?

Yes, the State Administrative Tribunal oversees them under the *Guardianship and Administration Act 1990* (WA). The Tribunal can end the power if it finds that the enduring attorney is not using their powers appropriately.

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