

Review of an Enduring Power of Attorney

An Enduring Power of Attorney is a legal document appointing a person of your choice to manage your financial and legal affairs in the event you lose capacity. NCAT's Guardianship Division can review the making and/or the operation and effect of an Enduring Power of Attorney.

About NCAT's Guardianship Division

Under the *Powers of Attorney Act 2003*, the NSW Civil and Administrative Tribunal (NCAT) Guardianship Division can review the making of or the operation and effect of an Enduring Power of Attorney.

NCAT does not have the authority to review an ordinary Power of Attorney.

Applications made to NCAT are generally decided at a hearing. The hearing is an opportunity for the person the application is about (the principal), as well as other parties and interested people, to present their views.

What can NCAT review?

Review the making of an Enduring Power of Attorney

If there are concerns that a person did not have the mental capacity to make an Enduring Power of Attorney, you can apply to NCAT to review the making of the Enduring Power of Attorney.

NCAT can make either or both of the following orders:

- Order declaring that the principal did or did not have mental capacity to make a valid Enduring Power of Attorney.
- Order declaring the Enduring Power of Attorney is invalid in whole or in part.

Review the operation and effect of an Enduring Power of Attorney

If there is a problem with how the Enduring Power of Attorney is working, you can apply to NCAT to review its operation and effect.

NCAT can make one or more of the following orders:

- Order removing the attorney.
- Order appointing a substitute attorney to replace an attorney.

- Order reinstating an Enduring Power of Attorney that has lapsed because the attorney is no longer able to perform their duties.
- Order directing or requiring certain things such as:
 - that an attorney provide accounts and other information
 - that an attorney provide copies of all records and accounts of dealings and transactions made under the Enduring Power of Attorney
 - that the records and accounts be audited
 - that the attorney submit a plan of financial management
 - limiting the disclosure of accounts or other information by the attorney
 - an inquiry and report on the conduct of the attorney.
- Order revoking all or part of the Enduring Power of Attorney.
- Any other order as NCAT thinks fit.

NCAT can make an order declaring that the principal lacks capacity for the time being, or lacked capacity at or during a specified time.

If NCAT finds that the principal lacks capacity for the time being, the principal is no longer competent to operate their finances and only their appointed attorney can undertake financial transactions on behalf of the principal. The principal is not able to revoke the Enduring Power of Attorney during this time.

A declaration that the principal lacks capacity for the time being continues to have effect until NCAT makes a further order bringing the declaration to an end.

Review the revocation of an Enduring Power of Attorney

NCAT can review the revocation of an Enduring Power of Attorney. There is a separate form for applying for a review of a revocation of an Enduring Power of Attorney. For more information refer to the fact sheet *Review revocation of an Enduring Power of Attorney*.



Treating the review as an application for financial management order

NCAT may decide to treat the request for review as an application for a financial management order. If satisfied that a financial management order is needed in the best interests of the principal, NCAT can then make a financial management order:

- placing the principal's finances under the management of a private financial manager subject to the directions of the NSW Trustee and Guardian, or
- committing the management of the principal's finances to the NSW Trustee and Guardian.

NCAT may decline to review

When considering an application to review an Enduring Power of Attorney, NCAT may decide to carry out the review or may decide not to carry out the review.

Refer to the fact sheet 'Financial Management – What happens after the hearing' for more information.

Applying for a review

Use the *Application to Review an Enduring Power of Attorney* form to apply for a review of the making and/or the operation and effect of an Enduring Power of Attorney.

There is no fee for lodging an application with the Guardianship Division of NCAT.

Who can apply for a review?

Under the *Powers of Attorney Act 2003* an 'interested person' may apply to NCAT for a review of an Enduring Power of Attorney. An 'interested person' is defined as:

- An attorney appointed under an Enduring Power of Attorney
- The person who made the Enduring Power of Attorney (the principal)
- Any person who is the appointed guardian of the principal
- Any person who is the enduring guardian of the principal
- An attorney whose appointment has purportedly been revoked
- Any other person who NCAT considers has a proper interest in the proceedings or a genuine concern for the welfare of the principal.

Applicant's responsibilities

The person who applies to NCAT to review an Enduring Power of Attorney has a role and responsibilities beyond completing and lodging the application form.

As the applicant you must:

- Provide your details to NCAT (anonymous applications are not accepted)
- Tell the person that you are making an application about them
- Provide details of all people who have an interest in the application even if they disagree with it
- Find evidence to support your application and supply it to NCAT at the same time as the application is lodged
- Keep NCAT informed of any changes to the person's circumstances while your application is being considered
- Give the person and the other parties a copy of the application and any supporting documents.
- Attend the hearing and arrange for the person to attend.

If for any reason you cannot continue in the role, you must inform NCAT and arrange for someone else to take your place as a substitute applicant.

Who are the parties?

The parties to a review as set out in the *Powers of Attorney Act 2003* are:

- The applicant
- The person who made the Enduring Power of Attorney (the principal)
- Each attorney appointed under the Enduring Power of Attorney
- NSW Trustee and Guardian
- Any other person joined as a party to the review hearing.

Other people involved, such as an enduring guardian, spouse or carer, may apply to NCAT to be joined as a party. NCAT has the authority to join a person if satisfied that he or she has a genuine concern for the welfare of the person that the application is about or a proper interest in the proceedings.

Please note that if you answer a question in the form by referring to an attached document, that document becomes a part of the application and will be distributed to parties.



Tribunal hearing

What happens at the hearing?

NCAT will ask the people attending the hearing questions about the application. Parties may also be able to ask questions.

NCAT may contact relevant people by phone during the hearing, such as doctors or other people who are unable to attend.

NCAT will listen to the evidence given and consider the written information provided.

NCAT will try to make sure that the person the application is about participates in the hearing to the best of his or her ability. NCAT will take into account the views of the person the application is about.

Can I have someone represent me?

NCAT will conduct the hearing with as little formality as possible. Parties to the application can be represented by a lawyer but usually this is not necessary.

If you would like to have a legal or other representative, make a request in writing to NCAT as soon as possible and at least 10 working days before the hearing. The request should include the reasons you want to be represented.

NCAT may make its decision about whether to grant leave for legal representation before the hearing date. Otherwise, it will make this decision at the beginning of the hearing.

Tribunal decision

When will I know the decision?

NCAT will usually tell you their decision at the end of the hearing. The written order and reasons for decision will be sent later to the parties to the hearing. Not all people who attend the hearing are parties, so not everyone will be sent copies of the order and reasons for decision.

What if I disagree with the decision?

If you are a party to the hearing and you disagree with the decision made by NCAT, you may be able to appeal to the NCAT Appeal Panel or the NSW Supreme Court.

For more information refer to the Guardianship Division *Reviews and Appeals* Fact Sheet.

Referring an application to the Supreme Court

NCAT may refer an application made to it for a review of an Enduring Power of Attorney to the Supreme Court.

While NCAT is not limited in the matters it may take into account when deciding whether to refer an application to the Supreme Court, it can take into account one or more of the following:

- whether the application relates to the effect of the Enduring Power of Attorney on third parties;
- whether the application is likely to raise for consideration complex or novel legal issues that the Supreme Court is better suited to determine; or
- any other matter it considers relevant.

Referring questions of law to the Supreme Court

NCAT may of its own initiative, or at the request of a party, refer a question of law arising in an application under Part 5 *Powers of Attorney Act 2003* to the Supreme Court.

Contact NCAT

1300 006 228 | www.ncat.nsw.gov.au

Interpreter Service (TIS) 13 14 50

National Relay Service for TTY users 13 36 77

For more information and assistance visit the NCAT website or contact NCAT's Guardianship Division on (02) 9556 7600 or 1300 006 228.