

APPLICATIONS TO REVIEW AN ENDURING POWER OF ATTORNEY AT NCAT

A resource for people accessing NCAT's jurisdiction to hear and decide applications reviewing Enduring Power of Attorney (EPOA) in NSW.

Fact Sheet

This factsheet gives information about:

- *how to apply to NCAT for an order about an EPOA; and*
- *what will happen at the hearing.*

NCAT can hear and make decisions about applications that relate to EPOA's. The decision is legally binding on all parties involved, like a court decision. The Supreme Court of NSW is also able to hear applications to review EPOA's. If you've made an application to NCAT about an EPOA, you can't also make an application to review the EPOA in the Supreme Court too.

Why apply to NCAT?

If you're worried that:

- the principal didn't have mental capacity to make the EPOA;
- the person acting as attorney isn't suitable to act in that role;
- there's a potential conflict of interest between the attorney and the principal;
- the EPOA might not be valid, because it wasn't signed or witnessed correctly;
- something the attorney has done might be outside of their power,

there are options available for help through NCAT.

What can NCAT do?

If you're concerned that someone didn't have the mental capacity to make or revoke (cancel) an EPOA, NCAT can make an order:

- that the principal did/did not have mental capacity to make or revoke an EPOA; and/or
- the EPOA is invalid because:
 - the principal didn't have the capacity to make a valid EPOA;
 - the EPOA didn't act in line with their responsibilities under the law; or
 - the EPOA is invalid for any other reason, for example, because it was made dishonestly, or the principal was pressured to make the EPOA.
- that the EPOA remains valid because:
 - the principal didn't have the mental capacity to revoke the EPOA; or
 - the revocation is invalid for another reason, for example, because the principal was pressured by someone else to cancel the EPOA.

Where there's a problem with how the EPOA is operating, NCAT can make an order to:

- remove the attorney;
- put a different attorney in place;
- put an EPOA that has lapsed back in place;
- revoke all or part of the EPOA.

Before lodging an application, it's important that you tell the principal about it, because any decision NCAT makes will impact him or her.

What does NCAT consider in reviewing an enduring power of attorney?

When you apply to NCAT for an order, NCAT will look at two main issues:

1. whether you have 'standing' to make an application; and
2. whether NCAT should decide to review how the EPOA was made, its operation and/or effect.

1. Who has standing to apply to NCAT for an order?

"Interested persons" are authorised to bring an application to NCAT which includes:

- an attorney;
- the principal;

- a guardian or enduring guardian; and
- any other person who, in the opinion of the Tribunal has a **proper interest** in the proceedings or a **genuine concern** for the welfare of the principal.

2. Whether NCAT will decide to review the EPOA

NCAT will look at whether there are real issues between the parties about how the EPOA was made, how it's operating and its effect before deciding to conduct a review. NCAT will only decide to review an EPOA if this is in the best interests of the principal to do this.

Making an application

- For an application to review how an EPOA has been operating and its effect, you need to fill in the [Application for Review of an Enduring Power of Attorney](#) form on the NCAT website.
- For an application to review the revocation of an EPOA, you need to fill in the [Application for Review Revocation of Enduring Power of Attorney](#) form on the NCAT website.

It doesn't cost anything to make an application.

In some circumstances, NCAT may order you to pay the other parties' legal costs. On the application form, you need to include enough information so everyone involved knows what's going to be discussed at the hearing.

What to include in an application:

- A copy of the EPOA that the application is about, and if the application is about a revocation of an EPOA, a copy of that document too.
- Details about other people that have an interest in the principal's affairs – this includes any other attorneys, administrators or enduring guardians of the principal.
- What you're asking NCAT to do/the order you're asking NCAT to make.
- Why you're asking NCAT to make the order, for example, if you're asking for an order to revoke an EPOA, details and evidence about anything the attorney has done that hasn't been in line with their legal responsibilities or in the best interests of the principal will be useful information.

- Details about attempts to resolve problems, for example, discussions between the people involved before you made application.
- If the principal's mental capacity is the issue you're asking NCAT to look at, you need to include:
 - a medical report about the principal's decision making capacity, or incapacity; and/or
 - any other written evidence about the person's decision making capacity. This could be a report, letter, or statutory declaration from a family member, friend, neighbour, doctor, social worker, solicitor, aged care provider or primary carer, current guardian or administrator.

Lodging documents

Once you've filled in the application form and gathered any medical reports and other written evidence you want to include, you need to lodge it at NCAT.

By post:

NCAT Guardianship Division
PO Box K1026, Haymarket NSW 1240

In person:

Level 6, John Maddison Tower
86-90 Goulburn Street
Sydney NSW 2000

By Email

gd@ncat.nsw.gov.au

Electronic Lodgement

www.ncat.nsw.gov.au

Serving documents

You also have to tell the other parties to an application that you've submitted an application to NCAT as soon as possible after you lodge the application. This is known as 'serving' the

documents. You can serve the application by sending it by post, delivering it in person or electronically by email or fax for example (but only if the person you're serving the documents on has agreed to receive the documents this way).

Parties to an application include:

- the person who made the application (the applicant);
- the attorney's under the EPOA;
- the principal;
- the NSW Trustee and Guardian;
- any other person that NCAT has joined as a party to the application.

What happens before, during and after the hearing?

Before the hearing

Once NCAT receives your application, they will contact you as well as the person who the application is about.

If you make an application, you're responsible for providing evidence to support it. Any evidence you're wanting to rely on needs to be given to NCAT and the other parties before the hearing.

Before the hearing takes place, NCAT will:

- make sure the parties know about the application;
- decide when and where the hearing will happen; and
- send a notice of the hearing and a copy of the application to all the parties to the application.

At the hearing

The person who made the application, the person who the application is about (or their representative) and anyone who wants to give evidence should attend the hearing.

NCAT 'Members' will hear your case. In the Guardianship Division, there are three categories of members with certain expertise:

- Senior Members (Legal) are Australian lawyers who have practised law for at least 7 years;
- Senior Members (Professional) are people who have special knowledge, skill or expertise and have experience in assessing or treating people with disabilities; and

- General Members (Community) are people who have special knowledge, skill or expertise and have professional or personal experience with people with disability.

Before starting the hearing, the NCAT Members will introduce themselves and the parties will be asked their name and their relationship with the person who the application is about.

The Members will consider all of the evidence that's been provided and any oral evidence given by witnesses and then make a decision about the application. The decision will most likely be given straight away orally, or it may be 'reserved' and given at a later date, usually in writing.

After the hearing

NCAT doesn't have to give you written reasons for its decision, but you can ask for them. If you disagree with the orders made, you may be able to appeal to the NCAT Appeal Panel or the Supreme Court of NSW.

An appeal must be made within 28 days after NCAT has told you its decision.

Where to get help and more information

- For general information about powers of attorney, please see our factsheet, 'Powers of Attorney – General Information': <https://justiceconnect.org.au/resources/powers-of-attorney-in-nsw/>
- For further information as to what NCAT will consider in applications to review EPOA's, please see our factsheet, 'How to apply to NCAT to review a power of attorney': <https://justiceconnect.org.au/resources/how-to-apply-for-a-review-of-a-power-of-attorney-at-ncat/>
- Application for Review of an Enduring Power of Attorney form: https://www.ncat.nsw.gov.au/Documents/gd_form_review_enduring_power_of_attorney.pdf
- Application for Review of a Revocation of an Enduring Power of Attorney form: https://www.ncat.nsw.gov.au/Documents/gd_form_review_revocation_of_enduring_power_of_attorney.pdf