

This article will outline different types of agents and how they are appointed or authorised.



An agent is someone whom you have legally authorised to act on your behalf. Your agent can represent you and enter into legal relationships with other people.

Common examples of agents include:

- Lawyers;
- Company representatives;
- Selling agents;
- Guardians; and
- Attorneys appointed under a Power of Attorney.

For example, if you are physically or mentally incapacitated, your Attorney appointed under an Enduring Power of Attorney will deal with medical staff and creditors on your behalf.

Appointing someone to be your agent gives them considerable power. Rogue agents can potentially damage individuals' and businesses' reputations. The law recognises this and imposes limits on agents and their authority.

Similarly, the law does not allow individuals or corporations to turn a blind eye to their agents' misdeeds. The law aims to promote accountability for agents due to the responsibilities they have assumed.

A. HOW DO I AUTHORISE SOMEONE TO ACT AS MY AGENT?

When you appoint someone to be your agent, you are giving them *authority* to do a specific thing. The agent does not have absolute free reign to act as they please. There are several different ways that you can confer authority on your agent. These range from formal, written agreements to your course of conduct in a business dealing.

A principal can confer either actual or ostensible authority on their agent. Actual authority can come from a written agreement, or it can arise from the agent's duties as an employee. On the other hand, ostensible authority depends on your conduct and representations. Even if you did not give an agent actual authority, the court may still find an agency relationship because you *acted* as if that person was your agent.

B. ACTUAL AUTHORITY

Actual authority can be express or implied.¹ Express authority can be conveyed orally or in the form of a written agreement. For example, a Power of Attorney is an express, written agreement authorising someone to act on your behalf under certain or all circumstances.

¹*Poulet Frais v The Silver Fox* (2005) 220 ALR 211.



Agency can also be implied from surrounding circumstances. In the commercial context, the court will look at the agent's position in the company and the company's behaviour and business practises.

For example:

- **Usual authority** – the person is an agent by virtue of the position they hold within the company. In the case of *Crabtree-Vickers v Australian Direct Mail Advertising and Addressing Co Pty Ltd*,² the court held that a managing director can act as the company's agent by negotiating contracts, resolving customer disputes and hiring new employees. However, a sales manager or marketing manager would have different responsibilities and a narrower scope of authority to act for the company.
- **Customary authority** – the purported agent acted in accordance with customary business practices. The court will determine if those practices were 'notorious, certain and reasonable'.³ The court is therefore unlikely to accept obscure, unethical and unreasonable business practices.

C. OSTENSIBLE AUTHORITY

Ostensible authority is based on the equitable concept of estoppel. This allows third parties harmed by rogue agents to sue the principal, even if the principal did not expressly authorise the agent to perform the harmful act.

Three main elements are required to establish ostensible authority:

- A representation from the principal;
- A third party's reliance on that representation; and
- A detriment suffered by the third party because of their reliance.

Ostensible authority requires that the principal represented to a third party that the agent had the principal's authority to perform a certain act.⁴ Representations can be made by words or conduct.

In determining whether a third party relied on the representation, the court will look at how the dealing between the agent and third party occurred.

There must be a causal relationship between the dealing and representation; ie, the third party entered the dealing *because* of the agent's representation.⁵

The term 'detriment' is very broad. A third party can claim a detriment if it altered its position as a result of relying on the rogue agent's representation.⁶ If the third party engaged a lawyer to assist in completing a legal transaction, the court will also consider the legal fees incurred to be a detriment.

Comasters Law Firm can assist you in drafting agency agreements and in litigation against individuals and companies for the actions of their agents.

² (1975) 133 CLR 72.

³ *Con-Stan Industries Australia Pty Ltd v Norwich Winterthur Insurance (Aust) Ltd* (1986) 160 CLR 226.

⁴ *International Paper Co v Spicer* [1906] HCA 75.

⁵ *Hely-Hutchinson v Brayhead Limited* [1968] 1 QB 549.

⁶ *Freeman & Lockyer v Buckhurst Park Properties (Mangal) Ltd* [1964] 2 QB 480.

CONTACT US