

Powers of Attorney Act 2014

Commencement. On the 1st of September 2015, unless proclaimed on an earlier date.

Repeal of present legislation. When the new Act comes into force it will repeal Part XI (powers of attorney) and Part XIA (enduring powers of attorney) of the Instruments Act and the provisions under the Guardianship and Administration Act relating to the appointment of enduring guardians.

All powers in place prior to the commencement of the new Act will not be affected.

Forms. The Act provides for power of attorney documents to be in the prescribed form however with one exception the forms have not yet been provided. The exception is that the form for the “general non-enduring” power of attorney is to be in the form to the Schedule in the Act, and that form has been enacted.

It is anticipated that there will be 4 forms for appointment of attorney(s):

1. general non-enduring power of attorney s.7
2. “power of attorney for security” (a non-enduring power)
3. “enduring power of attorney” s.32
 - 3.1 for all actions that a person may lawfully do through an attorney
 - 3.2 for personal matters
 - 3.3 for financial matters
 - 3.4 for both personal and financial matters

It is expected that one form will cover all of these 4 activities, or a selection of them

4. “supportive attorney appointment” s.45

Furthermore there will be prescribed forms for acceptance by attorney and alternate attorney of the appointment, and these are incorporated in the above forms creating the power:

1. enduring power of attorney s.37 (attorney) and s.38 (alternate attorney)
2. supportive attorney appointment s.99 (supportive attorney) and s.100 (alternate supportive attorney)

It is also anticipated that there will be forms to revoke some of the powers of attorney

1. enduring power of attorney s.45
2. supportive attorney appointment s.104

There will also be prescribed forms for resignation of attorney or alternate attorney

1. enduring power of attorney s.57 (where principal still has capacity), s.60 (where principal has lost capacity)
2. supportive attorney appointment s.112

Finally there is a prescribed form that an attorney must execute in the event that the attorney becomes an insolvent under administration, or becomes a case worker or health provider or accommodation provider for the principal or (if the attorney is one for financial matters) if the attorney is convicted or found guilty of an offence involving dishonesty:

1. enduring power of attorney s.54

Highlights and Lowlights

1. The Act:
 - 1.1 consolidates the present law relating to general powers of attorney, enduring powers of attorney (financial), and enduring guardianships
 - 1.2 does not change the legislation regarding the Enduring Power of Attorney (Medical Treatment) or its prescribed form
 - 1.3 creates a new form for the general non-enduring power of attorney
 - 1.4 creates a new “power of attorney for security” within the area of a non-enduring power of attorney
 - 1.5 creates a new form of enduring power of attorney which combines the former financial form and guardianship form and describes those former activities as “financial” and “personal”
 - 1.6 introduces a new power and new form with the supportive attorney appointment
 - 1.7 for all situations other than the general non-enduring power of attorney introduces a more comprehensive test and explanation of capacity – s.4
 - 1.8 defines “financial matters” and “personal matters” and gives many examples of both
 - 1.9 does NOT allow multiple alternate attorneys under enduring powers of attorney (despite such being allowed under general non-enduring powers of attorney and despite the Law Institute of Victoria campaigning for eleven years to change this anomaly)
 - 1.10 witnessing execution of attorney forms:

- 1.10.1 an enduring power of attorney requires one of the two witnesses to either be a person authorised to witness **affidavits** or a medical practitioner
- 1.10.2 a general non-enduring power of attorney needs no witness
- 1.10.3 a supportive attorney documents requires one of the two witnesses to be a person authorised to witness statutory declarations
- 1.11 introduces clarification and resolution of conflict transactions and permitted conflict transactions, and of matters for which power cannot be exercised by the attorney, and for resolution of deadlocks between attorneys
- 1.12 importantly introduces compensation for certain unlawful acts of the attorney causing loss to the principal. The compensation is to be paid by the attorney to the principal or to the estate of a deceased principal. The said acts are those undertaken by the attorney under the enduring power of attorney in contravention of a provision of the Act.
- 1.13 sets out in detail the duties of the attorney
- 1.14 prohibits an attorney from entering into a transaction where there is a conflict or a conflict may arise between the duty of the attorney to the principal. Exceptions to this prohibition are listed including some gifts, maintenance of a dependent of the principal, and dealings in land where the attorney is a co-owner
- 1.15 remuneration of an attorney under an enduring power is only allowed if the documents permits it, whereas an attorney under a supportive attorney appointment is not permitted to receive any remuneration under any circumstances
- 1.16 under a supportive attorney appointment:
 - 1.16.1 a principal may appoint an eligible person to support the principal in:
 - 1.16.1.1 making decisions
 - 1.16.1.2 giving effect to those decisions
 - 1.16.2 the principal may authorise the supportive attorney to act to carry the decision into effect, other than in relation to a “significant financial transaction” (making or continuing an investment, a real estate transaction – taking out a loan, and buying and selling substantial personal property)

- 1.16.3 the appointment is suspended during any period which the principal lacks capacity
 - 1.17 the jurisdiction of VCAT is expanded in a number of ways, including as mentioned above, in ordering an attorney to compensate the principal for loss in certain circumstances. VCAT can give advice, authorise some transactions and enforce submission of accounts by attorneys and auditing of them, and revocation of powers of attorney
 - 1.18 requires an attorney to keep good records and accounts of transactions and to keep the principal's assets separate from the attorneys
2. **Where to now?** The Act will commence on 1st of September 2015, unless proclaimed earlier. Forms required by the Act have not yet been prepared by the public service. Until the Act commences the current forms will continue to be used and once executed will remain valid and operative after the Act commences.