

Information for Attorneys

IMPORTANT NOTICE

The donor in choosing you to be his / her enduring power of attorney is entrusting you to act in his / her best interests. If you accept this trust and the enduring power of attorney, you will be taking on serious responsibilities. If you fail to observe these responsibilities, you could be removed as attorney or even convicted of an offence and required to pay compensation.

Besides the particular responsibilities mentioned in Part 1 of this document, there are responsibilities imposed by the **Instruments Act 1958** and under the common law.

What are these responsibilities?

They are both general and specific.

General responsibilities (to guide you in decision-making)

You must exercise the power given to you honestly and with reasonable care. It is an offence not to do so, and you may also be required to compensate the donor.

You must comply with the terms of the enduring power of attorney and any other requirement of the Court or VCAT. In addition, you must abide by the general principles on which the Act is based.

General principles include:

- presuming that the donor has the capacity to make a particular decision until there is conclusive evidence that this is not the case;
- recognising his/her right to participate in decisions affecting his/her life to the maximum extent for which he/she has capacity;
- respecting the donor's human worth and dignity and equal claim to basic human rights, regardless of his/her capacity;
- recognising the donor's role as a valued member of society and encouraging his/her self-reliance and participation in community life;
- taking into account the importance of the donor's existing supportive relationships, values and cultural and linguistic environment;
- ensuring that your decisions are appropriate to the donor's characteristics and needs;
- recognising the donor's right to confidentiality of information.

Specific responsibilities

- **Duty to keep records.** You must keep accurate records of dealings and transactions made under the power as VCAT or the Court or the Public Advocate may require you to produce them. You must keep these records separate from your own affairs where possible.

For example, if you dispose of an asset you should keep records about the disposal.

Where there are joint attorneys, then it is sufficient that by agreement one of the attorneys will retain a record or account of transactions or dealings.

- **Duty to keep property separate.** You must keep your property separate from the donor's property unless you and the donor own the property jointly.

If the donor's capacity to make decisions is impaired, you must also get approval from VCAT or the Court for any transactions that have not been authorised in this document.

- **Duty to avoid transactions that involve conflict of interest.** You must not enter into transactions that could or do bring your interests (or those of your relation, business associate or close friend) into conflict with those of the donor.

However, you may enter into such a transaction if it has been authorised in this document or by VCAT or the Court.

How do I complete a document for the donor?

If you have the power to execute (complete) a document for the donor, you do so in the ordinary way, but you must note on the document that you are executing it as the donor's attorney under enduring power of attorney (e.g. 'John Smith, by his duly appointed attorney, Mary Jones').

Proof of your authority

It is recommended that you keep the Enduring Power of Attorney document in a safe place. Sighting of the document may be a requirement of your authority by financial institutions, banks etc.

When does my power to make decisions begin?

The donor may nominate in this document when your power to make financial decisions begins. If the donor does not nominate a date or event or occasion when a power becomes exercisable, then your power begins immediately. However, while the donor retains capacity, you must act in accordance with the donor's directions.

When does my power end?

Though there is no time limit on enduring powers of attorney, certain actions by you or the donor or VCAT or the Court can bring your power to an end.

Your actions

- ❑ **Your resignation.** So long as the donor is capable of using the power given to you, you can resign by giving the donor a signed notice. However, if the donor is incapable of using the power, then you may only resign by getting leave of VCAT or the Court.
- ❑ **Becoming incapable.** Your power is revoked if you become incapable of understanding the nature and foreseeing the effects of a decision, and communicating that decision.
- ❑ **Becoming bankrupt or insolvent.** If this happens, your power is revoked.
- ❑ **Your death.**

The donor's actions

- ❑ **Revoking your power.** The donor may revoke your power at any time, so long as he / she has the capacity to revoke it, that is, the donor understands the nature and effect of revoking the power.

If the donor revokes your power, the donor has an obligation to inform you. If the donor neglects to advise you that the power is revoked and you continue to exercise the power in good faith, then you will be protected under the legislation.

- ❑ **Appointing a new attorney exclusively to have your powers.** If the donor completes a new document giving your powers to another attorney exclusively, your powers are revoked to that extent. Because the new document has a later date and is inconsistent with your powers, it overrides the earlier document.
- ❑ **The donor's death.** If the donor dies, your enduring power of attorney is revoked in its entirety.

Actions by the Court or VCAT

- ❑ Your power may also be changed or revoked by the Court or VCAT if you have failed to act in the donor's interests.

Can I be held liable?

Yes, you can be held liable if you use the enduring power of attorney knowing that it has been changed or revoked, or knowing of an event that effectively revokes it, or even if you have reason to believe that it has been revoked.

The Court, VCAT and the Public Advocate have the power to protect the donor's interests. You may be required to produce a summary of receipts and expenditure or more detailed accounts, and these may be audited. You may also be required to give evidence in relation to the exercise of your powers. If VCAT, the Court or the Public Advocate believes that you have not adequately protected the donor's interests, you may be removed or your enduring power of attorney may be revoked, and you may be required to compensate the donor.

Where can I go for advice?

The Public Advocate, a Community Legal Centre, a solicitor, VCAT, the Court, State Trustees Limited or a trustee company can advise you about this document and your power and responsibilities under it.

VCAT and the Court can also make a declaration about the validity of this document or whether your power to make a decision for the donor has begun.