

AMENDMENTS TO LEGISLATION RELATING TO ENDURING INSTRUMENTS

On 21 October 2013, Royal Assent was given to two amendments to legislation that relates to enduring instruments.

This document explains the effect of those amendments.

You can view the amendments and the second reading speeches here:

Amendments to the responsibilities of enduring guardians: Guardianship and Administration Amendment Act 2013 (No 40/2013) Second Reading Speech

Amendments to the responsibilities of attorneys acting under an enduring power of attorney: Powers of Attorney Amendment Act 2013 (No 39/2013) Second Reading Speech
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The amendments to the *Guardianship and Administration Act 1995* commenced on the date of Royal Assent which was 21 October 2013. They are already in force.

The amendments to the *Powers of Attorney Act 2000* will commence on Proclamation. The date of the Proclamation is not yet known, but is anticipated to be early in the New Year.

For more information, please visit the Guardianship and Administration Board website:

<http://www.guardianship.tas.gov.au/publications/policy>

AMENDMENTS TO THE RESPONSIBILITIES AND POWERS OF ENDURING GUARDIANS (PERSONAL DECISION MAKER):

TERMINOLOGY:

The person who appointed an enduring guardian is called '*the appointor*'.

The person appointed as an enduring guardian is called '*the guardian*' or '*the enduring guardian*'.

The document that the appointor executes to appoint an enduring guardian is called '*the instrument*'.

'*The Act*' in this discussion refers to the *Guardianship and Administration Act 1995*.

'*Enduring phase*' means the period during which the appointor lacks the ability to make reasoned judgments in respect of matters relating to his or her personal circumstances. In the *enduring phase* the guardian can make decisions on the appointor's behalf about his or her personal circumstances.

For more information about the role of an enduring guardian, please refer to:

http://www.guardianship.tas.gov.au/_data/assets/pdf_file/0010/251776/11_Instrument_Appointment_Enduring_Guardian_infosheet.pdf

To understand the role of the Guardianship and Administration Board with respect to enduring powers, please refer to:

http://www.guardianship.tas.gov.au/_data/assets/pdf_file/0009/67059/8_Review_of_Enduring_Powers.pdf

The amendments to the *Guardianship and Administration Act 1995* commenced on the date of Royal Assent, which was 21 October 2013. They are already in force. The following describes the effect of these amendments:

**AN ENDURING GUARDIAN CAN ACCESS INFORMATION ABOUT THE APPOINTOR:
(SECTION 32B OF THE ACT)**

In an enduring phase a guardian has a right to all of the information to which the appointor would have been entitled so long as that information is reasonably required for the purpose of exercising a power, or deciding to exercise a power as a guardian.

A guardian does not have the right to demand such information if the appointor still has capacity to make reasoned judgments in respect of matters relating to his or her personal circumstances.

EXAMPLE 1:

A guardian has been asked to give consent to the administration of a particular drug because the appointor does not have the capacity to give informed consent to that treatment. If the guardian wants to know whether the appointor has had that treatment before and if so if there were any side effects, the guardian can demand relevant medical records from previous medical practitioners.

EXAMPLE 2:

An appointor has lost the ability to care for herself at home due to dementia. Aged Care services have determined that she is unsafe and want the guardian to make a decision that the appointor is moved to an Aged Care Facility. The guardian believes it is necessary to understand the appointor's financial position before deciding whether she should move and, if so, to which facility. The guardian has a right to receive that information from an attorney, an administrator or a financial adviser acting on behalf of the appointor.

WHEN DOES THIS PROVISION APPLY?

This provision applies to enduring guardianships that are already in existence and future instruments, but it only applies to decisions made or actions taken by the guardian since the 21st October 2013.

AN ENDURING GUARDIAN CAN ACCESS THE APPOINTOR'S WILL:
(SECTION 32B(2) AND (3) OF THE ACT)

The guardian's right to access information includes the right to obtain a copy of the appointor's will if it is reasonably relevant to the decision that the guardian is contemplating.

WHEN DOES THIS PROVISION APPLY?

This provision applies to enduring guardianships that are already in existence and future instruments, but it only applies to decisions made or actions taken by the guardian since the 21st October 2013.

If the appointor does not want his or her guardian to access a copy of his or her will in an enduring phase, the appointor must expressly state that the guardian does not have this power in the instrument of appointment.

Where an instrument is already in existence, an enduring guardian will have the power to obtain a copy of the appointor's will. If an appointor does not wish for that to occur, an appointor should amend his or her instrument of appointment and have that amendment registered.

A GUARDIAN IS RESTRICTED FROM ACTING WHERE HE OR SHE HAS A CONFLICT OF INTERESTS:

(SECTION 32C OF THE ACT)

A ‘*conflict of interests*’ means that the guardian is conflicted between his or her duties as a guardian towards the appointor (a duty to act in the appointor’s best interests – see section 27 of the Act) and the guardian’s own interests or the interests of the a relative, business associate, or a close friend of the guardian.

A guardian cannot make a decision, take any action or consent to doing something on behalf of the appointor where the guardian has a conflict of interests in making that decision, taking that action or doing something on behalf of the appointor.

EXAMPLE 3:

A guardian is a director of an Aged Care Facility. In making a decision about whether an appointor should move to an aged care facility and which facility, the guardian can only decide to move the appointor to the Aged Care Facility if the instrument expressly enables the guardian to act in circumstances of a conflict of interests.

If, in this example, the guardian believes that moving to that particular Aged Care Facility would be in the best interests of the appointor but the instrument does not allow conflicted decisions, the guardian can apply to the Guardianship and Administration Board for approval of that decision (see section 35 of the Act).

WHEN DOES THIS PROVISION APPLY?

This provision applies to enduring guardianships that are already in existence and future instruments, but it only applies to decisions made or actions taken by the guardian since the 21st October 2013.

If the appointor does not want his or her guardian restricted from acting in circumstances of a possible conflict of interests, the appointor must expressly state that this decision - or this class of decisions - is exempt from this restriction.

Where an instrument is already in existence, and an appointor does not wish for the guardian to be restricted from acting in a circumstance of conflict of interests, an appointor should amend his or her instrument of appointment and have that amendment registered.

A GUARDIAN MUST KEEP RECORDS OF DECISIONS:

(SECTION 32D OF THE ACT)

In addition to the responsibilities of an enduring guardian pursuant to section 25, 26 and 27 of the Act, a guardian is required to keep records of all decisions and actions that he or she has taken as an enduring guardian. These records must be kept for at least 7 years after the person ceases to be the guardian.

The Board can request an accurate record of all decisions and actions that he or she has taken as an enduring guardian. If a guardian or former guardian does not provide the records to the Board within the time specified in the Board's request (at least 14 days) the guardian or former guardian could be amenable to a penalty up to 20 penalty units (\$2600).

EXAMPLE 4:

A guardian should keep records of and decisions that he or she communicates to medical practitioners, accommodation providers, allied health professionals, friends and relatives in his or her role as enduring guardian. Such records would include activities such as:

- Giving consent to the administration of a prescription drug, noting the dosage and frequency of application, the condition for which the drug is prescribed and any other relevant information.
- Deciding that the appointor should move to a new place of accommodation.
- Determining that certain family members will be excluded from visiting the appointor and instructing an Aged Care Facility that these persons should not be admitted to visit the appointor.

Record should include the reasons why and any relevant reports or opinions upon which the guardian relied in making that decision.

WHEN DOES THIS PROVISION APPLY?

This preclusion applies to enduring guardianships that are already in existence and future instruments, but it only applies to decisions made or actions taken by the guardian since the 21st October 2013.

AMENDMENTS TO THE RESPONSIBILITIES AND POWERS OF ATTORNEYS APPOINTED UNDER ENDURING POWERS OF ATTORNEY (FINANCIAL DECISION MAKER):

TERMINOLOGY:

The person who appointed an enduring attorney is called '*the donor*.'

The person appointed as an enduring attorney is called '*the attorney*' or '*the enduring attorney*'.

The document that the donor executes to appoint an enduring attorney is called '*the instrument*'.

'*The Act*' in this discussion refers to the *Powers of Attorney Act 2000*.

'*Enduring phase*' means any period where the donor lacks mental capacity. In the *enduring phase* the attorney is taken to be a trustee of the property and affairs of the donor according to the terms of the instrument.

To understand the role of the Guardianship and Administration Board with respect to enduring powers, please refer to:

http://www.guardianship.tas.gov.au/_data/assets/pdf_file/0009/67059/8_Review_of_Enduring_Powers.pdf

The amendments to the *Powers of Attorney Act 2000* will commence on proclamation. It is expected that proclamation will occur early in 2014. The following describes the effect of these amendments once they have commenced:

CHANGES TO WITNESSING OF AN ENDURING POWER OF ATTORNEY:

(SECTION 9 OF THE ACT)

A person who is a close relative of the donor or the attorney cannot witness an instrument appointing an enduring attorney. The persons witnessing the instrument must declare that he or she is not a party to the enduring power of attorney or a close relative of a party to it.

"CLOSE RELATIVE" INCLUDES:

- A spouse (including marriage, a significant relationship registered under the *Relationships Act 2003* or a relationship of 2 years standing as recognised under that Act) of the donor or the attorney
- A parent or grandparent of the donor or the attorney
- A sibling (including a half sibling) of the donor or the attorney
- A child or a parent of a spouse (as defined above) of the donor or the attorney
- An aunt or uncle of the donor or the attorney

A person who makes a false declaration may be amenable to a penalty of 2 penalty units (\$260).

WHEN DOES THIS PROVISION APPLY?

This provision applies to all future enduring powers of attorney. It does not invalidate an enduring power of attorney created before the commencement of these amendments in accordance with the requirements prevailing at that time.

NEED TO REGISTER NOTICE OF DEATH, BANKRUPTCY OR INSOLVENCY OF THE DONOR:

(SECTION 11 OF THE ACT)

The death, bankruptcy or insolvency of the donor needs to be registered with the Recorder of Titles.

WHEN DOES THIS PROVISION APPLY?

This provision applies to all existing and future enduring powers of attorney.

AN ENDURING ATTORNEY'S POWERS ARE DEFINED:

(SECTION 31 OF THE ACT)

The amendments set out in detail the activities that an attorney would typically undertake. The list of activities is similar to the activities described for an administrator appointed by the Guardianship and Administration Board, for example collect the donor's income and assets, invest monies, pay debts, bring and defend legal actions.

The amendments also clarify that an attorney is not empowered to make personal (non-financial) decisions on behalf of the donor. 'Personal matters' are defined in the Act and include decisions such as decisions about health care, accommodation, employment and education, adoption and marriage.

The amendments also provide that an enduring power of attorney can have no effect in relation to a part of the donor's estate if that part of the donor's estate is the subject of an administration order made by the Guardianship and Administration Board.

WHEN DOES THIS PROVISION APPLY?

This provision applies to powers that are already in existence and future instruments, but it only applies to actions taken by the attorney after the proclamation of the amendments.

ATTORNEY MUST ACT IN THE BEST INTERESTS OF THE DONOR:

(SECTION 32 OF THE ACT)

The attorney must keep his or her assets separate from the assets of the donor, except for property that the donor and the attorney hold as joint tenants or tenants in common. If an attorney mixes his assets with the donor's assets, he or she may be amenable to a penalty of 50 penalty units (\$6500).

Except where an action might conflict with the duties of the attorney:

- An attorney must exercise his or her powers in the best interests of the donor.
- The attorney should consult with the donor as far as is possible in the circumstances.
- The attorney should take into account the present or previously expressed wishes of the donor.

WHEN DOES THIS PROVISION APPLY?

This provision applies to powers that are already in existence and future instruments, but it only applies to actions taken by the attorney after the proclamation of the amendments.

AN ENDURING ATTORNEY CAN ACCESS INFORMATION ABOUT THE DONOR:

(SECTION 32AA OF THE ACT)

In an enduring phase an attorney has a right to all of the information to which the donor would have been entitled so long as that information is reasonably required for the purpose of exercising a power, or deciding to exercise a power as an attorney.

EXAMPLE 1:

An attorney can demand information and statements from financial institutions, financial advisers, creditors, debtors and employers.

WHEN DOES THIS PROVISION APPLY?

This provision applies to powers that are already in existence and future instruments, but it only applies to actions taken by the attorney after the proclamation of the amendments.

AN ENDURING ATTORNEY CAN ACCESS THE DONOR'S WILL:

(SECTION 32AA(2) AND (3) OF THE ACT)

The attorney's right to access information includes the right to obtain a copy of the donor's will if it is reasonably relevant to the decision that the attorney is contemplating.

WHEN DOES THIS PROVISION APPLY?

This provision applies to powers that are already in existence and future instruments, but it only applies to actions taken by the attorney after the proclamation of the amendments.

If the donor does not want his or her attorney to access a copy of his or her will in an enduring phase, the donor must expressly state that the attorney does not have this power in the instrument of appointment.

Where an instrument is already in existence, an enduring attorney will have the power to obtain a copy of the donor's will. If a donor does not wish for that to occur, a donor should amend his or her instrument of appointment and have that amendment registered.

AN ATTORNEY IS RESTRICTED FROM ACTING WHERE HE OR SHE WILL RECEIVE A BENEFIT OR ACTING UNDER A CONFLICT OF INTERESTS:

(SECTION 32AB AND 32 AC OF THE ACT)

An attorney is not authorised to execute an assurance or any other document that would result in a benefit being received by the attorney unless the instrument expressly authorises the attorney to take an action that would result in a benefit being received by the attorney.

A ‘*conflict of interests*’ means that the attorney is conflicted between his or her duties as an attorney towards the donor (a duty to protect the donor’s interests – see section 32 of the Act) and the attorney’s own interests or the interests of the a relative, business associate, or a close friend of the attorney.

A attorney cannot make a decision, take any action or consent to doing something on behalf of the donor where the attorney has a conflict of interests in making that decision, taking that action or doing something on behalf of the donor.

EXAMPLE 2:

An attorney cannot grant a loan or a gift from the donor’s estate to the attorney or one of his friends or family.

WHEN DOES THIS PROVISION APPLY?

There are exemptions with respect to these provisions with regard to interests in property and related interests where the donor and the attorney are joint tenants or tenants in common.

This preclusion applies to enduring powers of attorney that are already in existence and future instruments, but it only applies to decisions made or actions taken by the attorney after the amendments commence.

If the donor does not want his or her attorney restricted from acting in circumstances of a possible conflict of interests, the donor must expressly state that this decision - or this class of decisions - is exempt from this restriction.

Where an instrument is already in existence, and a donor does not wish for the attorney to be restricted from acting in a circumstance of conflict of interests, a donor should amend his or her instrument of appointment and have that amendment registered.

AN ATTORNEY MUST KEEP RECORDS OF TRANSACTIONS:

(SECTION 32AD OF THE ACT)

An attorney is required to keep records of all dealings and transactions that he or she has taken as an enduring attorney. These records must be kept for at least 7 years after the person ceases to be the attorney.

The Guardianship and Administration Board can request an accurate record of all dealings and transactions that he or she has taken as an enduring attorney. If an attorney or former attorney does not provide the records to the Board within the time specified in the Board's request (at least 14 days) the attorney or former attorney could be amenable to a penalty up to 20 penalty units (\$2600).

EXAMPLE 3:

An attorney should keep all financial records and statements, invoices, receipts, agreements and financial or legal advices for transactions involving the donor's estate.

WHEN DOES THIS PROVISION APPLY?

This preclusion applies to enduring powers of attorney that are already in existence and future instruments, but it only relates to dealings and transactions taken by the attorney after the commencement of the amendments.

Note, the Board has existing powers to demand records pursuant to section 11(11) of the *Guardianship and Administration Act 1995*.

ENDURING POWERS OF ATTORNEY REVOKED BY CERTAIN EVENTS:

(SECTION 32AE, 32AF AND 32AG OF THE ACT)

An enduring power of attorney will be revoked by the following events unless the instrument of appointment expressly excludes that outcome:

- The donor gives notice to the attorney that the power is revoked
- The donor dies, becomes bankrupt or insolvent
- The attorney was a spouse of the donor, but has ceased to be a spouse of the person
- The attorney and the donor were in a personal relationship (as defined in the *Relationship Act 2003*), but have ceased to be in that relationship
- Where a sole attorney dies, becomes subject to mental incapacity or becomes bankrupt or insolvent
- A notice is lodged with the Recorder of Titles to the effect that the attorney to an unregistered enduring power of attorney cannot be found after reasonable attempts or is unable to be served with notice.

Also, where an enduring power of attorney is made but there is an existing enduring power of attorney and the two instruments are inconsistent, the earlier instrument is of no effect. The donor is required to notify the original attorneys.

In a situation where a donor executes two enduring powers of attorney but only registers one power, the power that is registered first is the valid power and the other instrument cannot be registered unless the first power is revoked.

A person dealing with an attorney in good faith who is not aware that the power has been revoked is not affected by the revocation. However, once notice of revocation has been given to the Recorder of Titles, the rights of the person dealing in good faith are not preserved. A person dealing with an attorney in good faith who is not aware that the power has been suspended (see below) is not affected by the suspension. Please also note the amendments to section 51 protect a person making payments to the estate who is unaware that the terms of the power have been altered.

WHEN DOES THIS PROVISION APPLY?

A revocation on the end of a marriage or personal relationship will apply to enduring powers of attorney where the marriage or personal relationship ends after the commencement of the amendments.

Where a sole attorney dies, becomes subject to mental incapacity or becomes bankrupt or insolvent, the revocation provision applies to pre-existing enduring powers of attorney but the revocation commences on the date that the amendments commence.

The provisions relating to a donor having two powers only apply if at least one of the powers was created since the commencement of the amendments.

All other specified revocations to all existing and future enduring powers of attorney unless the instrument expressly excludes the operation of this amendment.

INTERESTS UNDER WILLS TO BE PRESERVED BY THE ATTORNEY:

(SECTION 32AH OF THE ACT)

Where an asset has been specifically included in a donor's will is sold or disposed of by an attorney acting under a power of attorney, the intended beneficiary of that asset will have the same interest in any surplus money or other property arising from the attorney's dealings with that asset as he or she would have had if the dealing had not been made.

There are provisions that allow for a beneficiary to apply to the Supreme Court to assist that beneficiary to inherit the share that he or she would have had but for the actions of the attorney.

WHEN DOES THIS PROVISION APPLY?

This provision applies to enduring powers of attorney that are already in existence, but only in relation to donors who lose capacity after the commencement of the amendments.

GUARDIANSHIP AND ADMINISTRATION BOARD HAS ADDITIONAL POWERS:

(SECTION 33 OF THE ACT)

In reviewing an enduring power of attorney, the Guardianship and Administration Board has additional powers to:

- Dismiss an application to review an enduring power of attorney if it is frivolous, vexatious or lacking in substance
- Open or read the donor's will or purported will
- Suspend an enduring power of attorney if an attorney fails to comply with a direction of the Board and make other orders or give other directions
- Revoke a suspension of the power
- Appoint the Public Trustee during any period of suspension
- Review an enduring power of attorney and revoke the power on the grounds that the attorney has not complied with the Board's directions

WHEN DOES THIS PROVISION APPLY?

This provision applies to powers that are already in existence and future instruments, but it only applies to actions taken by the attorney after the proclamation of the amendments.