

## **PART 1. ENDURING POWER OF ATTORNEY**

### **What is an Enduring Power of Attorney?**

An Enduring Power of Attorney is a legal document that appoints another person (or persons) to make financial and legal decisions for you. Unlike a General Non-enduring Power of Attorney, an Enduring Power of Attorney continues to be valid even if you lose legal capacity in the future. “**Enduring**” simply means that the power continues even if the person giving it loses the capacity to make decisions. It is useful as a means of ensuring that someone, chosen by you, takes control of your financial and legal affairs if and when you are ever unable to do so yourself.

### **What is an Enduring Power of Guardianship?**

An Enduring Power of Guardianship is a legal document by which you may appoint another person to make personal and lifestyle decisions on your behalf. These decisions may include access to services, where to live, healthcare, who has contact with you and whether you work. “**Enduring**” means the same as with an Enduring Power of Attorney relating to financial and legal matters i.e. the power continues when the person giving the power loses the capacity to make personal or lifestyle decisions for themselves.

### **Effect of legislative changes**

Under the *Powers of Attorney Act 2014* (the Act), which commenced on 1 September 2015, the new Enduring Power of Attorney replaces the old Enduring Power of Attorney (Financial) and the appointment of an Enduring Guardian so that **one document can now cover both functions** i.e. the ability of someone to make financial and legal decisions for you as well as personal and lifestyle decisions.

Under the *Powers of Attorney Amendment Act 2016* which came into effect on 1 May 2017, the legislation has clarified certain provisions to make it clear that a person making a Power of Attorney can now confine what he/she authorises to be done by an attorney to personal matters only, or financial matters only or to matters specifically set out in the document appointing the attorney.

### **Why give someone an Enduring Power of Attorney?**

There are some circumstances in which you may be unable to make decisions about matters that concern you. For example, you may be overseas or you may be ill or otherwise unable to adequately determine your own needs and what you require to have a reasonable quality of life appropriate to your circumstances. To have capacity is to have the ability to reason things out, that is:

- to understand;
- retain;
- believe;
- evaluate i.e. process; and
- weigh relevant information.

### **New terminology under the Act**

Under the amended legislation the person making the Enduring Power of Attorney (EPA) is called the “**Principal**” and the person or persons they appoint are known as “**Attorney(s)**”.

Attorneys can be authorised to act on behalf the Principal for “financial matters”, “personal matters” or both. In addition, different Attorneys may be given powers for different matters.

“**Financial matters**” are now specifically defined in the Act and include matters relating to the Principal’s financial or property affairs, including withdrawing money, making investments, performing contracts and paying debts or expenses. Legal matters relating to financial matters are also covered under this definition.

“**Personal Matters**” are also specifically defined in the Act and include matters relating to the Principal’s personal or lifestyle affairs, including where and with whom the Principal lives, whether and where the Principal works and who sees the Principal and even what the Principal eats. Legal matters relating to personal matters are also covered under this definition.

## Formalities

Under the Act an Attorney:

- **must not** be a care worker; a health provider or an accommodation provider for the Principal; and
- **must** have disclosed to the Principal any conviction or finding of guilt of an offence involving dishonesty,

in order to be “**eligible**” to act as an Attorney.

When the Principal signs the document, it is still required to be witnessed by two witnesses, but now:

- neither must be a relative of, or a care worker or accommodation provider for, the Principal;
- neither can be a relative of any Attorney; and
- at least one of the witnesses must be a person authorised to witness Affidavits (legal practitioners, amongst others) or a medical practitioner.

Attorneys and Alternative Attorneys are still required to sign a Statement of Acceptance. However, the significant difference is the Acceptance must also be witnessed by a person over 18 years. The Statement of Acceptance must state that the Attorney:

- is **eligible** to act as Attorney; and
- understands the obligations of an Attorney under the Act and the consequences of failing to comply; and
- undertakes to act in accordance with the provisions of the Act that relate to EPAs.

A Principal can appoint more than one Attorney and several options are provided for in the Act. For example, you may choose to appoint a single Attorney or two or more joint Attorneys or two or more joint and several Attorneys or an Alternative Attorney. The significant difference of the amendments to the Act now provide that:

- the Attorneys appointed (if more than one) may act **by majority**;
- it is possible to appoint **multiple** Attorneys for personal and lifestyle matters;
- it is possible to appoint a different Alternative Attorney in respect of each Attorney; and
- it is possible to appoint different Attorneys in relation to financial and legal matters and in relation to personal matters.

## Whom should I appoint as my Attorney?

You should appoint someone you trust to manage your property and financial affairs, and / or your personal affairs, in your best interests. Many people choose their spouse, or an adult child, but you may prefer to appoint another family member, a friend with expertise in the area, an accountant, a lawyer or a professional trustee company. In making that decision you should feel confident that the person or agency is competent to deal with the management and personal decisions that may arise and be capable of keeping accurate records of all dealings and transactions, particularly in relation to your financial and legal affairs. In addition, the Attorney you choose must also be willing to take on the responsibility on your behalf subject to them being **eligible** as referred to above.

## Can I limit my Attorney's powers?

Yes, you can specify how you want your Attorney(s) to carry out their responsibilities to you and any special conditions you want to apply in relation to the decisions they make on your behalf. You can also include particular instructions about what you would like your Attorney to do. Your Attorney **must** act in accordance with your instructions. Once the power to make a decision begins, your Attorney will have full control over that decision unless you have explicitly limited that power in the document.

Where you have large capital assets, such as property or shares, you should leave clear instructions for your Attorney(s) as to how to deal with or distribute or dispose of these assets. It is however best not to place too many restrictions on your Attorney(s)' power as this may make it difficult for your Attorney(s) to make decisions on your behalf. If you choose to impose conditions or restrictions on the power you are giving to your Attorney(s), it is recommended that you seek legal advice from us before doing so.

## What happens to my existing Power of Attorney

Under the provisions of the amending legislation which came into effect on 1 May 2017 all pre-existing enduring powers of attorney, both financial and guardianship, will be revoked entirely at the time of making a new Power of Attorney unless you specify otherwise in your new Power of Attorney.

## When does the Attorney's power begin?

You may nominate when your Attorney's power is to begin. In this regard you may specify:

- a time;
- a circumstance; or
- an occasion,

on which the power for all matters or the power for a specified matter (i.e. financial and legal or personal) under the EPA is exercisable, which may be:

- immediately; or
- when you cease to have decision making capacity for the matter or matters; or
- any other time, circumstance or occasion.

In default, the power for all matters i.e. both financial and legal and personal is exercisable on and from the making of the EPA. Where you have specified a time, circumstance or occasion on which the EPA is to commence but before the specified time, circumstances or occasion, you do not have decision making capacity for the matter then the Attorney who has power for that matter may exercise the power during any period when you do not have that capacity. If an Attorney is acting because you do not have decision making capacity for the matter, a person dealing with the Attorney may ask for evidence to establish that you do not have the decision making capacity. An example of evidence would be a medical certificate as to your capacity.

Before your Attorney exercises the power for the first time in relation to a matter because you do not have decision making capacity, the Attorney is obliged to take reasonable steps to give notice that he or she is commencing to exercise the power to any person who you stipulate in the EPA should be so notified. In this regard it is possible to nominate in your EPA a person or persons to whom you **require** your Attorney to give such notification that he / she intends to commence using the EPA because you no longer have the capacity to make decisions in relation to a matter yourself.

## How long does the Power continue?

The Power continues until it is revoked or upon your death and if your Attorney has commenced exercising power because you did not have decision making capacity for the matter, the Attorney may continue to exercise that power even if you regain decision making capacity for that matter. At that time you may change your EPA or revoke it so long as you are capable of understanding what you are doing. In other words, so long as you have the capacity to make an EPA, you also have capacity to change or revoke it.

## How can I be sure that my Attorney will Act in my interests?

If ever you are unable to oversee your Attorney's decisions the Victorian Civil and Administrative Tribunal (VCAT) and the Courts have power to protect your interests. Your Attorney may be required to produce a summary of receipts and expenditure or more detailed accounts and these may be audited. An Attorney who does not adequately protect your interests can be removed or replaced by VCAT. The Act itself now clearly sets out the duties of an Attorney and these include duties **to maintain your confidentiality** and a duty not to enter into certain "**conflict**" transactions without your authority or an order of VCAT. The Act also gives VCAT wider powers which apply to all new and existing appointments including a new power to order an Attorney who breaches their duties to pay compensation to a Principal for any loss suffered as a result of the breach. Previously a party only had recourse to the Supreme Court, at significant expense.

There are also criminal offences if an Attorney dishonestly obtains, or dishonestly uses, an EPA to obtain financial advantage or to cause loss to the Principal or another person. The penalty for these offences for a natural person is Level 6 imprisonment (5 years maximum) or 600 penalty units or both. In the case of a corporate trustee acting as an Attorney, the penalty is 2400 penalty units.

## **What happens to this document when it is completed?**

You should always leave the original EPA in a safe place such as with your Bank or with your Solicitor but it is important to keep a copy to refer to. You should also give a copy to anyone else who may need to be involved such as:

- your nominated Attorney(s);
- your doctor;
- your solicitor;
- your accountant;
- your stockbroker.

You may also wish to carry a card in your personal wallet, stating that you have made an EPA and giving details of whom you have appointed.

## **New Role**

The Act also creates a new role of “**Supportive Attorney**”, to support people to make and give effect to “supported decisions”. This might be useful where you may need some assistance managing your affairs, but are not yet willing to confer complete decision making authority on your Attorney. Supportive Attorneys can be given one or more of the following powers:

- the power to access, collect or retain information about you that is relevant to a supported decision;
- the power to communicate any information about you that is relevant or necessary to the making of or giving effect to a supported decision; and
- the power to take any reasonable action, or to do anything that is reasonably necessary, to give effect to a supported decision.

In this regard it is possible for you to appoint a Supportive Attorney to act while you still have capacity and when you lose decision making capacity, to enact an EPA and enable it to come into effect.

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## **PART 2. APPOINTED ATTORNEY’S ROLE AND OBLIGATIONS**

The Principal, 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 EPA, you will be taking on serious responsibilities. If you fail to observe these responsibilities you could be removed as Attorney, be required to pay compensation or even be convicted of an offence, having significant penalties involving both imprisonment and financial penalties.

### **What are the Attorney’s responsibilities?**

The Attorney’s responsibilities are both general and specific and may relate to financial and legal matters and / or personal matters.

### **General Responsibilities**

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 pay compensation to the Principal. You must also comply with the terms of the EPA and any other requirement of the Court or VCAT. In addition you must abide by the general principles on which the legislation is based. General principles include:

- presuming that the Principal has the capacity to make a particular decision until there is conclusive evidence that this is not the case;
- recognising the Principal’s right to participate in decisions affecting his or her life to the maximum extent for which he / she has capacity;
- respecting the Principal’s human worth and dignity and equal claim to basic human rights regardless of his / her capacity;
- recognising the Principal’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 Principal’s existing supporting relationships, values, culture and linguistic environment;
- ensuring that your decisions are appropriate to the Principal’s characteristics and needs;
- recognising the Principal’s right to confidentiality of information.

Where you are appointed Attorney in relation to personal matters, the general powers involve, subject to the underlying principles outlined above, the ability to:

- decide where the Principal is to live, whether permanently or temporarily;
- decide who the Principal is to live with;
- to decide whether the Principal should be permitted to work;
- consent to any healthcare that is in the Principal's best interests;
- to restrict visitors to such extent as may be necessary in the Principal's best interests.

### **Specific Responsibilities**

You must keep accurate records of financial dealings and transactions made under the Power of Attorney as VCAT or the Courts 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 belonging to the Principal, you must keep records about the disposal. Where your appointment is a joint one, then it is sufficient that by agreement, one of the jointly appointed Attorneys will retain a record or account of transactions or dealings.

### **Duty to keep property separate**

You must keep your property separate from the Principal's property unless you and the Principal own the property jointly. If the Principal'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 the 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 relations, business associates or close friends) into conflict with those of the Principal.

### **How do I know whether I am eligible?**

You are eligible to be appointed as an Attorney as long as you are not:

- a care worker, health provider or accommodation provider for the Principal; and
- you have disclosed to the Principal any conviction or finding of guilt of an offence involving dishonesty, which must be recorded in the EPA.

### **Can I make decisions that cost money?**

If acting in relation to personal matters only there may well be financial implications of decisions that you make. If there is also a separate Attorney appointed for financial and legal matters, you must ensure that you have consulted that Attorney and use reasonable efforts to ensure that the Principal can afford those decisions. In this regard you should confer with the Attorney appointed for financial and legal matters to satisfy yourself that the Principal can afford them.

### **What if there are disputes between appointed Attorneys where there is more than one?**

Where you are authorised to act severally (i.e. separately) under an EPA and there is a disagreement between, for example, an Attorney for personal matters and an Attorney for financial matters, regarding a matter where each have authority to act:

- either Attorney may apply to VCAT for an order as to how the matter should be resolved; and
- unless the Attorney in the EPA otherwise provides or unless otherwise ordered by VCAT, the decision of the Attorney for personal matters prevails to the extent of any inconsistency.

If the implementation of a decision of the Attorney for personal matters would result in a serious depletion of the Principal's financial resources, the Attorney for financial matters must apply to VCAT under the Act for an order on the matter to have it resolved.

### **How do I complete a document for the Principal?**

If you have the power to execute (complete) a document for the Principal, you do so in the ordinary way but you must note on the document that you are executing as the Principal's Attorney under the EPA e.g. "*John Smith, by his duly appointed Attorney, Mary Smith*".

## **Proof of your authority**

It is recommended that you keep the EPA document in a safe place if you hold the original. Sighting of the document may be a requirement of your authority by financial institutions, banks etc. although it is usual that such authorities will accept a certified copy of the EPA as sufficient evidence of the original.

## **When does my power to make decisions begin?**

The Principal may nominate in the EPA when your power to make decisions begins, whether they be financial and legal or personal. If the Principal does not nominate a date or event or occasion when the power becomes accessible then your power begins immediately. However, whilst the Principal retains legal capacity i.e. the ability to make his or her own decisions, you must act in accordance with the Principal's directions.

## **When does my power end?**

There is no time limit on EPAs however certain actions by you or the Principal or VCAT or the Court can bring your power to an end.

## **Your resignation**

As long as a Principal is capable of using the power given to you, you can resign by giving that Principal signed notice. However, if the Principal is incapable of using the power then you may only resign by obtaining 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 those decisions.

## **Becoming bankrupt or insolvent**

If this happens, your power is revoked and similarly it is revoked upon your death.

## **The Principal's actions**

The Principal may revoke your power at any time so long as he or she has the capacity to revoke it and understands the nature and effect of revoking the power, usually through the execution of a prescribed revocation form, notice of which is given to you.

If the Principal completes a new EPA 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 power, it will override the earlier document.

If the Principal dies, your EPA is revoked in its entirety.

The power may also be revoked where you become insolvent, under administration or you become a care worker, health provider or an accommodation provider for the Principal or, in relation to an Attorney for financial and legal matters, you are convicted or found guilty of an offence involving dishonesty i.e. one punishable by at least 3 months in prison, whether it is an offence in the State of Victoria, the Commonwealth, another State or a Territory.

## **What is the effect of my power ending?**

- if your power is joint, it does not affect the remaining joint Attorney or Attorneys' ability to exercise the power;
- if your appointment is joint and several, it does affect the remaining joint and several Attorney or Attorneys' ability to exercise the power;
- if your appointment is several or by way of majority, it does not affect any remaining several or majority Attorney or Attorneys' ability to exercise that power.

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