

TRIBUNAL UPDATE: COMPENSATION WHERE LOSS CAUSED BY ACTIONS OF AN ATTORNEY USING A POWER OF ATTORNEY

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Enduring powers of attorney are useful and specific forms of agency that allow for a person to appoint a trusted person to manage personal and/or financial decisions even after the person who appoints them has lost decision-making capacity to supervise the agent/attorney. While it is likely that most enduring powers are operated by honest and diligent appointees, sadly some persons appointed to these important positions of trust abuse those powers or operate the powers incompetently, causing financial loss to the person who appointed them. Cases of financial elder abuse that are presented to courts and tribunals frequently arise from misuse of an enduring power of attorney.

Guardianship lists in Australian tribunals have been the adjudicators of disputes arising from the operation of enduring powers of attorney since guardianship tribunals were established from the 1980s. Presumably legislatures of the era considered that the issues of incapacity and substitute decision making were suitably compatible between guardianship and powers of attorney that they may be determined by the same tribunals. Consequently, guardianship tribunal members make decisions about the validity, suitability and operation of enduring powers and can revoke or amend the powers. Tribunals are generally considered to be more accessible and informal, and less costly, than courts. particularly wealthy persons or instances of very serious fraud. Litigation about financial losses caused by an attorney have been more likely to occur after the death of the principal (sometimes called the donor) at the point of the distribution of a principal's deceased estate.

In a new approach, when the Victorian Parliament passed the 2014 *Powers of Attorney Act* (Vic) (the Act) it included provisions empowering the Victorian Civil and Administrative Tribunal (VCAT) to make compensation orders where an attorney has breached a statutory duty. The new Act also codified the duties of an attorney, which had previously been established in equity. Section 63 of the Act provides that an attorney (i) must act honestly, diligently and in good faith, (ii) must exercise reasonable skill and care and not use the position of attorney for profit, and (iii) must avoid acting where there may be a conflict of interest and to keep accurate records and accounts.

Section 77 of the Act allows VCAT or the Supreme Court to order an attorney under an enduring power of attorney to compensate the principal for a financial loss if the attorney contravened the Act while acting as an attorney.

The Act allows for an order to be made after the death of the principal. Section 79 requires that the application must be made within 6 months of the date of death of the attorney or the principal, whichever is the earlier although discretions apply to extend time if necessary.

The Act commenced operation on 1 September 2015 and applications for compensation have been made to VCAT since that time. The monetary value of claims for compensation is

significant, for example \$92,910.44 in *XEC*¹ and almost \$30,000 in *LSI*². Financial losses of this magnitude clearly have a serious impact on the wellbeing of a principal.

Since the compensation provisions commenced, successive decisions have clarified the scope of VCAT's powers to award compensation. A particular issue has been the operation of the transitional provisions in the Act³ and how the new compensation provisions apply to enduring powers of attorney made before the commencement of the Act (i.e. enduring powers made under the *Instruments Act 1958*). This is particularly important because most enduring powers of attorney that are currently in existence or operation were created prior to 1 September 2015. If the compensation provisions cannot apply to powers made before that date, the application of the provisions will be seriously limited. Additionally, if the provisions are limited to new enduring powers of attorney, it may result in persons not updating existing and outdated enduring powers to protect an attorney (usually a family member) from the potential operation of the compensation provisions.

In *ODY*⁴, Deputy President Nihill noted that a claim for compensation under s 77 of the *Powers of Attorney Act* can only succeed when the applicant can prove that the attorney has contravened a provision of the Act (e.g. a breach of attorneys' duties as set out in s 63 of the Act). In *DLM*⁵, Vice President, Judge Harbison agreed with that approach saying: 'It is clearly illogical to hold someone accountable for breaching a provision of an Act if that Act was not in existence at the date of the breach'.

In *YDM*⁶ DP Nihill dismissed an application that related to a principal who had died before the operation of the Act. In *DLM* Vice President Judge Harbison reiterated this finding noting: 'In other words, there may be available remedies in equity for breach of the duties of an attorney, but because this Tribunal is a creature of statute, those remedies cannot be pursued before this Tribunal.' The decision confirmed that the compensation provisions apply to transactions after 1 September 2015. The Act is not intended to apply retrospectively to transactions that were effected before the Act commenced.

However, further nuances of the operation of s 77 were aired in Judge Harbison's decision in *DLM*⁷ because the wording of the transitional provisions in the Act is quite specific and appears to be exclusionary, causing some interpretive difficulties.

Section 142 sets out the transitional arrangements for old enduring powers of attorney (being enduring powers of attorney (financial) made prior to the commencement of the Act). It provides that various provisions of the Act apply to an old enduring power of attorney as if it

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¹ *XEC (Guardianship)* [2017] VCAT 1064.

² *LSI (Guardianship)* [2018] VCAT 373.

³ Transitional provisions are included in almost all legislation. It is a term that describes the provisions that dictate how a new law will interact with the laws that came before them, in the case of enduring powers of attorney in Victoria, that was the *Instruments Act 1958*.

⁴ *ODY (Guardianship)* [2016] VCAT 804.

⁵ *DLM (Guardianship)* [2018] VCAT 1638.

⁶ *YDM (Guardianship)* [2016] VCAT 758.

⁷ *DLM (Guardianship)* [2018] VCAT 1638.

were made under the new Act. Amongst these provisions is s 77, which allows for compensation orders to be made.

In *DLM*, Judge Harbison explained that the interpretive issue is that s 77 requires VCAT to compensate the principal for any ‘loss caused by the attorney contravening any provision of *this Act* relating to enduring powers of attorney’; when considering an application for compensation in respect of an old power, the Tribunal must identify the provision of the Act which has been contravened. Judge Harbison noted a ‘startling omission’ in that nowhere in the transitional provisions is there reference to s 63 of the Act which is the provision which sets out the duties of an attorney. She noted that a literal interpretation of the provision would mean that:

... although it purports to extend the compensation provisions to an old enduring power of attorney, the section containing the transitional provisions does not in fact do so in any useful manner, because an attorney under an old power is not required to comply with the duties set out in s 63 of the Act.

Ultimately Judge Harbison rejected the literal interpretation, taking the view that there is a drafting error in the legislation. She adopted a purposive construction to the transitional provisions which provides a jurisdictional pathway for applications for compensation. Unless the decision in *DLM* is overturned by a Court at some point in time, it provides a basis for VCAT to award compensation for actions causing loss by an attorney after 1 September 2015 where the attorney was appointed either under the *Instruments Act 1958* or the *Powers of Attorney Act 2014*.

These decisions have ensured that the intention of Parliament has been made clear, that is that attorneys ought to be responsible for losses that they may cause in the estate and that redress for such losses ought to be provided in the more informal and accessible forums as provided by Tribunals. With an increasing interest in finding appropriate redress for cases of elder abuse, other States and Territories may in time follow Victoria’s example of assigning compensation for abuse of enduring powers of attorney to Tribunals with responsibility for guardianship and enduring power of attorney cases.