

Enduring powers of attorney reform

As noted in the last edition of the Client Newsletter, there have been significant legislative reforms affecting enduring powers of attorney. These recent reforms aim to protect donors (those persons giving the power), who are usually elderly, from abuses that can occur in the use of such powers. The government has made sweeping changes in this area in an attempt to make donors more aware of the full implications of the powers they are giving and attorneys more accountable in their use.

A power of attorney is a legal document used by a person (the "donor") to authorise another person (the "attorney" or "donee") to make decisions on the donor's behalf and in their best interests. An enduring power of attorney is a power that continues to operate even when the donor becomes unable to terminate or revoke it, e.g. the donor suffers a stroke or becomes incapacitated due to an accident.

The *Instruments (Enduring Powers of Attorney) Act 2003* (Vic) ("the Act"), which was passed by Parliament unamended on 21 October 2003, repeals ss114-118 of the Instruments Act 1958, replacing them with a new Part XIA. The new provisions become operational on 1 April 2004. The Act sets out the requirements for making an enduring power of attorney and prescribes new forms to be used and steps to be followed to ensure that the donor (the person giving the

power) fully understands its nature and effects. The noteworthy changes in this area are briefly outlined below. It should be noted that existing enduring powers of attorney will not be affected by these changes.

When can an enduring power of attorney be made?

Section 118 of the Act specifically states that a donor may make an enduring power of attorney only if he or she understands its nature and effects. The section outlines various elements relating to the power that need to be understood by the donor. These include the donor's ability to specify conditions, limit, or provide instructions concerning the use of the power, the effects of the power, and its ability to be revoked.

Further, the Act provides that a witness to the making of an enduring power of attorney should make a written record of the evidence giving rise to their belief that the donor understands these elements.

Formal requirements

An enduring power of attorney must be in the approved written form (new forms and an information pack have recently been released by the Department of Justice). The enduring power of attorney needs to be signed and dated by two adult witnesses in the presence of the donor and each other (in the same way a will is witnessed). Certificates signed by each witness need to be provided, stating that the donor signed the enduring power of

attorney freely and voluntarily in the presence of the witness (or that a person signing on behalf of the donor did so at the direction of the donor), and that the donor appeared to have the necessary capacity to make the enduring power of attorney. One of the witnesses must be a person authorised to witness the signing of a statutory declaration.

The enduring power of attorney is only effective once the attorney has accepted the appointment. A statement of acceptance needs to be signed by the attorney giving an undertaking that they will exercise the powers conferred with reasonable diligence, that they will avoid acting where any conflict of interest exists between themselves and the donor, and that they will comply with the provisions of the Act.

Record-keeping by attorneys

Section 125D of the Act requires the attorney to keep and preserve accurate records and accounts of all dealings and transactions made pursuant to the enduring power of attorney. This is an important requirement in the legislation and enables a higher level of accountability in the use of the power that has arguably been absent in the past.

The Act covers other areas associated with enduring powers of attorney, including the powers of the Victorian Civil and Administrative Tribunal (VCAT) to hear and determine applications made concerning them.

The new legislation represents significant change in the area of enduring powers of attorney. Clients considering making an enduring power of attorney, or those who already act as attorneys under existing powers, are advised to consult their solicitors to understand how the new legislation may affect them.

It is hoped that the legislative reforms reduce the risks associated with enduring powers of attorney and restore confidence in the use of this very valuable legal tool.

Dummy bids - Going, going, gone!

New property laws relating to vendor bidding and price quoting by estate agents took effect on 1 February 2004. Amendments to the *Sale of Land Act 1962* (Vic) prohibit vendors (or persons acting on their behalf, including estate agents and auctioneers) from making undisclosed bids at public auctions of their land. An auctioneer can only accept vendor bids where auction conditions permit the making of vendor bids, and these conditions, together with any subsequent vendor bid, need to be fully disclosed at the auction. Full disclosure of vendor bidding extends to the publication of auction sales results.

Recent amendments to the *Sale of Land Act* also include the abolition of the \$250,000 cap in relation to the cooling off provisions available to private property purchases. The right to "cool off" and pull out of a contract of sale is now available to all private sales regardless of the selling price. Note that the original exclusions to the cooling off provisions, namely those purchases made at public auctions, purchases of commercial, industrial or farming properties, purchases by bodies corporate, real estate agents or

by persons having already sought legal advice, still apply.

Amendments aimed at more accurate quoting of property prices by estate agents are also now in force. Amendments to the *Estate Agents Act 1980* (Vic) require estate agents to provide an estimated selling price to vendors prior to the signing of an agency agreement to sell their property. The estimated price can be expressed as a single figure or within a price range and, once provided, the estate agent cannot advertise the property at a lower figure than the estimate given.

Just say "Sorry"

Legislative reforms affecting personal injury claims have recently been made as part of the government's attempt to deal with perceived problems in the insurance industry. One small, but not insignificant, legislative amendment deals with apologies and how they are to be treated as evidence in court.

Traditionally, an exclamation of "I'm sorry" after an incident that caused injuries to a person was construed as an admission of liability to be used against the party who apologised. Recent amendments to the *Wrongs Act 1958* ("the Act") expressly remove construing an apology in this way. A new Part IIC inserted into the Act describes an apology as "an expression of sorrow, regret or sympathy but does not include a clear acknowledgment of fault". The apology can be expressed orally or in writing, and can be made before or after legal proceedings are contemplated or commenced. The Act continues to state that an apology does not constitute

"an admission of liability for the death or injury", or "an admission of unprofessional conduct, carelessness,

incompetence or unsatisfactory professional performance...for the purposes of any Act regulating the practice or conduct of a profession or occupation".

It should be noted that the definition of an apology in the Act specifically excludes "a clear acknowledgment of fault". Arguably, the exclamation "I'm sorry" will not be construed as an admission of liability under the new provisions, but the comment "I'm sorry, it was my fault" still will. The message is clear - apologise, but keep it brief!

The new provisions also deal with the reduction or waiver of fees by service providers. The Act states that in proceedings relating to injury or death as a consequence of the provision of a service, evidence of the reduction or waiver of the fees payable for that service does not constitute an admission of liability by the service provider.

Legislative reform in this area offers an attempt to minimise the legal wrangling associated with apologies - those spur of the moment expressions of regret that are often made during, or in the immediate aftermath of, a distressing and traumatic event. They allow us the freedom to express compassion and empathy to one another without compromising our right to justice at a later date.

Interest Rates – a snap shot of history

Attached is a Schedule of Penalty Interest Rates taken from the Law Institute Diary of 1991. It covers the period July 1983 to July 1990. At its height November/January 1990 penalty interest rates reached 23.5%. It shows what benign conditions the community is presently sailing in.