

Information Review of enduring powers of attorney Information for parties

What is the Guardianship Tribunal?

The Guardianship Tribunal is a legal tribunal. It conducts hearings to determine if guardians or financial managers should be appointed as substitute decision makers for people with a decision making disability. It can also conduct hearings to review enduring powers of attorney. Tribunal hearings are conducted by Tribunal members appointed by the Governor on the basis of their particular expertise. There are three categories of Tribunal member – legal, professional and community members. Legal members must be Australian lawyers of at least seven years standing, professional members are persons experienced in the assessment or treatment of people with disabilities, and community members have professional or personal experience with people with disabilities.

What happens at the hearing?

The Tribunal will ask the people attending the hearing questions about the application. You may also be able to ask questions. The Tribunal may contact relevant people by phone during the hearing, such as doctors or other people who have not been able to attend. The Tribunal will listen to all the evidence that people present and consider all the written information that has been provided. The Tribunal will try to make sure that the person the application is about understands what is happening at the hearing and is able to participate to the best of their ability.

Review of enduring powers of attorney

The *Powers of Attorney Act 2003* gives the Tribunal the power to review enduring powers of attorney. The Tribunal can review the making of an enduring powers of attorney or the

operation and effect of an enduring power of attorney (see s.36 of the Act) regardless of when it was made. However, the Guardianship Tribunal does not have authority to review other types of (non-enduring) powers of attorney.

Who can apply for a review?

An interested person may apply to the Tribunal for a review of an enduring power of attorney. The *Powers of Attorney Act 2003* identifies the following people as 'interested persons' (see s.35 of the Act):

- an attorney appointed under an enduring power of attorney
- the person who made the enduring power of attorney (the principal)
- any person who is the appointed guardian of the principal
- any person who is the enduring guardian of the principal
- any other person who the Tribunal considers has a proper interest in the proceedings or a genuine concern for the welfare of the principal.

What does an applicant have to do?

A person who applies to the Tribunal to review an enduring power of attorney has specific responsibilities.

- They need to complete an Application to Review an Enduring Power of Attorney.
- They must tell the principal about the application and why they have made it.
- They must provide adequate evidence to support their application. An applicant may have to pay for medical or professional reports that they obtain from a doctor or professional.

- They must make arrangements for the principal to attend the hearing whenever possible.
- They must attend the Tribunal hearing and give evidence in support of their application.
- They must inform the Tribunal of all the people who may have an interest in the application, even if they disagree with the application.
- They must advise the Tribunal if the principal's circumstances change, especially if there is an urgent need for financial protection of the principal.
- They must give a copy of their application and the notice of hearing to the principal. (Other parties will be sent a copy of the completed application form with the notice of hearing by the Tribunal.)

The Tribunal may decline to review an enduring power of attorney

When considering an application to review an enduring power of attorney, the Tribunal may decide to carry out the review or may decide not to carry out the review (see s.36(1) of the Act).

Reviews

The *Powers of Attorney Act 2003* provides for different types of review – reviews of the making of an enduring power of attorney and reviews of the operation and effect of an enduring power of attorney.

Reviews of the making of an enduring power of attorney

The Tribunal can review the making of an enduring power of attorney and make either or both of the following orders:

- an order declaring that the principal did or did not have mental capacity to make a valid enduring power of attorney (see s.36(3)(a) of the Act);
- an order declaring the enduring power of attorney is invalid in whole or in part (see s.36(3)(b) of the Act).

Reviews of the operation and effect of an enduring power of attorney

The Tribunal can review the operation and effect of an enduring power of attorney and if it is satisfied that it would either:

- be in the best interests of the principal, or
- better reflect the wishes of the principal, the Tribunal can make one or more of the following orders (see s.36(4) of the Act).

It can make:

- an order varying the term of, or a power conferred by, the enduring power of attorney;
- an order removing the attorney;
- an order appointing a substitute attorney to replace an attorney who has vacated the office or been removed by the Tribunal;
- an order reinstating an enduring power of attorney that has lapsed because the attorney is no longer able to perform their duties;
- an order directing or requiring certain things such as:
 - that an attorney provide accounts and other information to the Tribunal or to a person nominated by the Tribunal
 - that an attorney lodge with the Tribunal a copy of all records and accounts kept by the attorney of dealings and transactions made under the enduring power of attorney
 - that the records and accounts be audited by an auditor appointed by the Tribunal and that a copy of the report of the auditor be provided to the Tribunal
 - that the attorney submit a plan of financial management to the Tribunal for approval

- limiting the disclosure of accounts or other information by the attorney
- an inquiry and report on the conduct of the attorney;
- an order revoking all or part of the enduring power of attorney;
- any other orders as the Tribunal thinks fit.

The Tribunal can review the operation and effect of an enduring power of attorney and make an order declaring that the principal:

- lacks capacity for the time being; or
- lacked capacity at or during a specified time (see s.36(5) and (6) of the Act).

If the Tribunal makes a declaration that the principal lacks capacity for the time being, the principal is no longer competent to operate their affairs and only their appointed attorney can undertake financial transactions on behalf of the principal.

A declaration that the principal lacks capacity for the time being continues to have effect until the Tribunal makes a further order bringing the declaration to an end.

The Tribunal can treat the application to review an enduring power of attorney as an application for a financial management order

The Tribunal may decide to treat the request for review as an application for a financial management order. If satisfied that a financial management order is needed in the best interests of the principal, the Tribunal can then make a financial management order:

- placing the principal's affairs under the management of a private financial manager subject to the directions of the NSW Trustee, or
- committing the management of the principal's property and affairs to the NSW Trustee (see s.37 of the Act).

Who are the parties to a review?

The *Powers of Attorney Act 2003* defines the parties to an application for review of an enduring power of attorney to be:

- the applicant;
- the person who made the enduring power of attorney;
- each attorney appointed under the enduring power of attorney;
- any other person that has been joined as a party to the review hearing.

Can I have a lawyer there?

The Tribunal will conduct the hearing with as little formality as possible. Parties to the application can be represented by a lawyer but usually this is not necessary. If you would like to have a legal or other representative, you must get the Tribunal's approval. Your representative should make this request in writing to the Tribunal as soon as possible – at least five working days before the hearing. The request should include the reasons you want to be represented. If this is done, the Tribunal may make its decision about whether or not to grant leave for legal representation before the hearing date. Otherwise, it will make this decision at the beginning of the hearing.

When will I know the outcome?

The Tribunal will usually tell you their decision at the end of the hearing. Later the Tribunal will prepare a written Order and Reasons for their Decision. These will be sent out to the parties to the hearing. Not all people who attend the hearing are parties, so not everyone will be given copies of the orders and reasons.

Referring an application to the Supreme Court

The Tribunal may refer an application made to it for a review of an enduring power of attorney to the Supreme Court (see s.34(1) of the Act).

While the Tribunal is not limited in the matters it may take into account when deciding whether or

not to refer an application to the Supreme Court, it can take into account one or more of the following (see s.34(2) of the Act):

- whether the application relates to the effect of the enduring power of attorney on third parties;
- whether the application is likely to raise for consideration complex or novel legal issues that the Supreme Court is better suited to determine; or
- any other matter it considers relevant.

Referring questions of law to the Supreme Court

The Guardianship Tribunal may of its own initiative, or at the request of a party, refer a question of law arising in an application under Part 5 *Powers of Attorney Act 2003* to the Supreme Court (see s.39(1) of the Act).

What if I disagree with the decision?

If you are a party to the hearing and you disagree with the decision made by the Guardianship Tribunal, you may be able to appeal to the Supreme Court or the Administrative Decisions Tribunal on a question of law.

If you want to appeal the decision, you should seek independent legal advice. You must appeal within 28 days of receiving the reasons for decision. The Supreme Court or the Administrative Decisions Tribunal may accept an appeal outside this time in some circumstances.

For more information contact

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