

FOLEY'S | LIST

POWERS OF ATTORNEY ACT 2014

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THE BACKSHEET

FOLEY'S LIST SUCCESSION LAW NEWSLETTER

POWERS OF ATTORNEY ACT 2014by **Andrew Dickenson**

The *Powers of Attorney Act 2014* ("the Act") was assented to on 26 August 2014 and commenced operation on 1 September 2015. The Act applies to all powers of attorney executed since that date.

In many respects, the *Act* consolidates the law regarding the appointment of attorneys and guardians previously contained in the *Instruments Act 1958* and the *Guardianship and Administration Act 1986*. However, the *Act* also introduces important changes which create significant risk for attorneys that ought to be explained to them before they accept appointment as an attorney, and before they commence to act under the power.

By section 37 of the *Act*, an enduring power of attorney is effective if the attorney signs a statement of acceptance that records that the attorney "understands the obligations of an attorney under an enduring power of attorney under this *Act* and the consequences of failing to comply with those obligations [and] undertakes to act in accordance with the provisions of the *Act* that relate to enduring powers of attorney".

Pursuant to section 135 of the *Act*, it is now an offence for an attorney to obtain a financial advantage from the power, or to cause loss to the donor of the power (now called the "principal"). By signing a statement that complies with s.37, the

attorney will be acknowledging that they are prohibited from obtaining a financial advantage or causing loss to the principal. The attorney will also be acknowledging that they are aware that a breach of these obligations may expose them to five years' imprisonment or a penalty of 600 penalty units, being \$91,002.

The creation of an offence for "obtaining financial advantage" or "causing loss to the principal" exposes an attorney to considerable risk. Such allegations are frequently made against attorneys, usually in the context of disputes between siblings as to the conduct of one sibling as an attorney by other siblings in relation to their parents' finances. These disputes are often fought out in VCAT when a sibling applies for an order for the revocation of a power of attorney in favour of their sibling. These proceedings can be bitterly fought, particularly where the parties see their inheritance disappearing. The possibility of charges being laid against an attorney under s.135 is likely to add a whole new dimension to such proceedings.

Most attorneys would not be familiar with concepts such as fiduciary obligations and would be surprised to be told that they ought not, for example, to mix their own funds with the funds of their principal. They would be even more surprised to be told that using their principal's funds to pay for shopping, for example, that may contain some items for their own personal

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use, could expose them to a significant fine or even imprisonment. Yet, on its face, s.135 will do exactly that.

Section 135 also makes it an offence for an attorney to cause loss to "another person": s.135(1)(b). It is not clear who that other person may be, but it may give rise to an argument that an attorney has committed an offence where he or she has diminished the estate of the principal in circumstances where the principal has not suffered any loss, because they had ample funds during their lifetime, but the beneficiaries of their estate have suffered a loss by reason of the attorney's conduct. Again, this possibility could see an attorney exposed to risk of charges, even beyond the lifetime of the principal, if it were to be proved that some conduct of the attorney had caused loss to the principal's estate, and thereby to the principal's beneficiaries, being "another person" under s.135(1)(b).

Accordingly, it would be prudent for any practitioner drafting a power of attorney and being present at the

signing of a power of attorney by the attorney, to inform the attorney of the full extent of their obligations under the *Act* and the risks involved in acting as an attorney. Given that the practitioner will have been instructed by the principal to prepare the power of attorney, it may be that the practitioner will be obliged to inform the attorney that they ought to obtain their own independent legal advice prior to accepting the appointment and signing the statement required by s.37. Whilst this may be considered to be excessively cautious, it is not hard to imagine circumstances where an attorney who has signed a s.37 acceptance statement may complain about the practitioner who presented the statement to them for signing if there is subsequent charge of the attorney under s.135. This is something that the legal profession will need to consider over time and it may well be that the costs to the community in making powers of attorney will be significantly increased.