



# GUIDE TO THE GUARDIANSHIP AND ADMINISTRATION ACT 2019 (VIC)

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Judicial  
College of  
Victoria

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## 1 Introduction

### 1.1 About this Publication

This Guide to the *Guardianship and Administration Act 2019 (Vic)* is a project of the Judicial College of Victoria in conjunction with VCAT.

The *Guardianship and Administration Act 2019 (Vic)* commences on 1 March 2020, substantially updating the existing law relating to guardianship and administration. This publication is intended to assist Tribunal members and users to understand these changes.

The guide explains the operation of the *Guardianship and Administration Act 2019 (Vic)* and incorporates relevant principles and discussion from existing authorities, legislative materials and reports of government and law reform bodies. Content has been researched and drafted by Judicial College researchers in collaboration with VCAT.

This publication was produced by Andrix Lim. The Judicial College is grateful for the contributions, review, and guidance provided by VCAT Deputy President Genevieve Nihill AM and Senior Member Bernadette Steele.

Feedback or suggestions for improvement are welcome and may be emailed to [info@judicialcollege.vic.edu.au](mailto:info@judicialcollege.vic.edu.au).

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## 1.2 List of abbreviations

The following abbreviations are used to describe common names of legislation and reports throughout the guide.

<b>Name of Legislation or Report</b>	<b>Abbreviation</b>
Australian Law Reform Commission, <i>Equality, Capacity and Disability in Commonwealth Laws</i> (Final Report No 124, August 2014)	ALRC Report
<i>Guardianship and Administration Act 1986</i> (Vic)	<i>1986 Act</i>
<i>Guardianship and Administration Act 2019</i> (Vic)	<i>2019 Act</i>
<i>MTPD Act</i>	<i>MTPD Act</i>
New South Wales Law Reform Commission, <i>Review of the Guardianship Act 1987</i> (Report No 145, May 2018)	NSWLRC Report
<i>POA Act</i>	<i>POA Act</i>
Tasmania Law Reform Institute, <i>Review of the Guardianship Act 1995 (Tas)</i> (Report No 26, December 2018)	TLRI Report
<i>VCAT Act</i>	<i>VCAT Act</i>
Victorian Law Reform Commission, <i>Guardianship</i> , Final Report 24 (2012)	VLRC Report

### 1.3 About the 2019 Act and legislative history

The then Victorian Attorney-General Martin Pakula introduced the initial Guardianship and Administration Bill 2018 ('old Bill') into Parliament on Wednesday 06 March 2018, proposing a legislative scheme in relation to guardianship and administration that re-enacts the current law with amendments.

The old Bill was intended to replace the *1986 Act* with

... a law that reflects a contemporary understanding of decision-making capacity and disability, and recognises the rights of people with a decision-making impairment and the responsibilities of those who interact with such people — carers, health and accommodation providers, and the courts and tribunals.<sup>1</sup>

While the old Bill passed both houses, it failed to receive Royal Assent and subsequently lapsed at the end of the 58<sup>th</sup> Victorian Parliament. The new Attorney-General, Jill Hennessy, re-introduced the new Guardianship and Administration Bill 2018 ('Bill') into the Legislative Assembly on 19 December 2018 with minor and technical amendments from the old Bill.<sup>2</sup>

The Bill aims to achieve several objectives:

- Incorporate the recommendations of the United Nations Convention on the Rights of Persons with Disabilities, the 2012 report of the Victorian Law Reform Commission on *Guardianship* and the 2014 report of the Australian Law Reform Commission on *Equality, Capacity and Disability in Commonwealth Laws*.<sup>3</sup>
- Harmonise the concepts and terminology used in other Acts to "...promote consistent approaches and understanding of the rights, responsibilities and functions in relation to substitute decision-making that are articulated in these pieces of legislation."<sup>4</sup>
- Balance the rights of people with disabilities and ensuring that there are effective mechanisms for protection when protection is needed.<sup>5</sup>

The *2019 Act* passed both houses of Parliament with amendments from the Animal Justice Party,<sup>6</sup> and received royal assent on 04 June 2019.<sup>7</sup> The *2019 Act* came into operation on the default commencement date of 1 March 2020.<sup>8</sup>

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<sup>1</sup> Victoria, Parliamentary Debates, Legislative Assembly, 7 March 2018, 27 (Martin Pakula, Attorney-General).

<sup>2</sup> The only changes were that the default commencement date was now 1 March 2020 (formerly 1 June 2019), keeping with the AG's intent for a one-year delay, and that references to the *1986 Act* in the Part 10 transitional provisions was now named 'old Act' rather than '*1986 Act*'.

<sup>3</sup> Victoria, Parliamentary Debates, Legislative Assembly, 19 December 2018, 49–50 (Jill Hennessy, Attorney-General).

<sup>4</sup> These Acts include the *POA Act*, *Mental Health Act 2014* (Vic) and *MTPD Act*. Victoria, Parliamentary Debates, Legislative Assembly, 19 December 2018, 49–50 (Jill Hennessy, Attorney-General).

<sup>5</sup> Victoria, Parliamentary Debates, Legislative Assembly, 19 December 2018, 49–50 (Jill Hennessy, Attorney-General).

<sup>6</sup> Victoria, Parliamentary Debates, Legislative Council, 29 May 2019, 1 (Shaun Leane, President of the Legislative Council).

<sup>7</sup> Victoria, Victoria Government Gazette, No S 124. 4 June 2019, 1.

<sup>8</sup> Guardianship and Administration Bill 2018 (Vic) s 2(2); Victoria, Parliamentary Debates, Legislative Assembly, 19 December 2018, 49–51 (Jill Hennessy, Attorney-General).

The *2019 Act* repeals the previous *1986 Act* on guardianship and administration, and restructures the provisions into a more modern framework that recognises the rights of people with a decision-making impairment and the responsibilities of those who interact with such people.

The key changes of the *2019 Act* included:

- A more modern concept of decision-making capacity and decision-making principles;
- Introducing the concept of supported decision-making in Guardianship and Administration;
- Clarifying and streamlining provisions on the appointment of guardians and administrators at VCAT;
- Allowing enforcement of decisions of guardians and administrators against third parties through VCAT;
- Introducing a dispute resolution process for guardians and administrators who are appointed for the same represented person;
- Introducing offences that penalise a guardian or administrator who dishonestly uses their appointment to gain a financial advantage or cause loss; and
- Allowing a process for the Supreme Court or VCAT to order a guardian or administrator to compensate a person for a loss caused by contraventions by the guardian or administrator.

These will be discussed further in the guide.



## 2 Preliminary Matters

### 2.1 Principles under the 2019 Act

The *2019 Act* lists principles that decision-makers and VCAT members must have regard to in their role. These were modelled on law reform commission reports and the *United Nations Convention on the Rights of Persons with Disabilities* ('UN Convention'), and aim to reflect a contemporary understanding of disability and the need to recognise people with disabilities as persons before the law and their right to make choices for themselves.

The principles are intended to highlight the public policy that the *2019 Act* seeks to apply.<sup>9</sup> They also provide guidance and aid in interpretation to tribunal members, the Public Advocate, State Trustees, and guardians and administrators, when applying the legislation or exercising power.<sup>10</sup>

#### 2.1.1 General principles

The primary object of the *2019 Act* is to protect and promote the human rights and dignity of persons with a disability and to recognise the need to support persons with a disability to make, participate in and implement decisions that affect their lives.<sup>11</sup>

In furtherance of this, the *2019 Act* establishes general principles that a person exercising a power, carrying out a function or performing a duty under the *2019 Act* must have regard to.<sup>12</sup> These are intended to clearly explain the values upon which the law is based and guide interpretation,<sup>13</sup> and apply to everyone including people on formal supportive guardianship orders, supportive administration orders, and represented people generally.<sup>14</sup>

The general principles are:<sup>15</sup>

1. a person with a disability who requires support to make decisions should be provided with practicable and appropriate support to enable the person, as far as practicable in the circumstances:
  - to make and participate in decisions affecting the person; and
  - to express the person's will and preferences; and
  - to develop the person's decision-making capacity;
2. the will and preferences of a person with a disability should direct, as far as practicable, decisions made for that person; and
3. powers, functions and duties should be exercised, carried out and performed in a way which is the least restrictive of the ability of a person with a disability to decide and act as is possible in the circumstances. This applies to VCAT as well as anyone else acting under the *2019 Act*.

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<sup>9</sup> Explanatory Memorandum, Guardianship and Administration Bill 2018 (Vic) 7; Also see VLRC Report 78 [6.1]; Victoria, Parliamentary Debates, Legislative Assembly, 7 March 2018, 27 (Martin Pakula, Attorney-General).

<sup>10</sup> NSWLRC Report 42; VLRC Report 78 [6.2].

<sup>11</sup> Explanatory Memorandum, Guardianship and Administration Bill 2018 (Vic) 7.

<sup>12</sup> *2019 Act* s 8(1). This also includes VCAT members: *2019 Act* s 8(2).

<sup>13</sup> VLRC Report 89 [6.72].

<sup>14</sup> Explanatory Memorandum, Guardianship and Administration Bill 2018 (Vic) 7-8.

<sup>15</sup> *2019 Act* s 8(1).

These are in addition to other statutory duties or considerations under the *2019 Act*.

These general principles recognise the need to develop supported decision-making so that people with a disability can exercise an equal right to make decisions. It is not prescriptive as to by whom, and how, the support may be given, but reflects a '*general recognition that the focus must now move from the challenges facing a person with disability to the supports that should be provided to enable them to make decisions and exercise their legal capacity.*'<sup>16</sup>

### 2.1.2 Promoting the personal and social wellbeing of a person

To make guardianship, administration or supportive orders, and in certain situations for special medical procedures, VCAT must now be satisfied that the order will 'promote the personal and social wellbeing' of the proposed represented person. This is a new standard that guardians or administrators ('decision-makers'), supportive guardians or administrators ('supporters') and VCAT Members must adhere to before making decisions regarding the represented/proposed represented person.<sup>17</sup>

This change is to recognise the need to support people with disability to make, participate in and implement decisions that affect their lives, and otherwise provides that a person's will and preferences should direct decisions affecting the person as far as possible.<sup>18</sup> It also is said to adopt more commonly-used language in promoting a rights-based approach.<sup>19</sup>

The *2019 Act* provides a non-exhaustive list of ways that personal and social wellbeing is promoted:<sup>20</sup>

- recognising the inherent dignity of the person;
- respecting the person's individuality;
- having regard to the person's existing supportive relationships, religion, values and cultural and linguistic environment;
- respecting the confidentiality of confidential information relating to the person; and
- recognising the importance to the person of any companion animal the person has and having regard to the benefits that may be obtained from the person having any companion animal.

As this principle is subjective and targeted at the particular represented person, what is meant by "personal and social wellbeing" will depend on each individual's circumstances.<sup>21</sup> It also signals to decision-makers that their duty is broader than their obligations under the *1986 Act*, as they must now act in a way that promotes rather than protects the represented person.<sup>22</sup>

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<sup>16</sup> ALRC Report 68 [3.23].

<sup>17</sup> NSWLRC Report 49–50.

<sup>18</sup> Victoria, Parliamentary Debates, Legislative Assembly, 19 December 2018, 50 (Jill Hennessy, Attorney-General).

<sup>19</sup> TLRI Report 189–190.

<sup>20</sup> *2019 Act* s 4.

<sup>21</sup> NSWLRC Report 50.

<sup>22</sup> For example, a decision-maker may decide that the represented person's assets are to be used for the person's overall welfare, including spending on items that make the person's life more enjoyable, rather than in a way to merely preserve the person's assets: *Ibid*.

### 2.1.3 Decision-making principles

A decision-maker must have regard to the decision-making principles.<sup>23</sup> This applies for represented persons who are the subject of a guardianship, administration, or administration (missing person) order,<sup>24</sup> and reflects the shift away from the best interests standard under the *1986 Act*<sup>25</sup> to involvement of the person with a disability in the process.

The decision-making principles are that:<sup>26</sup>

- a) the decision-maker should give all practicable and appropriate effect to the represented person's will and preferences, if known.
- b) if the decision-maker is not able to determine the represented person's will and preferences, the decision-maker should give effect as far as practicable in the circumstances to what the decision-maker believes the represented person's will and preferences are likely to be, based on all the information available, including information obtained by consulting the represented person's relatives, close friends and carers;
- c) if the decision-maker is not able to determine the represented person's likely will and preferences, the decision-maker should act in a manner which promotes the represented person's personal and social wellbeing;
- d) if the represented person has a companion animal, the decision-maker should act in a manner that recognises the importance of the companion animal to the represented person and any benefits the represented person obtains from the companion animal;
- e) the represented person's will and preferences should only be overridden if it is necessary to do so to prevent serious harm to the represented person. Any override should be limited to the greatest extent possible, and decision-makers should continue to attempt to find ways to give effect to a person's will and preferences in these circumstances.<sup>27</sup>

In summary, decision-makers:

- are required to give effect to a person's will and preferences;
- must determine a person's likely will and preferences if a person's actual will and preferences cannot be determined;
- are required to promote a person's personal and social wellbeing if their likely will and preferences cannot be determined; and
- may override a person's will and preferences where necessary to prevent serious harm to the represented person.

The term 'will and preferences' is not defined in the *2019 Act*, but is derived from the UN Convention and mirrors other jurisdictions. Decision-makers and VCAT have a wide scope to determine what the person's will and preferences are (or may be).<sup>28</sup>

The decision-making principles also do not refer to 'current' will and preferences, although the use of 'likely to be' in (b) indicates currency in the particular circumstances. However, where conflict arises between 'current' and 'previously communicated' will and preference (such as

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<sup>23</sup> *2019 Act* s 9(1).

<sup>24</sup> *Ibid* s 9(2).

<sup>25</sup> As was previously the case in section 4(2)(b) of the *1986 Act*.

<sup>26</sup> *2019 Act* s 9(1).

<sup>27</sup> TLRI Report 191.

<sup>28</sup> ALRC Report 78.

where that change has occurred because of a decision-making disability), the *2019 Act* impliedly allows flexibility for decision-makers to decide the point in time that the will and preferences is ascertained.<sup>29</sup> Conversely, where the person's will and preference may conflict, or the decision-maker is unable to pinpoint what they are, they may fall back on acting in such a way that promotes the represented person's personal and social wellbeing.<sup>30</sup>

The *2019 Act* also provides that the decision-maker may override will and preferences where necessary to prevent serious harm to the represented person. This may be difficult where the represented person expresses views or performs actions that might lead to outcomes that are significantly detrimental to health and welfare, such as self-harming or anorexic behaviour.<sup>31</sup>

As to questions such as the meaning of 'serious harm' or whether a person's wishes can be overridden to prevent serious harm to a third person, the *2019 Act* is silent on that point, and these issues may be a matter for interpretation in future.

## 2.2 Decision-making capacity

In deciding whether to make an order, VCAT must be satisfied that the person does not have decision-making capacity in relation to the particular matter because of that disability.

This approach to capacity harmonises the *2019 Act* with the capacity definitions in other similar Victorian legislation, such as the *POA Act*, the *Mental Health Act 2014 (Vic)* and the *MTPD Act*.

A person is presumed to have decision-making capacity unless there is evidence to the contrary,<sup>32</sup> and will have decision-making capacity if they are able:

- to understand the information relevant to the decision and the effect of the decision. A person is taken to understand if they understand an explanation of the information given in a way that is appropriate to the person's circumstances, whether by using modified language, visual aids or any other means;<sup>33</sup>
- to retain that information to the extent necessary to make the decision;
- to use or weigh that information as part of the process of making the decision; and
- to communicate the decision and the person's views and needs as to the decision in some way, including by speech, gesture or other means.<sup>34</sup>

Medical evidence is usually required to show that a person lacks capacity, since this is a matter of expert medical judgement. Commentators have suggested that it is also wise to have regard to any cultural or linguistic factors, and any other relevant considerations pertaining to the person's culture, when making this assessment.<sup>35</sup> A person conducting the assessment of decision-

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<sup>29</sup> TLRI Report 188.

<sup>30</sup> *Ibid* 191.

<sup>31</sup> One ALRC submission gave the example of PEG feeding for people with anorexia, which would not be allowed unless the individual agreed to it: ALRC Report 84 [3.86].

<sup>32</sup> *2019 Act* s 5(2).

<sup>33</sup> *Ibid* s 5(3).

<sup>34</sup> *Ibid* s 5(1).

<sup>35</sup> NSWLRC Report 62-63.

making capacity (including VCAT) must take reasonable steps to conduct it at a time and in an environment in which capacity can be assessed most accurately.<sup>36</sup>

While it may be obvious that the person with a disability has one or more impairments or physical disabilities, these are only relevant in determining if they affect decision-making capacity. For example, physical disability does not in itself affect a person's ability to make decisions, but severe physical disability as the VLRC Report noted may impair a person's ability to communicate their decision and therefore fail the test of capacity.<sup>37</sup>

The *2019 Act* provides guidance on the meaning of 'decision-making capacity', that:<sup>38</sup>

- a person may have decision-making capacity in relation to some matters and not others;
- if a person lacks decision-making capacity, it may be temporary;
- it should not be assumed that a person does not have decision-making capacity either:
  - on the basis of the person's appearance; or
  - merely because the person makes a decision that in the opinion of others is unwise.<sup>39</sup> This can be contrasted with the comparable section in the *POA Act*, which allows consideration of whether the decision has a high risk of being seriously injurious to the person's health or wellbeing.<sup>40</sup>
- a person has decision-making capacity if it is possible for them to make the decision with practicable and appropriate support. Examples include:
  - using information or formats tailored to the particular needs of a person;
  - communicating or assisting a person to communicate the person's decision;
  - giving a person additional time and discussing the matter with the person; or
  - using technology that alleviates the effects of a person's disability.

Under the *1986 Act*, where the person may make decisions with support but lacks impartial supports, VCAT could find that the person lacked capacity where the person required the protection of independent decision makers.<sup>41</sup>

However, the *2019 Act* now allows for a supportive decision-making scheme to assist the person in making their decision, allowing VCAT to make a supportive order should the person consent and a suitable person is available.<sup>42</sup> Therefore, VCAT may consider that if the person is given practicable and appropriate support via a supportive decision-maker, the person will have decision-making capacity.<sup>43</sup>

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<sup>36</sup> *2019 Act* s 6. For example, some may demonstrate better decision-making ability in their home environment rather than a hospital, or in the morning rather than afternoon: VLRC Report [7.160].

<sup>37</sup> VLRC Report 254, *EML (Guardianship)* [2018] VCAT 766, [66] (as it relates to the *1986 Act*) although in that case physical disability did not prevent the person communicating and the person was found to have decision-making capacity.

<sup>38</sup> *2019 Act* s 5(4).

<sup>39</sup> Other assumptions that should not be made include the person's age, behaviour and beliefs, the person's level of literacy or education, that the person is known to have a disability, illness or other medical condition, or the person's methods of communication: NSWLRC Report 62-63; TLRI Report 101-103.

<sup>40</sup> *POA Act* s 4(5).

<sup>41</sup> *XAC (Guardianship)* [2016] VCAT 1792 [67].

<sup>42</sup> For more information, see [4 – Supportive guardianship and administration orders](#).

<sup>43</sup> *2019 Act* s 87(2)(b).



## 2.3 Disability

The issue of what is a disability is relevant to determining capacity. Disability is defined to mean:<sup>44</sup>

- neurological impairment;
- intellectual impairment;
- mental disorder;
- brain injury;
- physical disability; or
- dementia.

This replaces the previous definition under the *1986 Act*, and the reference to neurological impairment is intended to include a person with an autism spectrum disorder.<sup>45</sup>

Intellectual impairment is not defined in the *2019 Act*. VCAT has in the past considered this term as comparable to “intellectual disability” under the *Disability Act 2006 (Vic)*,<sup>46</sup> which constitutes the “concurrent existence of significant sub-average general intellectual functioning and significant deficits in adaptive behaviour manifesting before the age of 18.”<sup>47</sup> Tests to determine cognitive and adaptive functioning may be affected by other factors such as the person’s level of education and English skills, and therefore caution is urged in assessment.<sup>48</sup>

Finally, a combination of low intellectual functioning and poor financial decisions does not of itself constitute a disability if there are valid and coherent alternative explanations of events and the medical opinion is limited.<sup>49</sup>

## 2.4 Personal or Financial Matters

A representative or supportive order may be made over the represented person’s personal matters or financial matters respectively. These are defined to align with the *POA Act* and will be explored further below.

Personal and financial matters are seldom completely separate, and in some situations financial and personal decisions may overlap.<sup>50</sup> However, each category often requires different skills and this delineation justifies separate orders, even if one person will be both guardian and administrator.<sup>51</sup>

These matters are not exhaustively defined, and whether the matter constitutes personal or financial matters may depend on the particular circumstances. VCAT may determine this after an order is made through their advice jurisdiction.

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<sup>44</sup> Ibid s 3 (definition of ‘disability’).

<sup>45</sup> Explanatory Memorandum, Guardianship and Administration Bill 2018 (Vic) 2.

<sup>46</sup> *IVH (Guardianship)* [2018] VCAT 1839, [69].

<sup>47</sup> *Disability Act 2006 (Vic)* s 3 (definition of ‘intellectual disability’).

<sup>48</sup> *IVH (Guardianship)* [2018] VCAT 1839, [70]–[71].

<sup>49</sup> *UWJ (Guardianship)* [2018] VCAT 1063, [12]–[18].

<sup>50</sup> VLRC Report 59, 243. For example, the decision about where a person should live is a personal or lifestyle decision that also involves significant financial considerations.

<sup>51</sup> Ibid; TLRI Report 32.

### 2.4.1 Personal matters

Guardianship and supportive guardianship orders are made over personal matters specified in the order. Personal matters refer to any matter, including legal matters, relating to personal or lifestyle affairs. This is not a closed list, and some examples in the *2019 Act* include:<sup>52</sup>

- where and with whom the person lives;
- other persons with whom the person associates;
- whether the person works and, if so, the kind and place of work and employer;
- whether the person undertakes education or training and if so, the kind of education or training and the place where it takes place;
- daily living issues such as diet and dress; and
- certain medical treatment decisions.<sup>53</sup>

Other examples in different law reform commission reports include:<sup>54</sup>

- whether to consent to a forensic examination of a person;
- whether a person will go on a holiday and where;
- smoking (where it does not overlap with medical decisions); and
- restricting visits where it promotes their personal and social wellbeing, and prohibiting visits where the visit would have an adverse effect on the person.

### 2.4.2 Financial matters

Administration, supportive administration and administration (missing person) orders are made over financial matters specified in the order. Financial matters refer to any matter, including legal matters, relating to the person's financial or property affairs.<sup>55</sup> This is not a closed list, and some examples in the *2019 Act* include:

- making money available to the person for the person's personal expenditure;
- paying expenses of the person and any dependants relating to maintenance and accommodation, including:
  - purchasing an interest in a property to accommodate the person or any dependants, or
  - making a contribution to a property to accommodate the person or any dependants, or
  - otherwise making payments in relation to such property;
- paying the person's debts, including any fees and expenses to which an administrator is legally entitled;
- receiving and recovering money payable to the person;
- carrying on any trade or business of the person;
- performing any contracts entered into by the person;
- doing the following with regards to the person's property:
  - discharging any mortgage;
  - paying rates, taxes and insurance premiums or other outgoings; and

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<sup>52</sup> *2019 Act* s 3 (definition of 'personal matter'). Also see VLRC Report xvii.

<sup>53</sup> Excluding decisions about matters as they relate to special medical procedures. For more information, see [7 – Special Medical Procedures](#).

<sup>54</sup> TLRI Report 164–5; NSWLRC Report 27.

<sup>55</sup> *2019 Act* s 3 (definition of 'financial matter').

- otherwise preserving or improving the person's property;
- insuring the person or the person's property;
- making investments for the person;
- continuing investments of the person, including taking up rights to issues of new shares or options for new shares to which the person becomes entitled by the person's existing shareholding;
- undertaking any real estate transaction for the person;
- dealing with land for the person;
- undertaking a beneficial transaction for the person involving the use of the person's property as security for an obligation, including taking out a loan on behalf of the person or giving a guarantee on behalf of the person; and
- withdrawing money from or depositing money into an account of the person with a financial institution.

### 2.4.3 Legal matters

Both personal and financial matters also include legal matters as it relates to the person's personal and financial matters respectively. Here, 'legal matters' are defined as:<sup>56</sup>

- the use of legal services for the person's benefit; or
- bringing or defending a legal proceeding or hearing in a court, tribunal or other body on behalf of the person, including settling a claim before or after a legal proceeding or hearing starts.

Examples under the *2019 Act* include:<sup>57</sup>

- the use of legal services to obtain information about the person's legal rights; and
- the use of legal services to make a transaction.

Where it is unclear if the legal matter may be related to either a personal or financial matter (and therefore whether a guardian or administrator may be more appropriate), VCAT may choose to reject the application where it does not relate to the type of order sought. For example, an application for a guardianship order may be rejected where the order is sought as part of a migration application, as it may be more appropriate for an administration order.<sup>58</sup>

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<sup>56</sup> Ibid (definition of 'legal matter').

<sup>57</sup> Ibid.

<sup>58</sup> *NJB (Guardianship)* [2019] VCAT 1135, [10].

## 3 Guardianship and administration orders

### 3.1 Applications for guardianship and administration orders

#### 3.1.1 Applications by persons

Any person may apply to VCAT for an order to appoint a guardian or administrator ('decision-maker') for a person with a disability ('represented person'), if the proposed represented person is either:<sup>59</sup>

- at least 18 years of age; or
- under 18 years of age, but the order will take effect when that person reaches 18.

For administration orders, if the represented person does not reside in Victoria, the order only applies to that part of the person's property that is in Victoria.<sup>60</sup>

The content of the application must include:<sup>61</sup>

- the proposed represented person's name;
- the type of order sought, including details of the relevant personal or financial matters;
- details of the reasons for making the application;
- the proposed decision-maker's name and contact details;
- the name and contact details of:
  - the applicant, and
  - any persons who have a direct interest in the application (if known to the applicant). This includes the represented person's relatives,<sup>62</sup> any primary carer, close friends, any attorney appointed under an enduring power of attorney, and any supportive attorney appointed under the *POA Act*
- any support needs of the proposed represented person, including support provided by any companion animal.<sup>63</sup>

The parties to the proceeding are:<sup>64</sup>

- the applicant;
- the proposed represented person;
- the proposed decision-maker;
- any current decision-makers for the proposed represented person; and

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<sup>59</sup> *2019 Act* ss 22–23.

<sup>60</sup> *Ibid* s 23(2)

<sup>61</sup> *Ibid* s 24.

<sup>62</sup> See *Ibid* s 3 (definition of 'relative') on who is a relative. The list is wider than the definition of relative in the *1986 Act* as it includes step-parents and step-siblings.

<sup>63</sup> This is intended to refer to any supports that might be necessary to enable to the proposed represented person to attend and participate in the hearing, such as access requirements, transportation needs, alternative communication methods (e.g. ability to use a recognised sign language if the person has a hearing impediment, or use of electronic or pictorial/symbol communication if speech is impaired), and the possibility of using video link if the person is bedridden: Explanatory Memorandum, Guardianship and Administration Bill 2018 (Vic) 43.

<sup>64</sup> *2019 Act* s 25.

- any other person VCAT orders to be joined as a party to the proceeding under section 60 of the *VCAT Act*.<sup>65</sup>

The following people are entitled to notice of an application, the hearing and any order made in the proceeding, where applicable:<sup>66</sup>

- any party to a proceeding;
- the spouse or domestic partner of the proposed represented person;
- the primary carer of the proposed represented person;
- any person referred to in the application as having a direct interest in the application;
- the Public Advocate, where:
  - the proceeding is an application for a guardianship order; and
  - no person is proposed as guardian; and
- any other person VCAT directs be given notice.

The notice to a party to the application must include:<sup>67</sup>

- a copy of the application and any information filed in support of the application;<sup>68</sup>
- the names of—
  - the parties to the proceeding; and
  - the other persons entitled to the notice; and
- information about the rights of the party in relation to the application.

If the person is not a party, the notice must include:<sup>69</sup>

- a copy of the application;
- the names of—
  - the parties to the proceeding; and
  - the other persons entitled to the notice;
- information about the rights of the person to seek information about the application; and
- information about how to apply to VCAT to be made a party to the proceeding.

VCAT must start to hear an application for a guardianship or administration order within 30 days after the day on which the application is received by VCAT, unless VCAT or the principal registrar schedules a compulsory conference or refers the proceeding to mediation:<sup>70</sup>

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<sup>65</sup> *VCAT Act* s 60 sets out the test for ordering that a party is joined. VCAT can exercise this power on its own initiative or on application of any person.

<sup>66</sup> *2019 Act* s 26. This is for the purposes of notice and service requirements under sections 72(1), 99(1) and 116(2) of the *VCAT Act*.

<sup>67</sup> *2019 Act* s 27(1).

<sup>68</sup> However, a person may apply to the principal registrar that any documents lodged in relation to this proceeding not be disclosed to a specified person or class of persons: *VCAT Act* sch 1 pt 9 cl 37A.

<sup>69</sup> *2019 Act* s 27(2).

<sup>70</sup> *Ibid* s 28. This power may be exercised under *VCAT Act* pt 4 div 5.



The proposed represented person must attend the hearing in person, unless VCAT is satisfied that:<sup>71</sup>

- the person does not wish to attend the hearing in person;<sup>72</sup> or
- personal attendance is impracticable or unreasonable, despite any arrangement that VCAT may make.

### 3.1.2 Court-referred applications for guardianship and administration orders

Where the Supreme, County or Magistrates Court<sup>73</sup> considers that a party may need a decision-maker in any civil proceeding before them, the Court may refer the issue to VCAT for determination.<sup>74</sup> This referral is treated as if it were an application to VCAT for the relevant decision-maker or supporter,<sup>75</sup> and the prothonotary or the principal registrar is taken to be the applicant.<sup>76</sup>

## 3.2 Making guardianship and administration orders

VCAT may make a guardianship or administration order if satisfied about all of the following:<sup>77</sup>

1. because of the proposed represented person's disability, the person does not have decision-making capacity<sup>78</sup> in relation to:
  - the relevant personal matter (for guardianship orders); or
  - the relevant financial matter (for administration orders);
2. the proposed represented person is in need of a guardian or administrator, as the case requires, taking into account:
  - the proposed represented person's will and preferences (so far as they can be ascertained);
  - whether decisions in relation to the relevant personal or financial matter:
    - may more suitably be made by informal means; or
    - may reasonably be made through negotiation, mediation or similar means;<sup>79</sup>
  - the wishes of any primary carer or relative of the proposed represented person or other person with a direct interest in the application; and

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<sup>71</sup> *2019 Act* s 29. VCAT may also conduct all or part of a proceeding via teleconference, video links or any other system if they think it appropriate: *VCAT Act* s 100.

<sup>72</sup> For example, where the proposed represented person is in a dispute with attending parties: *THD (Guardianship)* [2017] VCAT 910, [179]–[182].

<sup>73</sup> *2019 Act* s 179(9).

<sup>74</sup> *Ibid* s 179(1).

<sup>75</sup> *Ibid* s 179(2)(a).

<sup>76</sup> The applicant is taken to be the prothonotary (in the case of a referral by the Supreme Court) or the principal registrar of the Court (in any other case): *Ibid* s 179(2)(b).

<sup>77</sup> *Ibid* s 30(2).

<sup>78</sup> For more information on decision-making capacity, see [2.1.3 – Decision-making capacity](#).

<sup>79</sup> For example, certain types of minor, typical or routine decisions, such as a person's diet in a residential service or recreational activities, may be more appropriately made through informal means: Explanatory Memorandum, *Guardianship and Administration Bill 2018 (Vic)* 20.

- the desirability of preserving existing relationships important to the proposed represented person;<sup>80</sup>
- 3. the order will promote the proposed represented person's personal and social wellbeing;<sup>81</sup> and
- 4. in the case of an application for an administration order for a proposed represented person who does not reside in Victoria, State Trustees has not been authorised to collect, manage, sell or otherwise dispose of or administer any property in Victoria in relation to which the administration order is sought.<sup>82</sup>

In determining whether to make an order, VCAT is acting in an administrative capacity and therefore must act compatibly with the *Charter of Human Rights and Responsibilities Act 2006* (Vic).<sup>83</sup>

After considering an application for a guardianship and administration order, VCAT may:<sup>84</sup>

- make a guardianship or an administration order;
- decline to make a guardianship order or an administration order, and instead make a supportive guardianship or supportive administration order;<sup>85</sup> or
- make no order.

### 3.2.1 Considerations in making an order

The test for making a guardianship or administration order raises several discrete issues:

- Does the proposed represented person have a disability?
- Does the order relate to personal or financial matters?
- Is the order necessary – is there a need for the order?

VCAT must be satisfied that the represented person has a disability, and that the matters fall within the categories of personal or financial matters. See [2 – Preliminary Matters](#) for more information about:

- [disability](#),
- [personal or financial matters](#),
- [decision-making capacity](#), and
- [promoting personal and social wellbeing](#).

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<sup>80</sup> *2019 Act* s 31.

<sup>81</sup> For more information on what constitutes personal and social wellbeing, see [2.1.2 Promoting the personal and social wellbeing of a person](#).

<sup>82</sup> The authorisation must be given under the *State Trustees (State Owned Company) Act 1994* (Vic) s 12.

<sup>83</sup> *PJB v Melbourne Health* [2011] VSC 327.

<sup>84</sup> *2019 Act* s 30(1).

<sup>85</sup> For more information on supportive orders, see [4 – Supportive guardianship and supportive administration orders](#).

### 3.2.2 Need

VCAT must decide whether the proposed represented person is in need of a guardian or administrator. Under the *1986 Act*, case law indicated that there should be proper and independent satisfaction as to whether a decision-maker is needed.<sup>86</sup> In assessing need, VCAT has considered it must be satisfied that:<sup>87</sup>

- there is a decision to be made, or there is a reasonable likelihood that a decision will be required to be made in the near or foreseeable future;<sup>88</sup> and
- the issue has not been resolved or decided because there is no decision-maker and the matter is inappropriate for informal decision-making.<sup>89</sup>

According to the VLRC Report, this concept of ‘need for decisions’ is intended to cover ongoing decisions that may need to be made, or decisions already being made informally.<sup>90</sup> VCAT has also held that where there is an eligible and competent attorney for personal and financial matters, applications for appointment of a guardian and administrator would usually fail because the person is not ‘in need’ of a guardian or an administrator.<sup>91</sup>

Another consideration in the topic of ‘need’ is the matter itself and the proposed represented person’s condition. For example, an administrator may be necessary where there is a complex financial issue or where the person’s financial affairs require considerable care.<sup>92</sup> However, where matters are minor or not urgent, an administrator would not be required.<sup>93</sup> The VLRC Report described this as whether “the pending decision [is] one of consequence.”<sup>94</sup>

VCAT has also held that ‘need’ is for the current matter in time,<sup>95</sup> and that it may order a reassessment at any time should the financial situation steady or the person’s health improve.<sup>96</sup> Accordingly, where the matter has resolved itself by the time of the hearing, the need is therefore resolved and the application may be dismissed.<sup>97</sup>

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<sup>86</sup> *Moore v Guardianship and Administration Board* [1990] VR 902, 916; *GM (Guardianship)* [2007] VCAT 2488; *NC (Guardianship)* [2009] VCAT 2430, [19].

<sup>87</sup> VLRC Report 255.

<sup>88</sup> *Re BWV* [2003] VCAT 121, [11]; *GM (Guardianship)* [2007] VCAT 2488, [15]; *DZZ (Guardianship)* [2018] VCAT 194, [29], [41]. VCAT has also said that further applications may be made should there be any change in circumstances: *DZZ (Guardianship)* [2018] VCAT 194, [51].

<sup>89</sup> *INM (Guardianship)* [2016] VCAT 1146, [42].

<sup>90</sup> VLRC Report 256–9; *XYZ v State Trustees Ltd* [2006] VSC 444, [44]; *GM (Guardianship)* [2007] VCAT 2488, [12]; *NC (Guardianship)* [2009] VCAT 2430, [21]. For example, the proposed represented person’s needs can be met by a parent with access to their bank account, or by support workers helping them to arrange to pay rent and other bills by direct debit: *NYO (Guardianship) (Amended)* [2017] VCAT 43, [24].

<sup>91</sup> *NYO (Guardianship) (Amended)* [2017] VCAT 43, [26]; *QJB (Guardianship)* [2018] VCAT 531, [20]; *TAG (Guardianship)* [2019] VCAT 234; cf *ZUS Guardianship List* [2014] VCAT 1621, [39]. Separately, where the attorney is incompetent an administrator may be preferable: *YMX (Guardianship)* [2019] VCAT 673, [59].

<sup>92</sup> *OFS (Guardianship)* [2014] VCAT 1598, [6].

<sup>93</sup> *NC (Guardianship)* [2009] VCAT 2430, [21]. For example, where an inpatient would spend money to purchase cigarettes or sweets rather than save money: *CLH (Guardianship)* [2014] VCAT 1123, [17]. For more information on supportive orders, see [4 – Supportive guardianship and administration orders](#).

<sup>94</sup> VLRC Report 244 [12.48].

<sup>95</sup> *GM (Guardianship)* [2007] VCAT 2488, [12]; *THD (Guardianship)* [2017] VCAT 910, [109].

<sup>96</sup> *KSJ (Guardianship)* [2018] VCAT 1275, [53]–[55].

<sup>97</sup> *XEZ (Guardianship)* [2018] VCAT 8, [6]; *NYO (Guardianship) (Amended)* [2017] VCAT 43, [72].

Separately, VCAT may make a supportive guardianship or supportive administration order as part of an application for a guardianship order or an administration order for a proposed represented person – for example, where VCAT decides that while a guardianship order is unnecessary, a supportive guardian would assist the person in making and communicating their decisions.<sup>98</sup>

### 3.3 Appointing guardians or administrators

To be appointed as a guardian or administrator, potential appointees must meet certain threshold and suitability requirements. These will be discussed in turn.

#### 3.3.1 Threshold requirements

If VCAT decides to make a guardianship order, VCAT may appoint a guardian who is an individual over the age of 18, and who consents to act as guardian.<sup>99</sup> VCAT must be satisfied that the individual:<sup>100</sup>

- will act in accordance with the statutory duties;
- is not in a position where the individual's interests conflict, or may conflict, with the interests of the proposed represented person;<sup>101</sup> and
- is a suitable person to act as the guardian for the proposed represented person.

VCAT may also appoint multiple persons as joint guardians if:<sup>102</sup>

- each person fulfils the threshold requirements and suitability matters; and
- VCAT considers it appropriate to do so.<sup>103</sup>

If VCAT decides to make an administration order, VCAT may appoint an administrator who is either a body corporate or an individual over the age of 18 and who consents to act as administrator.<sup>104</sup> VCAT must be satisfied that the individual:<sup>105</sup>

- will act in accordance with the statutory duties;
- is not in a position where the administrator's interests conflict, or may conflict, with the interests of the proposed represented person; and
- is a suitable person to act as the administrator for the proposed represented person; and
- has sufficient expertise to make decisions about any specified financial matter.

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<sup>98</sup> *2019 Act* s 87(1); Victoria, Parliamentary Debates, Legislative Assembly, 7 March 2018, 28 (Martin Pakula, Attorney-General).

<sup>99</sup> *2019 Act* s 32(1).

<sup>100</sup> *Ibid* s 32(1).

<sup>101</sup> These are not necessarily financial interests; for example, the proposed guardian wishing to reduce travel time in accommodation decisions or to eventually have the represented person live with the proposed guardian: *FDG (Guardianship)* [2019] VCAT 508, [38].

<sup>102</sup> *2019 Act* s 33(2). This also includes the Public Advocate or any other person.

<sup>103</sup> For example, where it would be consistent with the represented person's wishes, and where shared decision making might minimise the effect of the existing conflict between the decision-makers: *WRU (Guardianship)* [2018] VCAT 1171, [88].

<sup>104</sup> *2019 Act* s 32(2).

<sup>105</sup> *Ibid* s 32(2).

With regards to conflicting interests, some examples of possible conflicts include where the proposed administrator is already handling funds of the represented person<sup>106</sup> or has previously acted as a solicitor for a relative of the represented person.<sup>107</sup>

Sufficient expertise does not mean only professional administrators may be appointed. An accountancy practice would also have such expertise,<sup>108</sup> as would a legal practitioner.<sup>109</sup> There are also examples under the *1986 Act* of VCAT appointing family or friends of the represented person as administrator, and as such there is not always a need for professional expertise.

An administrator may seek advice from a professional adviser or from VCAT about the specified financial matters, although doing so too often may be an indication that they do not have sufficient expertise.<sup>110</sup> However, an alternative would be to appoint a joint administrator to supplement the shortfall in expertise.<sup>111</sup>

### 3.3.2 Suitability matters

To determine suitability to be a guardian or administrator, VCAT must take into account:<sup>112</sup>

- the proposed represented person's will and preferences (so far as they can be ascertained);
- the desirability of preserving existing relationships important to the proposed represented person;
- the desirability of appointing a person who is a relative or has a personal relationship with the proposed represented person, rather than appointing a person with no such relationship;
- whether the person will be available to the proposed represented person and able to meet and communicate with the proposed represented person;
- whether the person will act cooperatively with any current guardian or administrator for the proposed represented person (as the case requires);<sup>113</sup> and
- whether, in the case of an administration order, the person proposed as administrator is or was a VCAT Guardianship List member.

VCAT must also consider any statement of wishes for a future appointment lodged under the *2019 Act*.<sup>114</sup>

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<sup>106</sup> For example: *FDG (Guardianship)* [2019] VCAT 508, [46]. Also see *TAG (Guardianship)* [2019] VCAT 234.

<sup>107</sup> *VQL (Guardianship)* [2018] VCAT 1797, [17].

<sup>108</sup> *LWJ (Guardianship)* [2018] VCAT 775, [42].

<sup>109</sup> *LFH (Guardianship)* [2017] VCAT 1704, [20].

<sup>110</sup> For example: where an administrator had to engage friends and then a solicitor to negotiate the problems encountered: *ZUS Guardianship List* [2014] VCAT 1621, [46].

<sup>111</sup> *Ibid* [50]; *KAU (Guardianship)* [2019] VCAT 1721, [28].

<sup>112</sup> *2019 Act* s 32(3).

<sup>113</sup> See for example *WSA (Guardianship)* [2019] VCAT 1401, [33] where 'intense discord' between the current guardian and administrator and potential private guardian led VCAT to appoint an independent guardian.

<sup>114</sup> *2019 Act* s 32(6).



These considerations include a focus on relationships important to the proposed represented person and emphasise the desirability of maintaining pre-existing relationships of trust.<sup>115</sup> VCAT must also not assume, without any evidence, that a relative:<sup>116</sup>

- has interests that conflict, or may conflict, with those of the proposed represented person merely because the proposed guardian or administrator is a relative; or
- is unsuitable to be appointed merely because that relative disagrees with another relative of the proposed represented person about a matter pertaining to the proposed represented person.

The mere fact that the proposed decision-maker is a relative is not determinative of the appointment. As the principles of the *2019 Act* require, the first consideration is to give effect to the proposed represented person's will and preferences.<sup>117</sup> Therefore, if the proposed represented person does not wish the relative appointed (such as where there is a familial dispute) the relative is less likely to be appointed.

Further, where there is a familial dispute, appointing the relative would not be preserving existing relationships important to the proposed represented person, as the dispute shows the relationship has broken down.

Other matters that may be taken into account include:

- the understanding of the represented person's finances;<sup>118</sup>
- awareness of responsibilities as decision-makers;<sup>119</sup>
- whether there is any other matter that may prevent the person from effectively acting as a decision-maker;<sup>120</sup>
- whether the private proposed decision-maker is seeking appointment only for remuneration;<sup>121</sup> and
- the cost savings in appointing a particular candidate as opposed to another.<sup>122</sup>

### 3.3.3 Statement of wishes for future appointment

The current guardian/administrator, a supportive guardian/administrator, the primary carer, or a relative of the represented person, may lodge a 'statement of wishes for future appointment' with VCAT at any time.<sup>123</sup> The statement of wishes sets out:<sup>124</sup>

- the wishes of the lodger as to who should be appointed as a guardian or administrator for the represented person in the future; and
- the reasons for those wishes.

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<sup>115</sup> Explanatory Memorandum, Guardianship and Administration Bill 2018 (Vic) 20–21.

<sup>116</sup> *2019 Act* s 32(5).

<sup>117</sup> *Ibid* s 8(1)(b).

<sup>118</sup> *FBK (Guardianship)* [2019] VCAT 1236, [20].

<sup>119</sup> *Ibid*.

<sup>120</sup> For example, an intervention order against the proposed decision-maker, which may be relevant to their suitability and the represented person's will and preferences: *Ibid* [19].

<sup>121</sup> *VQL (Guardianship)* [2018] VCAT 1797, [13].

<sup>122</sup> *LWJ (Guardianship)* [2018] VCAT 775, [50]; *WRG (Guardianship)* [2019] VCAT 1642, [42]–[45].

<sup>123</sup> *2019 Act* s 35(1).

<sup>124</sup> *Ibid* s 35(2).

These will be taken into account during VCAT's consideration of suitability requirements.<sup>125</sup>

### 3.3.4 The Public Advocate and VCAT Members

VCAT may appoint the Public Advocate as guardian if VCAT is satisfied that no other person fulfils the threshold and suitability requirements.<sup>126</sup> This includes situations where it would be difficult for the candidate to perform their guardianship duties effectively, and it would be more effective to have an independent guardian or administrator, despite candidates being otherwise suitable.<sup>127</sup> This is to ensure that the decision-maker is able to bring objectivity to their role.<sup>128</sup>

Some examples of such situations include where the candidate is likely to be placed under duress or undue pressure from external parties,<sup>129</sup> or where there was 'articulated and observed animosity' between service providers and the candidate.<sup>130</sup>

Further, appointing the Public Advocate has been the preferred option where the represented person does not want the candidate to have that role (which is consistent with giving priority to the person's will and preferences) or where there is likely to be discord between multiple candidates or family members.<sup>131</sup>

VCAT may also appoint any former or present member of VCAT's Guardianship list as an administrator if VCAT considers that in the circumstances it is appropriate for the member to act as an administrator.<sup>132</sup>

## 3.4 What details must VCAT specify in an order?

In a guardianship order, VCAT must specify:<sup>133</sup>

- the name of the represented person;
- the name of the guardian;
- the personal matters in relation to which the guardian has powers;
- whether VCAT specifically confers on the guardian the power to undertake legal proceedings under section 40 of the *2019 Act*;
- any restrictions on the guardian's exercise of a power in relation to the relevant personal matters or legal proceedings; and
- whether the order is an urgent order.

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<sup>125</sup> Ibid s 32(6).

<sup>126</sup> Ibid s 33(1).

<sup>127</sup> See *NCX (Guardianship)* [2018] VCAT 520, [91]; *OQE (Guardianship)* [2019] VCAT 1507, [25].

<sup>128</sup> *KK (Guardianship)* [2009] VCAT 2219, [65].

<sup>129</sup> *BSM (Guardianship)* [2017] VCAT 288, [46].

<sup>130</sup> *DZZ (Guardianship)* [2018] VCAT 194, [43].

<sup>131</sup> *KK (Guardianship)* [2009] VCAT 2219, [63]; *LWJ (Guardianship)* [2018] VCAT 775, [21]; *YMX (Guardianship)* [2019] VCAT 673, [43]; *KAU (Guardianship)* [2019] VCAT 1721, [22].

<sup>132</sup> *2019 Act* s 32(4).

<sup>133</sup> Ibid s 34(1).

In an administration order, VCAT must specify:<sup>134</sup>

- the name of the represented person;
- the name of the administrator;
- the financial matters in relation to which the administrator has powers;
- any specified power available in Division 6 of the *2019 Act* that VCAT specifically confers on the administrator;
- any restrictions on the administrator's exercise of power in relation to the relevant financial matters or specified powers; and
- whether the order is an urgent order.

For administrators, VCAT may also specify any fee, remuneration or other reward from the represented person's estate that the administrator may receive.<sup>135</sup>

### 3.5 Related orders and proceedings at VCAT

#### 3.5.1 Urgent guardianship or administration order

An urgent guardianship or administration order ('urgent order') can be made without notice and without the participation of the proposed represented person. These orders last only for a brief period in urgent circumstances.

On application, VCAT may make an urgent order if VCAT is satisfied, on reasonable grounds, that there is an immediate risk of harm to the health, welfare or property of a proposed represented person if the order were not made.<sup>136</sup>

The risk of harm may be caused by one or more factors, including:<sup>137</sup>

- abuse, exploitation or neglect of the proposed represented person;<sup>138</sup> and
- self-neglect by the proposed represented person.

VCAT must be constituted by either a presidential member or a VCAT member who is an Australian lawyer sitting alone.<sup>139</sup> They may waive the notice requirements and the required participation of the represented person at the hearing.<sup>140</sup>

If an urgent order is made, VCAT must specify the duration of the order, which cannot exceed 21 days.<sup>141</sup> This may be renewed once for a maximum 21-day period.<sup>142</sup>

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<sup>134</sup> Ibid s 34(2).

<sup>135</sup> *2019 Act* s 175(1). For more information on remuneration for administrators, see [3.8.4 – Remuneration and Costs](#).

<sup>136</sup> Ibid s 36(1).

<sup>137</sup> Ibid s 36(2).

<sup>138</sup> For example, where a relative took the represented person out of a hostel where he was residing and refused to return him: *UKM (Guardianship)* [2017] VCAT 1732.

<sup>139</sup> *VCAT Act* sch 1 cl 31.

<sup>140</sup> *2019 Act* s 36(1).

<sup>141</sup> Ibid s 36(3)(a).

<sup>142</sup> Ibid s 36(3)(b).

As soon as practicable but within 42 days after making such an order, VCAT must hold a hearing to determine whether a guardianship or administration order should be made.<sup>143</sup> Where the order is considered no longer necessary, VCAT may dismiss the application for an order or a further order.

### 3.5.2 Special orders for unlawful detention or risk of harm

VCAT may in certain situations make orders in relation to proposed represented persons who are being unlawfully detained or at risk of harm.

This power is enlivened where a person has applied for a guardianship order and VCAT receives information on oath or affirmation that the proposed represented person:<sup>144</sup>

- is unlawfully detained against their will; or
- is likely to suffer serious damage to their physical, emotional or mental health or wellbeing unless immediate action is taken.

VCAT may, by order, empower the Public Advocate or some other person to visit the proposed represented person in the company of a police officer in order to prepare a report for VCAT ('visitation order').<sup>145</sup> The police officer may use reasonable force to enter the premises where the proposed represented person is, with such assistance as is necessary.<sup>146</sup>

If VCAT receives the report and is satisfied that one of the above circumstances exists, VCAT may order the proposed represented person be taken to a place specified in the order for assessment and placement until the application for a guardianship order is determined ('special order').<sup>147</sup>

It is an offence to delay or obstruct a person who is acting under a special order or a visitation order, with a maximum penalty of 20 penalty units.<sup>148</sup>

### 3.5.3 Order for represented person to comply with guardian's decisions

While a guardianship order is in force, VCAT may make an order ('compliance order') at any time giving the guardian or another specified person power to take specified measures or actions, to ensure that the represented person complies with the guardian's decisions in the exercise of the powers and duties conferred by the guardianship order.<sup>149</sup>

This is considered to include ambulance services, Victoria Police or medical service providers being empowered to ensure the represented person's compliance. For example, they could transport the person to a location directed by the guardian, including by removing the represented person, breaking and entering premises and using reasonable force.<sup>150</sup> However, this

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<sup>143</sup> Ibid s 37.

<sup>144</sup> Ibid ss 43(1)(a), (b).

<sup>145</sup> Ibid s 43(2).

<sup>146</sup> Ibid s 43(4).

<sup>147</sup> Ibid s 43(3).

<sup>148</sup> Ibid s 43(5). Note that this offence applies to bodies corporate and officers of bodies corporate: Ibid s 193(2)(a).

<sup>149</sup> 2019 Act s 45(1).

<sup>150</sup> *MW (Guardianship)* [2008] VCAT 1181, [26]; *THD (Guardianship)* [2017] VCAT 910.

is an extreme power, and will not be used where the compliance order will unreasonably restrict the represented person's rights.<sup>151</sup>

A guardian or other specified person is not liable to any action, liability, claim or demand for actions taken under a compliance order with the belief it will promote the represented person's personal and social wellbeing.<sup>152</sup>

VCAT must hold a hearing to reassess the compliance order as soon as practicable but within 42 days after making the order.<sup>153</sup> Where the order is considered no longer necessary, VCAT may dismiss the application for an order or a further order.<sup>154</sup>

### 3.5.4 Enforcement orders against persons refusing

A decision-maker may apply to VCAT for an enforcement order in relation to a decision or act that the decision-maker claims:<sup>155</sup>

1. is an exercise of the decision-maker's powers; and
2. is either:
  - not recognised as an exercise of the decision-maker's powers, or
  - not given effect to,

by another person ('person refusing').

The person refusing is entitled to notice of the application in accordance with section 72 of the *VCAT Act*.<sup>156</sup>

VCAT may make an order that the person refusing recognise or give effect to the disputed decision or act if VCAT is satisfied that:<sup>157</sup>

- the disputed decision or act is an exercise of the decision-maker's powers; and
- the person refusing has failed or refused to recognise or give effect to the disputed decision or act; and
- the order will promote the personal and social wellbeing of the represented person for whom the guardian or administrator is appointed.

Failing to comply with the VCAT order is an offence.<sup>158</sup>

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<sup>151</sup> *MW (Guardianship)* [2008] VCAT 1181, [27].

<sup>152</sup> *2019 Act* s 45(3). This includes actions for false imprisonment or assault.

<sup>153</sup> *Ibid* s 45(2).

<sup>154</sup> *UKM (Guardianship)* [2017] VCAT 1732.

<sup>155</sup> *2019 Act* s 178(1).

<sup>156</sup> *Ibid* s 178(2). Section 72 of the *VCAT Act* provides that the applicant must serve a copy of the application on the person refusing, with certain exceptions.

<sup>157</sup> *2019 Act* s 178(3).

<sup>158</sup> *VCAT Act* s 133.

### 3.5.5 Applications regarding financial matters

A represented person or a 'person interested' in a specified financial matter may apply to VCAT on any matter arising out of any dealing or transaction in relation to that financial matter.<sup>159</sup> VCAT may then make any order which VCAT considers appropriate.<sup>160</sup>

Here, 'person interested' consists of a represented person's:<sup>161</sup>

- creditor;
- beneficiary;
- next of kin, which is any person who would be entitled to the represented person's property, or to any share of the property under any law for the distribution of the property of intestates if the represented person had died intestate;
- guardian;
- nearest relative;<sup>162</sup>
- primary carer; and
- the Public Advocate.

A 'person interested' also includes any other person who can demonstrate their interest in the specified financial matter.<sup>163</sup>

## 3.6 Powers and duties of Guardians

### 3.6.1 Powers of Guardians: Generally

A guardianship order confers upon the appointed guardian:<sup>164</sup>

1. a power to make decisions about the specified personal matters in relation to the represented person;
2. the power to sign and do anything that is necessary to give effect to any power or duty vested in the guardian; and
3. the power to undertake legal proceedings, if specified in the order.

Any decision made, action taken, consent given or thing done by a guardian under a guardianship order has effect as if it were made, taken, given or done by the represented person, and the represented person had decision-making capacity for the relevant matter.<sup>165</sup>

However, a guardianship order cannot confer powers to:<sup>166</sup>

- make or revoke a will for the represented person;<sup>167</sup> or
- make or revoke an enduring power of attorney for the represented person; or

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<sup>159</sup> Ibid s 78(1).

<sup>160</sup> Ibid s 78(2).

<sup>161</sup> Ibid ss 78(1), (3).

<sup>162</sup> This is the relative first listed in *2019 Act* s 3 (definition of 'nearest relative'), who is of or over 18 years of age, the elder or eldest of 2 or more relatives described in any paragraph being preferred to any other so described.

<sup>163</sup> *2019 Act* s 78(1).

<sup>164</sup> Ibid s 38(1).

<sup>165</sup> Ibid s 38(3).

<sup>166</sup> Ibid s 39.

<sup>167</sup> Also see *Edwards v Edwards* (2009) 25 VR 40, 58 [62].

- vote on the represented person's behalf in any government or council election;<sup>168</sup> or
- consent to the represented person entering, or dissolving, a marriage or sexual relationship; or
- make or give effect to a decision about:
  - the care and wellbeing of the represented person's child; or
  - the adoption of the represented person's child who is under 18; or
- enter, or agree to enter, into a surrogacy arrangement on the represented person's behalf;<sup>169</sup> or
- consent to making, or discharging, a substitute parentage order on the represented person's behalf;<sup>170</sup> or
- manage the estate of the represented person on the represented person's death; or
- consent to an unlawful act.

As noted, the order must specify the personal matters that the guardian has power to make decisions over. Under the *1986 Act*, these matters commonly included:<sup>171</sup>

- accommodation;
- medical treatment;
- access to services (including services provided at home such as household cleaning, meals and nursing); and
- access to the represented person.

The guardian will also be able to apply to VCAT for advice or to have the order reassessed should there be a new matter arising after the order is made.<sup>172</sup>

### 3.6.2 Powers of Guardians: Undertaking legal proceedings

VCAT may specify in a guardianship order that the guardian has power to bring and defend an action or other legal proceeding in the name, and on behalf, of the represented person.<sup>173</sup> The legal proceeding must be in relation to a personal matter specified in the order,<sup>174</sup> and the guardian is not required to be appointed as a litigation guardian in accordance with rules of the relevant court or tribunal.<sup>175</sup>

With regards to costs, the costs of the proceeding are generally to be paid out of the represented person's estate.<sup>176</sup> The court or tribunal may also order that a person who is or was a guardian be reimbursed from the represented person's estate for costs incurred in bringing or defending proceedings.<sup>177</sup>

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<sup>168</sup> This is specified as an election for the State or the Commonwealth or another State or a Territory of the Commonwealth or in a local election or a referendum: *2019 Act* s 39(c).

<sup>169</sup> Within the meaning of the *Assisted Reproductive Treatment Act 2008* (Vic): *2019 Act* s 39(f).

<sup>170</sup> Within the meaning of the *Status of Children Act 1974* (Vic): *2019 Act* s 39(g).

<sup>171</sup> *OFL (Guardianship)* [2016] VCAT 684, [27].

<sup>172</sup> For more information on reassessments, see [6.2 – Reassessments](#).

<sup>173</sup> *2019 Act* ss 38(1)(c), 40(1).

<sup>174</sup> *Ibid* s 40(1).

<sup>175</sup> *Ibid* s 40(2).

<sup>176</sup> *Ibid* s 40(3).

<sup>177</sup> *Ibid* s 40(5).



A court or tribunal may order that the guardian is personally liable for costs if the guardian was negligent or engaged in misconduct.<sup>178</sup>

### 3.6.3 Duties of Guardians

When exercising powers, guardians must:<sup>179</sup>

- act in accordance with the general principles and the decision-making principles;<sup>180</sup>
- act as an advocate for the represented person;
- encourage and assist the represented person to develop the person's decision-making capacity in relation to personal matters;<sup>181</sup>
- act in such a way so as to protect the represented person from neglect, abuse or exploitation;
- act honestly, diligently and in good faith;
- exercise reasonable skill and care;
- not use the position for profit;
- avoid acting if there is or may be a conflict of interest; and
- not disclose confidential information gained as a guardian unless authorised to do so under the guardianship order or by law.

A guardian who has the power to make medical treatment decisions for a represented person must comply with the *MTPD Act* in relation to those decisions.<sup>182</sup>

To assist guardians in performing their role, they may refer to:

- the Australian Guardianship and Administration Council's *National Standards of Public Guardianship*;<sup>183</sup> and
- the Office of the Public Advocate's *Good Guardianship Guide*.<sup>184</sup>

When a guardianship order is reassessed, if VCAT is considering reappointing a guardian then it would consider whether the guardian has properly complied with their duties under the Act. VCAT can also advise a guardian, either when the guardian applies for advice or on VCAT's own initiative.<sup>185</sup> Otherwise, the legislation does not provide for VCAT to review or supervise the actions of guardians. The *2019 Act* does however allow for applications for compensation, where a person contends that a guardian caused loss to the represented person by failing to comply with the *2019 Act*.

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<sup>178</sup> Ibid s 40(4).

<sup>179</sup> Ibid s 41(1).

<sup>180</sup> For more information on the principles, see [2.1 – Principles under the 2019 Act](#).

<sup>181</sup> For more information on decision-making capacity, see [2.2 – Decision-making capacity](#).

<sup>182</sup> *2019 Act* s 41(2).

<sup>183</sup> 'National Standards of Public Guardianship' (3<sup>rd</sup> Edition, Australian Guardianship and Administration Council, 2006) <[https://www.agac.org.au/images/stories/national\\_stands\\_public\\_guardianship.pdf](https://www.agac.org.au/images/stories/national_stands_public_guardianship.pdf)>.

<sup>184</sup> 'Good Guardianship 2018' (Office of the Public Advocate, December 2018)

<<https://www.publicadvocate.vic.gov.au/resources/booklets/guardianship-and-administration-1/23-good-guardianship>>. A new guide is scheduled to be released in March 2020.

<sup>185</sup> *2019 Act* s 44.

### 3.6.4 Misconduct by Guardians

In the past, VCAT has declined to make a declaration under section 124 of the *VCAT Act* that the guardian has breached their duties.<sup>186</sup> The primary means of holding guardians accountable are:

- the Public Advocate, which holds the power to investigate any complaint or allegation that a person is under inappropriate guardianship, is being exploited or abused or is in need of guardianship;<sup>187</sup> and
- the OPP and Victoria Police, who can prosecute any offences committed in the course of a dishonest breach of the statutory duties.<sup>188</sup>

However, under the *2019 Act* a victim of misconduct by guardians now has access to a compensation process, and guardians will also be made subject to specific offences. For more information, see [8.2 – Compensation, liability and offences under the 2019 Act](#).

### 3.6.5 Other matters for Guardians: Advice and Notification

A guardian may apply to VCAT for advice on:<sup>189</sup>

- the scope of the guardianship order; or
- the exercise of any power under the guardianship order.

These includes questions on:

- what sort of decisions can be made about access to services;<sup>190</sup>
- contact with support workers and family members;<sup>191</sup>
- whether a guardian has authority to have visitors removed from the represented person's home;<sup>192</sup>
- whether conditions on a community treatment order may be more appropriate than a guardianship order to resolve issues;<sup>193</sup> and
- whether the power to decide the represented person's residence includes deciding the person would live in a locked facility.<sup>194</sup>

After considering an application for advice, or on its own initiative, VCAT may:<sup>195</sup>

- approve or disapprove of any act proposed by the guardian;
- give such advice as it considers appropriate; and
- make any order it considers necessary.

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<sup>186</sup> *GXS (Guardianship)* [2016] VCAT 1514.

<sup>187</sup> *2019 Act* s 15(g).

<sup>188</sup> For more information on offences, see [8.2.3 – Offences](#).

<sup>189</sup> *2019 Act* s 44(1).

<sup>190</sup> *OFL (Guardianship)* [2016] VCAT 684.

<sup>191</sup> *THD (Guardianship)* [2018] VCAT 1588, [3].

<sup>192</sup> *MW (Guardianship)* [2008] VCAT 1181, [5].

<sup>193</sup> *MW (Guardianship)* [2008] VCAT 1181, [9].

<sup>194</sup> *NLA (Guardianship)* [2015] VCAT 1104, [4].

<sup>195</sup> *2019 Act* s 44(2).

No action lies against a guardian for an act or thing done, or omitted to be done, under VCAT advice or order, unless the guardian has been guilty of fraud, wilful concealment or misrepresentation in representing the facts to VCAT.<sup>196</sup>

VCAT in its advice jurisdiction is acting in an administrative capacity, and therefore must act compatibly with section 38 of the *Charter of Human Rights and Responsibilities Act 2006 (Vic)*.<sup>197</sup> Where VCAT also gives advice to a guardian who is a public authority, VCAT must consider Charter obligations upon the guardian in giving advice.<sup>198</sup>

If a guardian is advised of the death of the represented person, the guardian must report the death in writing to VCAT as soon as practicable.<sup>199</sup>

## 3.7 Powers and duties of Administrators

### 3.7.1 Powers of Administrators

#### 3.7.1.1 Powers of Administrators Generally

An administration order confers upon the appointed administrator:<sup>200</sup>

1. a power to make decisions about the specified financial matters in relation to the represented person;
2. a power to make gifts;
3. a power of investment;
4. a power to open the represented person's will;
5. any other power specified in the order;
6. a power to sign and do anything that is necessary to give effect to any power or duty vested in the administrator; and
7. a power to do all matters necessary or incidental to the performance of any conferred power.

Any decision made, action taken, consent given or thing done by an administrator under an administration order has effect as if it were made, taken, given or done by the represented person,<sup>201</sup> and the represented person had decision-making capacity for the relevant matter.<sup>202</sup>

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<sup>196</sup> *Ibid* s 44(3).

<sup>197</sup> *PJB v Melbourne Health* [2011] VSC 327, *NLA (Guardianship)* [2015] VCAT 1104, [13], [50].

<sup>198</sup> *PJB v Melbourne Health* [2011] VSC 327, *NLA (Guardianship)* [2015] VCAT 1104, [13], [50].

<sup>199</sup> *2019 Act* s 42.

<sup>200</sup> *Ibid* s 46(1).

<sup>201</sup> *Ibid* s 46(3).

<sup>202</sup> *Ibid* s 46(3).

Consequently, once a specified financial matter is subject to an administration order, the represented person will not have decision-making capacity generally in relation to:<sup>203</sup>

- dealing with, transferring, alienating or charging their money or other property;<sup>204</sup> or
- becoming liable under a contract,

in relation to that specified financial matter without a VCAT order or the administrator's written consent.

Any dealing, transfer, alienation or charge by a represented person in relation to a specified financial matter is void and of no effect, and the money or other property will be recoverable by the administrator in any court of competent jurisdiction.<sup>205</sup>

However, a dealing, transfer, alienation or charge by a represented person will not be rendered invalid if:<sup>206</sup>

- it was made for adequate consideration, with, or to, or in favour of, another person; and
- the other person proves that the other person acted in good faith and did not know, or could not reasonably have known, that the represented person was a represented person.

The administration order will lapse on the death of the represented person, and the law relating to the administration of a deceased person's estate will apply accordingly.<sup>207</sup>

An administration order cannot confer powers to:<sup>208</sup>

- make or revoke a will for the represented person; or
- make or revoke an enduring power of attorney for the represented person; or
- vote on the represented person's behalf in any government or council election;<sup>209</sup> or
- consent to the represented person entering, or dissolving, a marriage or sexual relationship; or
- make or give effect to a decision about—
  - the care and wellbeing of the represented person's child; or
  - the adoption of the represented person's child who is under 18; or
- enter, or agree to enter, into a surrogacy arrangement on the represented person's behalf;<sup>210</sup> or
- consent to making, or discharging, a substitute parentage order on the represented person's behalf;<sup>211</sup> or
- manage the estate of the represented person on the represented person's death; or
- consent to an unlawful act.

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<sup>203</sup> Ibid s 75(1).

<sup>204</sup> 'Dealing with property' also includes the acceptance of payment of the whole or a part of a debt: Ibid s 45(4).

<sup>205</sup> Ibid s 75(2).

<sup>206</sup> Ibid s 75(3).

<sup>207</sup> Ibid s 54.

<sup>208</sup> Ibid s 53.

<sup>209</sup> This is specified as an election for the State or the Commonwealth or another State or a Territory of the Commonwealth or in a local election or a referendum: Ibid s 53(c).

<sup>210</sup> Within the meaning of the *Assisted Reproductive Treatment Act 2008 (Vic)*: *2019 Act* s 53(f).

<sup>211</sup> Within the meaning of the *Status of Children Act 1974 (Vic)*: *2019 Act* s 53(g).

### 3.7.1.2 Gifts

Unless otherwise provided in the administration order, an administrator may make a gift of a represented person's property if:<sup>212</sup>

1. the gift is reasonable having regard to all the circumstances, including the represented person's financial circumstances; and
2. the gift is one of the following:
  - the gift is made:
    - to a relative or a close friend of the represented person, and
    - is of a seasonal nature or for a special event; or
  - the gift is of a type of donation that the represented person:
    - made when the represented person had decision-making capacity in relation to making donations; or
    - might reasonably be expected to make.

A gift may be made by an administrator even if the gift is given to:

- the administrator;
- a relative or close friend of the administrator; or
- an organisation with which the administrator has a connection.

Accounting requirements apply in relation to certain gifts that are \$100 or more, or that meet the prescribed amount (whichever is greater).<sup>213</sup>

### 3.7.1.3 Investment

Unless otherwise provided in the administration order, an administrator has the power of investments in certain situations. Administrators may:<sup>214</sup>

- re-deposit money deposited in an authorised deposit-taking institution after it becomes payable;
- exercise the same powers over property as if the administrator was a trustee under the *Trustee Act 1958*;<sup>215</sup> and
- continue investments in the way they were invested by the represented person for such period as the administrator thinks fit, including taking up rights to issues of new shares and options.

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<sup>212</sup> *2019 Act* s46(1).

<sup>213</sup> *Ibid* s 61.

<sup>214</sup> *Ibid* s 48.

<sup>215</sup> The *Trustee Act 1958* (Vic) may also impose additional responsibilities in relation to the power of investment, such as the 'prudent person principle' in section 6 and other specific obligations: VLRC Report 379–80.

#### 3.7.1.4 Wills

An administrator may open and read any paper or writing deposited with them that is a will, a revoked will, a purported will or a copy of a will of the represented person ('will document'), without an order of VCAT.<sup>216</sup> This power exists either before or after the death of the represented person.

Separately, VCAT also has powers with regards to wills – they may:

- open and read any will document of:<sup>217</sup>
  - a represented person who does not have testamentary capacity; or
  - a deceased person who, immediately before they died, was a represented person.
- make a full or redacted will document available to an administrator if VCAT is satisfied that that the represented person does not have testamentary capacity;<sup>218</sup> and
- make an order compelling a person who has possession or control of a will document of a represented person who does not have testamentary capacity, to produce that document to VCAT for the purposes of opening/reading or making it available to administrators, or otherwise on application by an administrator.<sup>219</sup>

#### 3.7.1.5 Exercising vested powers

An administrator may exercise certain powers (for example powers under a deed of trust) vested in represented persons in two situations – where the power is for the represented person's benefit, or where the represented person is a trustee or guardian of a trust. These will be exercised on behalf and in the name of the represented person.

Where the power is for the represented person's benefit, an administrator may exercise a power or give consent where the following apply:<sup>220</sup>

1. the power is vested in a represented person for that person's own benefit or the consent of the represented person is necessary to the exercise of the power; and
2. the power or consent is in the nature of a beneficial interest in the represented person; and
3. the administrator believes exercising the power or giving the consent will benefit the represented person.

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<sup>216</sup> *2019 Act* s 49.

<sup>217</sup> *Ibid* s 66.

<sup>218</sup> *Ibid* s 68.

<sup>219</sup> *Ibid* s 67.

<sup>220</sup> *Ibid* s 50(1).

Where the represented person is a trustee or guardian of a trust, an administrator may exercise a power or give consent where the following apply:<sup>221</sup>

1. the power is vested in the represented person's capacity as a trustee or guardian of a trust or the consent of the represented person to the exercise of a power is necessary in the represented person's capacity as a trustee or guardian of a trust;<sup>222</sup> and
2. the administrator believes that the power should be exercised or that the consent should be given.

### 3.7.1.6 Undertaking legal proceedings

VCAT may specify in an administration order that the administrator has power to bring and defend an action or other legal proceeding in the name, and on behalf, of the represented person.<sup>223</sup> The legal proceeding must be in relation to a financial matter specified in the administration order,<sup>224</sup> and the administrator is not required to be appointed as a litigation guardian in accordance with rules of the relevant court or tribunal.<sup>225</sup>

The court has held that an administrator may take such legal actions even without the represented person's consent or knowledge, as the very nature of an administration order means that an administrator regularly acts without the represented person's knowledge or consent.<sup>226</sup>

With regards to costs, the costs of the proceeding are generally to be paid out of the represented person's estate.<sup>227</sup> The court or tribunal may also order that a person who is or was an administrator be reimbursed from the estate for costs incurred in bringing or defending proceedings.<sup>228</sup> However, a court or tribunal may order that the administrator is personally liable for costs if the latter was negligent or engaged in misconduct.<sup>229</sup>

### 3.7.1.7 Other specified matters

VCAT may specify in the administration order that the administrator has any or all of the following powers in relation to a specified financial matter:<sup>230</sup>

- collect, receive and recover—
  - income of the represented person; and
  - money due or which becomes due to the represented person; and
  - any compensation or damages for injury to the estate or person of the represented person;

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<sup>221</sup> Ibid s 50(2).

<sup>222</sup> The exercise of vested power to appoint a new trustee is taken to be power to appoint a new trustee within the meaning of section 45 of the *Trustee Act 1958* (Vic).

<sup>223</sup> *2019 Act* s51(1).

<sup>224</sup> *2019 Act* s51(1).

<sup>225</sup> *2019 Act* s51(2). They are, however, still subject to the rules of court regarding accepting offers of compromise or generally with litigation guardians: *Noble v Fraraccio* (Ruling No 2) [2016] VCC 680; *State Trustees Ltd v Christodoulou* [2010] VSCA 86.

<sup>226</sup> *Giurina v Giurina* [2018] VSC 599, [18].

<sup>227</sup> *2019 Act* s 51(3).

<sup>228</sup> Ibid s 51(5).

<sup>229</sup> Ibid s 51(4).

<sup>230</sup> Ibid s 52.



- invest any money in any security in which a trustee may by law invest;
- demise land at a rent and on conditions as the administrator thinks fit for any term not exceeding 5 years, or for any longer term with VCAT's consent;
- exercise, to the extent and in the manner the administrator thinks fit, any power of leasing vested in the represented person;
- surrender, accept, accept the surrender or renew any lease;
- bring land under the *Transfer of Land Act 1958* (Vic);
- sell, exchange, partition or convert into money any property with VCAT's approval;
- mortgage or charge any property;
- pay any debts and settle, adjust or compromise any demand made by or against the represented person's estate, and discharge any encumbrance on the represented person's estate;
- carry on, to the extent the administrator thinks appropriate, any trade, profession or business which the represented person carried on;
- agree to any alteration of a condition of any partnership into which the represented person has entered or to a dissolution and distribution of the assets of the partnership;
- execute and sign deeds, instruments and other documents;
- complete any contract for the performance of which the represented person was liable, or enter into any agreement terminating liability;
- pay a sum for—
  - the maintenance of the represented person's spouse or domestic partner or any child, parent or other person dependent on the represented person;<sup>231</sup>
  - the education of any child of the represented person; and
  - the ongoing care of any companion animal of the represented person;
- pay to the represented person any money standing to their credit with the administrator for the represented person's personal use;
- give the represented person any personal property belonging to them, which is under the administrator's control, for the personal use of that person; and
- any other relevant power in relation to a specified financial matter.

## 3.7.2 Duties of Administrators

### 3.7.2.1 Duties of Administrators Generally

When exercising powers, administrators must:<sup>232</sup>

- act in accordance with the general principles and the decision-making principles;<sup>233</sup> and
- act as an advocate for the represented person;
- encourage and assist the represented person to develop the person's decision-making capacity in relation to financial matters;<sup>234</sup>
- act in such a way to protect the represented person from neglect, abuse or exploitation;
- act honestly, diligently and in good faith;

<sup>231</sup> 'Child' in this instance is considered a dependent child, and therefore the administrator may decline to make maintenance where the child is not a dependent: *VBR (Guardianship)* [2017] VCAT 91, [37].

<sup>232</sup> *2019 Act* s 55.

<sup>233</sup> For more information on the principles, see [2.1 – Principles under the 2019 Act](#).

<sup>234</sup> For more information on decision-making capacity, see [2.2 – Decision-making capacity](#).

- exercise reasonable skill and care;
- not use the position for profit unless otherwise permitted;<sup>235</sup>
- avoid acting if there is or may be a conflict of interest, unless so authorised under the *2019 Act*, by VCAT order or otherwise by law;<sup>236</sup> and
- not disclose confidential information gained as an administrator unless authorised to do so under the administration order or by law.

An administrator has responsibility to inform external entities of their appointment when performing their role as the person's decision-maker.<sup>237</sup>

There are also other statutory duties listed in the *2019 Act*. These will be discussed below.

To assist administrators in performing their role, they may refer to the Australian Guardianship and Administration Council's *National Standards for Financial Managers*.<sup>238</sup>

### 3.7.2.2 Property

The administrator must take possession and care of, recover, collect, preserve and administer the represented person's property and estate,<sup>239</sup> and otherwise generally manage the represented person's property and financial affairs.<sup>240</sup>

The administrator must keep their own property separate from the represented person's property,<sup>241</sup> unless the property is owned jointly by the administrator and the represented person.<sup>242</sup>

However, the interests of the represented person<sup>243</sup> or a beneficiary<sup>244</sup> cannot be altered by the sale or other disposition of property;<sup>245</sup> their interests in any money or other property must remain the same as if the disposition had not been made.<sup>246</sup> This is a statutory exception to the ademption principle,<sup>247</sup> designed to ensure that gifts to a specific beneficiary in a will are not adeemed (or extinguished) if that property is dealt with by the administrator.

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<sup>235</sup> Permission may be given under section 175 of the *2019 Act* (remuneration of decision-makers), or otherwise by law.

<sup>236</sup> It is unknown if this includes a positive duty to identify conflicts of interest, or whether this merely means a positive duty to stop acting once a conflict is identified: VLRC Report 400 [17.145].

<sup>237</sup> *Giurina v Giurina* [2018] VSC 599, [30]. For example, the administrator should inform Centrelink to receive the represented person's pension payments and banks to operate accounts on behalf of the represented person.

<sup>238</sup> 'National Standards for Financial Managers' (Australian Guardianship and Administration Council, August 2018) < <https://www.agac.org.au/agac-publications> >.

<sup>239</sup> *2019 Act* s 56(a).

<sup>240</sup> *Ibid* s 56(b).

<sup>241</sup> *Ibid* s 60(1).

<sup>242</sup> *Ibid* s 60(2). This also does not affect any other obligation imposed by law: *2019 Act* s 60(3).

<sup>243</sup> This is irrespective of whether the represented person has testamentary capacity: *2019 Act* s 76(1).

<sup>244</sup> Here, beneficiary includes a beneficiary under the represented person's will, the represented person's executor, or the represented person's administrator under the *Administration and Probate Act 1958* (Vic): *2019 Act* s 76(5).

<sup>245</sup> Disposition here includes any sale, mortgage, exchange, partition or other disposition of property, as well as money arising from the compulsory acquisition or purchase under any Act of the represented person's property: *2019 Act* ss 76(1)–(2).

<sup>246</sup> *Ibid* s 76(1).

<sup>247</sup> *Simpson v Canning* [2011] VSC 466, [42].

In this situation, the administrator is not required to keep the proceeds of the sale or other disposition of property separate from the represented person's other assets,<sup>248</sup> and may invest any money received, in any manner in which trust funds may be invested under the *Trustee Act 1958 (Vic)*.<sup>249</sup>

### 3.7.2.3 Financial transactions and related matters

The administrator must not enter into a transaction in their capacity as administrator if the transaction is one in which there is, or may be, a conflict between:<sup>250</sup>

- the duty of the administrator to the represented person; and
- the interests of the administrator, or of a relative, business associate or close friend of the administrator.

However, the administrator may enter into a conflict transaction if:

1. the transaction is a gift made under the *2019 Act*;<sup>251</sup>
2. it is a transaction providing for the maintenance of the represented person's dependant(s) made in accordance with the specified power to pay for the maintenance of the represented person's dependents;<sup>252</sup>
3. VCAT authorises the administrator, at or before the time of the conflict transaction, to enter into:<sup>253</sup>
  - a. the conflict transaction,
  - b. a transaction of a similar nature, or
  - c. any conflict transaction otherwise prohibited; or
4. VCAT otherwise validates a prohibited conflict transaction.<sup>254</sup> Once validated, the conflict transaction is taken to be valid from the time it was entered into.<sup>255</sup>

A transaction is not a conflict transaction merely because in the transaction, the administrator (in their own right and on behalf of the represented person) either obtains a loan or gives a guarantee or indemnity, or otherwise deals with, an interest in property held jointly by the administrator and the represented person (whether as joint tenants or tenants in common).<sup>256</sup>

An administrator must keep accurate records and accounts of all dealings and transactions made by them in relation to the financial matters specified in the administration order.<sup>257</sup>

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<sup>248</sup> *2019 Act* s 76(3).

<sup>249</sup> *Ibid* s 76(4).

<sup>250</sup> *Ibid* s 57(1).

<sup>251</sup> *Ibid* s 57(2)(a). For the relevant specified power, see *2019 Act* s 47.

<sup>252</sup> *Ibid* s 57(2)(b). For the relevant specified power, see *2019 Act* s 52(n).

<sup>253</sup> *Ibid* s 58(1).

<sup>254</sup> *Ibid* s 58(2).

<sup>255</sup> *Ibid* s 58(3).

<sup>256</sup> *Ibid* s 57(2)(c).

<sup>257</sup> *Ibid* s 59.

### 3.7.2.4 Accounts

The administrator must lodge an account with VCAT either on the anniversary of the administrator's appointment, or as soon as practicable after, or on VCAT's direction at any time.<sup>258</sup>

The account must detail both:<sup>259</sup>

- in relation to the financial matters specified in the administration order:
  - the dealings and transactions during the previous 12 months;
  - a full and true account of the represented person's assets and liabilities; and
  - all receipts and disbursements made during the previous 12 months; as well as
- details of any gift made by the administrator of the represented person's property with a total value of or over the prescribed amount (or if no amount is prescribed, \$100) to:
  - the administrator; or
  - a relative or close friend of the administrator; or
  - an organisation with which the administrator has a connection.

VCAT may also appoint a person to examine or audit the accounts at the time it appoints an administrator or at any later time.<sup>260</sup> The appointed examiner or auditor must lodge a report in relation to the accounts with VCAT, and may recommend any item in the accounts be disallowed by VCAT.<sup>261</sup>

VCAT must not disallow the item if satisfied that the administrator acted in good faith and with reasonable care in the exercise of powers conferred.<sup>262</sup> If VCAT decides to order the item disallowed, then the administrator is liable for the amount of the disallowed item.<sup>263</sup> It is likely VCAT would give the administrator an opportunity to explain the situation before disallowing an item, which will include a written request for information and, should that fail to solve the issue, a hearing would follow.<sup>264</sup>

The examiner or auditor's fee must be paid by the administrator out of the represented person's estate,<sup>265</sup> which must be an amount certified by the examiner or auditor as being the reasonable cost of examining or auditing the accounts.<sup>266</sup> However, this fee may be partly or wholly waived by VCAT on application by the administrator and with the consent of the examiner or auditor.<sup>267</sup>

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<sup>258</sup> *Ibid* ss 61(2)–(3).

<sup>259</sup> *Ibid* ss 61(2), (4).

<sup>260</sup> *Ibid* s 61(1).

<sup>261</sup> *Ibid* s 61(5).

<sup>262</sup> *Ibid* s 61(6).

<sup>263</sup> *Ibid* s 61(7).

<sup>264</sup> *VCAT Act* s 98.

<sup>265</sup> *2019 Act* ss 61(1), 62(1).

<sup>266</sup> *Ibid* s 62(1).

<sup>267</sup> *Ibid* s 62(2).

## 3.8 Other matters for Administrators

### 3.8.1 Advice

An administrator may seek advice from a professional adviser<sup>268</sup> about the financial matters specified in the administration order,<sup>269</sup> and is entitled to be reimbursed from the represented person's estate for any costs paid in the course of obtaining professional advice.<sup>270</sup>

An administrator<sup>271</sup> may also apply to VCAT for advice on:<sup>272</sup>

- the scope of the administration order; or
- the exercise of any power under the administration order.

Examples of such matters include:

- whether it would be financially prudent to sell the represented person's property;<sup>273</sup>
- whether to sell the represented person's assets to maintain ongoing care needs;<sup>274</sup>
- seeking approval to execute deeds with executors of the estate;<sup>275</sup>
- whether pre-existing financial support to adult children should continue;<sup>276</sup>
- whether payments ordered by international courts should be made out of the estate;<sup>277</sup>
- authorising the administrator to take all steps necessary to gain entry to the represented person's property to carry out a full property inspection and make an inventory of assets;<sup>278</sup>
- interaction between roles as attorney and administrator for the same represented person for State Trustees;<sup>279</sup> and
- advice on capital commission and security interests over the estate.<sup>280</sup>

After considering an application for advice, or on its own initiative, VCAT may:<sup>281</sup>

- approve or disapprove of any act proposed by the administrator;
- give such advice as it considers appropriate; and
- make any order it considers necessary. This also includes:
  - ordering the administrator to keep the represented person informed about proceedings;<sup>282</sup> and

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<sup>268</sup> This is defined as a person who provides professional advice to administrators, including a financial adviser, a legal practitioner and an accountant: *Ibid* s 65(3).

<sup>269</sup> *2019 Act* s 65(1).

<sup>270</sup> *Ibid* s 65(2).

<sup>271</sup> It must be noted that only the administrator can apply for advice to VCAT. However, others with an interest in the financial matters being administered can apply to VCAT for orders under *Ibid* s 78.

<sup>272</sup> *Ibid* s 64(1).

<sup>273</sup> *KSJ (Guardianship)* [2018] VCAT 1275, [57]–[61]; *LWJ (Guardianship)* [2018] VCAT 775, [52]–[57]; *ZUS Guardianship List* [2014] VCAT 1621, [2].

<sup>274</sup> *WRU (Guardianship)* [2019] VCAT 888, [2].

<sup>275</sup> *JHS (Guardianship)* [2017] VCAT 1073, [1].

<sup>276</sup> *VBR (Guardianship)* [2017] VCAT 91.

<sup>277</sup> *HRI (Guardianship)* [2016] VCAT 536, [8].

<sup>278</sup> *KK (Guardianship)* [2009] VCAT 2219, [27].

<sup>279</sup> *PW (Guardianship)* [2008] VCAT 2000, [5].

<sup>280</sup> *IED (Guardianship)* [2014] VCAT 1368.

<sup>281</sup> *2019 Act* s 64(3).

<sup>282</sup> *JHS (Guardianship)* [2017] VCAT 1073, [23].

- ordering financial advice be obtained before a further hearing about what the administrator should do.<sup>283</sup>

However, VCAT must act within the framework of the existing administration order, and cannot discharge or vary the order as an advice application is not intended to be another method of reassessment.<sup>284</sup>

No action lies against an administrator for an act or thing done, or omitted to be done, under VCAT advice or order, unless the administrator has been guilty of fraud, wilful concealment or misrepresentation in representing the facts to VCAT.<sup>285</sup>

VCAT's advice jurisdiction also includes the jurisdiction to approve, order or advise the commencement of a proceeding where the State Trustees is acting in one capacity or on behalf of a represented person, against State Trustees acting in another capacity or on behalf of another represented person.<sup>286</sup>

When providing advice to administrators under the advice jurisdiction, VCAT is in an analogous position to a Court giving advice to a trustee, particularly where that advice relates to possible future litigation or a compromise of litigation on the represented person's behalf.<sup>287</sup> Therefore, the principles in *Macedonian Orthodox Community Church*<sup>288</sup> apply, that:

...there is no implied limitation on the power to give advice; that there are no implied limitations on discretionary factors; that the procedure is summary in character; and that the advice is private because its function is to give personal protection to the trustee and operates as an exception to the court's ordinary function of deciding disputes between litigants.<sup>289</sup>

As the advice is private, proceedings may be kept private between the administrator and VCAT especially where privileged legal advice would be communicated to third parties.<sup>290</sup>

Administrators are highly recommended to apply for advice from VCAT where there is anything unclear about the power or exercise of power. The courts and VCAT have considered it a matter going to suitability if the administrator makes decisions without seeking advice.<sup>291</sup>

### 3.8.2 Notification of death of represented person or expiry of administration order

If an administrator is advised of the death of the represented person, the administrator must report the death in writing to VCAT as soon as practicable.<sup>292</sup>

If VCAT knows that the represented person has ceased to be a represented person or has died, VCAT must notify the administrator as soon as practicable.<sup>293</sup> The administrator may otherwise

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<sup>283</sup> *ZUS Guardianship List* [2014] VCAT 1621, [57].

<sup>284</sup> *IED (Guardianship)* [2014] VCAT 1368, [21].

<sup>285</sup> *2019 Act* s 64(4).

<sup>286</sup> *Ibid* s 64(2).

<sup>287</sup> *JHS (Guardianship)* [2017] VCAT 1126, [11].

<sup>288</sup> *Macedonian Orthodox Community Church St Petka Inc v His Eminence Petar The Diocesan Bishop of The Macedonian Orthodox Diocese of Australia and New Zealand* (2008) 237 CLR 66.

<sup>289</sup> *Re Centro Retail Australia Limited* (2012) 35 VR 512, [14] (Almond J).

<sup>290</sup> See *JHS (Guardianship)* [2017] VCAT 1126.

<sup>291</sup> *GSH (Guardianship)* [2017] VCAT 952, [35]–[39]; *EBG v KPZ* [2019] VSC 630, [21], [24], [52].

<sup>292</sup> *2019 Act* s 42.

<sup>293</sup> *Ibid* s 69(1)

exercise all or any of the powers given until the administrator receives the notice or otherwise knows that the represented person has ceased to be a represented person or has died.<sup>294</sup>

Once VCAT gives notice, the former represented person or their personal representative is bound by, and may take advantage of, any act done by the administrator within the powers conferred as if:<sup>295</sup>

- the act had been done by the represented person; and
- the represented person had decision-making capacity to do the act.

### 3.8.3 Entitlements of former represented persons and obligations of administrators

If an administrator is informed<sup>296</sup> that the represented person has ceased to be a represented person, the administrator must:<sup>297</sup>

- pay, or cause to be paid, all money standing to the former represented person's credit with the administrator; and
- deliver all the former represented person's property that is in the administrator's custody, and any documents relating to that property, unless VCAT orders the documents be withheld,<sup>298</sup>

to the former represented person or their personal representative.

Both the payment and the delivery of property is subject to satisfying any amount due to the administrator, and all costs, expenses and liabilities incurred by the administrator.<sup>299</sup> Receiving the payment or property will be considered an absolute discharge to an administrator despite any informality in the discharge or certification.<sup>300</sup>

A former represented person is entitled to an inspection of accounts. This gives the former represented person a right to access any books, accounts, notices and other documents relating to the dealings and transactions made for the financial matters specified in the administration order ('dealings documents'). They or their personal representative:<sup>301</sup>

- may:
  - examine and inspect any dealings documents in the administrator's custody. This right may be exercised personally or through a legal practitioner or other authorised agent; and
  - make, or cause to be made, copies or extracts from those dealings documents; and

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<sup>294</sup> Ibid s 69(2).

<sup>295</sup> Ibid s 70.

<sup>296</sup> This includes receipt of a notice by VCAT under section 69 of the *2019 Act*, or otherwise being informed: Ibid s 71(1).

<sup>297</sup> Ibid s 71(1).

<sup>298</sup> Under Ibid s 73.

<sup>299</sup> Ibid s 71(2), replacing section 58D(2) of the *1986 Act* which did not provide for property to be withheld pending payment to the administrator. See *IED (Guardianship)* [2014] VCAT 1368, [60].

<sup>300</sup> *2019 Act* s 71(3).

<sup>301</sup> Ibid s 72.



- must be provided with:
  - copies of or extracts from any dealings documents; and
  - information relating to the dealings and transactions made for the specified financial matters by the administrator that is:
    - reasonable to request, and
    - that can be given by the administrator.

A person can exercise this right of inspection before or after obtaining all or any part of their money or other property from the administrator.

However, on application by the administrator, VCAT may order that delivery of, or access to, dealings documents be withheld from a person specified by VCAT or a person belonging to a class of person specified by VCAT.<sup>302</sup> To make an order, VCAT must be satisfied that:<sup>303</sup>

- it is in the interests of the former represented person that the information, or part of the information, contained in the dealings documents remain confidential; or
- the dealings documents contains confidential information about another person.

An administrator may sell the former represented person's personal effects if they are in the administrator's possession and unclaimed within 2 years after the represented person ceases to be a represented person.<sup>304</sup> The administrator must only do so after public notice,<sup>305</sup> and the proceeds of the sale must be paid into the Consolidated Fund.<sup>306</sup>

### 3.8.4 Remuneration and Costs

An administrator who carries on a business of, or including the, administration of estates (a 'professional administrator') may receive remuneration from the represented person's estate.<sup>307</sup> This will be calculated either in accordance with a scale fixed by rules,<sup>308</sup> or as otherwise determined by VCAT.<sup>309</sup>

If remuneration is determined by VCAT in relation to a licensed trustee company,<sup>310</sup> it must not exceed the limit on fees that may be charged by a licensed trustee company under Chapter 5D of the *Corporations Act 2001* (Cth).<sup>311</sup>

An administrator who is not a professional administrator is not entitled to receive any fee, remuneration or other reward from the represented person's estate unless VCAT otherwise

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<sup>302</sup> Ibid s 73(1).

<sup>303</sup> Ibid s 73(2).

<sup>304</sup> Ibid s 74(1).

<sup>305</sup> Ibid.

<sup>306</sup> Ibid s 74(2).

<sup>307</sup> Ibid s 175(2).

<sup>308</sup> Specifically, in accordance with a scale in relation to remuneration for administrators that is fixed by rules made under the *VCAT Act*: Ibid s 175(2)(a). The practice in the absence of any such rules has been for administrators to charge fees according to the scale set out in the Practitioner Remuneration Order, as there is no specific available scale for administrators: *VVA (Guardianship)* [2019] VCAT 981, [28], [43].

<sup>309</sup> *2019 Act* s175(2)(b).

<sup>310</sup> That is, a 'licensed trustee company' within the meaning of section 601RAA of the *Corporations Act 2001* (Cth): Ibid s 175(3).

<sup>311</sup> Ibid s 175(3).

specifies in the administration order.<sup>312</sup> The relationship between a represented person and an administrator has long been considered a fiduciary relationship, and therefore there is no ‘right’ to remuneration for a private administrator – any such remuneration will be decided by VCAT in its discretion.<sup>313</sup>

VCAT may order an administrator to pay to the represented person’s estate any remuneration or other reward paid or deducted from the estate which VCAT specifies.<sup>314</sup> VCAT may also request accounts from the administrator to determine compliance with the *2019 Act*, any VCAT order or any approval or specification made by VCAT in relation to remuneration.<sup>315</sup>

Regarding costs, a court or tribunal may order that costs incurred by an administrator arising from the administrator’s dealings and transactions relating to the specified financial matters be paid out of, or reimbursed from, the represented person’s estate (‘costs order’).<sup>316</sup> This is regardless of whether their appointment as administrator is no longer in force or is revoked or set aside.

VCAT may make a costs order as part of their advice jurisdiction, on application by a current administrator, or an administrator whose appointment has been revoked or set aside.<sup>317</sup>

There is no current scale of costs for work in VCAT, and the common practice and expectation in dealing with costs applications has been that the County Court scale is usually applied. In the absence of an order to the contrary, if VCAT makes an order as to costs, the applicable scale of costs is the County Court cost scale.<sup>318</sup> This also allows party-party or indemnity costs where appropriate.

It is not practical for VCAT to deal with these matters as if it were a Costs Court – where the administrator has been ordered to calculate fees according to a certain scale, the Member’s role is limited to considering whether the scale has been correctly applied to the work actually done.<sup>319</sup>

### 3.8.5 Orders set aside

An order of a court or VCAT that sets aside an administration order, or has the effect of setting it aside (‘setting aside order’), does not affect the validity of anything done in accordance with the administration order before the setting aside order takes effect,<sup>320</sup> subject to any VCAT or court order to the contrary when the setting aside order is made.<sup>321</sup>

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<sup>312</sup> *Ibid* s 175(1).

<sup>313</sup> *IED (Guardianship)* [2014] VCAT 1368 [36].

<sup>314</sup> *2019 Act* s 175(5).

<sup>315</sup> *Ibid* s 175(4). For more detail on accounts requirements, see [3.7.2.4 – Accounts](#) for Administrators and [5.8.4 – Accounts](#) for AMP administrators.

<sup>316</sup> *2019 Act* s 176(1).

<sup>317</sup> *Ibid* s 176(2).

<sup>318</sup> Victorian Civil and Administrative Tribunal Rules 2018 (Vic) r 1.07; *VVA (Guardianship)* [2019] VCAT 981, [41].

<sup>319</sup> *VVA (Guardianship)* [2019] VCAT 981, [120], [125].

<sup>320</sup> *2019 Act* s 180(1).

<sup>321</sup> *Ibid* s 180(2).

### 3.8.6 Civil Proceedings in the Supreme, County or Magistrates Court

For civil proceedings before the Supreme, County or Magistrates Court,<sup>322</sup> the *2019 Act* provides different procedures for money or property as they relate to persons with a disability.

Where the court adjudges or orders that money be paid to a person with a disability, the money is to be paid into court,<sup>323</sup> and is to be paid out to the person's administrator (if any) or State Trustees unless the Court otherwise orders.<sup>324</sup> This applies irrespective of whether the person with a disability is party to a cause or matter.

If any money is paid into court and is being held in court on behalf of a person with a disability, the court may, by order, direct that the money be paid out to the person's administrator (if any) or to State Trustees.<sup>325</sup> This order will have effect as if it were an administration order.<sup>326</sup>

If the Court judges or orders that property (whether real or personal) be delivered up or transferred to a person with a disability, the court:<sup>327</sup>

- may order that the property be delivered up or transferred to the person's administrator (if any) or State Trustees ('property order'); and
- may give any directions for the service of the order on that administrator or State Trustees as it thinks fit.

This applies irrespective of whether the person with a disability is party to a cause or matter.

Where the property order is served, the administrator or State Trustees must accept delivery or transfer of the property to which the order relates. This acceptance of the property constitutes a sufficient discharge to the person delivering or transferring the property.<sup>328</sup>

All orders made by the Court must be given by the administrator or State Trustees (as the case requires) to VCAT and the Public Advocate.<sup>329</sup>

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<sup>322</sup> *Ibid* s 179(9).

<sup>323</sup> *Ibid* s 179(3)(a).

<sup>324</sup> *Ibid* s 179(3)(b).

<sup>325</sup> *Ibid* s 179(4).

<sup>326</sup> *Ibid* s 179(8).

<sup>327</sup> *Ibid* s 179(5).

<sup>328</sup> *Ibid* s 179(6).

<sup>329</sup> *Ibid* s 179(7).

## 4 Supportive guardianship and administration orders

The *2019 Act* introduces supportive guardianship and supportive administration orders ('supportive orders'), allowing appointees to support a person with a disability in making decisions in relation to personal or financial matters respectively. This differs from the substituted decision-making regime of guardianship and administration orders – the assisted person continues to be the person authorised to make decisions and makes the decision themselves with assistance.<sup>330</sup>

This regime also acknowledges relationships of support (for example with family members and trusted carers) while ensuring that the person with a disability retains their right to make decisions.<sup>331</sup> It provides legal acknowledgment of these relationships of support, and recognition and certainty for third party interactions.<sup>332</sup>

VCAT may make a supportive guardianship or supportive administration order on a specific application, or as part of an application for a guardianship order or an administration order for a proposed represented person – for example, where VCAT decides that while a guardianship order is unnecessary, a supportive guardian would assist the person in making and communicating their decisions.<sup>333</sup>

### 4.1 Applications for supportive guardianship and administration orders

Any person may apply to VCAT for an order to appoint a supportive guardian or administrator ('supporter') for a person with a disability ('supported person'), if the supported person is either:<sup>334</sup>

- at least 18 years of age; or
- under 18 years of age, but the order will take effect on that person attaining 18 years of age.

The content of the application must include:<sup>335</sup>

- the proposed supported person's name;
- the type of order applied for, including details of the personal or financial matters in relation to which the order is sought;<sup>336</sup>
- details of the reasons for making the application;
- the proposed supporter's name and contact details;
- the name and contact details of:
  - the applicant, and

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<sup>330</sup> VLRC Report 126.

<sup>331</sup> Victoria, Parliamentary Debates, Legislative Assembly, 7 March 2018, 27–8 (Martin Pakula, Attorney-General).

<sup>332</sup> ALRC Report 97.

<sup>333</sup> *2019 Act* s 87(1); Victoria, Parliamentary Debates, Legislative Assembly, 7 March 2018, 28 (Martin Pakula, Attorney-General).

<sup>334</sup> *2019 Act* ss 79–80.

<sup>335</sup> *Ibid* s 81.

<sup>336</sup> For further detail on what constitutes financial matters and personal matters, see [2.4 – Personal or Financial Matters](#).

- any persons who have a direct interest in the application (if known to the applicant). This includes the supported person's relatives, any primary carer, close friends, any attorney appointed under an enduring power of attorney and any supportive attorney appointed under the *POA Act*.
- any support needs of the proposed supported person, including support provided by any companion animal.<sup>337</sup>

The parties to the proceeding are:<sup>338</sup>

- the applicant;
- the proposed supported person;
- the proposed supporter; and
- any other person VCAT orders to be joined as a party to the proceeding under section 60 of the *VCAT Act*.<sup>339</sup>

The following people are entitled to notice of an application, the hearing and any order made in the proceeding, where applicable:<sup>340</sup>

- any party to a proceeding;
- the spouse or domestic partner of the proposed supported person;
- the primary carer of the proposed supported person;
- any person referred to in the application as having a direct interest in the application;
- any other person VCAT directs be given notice.

The notice of an application to a party must include:<sup>341</sup>

- a copy of the application and any information filed in support of the application;<sup>342</sup>
- the names of—
  - the parties to the proceeding; and
  - the other persons entitled to the notice;
- information about the rights of the party in relation to the application.

If the person is not a party, the notice must include:<sup>343</sup>

- a copy of the application;
- the names of:
  - the parties to the proceeding; and
  - the other persons entitled to the notice;

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<sup>337</sup> This is intended to refer to any supports that might be necessary to enable to the proposed supported person to attend and participate in the hearing, such as access requirements, transportation needs, alternative communication methods (e.g. ability to use a recognised sign language if the person has a hearing impediment, or use of electronic or pictorial/symbol communication if speech is impaired), and the possibility of using video link if the person is bedridden: Explanatory Memorandum, Guardianship and Administration Bill 2018 (Vic) 42–43.

<sup>338</sup> *2019 Act* s 82.

<sup>339</sup> VCAT may order a person be joined on its own initiative or on application once certain considerations are met: see *VCAT Act* s 60.

<sup>340</sup> *2019 Act* s 83. This is for notice and service requirements under sections 72(1), 99(1) and 116(2) of the *VCAT Act*.

<sup>341</sup> *2019 Act* s 84(1).

<sup>342</sup> However, a person may apply to the principal registrar that any documents lodged in relation to this proceeding not be disclosed to a specified person or class of persons: *VCAT Act* cl 37A pt 9 sch 1.

<sup>343</sup> *2019 Act* s 84(2).

- information about the rights of the person to seek information about the application;
- information about how to apply to VCAT to be made a party to the proceeding.

VCAT must commence the hearing within 30 days of receiving an application for a supporter, unless VCAT or the principal registrar:<sup>344</sup>

- requires the parties to attend a compulsory conference in relation to the application; or
- refers the proceeding in relation to the application, or any part of it, for mediation.

The proposed supported person must attend the hearing in person, unless VCAT is satisfied that:

- the person does not wish to attend the hearing in person; or
- personal attendance is impracticable or unreasonable, despite any arrangement that VCAT may make.<sup>345</sup>

## 4.2 Court-referred applications for supportive guardianship and supportive administration orders

Where the Supreme, County or Magistrates Court<sup>346</sup> considers that a party may need a supporter in any civil proceeding before them, the Court may refer the issue to VCAT for determination.<sup>347</sup> This referral is treated as if it were an application to VCAT for the relevant supporter,<sup>348</sup> and the prothonotary or the principal registrar is taken to be the applicant.<sup>349</sup>

## 4.3 Granting supportive guardianship and supportive administration orders

VCAT may only make an order appointing a supporter if VCAT is satisfied that:<sup>350</sup>

- the proposed supported person consents to VCAT making the order;
- if the proposed supported person is given practicable and appropriate support, they will have decision-making capacity in relation to the relevant personal or financial matter;<sup>351</sup> and
- the supportive order will promote the person's personal and social wellbeing.<sup>352</sup>

To be appointed as a supporter, the appointee must be an individual who:<sup>353</sup>

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<sup>344</sup> Ibid s 85. This power may be exercised under Division 5 of Part 4 of the *VCAT Act*.

<sup>345</sup> *2019 Act* s 86. VCAT may also conduct all or part of a proceeding via teleconference, video links or any other system if they think it appropriate: *VCAT Act* s 100.

<sup>346</sup> *2019 Act* s 179(9).

<sup>347</sup> Ibid s 179(1).

<sup>348</sup> Ibid s 179(2)(a).

<sup>349</sup> The applicant is taken to be the prothonotary (in the case of a referral by the Supreme Court) or the principal registrar of the Court (in any other case): Ibid s 179(2)(b).

<sup>350</sup> Ibid s 87(2).

<sup>351</sup> For more information on decision-making capacity, see [2.2 – Decision-making capacity](#). This also implies that supportive decision-makers will be suitable for people who have some decision-making ability but need assistance at times; conversely, it will not suit every circumstance especially those with serious handicaps such as advanced dementia or a severe brain injury: NSWLRC Report 70.

<sup>352</sup> For more information on what constitutes personal and social wellbeing, see [2.1.2 – Promoting the personal and social wellbeing of a person](#).

<sup>353</sup> *2019 Act* s 88(1).

- is at least 18 years of age; and
- consents to act as supportive guardian or supportive administrator.

VCAT must also be satisfied that the appointee will act in accordance with the relevant duties and obligations,<sup>354</sup> and is a suitable person to act as the supporter for the proposed supported person.<sup>355</sup> To determine suitability, VCAT must take into account:<sup>356</sup>

- the proposed supported person's will and preferences (so far as they can be ascertained);
- the desirability of preserving existing family relationships and other relationships important to the proposed supported person;<sup>357</sup>
- the nature of the relationship between the appointee and the proposed supported person, in particular whether the relationship is characterised by trust;
- whether the appointee will be available to the proposed supported person, and able to meet and communicate with them;
- the capacity of the appointee to recognise and give due regard to the importance of the relationship the proposed supported person has with their companion animal.

It is unclear if professional decision-makers such as the Public Advocate or State Trustees can be appointed as a supporter. They appear unlikely to meet the suitability test, for example, the need for a relationship characterised by trust and preserving existing relationships,<sup>358</sup> and supporters are also barred from receiving remuneration for acting in that role.<sup>359</sup> However, this does not necessarily bar other advocates from being appointed. The VLRC report suggested that employees of advocacy groups could also be appointed even if they are indirectly remunerated for this service.<sup>360</sup>

If VCAT makes a supportive order, the order must specify:<sup>361</sup>

- the name of the supported person;
- the name of the supporter;
- the personal or financial matters in relation to which the supporter has powers;
- any specific power that VCAT confers on the supporter;<sup>362</sup>
- any restrictions on the supporter's exercise of powers.

A supportive order does not have a specified end date but will cease to have effect to the extent that it is inconsistent with any subsequent guardianship or administration order.<sup>363</sup> The

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<sup>354</sup> It may be relevant, for example, to examine whether the appointee has relevant dishonesty or violence convictions: NSWLRC Report 80.

<sup>355</sup> *2019 Act* s 88(1).

<sup>356</sup> *Ibid* s 88(2).

<sup>357</sup> While there is no specific list of factors in the *2019 Act*, the NSWLRC suggests that considerations pertaining to the person's culture, such as Indigenous communities (and communal decision-making) may be relevant: NSWLRC Report 79.

<sup>358</sup> In fact, the intent is for this supportive decision-making regime to formalise pre-existing relationships of support: Victoria, Parliamentary Debates, Legislative Assembly, 7 March 2018, 27–8 (Martin Pakula, Attorney-General).

<sup>359</sup> *2019 Act* s 95.

<sup>360</sup> VLRC Report 139.

<sup>361</sup> *2019 Act* s 89.

<sup>362</sup> The power must be referred to in sections 91–3 of the *2019 Act*.

<sup>363</sup> *2019 Act* s 96(1).



supportive order may also be modified after a reassessment or rehearing under Part 7 of the *2019 Act*.<sup>364</sup>

For supportive administration orders, if the supported person does not reside in Victoria, the supportive order only applies to that part of the person's property that is in Victoria.<sup>365</sup>

#### 4.4 Powers of supporters

Generally, a supporter's role is to assist the supported person in decision-making. The VLRC has suggested that this may involve:<sup>366</sup>

- explaining the relevant information in a way the supported person can understand;
- spending time with the supported person to help them consider the options available to them, and the consequences of these options;
- providing advice about which options the supported person might choose;
- helping the supported person identify wishes and preferences.

To accomplish this, VCAT must specifically confer one or more of the following powers on the supporter:<sup>367</sup>

- a power to collect and access information;
- a power to communicate certain information about the supported person with others;
- a power to communicate decisions made by the supported person, or to assist the supported person in communicating these decisions; and
- a power to take any reasonable action or do anything that is reasonably necessary to give effect to decisions.

VCAT may only specify a power if satisfied that the power will ensure that the supporter can give practicable and appropriate support that will enable the supported person to have decision-making capacity in relation to the relevant matters.<sup>368</sup> VCAT may also place restrictions on the exercise of these powers.<sup>369</sup>

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<sup>364</sup> Ibid s 96(2). For more detail about reassessments or rehearings, see [6 – Rehearings and Reassessments](#).

<sup>365</sup> *2019 Act* s 80(2).

<sup>366</sup> VLRC Report 141.

<sup>367</sup> *2019 Act* s 90(1).

<sup>368</sup> Ibid s 90(2).

<sup>369</sup> Ibid s 89(f).

#### 4.4.1 Power of information collection and access

This power allows the supporter to access, collect or obtain any personal information about the supported person from an information holder, or assist the supported person to do so.<sup>370</sup>

This personal information must be relevant to a supported decision, and be information that may lawfully be collected or obtained by the supported person.<sup>371</sup> Some examples include medical reports, financial statements, and other personal information held by government departments.<sup>372</sup>

To avoid doubt, the information holder is authorised to disclose that personal information to the supporter,<sup>373</sup> and the supporter may also disclose that personal information for the purposes of:<sup>374</sup>

- anything that is relevant and necessary to the supporter carrying out their role; or
- any legal proceeding or report of a legal proceeding under the *2019 Act*; or
- any other lawful reason.

#### 4.4.2 Power of communicating information about the supported person

This power allows the supporter to communicate any information about the supported person that is relevant to or necessary for the making of or giving effect to a supported decision.<sup>375</sup>

#### 4.4.3 Power of communicating the supported person's decision

This power allows the supporter to communicate a supported decision of the supported person, or to assist the supported person to communicate the supported decision.<sup>376</sup>

#### 4.4.4 Power to give effect to decisions

This power allows the supporter to take any reasonable action or do anything that is reasonably necessary to give effect to a supported decision, other than a decision about a significant financial transaction.<sup>377</sup> Here, 'significant financial transaction' includes:<sup>378</sup>

- undertaking any real estate transaction for the supported person, except for entering a residential tenancy for premises in which the supported person lives or intends to live;
- dealing with land on behalf of the supported person, including taking out a loan or giving a guarantee on behalf of the supported person;

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<sup>370</sup> Ibid s 91(1).

<sup>371</sup> Ibid s 91(1); VLRC Report 141.

<sup>372</sup> VLRC Report 141.

<sup>373</sup> *2019 Act* s 91(2). But also note the *Disability Act 2006 (Vic)*, the *Health Records Act 2001 (Vic)* and the *Privacy and Data Protection Act 2014 (Vic)* for provisions relating to disclosure and access to personal information by supportive decision-makers.

<sup>374</sup> *2019 Act* s 91(3).

<sup>375</sup> Ibid s 92(a).

<sup>376</sup> Ibid s 92(b).

<sup>377</sup> Ibid s 93(1).

<sup>378</sup> Ibid s 93(2).

- undertaking a transaction for the supported person involving the use of the supported person's property as security for an obligation;
- buying and selling substantial personal property on behalf of the supported person; and
- making or continuing an investment for the supported person, including taking up rights to issues of or options for new shares to which the supported person becomes entitled by the supported person's existing shareholding. However, this does not include investing or continuing an investment of \$10K or less in total in one or more interest-bearing accounts of an authorised deposit-taking institute.<sup>379</sup>

Examples of actions to give effect to a supported decision include contacting the relevant organisation to follow up on information provided or the decision given, or provide assistance for the represented person to seek review of a decision.<sup>380</sup>

#### 4.5 Duties and obligations of supporters

A supporter must act in accordance to the following duties and obligations:<sup>381</sup>

- to act honestly, diligently and in good faith;
- to exercise reasonable skill and care;
- to not use the position for profit;
- to avoid acting when there is or may be a conflict of interest. If there is a conflict of interest, the supporter must ensure that the interests of the supported person are the primary consideration;
- to discuss anything relating to a supported decision with the supported person in a way that the supported person can understand and that will assist the supported person to make the decision;
- to not assist the supported person, in their role of supporter, to conduct any illegal activity;
- to not coerce, intimidate or in any way unduly influence the supported person into a particular course of action; and
- to otherwise act in accordance with the general principles.<sup>382</sup>

Separately, if a supporter is advised of the supported person's death, the former must report the death in writing to VCAT as soon as practicable.<sup>383</sup>

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<sup>379</sup> Ibid s 93(3).

<sup>380</sup> ALRC Report 104.

<sup>381</sup> *2019 Act* s 94.

<sup>382</sup> For more information on the general principles, see [2.1.1 – General principles](#).

<sup>383</sup> *2019 Act* s 98.

## 4.6 Other matters relating to supporters: Advice and Remuneration

A supportive decision maker may apply to VCAT for advice about:<sup>384</sup>

- the scope of the supportive order; or
- the exercise of any power under the supportive order.

After considering an application for advice, or on its own initiative, VCAT may:<sup>385</sup>

- approve or disapprove of any act proposed by the supporter;
- give such advice as it considers appropriate; and
- make any order it considers necessary.

No action lies against a supporter for an act or thing done, or omitted to be done, under VCAT advice or order, unless the supporter has been guilty of fraud, wilful concealment or misrepresentation in representing the facts to VCAT.<sup>386</sup>

A supporter is not entitled to receive any remuneration for acting in their role.<sup>387</sup>

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<sup>384</sup> Ibid ss 97(1)–(2).

<sup>385</sup> Ibid s 97(3).

<sup>386</sup> Ibid s 97(4).

<sup>387</sup> Ibid s 95.

## 5 Administration (missing person) orders

Administration (missing person) orders ('AMP orders') were introduced in 2010 to allow people to apply to VCAT for the administration of a missing person's estate, providing a mechanism for families or others to manage a missing person's financial affairs without having to establish a presumption of death at the Supreme Court.<sup>388</sup> The *1986 Act* provided for a regime for AMP administrators to be appointed over a missing person's estate, with the duties and powers modified from the administrators regime as needed.

Part 5 of the *2019 Act* replicates the regime under the *1986 Act* with a few modifications, harmonising the provisions with the administration orders regime. This chapter discusses applications for AMP orders, procedures and VCAT considerations in granting orders, as well as powers and duties of administrators under a missing person order ('AMP administrator').

These provisions also do not exclude or limit the operation of the *Administration and Probate Act 1958* (Vic).<sup>389</sup>

### 5.1 Applications for AMP Orders

Any person may apply to VCAT for an AMP order to appoint an AMP administrator in relation to a financial matter for a missing person.<sup>390</sup>

The application must include:<sup>391</sup>

- the missing person's name;
- details of the reasons for making the application;
- the proposed administrator's name and contact details;
- the name and contact details of:
  - the applicant, and
  - any persons who have a direct interest in the application (if known to the applicant). This includes the missing person's relatives, any primary carer, close friends, any attorney appointed under an enduring power of attorney and any supportive attorney appointed under the *Powers of Attorney Act 2014*;

The following people are parties to the proceeding:<sup>392</sup>

- the applicant;
- the missing person;
- the proposed administrator; and

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<sup>388</sup> Victoria, Parliamentary Debates, Legislative Assembly, 12 August 2010, 3271 (Bob Cameron, Minister for Police and Emergency Services, and Minister for Corrections).

<sup>389</sup> *2019 Act* s 139.

<sup>390</sup> *Ibid* s 99.

<sup>391</sup> *Ibid* s 100. Section 100 includes a Note which refers to *VCAT Act* s 67, which allows Rules to specify particulars and documents required in applications. At present, no Rules have been made that prescribe any additional matters.

<sup>392</sup> *2019 Act* s 101.

- any other person VCAT orders to be joined as a party to the proceeding under section 60 of the *VCAT Act*.<sup>393</sup>

The following people are entitled to notice of an application, the hearing and any order made in the proceeding, where applicable:<sup>394</sup>

- any party to a proceeding;
- the spouse or domestic partner of the missing person;
- the primary carer of the missing person;
- any person referred to in the application as having a direct interest in the application;
- any other person VCAT directs be given notice.

The notice of the application to a party must include:<sup>395</sup>

- a copy of the application and any information filed in support of the application;<sup>396</sup>
- the names of:
  - the parties to the proceeding; and
  - the other persons entitled to the notice;
- information about the rights of the party in relation to the application.

If the person is not a party, the notice must include:<sup>397</sup>

- a copy of the application;
- the names of—
  - the parties to the proceeding; and
  - the other persons entitled to the notice;
- information about the rights of the person to seek information about the application;
- information about how to apply to VCAT to be made a party to the proceeding.

VCAT must commence the hearing within 30 days of receiving an application for an AMP administrator, unless VCAT or the principal registrar schedules a compulsory conference or refers the proceeding to mediation.<sup>398</sup>

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<sup>393</sup> VCAT may order a person be joined on its own initiative or on application once certain considerations are met: see *VCAT Act* s 60.

<sup>394</sup> *2019 Act* s 102. This is for the purposes of notice and service requirements under sections 72(1), 99(1) and 116(2) of the *VCAT Act*.

<sup>395</sup> *2019 Act* s 103(1).

<sup>396</sup> However, a person may apply to the principal registrar that any documents lodged in relation to this proceeding not be disclosed to a specified person or class of persons: *VCAT Act* cl 37A pt 9 sch 1.

<sup>397</sup> *2019 Act* s 103(2).

<sup>398</sup> *Ibid* s 104. This power may be exercised under Division 5 of Part 4 of the *VCAT Act*.

## 5.2 Court-referred applications for AMP orders

Where the Supreme, County or Magistrates Court<sup>399</sup> considers that a party may need an AMP administrator in any civil proceeding before them, the Court may refer the issue to VCAT for determination.<sup>400</sup> This referral is treated as if it were an application to VCAT for the relevant decision-maker,<sup>401</sup> and the prothonotary or the principal registrar is taken to be the applicant.<sup>402</sup>

## 5.3 Making AMP orders

VCAT may only make an AMP order if VCAT:

- has determined that the person is a missing person ('missing person determination'), being satisfied that:<sup>403</sup>
  - it is not known whether the person is alive; and
  - reasonable efforts have been made to find the person; and
  - for at least 90 days, the person has not contacted:
    - anyone who lives at the person's last-known home address; or
    - any relative or friend of the person with whom the person is likely to communicate.
- has determined that the person usually resides in Victoria;<sup>404</sup> and
- is satisfied that:<sup>405</sup>
  - while the person is missing there is, or is likely to be, a need for a decision to be made in relation to the person's financial matters;<sup>406</sup> and
  - the order would promote the missing person's personal and social wellbeing while that person is missing.<sup>407</sup>

This test raises several discrete issues which has already been discussed in other parts of the guide:

- For the question of 'need', see [3.2.2 – Need](#).
- For what is included in 'financial matters', see [2.4.2 – Financial matters](#).
- To determine what promotes personal and social wellbeing, see [2.1.2 – Promoting the personal and social wellbeing of a person](#).

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<sup>399</sup> 2019 Act s 179(9).

<sup>400</sup> 2019 Act s 179(1).

<sup>401</sup> Ibid s 179(2)(a).

<sup>402</sup> The applicant is taken to be the prothonotary (in the case of a referral by the Supreme Court) or the principal registrar of the Court (in any other case): Ibid s 179(2)(b).

<sup>403</sup> Ibid s 105(3).

<sup>404</sup> Ibid s 105(2)(a).

<sup>405</sup> Ibid s 105(2)(b).

<sup>406</sup> This includes the ongoing care of any companion animal of the person: Ibid s 105(2)(b)(i).

<sup>407</sup> For more information on what constitutes personal and social wellbeing, see [2.1.2 – Promoting the personal and social wellbeing of a person](#).

VCAT has discretion to make an AMP order or make no order at all.<sup>408</sup> However, VCAT cannot make an order in relation to the property of a missing person if the property is 'uncared for' property subject to an administration order (or an application for such an order) by a trustee company.<sup>409</sup>

If VCAT decides to make an AMP order, VCAT may appoint an AMP administrator who is either an individual over the age of 18 or a body corporate, and who consents to act as administrator. VCAT must be satisfied that the AMP administrator:<sup>410</sup>

- will act in accordance with the relevant statutory duties;
- is not in a position where their interests conflict, or may conflict, with the missing person's interests;
- has sufficient expertise to make decisions about any specified financial matter in the AMP order; and
- is suitable to act as the AMP administrator, taking into account:<sup>411</sup>
  - the missing person's will and preferences (so far as they can be ascertained);
  - the desirability of preserving existing relationships important to the missing person;
  - the desirability of appointing a relative of the missing person, or who has a personal relationship with the missing person, rather than appointing a person with no such relationship;
  - whether the proposed AMP administrator is or was a member of VCAT as constituted for a proceeding under the *2019 Act*. Such a VCAT member may be appointed as an AMP administrator if VCAT considers it appropriate in the circumstances.<sup>412</sup>

VCAT must also not assume, without any evidence, that because the proposed administrator is a relative, it means that they:

- are unsuitable to be an AMP administrator merely because the relative disagrees with another relative about a matter relating to the missing person;<sup>413</sup>
- have interests that conflict, or may conflict, with those of the missing person.<sup>414</sup>

For more discussion about suitability matters in appointing an administrator, see [3.3.2 – Suitability matters](#).

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<sup>408</sup> *2019 Act* s 105(1).

<sup>409</sup> Under *Administration and Probate Act 1958* (Vic) s 24A: *Ibid* s 105(4).

<sup>410</sup> *2019 Act* s 107(1).

<sup>411</sup> *Ibid* s 107(2).

<sup>412</sup> *Ibid* s 107(3).

<sup>413</sup> *Ibid* s 107(4)(b).

<sup>414</sup> *Ibid* s 107(4)(a).



VCAT must specify the following matters in the order:<sup>415</sup>

- the name of the missing person;
- the name of the administrator;
- the financial matters in relation to which the administrator has powers;
- any other power that VCAT specifically confers on the administrator;<sup>416</sup>
- the duration of the AMP order;<sup>417</sup>
- any restrictions on the administrator's exercise of powers; and
- whether the order is an urgent order.

An AMP order will be in force for a maximum two years or any shorter period specified.<sup>418</sup>

## 5.4 Urgent AMP orders

A person may apply for an urgent AMP order if there is a risk of harm to the missing person's property. VCAT may also waive the content and notice requirements and make an AMP order in accordance with the considerations in [5.3 – Making AMP orders](#).<sup>419</sup>

To grant an urgent AMP order, VCAT must be satisfied, on reasonable grounds, that there is an immediate risk of harm to the missing person's property if the order were not made.<sup>420</sup>

If an urgent AMP order is made, VCAT must specify the duration of the order, which cannot exceed 21 days.<sup>421</sup> As soon as practicable but within 42 days after making such an order, VCAT must hold a hearing to determine whether an AMP order should be made.<sup>422</sup>

## 5.5 Enforcement orders against persons refusing

An AMP administrator may apply to VCAT for an enforcement order in relation to a decision or act that the AMP administrator claims:<sup>423</sup>

1. is an exercise of their powers; and
2. is either:
  - a. not recognised as an exercise of their powers, or
  - b. not given effect to,

by another person ('person refusing'). The person refusing is entitled to notice of the application in accordance with section 72 of the *VCAT Act*.<sup>424</sup>

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<sup>415</sup> Ibid s 108.

<sup>416</sup> Under Division 3 of the *2019 Act*.

<sup>417</sup> *2019 Act* s 106(1).

<sup>418</sup> Ibid s 106(1).

<sup>419</sup> Ibid s 109(1).

<sup>420</sup> Ibid s 109(1).

<sup>421</sup> Ibid s 106(2).

<sup>422</sup> Ibid s 109(2).

<sup>423</sup> Ibid s 178(1).

<sup>424</sup> Ibid s 178(2). Section 72 of the *VCAT Act* provides that the applicant must serve a copy of the application on the person refusing, with certain exceptions.

VCAT may make an order that the person refusing recognise or give effect to the disputed decision or act if VCAT is satisfied that:<sup>425</sup>

- the disputed decision or act is an exercise of the AMP administrator's powers; and
- the person refusing has failed or refused to recognise or give effect to the disputed decision or act; and
- the order will promote the personal and social wellbeing of the represented person for whom the AMP administrator is appointed.

Failing to comply with the VCAT order is an offence.<sup>426</sup>

## 5.6 Renewing and revoking orders, and interactions with other proceedings

The AMP administrator may apply to VCAT for a renewal of an AMP or urgent AMP order. VCAT may renew the order if satisfied that the matters within the missing person determination continue to apply.<sup>427</sup> The order may be only be renewed once, for a further period not exceeding two years (for AMP orders), or 21 days (for urgent AMP orders).<sup>428</sup>

At the end of the specified period, the order will expire. Should that happen, a person may apply for a new AMP order over the missing person.<sup>429</sup> A person may also apply at any time for a reassessment of an AMP order.<sup>430</sup>

VCAT **must** revoke the AMP by order where:

- a grant of probate of the will or administration of the estate of the missing person is made by the Supreme Court or registrar of probates;<sup>431</sup>
- the presumption of death is successfully invoked for the purpose of any other proceeding before a Victorian court or elsewhere in Australia;<sup>432</sup> or
- the missing person's property or affairs becomes subject to an 'uncared for' property order.<sup>433</sup>

Otherwise, VCAT **may** revoke the AMP on application by:<sup>434</sup>

- the missing person, or
- the administrator or any other person, if satisfied that:
  - the missing person is alive; or
  - the missing person is dead; or
  - the missing person may be presumed to be dead.

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<sup>425</sup> *2019 Act* s 178(3).

<sup>426</sup> *VCAT Act* s 133.

<sup>427</sup> *2019 Act* s 106(3).

<sup>428</sup> *Ibid* s 106(3).

<sup>429</sup> *Ibid* s 106(4).

<sup>430</sup> *Ibid* s 106(4). For more information on reassessments, see [6.2 – Reassessments](#).

<sup>431</sup> The Court or registrar must be satisfied of the missing person's death, whether by direct evidence or on presumption of death: *2019 Act* s 138(2)(a). Also see *Administration and Probate Act 1958* (Vic) ss 7 and 12.

<sup>432</sup> *2019 Act* s 138(2)(c).

<sup>433</sup> *Ibid* s 138(2)(d). See the requirements of an 'uncared for' property order in *Administration and Probate Act 1958* (Vic) s 24A.

<sup>434</sup> *2019 Act* s 138(1).

While the *2019 Act* refers to VCAT revoking the order, whereas the corresponding provisions in the *1986 Act* refer to VCAT removing an administrator, it is likely that no practical difference applies.<sup>435</sup>

## 5.7 Powers of AMP Administrators

The AMP order authorises the AMP administrator to do all acts and exercise all powers in relation to the financial matters specified in the order, in the name, and on behalf, of the missing person in the same manner as the missing person may have done, if the person were not missing and had the relevant decision-making capacity.<sup>436</sup>

An AMP order will automatically confer the following powers on the AMP administrator:<sup>437</sup>

- a power to make decisions about specified financial matters in relation to the missing person;
- a power of investment;
- a power to open the missing person's will; and
- any other power specified in the order.

An AMP order also confers onto the AMP administrator:<sup>438</sup>

- a power to sign and do anything necessary to give effect to any power or duty vested; and
- a power to do all matters necessary or incidental to the performance of any power conferred.

Any decision made, action taken, consent given or thing done by an AMP administrator under an AMP order has effect as if it were made, taken, given or done by the missing person and as if the missing person were not missing and had the decision-making capacity for the particular matter.<sup>439</sup>

### 5.7.1 Powers of investment

An AMP administrator may:<sup>440</sup>

- re-deposit money deposited in an authorised deposit-taking institution after it becomes payable;
- exercise the same powers over property as if the AMP administrator were a trustee under the *Trustee Act 1958* (Vic); and
- continue investments in the way they were invested by the missing person for such period as the administrator thinks fit, including taking up rights to issues of new shares and options.

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<sup>435</sup> See *1986 Act* s 60AD.

<sup>436</sup> Subject to, and in accordance with, the *2019 Act* and the AMP order: *2019 Act* s 110(3).

<sup>437</sup> *Ibid* ss 110(1)(a)–(d).

<sup>438</sup> *Ibid* ss 110(1)(e)–(f).

<sup>439</sup> *Ibid* s 110(4).

<sup>440</sup> *Ibid* s 111.

As under the *1986 Act*, the *2019 Act* provides an exception to the ademption principle in relation to property dealt with by the AMP administrator. This ensures that testamentary gifts of the represented person are not undermined by actions taken by the AMP administrator in relation to specific items of property. Instead, the proceeds from the disposition of the property are notionally treated as the property identified in the will.<sup>441</sup>

An AMP administrator is not required to keep the proceeds of any sale or other disposition of property separate from the missing person's other assets,<sup>442</sup> and any money received may be invested in a similar manner to trust funds under the *Trustee Act 1958 (Vic)*.<sup>443</sup>

The investment power may be limited by any order of VCAT.<sup>444</sup>

### 5.7.2 Power to open a will (and powers over wills generally)

An AMP administrator may open and read any paper or writing deposited with them that is a will, a revoked will, a purported will or a copy of a will of the missing person ('will document'), without an order of VCAT.<sup>445</sup>

Separately, VCAT also has powers with regards to wills – it may:

- open and read any will document;<sup>446</sup>
- make a full or redacted will document available to an AMP administrator if VCAT is satisfied that it is reasonable to make it available in the circumstances, taking into account whether:<sup>447</sup>
  - the copy will assist the AMP administrator to make decisions about the financial matters specified in the AMP order; and
  - the AMP administrator is also a beneficiary under the will; and
- make an order compelling a person who has possession or control of a will document to produce that document to VCAT for the purposes of opening/reading or making it available to AMP administrators, or otherwise on application by an AMP administrator.<sup>448</sup>

### 5.7.3 Power to undertake legal proceedings

VCAT may specify in an AMP order that the AMP administrator has power to bring and defend an action or other legal proceeding in the name, and on behalf, of the missing person.<sup>449</sup> The legal proceeding must be in relation to a financial matter specified in the AMP order,<sup>450</sup> and the AMP

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<sup>441</sup> Ibid s 111; *1986 Act* s 53; *Simpson v Cunning* [2011] VSC 466, [42].

<sup>442</sup> *2019 Act* s 136(3).

<sup>443</sup> Ibid s 136(4).

<sup>444</sup> Ibid s 111.

<sup>445</sup> Ibid s 112.

<sup>446</sup> Ibid s 127.

<sup>447</sup> Ibid s 129.

<sup>448</sup> Ibid s 128.

<sup>449</sup> Ibid s 113(1).

<sup>450</sup> Ibid.

administrator is not required to be appointed as a litigation guardian in accordance with rules of the relevant court or tribunal.<sup>451</sup>

With regards to costs, the costs of the proceeding are generally to be paid out of the missing person's estate. The court or tribunal may also order that a person who is or was an AMP administrator be reimbursed from the missing person's estate for costs incurred in bringing or defending proceedings.<sup>452</sup>

However, a court or tribunal may order the AMP administrator is personally liable for costs if the latter was negligent or engaged in misconduct.<sup>453</sup>

#### 5.7.4 Other specified powers

VCAT may specify a power in the AMP order, if VCAT is satisfied that the power is necessary or desirable for the purposes of promoting the personal and social wellbeing of the missing person.<sup>454</sup>

Once satisfied, VCAT may specify that the AMP administrator has any or all of the following powers in relation to a specified financial matter:<sup>455</sup>

- collect, receive and recover:
  - income of the missing person; and
  - money due or which becomes due to the missing person; and
  - any compensation or damages for injury to the estate or person of the missing person;
- invest any money in any security in which a trustee may by law invest;
- demise land at a rent and on conditions as the AMP administrator thinks fit for any term not exceeding 5 years, or for any longer term with VCAT's consent;
- exercise, to the extent and in the manner the AMP administrator thinks fit, any power of leasing vested in the missing person;
- surrender, accept, accept the surrender or renew any lease;
- bring land under the *Transfer of Land Act 1958* (Vic);
- sell, exchange, partition or convert into money any property with the approval of VCAT;
- mortgage or charge any property;
- pay any debts and settle, adjust or compromise any demand made by or against the missing person's estate, and discharge any encumbrance on the missing person's estate;
- carry on, to the extent the administrator thinks appropriate, any trade, profession or business which the missing person carried on;
- agree to any alteration of a condition of any partnership into which the missing person has entered or to a dissolution and distribution of the assets of the partnership;
- execute and sign deeds, instruments and other documents;
- complete any contract for the performance of which the missing person was liable, or enter into any agreement terminating liability;
- pay a sum for:

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<sup>451</sup> Ibid s 113(2).

<sup>452</sup> Ibid s 113(5).

<sup>453</sup> Ibid s 113(4).

<sup>454</sup> Ibid s 110(2).

<sup>455</sup> Ibid s 114.

- the maintenance of the missing person's spouse or domestic partner or any child, parent or other person dependent on the missing person; and
- the education of any child of the missing person;
- any other relevant power in relation to a specified financial matter.

### 5.7.5 Advice

An AMP administrator may seek advice from a professional adviser<sup>456</sup> about the financial matters specified in the AMP order,<sup>457</sup> and is entitled to be reimbursed from the missing person's estate for any costs paid in the course of obtaining professional advice.<sup>458</sup>

An AMP administrator may apply to VCAT for advice on:<sup>459</sup>

- the scope of the AMP order; or
- the exercise of any power under the AMP order.

After considering an application for advice, or on its own initiative, VCAT may:<sup>460</sup>

- approve or disapprove of any act proposed by the AMP administrator;
- give such advice as it considers appropriate; and
- make any order it considers necessary.

Under the *2019 Act*, VCAT no longer has jurisdiction to direct an administrator concerning any matter.<sup>461</sup> It is not known whether there will be any practical difference as VCAT may still 'make any order it considers necessary'.<sup>462</sup>

No action lies against an AMP administrator for an act or thing done, or omitted to be done, under VCAT advice or order, unless the AMP administrator has been guilty of fraud, wilful concealment or misrepresentation in representing the facts to VCAT.<sup>463</sup>

VCAT's advice jurisdiction also includes the jurisdiction to approve, order or advise the commencement of a proceeding where the State Trustees is acting in one capacity or on behalf of a represented or missing person, against State Trustees acting in another capacity or on behalf of another represented or missing person.<sup>464</sup>

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<sup>456</sup> 'Professional adviser' is defined as a person who provides professional advice to administrators, including a financial adviser, a legal practitioner and an accountant: *Ibid* s 126(3).

<sup>457</sup> *Ibid* s 126(1).

<sup>458</sup> *Ibid* s 126(2).

<sup>459</sup> *Ibid* ss 125(1), (3).

<sup>460</sup> *Ibid* s 125(3).

<sup>461</sup> Compare *1986 Act* s 55(4A).

<sup>462</sup> *2019 Act* s 125(3)(c).

<sup>463</sup> *Ibid* s 125(4).

<sup>464</sup> *Ibid* s 125(2).

## 5.8 Duties of AMP Administrators

### 5.8.1 Duties Generally

In exercising their power, an AMP administrator must:<sup>465</sup>

- take actions that the AMP administrator considers necessary or desirable for—
  - the payment of the missing person's debts and engagements, and otherwise for the missing person's benefit;
  - the maintenance and benefit of the missing person's dependants; and
  - the care and management of the missing person's property;
- act in accordance with the decision-making principles;<sup>466</sup>
- act as an advocate for the missing person;
- act honestly, diligently and in good faith;
- exercise reasonable skill and care;
- not use the position for profit unless otherwise permitted or authorised;<sup>467</sup>
- avoid acting if there is or may be a conflict of interest unless otherwise authorised;<sup>468</sup>
- not disclose confidential information gained as an AMP administrator unless authorised to do so under the AMP order or by law.

### 5.8.2 Duties regarding property

The AMP administrator must take possession and care of, recover, collect, preserve and administer the missing person's property and estate,<sup>469</sup> and otherwise manage the missing person's property and financial affairs.<sup>470</sup>

The AMP administrator must also keep their own property separate from the missing person's property,<sup>471</sup> unless the property is owned jointly by the AMP administrator and the missing person.<sup>472</sup>

### 5.8.3 Financial transactions and other matters

The AMP administrator must not enter into a transaction in their capacity as AMP administrator if the transaction is one in which there is, or may be, a conflict between:

- the duty of the AMP administrator to the missing person; and
- the interests of the AMP administrator, or of a relative, business associate or close friend of the AMP administrator.

However, the AMP administrator may enter into a conflict transaction if:

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<sup>465</sup> Ibid s 116.

<sup>466</sup> For more information on the decision-making principles, see [2.1.3 – Decision-making principles](#).

<sup>467</sup> This would be permitted under section 175 of the *2019 Act* or otherwise authorised by law: *2019 Act* s 116(f).

<sup>468</sup> Authorisation may be given under the *2019 Act*, by order of VCAT or otherwise by law: *2019 Act* s 116(g).

<sup>469</sup> *2019 Act* s 117(a).

<sup>470</sup> Ibid s 117(b).

<sup>471</sup> Ibid s 121(1).

<sup>472</sup> Ibid s 121(2). This also does not affect any other obligation imposed by law: Ibid s 121(3).

1. it is a transaction providing for the maintenance of the missing person's dependant(s) made in accordance with the specified power to pay for the maintenance of the missing person's spouse, domestic partner or other dependent, or the education of any child of the missing person;<sup>473</sup>
2. merely because in the transaction, the AMP administrator (in their own right and on behalf of the missing person), obtains a loan or gives a guarantee or indemnity, or otherwise deals with, an interest in property held jointly by the AMP administrator and the missing person (whether as joint tenants or tenants in common);<sup>474</sup>
3. VCAT authorises the AMP administrator, at or before the time of the conflict transaction, to enter into:
  - the conflict transaction,
  - a transaction of a similar nature, or
  - any conflict transaction otherwise prohibited,<sup>475</sup>; or
4. VCAT otherwise validates a prohibited conflict transaction.<sup>476</sup> Once validated, the conflict transaction is taken to be valid from the time it was entered into.<sup>477</sup>

An AMP administrator must keep accurate records and accounts of all dealings and transactions made by them in relation to the financial matters specified in the AMP order.<sup>478</sup>

#### 5.8.4 Accounts

The AMP administrator must lodge an account with VCAT either on the anniversary of the AMP administrator's appointment, or as soon as practicable after, or on VCAT's direction at any time.<sup>479</sup>

The account must detail:<sup>480</sup>

- the dealings and transactions during the previous 12 months;
- a full and true account of the missing person's assets and liabilities; and
- all receipts and disbursements made during the previous 12 months;

relating to the financial matters specified in the AMP order.

VCAT may also appoint a person to examine or audit the accounts, at the time it appoints an administrator or at any later time.<sup>481</sup> The appointed examiner or auditor must lodge a report in relation to the accounts with VCAT, and may recommend any item in the accounts be disallowed by VCAT.<sup>482</sup>

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<sup>473</sup> Ibid s 118(1). For the relevant specified power, see section 114(n) of the *2019 Act*.

<sup>474</sup> *2019 Act* s 118(2).

<sup>475</sup> Ibid s 119(1).

<sup>476</sup> Ibid s 119(2).

<sup>477</sup> Ibid s 119(3).

<sup>478</sup> Ibid s 120.

<sup>479</sup> Ibid ss 122(2)–(3).

<sup>480</sup> Ibid ss 122 (2), (4).

<sup>481</sup> Ibid s 122(1).

<sup>482</sup> Ibid s 122(5).



VCAT must not disallow the item if satisfied that the AMP administrator acted in good faith and with reasonable care in the exercise of powers conferred.<sup>483</sup> If VCAT decides to make the order, then the AMP administrator is liable for the amount of the disallowed item.<sup>484</sup>

The examiner or auditor's fee must be paid by the AMP administrator out of the missing person's estate,<sup>485</sup> which must be an amount certified by the examiner or auditor as being the reasonable cost of examining or auditing the accounts.<sup>486</sup> However, this fee may be partly or wholly waived by VCAT, on application by the AMP administrator and with consent of the examiner or auditor.<sup>487</sup>

## 5.9 Former Missing Persons

There are certain requirements, obligations and entitlements that apply when a missing person ceases to be a missing person (either when they have died or been found alive).

### 5.9.1 Notification requirements

Notification requirements apply if a missing person ceases to be a missing person.

If the AMP administrator becomes aware that the missing person is alive (in Victoria or elsewhere), or has died, they must notify VCAT in writing as soon as practicable after the administrator becomes aware.<sup>488</sup>

If VCAT knows that the missing person has ceased to be a missing person or has died, VCAT must notify the administrator as soon as practicable.<sup>489</sup> The AMP administrator may otherwise exercise all or any of the powers given until the AMP administrator knows that the missing person has ceased to be a missing person or has died.<sup>490</sup>

Once VCAT gives notice, the former missing person or their personal representative is bound by, and may take advantage of, any act done by the AMP administrator within the powers conferred as if:<sup>491</sup>

- the act had been done by the missing person; and
- the missing person had decision-making capacity to do the act.

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<sup>483</sup> *Ibid* s 122(6).

<sup>484</sup> *Ibid* s 122(7).

<sup>485</sup> *Ibid* ss 122(1), 123(1).

<sup>486</sup> *Ibid* s 123(1).

<sup>487</sup> *Ibid* s 123(2).

<sup>488</sup> *Ibid* s 124.

<sup>489</sup> *Ibid* s 130(1).

<sup>490</sup> *Ibid* s 130(2).

<sup>491</sup> *Ibid* s 131.

### 5.9.2 Entitlements of Former Missing Persons and obligations of AMP administrators

If an AMP administrator is informed<sup>492</sup> that the missing person has ceased to be a missing person, the administrator must:<sup>493</sup>

- pay, or cause to be paid, all money standing to the former missing person's credit with the AMP administrator; and
- deliver all the former missing person's property that is in the AMP administrator's custody, and any documents relating to that property, unless VCAT orders the documents be withheld,<sup>494</sup>

to the former missing person or their personal representative.

The payment or delivery of property is subject to satisfying any amount due to the AMP administrator, and all costs, expenses and liabilities incurred by the AMP administrator.<sup>495</sup> Receiving the payment or property will be considered an absolute discharge to an AMP administrator despite any informality in the discharge or certification.<sup>496</sup>

A former missing person is entitled to an inspection of accounts. This gives the former missing person a right to access any books, accounts, notices and other documents relating to the dealings and transactions made for the financial matters specified in the AMP order ('dealings documents'). They or their personal representative:<sup>497</sup>

- may:
  - examine and inspect any dealings documents in the AMP administrator's custody. This right may be exercised personally or through a legal practitioner or other authorised agent; and
  - make, or cause to be made, copies or extracts from those dealings documents; and
- must be provided with:
  - copies of or extracts from any dealings documents; and
  - information relating to the dealings and transactions made for the financial matters specified in the AMP order by the AMP administrator that is:
    - reasonable to request and
    - that can be given by the AMP administrator.

A person can exercise this right of inspection before or after obtaining all or any part of their money or other property from the AMP administrator.

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<sup>492</sup> This includes receipt of a notice by VCAT under s 130 of the *2019 Act*, or otherwise being informed: *Ibid* s 132(1).

<sup>493</sup> *Ibid* s 132(1).

<sup>494</sup> Under *2019 Act* s 134.

<sup>495</sup> *Ibid* s 132(2).

<sup>496</sup> *Ibid* s 132(3).

<sup>497</sup> *Ibid* s 133.

However, on application by the AMP administrator, VCAT may order that delivery of, or access to, dealings documents be withheld from a person specified by VCAT or a person belonging to a class of person specified by VCAT.<sup>498</sup> To make an order, VCAT must be satisfied that:<sup>499</sup>

- it is in the interests of the former missing person that the information, or part of the information, contained in the dealings documents remain confidential; or
- the dealings documents contains confidential information about another person.

An AMP administrator may sell the former missing person's personal effects if they are in the AMP administrator's possession, and unclaimed within 2 years after the missing person ceases to be a missing person.<sup>500</sup> The AMP administrator must only do so after public notice,<sup>501</sup> and the proceeds of the sale must be paid into the Consolidated Fund.<sup>502</sup>

## 5.10 Other matters for AMP Administrators

### 5.10.1 Orders set aside

An order of a court or VCAT that sets aside an administration order, or has the effect of setting it aside ('setting aside order'), does not affect the validity of anything done in accordance with the administration order before the setting aside order takes effect,<sup>503</sup> subject to any VCAT or court order to the contrary when the setting aside order is made.<sup>504</sup>

### 5.10.2 Remuneration and Costs

An administrator who carries on a business of, or including, the administration of estates (a 'professional administrator') may receive remuneration from the represented person's estate. This will be calculated either in accordance with a scale fixed by rules,<sup>505</sup> or as otherwise determined by VCAT.<sup>506</sup>

If remuneration is determined by VCAT in relation to a licensed trustee company,<sup>507</sup> it must not exceed the limit on fees that may be charged by a licensed trustee company under Chapter 5D of the *Corporations Act 2001* (Cth).<sup>508</sup>

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<sup>498</sup> Ibid s 134(1).

<sup>499</sup> Ibid s 134(2).

<sup>500</sup> Ibid s 135(1).

<sup>501</sup> Ibid s 135(1).

<sup>502</sup> Ibid s 135(2).

<sup>503</sup> Ibid s 180(1).

<sup>504</sup> Ibid s 180(2).

<sup>505</sup> Specifically, in accordance with a scale in relation to remuneration for administrators that is fixed by rules made under the *VCAT Act*. Ibid s175(2)(a). The practice in the absence of any such rules has been for administrators to charge fees according to the scale set out in the Practitioner Remuneration Order, as there is no specific available scale for administrators: *VVA (Guardianship)* [2019] VCAT 981, [28], [43].

<sup>506</sup> *2019 Act* s175(2)(b).

<sup>507</sup> That is, a 'licensed trustee company' within the meaning of section 601RAA of the *Corporations Act 2001* (Cth): Ibid s 175(3).

<sup>508</sup> Ibid s 175(3).

An administrator who is not a professional administrator is not entitled to receive any fee, remuneration or other reward from the represented person's estate unless VCAT otherwise specifies in the administration order.<sup>509</sup> The relationship between a represented person and an administrator has long been considered a fiduciary relationship, and therefore there is no 'right' to remuneration for a private administrator – any such remuneration will be decided by VCAT in its discretion.<sup>510</sup>

VCAT may order an administrator to pay to the represented person's estate any remuneration or other reward paid or deducted from the estate which VCAT specifies.<sup>511</sup> VCAT may also request accounts from the administrator to determine compliance with the *2019 Act*, any VCAT order or any approval or specification made by VCAT in relation to remuneration.<sup>512</sup>

Regarding costs, a court or tribunal may order that costs incurred by an administrator arising from the administrator's dealings and transactions relating to the specified financial matters be paid out of, or reimbursed from, the represented person's estate ('costs order').<sup>513</sup> This is regardless of whether their appointment as administrator is no longer in force or is revoked or set aside.

VCAT may make a costs order as part of their advice jurisdiction, on application by a current administrator, or an administrator whose appointment has been revoked or set aside.<sup>514</sup>

There is no current scale of costs for work in VCAT, and the common practice and expectation in dealing with costs applications has been that the County Court scale is usually applied. In the absence of an order to the contrary, if VCAT makes an order as to costs, the applicable scale of costs is the County Court cost scale.<sup>515</sup> This also allows party-party or indemnity costs where appropriate.

It is not practical for VCAT to deal with these matters as if it were a Costs Court – where the administrator has been ordered to calculate fees according to a certain scale, the Member's role is limited to considering whether the scale has been correctly applied to the work actually done.<sup>516</sup>

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<sup>509</sup> *Ibid* s 175(1).

<sup>510</sup> *IED (Guardianship)* [2014] VCAT 1368, [36].

<sup>511</sup> *2019 Act* s 175(5).

<sup>512</sup> *2019 Act* s 175(4). For more detail on accounts requirements, see [3.7.2.4 – Accounts](#) for Administrators and [5.8.4 – Accounts](#) for AMP administrators.

<sup>513</sup> *Ibid* s 176(1).

<sup>514</sup> *Ibid* s 176(2).

<sup>515</sup> Victorian Civil and Administrative Tribunal Rules 2018 (Vic) r 1.07; *VVA (Guardianship)* [2019] VCAT 981, [41].

<sup>516</sup> *VVA (Guardianship)* [2019] VCAT 981, [120], [125].

## 6 Rehearings and Reassessments

Rehearings are a de facto internal appeal mechanism where the same issues that were the subject of the first hearing will be heard again by a more senior member of VCAT than the one who heard it at first instance.<sup>517</sup>

Reassessments are reviews of the order in place, held regularly to consider whether the order is still required or should be varied or removed due to changes in circumstances.<sup>518</sup>

There is some overlap between reassessments and rehearings, although the latter is usually only available where an application is made 28 days after the hearing. According to the VLRC Report, there appears to be an unstated statutory assumption that the represented person (or any other interested person) should only apply for a reassessment if the circumstances have changed since the order was made, and otherwise to apply for a rehearing.<sup>519</sup>

In determining which mechanism would be more appropriate, consideration should also be given to the original order that is being reheard or reassessed.<sup>520</sup>

### 6.1 Rehearings

#### 6.1.1 Applications for rehearings

Where VCAT makes an order under the *2019 Act* (other than an urgent order appointing a guardian or administrator), the Public Advocate or a party to the application may apply within 28 days for a rehearing of the application.<sup>521</sup> A person who was entitled to notice of the application who was not or did not become a party to the application may apply for a rehearing only if VCAT gives leave.<sup>522</sup>

Where VCAT makes an order on a reassessment conducted on VCAT's own initiative, a party to the reassessment or a person entitled to notice of the reassessment may apply to VCAT for a rehearing of the reassessment if VCAT gives leave.<sup>523</sup>

The parties on a rehearing are the applicant, the parties to the original application or reassessment and any other person VCAT orders be joined as a party.<sup>524</sup>

The people entitled to notice of the original application or reassessment are entitled to notice of an application for rehearing, as well as any other person that VCAT directs be given notice.<sup>525</sup>

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<sup>517</sup> VCAT Practice Note – PNG1 – Guardianship List General Procedures (<https://www.vcat.vic.gov.au/resources/practice-note-png1-guardianship-list-general-procedures>); VLRC Report 21.156].

<sup>518</sup> VCAT Practice Note – PNG1 – Guardianship List General Procedures (<https://www.vcat.vic.gov.au/resources/practice-note-png1-guardianship-list-general-procedures>); VLRC Report 497 [21.155].

<sup>519</sup> VLRC Report 497.

<sup>520</sup> *XYZ v State Trustees Ltd* [2006] VSC 444, [17].

<sup>521</sup> *2019 Act* s 150(1).

<sup>522</sup> *Ibid* s 150(2).

<sup>523</sup> *Ibid* s 151.

<sup>524</sup> *Ibid* s 154.

<sup>525</sup> *Ibid* s 155.

A person cannot apply for a rehearing of: <sup>526</sup>

- an application in relation to which an order was made by VCAT constituted by the President (whether with or without others); or
- an application for a rehearing; or
- an application for leave to apply for a rehearing of an application; or
- an application for leave to apply for a rehearing of a reassessment.<sup>527</sup>

Application for rehearings or leave to apply for a rehearing must be made within 28 days after the day on which either VCAT made the relevant order,<sup>528</sup> or when requested written reasons are given to the party.<sup>529</sup>

A first instance order generally continues unaffected by an application for rehearing.<sup>530</sup> However, VCAT may order the operation of the first-instance order be stayed pending the determination of the application for a rehearing.<sup>531</sup>

### 6.1.2 Conduct of rehearings

The represented or supported person (or proposed represented or supported person) must attend the hearing in person, unless VCAT is satisfied that:

- the person does not wish to attend the hearing in person; or
- personal attendance is impracticable or unreasonable, despite any arrangement that VCAT may make.<sup>532</sup>

VCAT must be differently constituted than at first instance, and must be constituted by:<sup>533</sup>

- a senior member or presidential member, if originally constituted by an ordinary member;
- a presidential member, if originally constituted by a senior member;
- a judicial member, if originally constituted by a Deputy President;
- a Vice President, if originally constituted by more than one member (except where one or more of the members was a Vice President); or
- the President, if originally constituted by a Vice President (whether with or without others).

### 6.1.3 Rehearings and leave applications

Once the above requirements for an application for a rehearing of a first-instance order are met, or leave is granted for an application for the rehearing of a reassessment, VCAT must rehear the

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<sup>526</sup> Ibid s 153.

<sup>527</sup> *OYN (Guardianship)* [2019] VCAT 1066, [5].

<sup>528</sup> *2019 Act* s 152(1).

<sup>529</sup> Ibid s 152(2).

<sup>530</sup> Ibid s 158(1).

<sup>531</sup> Ibid s 158(2).

<sup>532</sup> Ibid s 156. VCAT may also conduct all or part of a proceeding via teleconference, video links or any other system if they think it appropriate: *VCAT Act* s 100.

<sup>533</sup> *VCAT Act* sch 1 pt 9 s 31(3); *XYZ v State Trustees Ltd* [2006] VSC 444, [10].

matter with all the same functions and powers as it had at first instance.<sup>534</sup>

A rehearing is conducted as a *de novo* hearing. Accordingly, VCAT hears all the evidence again and the tribunal decides what order should be made. VCAT is not deciding whether the previous hearing was conducted properly, or whether the decision maker made any errors of law or fact.<sup>535</sup>

The application must be considered afresh, and the same legal principles and criteria must be applied to the facts and circumstances as they currently are, at the time of rehearing.<sup>536</sup> The rehearing will consider all relevant material, even where that was not produced at first instance.

With leave applications, the *2019 Act* sets no specific criteria for granting leave, so VCAT must use its discretion. There is no requirement that VCAT be satisfied that the applicant has new material to put before VCAT, or that VCAT erred in making the original decision. However, VCAT may base the decision to grant leave on:

- the applicant's entitlement to apply for a rehearing in situations where leave was not required (such as a reassessment not on VCAT's own initiative);<sup>537</sup> or
- the applicant's entitlement to apply for the original order.<sup>538</sup>

On a rehearing VCAT may affirm or vary the first-instance order, or set aside the first-instance order and may make another order in substitution.<sup>539</sup>

## 6.2 Reassessments

### 6.2.1 Applications for reassessments

Under Part 7, Division 2 of the *2019 Act* VCAT may reassess the following orders:<sup>540</sup>

- guardianship orders;
- supportive guardianship orders;
- administration orders;
- supportive administration orders; and
- administration (missing person) orders.

A reassessment must be conducted, unless VCAT orders otherwise:

- within 12 months after making the order; and
- at least once within each three-year period after making the order.<sup>541</sup>

A reassessment may also be conducted on application or on VCAT's own initiative.<sup>542</sup>

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<sup>534</sup> *2019 Act* s 157(1).

<sup>535</sup> *HH (Guardianship)* [2008] VCAT 2344, [13].

<sup>536</sup> *KSJ (Guardianship)* [2019] VCAT 891, [5]. But note the transitional provisions as they apply to rehearings: *2019 Act* s 203. For more information on Transitional Matters generally see [8.4 – Transitional Matters](#).

<sup>537</sup> *OYN (Guardianship)* [2019] VCAT 1066, [10].

<sup>538</sup> *Ibid* [20].

<sup>539</sup> *2019 Act* s 157(2).

<sup>540</sup> *Ibid* s 159(1).

<sup>541</sup> *Ibid* s 159(2).

<sup>542</sup> *Ibid* s 159(3).

An applicant for reassessment must include in their application (where relevant):<sup>543</sup>

- name and contact details of the represented, supported or missing person;
- name and contact details of the guardian, administrator, supportive guardian or supportive administrator;
- the type of order to which the application relates;
- details of the reasons for making the application;
- name and contact details of the applicant and of any person who has a direct interest in the application (if known to the applicant);<sup>544</sup>
- any support needs of the represented or supported person; and
- any other requirements in the VCAT rules.<sup>545</sup>

The following people are entitled to notice (where applicable):

- any party to the reassessment, which includes;
  - the applicant;
  - the represented or supported person;
  - the guardian, administrator, supportive guardian or supportive administrator; and
  - any other person VCAT orders to be joined as a party, including under section 60 of the *VCAT Act*;<sup>546</sup>
- the spouse, domestic partner or primary carer of the represented, supported or missing person;
- any person referred to in the application as having a direct interest in the application; and
- any other person VCAT directs be given notice.<sup>547</sup>

The notice of an application for reassessment to a party to the proceeding must include:<sup>548</sup>

- a copy of the application for the reassessment and any information filed in support of the application;<sup>549</sup>
- the names of:
  - the parties to the proceeding; and
  - the other persons entitled to notice of a reassessment (mentioned above);
- information about the rights of the party in relation to the application.

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<sup>543</sup> Ibid s 160.

<sup>544</sup> Persons having a direct interest includes, among others, relatives of the represented, supported or missing person, any primary carer, close friends, any attorney appointed under an enduring power of attorney and any supportive attorney: Ibid s 160(e).

<sup>545</sup> As required by section 67 of the *VCAT Act*. This allows Rules to specify particulars and documents required in applications. At present, no Rules have been made that prescribe any additional matters.

<sup>546</sup> *2019 Act* s 161.

<sup>547</sup> Ibid s 162.

<sup>548</sup> Ibid s 163(1).

<sup>549</sup> However, a person may apply to the principal registrar that any documents lodged in relation to this proceeding not be disclosed to a specified person or class of persons: *VCAT Act* sch 1 pt 9 s 37A.



If the person is not a party, the notice must include:<sup>550</sup>

- a copy of the application;
- the names of:
  - the parties to the reassessment; and
  - the other persons entitled to notice of a reassessment (mentioned above);
- information about the rights of the person to seek information about the application;
- information about how to apply to VCAT to be made a party to the proceeding.

### 6.2.2 Conduct of reassessments

An order must be reassessed every three years.<sup>551</sup> VCAT can conduct a reassessment at any time on its own initiative or on the application of any person.

This wide discretion has been read as including a discretion to reject an application for early reassessment when the stated grounds do not provide any basis for a change of the order.<sup>552</sup> VCAT is however likely to accept the application for reassessment where there is a change of circumstances, whether with the decision-maker or with the represented person.<sup>553</sup>

Before conducting a reassessment on its own initiative, VCAT must decide whether to conduct a hearing or to reassess the relevant order on the papers,<sup>554</sup> and must take reasonable steps to contact the represented or supported person to ascertain their wishes.<sup>555</sup> Different notice requirements apply depending on whether VCAT conducts a hearing or decides the reassessment on the papers.<sup>556</sup>

If VCAT decides to hold a hearing, the represented or supported person must attend the hearing in person, unless VCAT is satisfied that:

- the person does not wish to attend the hearing in person; or
- personal attendance is impracticable or unreasonable, despite any arrangement that VCAT may make.<sup>557</sup>

When conducting a reassessment, VCAT must consider whether the decision-maker appointed at first instance has performed their duties in compliance with the relevant statutory provision.<sup>558</sup>

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<sup>550</sup> *2019 Act* s 163(2).

<sup>551</sup> *Ibid* s 159(2).

<sup>552</sup> Section 159(3) states that VCAT may conduct a reassessment at any time on the application of any other person. The equivalent provision in the *1986 Act* has been interpreted to indicate that VCAT has a discretion to reject an application: *VIP (Guardianship)* [2018] VCAT 201, [11]; *FDG (Guardianship)* [2019] VCAT 508, [4].

<sup>553</sup> For example, where the administrator can no longer continue in their role: *KK (Guardianship)* [2009] VCAT 2219 [12]. Also see the OPA's *Good Guardianship Guide* for examples of when a guardian may seek reassessment: <https://www.publicadvocate.vic.gov.au/resources/booklets/guardianship-and-administration-1/23-good-guardianship/file>.

<sup>554</sup> *2019 Act* s 164(1).

<sup>555</sup> *Ibid* s 164(2).

<sup>556</sup> *Ibid* s 164(3)–(7).

<sup>557</sup> *Ibid* s 165. VCAT may also conduct all or part of a proceeding via teleconference, video links or any other system if they think it appropriate: *VCAT Act* s 100.

<sup>558</sup> *2019 Act* s 166.

Cases decided under the *1986 Act* have noted that VCAT must make a fresh assessment of the evidence and not rely on the earlier decision in considering the same matters as an original order.<sup>559</sup> VCAT is required to make its decision on the best evidence available to it at the time of hearing,<sup>560</sup> which may also include material on file, especially where there is no new evidence or correspondence from parties.<sup>561</sup> It may be that some of these matters will be interpreted differently under the *2019 Act*.

On completing a reassessment, VCAT may order that the original order be revoked, amended, varied, continued or replaced subject to any conditions or requirements it considers necessary.<sup>562</sup>

Where the matter involves replacing a guardian or administrator, the usual practice is to revoke the existing order and make a new order as it allows clarification of changes in powers and remuneration, and otherwise assists administratively.<sup>563</sup> If the Public Advocate was appointed as guardian at first instance, that appointment may only be retained if VCAT is satisfied that no other person fulfils the requirements for appointment as guardian.<sup>564</sup>

In determining the date of future reassessments (and therefore the length of the order), VCAT has in the past considered:

- if the matter causes stress to the represented person due to a shorter reassessment period,<sup>565</sup>
- the need to make the least restrictive order possible;<sup>566</sup> and
- other court orders the represented person is subject to that may affect future assessments.<sup>567</sup>

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<sup>559</sup> *THD (Guardianship)* [2018] VCAT 1588, [6]; *FDG (Guardianship)* [2019] VCAT 508, [8]. But note the transitional provisions as they apply to reassessments: *2019 Act* s 204. For more information on Transitional Matters generally see [8.4 – Transitional Matters](#).

<sup>560</sup> *UAS (Guardianship)* [2019] VCAT 638, [13].

<sup>561</sup> *THD (Guardianship)* [2018] VCAT 1588, [6]; *UAS (Guardianship)* [2019] VCAT 638, [13], [17].

<sup>562</sup> *2019 Act* s 167(1).

<sup>563</sup> *SMcD (Guardianship)* [2007] VCAT 666, [17].

<sup>564</sup> *2019 Act* s 167(2).

<sup>565</sup> For example, if the matter has been the subject of a number of hearings and causes stress before and during hearings: *THD (Guardianship)* [2018] VCAT 1588 [39].

<sup>566</sup> *KSJ (Guardianship)* [2019] VCAT 891, [55].

<sup>567</sup> *Ibid* [56].

## 7 Special Medical Procedures

Part 6 of the *2019 Act* governs special medical procedures. It adapts Part 4A of the *1986 Act* with some changes.<sup>568</sup> While most medical treatment decisions (including dental treatment decisions) are now covered by the *MTPD Act*, ‘special medical procedures’ are the province of the *2019 Act*.

### 7.1 Definitions

VCAT may give consent to the carrying out of a special medical procedure (‘SMP’) on a patient.<sup>569</sup> SMPs are defined as:<sup>570</sup>

- any procedure that is intended, or is reasonably likely, to have the effect of rendering permanently infertile the person on whom it is carried out (i.e. sterilisation); or
- a termination of pregnancy; or
- any removal of tissue for the purposes of transplantation to another person; or
- any other prescribed medical treatment.<sup>571</sup>

‘Patient’ is defined as a person 18 years and over, with a disability, and who does not have decision-making capacity in relation to giving consent to a SMP (‘SMP decision-making capacity’). This is irrespective of whether or not the person is a represented person.<sup>572</sup>

Whether a patient has SMP decision-making capacity must be determined under the general test of decision-making capacity, marking a shift from the specific test in the *1986 Act*.<sup>573</sup>

### 7.2 Applying for SMP consent

#### 7.2.1 Who can apply and notice requirements

Either the patient's medical treatment decision-maker (‘Medical DM’), or any person VCAT determines to have a special interest in the patient's affairs (‘special interest person’), may make an application to VCAT for consent to a SMP.<sup>574</sup>

Medical DM is defined as, in order of priority:<sup>575</sup>

- a Medical DM appointed by the patient or VCAT under the *MTPD Act*,<sup>576</sup>
- a guardian with power to make medical treatment decisions on the person's behalf;

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<sup>568</sup> The *2019 Act* s 202 makes transitional provisions for applications on foot at commencement day and consent given by VCAT before commencement day.

<sup>569</sup> *Ibid* s 141.

<sup>570</sup> *Ibid* s 140 (definition of ‘special medical procedure’).

<sup>571</sup> This must be within the meaning of medical treatment as defined in *MTPD Act* s 3 (definition of ‘medical treatment’), prescribed under the *2019 Act* to be a special medical procedure for the purposes of Part 6.

<sup>572</sup> *2019 Act* s 140 (definition of ‘patient’).

<sup>573</sup> For more information on Decision-Making Capacity, see [2.2 – Decision-making capacity](#).

<sup>574</sup> *2019 Act* s 143(1).

<sup>575</sup> *Ibid* s 140 (definition of ‘medical treatment decision-maker’). Also see *MTPD Act* s 55; *HZK (Guardianship)* [2019] VCAT 66, [18]–[20].

<sup>576</sup> See *MTPD Act* div 2. In certain circumstances, VCAT may limit the powers of the appointed medical DM and even appoint a guardian to make medical treatment decisions.

- the first of the following who is in a close and continuing relationship with the patient and is reasonably available and willing to make the decision:
  - the patient's spouse or domestic partner;
  - the patient's primary carer;
  - an adult child of the patient;
  - a parent of the patient;
  - an adult sibling of the patient.

Where there are multiple adult children, parents or adult siblings, priority goes to the oldest child, parent or sibling, in preference to a younger child, parent or sibling.<sup>577</sup>

VCAT must give the Public Advocate and any special interest persons notice of:<sup>578</sup>

- the application to VCAT;
- the VCAT hearing and any orders in relation to the application; and
- any direction or advisory opinion in relation to the application.

The patient is considered a party to the proceeding.<sup>579</sup> VCAT often refers applications for SMP consent to the Public Advocate to investigate, report and make submissions in their role as independent advocate.<sup>580</sup>

VCAT must commence the hearing within 30 days of receiving an application for consent to a SMP.<sup>581</sup> VCAT may inform itself as it sees fit and seek evidence separately from the patient to determine the application.<sup>582</sup>

### 7.2.2 VCAT considerations

The SMP consent process is intended to mirror the authorisation process in section 61 of the *MTPD Act*.<sup>583</sup> This includes considerations of decision-making capacity and whether the patient might have decision-making capacity within a reasonable time

VCAT may consent to an SMP if they are satisfied that the patient:<sup>584</sup>

- (a) has not given an instructional directive in relation to the SMP;
- (b) does not have SMP decision-making capacity;
- (c) is not likely to have SMP decision-making capacity within a reasonable time; and
- (d) would consent to the carrying out of the SMP if the patient had SMP decision-making capacity. To determine this, VCAT must:<sup>585</sup>
  - first consider the patient's valid and relevant values directive (if one is given); and
  - then consider any other relevant preferences that the patient has expressed and the circumstances in which those preferences were expressed.

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<sup>577</sup> *MTPD Act* s 55.

<sup>578</sup> *2019 Act* s 143(3).

<sup>579</sup> *Ibid* s 143(2).

<sup>580</sup> *ZEH (Guardianship)* [2015] VCAT 2051, [2].

<sup>581</sup> *2019 Act* s 144.

<sup>582</sup> *VCAT Act* s 98; *ZEH (Guardianship)* [2015] VCAT 2051, [25].

<sup>583</sup> Explanatory Memorandum, Guardianship and Administration Bill 2018, 65.

<sup>584</sup> *2019 Act* s 145(1).

<sup>585</sup> *Ibid* ss 145(2)(a)–(b).

VCAT must also consider:<sup>586</sup>

- the SMP's likely effects and consequences, including:
  - the likely effectiveness of the procedure; and
  - whether these are consistent with the patient's preferences or values; and
- whether there are any alternatives, including refusing the SMP, that would be more consistent with the patient's preferences or values.

If VCAT is unable to identify the patient's preferences, VCAT must consider the patient's values, whether:<sup>587</sup>

- expressed other than by way of a values directive; or
- inferred from the patient's life.

'Values directive' has the same meaning as in the *MTPD Act*, and the validity of the directive will be governed by the same considerations as in the *MTPD Act*. This includes determining the meaning and effect of an advance care directive, and whether a statement in an advance care directive is still applicable.<sup>588</sup>

If VCAT is unable to ascertain or apply the patient's preferences or values, VCAT may only consent carrying out the SMP if:<sup>589</sup>

- having regard to the need to respect the patient's individuality, VCAT is satisfied that the SMP will promote the personal and social wellbeing of the patient; and
- VCAT has considered—
  - the SMP's likely effects and consequences, including the likely effectiveness of the procedure, and
  - whether there are any alternatives, including refusing the SMP, that would better promote the patient's personal and social wellbeing.<sup>590</sup>

In each case, VCAT must consult any other person who VCAT reasonably believes the patient would want to be consulted in the circumstances.<sup>591</sup> Under the *1986 Act*, VCAT considered it could disregard matters raised that do not relate to the patient's best interests or rights.<sup>592</sup> It is likely that such matters can also be disregarded in determining the patient's preferences or values.

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<sup>586</sup> Ibid s 145(2)(d).

<sup>587</sup> Ibid ss 145(2)(c)–(d).

<sup>588</sup> Ibid s 145(2)(a); *MTPD Act* ss 6, 22.

<sup>589</sup> *2019 Act* s 145(3).

<sup>590</sup> For more information on promoting personal and social wellbeing, see [2.1.2 – Promoting the personal and social wellbeing of a person](#).

<sup>591</sup> *2019 Act* s 145(4).

<sup>592</sup> *ZEH (Guardianship)* [2015] VCAT 2051, [38].

VCAT must also consider the relevant human rights of the *Charter of Human Rights and Responsibilities Act 2006* (Vic), such as the right to recognition and equality before the law,<sup>593</sup> and the right to protection from treatment without full, free and informed consent.<sup>594</sup> Therefore, VCAT must consider if the special medical procedure can be justified in terms of the Charter, and whether any less restrictive alternatives are available.<sup>595</sup> For example, sterilisation will usually be considered a step of last resort and requires justification of the most compelling kind. Alternative and less invasive procedures must all have failed, and it must be certain that no other procedure or treatment will work before consent is granted.<sup>596</sup>

If consent is granted, it has effect as if the patient had SMP decision-making capacity and the special medical procedure was carried out with the patient's consent.<sup>597</sup>

### 7.3 Conferral of Authority on the patient's Medical DM

VCAT may confer authority on the patient's Medical DM to consent to continuing or further SMP after the initial consent is given.<sup>598</sup> VCAT may only do so at the request or with consent of the patient's Medical DM,<sup>599</sup> and may at any time:<sup>600</sup>

- impose conditions as to the exercise of an authority;
- give directions as to the exercise of an authority; or
- revoke that authority.

If authority is conferred, a person may request the conferee's consent to the continuation of the SMP or any further SMP of a similar nature.<sup>601</sup> VCAT may also confer authority on a new Medical DM if the original one ceases to be the patient's Medical DM.<sup>602</sup>

### 7.4 Offences

It is an offence for a registered medical practitioner to carry out, or supervise the carrying out of, any SMP on a patient (as defined in Part 6 of the *2019 Act*) unless:<sup>603</sup>

- VCAT has consented to the carrying out of that procedure;
- the patient's Medical DM with authority conferred upon him/her has consented to the carrying out of that procedure; or
- the medical treatment is administered in an emergency.<sup>604</sup>

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<sup>593</sup> *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 8(3).

<sup>594</sup> *Ibid* s 10(c).

<sup>595</sup> *ZEH (Guardianship)* [2015] VCAT 2051, [54], [61].

<sup>596</sup> *Ibid* [67].

<sup>597</sup> *2019 Act* s 142.

<sup>598</sup> *Ibid* s 146(1).

<sup>599</sup> *Ibid* s 146(2).

<sup>600</sup> *Ibid* s 146(4).

<sup>601</sup> *Ibid* s 146(5).

<sup>602</sup> *Ibid* s 146(3).

<sup>603</sup> *Ibid* s 147(1).

<sup>604</sup> Under the *MTPD Act* s 52; *Mercy Hospitals Victoria v D1* (2018) 56 VR 394, 410 [66].

Despite these exceptions, a registered medical practitioner must not carry out an SMP if the patient has refused consent to the procedure under an instructional directive.<sup>605</sup> This offence is punishable by 2 years imprisonment or a fine of 240 penalty units or both.<sup>606</sup>

It is a defence for the registered medical practitioner to have acted:

- in good faith and without negligence; and
- in the belief on reasonable grounds that the SMP requirements have been complied with.<sup>607</sup>

It is also an offence to purport to give consent on behalf of a patient to continue a SMP or a further SMP unless:

- the person knows they are authorised under the conferral sections of the *2019 Act* to give such consent; or
- the person believes on reasonable grounds that they are authorised to give such consent.<sup>608</sup>

This is punishable by a fine of 20 penalty units.<sup>609</sup>

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<sup>605</sup> *2019 Act* s 148; *Mercy Hospitals Victoria v D1* (2018) 56 VR 394, 410 [66].

<sup>606</sup> *2019 Act* s 147(1).

<sup>607</sup> *Ibid* s 147(2). They will not be guilty of an offence, liable for unprofessional conduct or professional misconduct, liable in any civil proceeding; and not liable for a contravention of any code of conduct. However, it will not affect any duty of care owed by a registered medical practitioner to a patient: *2019 Act* s 147(3).

<sup>608</sup> Note that under the *2019 Act* s 202, an authority conferred under section 42F of the *1986 Act* is taken to be an authority conferred under section 146 of the *2019 Act*.

<sup>609</sup> *2019 Act* s 149.

## 8 Miscellaneous

This chapter summarises miscellaneous provisions that apply to different decision-makers at different times. Care must be taken to ensure the applicability of each sub-chapter.

### 8.1 Multiple decision-makers and dispute resolution

Where VCAT appoints more than one guardian, administrator, or both over the same represented person,<sup>610</sup> each decision-maker must consult the other decision-maker(s) in relation to any overlap in the exercise of their powers under the VCAT order.<sup>611</sup>

If there is a disagreement about said exercise of powers, the decision-makers must:<sup>612</sup>

1. first, seek to resolve the disagreement by informal means or by mediation; and
2. second, if the disagreement continues, seek advice from VCAT about how to resolve the disagreement.

VCAT may then give direction as to how to resolve the disagreement under its advice jurisdiction.<sup>613</sup>

Unless otherwise agreed by the decision-makers, or directed by VCAT:<sup>614</sup>

- a decision of a guardian prevails over a decision of an administrator, to the extent of any inconsistency; and
- an administrator must take any necessary steps to ensure that a guardian's decision may be implemented.

However, an administrator does not have to take the necessary steps to comply if they reasonably believe that doing so is likely to deplete seriously the represented person's estate. When that happens, they must seek advice from VCAT about how to resolve the disagreement.<sup>615</sup>

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<sup>610</sup> *2019 Act* s 177(1).

<sup>611</sup> *Ibid* s 177(2).

<sup>612</sup> *Ibid* s 177(3).

<sup>613</sup> For more detail on VCAT's advice jurisdiction, see [3.6.5 – Other matters for Guardians: Advice and Notification for Guardians](#), [3.8.1 – Advice for Administrators](#) and [5.7.5 – Advice for AMP Administrators](#).

<sup>614</sup> *2019 Act* s 177(4).

<sup>615</sup> *Ibid* s 177(5).



## 8.2 Compensation, liability and offences under the *2019 Act*

### 8.2.1 Compensation

Under the *2019 Act*, decision-makers can be held personally liable for contraventions where the represented person suffers a loss. However, no compensation will be payable by the State.<sup>616</sup>

The Supreme Court or VCAT may order a decision-maker to compensate the represented person for a loss caused by the decision-maker contravening the Act.<sup>617</sup> This power exists even where:<sup>618</sup>

- the decision-maker is convicted of an offence in relation to their contravention;
- the represented person has died (in which case compensation is payable to their estate);  
or
- the guardianship or administration order is no longer in force or has been revoked or set aside.

The following persons may apply for compensation:<sup>619</sup>

- the represented person or a person who has ceased to be a represented person;
- a former missing person;
- the personal representative of a current or former represented person, or a former missing person;
- an executor or administrator<sup>620</sup> of the represented person's or missing person's estate;
- the Public Advocate;
- the nearest relative of the represented person or missing person; and
- any other person the Supreme Court or VCAT determines to have a special interest in the affairs of the represented person or missing person.

Applications may be made to either VCAT or the Supreme Court, and VCAT may refer an application for compensation to the Supreme Court.<sup>621</sup>

Time limits apply to applications for compensation – an application must be made:<sup>622</sup>

- if the represented person has died, within 6 months after that death;
- if the guardian or administrator has died, within 6 months after that death; or
- if both the represented person and the guardian (or administrator) have died, within 6 months after the first death.

However, the Supreme Court or VCAT may extend the time limits.<sup>623</sup>

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<sup>616</sup> *Ibid* s 186.

<sup>617</sup> *Ibid* s 181(1).

<sup>618</sup> *Ibid* s 181(2).

<sup>619</sup> *Ibid* s 183.

<sup>620</sup> Within the meaning of the *Administration and Probate Act 1958* (Vic).

<sup>621</sup> *2019 Act* s 185.

<sup>622</sup> *Ibid* s 184(1).

<sup>623</sup> *Ibid* s 184(2).

### 8.2.2 Relief from personal liability and Judicial Notice

If the Supreme Court or VCAT considers that a guardian or administrator:

1. is or may be personally liable for a contravention of a provision of the *2019 Act*; and
2. acted honestly and reasonably and ought fairly to be excused for the contravention,

the Supreme Court or VCAT may relieve the guardian or administrator from all or part of that personal liability.

These compensation provisions are similar to the compensation provisions in the *POA Act*.<sup>624</sup>

### 8.2.3 Offences

The *2019 Act* includes offences for decision-makers who use their orders dishonestly. They are modelled after similar provisions under sections 135–137 of the *POA Act*.<sup>625</sup>

When evidence emerges in a hearing that a guardian or administrator has misused their position in a manner that may constitute an offence, tribunal members will need to consider the following matters:

- First, the privilege against self-incrimination does not apply in tribunal hearings;<sup>626</sup>
- Second, the tribunal does not have jurisdiction to punish for criminal offences;
- Third, conduct constituting an offence will usually be grounds for removal of a guardian or administrator on the basis that the person has demonstrated that they will not act in accordance with their statutory duties, or in a manner that will promote the represented person's personal and social wellbeing;
- Fourth, as a matter of procedural fairness, the guardian or administrator should be given notice of the possibility that the Tribunal will make an adverse finding regarding their conduct, and be given an opportunity to be heard;<sup>627</sup> and
- Fifth, in appropriate cases, tribunal members should consider whether to direct that the Office of the Public Advocate investigate whether a guardian or administrator has misused their position, so that the tribunal can exercise its powers in a way that best promotes the personal and social wellbeing of the represented person.

It is an offence for a decision-maker to use the guardianship, administration, AMP order or supportive order to obtain a financial advantage for themselves or another person. The penalty is Level 6 imprisonment (5 years maximum), or 600 penalty units, or both.

The relevant sections are:

- Guardians – section 188(1)
- Administrators – section 189(1)
- AMP administrators – section 190(1)
- Supportive Guardians – section 191(1)
- Supportive Administrators – section 192(1)

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<sup>624</sup> See *POA Act* s 77.

<sup>625</sup> Explanatory Memorandum, Guardianship and Administration Bill 2018 (Vic) 83–85.

<sup>626</sup> *VCAT Act* s 105.

<sup>627</sup> See *VCAT Act* s 97 and, in a related context, *Annetts v McCann* (1990) 170 CLR 596 and *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564.

It is also an offence for a decision-maker to dishonestly use the guardianship, administration, AMP order or supportive order to cause loss to the supported person or another person. The penalty is Level 6 imprisonment (5 years maximum), or 600 penalty units, or both.

The relevant sections are:

- Guardians – section 188(2)
- Administrators – section 189(2)
- AMP administrators – section 190(2)
- Supportive guardians – section 191(2)
- Supportive administrators – section 192(2)

If a body corporate<sup>628</sup> commits one of the following offences, an officer of the body corporate also commits an offence if the officer failed to exercise due diligence to prevent the commission of the offence:<sup>629</sup>

- delaying or obstructing a person acting under a special order or visitation order;<sup>630</sup>
- obtaining a financial advantage as an administrator or AMP administrator; and
- causing loss as an administrator or AMP administrator.

An officer of a body corporate is defined for this purpose as:<sup>631</sup>

- a person who is an officer as defined by section 9 of the *Corporations Act 2001* (Cth); or
- a person who is concerned in, or takes part in, the management of the body corporate.

An officer of a body corporate may commit an offence whether or not the body corporate has been prosecuted for, or found guilty of, that offence.<sup>632</sup>

In determining whether an officer of a body corporate failed to exercise due diligence, a court may have regard to:<sup>633</sup>

- what the officer knew, or ought reasonably to have known, about the commission of the offence by the body corporate;
- whether or not the officer was in a position to influence the body corporate in relation to the commission of the offence by the body corporate;
- what steps the officer took, or could reasonably have taken, to prevent the commission of the offence by the body corporate; and
- any other relevant matter.

An officer of a body corporate may rely on a defence that would be available to the body corporate if it were charged with the same offence. In doing so, the officer bears the same burden of proof that the body corporate would bear.<sup>634</sup>

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<sup>628</sup> Here, 'body corporate' has the same meaning as corporation has in section 57A of the *Corporations Act 2001* (Cth): *2019 Act* s 193(6) (definition of 'body corporate').

<sup>629</sup> *2019 Act* ss 193(1), (2).

<sup>630</sup> For more information about special orders and visitation orders, see [3.5.2 – Special orders for unlawful detention or risk of harm](#) and [3.5.4 – Enforcement orders against persons refusing](#) respectively.

<sup>631</sup> *2019 Act* s 193(6).

<sup>632</sup> *Ibid* s 193(5).

<sup>633</sup> *Ibid* s 193(3).

<sup>634</sup> *Ibid* s 193(4).

### 8.3 Interstate Orders

The provisions for interstate orders under the *2019 Act* are largely similar to the provisions under the *1986 Act*. For an interstate order to be registered in Victoria, the order must be:

- a guardianship or administration order, a supportive order, or an AMP order;<sup>635</sup>
- made in relation to a person who:<sup>636</sup>
  - either resides in the participating State or Territory and proposes entering Victoria,<sup>637</sup> or
  - has property in Victoria; and
- made:
  - under a law declared by the Governor in Council<sup>638</sup> to be a corresponding law;<sup>639</sup> and
  - in a participating State or Territory, which is a State or Territory of the Commonwealth in which a corresponding law is in force.<sup>640</sup>

The following orders are not guardianship or administration orders and so cannot be registered:

- an order consenting to special medical procedures or revoking an appointment;
- an order directing the represented person to reside at a place determined by the guardian;<sup>641</sup> and
- an order for variation to empower a guardian to direct police and emergency services to enforce a guardianship order.<sup>642</sup>

Minor differences between states or territories (such as differences between age thresholds for represented persons) may be disregarded when registering the interstate order.<sup>643</sup> The residence and property requirement has also been interpreted to allow frequent travel in and out of Victoria.<sup>644</sup>

VCAT may register an interstate order on the application of the Victorian Public Advocate or the relevant decision-maker in the participating state or territory.<sup>645</sup> VCAT may also appoint the Victorian Public Advocate as the guardian if:<sup>646</sup>

- the guardian in a participating state/territory holds an equivalent position to the Victorian Public Advocate; and

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<sup>635</sup> Ibid s 168.

<sup>636</sup> Ibid s 168.

<sup>637</sup> Not applicable for administration (missing person) orders: Ibid s 168(b).

<sup>638</sup> The declaration must be made on the recommendation of the Minister and by Order published in the Government Gazette: Ibid s 170(1).

<sup>639</sup> Ibid s 170. An Order declaring a corresponding law may include a declaration that an order under that law is substantially similar to a guardianship order, a supportive guardianship order, an administration order, a supportive administration order or an administration (missing person) order.

<sup>640</sup> *2019 Act* s 169 (definition of 'participating State or Territory').

<sup>641</sup> *CR (Guardianship)* [2009] VCAT 1188, [12].

<sup>642</sup> However, a workaround is for the original guardianship order to be registered in Victoria, and then for VCAT to make a new enforcement order: *PT (Guardianship)* [2009] VCAT 1187.

<sup>643</sup> *RC (Guardianship)* [2007] VCAT 2483, [7].

<sup>644</sup> *CR (Guardianship)* [2009] VCAT 1188, [2].

<sup>645</sup> *2019 Act* s 172(1).

<sup>646</sup> Ibid s 172(2).

- no other person fulfils the requirements of section 32 of the *2019 Act* for appointment as guardian.<sup>647</sup>

In deciding whether to register an interstate order, VCAT must have regard to the general principles in the *2019 Act*.<sup>648</sup> This does not require VCAT to consider whether it would or could have made the order in question. In most cases, there will be little scope for VCAT to go behind the interstate order. Instead, if the interstate determining body has followed its processes, the Tribunal may readily determine that the order is the least restrictive possible and that decisions take into account the represented person's will and preferences.<sup>649</sup>

VCAT must notify the original determining body in the original state or territory<sup>650</sup> that the order has been registered,<sup>651</sup> or if an order is made under reassessment provisions.<sup>652</sup>

See table for list of determining bodies in Australia:

State	Determining body
Australian Capital Territory	ACAT ( <a href="#">Link</a> )
New South Wales	NCAT (Guardianship Division) ( <a href="#">Link</a> )
Northern Territory	NTCAT ( <a href="#">Link</a> )
Queensland	QCAT ( <a href="#">Link</a> )
South Australia	SACAT ( <a href="#">Link</a> )
Tasmania	Guardianship and Administration Board ( <a href="#">Link</a> )
Western Australia	SAT ( <a href="#">Link</a> )

Once the interstate order is registered in Victoria, it has the same force and effect as a comparable order under the *2019 Act*.<sup>653</sup> It may also be reassessed in accordance with reassessment provisions in the *2019 Act* (except for AMP orders).<sup>654</sup>

Revocation, amendment or variation of a registered order in the original state/territory has no effect on the operation of the order as registered in Victoria.<sup>655</sup> Similarly, any order made under reassessment provisions in Victoria do not have effect in the original state/territory.<sup>656</sup>

Registration of a Victorian order in a participating state/territory does not cause the Victorian order to be revoked.<sup>657</sup>

<sup>647</sup> For more information on the appointment of guardians, see [3.3 – Appointing guardians or administrators](#).

<sup>648</sup> *2019 Act* s 8(1). For more information on the general principles, see [2.1.1 – General principles](#).

<sup>649</sup> See *RC (Guardianship)* [2007] VCAT 2483, [8] and *PT (Guardianship)* [2009] VCAT 1187, [9].

<sup>650</sup> *2019 Act* s 169 (definition of 'determining body').

<sup>651</sup> *Ibid* s 172(3).

<sup>652</sup> *Ibid* s 173(3).

<sup>653</sup> *Ibid* s 172(4).

<sup>654</sup> *Ibid* ss 173(1)–(2).

<sup>655</sup> *Ibid* s 173(5).

<sup>656</sup> *Ibid* s 173(4).

<sup>657</sup> *Ibid* s 172(5).

## 8.4 Transitional Matters

The *2019 Act* repeals the *1986 Act* on commencement day, 1 March 2020. All references in any statutory material to the *1986 Act* will be replaced by or construed as a reference to, the *2019 Act*.<sup>658</sup>

If any difficulty arises, VCAT may make orders of a transitional nature that it considers appropriate to resolve the difficulty. This may be made on the application of any party to the proceeding or on its own initiative.<sup>659</sup>

### 8.4.1 Guardianship and Administration orders under the *1986 Act* – Orders in Force and applications

Despite the repeal of the *1986 Act*, any guardianship,<sup>660</sup> administration,<sup>661</sup> and AMP order<sup>662</sup> that is:

- made under the *1986 Act*, and
- in force immediately before commencement day,

remains in force unless revoked or set aside by an order of a court or VCAT.<sup>663</sup>

The applicable provisions of the *1986 Act* and the powers and duties of the decision-maker under the *1986 Act* will continue to apply, with the addition of the following *2019 Act* provisions:<sup>664</sup>

- resolution of disagreements (s 177);
- enforcement orders (s 178);
- compensation provisions (ss 181–186), as if the contravention relevant to those provisions were a contravention of a provision under the *1986 Act* occurring after 1 March 2020;
- relevant offences for decision-makers (ss 188–93);
- powers for administrators to undertake legal proceedings (ss 51(3)–(5));<sup>665</sup>
- powers for AMP administrators to undertake legal proceedings (ss 113(3)–(5));<sup>666</sup>
- other matters pertaining to administrators (Division 8 of Part 3);
- other matters pertaining to AMP administrators (Division 5 of Part 5).

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<sup>658</sup> Ibid s 197.

<sup>659</sup> Ibid s 206.

<sup>660</sup> Made under sections 22 or 33 of the *1986 Act*.

<sup>661</sup> Made under sections 46 or 60 of the *1986 Act*.

<sup>662</sup> Made under sections 60AB or 60AG of the *1986 Act*.

<sup>663</sup> *2019 Act* ss 198(1), 199(1), 200(1).

<sup>664</sup> Ibid ss 198(2), 199(2), 200(2).

<sup>665</sup> If the administration order made under the *1986 Act* conferred on the administrator the power to bring and defend actions and other legal proceedings in the name of the represented person under section 58B of the *1986 Act*.

<sup>666</sup> If the administration order made under the *1986 Act* conferred on the administrator the power to bring and defend actions and other legal proceedings in the name of the missing person under section 58B of the *1986 Act* (as modified by section 60AI of the *1986 Act*).

An application made under the *1986 Act* and is not determined before 1 March 2020 is taken to be an application made under the *2019 Act* and must be determined in accordance with the *2019 Act*.<sup>667</sup>

On and after commencement day, any *1986 Act* temporary guardianship or administration (including AMP) orders in force may be renewed once in accordance with the relevant *1986 Act* provisions.<sup>668</sup>

VCAT must also hold a hearing as soon as practicable after the temporary order is made under the *1986 Act* but within 42 days of making the order to determine if a guardianship, administration and AMP order should be made.<sup>669</sup> This replicates the pre-existing procedures in the *1986 Act* in dealing with temporary orders.

#### 8.4.2 Rehearings and Reassessments of *1986 Act* Orders

VCAT may conduct a rehearing in relation to an order made under the *1986 Act* where:

- on and after 1 March 2020, a person applies for a rehearing or leave to apply for a rehearing under the *1986 Act* within 28 days after a *1986 Act* order was made; or
- any application for a rehearing or leave is not determined before 1 March 2020.<sup>670</sup>

Any such rehearing must be determined in accordance with the *1986 Act*, and VCAT is taken to have the same powers and functions as it had with respect to the matter at first instance under the *1986 Act*.<sup>671</sup>

Any order made by VCAT in determining the application for the rehearing is taken to be an order under the *1986 Act* as in force immediately before commencement day. Therefore, the transitional provisions listed above will apply to these orders.<sup>672</sup>

For reassessments of *1986 Act* orders, any reassessment that is not determined before 1 March 2020 must be conducted in accordance with the *2019 Act*. This is irrespective of whether the reassessment application is made before or after commencement day, or the reassessment was launched on VCAT's own initiative before or after commencement day.<sup>673</sup>

Nevertheless, when conducting the reassessment, VCAT is not to consider whether the guardian or administrator appointed at first instance has performed their role in accordance with the 2019 statutory duties.<sup>674</sup> Once VCAT completes the reassessment, VCAT must revoke the *1986 Act* order. VCAT may then make an order under the *2019 Act* if they determine appropriate in the circumstances.<sup>675</sup>

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<sup>667</sup> *2019 Act* s 201.

<sup>668</sup> *Ibid* ss 198(3), 199(3), 200(3).

<sup>669</sup> *Ibid* ss 198(3), 199(3), 200(3).

<sup>670</sup> *Ibid* ss 203(a)–(b).

<sup>671</sup> *Ibid* s 203(c).

<sup>672</sup> *Ibid* s 203(d).

<sup>673</sup> *Ibid* s 204(1).

<sup>674</sup> *Ibid* s 204(2)(a). For more information on rehearings and reassessments, see [6 – Rehearings and Reassessments](#).

<sup>675</sup> *Ibid* s 204(2)(b).

### 8.4.3 Other provisions

For SMPs on and after 1 March 2020:

- an application for VCAT's consent to the carrying out of any SMPs made under the *1986 Act* that is not determined before 1 March 2020;
- a consent given by VCAT under the *1986 Act*, or
- an authority conferred by VCAT under the *1986 Act*,

is taken to be an application, consent given, or an authority conferred under the *2019 Act*, and where relevant, will be determined accordingly.<sup>676</sup>

For interstate orders, a registered interstate order or a Ministerial agreement referred to under the *1986 Act* is taken to be the same under the *2019 Act* on and after 1 March 2020.<sup>677</sup>

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<sup>676</sup> *Ibid* s 202.

<sup>677</sup> *Ibid* s 205.