POA-02 Powers of Attorney - types of

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1 Schedule Form

The Western Australian Supreme Court case of Clazy v Registrar of Titles (1902) 4 WALR 113 emphasised that a power of attorney created for noting and filing under the TLA in Western Australia must be in the form of, or substantially in the form of, the form set out in the Nineteenth schedule of the TLA.

An examination of the form reveals the following features:

- the donee must be a natural person or a corporation (legal entity)

- the attorney must be given a power or powers to deal in land registered under the TLA

- after listing a comprehensive set of powers to deal in land registered under the Act, the form provides for the insertion of express words that restrict those comprehensive powers to those inserted in this section. (See LT RPM Form Examples - Example 21.)

and

- the attorney is then given the power to sign the documents and do the acts necessary to carry out the powers listed, and preserve the rights and assets of the donor.

Powers of attorney to be noted and filed, whether on a printed form or on a typed form, must contain the same elements:

- The attorney may be the person holding a particular position. As an example, a financial institution
may appoint the person holding the position of Loans Manager as an attorney to lodge and withdraw caveats.

- The power of attorney document must name a person, or may appoint a position where the above described conditions are met. The power of attorney document may also qualify the appointment of a named person by naming the position held by that person (in which case the person would only remain the attorney during the period the stated position was held).

- The power of attorney document must expressly or by necessary implication refer to real property in Western Australia, e.g. the appointment, by a donor from outside Western Australia, of a Western Australian Attorney will constitute necessary implication; and,

- The power of attorney document must give both the power to deal in land in very specific terms (eg: to sell, to mortgage, to lease, etc.) and then the authority to carry out those specific powers (giving the power to sign a transfer, mortgage or lease, etc.).

2 Power of Attorney by a Corporation

A corporation may appoint an attorney by executing a power of attorney under its common seal. The authority for a corporation to act by an attorney is contained in s.88 of the Property Law Act 1969 and s.129 of the Corporations Act 2001 (Cwlth). A Company Power of Attorney should substantially comply with the nineteenth schedule in order to be registered under section 143 of the TLA. The Registrar of Titles is prepared to accept Power of Attorney documents by a Corporation where:

- The General Power of Attorney or Deed Power of Attorney substantially give the power to deal in land in very specific terms, such as: to sell, to purchase, to mortgage, to lodge and withdraw caveats, to lease, etc.) and the authority to carry out those specific powers (giving the power to sign a transfer, mortgage or lease, etc.).

- The Company can appoint an individual or a named position within a company.

- It contains the appropriate recital/ratification clause.

- Under common law a power of attorney must not place an administrative or interpretative burden on the Registrar, ie there must not be any conflicting or ambiguous terms, which require unreasonable checks or similar research to be made (see Clazy v Registrar of Titles 1902 WALR 4,113).


Note: General Power of Attorney and Deed Power of Attorney may contain provisions to revoke a previously deposited Power of Attorney. These clauses should comply with the requirements set out in POA-04 Powers of Attorney - revocation and additional fees are payable.

2.1 A named position within a corporation

The Registrar of Titles is prepared to accept the appointment of a named position within a corporation where a clause to the following effect is included in such powers of attorney documents.

"Any person including the Registrar of Titles of Western Australia or any other registration authority in Australia or elsewhere, dealing with the attorney or a person purporting to be an attorney under
this power, is:

(a) Entitled to rely on execution of any document by that person as conclusive evidence that:

- the person holds the office set out in the power;
- the power of attorney has come into effect;
- the power of attorney has not been revoked;

the right or power being exercised or being purported to be exercised is properly exercised and that the circumstances have arisen to authorise the exercise of that right and power.

(b) Not required to make any inquiries in respect of any of the above matters."

However, it is not possible to deposit a power of attorney where different powers are to be given to different categories of positions. Separate Power of Attorney documents should be prepared.

2.2 A Category of Officer within the corporation

The Registrar of Titles is also prepared to accept the appointment of attorneys identified as a Category of Officer within the corporation if all the powers to be exercised are common to each category of officer. This means that it is possible to authorise an officer in Category 1 and an officer in Category 2 acting jointly to exercise all the powers in the power of attorney.

However, it is not possible to deposit a power of attorney where different powers are to be given to different categories of officer. Separate Power of Attorney documents should be prepared.

The following indemnity clause must be contained in each power of attorney document as follows:

"Any person including the Registrar of Titles of Western Australia or any other registration authority in Australia or elsewhere, dealing with the attorney or a person purporting to be an attorney under this power, is:

(a) Entitled to rely on execution of any document by that person as conclusive evidence that:

- the person is an Officer of the Category set out in the power;
- the power of attorney has come into effect;
- the power of attorney has not been revoked;

the right or power being exercised or being purported to be exercised is properly exercised and that the circumstances have arisen to authorise the exercise of that right and power.

(b) Not required to make any inquiries in respect of any of the above matters."

3 Power of Attorney by Trustee

Trustees of a Trust may appoint an attorney to act in their place under the provisions of s.54 of the Trustees Act 1962 (referred to as the Act in this section). The Trust/Trustee may appoint another person to carry out the functions of the Trust where trustees are:

- incapacitated by reason of ill health
- absent from the State

or

- a member of the armed forces;

they may execute a power of attorney which, if in required form, may be recorded under the TLA. In these situations, the Power of Attorney document should include specific reference to the Act and in some cases, may need to present the Trust Deed to support the appointment.

The donee of such a power may not be the only other co-trustee unless that co-trustee is a trustee corporation.

Where the trustee is not the sole trustee, the consent of all other trustees must be obtained to the power of attorney before noting and filing.

Every dealing by the attorney for a trustee must be accompanied by a statutory declaration to the effect that at the date of the exercise of the power the donor was still either:

- incapacitated

- absent from the State

or

- a member of the armed forces.

A power of attorney under s.54 of the Act is revoked by the subsequent recovery from incapacity of the donor, his or her return to the State or discharge from the armed forces. A power revoked in these circumstances is not revivified by a subsequent occurrence of the condition which enabled the power to be granted, e.g. a further absence from the State.

NOTE: The appointment of an Attorney for the purpose of this section should not be for a permanent appointment, rather as a temporary appointment or one off.

Where s.54 of the Act does not apply but the trust deed empowers the Trustee to delegate the exercise of the trusts, the Trustee may execute a power of attorney which, if in required form, may be recorded under the TLA. However, as the Register under the TLA is based on the legal proprietorship and does not note trusts on the register, any power of attorney lodged with the Registrar of Titles must enable the Registrar to register transactions on properties registered or otherwise held in the name of the grantor without reference to the terms of any trust.

If the attorney executes a document that affects the grantor in some capacity other than that in respect of which the attorney is authorised to act, that should be an issue solely between the grantor and the attorney. For a Power of Attorney to be registered under the TLA, it is essential that the grantor, whether in the grantor’s own right, as trustee of a particular fund or in any other capacity be bound by such document and that the Registrar of Titles and others not be bound to inquire whether the attorney or purported attorney has acted within power.

If the grant of the power of attorney is restricted, as between the grantor and the grantee, to the grantor’s powers as a trustee then a clause to the following effect is to be included in such powers of attorney documents:

"Any person including the Registrar of Titles of Western Australia or any other registration authority in Australia or elsewhere, dealing with the attorney or a person purporting to be an attorney under this power, is:
(a) Entitled to rely on execution of any document by that person as conclusive evidence that:

- the person is authorised to execute the document under the power of attorney on behalf of the donor in the donor’s capacity as trustee as set out in the power of attorney;

- the power of attorney has come into effect;

- the power of attorney has not been revoked;

- the right or power being exercised or being purported to be exercised is properly exercised and that the circumstances have arisen to authorise the exercise of that right and power.

(b) Not required to make any inquiries in respect of any of the above matters."

Note: A Person(s) appointed as Executor or Administrator of an estate of a deceased person cannot as a general rule delegate their duties. Where an Executor or Administrator cannot fulfil their duties a new Executor or Administrator should be appointed.

4 Powers of Attorney in a General Lien, etc.

Commercial documents in the nature of a mortgage, such as General Liens, Equitable Charges and Debentures, usually contain a power for the lender, on default by the borrower, to appoint a receiver or a receiver and manager. It is usual also for the document to create the appointed receiver the attorney of the borrower with all the powers set out in the document.

Provided the document creates a power of attorney and it is properly witnessed as set out in s.145 of the TLA, it may be registered as a power of attorney. Registration depends on the evidence provided in support, which should take the form of a statutory declaration by the receiver declaring that:

- default has occurred on a specified date in the payment of moneys owing under the document of loan (to be identified);

- notice to remedy the default has been given to the borrower, but the default was not remedied within the notice period;

- the declarant has been appointed a receiver of the borrower by the lender and that such appointment is still current (a copy of the notice of appointment, as lodged with the Australian Securities & Investments Commission and certified correct by the Commission must be produced with the declaration);

- the declarant is the attorney for the borrower under the terms of the loan document;

- default has continued to the date of sale; and,

- the land being dealt with is land to which the loan document applied.

Powers of attorney of this nature are usually deposited at the same time as a transfer of the land affected is presented for registration.

5 Irrevocable Power of Attorney

The Property Law Act 1969 at Part V111 permits the creation of an irrevocable power for valuable
consideration (s.86) or an irrevocable power for a fixed time (s.87).

To be filed under the TLA an irrevocable power for valuable consideration would have to meet the normal requirements of form (i.e. be substantially in the form of the Nineteenth Schedule to the TLA) in addition to disclosing the fact that the power was given for valuable consideration, and confirmation of the parties’ intention that the power be irrevocable. It is not necessary for the precise amount of consideration to be shown in the power of attorney. A purchaser obtaining land in an instrument signed by such an attorney gains a valid title despite any lack of consent of the donor to the transaction, or his death, mental incapacity or bankruptcy of the donor.

To be filed under the TLA an irrevocable power of attorney for a fixed time (not exceeding two years) would also have to meet the normal requirements of form, in addition to disclosing whether or not a valuable consideration was involved, and confirmation of the parties’ intention that the power be irrevocable for a specific term. A purchaser obtaining land in an instrument signed by an attorney in these circumstances is protected in a similar manner.

6 Powers Contained in Leases, Contracts, etc.

Leases, contracts for sale and other contracts such as strata management agreements and retirement village agreements often contain clauses appointing the vendor or lessor the attorney of the purchaser or lessee for the purpose of withdrawing caveats or signing transfers.

A signed copy of the lease or contract can be filed with the Registrar as a valid power of attorney so long as the relevant clauses of the document are substantially in the form of the Nineteenth Schedule to the TLA. Where the power of attorney is activated by a specific event (eg: refusal to withdraw a caveat) then at the time the power is filed a statutory declaration will be required proving that the conditions precedent to the power becoming operative have occurred.

The declaration will usually also have to meet the requirement of the Registrar for proof of non-revocation for powers dated more than three months prior to filing. Where the power arises from a donor living in a retirement village the declarant must also include a reference to the capacity of the donor to understand the nature of the demand made (e.g. to sign a withdrawal or transfer) to obtain compliance with the conditions precedent to the activation of the power.

7 Powers Contained in Mortgages

Mortgages usually contain a clause appointing the mortgagee or an officer to be later designated, as attorney for the mortgagor. To be effective the powers must be expressed substantially in the form of the Nineteenth Schedule to the TLA, and the powers are only noted by the Registrar when a signed copy of the mortgage is filed as a power of attorney document.

Where the power of attorney is activated by a specific event (such as default) then at the time the power is filed a statutory declaration will be required proving that the conditions precedent to the power have been met. The declaration will also usually have to meet the requirements of the Registrar for proof of non-revocation for powers dated more than three months prior to filing.

Where the mortgage is a short form mortgage linked to a Memorandum of Common Provisions, a signed copy of the short form mortgage will be accepted for filing.

Conveyancers are advised that the Registrar will not register transfers by the mortgagee as attorney for a Mortgagor as an alternative to exercising a power of sale, and registering the
transfer form designed for that purpose (ie: T4 Transfer form).

8 Execution of Documents by Attorney

8.1 Most common form of execution by attorney

A proper form of execution of a document by an attorney is as follows:

1.1.1 Named person

Signed by (Name of Attorney) )
as attorney for (Name of Donor) ) (Signature of Attorney)
in the presence of ) P/A Number (insert number)

Witness
(Full Name, Address and Occupation)

1.1.1 Execution by attorney appointed in named position

Signed by (Name of Attorney) the )
Loans Manager of (Name of Donor) as ) (Signature of Attorney)
attorney for (Name of Donor) in ) P/A Number (insert number)

the presence of )

Witness
Full Name, Address and Occupation

Variations of these forms will be accepted provided it is clear that the person executing the
document does so as an attorney.

NOTE: Each Attorney's signature should be independently witnessed.

9 Also see

- POA-01 Powers of Attorney
- POA-03 Powers of Attorney - enduring
- POA-04 Powers of Attorney - revocation
- POA-05 Declarations of Trust (Section 55 of the TLA)