



# VCAT ADMINISTRATION GUIDE RUNNING THE AFFAIRS OF THOSE IN NEED



 **Burke  
Lawyers**

 **70** YEARS

## **Introduction**

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*For over a decade, the legal team at Burke & Associates Lawyers have been entrusted by VCAT (The Victorian Civil & Administrative Tribunal) and appointed to act as independent specialist Administrators. Burke & Associates Lawyers have been active in consulting on proposed changes within the Guardianship List of VCAT and consequently, we have developed considerable experience and expertise in this unique and often challenging area of law.*

### **How can we help and support?**

- ✓ *In circumstances where an independent specialist Administrator is required, we accept those appointments from the Tribunal.*
- ✓ *Where it is proposed that a family member or friend be appointed, our team can assist with the application to the Tribunal seeking such an appointment.*

*Our Administrators are supported by the team of lawyers at Burke & Associates Lawyers to assist and consult across various areas of law including property, estates, and litigation.*

*The purpose of this publication is to provide an overview of some key points in VCAT appointed Administration in the hope that it is useful to those who may need to consider the appointment of an Administrator either for themselves or a loved one.*

*This publication is not intended to be legal advice and should not be relied on for that purpose. This publication should be used as a guide only and not a substitute for formal legal advice.*

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## **VCAT Administration Definitions**

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### *The Act*

*The Guardianship and Administration Act 2019 (Vic) ("the Act") is the legislation under which Administrators and Guardians can be appointed. Part three of this act deals with the appointment of an Administrator including the powers and duties of an Administrator. A complete copy of this Act can be found [here](#).*

### *VCAT*

*The acronym VCAT stands for Victorian Civil and Administrative Tribunal. There is Guardianship List at VCAT dedicated to hearing issues relating to a person's financial and personal matters.*

### *Administrator*

*An Administrator is the person appointed by VCAT to make decisions for the Represented Person (see next point) about financial and legal matters. This may be limited to particular types of matters, but often applies to the whole of the Represented Person's estate.*

*If more than one person is appointed as an Administrator (for example under a joint or joint and several appointment) they work together as the Administrators.*

### *Represented Person*

*The term for the person who is subject to an Administration Order. When there is a pending Administration Order, we refer to that person as a Proposed Represented Person.*

### *VCAT Order*

*This is an order made by a VCAT Member to give direction to parties involved, Represented Persons and Proposed Represented Persons. An Administration Order is a VCAT Order when an Administrator is formally appointed.*

### *Estate*

*For the purposes of administration, a Represented Person's Estate is their collective financial wealth and resources. This is not to be confused with the "estate" a person leaves when they die.*

## Guardian

A Guardian is the person appointed by VCAT to make personal and lifestyle decisions on behalf of a person with a disability, including decisions regarding living and work arrangements, medical treatment and access to people and services.

## The Appointment of an Administrator

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To appoint an Administrator, the process through VCAT is as follows:

- An Applicant completes the "Application for Order – Appointment of and Administrator and/or Guardian" form (available [here](#))
- The application should be submitted together with a medical report of the Proposed Represented Person which can be completed by a general practitioner. If there are difficulties obtaining the requisite medical evidence, VCAT may order a medical assessment.
- VCAT will set down a hearing to consider the application. Commonly, the first hearing will be an opportunity for the parties to receive directions from the VCAT Member which serves to provide the parties with guidance about the additional information VCAT requires to adequately hear and make a decision on this matter.
- Depending on the circumstances, there may be further hearings before an administrator is appointed.

This will be determined by a variety of factors, such as:

- Whether there are current Enduring Powers of Attorney;
- Whether the application is contested; and/or
- Who the proposed Administrator and/or Guardian is.

The process followed at VCAT hearings is different to that followed in other Courts and Tribunals. This is due to VCAT adopting a less formal approach;

- There are no applications or hearing fees for Administration and Guardianship cases; and
- Each hearing is conducted by a Member or Senior Member who is a trained lawyer and experienced in the conduct of such cases.

VCAT encourages the Represented Person to attend on appropriate occasions and may meet privately with the Represented Person if it is clear that, notwithstanding the disability, the Represented Person is still capable of expressing clear views about relevant issues.

Whilst family and interested persons may find it difficult to go through the VCAT process, particularly if there are several hearings before an Administration Order is made, it is important to remember that VCAT is required to protect the

*Proposed Represented Person and due process must be observed to ensure a suitable outcome.*

*In determining whether a person needs an Administrator, VCAT will consider a number of factors including the will (wishes) and preferences of the Proposed Represented Person (so far as they can ascertain).*

### *Capacity*

*VCAT must be satisfied that the Proposed Represented Person has a disability and because of that disability does not have capacity to make reasonable judgments in relation to their estate and therefore requires the assistance of an Administrator.*

*Determining if a Proposed Represented Person has capacity can sometimes be difficult as they may:*

- show capacity in the morning but may not have capacity in the afternoon as the day progresses;*
- may not have capacity to make decisions about their finances but may retain capacity to make decisions regarding themselves;*
- may not have capacity to manage their finances but may retain testamentary capacity and can validly execute a Will and revoke a previous Will.*

*In such circumstances, it may be prudent for a formal report to be commissioned by a Neuropsychologist to determine the capacity of a Proposed Represented Person. VCAT may also request that this report be completed before they make an Administration Order.*

### *Who should be appointed as an Administrator?*

*If appropriate, VCAT will appoint a trusted friend or family member to act as an Administrator. However, it can often be difficult for a trusted friend or family member to make the sorts of financial and legal decisions required of an Administrator. This is where the appointment of an independent Administrator may be more suitable.*

## **Role of an Administrator**

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*The role of an Administrator under the Act is limited in scope to dealing with the financial affairs of the Represented Person. It follows that an Administrator has no authority to deal with medical treatment, guardianship matters, access to services and general lifestyle considerations. Likewise, an Administrator cannot change the Will of a Represented Person but may be entitled to inspect it.*

### *The Represented Person's Estate*

*Upon being appointed, an Administrator should carry out due diligence to identify the nature and extent of the Represented Person's estate, including any assets and liabilities.*

*When identifying the Represented Person's assets and liabilities, the Administrator may:*

- Obtain identification documents for the Represented Person and consider the possibility of alternate rendering of names;*
- Request information and documentation from relatives, friends and known business and professional associates;*
- Carry out index searches at the Land Titles Office to identify any property holdings and seek to locate titles. In the case of property held with others, identify and make contact with co-owners;*
- If there is reason to believe that the Represented Person may be involved in one or more companies, conduct a series of searches to identify directorships, offices held and shareholdings and then search the relevant companies through ASIC;*
- If original documents are held in safe custody, arrange to inspect them and obtain copies; and*
- Obtain copies of recent tax returns which should reveal the source of income and thus point in the direction of other enquiries regarding banks, trusts, shareholdings and so on.*

### *Property*

*There are instances where the Represented Person will own real property jointly with one or more people who is not suffering a disability and who is not subject to an Administration Order. As a matter of law, jointly owned property is different to property owned in common and in defined shares.*

*When an Administrator is appointed to look after the financial affairs of a Represented Person, dealing with jointly owned property can be a significant challenge. Until the jointly owned property is disentangled the Administrator cannot be clear as to the extent of the estate to be administered.*

*The problems become more challenging when it seems that the Represented Person will live for many years, may transition from one form of accommodation to another and when future needs are uncertain. The Represented Person may also have ongoing obligations to provide financial support for a spouse or a former spouse.*

*When selling property owned by a Represented Person, an Administrator steps into the shoes of the Represented Person and has authority to sign all documents, engage lawyers or a conveyancer to deal with the sale and to execute a valid Transfer of Land to the purchaser.*

*In some cases, the Administration Order appointing an Administrator for a Represented Person may restrict the sale of property and in such circumstances, an Administrator would need written consent of the Tribunal prior to putting the property on the market. This is a protective measure to ensure that when significant transactions are in contemplation, VCAT has an opportunity to satisfy itself that it is for a proper purpose and in the best interest of the Represented Person.*

#### *Other financial / legal matters*

*An Administrator for a Represented Person also has the responsibility to deal with his or her taxation affairs. That means the Administrator will usually have to engage the services of an accountant to prepare Financial Statements, taxation returns and sometimes also Business Activity Statements (BAS).*

*It is not uncommon for the disability of the Represented Person to result in past years of taxation returns being neglected. Sometimes it is possible for the Administrator to make representations to the Australian Taxation Office to seek relief against fines and penalties that might otherwise be payable given the circumstances of the disability.*

*In relation to investments, the Administrator must always act in the best interest of the Represented Person, meaning a cautious and prudential approach should be adopted when considering an investment strategy.*

*In some circumstances, VCAT will appoint an administrator if there have been complaints about inappropriate conduct in the past by family members, an attorney or a previous Administrator. In this instance, VCAT would appoint an Administrator for the sole purpose of investigating and reporting on that past behaviour.*

*In investigating such claims, the Administrator may review bank records and other financial documents to determine if the claim is valid. The investigating Administrator may commission the advice of Counsel as to whether the past conduct might have given a cause of action in law that might be pursued for the benefit of the Represented Person and the cost-benefit considerations of any such court processes.*



*The Administrator would then report back to VCAT on their findings.*

*In our experience at Burke & Associates Lawyers it is quite common for there to be issues arising in the administration of a Represented Person's affairs that require pursuing claims in the Court. Examples include:*

- In the case of jointly owned property, there may be the need to sever a joint tenancy or otherwise seek orders under the Family Law Act;*
- A Represented Person may be a beneficiary of a deceased estate that is beset by dispute;*
- Occasionally, a former attorney may have dealt inappropriately with the property of a Represented Person with the consequence that the Administrator must seek restitution;*
- A Represented Person may have been involved in a business and there may be business related disputes; or*
- A Represented Person may have one or more investment properties with issues arising from time to time with tenants, suppliers and estate agents.*

*The most important consideration whenever a dispute arises is the best interests of the Represented Person and a prudent Administrator will always seek to keep the Represented Person's best interests at the forefront of any decision making in relation to a dispute.*

### *Reporting to VCAT*

*An Administrator is required to lodge a Financial Statement and Plan for approval by VCAT not more than six weeks after the date of the appointment. Known as a 'FSP', this document provides VCAT a snapshot of the Represented Person's assets, liabilities and their anticipated income and expenditure. It also asks a series of questions about Administrator's intentions to manage the Represented Person's financial matters.*

*The Account by the Administrator (ABA) provides a detailed recording of all assets, liabilities, income and expenditure of the Represented Person as at 30 June each year.*

*This ABA is required to be completed by the Administrator annually and is lodged online to VCAT and is then independently assessed by State Trustees Limited. This assessment includes an audit of the Administrator's actions for the relevant financial year and a determination as to whether the Administrator has acted in accordance with the Represented Person's wishes and preferences.*

*This supervision of Administrators is extensive for those independent Administrators in the legal profession, because:*

- *They receive funds on behalf of a Represented Person and hold those funds in a trust account;*
- *They must comply with the obligations under the separate legislation governing the legal profession; and*
- *They are routinely audited by auditors working for the Legal Services Commission and independent auditors retained by the law practice.*

### *Costs of Administration*

*VCAT establishes a basis of fees to be paid to the Administrator in the Administration Order. This provides certainty for the Administrator, the Represented Person, family members and other interested parties.*

*In the appointment of an independent specialist Administrator, the most common approach by VCAT is to order that the fees of the Administrator be calculated to a scale of costs published by the Supreme Court of Victoria known as the Practitioner Remuneration Order and that those fees be independently assessed by a cost consultant.*

*A cost consultant reviews the work completed by an Administrator and advises the fee based on the proper application of the Practitioners Remuneration Order. An invoice is then prepared and submitted to VCAT for approval before it is paid from the Estate of the Represented Person.*

*This fee structure ensures that there is independent scrutiny of the fees paid to an independent Administrator.*

*Our experience at Burke & Associates Lawyers is that in the early stages of Administration, the process can be time consuming and fees will reflect that. However, once data is gathered and orderly systems implemented, the administration should become far more streamlined and less time consuming to the fees of the administration will reduce.*

*In some situations, it may be possible for a portion of the administration fees to be claimed by the Represented Person as a deduction against income, to the extent the work of the Administrator deals with gaining assessable income for taxation purposes.*

### **Ending of Administration**

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*The appointment by VCAT of an Administrator for a Represented Person ends when one of the following occurs:*

- *When the Represented Person recovers capacity, perhaps following recuperation from a disabling illness or injury, and makes application for the Administration Order to be revoked.*

*Where a Represented Person has a current Administration Order, they can make an application to VCAT seeking the Administration Order be overturned. As with making application to appoint an administrator in the first place, medical evidence is crucial to the revocation of an Administration Order that is in place.*

*Or*

- *On the death of the Represented Person.*

*At the time of the Represented Person's death, assuming there is a Will, responsibility of the Represented Person's estate passes to the executor (or executors) appointed in the Will of the Represented Person.*

*If there is no Will then a person having an interest in the estate can apply to the Supreme Court for a grant of letters of administration of the intestate estate of the Represented Person.*

*The Administrator has no authority to act once the Represented Person has passed away.*

## **Guardianship**

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*While often appointed concurrently, Administrators and Guardians have distinct responsibilities to a Represented Person. A Guardian is appointed to make personal and lifestyle decisions, which include living arrangements, work arrangements, medical treatment and access to people and services.*

*If appropriate, VCAT will appoint a trusted friend or family member as Guardian as generally speaking, they are more familiar with the wishes of the Represented Person. However in the case where, there may not be a friend or family member suitable to fulfil this role the Office of the Public Advocate ("OPA") may be appointed as Guardian. If the Office of the Public Advocate is appointed as Guardian, a case manager from this organisation is then assigned to the Represented Person and the case manager will continue to make decisions for the Represented Person for as long as necessary.*

*The extent of a Guardian's role varies depending on the needs of the Represented Person. Guardians can be appointed to make one-off decisions, such as where a Represented Person is to live, or they can be appointed to manage more regular requirements of a Represented Person.*

*Regardless of the reason for appointment the extent of the Guardian's responsibilities, it is very important that the Administrator and the Guardian work closely together during the course of the Administration and Guardianship to ensure that the personal and financial needs of the Represented Person are met.*

## **What should my next steps be to appoint an Administrator?**

*The process of appointing an Administrator can be daunting and the lawyers at Burke Lawyers are here to support you.*

*We have been entrusted by VCAT and appointed to act as independent specialist Administrators for over ten years. Burke & Associates Lawyers have been active in consulting on proposed changes within the Guardianship List of VCAT and consequently, we have developed considerable experience and expertise in this unique and often challenging area of law.*

### **How can we help and support?**

- ✓ In circumstances where an independent specialist Administrator is required, we accept those appointments from the Tribunal.*
- ✓ Where it is proposed that a family member or friend be appointed, our team can assist with the application to the Tribunal seeking such an appointment.*

*Our Administrators are supported by the team of lawyers at Burke Lawyers to assist and consult across various areas of law including Property, Commercial law, Wills and Estates, and Dispute Resolution.*

*If, after reading this document you believe you need to appoint an Administrator or this document has prompted more questions please don't hesitate to contact the legal team at Burke lawyers [here](#) or by phone on +61 3 9822 8588.*

## **Our Team is here to support you**

### **Rosanna (“Rosy”) Dean**

*Rosy is a Principal of Burke Lawyers and her practice focus is in Litigation, Alternative Dispute Resolution, Family Law and VCAT Administration.*

*Rosy is highly experienced in complex VCAT appointed administration matters and is appointed by VCAT to act as co-Administrator with Tony. Her experience in each of these other areas of law underpins her role as an Administrator in the management of the financial affairs of the Represented Person. She is astute at identifying and managing family disputes.*

*Beyond her wide academic qualifications Rosy has done advanced management training including financial analysis.*

Contact Rosy: [rdean@burkelawyers.com.au](mailto:rdean@burkelawyers.com.au)



### **Susan Bonnici**

*Susan practiced in the areas of estate planning, estate administration and estate litigation since 2010. Susan has extensive experience in assisting people with disabilities and managing Special Disability Trusts and Vulnerable Beneficiary trusts.*

*She has an excellent understanding of the complex financial and emotional issues which can arise upon the death of a loved one, and in the years leading up to this, particularly upon loss of decision-making capacity.*

*Susan has been chosen by numerous clients to be their trusted decision-maker, nominated as Financial and Medical Power of Attorney, as well as the Executor of Estates.*

Contact Susan: [sdean@burkelawyers.com.au](mailto:sdean@burkelawyers.com.au)



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