



New South Wales

# Powers of Attorney Bill 2003

## Explanatory note

This explanatory note relates to this Bill as introduced into Parliament.

## Overview of Bill

The objects of this Bill are:

- (a) to re-enact the provisions of Part 16 of the *Conveyancing Act 1919* relating to powers of attorney with modifications that provide for the following:
  - (i) the replacement of the statutory short form of power of attorney with one that can be amended by the regulations (a ***prescribed power of attorney***),
  - (ii) the clarification of the extent to which an attorney under a prescribed power of attorney may take a benefit, confer a benefit on a third party or give a gift under the power of attorney,
  - (iii) the renaming of protected powers of attorney, which have effect despite the subsequent mental incapacity of the person giving the power (the ***principal***), as enduring powers of attorney,

- (iv) the enactment of a requirement that an enduring power of attorney does not operate to confer any authority on a proposed attorney under that power until the attorney accepts appointment by signing the instrument creating the power,
  - (v) the enactment of provisions to protect an interest of a beneficiary under the will of a principal under an enduring power of attorney where a proposed gift of property to the beneficiary under the will has been disposed of by the attorney before the principal's death,
  - (vi) the enactment of provisions to protect the interest of a spouse of an intestate deceased principal in a shared home that was sold or otherwise disposed of by an attorney under an enduring power of attorney,
  - (vii) the expansion of the jurisdiction of the Guardianship Tribunal and Supreme Court to deal with enduring powers of attorney and issues of incapacity relating to powers of attorney,
  - (viii) the enactment of provisions that will recognise and give effect in this State to enduring powers of attorney made in other States and Territories,
  - (ix) the restatement of the common law rule that an attorney under a power of attorney cannot delegate the attorney's authority to a third party unless the instrument creating the power expressly provides for it,
  - (x) to extend the concept of incommunicate principals to persons who are unable to receive communications respecting their property or affairs because they cannot be located or contacted so that the Supreme Court can review powers of attorney made by such persons,
  - (xi) the enactment of provisions that make it clear that if more than one attorney is appointed under a power of attorney, a vacancy in the office of one of the attorneys will not terminate the power of attorney if the attorney was appointed severally or jointly and severally, but will terminate the power if the attorney was appointed jointly but not severally, and
- (b) to enact provisions of a savings and transitional nature, and
  - (c) to make consequential amendments to the *Conveyancing Act 1919* and certain other legislation.

## Outline of provisions

### Part 1 Preliminary

**Clause 1** sets out the name (also called the short title) of the proposed Act.

**Clause 2** provides for the commencement of the proposed Act on a day or days to be appointed by proclamation.

**Clause 3** defines certain terms and expressions used in the proposed Act.

**Clause 4** provides that a person is *incommunicate* for the purposes of the proposed Act if:

- (a) the person suffers from a physical or mental incapacity (whether of a temporary or permanent nature) that makes the person unable:
  - (i) to understand communications respecting the person's property or affairs, or
  - (ii) to express the person's intentions respecting the person's property or affairs, or
- (b) the person is unable to receive communications respecting the person's property or affairs because the person cannot be located or contacted.

Proposed section 4 (1) (a) substantially re-enacts the definition of *incommunicate* in section 163D of the *Conveyancing Act 1919*. However, the proposed section extends the concept to persons who are unable to receive communications respecting their property or affairs because they cannot be located or contacted. In *Cox v Goldcrest Developments (NSW) Pty Ltd* (2000) 50 NSWLR 76 at 79, it was held that such persons were not incommunicate for the purposes of section 163D of the *Conveyancing Act 1919*.

**Clause 5** provides that there is a vacancy in the office of an attorney for the purposes of the proposed Act if:

- (a) the appointment of the attorney is revoked, or
- (b) the attorney renounces the power, or
- (c) the attorney dies, or
- (d) the attorney becomes bankrupt, or
- (e) where the attorney is a corporation, the corporation is dissolved, or
- (f) the attorney, by reason of any physical or mental incapacity, ceases to have the capacity to continue to act as an attorney, or
- (g) in such other circumstances as may be prescribed by the regulations.

**Clause 6** provides that, as a general rule, the proposed Act will apply only to powers of attorney created (or purportedly created) by an instrument executed on or after the commencement of the proposed section (the ***commencement date***). The provisions of Part 16 of, and Schedule 7 to, the *Conveyancing Act 1919* will continue to apply to powers of attorney created (or purportedly created) before the commencement date despite the repeal of those provisions by Schedule 4.1 to the proposed Act.

There are three exceptions to this general rule.

Firstly, proposed section 25 (Recognition of enduring powers of attorney made in other States and Territories) will extend to any power of attorney created (or purportedly created) by an instrument executed before the commencement date.

Secondly, Part 5 (Review of powers of attorney) of the proposed Act will extend to certain powers of attorney created (or purportedly created) by an instrument executed before the commencement date.

Thirdly, Division 3 of Part 6 (Registration of powers of attorney) of the proposed Act will extend to certain powers of attorney created by an instrument executed before the commencement date.

**Clause 7** provides that the proposed Act does not affect the operation of any principle or rule of the common law or equity in relation to powers of attorney except to the extent that the proposed Act provides otherwise, whether expressly or by necessary intention. It also provides that the proposed Act does not affect the operation of Part 3 of the *Conveyancing Act 1919* (which deals with the execution and effect of deeds) except to the extent that the proposed Act provides otherwise, whether expressly or by necessary intention.

## **Part 2      Prescribed powers of attorney**

**Clause 8** provides that an instrument that is in or to the effect of the form set out in Schedule 2 is a ***prescribed power of attorney*** for the purposes of the proposed Act.

The proposed section substantially re-enacts the provisions of section 163B (1) of the *Conveyancing Act 1919* relating to the form of a prescribed power of attorney.

**Clause 9** specifies the kinds of powers that a prescribed power of attorney confers on an attorney. In particular, a prescribed power of attorney authorises an attorney to do on behalf of a principal anything that a principal may lawfully authorise an attorney to do. However, the proposed section also makes it clear that a prescribed power of attorney has effect subject to compliance with any conditions or limitations specified in the instrument creating the power.

The proposed section substantially re-enacts the provisions of section 163B (1) and (3) of the *Conveyancing Act 1919* relating to the power conferred on an attorney by a prescribed power of attorney.

**Clause 10** makes it clear that a prescribed power of attorney does not confer authority to exercise any function as a trustee that is conferred on a principal.

The proposed section substantially re-enacts the provisions of section 163B (2) (a) of the *Conveyancing Act 1919*.

**Clause 11** provides that a prescribed power of attorney does not authorise an attorney to give a gift of all or any property of the principal to any other person unless the instrument creating the power expressly authorises the giving of the gift.

However, the proposed section also provides that if a prescribed power of attorney includes a certain expression set out in Schedule 3, this will authorise an attorney to give the kinds of gifts that are specified by that Schedule for that expression.

**Clause 12** provides that a prescribed power of attorney does not authorise an attorney to execute an assurance or other document, or to do any other act, as a result of which a benefit would be conferred on the attorney unless the instrument creating the power expressly authorises the conferral of the benefit. This restates the rule currently contained in section 163B (2) (b) of the *Conveyancing Act 1919*.

However, the proposed section also provides that if a prescribed power of attorney includes a certain expression set out in Schedule 3, this will authorise an attorney to confer on the attorney the kinds of benefits that are specified by that Schedule for that expression.

**Clause 13** provides that a prescribed power of attorney does not authorise an attorney to execute an assurance or other document, or to do any other act, as a result of which a benefit would be conferred on a third party unless the instrument creating the power expressly authorises the conferral of the benefit.

However, the proposed section also provides that if a prescribed power of attorney includes a particular expression set out in Schedule 3, this will authorise an attorney to confer on a third party the kinds of benefits that are specified by that Schedule for that expression.

**Clause 14** enables the Governor to make regulations that replace or amend Schedule 2 or 3 (or both). Schedule 2 sets out the form of a prescribed power of attorney. Schedule 3 specifies expressions that may be included in a prescribed power of attorney for the purposes of proposed sections 11, 12 and 13 that, if included in a prescribed power of attorney, will authorise the attorney to give gifts or confer certain benefits of the kind specified in that Schedule.

### **Part 3      Irrevocable powers of attorney**

**Clause 15** provides that an instrument is an *irrevocable power of attorney* for the purposes of the proposed Act if the instrument is expressed to be irrevocable and is given for valuable consideration (or is expressed to be given for valuable consideration).

The proposed section substantially re-enacts the provisions of section 160 (1) of the *Conveyancing Act 1919* relating to the creation of irrevocable powers of attorney.

**Clause 16** provides for the effect of an irrevocable power of attorney. In essence, an irrevocable power of attorney will remain effective even if the principal dies, becomes mentally incapacitated or becomes bankrupt. It will also remain effective if an act is done by the attorney without the concurrence of the principal.

The proposed section substantially re-enacts the provisions of section 160 (1) of the *Conveyancing Act 1919* relating to the effect of an irrevocable power of attorney.

### **Part 4      Incapacity and enduring powers of attorney**

#### **Division 1      Initial and supervening mental incapacity**

**Clause 17** provides that a power of attorney is not ineffective only because any act within the scope of the power is of such a nature that it was beyond the understanding of the principal through mental incapacity at the time the power is given. However, an attorney is not authorised to do any such act unless it is authorised by or under the proposed Act.

The proposed section substantially re-enacts the provisions of section 163E (1) and (2) of the *Conveyancing Act 1919*.

**Clause 18** provides that a power of attorney is effective to the extent that it concerns any act within its scope that is of such a nature that is not beyond the understanding of the principal through mental incapacity at the time of the act.

The proposed section substantially re-enacts the provisions of section 163F (1) of the *Conveyancing Act 1919*.

#### **Division 2      Enduring powers of attorney**

**Clause 19** provides that an instrument creating a power of attorney is an *enduring power of attorney* for the purposes of the proposed Act if:

- (a) the instrument is expressed to be given with the intention that it will continue to be effective even if the principal lacks capacity through loss of mental capacity after the execution of the instrument, and
- (b) the execution of the instrument by the principal is witnessed by a witness (not being an attorney under the power) of the kind set out in the proposed section, and
- (c) there is endorsed on, or annexed to, the instrument a certificate by the witness stating that the witness explained the effect of the instrument to the principal and the principal appeared to understand the effect of the power of attorney before it was signed.

An enduring power of attorney is the same kind of instrument as the protected power of attorney currently recognised by section 163F (2) of the *Conveyancing Act 1919*.

**Clause 20** provides that an enduring power of attorney does not operate to confer any authority on an attorney until the attorney has accepted the appointment by signing the instrument creating the power. There is currently no similar requirement in relation to protected powers of attorney under the *Conveyancing Act 1919*.

**Clause 21** provides that an act done by an attorney that is within the scope of the power conferred by an enduring power of attorney and that is of such a nature that it is beyond the understanding of the principal through mental incapacity at the time of the act is as effective as it would have been had the principal understood the nature of the act at that time.

The proposed section substantially re-enacts the provisions of section 163F (2), (3) and (4) of the *Conveyancing Act 1919* relating to the effectiveness of protected powers of attorney under that Act.

**Clause 22** provides that a person who is referred to in the will of a deceased principal under an enduring power of attorney as the beneficiary (a ***named beneficiary***) of property of the principal that has been disposed of by the attorney under that power retains the same interest in any surplus money or other property arising from the disposition as the beneficiary would have had if the property had not been disposed of. The purpose of the provision is to protect against the ademption of testamentary gifts by the attorney. Currently, there is no similar protection in respect of protected powers of attorney under the *Conveyancing Act 1919*.

The provision is similar in its terms to section 48 (Interest in property of certain persons not to be altered) of the *Protected Estates Act 1983*.

**Clause 23** enables a beneficiary of the kind referred to in proposed section 22 to apply to the Supreme Court for orders either confirming the operation of proposed section 22 or varying the operation of the proposed section so as to avoid any one or more beneficiaries under the will gaining an unjust and disproportionate advantage or disadvantage of the kind not intended by the principal.

**Clause 24** enables the spouse of a deceased principal under an enduring power of attorney who dies intestate to have a greater proportion of the principal's estate where their shared home (to which the spouse would have been entitled under sections 61B and 61D of the *Wills, Probate and Administration Act 1898*) has been disposed of by the attorney under the power of attorney and the spouse has no claim in respect of any replacement shared home at the time of the principal's death. Currently, there is no similar protection in respect of protected powers of attorney under the *Conveyancing Act 1919*.

**Clause 25** provides for the recognition in New South Wales of enduring powers of attorney made in other States or Territories. There is currently no comparable provision in the *Conveyancing Act 1919*.

## **Part 5      Review of powers of attorney**

### **Division 1      General**

**Clause 26** provides that, for the purposes of reviewing powers of attorney under the Part, both the Guardianship Tribunal and Supreme Court are *review tribunals*.

**Clause 27** confers concurrent jurisdiction on both the Guardianship Tribunal and Supreme Court in respect of provisions of the Part that confer functions on a review tribunal. However, if a function is conferred on the Guardianship Tribunal or Supreme Court expressly, the jurisdiction to exercise that function can only be exercised by the expressly named body.

### **Division 2      Termination of irrevocable powers of attorney**

**Clause 28** provides that the Supreme Court may order that an irrevocable power of attorney is terminated if it considers that:

- (a) the objects of the power of attorney have been carried out, or
- (b) the objects of the power of attorney have become incapable of being carried out, or
- (c) the power of attorney is otherwise exhausted.



The proposed section substantially re-enacts the provisions of section 160 (2) of the *Conveyancing Act 1919* relating to the termination of irrevocable powers of attorney under that Act.

### **Division 3      Confirmation of powers conferred when principal mentally incapacitated**

**Clause 29** enables the Supreme Court, on the application of a principal under a power of attorney, to confirm any power to do an act under the power of attorney if it appears to the Court that the nature of the act was not beyond the understanding of the principal through mental incapacity at the time when the power was given.

The proposed section substantially re-enacts the provisions of section 163E (3) of the *Conveyancing Act 1919*.

**Clause 30** enables the Supreme Court, on the application of a principal under a power of attorney, to confirm any power to do an act under the power of attorney that was beyond the understanding of the principal through mental incapacity at the time the power was given to the extent that it appears to the Court that the power was subsequently affirmed by the principal while he or she was mentally capable.

The proposed section substantially re-enacts the provisions of section 163E (4) of the *Conveyancing Act 1919*.

**Clause 31** enables the Supreme Court, on the application of a principal under a power of attorney, to confirm any power to do an act under the power of attorney that was beyond the understanding of the principal through mental incapacity at the time the power was given if it appears to the Court that the principal is still unable to affirm the power and it is in the principal's best interest to do so.

The proposed section substantially re-enacts the provisions of section 163E (5) and (7) of the *Conveyancing Act 1919*.

**Clause 32** provides that an order made by the Supreme Court under the Division confirming a power has effect as if at the time when the order takes effect the principal were of full capacity and had in due form confirmed the power of attorney to the extent of the order of confirmation.

The proposed section substantially re-enacts the provisions of section 163E (6) of the *Conveyancing Act 1919*.

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## **Division 4      Review of enduring powers of attorney and other powers**

**Clause 33** provides that the following powers of attorney are reviewable under the Division (*reviewable powers of attorney*):

- (a) enduring powers of attorney are reviewable by both the Guardianship Tribunal and the Supreme Court,
- (b) any other power of attorney where the principal is currently incommunicate is reviewable by the Supreme Court (but not the Guardianship Tribunal).

Currently, the Supreme Court has exclusive jurisdiction to review such powers of attorney under section 163G of the *Conveyancing Act 1919*. However, the Supreme Court's jurisdiction in respect of powers of attorney made by principals who are incommunicate is limited to principals who are incommunicate by reason of a mental or physical incapacity. The extended definition of *incommunicate* in the proposed Act will confer jurisdiction on the Supreme Court to review powers of attorney made by principals who are unable to receive communications respecting their property or affairs because they cannot be located or contacted.

**Clause 34** enables the Guardianship Tribunal and the Supreme Court each to refer an application under the Division relating to an enduring power of attorney to the other review tribunal (for instance, because of the level of complexity of legal issues likely to be raised by the application).

**Clause 35** provides for who may make, and who are to be the parties to, applications under the Division. For instance, a person is an *interested person* for the purposes of making applications in respect of a reviewable power of attorney if the person is any of the following:

- (a) an attorney,
- (b) the principal,
- (c) any person who is:
  - (i) a guardian of the principal (whether under the *Guardianship Act 1987* or any other Act or law), or
  - (ii) an enduring guardian of the principal under the *Guardianship Act 1987*,
- (d) any other person who, in the opinion of the review tribunal, has a proper interest in the proceedings or a genuine concern for the welfare of the principal.

Currently, section 163G (2) of the *Conveyancing Act 1919* limits the making of applications to review such powers of attorney to the principal.

**Clause 36** enables a review tribunal to review the operation and effect of a reviewable power of attorney on the application of an interested person.

The proposed section confers a number of new powers on a review tribunal beyond those currently listed in section 163G of the *Conveyancing Act 1919*, including powers to make the following orders:

- (a) an order declaring that the principal did or did not have mental capacity to make a valid power of attorney,
- (b) an order declaring that the power of attorney is invalid (either in whole or in part),
- (c) an order varying a term of, or a power conferred by, the power of attorney (even without the consent of the attorney),
- (d) an order reinstating a power of attorney that has lapsed by reason of any vacancy in the office of an attorney and appointing a substitute attorney to replace the attorney who vacated office,
- (e) an order declaring that the principal lacked or lacks capacity because of mental incapacity at a specified time or during a specified period or for the time being,
- (f) such other orders as the review tribunal thinks fit.

The new review powers differ from the current provisions of section 163G of the *Conveyancing Act 1919* in at least two other respects. First, the jurisdiction conferred by section 163G on the Supreme Court can, except to a limited extent, be ousted by the instrument creating the power of attorney. This is not the case with the new provisions, unless the power of attorney is an irrevocable power of attorney. Second, a review tribunal will have the power to reinstate a lapsed power of attorney and direct that the order have effect from the date on which it lapsed. There is no similar power in section 163G.

**Clause 37** enables the Guardianship Tribunal, on an application for the review of a reviewable power of attorney, to proceed instead as if an application for a financial management order under Part 3A (Financial management) of the *Guardianship Act 1987* had been duly made in respect of the principal under that power if it considers it appropriate in all the circumstances to do so. Also, the proposed section enables the Supreme Court, on an application for the review of a reviewable power of attorney, to proceed instead as if an application for a declaration and order under section 13 (Declaration and order where person incapable of managing affairs) of the *Protected Estates Act 1983* had been duly made in respect of the principal under that power if it considers it appropriate in all the circumstances to do so.

**Clause 38** enables a review tribunal, on the application of an attorney under a reviewable power of attorney, to give advice or direction on any matter relating to the scope of the attorney's appointment or the exercise of any function by the attorney under the power of attorney or to approve acts proposed to be done by the attorney under the power. If any such advice or direction is given (or an act approved), no proceedings will lie against an attorney for or on account of any act, matter or thing done or omitted to be done by the attorney in good faith and in accordance with any approval, advice or direction given by the review tribunal.

#### **Division 5      Reference of questions of law**

**Clause 39** enables the Guardianship Tribunal, in determining an application in respect of a reviewable power of attorney, to refer questions of law to the Supreme Court for the opinion of the Court.

#### **Division 6      Appeals from decisions of Guardianship Tribunal**

**Clause 40** provides for an appeal against a decision of the Guardianship Tribunal to the Supreme Court on a question of law or, with the leave of that Court, on any other question, in each case relating to proceedings for joining a party in a matter under Division 4 or arising under proposed section 36.

**Clause 41** provides for an appeal to the Administrative Decisions Tribunal against any decision of the Guardianship Tribunal in any such proceedings.

#### **Division 7      Procedure in relation to incommunicate principals**

**Clause 42** provides for how proceedings under the Part are to be commenced and carried on if the principal is incommunicate.

The proposed section substantially re-enacts the provisions of section 163H of the *Conveyancing Act 1919*.

### **Part 6      Powers of attorney generally**

#### **Division 1      General provisions**

**Clause 43** enables an attorney under a power of attorney to execute instruments and do other things in the attorney's own name.

The proposed section substantially re-enacts the provisions of section 159 of the *Conveyancing Act 1919*.

**Clause 44** provides that a document that is a certified copy of a power of attorney as provided by the proposed section is evidence of the execution and contents of the power of attorney. It also makes it an offence for a person to give a false certificate under the proposed section. The maximum penalty for such an offence will be 5 years imprisonment.

The proposed section substantially re-enacts the provisions of section 163A of the *Conveyancing Act 1919*.

**Clause 45** provides that an attorney under a power of attorney cannot appoint a substitute, delegate or sub-attorney unless the instrument creating the power expressly provides for the attorney to do so. It also provides that an attorney cannot irrevocably appoint a substitute, delegate or sub-attorney unless the instrument creating the power of attorney expressly provides for the attorney to do so.

The proposed section substantially re-enacts the provisions of section 158 (3) of the *Conveyancing Act 1919* in relation to attempts to irrevocably appoint a substitute, delegate or sub-attorney.

## **Division 2      Termination and suspension of powers of attorney**

**Clause 46** provides that if a power of attorney appoints 2 or more persons as joint attorneys, the power of attorney is terminated if the office of one or more of the attorneys becomes vacant. It also provides that if a power of attorney appoints 2 or more persons as attorneys either severally or jointly and severally, a vacancy in the office of one or more attorneys does not operate to terminate the power of attorney in relation to the other attorneys. There are currently no corresponding provisions in the *Conveyancing Act 1919*.

**Clause 47** provides that an attorney is entitled to rely on a power of attorney that has been terminated or suspended if the attorney is unaware of the termination or suspension of the power.

The proposed section substantially re-enacts the provisions of section 161 of the *Conveyancing Act 1919*.

**Clause 48** provides that third parties to a power of attorney are entitled in certain circumstances to rely on acts done under terminated or suspended powers of attorney.

The proposed section substantially re-enacts the provisions of section 162 of the *Conveyancing Act 1919*.

**Clause 49** makes it an offence for an attorney to do an act or thing under a power of attorney that the attorney knows had been terminated at the time of doing the act or thing. It also makes it an offence for an attorney to do an act or

thing under a power of attorney that the attorney knows had been suspended at the time of doing the act or thing. The maximum penalty for each of the offences is 5 years imprisonment.

The proposed section substantially re-enacts the provisions of section 162A of the *Conveyancing Act 1919*.

**Clause 50** indicates that section 76 of the *Protected Estates Act 1983* makes provision in respect of powers of attorney made by principals who are subject to management under that Act. Section 76 of that Act provides that a power of attorney is not terminated only because the estate of the principal has become subject to management under that Act. It also provides that a power of attorney is suspended while the estate of the principal is subject to management under that Act.

### **Division 3      Registration of powers of attorney**

**Clause 51** enables an instrument creating or revoking a power of attorney to be registered by the Registrar-General in the General Register of Deeds kept under the *Conveyancing Act 1919*.

The proposed section substantially re-enacts the provisions of section 163 (1) and (3) of the *Conveyancing Act 1919*.

**Clause 52** provides that certain deeds (or memoranda that operate as deeds) that are executed by an attorney under a power of attorney do not have effect until the power of attorney is registered.

The proposed section substantially re-enacts the provisions of section 163 (2) and (4) of the *Conveyancing Act 1919*. However, the proposed section makes it clear that this requirement to register powers of attorney is limited to deeds and memoranda affecting land. There has been some doubt in the case law about whether section 163 (2) and (4) of the *Conveyancing Act 1919* extend to other kinds of deed. However, the case law has tended to suggest that those provisions are limited to instruments affecting land. See *Maronis Holdings Ltd v Nippon Credit Australia Pty Ltd* (2001) 38 ACSR 404 at 432.

## **Part 7      Miscellaneous**

**Clause 53** enables the Governor to make regulations for the purposes of the proposed Act.

**Clause 54** provides that an offence under the proposed Act (other than an offence under the regulations) is to be prosecuted on indictment. Offences under the regulations may be dealt with summarily before a Local Court.

**Clause 55** gives effect to consequential amendments made to certain Acts and a regulation set out in Schedule 4.

**Clause 56** gives effect to Schedule 5 containing savings, transitional and other provisions.

**Clause 57** provides for a review of the operation of the proposed Act to be undertaken after 5 years from the date of assent to the proposed Act.

## **Schedule 1 Repealed provisions of Conveyancing Act 1919 with continuing operation**

**Schedule 1** contains a copy of the provisions of Part 16 of, and Schedule 7 to, the *Conveyancing Act 1919* (which deal with powers of attorney) as in force immediately before the commencement of proposed section 6.

## **Schedule 2 Form for prescribed power of attorney**

**Schedule 2** contains the form for a prescribed power of attorney.

## **Schedule 3 Prescribed expressions and authorisations for prescribed powers of attorney**

**Schedule 3** specifies expressions that may be included in a prescribed power of attorney for the purposes of proposed sections 11, 12 and 13 that, if included in a prescribed power of attorney, will authorise the attorney to give gifts or confer certain benefits of the kind specified in that Schedule.

## **Schedule 4 Amendment of Acts and regulation**

**Schedule 4** makes amendments that are consequential on the enactment of the proposed Act to the *Conveyancing Act 1919*, the *Conveyancing (General) Regulation 2003*, the *Guardianship Act 1987*, the *Protected Estates Act 1983*, the *Retirement Villages Act 1999*, the *Trustee Act 1925* and the *Wills, Probate and Administration Act 1898*.

## **Schedule 5 Savings, transitional and other provisions**

**Schedule 5** contains provisions enabling the Governor to make regulations of a savings and transitional nature. It also provides that references in other Acts and in instruments made under other Acts to the proposed Act are to be read as including references to corresponding provisions of the *Conveyancing Act 1919* that have continuing effect under proposed section 6 of the proposed Act.

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New South Wales

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New South Wales

## Powers of Attorney Bill 2003

No , 2003

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### A Bill for

An Act to consolidate and revise the legislation relating to powers of attorney; to make consequential amendments to the *Conveyancing Act 1919* and certain other legislation; and for other purposes.

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**The Legislature of New South Wales enacts:**

## **Part 1 Preliminary**

### **1 Name of Act**

This Act is the *Powers of Attorney Act 2003*.

### **2 Commencement**

This Act commences on a day or days to be appointed by proclamation.

### **3 Definitions** (cf 1919 No 6, ss 7 (1) and 158 (1) and (2))

(1) In this Act:

**assurance** includes a conveyance and a disposition made otherwise than by will.

**attorney**, in relation to a power of attorney, means a person to whom the power is given.

**bankruptcy** means any act or proceeding in law having effects or results similar to those of bankruptcy, and includes the winding up of a company under the *Corporations Act 2001* of the Commonwealth.

**conveyance** includes any assignment, appointment, lease, settlement or other assurance by deed of any property.

**dealing** has the same meaning as it has in the *Real Property Act 1900*.

**deed**, in relation to land under the provisions of the *Real Property Act 1900*, includes a dealing having the effect of a deed under that Act.

**disposition** includes:

- (a) a conveyance, and
- (b) an acknowledgment under section 83 of the *Wills, Probate and Administration Act 1898*, and
- (c) a vesting instrument, declaration of trust, disclaimer, release and every other assurance of property by any instrument except a will, and

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- (d) a release, devise, bequest or an appointment of property contained in a will. 1  
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- enduring power of attorney***—see section 19 (1). 3
- exercise*** a function includes perform a duty. 4
- function*** includes a power, authority or duty. 5
- Guardianship Tribunal*** means the Guardianship Tribunal constituted under the *Guardianship Act 1987*. 6  
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- incommunicate***—see section 4. 8
- instrument*** includes a deed. 9
- irrevocable power of attorney***—see section 15. 10
- prescribed form***—see section 8. 11
- prescribed power of attorney***—see section 8. 12
- principal***, in relation to a power of attorney, means the person giving the power. 13  
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- property*** includes: 15
- (a) real and personal property, and 16
- (b) any estate or interest in any real or personal property, and 17
- (c) any debt, thing in action or other right or interest. 18
- registered*** means registered as referred to in section 51. 19
- review tribunal***—see section 26. 20
- third party***, in relation to a power of attorney, means a person other than the principal or an attorney on which a power is conferred by the power of attorney. 21  
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- vacancy*** in office of an attorney—see section 5. 24
- valuable consideration*** includes marriage but does not include a nominal consideration, even if it has some value. 25  
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- will*** includes codicil. 27
- (2) A power of attorney does not become a different power of attorney if an attorney appointed by the power is lawfully replaced by a different attorney, the exercise of a power conferred by it is lawfully delegated or a sub-attorney is lawfully appointed to exercise a power under it. 28  
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- (3) A reference in this Act to a *suspended* power of attorney is a reference to a power of attorney that is:
- (a) suspended or restricted in operation by reason of mental incapacity of the principal occurring after the execution of the instrument creating the power, or
  - (b) suspended by operation of section 76 of the *Protected Estates Act 1983*.

- (4) Notes included in this Act (other than in Schedule 2) do not form part of this Act.

**Note.** For the purposes of comparison, a number of provisions of this Act contain bracketed notes in headings drawing attention ("cf") to equivalent or comparable (though not necessarily identical) provisions of other Acts. Abbreviations in the notes include:

1919 No 6: *Conveyancing Act 1919* (as in force immediately before the enactment of this Act),

1983 No 179: *Protected Estates Act 1983* (as in force immediately before the enactment of this Act).

#### 4 When is a person incommunicate? (cf 1919 No 6, s 163D)

- (1) For the purposes of this Act, a person is *incommunicate* if:
- (a) the person suffers from any physical or mental incapacity (whether of a temporary or permanent nature) that makes the person unable:
    - (i) to understand communications respecting the person's property or affairs, or
    - (ii) to express the person's intentions respecting the person's property or affairs, or
  - (b) the person is unable to receive communications respecting the person's property or affairs because the person cannot be located or contacted.
- (2) Without limiting subsection (1) (a), a person may be incommunicate even if the incapacity concerned is induced by any drug or by medical or other treatment.

#### 5 Vacancy in office of attorney (cf 1919 No 6, s 163G (3))

For the purposes of this Act, there is a vacancy in the office of an attorney if:

- (a) the appointment of the attorney is revoked, or
- (b) the attorney renounces the power, or
- (c) the attorney dies, or



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- (d) the attorney becomes bankrupt, or
- (e) where the attorney is a corporation, the corporation is dissolved, or
- (f) the attorney, by reason of any physical or mental incapacity, ceases to have the capacity to continue to act as an attorney, or
- (g) in such other circumstances as may be prescribed by the regulations for the purposes of this paragraph.

## 6 Application of Act

### (1) Act applies to instruments executed on or after commencement

This Act applies to any power of attorney created (or purporting to have been created) by an instrument executed on or after the commencement of this section.

### (2) Act does not generally apply to existing powers of attorney

This Act does not apply to any power of attorney created (or purporting to have been created) by an instrument executed before the commencement of this section, except as provided by subsection (5).

### (3) Repealed provisions of Conveyancing Act 1919 continue to apply to existing powers of attorney

Subject to subsection (5), the provisions of Part 16 of, and Schedule 7 to, the *Conveyancing Act 1919* (and of any regulations made under those provisions) as in force immediately before the commencement of this section continue to apply to any power of attorney created (or purporting to have been created) by an instrument executed before that commencement despite the repeal of those provisions by this Act.

### (4) Schedule 1 contains copy of repealed provisions of Conveyancing Act 1919

Schedule 1 contains a copy of the provisions of Part 16 of, and Schedule 7 to, the *Conveyancing Act 1919* as in force immediately before the commencement of this section.

**Note.** The copy of the provisions of Part 16 of, and Schedule 7 to, the *Conveyancing Act 1919* contained in Schedule 1 does not include the definitions for certain terms used in those provisions that are contained in section 7 of the *Conveyancing Act 1919*. The regulations made under those provisions have also not been included in the Schedule.

(5) **Certain provisions of this Act extend to existing powers of attorney**

The provisions of section 25 (Recognition of enduring powers of attorney made in other States and Territories), Part 5 (Review of powers of attorney) and Division 3 of Part 6 (Registration of powers of attorney) extend to any power of attorney created (or purporting to have been created) by an instrument executed before the commencement of this section.

(6) **Certain references in Part 5 extended to existing powers of attorney**

For the purposes of subsection (5):

- (a) a reference in Part 5 to an enduring power of attorney is taken to include a reference to a power of attorney that was a protected power of attorney under Part 16 of the *Conveyancing Act 1919* immediately before its repeal, and
- (b) a reference in Part 5 to an irrevocable power of attorney is taken to include a reference to a power of attorney to which section 160 of the *Conveyancing Act 1919* applied immediately before its repeal.

(7) **Subsection (5) does not affect current proceedings**

Nothing in subsection (5) affects the continued operation of the provisions of the *Conveyancing Act 1919* and regulations made under that Act (as continued in force by subsection (3)) in relation to any proceedings commenced, but not finally determined, under those provisions before the commencement of this section.

**7 Application of general law to powers of attorney**

- (1) This Act does not affect the operation of any principle or rule of the common law or equity in relation to powers of attorney except to the extent that this Act provides otherwise, whether expressly or by necessary intention.
- (2) This Act does not affect the operation of Part 3 of the *Conveyancing Act 1919* except to the extent that this Act provides otherwise, whether expressly or by necessary intention.

**Note.** Part 3 of the *Conveyancing Act 1919* contains general provisions relating to the execution and effect of deeds.

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## Part 2 Prescribed powers of attorney

### 8 Creation of prescribed power of attorney (cf 1919 No 6, s 163B (1))

An instrument (whether or not under seal) that is in or to the effect of the form set out in Schedule 2 (the *prescribed form*) and is duly executed creates a *prescribed power of attorney* for the purposes of this Act.

### 9 Powers conferred by prescribed power of attorney (cf 1919 No 6, s 163B (1) and (3))

- (1) Subject to this Act, a prescribed power of attorney confers on the attorney the authority to do on behalf of the principal anything that the principal may lawfully authorise an attorney to do.
- (2) A prescribed power of attorney has effect subject to compliance with any conditions or limitations specified in the instrument creating the power.

### 10 Prescribed power of attorney does not confer authority to act as trustee (cf 1919 No 6, s 163B (2) (a))

A prescribed power of attorney does not confer authority to exercise any function as a trustee that is conferred or imposed on the principal.

### 11 Prescribed power of attorney does not generally confer authority to give gifts

- (1) A prescribed power of attorney does not authorise an attorney to give a gift of all or any property of the principal to any other person unless the instrument creating the power expressly authorises the giving of the gift.

**Note.** This subsection restates a rule of the general law. Accordingly, whether a gift of all or any of the property of a principal is expressly authorised by a prescribed power of attorney is to be determined by reference to the general principles and rules of the common law and equity concerning the interpretation of powers of attorney.

- (2) Without limiting subsection (1), a prescribed power of attorney that includes the prescribed expression for the purposes of this subsection set out in Schedule 3 authorises an attorney to give the kinds of gifts that are specified by that Schedule for that expression.

**12 Prescribed power of attorney does not generally confer authority to confer benefits on attorneys** (cf 1919 No 6, s 163B (2) (b))

- (1) A prescribed power of attorney does not authorise an attorney to execute an assurance or other document, or to do any other act, as a result of which a benefit would be conferred on the attorney unless the instrument creating the power expressly authorises the conferral of the benefit.

**Note.** This subsection restates a rule of the general law. Accordingly, whether the conferral of a benefit on an attorney is expressly authorised by a prescribed power of attorney is to be determined by reference to the general principles and rules of the common law and equity concerning the interpretation of powers of attorney.

- (2) Without limiting subsection (1), a prescribed power of attorney that includes the prescribed expression for the purposes of this subsection set out in Schedule 3 authorises an attorney to confer on the attorney the kinds of benefits that are specified by that Schedule for that expression.

**13 Prescribed power of attorney does not generally confer authority to confer benefits on third parties**

- (1) A prescribed power of attorney does not authorise an attorney to execute an assurance or other document, or to do any other act, as a result of which a benefit would be conferred on a third party unless the instrument creating the power expressly authorises the conferral of the benefit.

**Note.** This subsection restates a rule of the general law. Accordingly, whether the conferral of a benefit on a third party is expressly authorised by a prescribed power of attorney is to be determined by reference to the general principles and rules of the common law and equity concerning the interpretation of powers of attorney.

- (2) Without limiting subsection (1), a prescribed power of attorney that includes the prescribed expression for the purposes of this subsection set out in Schedule 3 authorises an attorney to confer on a third party the kinds of benefits that are specified by that Schedule for that expression.

**14 Regulations may amend Schedules 2 and 3**

- (1) The regulations may replace or amend Schedule 2 or 3 (or both).
- (2) The amendment or repeal of the prescribed form in Schedule 2, or a provision of Schedule 3 that prescribes an expression or specifies a kind of gift or benefit for the purposes of section 11 (2), 12 (2) or 13 (2), does not:

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- (a) confer any additional authority on an attorney under a power of attorney that was a prescribed power of attorney in force immediately before the day on which the amendment or repeal takes effect (an *existing authority*), or
  - (b) remove any authority conferred on a principal by an existing authority, or
  - (c) otherwise affect the continued operation of an existing authority.

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## Part 3 Irrevocable powers of attorney

### 15 Irrevocable powers of attorney (cf 1919 No 6, s 160 (1))

An instrument that creates a power of attorney creates an ***irrevocable power of attorney*** for the purposes of this Act if:

- (a) the instrument is expressed to be irrevocable, and
- (b) the instrument is given for valuable consideration or is expressed to be given for valuable consideration.

### 16 Effect of irrevocable powers of attorney (cf 1919 No 6, s 160 (1))

- (1) The power conferred by an irrevocable power of attorney is not revoked or otherwise terminated by, and remains effective despite, the occurrence of any of the following:

- (a) anything done by the principal without the concurrence of the attorney,
- (b) the bankruptcy of the principal,
- (c) the mental incapacity of the principal,
- (d) the principal becoming a person who is a temporary patient, a continued treatment patient or a forensic patient within the meaning of the *Mental Health Act 1990*, or a protected person within the meaning of the *Protected Estates Act 1983*,
- (e) the death of the principal,
- (f) if the principal is a corporation, the dissolution of the corporation.

- (2) Subsection (1) has effect except to the extent that the instrument creating the irrevocable power of attorney provides otherwise.

**Note.** Division 2 of Part 5 enables the Supreme Court to order the termination of an irrevocable power of attorney in certain circumstances.

<b>Part 4</b>	<b>Incapacity and enduring powers of attorney</b>	1
<b>Division 1</b>	<b>Initial and supervening mental incapacity</b>	2
<b>17</b>	<b>Initial mental incapacity</b> (cf 1919 No 6, s 163E (1) and (2))	3
(1)	Subject to this Act, a power of attorney is not ineffective only because any act within the scope of the power is of such a nature that it was beyond the understanding of the principal through mental incapacity at the time the power is given.	4 5 6 7
(2)	However, a power of attorney does not authorise an attorney to do any such act unless it is authorised by or under this Act.	8 9
	<b>Note.</b> Division 3 of Part 5 contains provisions that enable the Supreme Court to confirm the operation of a power of attorney despite the mental incapacity of the principal at the time the power is given.	10 11 12
<b>18</b>	<b>Supervening mental incapacity does not affect validity of acts principal understands</b> (cf 1919 No 6, s 163F (1))	13 14
	A power of attorney is effective to the extent that it concerns any act within its scope that is of such a nature that is not beyond the understanding of the principal through mental incapacity at the time of the act.	15 16 17 18
	<b>Note.</b> Division 2 makes provision for enduring powers of attorney, which can have effect in relation to acts that are beyond the understanding of the principal through mental incapacity at the time of the act.	19 20 21
<b>Division 2</b>	<b>Enduring powers of attorney</b>	22
<b>19</b>	<b>Creation of enduring power of attorney</b> (cf 1919 No 6, s 163F (2))	23
(1)	An instrument that creates a power of attorney creates an <i>enduring power of attorney</i> for the purposes of this Act if:	24 25
(a)	the instrument is expressed to be given with the intention that it will continue to be effective even if the principal lacks capacity through loss of mental capacity after execution of the instrument, and	26 27 28 29
(b)	execution of the instrument by the principal is witnessed by a person who is a prescribed witness (not being an attorney under the power), and	30 31 32
(c)	there is endorsed on, or annexed to, the instrument a certificate by that person stating that:	33 34
(i)	the person explained the effect of the instrument to the principal before it was signed, and	35 36

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	(ii) the principal appeared to understand the effect of the power of attorney, and	1 2
	(iii) the person is a prescribed witness, and	3
	(iv) the person is not an attorney under the power of attorney, and	4 5
	(v) the person witnessed the signing of the power of attorney by the principal.	6 7
(2)	In this section:	8
	<i>prescribed witness</i> means:	9
	(a) a registrar of a Local Court, or	10
	(b) a barrister or solicitor of a court of any State or Territory of the Commonwealth, or	11 12
	(c) a licensee under the <i>Conveyancers Licensing Act 1995</i> , or an employee of the Public Trustee or a trustee company within the meaning of the <i>Trustee Companies Act 1964</i> , who has successfully completed a course of study approved by the Minister, by order published in the Gazette, for the purposes of this paragraph, or	13 14 15 16 17 18
	(d) a legal practitioner duly qualified in a country other than Australia, instructed and employed independently of any legal practitioner appointed as an attorney under the instrument, or	19 20 21 22
	(e) any other person (or person belonging to a class of persons) prescribed by the regulations for the purposes of this paragraph.	23 24 25
<b>20</b>	<b>Enduring power of attorney does not confer authority until attorney accepts appointment</b>	26 27
(1)	An enduring power of attorney does not operate to confer any authority on an attorney until the attorney has accepted the appointment by signing the instrument creating the power.	28 29 30
(2)	If more than one attorney is appointed by an enduring power of attorney, the power of attorney operates to confer authority only in relation to such of the attorneys who accept their appointments as provided by subsection (1).	31 32 33 34
(3)	An attorney may accept the appointment at the time the instrument creating the enduring power of attorney is executed or at any time after it is executed.	35 36 37



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- 21 Effect of enduring power of attorney** (cf 1919 No 6, s 163F (2), (3) and (4))
- (1) Subject to this Act, an act done by an attorney that is within the scope of the power conferred by an enduring power of attorney and that is of such a nature that it is beyond the understanding of the principal through mental incapacity at the time of the act is as effective as it would have been had the principal understood the nature of the act at that time.
- (2) This section does not save a power of attorney from being or becoming ineffective by reason of any matter other than mental incapacity of the principal arising after the execution of the instrument creating the power.
- (3) This section applies only if and to the extent that a contrary intention is not expressed in the instrument creating the power and has effect subject to the terms of the instrument creating the power.
- 22 Effect of adempments of testamentary gifts by attorney under enduring power of attorney** (cf 1983 No 179, s 48)
- (1) Any person who is named as a beneficiary (a *named beneficiary*) under the will of a deceased principal who executed an enduring power of attorney has the same interest in any surplus money or other property arising from any sale, mortgage, charge or disposition of any property or other dealing with property by the attorney under the power of attorney as the named beneficiary would have had in the property the subject of the sale, mortgage, charge, disposition or dealing, if no sale, mortgage, charge, disposition or dealing had been made.
- (2) The surplus money or other property arising as referred to in subsection (1) is taken to be of the same nature as the property sold, mortgaged, charged, disposed of or dealt with.
- (3) Except as provided by subsection (4), money received for equality of partition and exchange, and all fines, premiums and sums of money received on the grant or renewal of a lease where the property the subject of the partition, exchange, or lease was real estate of a deceased principal are to be considered as real estate.
- (4) Fines, premiums and sums of money received on the grant or renewal of leases of property of which the deceased principal was tenant for life are to be considered as the personal estate of the deceased principal.
- (5) This section has effect subject to any order of the Supreme Court made under section 23.

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- (6) A person is named as a beneficiary under a will for the purposes of this section if:
- (a) the person is referred to by name in the will as being a beneficiary, or
  - (b) the person answers a description of a beneficiary, or belongs to a class of persons specified as beneficiaries, under the will.
- (7) This section does not apply to any person to whom section 48 of the *Protected Estates Act 1983* applies.

**23 Supreme Court may make orders confirming or varying operation of section 22**

- (1) On the application of a named beneficiary referred to in section 22 (1) or such other person as the Supreme Court considers has a proper interest in the matter, the Supreme Court may:
- (a) make such orders and direct such conveyances, deeds and things to be executed and done as it thinks fit in order to give effect to section 22, or
  - (b) if it considers that the operation of section 22 (1) and (2) would result in one or more named beneficiaries gaining an unjust and disproportionate advantage, or suffering an unjust and disproportionate disadvantage, of the kind not contemplated by the will of the deceased principal—make such other orders as the Court thinks fit to ensure that no named beneficiary gains such an advantage or suffers such a disadvantage.
- (2) An order made by the Supreme Court under subsection (1) (b):
- (a) may provide that it has effect as if it had been made by a codicil to the will of the deceased principal executed immediately before his or her death, and
  - (b) has effect despite anything to the contrary in section 22.
- (3) An application under subsection (1) must be made within 6 months from the date of the grant or resealing in this State of probate of the will or letters of administration unless the Supreme Court, after hearing such of the persons affected as the Supreme Court thinks necessary, extends the time for making the application.
- (4) An extension of time granted under subsection (3) may be granted:
- (a) on such conditions as the Supreme Court thinks fit, and

- (b) whether or not the time for making an application under this section has expired.

**24 Effect of disposal of home shared by spouses under enduring power of attorney in cases of intestacy**

- (1) This section applies to a spouse of a principal (the *interested spouse*) under an enduring power of attorney who dies intestate (the *deceased principal*) leaving the spouse and issue (within the meaning of section 61D of the *Wills, Probate and Administration Act 1898*), but only if:
- (a) the attorney under the power of attorney sold or otherwise disposed of the principal's interest in a dwelling house (the *former shared home*) that was occupied by the deceased principal and deceased principal's spouse as their, or the spouse's, only or principal residence at the time of the sale or disposal, and
- (b) the spouse would have had the right to require the administrator of the deceased principal's estate to hold that interest in the former shared home in trust for the spouse under section 61D of the *Wills, Probate and Administration Act 1898* if:
- (i) the interest had not been sold or otherwise disposed of, and
- (ii) the former shared home had continued to be their, or the spouse's, only or principal residence at the time of the deceased principal's death, and
- (c) the deceased principal did not have an interest in another dwelling house that was occupied by the deceased principal and the spouse as their, or the spouse's, only or principal residence at the time of the deceased principal's death in respect of which the spouse has a right under section 61D of the *Wills, Probate and Administration Act 1898* to require the administrator of the deceased principal's estate to hold that interest in trust for the spouse.
- (2) For the purposes of subsection (3):
- the disposal value* of the interest in a former shared home of an interested spouse is the amount for which the interest in the shared home was sold or otherwise disposed of under the power of attorney.

*the shortfall* is any amount by which the value of the share of the deceased principal's estate to which an interested spouse would, but for this subsection, have been entitled under section 61B (3) (b) and (c) of the *Wills, Probate and Administration Act 1898* is less than the disposal value of the spouse's interest in the former shared home.

- (3) If the value of the deceased principal's estate after excluding the value of household chattels (*the nett value of the estate*):
  - (a) is greater than the disposal value of the spouse's interest in the former shared home:
    - (i) the share of the spouse under section 61B (3) of that Act is taken to be increased by the amount of the shortfall up to a maximum of the nett value of the estate, and
    - (ii) the share of the issue under section 61B (3) of that Act is taken to be correspondingly reduced, or
  - (b) is equal to or less than the disposal value of the spouse's interest in the former shared home:
    - (i) the share of the spouse under section 61B (3) of that Act is taken to be the value of the whole estate (including household chattels), and
    - (ii) the issue are taken not to be entitled to a share of the deceased principal's estate under section 61B (3) of that Act.
- (4) Nothing in this section affects the operation of section 61B (3) of the *Wills, Probate and Administration Act 1898* in relation to an interested spouse if the value of the share of the deceased principal's estate to which the spouse is entitled under section 61B (3) (b) and (c) of that Act is equal to or greater than the disposal value of the spouse's interest in the former shared home.
- (5) This section applies despite anything to the contrary in the *Wills, Probate and Administration Act 1898*.

## 25 Recognition of enduring powers of attorney made in other States and Territories

- (1) An interstate enduring power of attorney has effect in this State as if it were an enduring power of attorney made under, and in compliance with, this Act, but only to the extent that the powers it gives under the law of the State or Territory in which it was made could validly have been given by an enduring power of attorney made under this Act.

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- (2) In particular, an interstate enduring power of attorney to which subsection (1) applies:
- (a) has effect in this State subject to any limitations on the power that apply to it under the law of the State or Territory in which it was made, and
  - (b) does not operate to confer any power on an attorney in this State that cannot be conferred on an attorney under an enduring power of attorney made in this State.
- (3) Subsection (1) does not apply to any power of attorney (or class of powers of attorney) prescribed by the regulations.
- (4) A document signed by a qualified interstate legal practitioner that certifies that an interstate enduring power of attorney was made in accordance with the formal requirements of the law of the State or Territory in which it was made is admissible in any proceedings concerning that power and is prima facie evidence of the matter so certified.
- (5) In this section:
- interstate enduring power of attorney*** means a power of attorney made in another State or a Territory that, under the law of that State or Territory, has effect in that State or Territory as a valid power of attorney even if the principal loses capacity through mental incapacity after the execution of the instrument creating the power of attorney.
- qualified interstate legal practitioner***, in relation to an interstate enduring power of attorney, means an individual:
- (a) who has been admitted to legal practice in the State or Territory in which the power of attorney was made, and
  - (b) who holds a certificate or other form of authorisation that confers an authority to practise in that State or Territory that corresponds to the authority conferred by a practising certificate issued under Part 3 of the *Legal Profession Act 1987*, and
  - (c) who practises in that State or Territory.
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## **Part 5 Review of powers of attorney**

### **Division 1 General**

#### **26 Review tribunals**

Each of the following is a *review tribunal* for the purposes of this Part:

- (a) the Guardianship Tribunal,
- (b) the Supreme Court.

#### **27 Concurrent jurisdiction of review tribunals**

- (1) If a provision of this Part confers a function on any review tribunal, the jurisdiction to exercise that function is conferred on each review tribunal concurrently.
- (2) A person cannot make an application to a review tribunal for the exercise of a function conferred on the tribunal by this Part if the person has already applied to another review tribunal for the exercise of the same function in respect of the same (or substantially the same) matter.
- (3) However, subsection (2) does not prevent a person from making an application to a review tribunal for the exercise of a function under this Part if the earlier application for the exercise of the same function has been withdrawn with the approval of the review tribunal in which the application was made.
- (4) Subsections (1)–(3) do not apply to a provision of this Part that confers a function on the Guardianship Tribunal or the Supreme Court expressly.

### **Division 2 Termination of irrevocable powers of attorney**

#### **28 Supreme Court may order the termination of irrevocable power of attorney** (cf 1919 No 6, s 160 (2))

The Supreme Court may order that an irrevocable power of attorney is terminated and may order that the instrument creating the power be delivered up for cancellation if the Court considers that:

- (a) the objects of the power of attorney have been carried out, or
- (b) the objects of the power of attorney have become incapable of being carried out, or
- (c) the power of attorney is otherwise exhausted.

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### **Division 3      Confirmation of powers conferred when principal mentally incapacitated**

#### **29      Supreme Court may make orders confirming powers understood by principal** (cf 1919 No 6, s 163E (3))

The Supreme Court may, on the application of a principal under a power of attorney, confirm (whether in whole or in part) any power to do an act under the power of attorney if it appears to the Court that the nature of the act was not beyond the understanding of the principal through mental incapacity at the time when the power was given.

#### **30      Supreme Court may make orders confirming powers subsequently affirmed by principal** (cf 1919 No 6, s 163E (4))

The Supreme Court may, on the application of a principal under a power of attorney, confirm (whether in whole or in part) any power to do an act under the power of attorney that was beyond the understanding of the principal through mental incapacity at the time the power was given to the extent that it appears to the Court that:

- (a) the principal has affirmed the power before or during the proceedings on the application, and
- (b) the principal had sufficient mental capacity to affirm the power at the time the affirmation was made.

#### **31      Supreme Court may make orders confirming powers in best interests of principal** (cf 1919 No 6, s 163E (5) and (7))

- (1) The Supreme Court may, on the application of a principal under a power of attorney (whether or not an enduring power of attorney), confirm (whether in whole or in part) any power to do an act under the power of attorney if it appears to the Court that:

- (a) the principal is incapable of affirming the power because:
  - (i) the principal lacks capacity by reason of the continuation of mental incapacity that affected the principal when the principal gave the power, or
  - (ii) the principal is incommunicate, and
- (b) it is for the benefit of the principal that the power be confirmed in whole or in part.

- (2) Subsection (1):
- (a) applies only if and to the extent that a contrary intention is not expressed in the instrument creating the power of attorney, and
  - (b) has effect subject to the terms of the instrument creating the power of attorney.

**32 Effect of orders made by Supreme Court under this Division** (cf 1919 No 6, s 163E (6))

If the Supreme Court makes an order under this Division confirming a power of an attorney (whether in whole or in part), any act done by the attorney after the order takes effect that is within the scope of the power is, to the extent it is confirmed, taken to be as good for all purposes and between all persons as if, at the time when the order took effect, the principal were of full capacity and had in due form confirmed the power of attorney to the extent of the order of confirmation.

**Division 4 Review of enduring powers of attorney and other powers**

**33 Reviewable powers of attorney** (cf 1919 No 6, s 163G (1))

- (1) A power of attorney is a *reviewable power of attorney* for the purposes of an application under this Division if the review tribunal to which the application is to be made has jurisdiction to deal with the application as provided by this section.
- (2) Both the Guardianship Tribunal and the Supreme Court have jurisdiction to deal with an application under this Division in respect of an enduring power of attorney.
- (3) The Supreme Court (but not the Guardianship Tribunal) also has jurisdiction to deal with an application under this Division in respect of any other power of attorney given by a principal who is incommunicate for the time being.
- (4) To remove any doubt, references in this Division to a reviewable power of attorney extend to a document purporting to be a reviewable power of attorney and to the making of a power of attorney extend to the purported making of a power of attorney.



**34 Referral of application to different review tribunal**

- (1) Whether or not on its own initiative, the Supreme Court may refer an application made to it under this Division in respect of an enduring power of attorney to the Guardianship Tribunal and the Guardianship Tribunal may refer such an application made to it to the Supreme Court.
- (2) Without limiting the matters that a review tribunal may take into account in deciding whether or not to refer such an application, the review tribunal may take into account any one or more of the following matters:
  - (a) whether the application relates to the effect of the enduring power of attorney on third parties,
  - (b) whether the application is likely to raise for consideration complex or novel legal issues that the Supreme Court is better suited to determine,
  - (c) any other matter it considers relevant.

**35 Who are interested persons and parties in relation to applications****(1) Interested persons who may make applications**

Each of the following persons is an *interested person* in relation to the making of applications under this Division in respect of a reviewable power of attorney:

- (a) an attorney,
- (b) the principal,
- (c) any person who is:
  - (i) a guardian of the principal (whether under the *Guardianship Act 1987* or any other Act or law), or
  - (ii) an enduring guardian of the principal under the *Guardianship Act 1987*,
- (d) any other person who, in the opinion of the review tribunal, has a proper interest in the proceedings or a genuine concern for the welfare of the principal.

**(2) Parties to proceedings in respect of an application**

Each of the following persons is a party to an application in respect of a reviewable power of attorney:

- (a) the applicant,

(b)	each attorney under the power (if the attorney is not the applicant),	1
(c)	the principal (if the principal is not the applicant),	2
(d)	any other person that the review tribunal concerned has joined as a party under subsection (3).	3
(3)	<b>Joinder of parties</b>	4
	A review tribunal may, on its own initiative or on the application of an interested person, decide to join, as a party to any proceedings before the tribunal under this Division, any person who, in the opinion of the tribunal, should be a party to the proceedings (whether because of the person's concern for the welfare of the principal or for any other reason).	5
(4)	<b>Application of section 51A (2) of Guardianship Act 1987</b>	6
	Section 51A (2) of the <i>Guardianship Act 1987</i> applies to the joinder of a party under subsection (3) in the same way as it applies to the joinder of a party in proceedings under that Act.	7
	<b>Note.</b> Section 51A (2) of the <i>Guardianship Act 1987</i> provides that the persons who may constitute the Guardianship Tribunal for the purposes of joinder of parties under that section are the President and Deputy President of the Tribunal and such other members of the Tribunal as the President may nominate in writing for the purposes of that section.	8
(5)	<b>Applicant to be notified of joinder</b>	9
	If a review tribunal joins a person as a party to any proceedings, the tribunal must, as soon as practicable, notify the applicant (or cause the applicant to be notified) accordingly.	10
<b>36</b>	<b>Interested persons may apply for review</b> (cf 1919 No 6, s 163G)	11
(1)	<b>Tribunal may review making or operation and effect of power</b>	12
	A review tribunal may, on the application of an interested person, decide to review the making or the operation and effect of a reviewable power of attorney or not to carry out such a review.	13
(2)	As a consequence of reviewing the making or operation and effect of a reviewable power of attorney, a review tribunal may decide whether or not to make an order under this section.	14

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**(3) Orders relating to making of power of attorney**

A review tribunal may make either or both of the following orders with respect to the making of a power of attorney:

- (a) an order declaring that the principal did or did not have mental capacity to make a valid power of attorney,
- (b) an order declaring that the power of attorney is invalid (either in whole or in part) if the tribunal is satisfied:
  - (i) the principal did not have the capacity necessary to make it, or
  - (ii) the power of attorney did not comply with the other requirements of this Act applicable to it, or
  - (iii) the power of attorney is invalid for any other reason, for example, the principal was induced to make it by dishonesty or undue influence.

**(4) Orders relating to operation and effect of power**

A review tribunal may, if satisfied that it would be in the best interests of the principal to do so or that it would better reflect the wishes of the principal, make any one or more of the following orders relating to the operation and effect of a power of attorney:

- (a) an order varying a term of, or a power conferred by, the power of attorney,
- (b) an order removing a person from office as an attorney,
- (c) an order appointing a substitute attorney to replace an attorney who has been removed from office by a review tribunal or who otherwise vacates the office,
- (d) an order reinstating a power of attorney that has lapsed by reason of any vacancy in the office of an attorney and appointing a substitute attorney to replace the attorney who vacated office,
- (e) an order directing or requiring any one or more of the following:
  - (i) that an attorney furnish accounts and other information to the tribunal or to a person nominated by the tribunal,
  - (ii) that an attorney lodge with the tribunal a copy of all records and accounts kept by the attorney of dealings and transactions made by the attorney under the power,

- (iii) that those records and accounts be audited by an auditor appointed by the tribunal and that a copy of the report of the auditor be furnished to the tribunal, 1
  - (iv) that the attorney submit a plan of financial management to the tribunal for approval, 2
- (f) an order revoking all or part of the power of attorney, 3
- (g) such other orders as the review tribunal thinks fit. 4
- (5) **Orders relating to mental capacity of principal** 5
- A review tribunal may make an order relating to the operation and effect of a power of attorney declaring that the principal lacked or lacks capacity because of mental incapacity at a specified time or during a specified period or for the time being. An enduring power of attorney can not be lawfully revoked by the principal while the principal is declared to be incapable by such an order. 6
- (6) **Effect of order declaring mental incapacity for the time being** 7
- If a review tribunal makes an order under this section declaring that a principal under a reviewable power of attorney lacks capacity through mental incapacity for the time being, the principal is to be taken, for the purposes of the operation of the power of attorney, to lack such capacity for such period (if any) specified in the order or until further order of the tribunal. 8
- (7) **Orders may be subject to terms and conditions** 9
- An order made under this section may be made subject to such terms and conditions as the review tribunal thinks fit. 10
- (8) **Further orders relating to accounts and information** 11
- If a review tribunal makes an order under this section directing an attorney to furnish accounts or other information, the tribunal may decide to make further orders for: 12
- (a) limiting the disclosure of accounts or other information by the attorney, and 13
  - (b) inquiry and report on the conduct of the attorney. 14
- (9) **Order reinstating lapsed power of attorney may have retrospective operation** 15
- If a review tribunal makes an order under this section reinstating a power of attorney that has lapsed by reason of a vacancy in the office of an attorney, the order may also direct that it has effect from the time at which the power of attorney originally lapsed. 16

(10) **Effect of order removing or appointing attorney or altering power**

The removal or appointment of an attorney, or the alteration or revocation of a power of attorney, under this section has effect as if:

- (a) it were done in due form by the principal, and
- (b) the principal were of full capacity and were, to the extent necessary, authorised to do the thing in question by the instrument creating the power.

(11) **Review tribunal may exercise functions despite instrument**

A review tribunal may exercise a function under this section despite anything to the contrary in the instrument creating the power.

(12) **Section does not affect irrevocable powers of attorney**

This section has effect subject to the provisions of Part 3 (Irrevocable powers of attorney).

**37 Review tribunal may treat certain applications for review of power of attorney as application for management order**

- (1) If, on a review of the making or operation and effect of a reviewable power of attorney under section 36, the Guardianship Tribunal decides not to make an order under that section in respect of the power of attorney, it may (if it considers it appropriate in all the circumstances to do so) decide to treat the application for the review as an application for a financial management order under Part 3A (Financial management) of the *Guardianship Act 1987*.
- (2) If such a decision is made, the application is taken to be an application for such a financial management order duly made in respect of the principal under that power.
- (3) If, on a review of the making or operation and effect of a reviewable power of attorney under section 36, the Supreme Court decides not to make an order under that section in respect of the power of attorney, it may (if it considers it appropriate in all the circumstances to do so) proceed instead as if an application for a declaration and order under section 13 (Declaration and order where person incapable of managing affairs) of the *Protected Estates Act 1983* had been duly made in respect of the principal under that power.

**38 Advice or directions concerning reviewable powers of attorney**

- (1) An attorney under a reviewable power of attorney may apply for advice or direction by a review tribunal on any matter relating to the scope of the attorney's appointment or the exercise of any function by the attorney under a reviewable power of attorney.
- (2) In determining any such application, a review tribunal may decide to:
  - (a) approve or disapprove of any act proposed to be done by the attorney, or
  - (b) give such advice or direction as it considers appropriate, or
  - (c) vary the effect of the enduring power of attorney or make any other order it could make in an application under section 36.
- (3) No proceedings lie against an attorney under a reviewable power of attorney for or on account of any act, matter or thing done or omitted to be done by the attorney in good faith and in accordance with any approval, advice or direction given under this section.

**Division 5 Reference of questions of law**

**39 References of questions of law to Supreme Court by Guardianship Tribunal**

- (1) If the Guardianship Tribunal is determining an application under this Part, it may, on its own initiative or at the request of a party, refer a question of law arising in the application to the Supreme Court for the opinion of the Court.
- (2) The Supreme Court has jurisdiction to hear and determine any question of law referred to it under this section.
- (3) If a question of law arising in any application to the Guardianship Tribunal has been referred to the Supreme Court under this section, the Tribunal is not:
  - (a) to give a decision in the application to which the question is relevant while the reference is pending, or
  - (b) to proceed in a manner, or make a decision, that is inconsistent with the opinion of the Supreme Court on the question.

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## **Division 6      Appeals from decisions of Guardianship Tribunal**

### **40   Appeals to the Supreme Court**

- (1) A party to a proceeding under section 35 (3) or 36 before the Guardianship Tribunal may appeal to the Supreme Court from any decision of that Tribunal in that proceeding:
  - (a) as of right, on a question of law, or
  - (b) by leave of the Supreme Court, on any other question.
- (2) A person who has appealed to the Administrative Decisions Tribunal under section 41 against a decision of the Guardianship Tribunal may not appeal to the Supreme Court under this section in respect of the same decision. However, the person may appeal to the Supreme Court under this section if the appeal under section 41 is withdrawn with the approval of the Administrative Decisions Tribunal for the purpose of enabling the Supreme Court to deal with the matter.
- (3) An appeal by a person under this section is to be instituted within the period ending 28 days after the day on which the decision is made.
- (4) The Supreme Court shall hear and determine the appeal and may make such orders as it thinks appropriate in the light of its decision.
- (5) Without affecting the generality of subsection (4), the orders that may be made by the Supreme Court on an appeal include:
  - (a) an order affirming or setting aside the decision of the Guardianship Tribunal, and
  - (b) an order remitting the case to be heard and decided again by the Guardianship Tribunal (either with or without the hearing of further evidence) in accordance with the directions of the Supreme Court.
- (6) Subject to any interlocutory order made by the Supreme Court, an appeal operates to stay the decision appealed against.
- (7) The Guardianship Tribunal is not liable for any costs relating to:
  - (a) an order or decision of that Tribunal in respect of which an appeal is made, or
  - (b) any such appeal.

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**41 Appeals to ADT**

- (1) An appeal may be made to the Administrative Decisions Tribunal against a decision of the Guardianship Tribunal under section 35 (3) or 36.
- (2) An appeal to the Administrative Decisions Tribunal under this section may be made by a person who was a party to the proceedings in which the decision of the Guardianship Tribunal was made.
- (3) If any such person has appealed to the Supreme Court under section 40 against a decision of the Guardianship Tribunal, the person may not appeal to the Administrative Decisions Tribunal under this section in respect of the same decision. However, the person may appeal to the Administrative Decisions Tribunal under this section if the appeal under section 40 is withdrawn with the approval of the Supreme Court for the purpose of enabling the Administrative Decisions Tribunal to deal with the matter.
- (4) An appeal under this section is an external appeal within the meaning of the *Administrative Decisions Tribunal Act 1997*.

**Division 7 Procedure in relation to incommunicate principals**

**42 Procedure where principal incommunicate** (cf 1919 No 6, s 163H)

- (1) If the principal under a power of attorney is incommunicate:
  - (a) proceedings under this Part by the principal:
    - (i) may be commenced and carried on as prescribed by rules of court, or
    - (ii) subject to rules of court, may be commenced and carried on as if the principal were mentally incapacitated, and
  - (b) subject to rules of court, all persons are, in relation to the proceedings, to be as nearly as may be in the like position in law as if the principal were mentally incapacitated.
- (2) Subsection (1) does not limit the rule-making powers conferred by the *Supreme Court Act 1970*.
- (3) A reference to rules of court in subsection (1) includes a reference to rules of the Guardianship Tribunal made under section 75 of the *Guardianship Act 1987* in relation to proceedings in that Tribunal brought under this Part.



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## **Part 6 Powers of attorney generally**

### **Division 1 General provisions**

#### **43 Attorney may execute instruments and do other things in own name**

(cf 1919 No 6, s 159)

- (1) An attorney under a power of attorney may, in the exercise of the power:
  - (a) execute any assurance or instrument with the attorney's own signature and, where sealing is required, with the attorney's own seal, or
  - (b) do any other thing in the attorney's own name.
- (2) An assurance or instrument executed, or thing done, in accordance with subsection (1) is as effectual in law as if executed or done by the attorney with the signature and seal or, as the case may be, in the name, of the principal.

#### **44 Proof of powers of attorney** (cf 1919 No 6, s 163A)

- (1) A document is a certified copy of an instrument for the purposes of this section if:
  - (a) there is endorsed on the document a written certificate, to the effect that the document is a true and complete copy of the contents of the instrument of which it purports to be a copy, by:
    - (i) the principal under the power of attorney created by the instrument, or
    - (ii) a person (or person belonging to a class of persons) prescribed by the regulations for the purposes of this subsection, and
  - (b) each page of the document bears the signature of the person who gives the certificate referred to in paragraph (a).
- (2) A legible document that is a certified copy of an instrument creating a power of attorney is evidence:
  - (a) as against the principal under the power of attorney of the execution and contents of the instrument, and
  - (b) as against any other person of the contents of the instrument.
- (3) Subsection (2) does not make a document better evidence than is the instrument of the contents of which it purports to be a copy.

(4) This section does not affect any other method of proving the execution or contents of an instrument creating a power of attorney.

(5) A person must not give a certificate for the purposes of this section knowing the certificate to be false.

Maximum penalty (subsection (5)): 5 years imprisonment.

**45 Delegation of power of attorney** (cf 1919 No 6, s 158 (3))

(1) An attorney under a power of attorney cannot appoint a substitute, delegate or sub-attorney unless the instrument creating the power expressly provides for the attorney to do so.

(2) Nothing in this section enables an attorney irrevocably to appoint a substitute, delegate or sub-attorney unless the instrument creating the power of attorney expressly provides for the attorney to do so.

**Division 2 Termination and suspension of powers of attorney**

**46 Effect of vacation of office of joint and several attorneys**

(1) If a power of attorney appoints 2 or more persons as joint attorneys, the power of attorney is terminated if the office of one or more of the attorneys becomes vacant.

(2) If a power of attorney appoints 2 or more persons as attorneys either severally or jointly and severally, a vacancy in the office of one or more attorneys does not operate to terminate the power of attorney in relation to the other attorneys.

**47 Attorney entitled to rely on power of attorney if unaware of termination or suspension of power** (cf 1919 No 6, s 161)

If a power of attorney is terminated or suspended, an attorney who does an act that would have been within the scope of the power without knowing of the termination or suspension is entitled to rely on the power of attorney in relation to that act in the same manner and to the same extent as if the power had not been terminated or suspended.

**48 Certain third parties entitled to rely on acts done under terminated or suspended powers of attorney** (cf 1919 No 6, s 162)

(1) If a power of attorney is terminated or suspended, a third party who deals or otherwise transacts in good faith with the attorney without knowing of the termination or suspension is entitled to rely on the

power of attorney in relation to that dealing or transaction in the same manner and to the same extent as if the power had not been terminated or suspended.

- (2) Subsection (1) does not entitle an attorney to rely on a power in support of an act within the scope of the power done by the attorney with notice of the termination or suspension of the power to the extent that it concerns authority to do that act.

**49 Attorney acting with knowledge of termination or suspension of power** (cf 1919 No 6, s 162A)

- (1) An attorney under a power of attorney that is terminated must not do any act or thing under the power of attorney if the attorney knows of the termination at the time the attorney does the act or thing.

Maximum penalty: 5 years imprisonment.

- (2) An attorney under a power of attorney must not do any act or thing under the power of attorney where the authority to do that act or thing has been suspended if the attorney knows of the suspension at the time the attorney does the act or thing.

Maximum penalty: 5 years imprisonment.

**50 Application of section 76 of Protected Estates Act 1983**

Section 76 of the *Protected Estates Act 1983* makes provision in respect of powers of attorney made by principals who are subject to management under that Act.

**Note.** Section 76 of the *Protected Estates Act 1983* provides that a power of attorney is:

- (a) not terminated only because the estate of the principal has become subject to management under that Act, and  
(b) suspended while the estate of the principal is subject to management under that Act.

**Division 3 Registration of powers of attorney**

**51 Powers of attorney may be registered** (cf 1919 No 6, s 163 (1) and (3))

- (1) Any instrument executed before or after the commencement of this Act that creates a power of attorney may be registered by the Registrar-General in the General Register of Deeds kept under the *Conveyancing Act 1919*.
- (2) An instrument revoking a registered power of attorney may also be registered by the Registrar-General in that Register.

- 52 Powers of attorney to be registered for dealings affecting land** (cf 1919 No 6, s 163 (2) and (4)) 1
- (1) A conveyance or other deed affecting land executed on or after 2  
1 July 1920 under a power of attorney has no effect unless the 3  
instrument creating the power has been registered. 4  
**Note.** 1 July 1920 is the day on which the *Conveyancing Act 1919* commenced. 5
- (2) If the instrument is registered after the time when the conveyance or 6  
other deed was executed, the conveyance or other deed has effect as 7  
if the instrument had been registered before that time. 8
- (3) In this section, **deed** includes any memorandum, dealing or other 9  
instrument affecting land that is deemed by an Act to have effect as 10  
a deed. 11
- (4) This section does not apply to a lease for a term of 3 years or less. 12

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## Part 7      Miscellaneous

### 53      Regulations

- (1) The Governor may make regulations, not inconsistent with this Act, for or with respect to any matter that by this Act is required or permitted to be prescribed or that is necessary or convenient to be prescribed for carrying out or giving effect to this Act.
- (2) A regulation may create an offence punishable by a penalty not exceeding 25 penalty units.

### 54      Nature of proceedings for offences

- (1) Subject to subsection (2), an offence under this Act is to be prosecuted on indictment.
- (2) Proceedings for an offence under the regulations may be dealt with summarily before a Local Court.

### 55      Amendment of Acts and regulation

The Acts and regulation specified in Schedule 4 are amended as set out in that Schedule.

### 56      Savings, transitional and other provisions

Schedule 5 has effect.

### 57      Review of Act

- (1) The Minister is to review this Act to determine whether the policy objectives of the Act remain valid and whether the terms of the Act remain appropriate for securing those objectives.
- (2) The review is to be undertaken as soon as possible after the period of 5 years from the date of assent to this Act.
- (3) A report on the outcome of the review is to be tabled in each House of Parliament within 12 months after the end of the period of 5 years.

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**Schedule 1   Repealed provisions of Conveyancing Act 1919 with continuing operation**  
(Section 6 (4))

**Part 16   Powers of attorney**

**Division 1      General**

**158   Definitions and application of Part**

(1)   In this Part:

*attorney*, in relation to a power of attorney, means an attorney under the power.

*commencement*, in relation to the *Conveyancing (Powers of Attorney) Amendment Act 1983*, means the commencement of section 3 of, and Schedule 1 to, that Act.

*power of attorney* or *power* includes an authorised substitution, delegation or appointment of sub-attorney.

*principal*, in relation to a power of attorney, means the person giving the power.

(2)   In sections 161, 162 and 162A, *suspended*, in relation to a power of attorney, means:

(a)   suspended or restricted in operation by reason of unsoundness of mind of the principal occurring after the execution of the instrument creating the power, or

(b)   suspended by section 110A of the *Mental Health Act 1958*.

(3)   This Part does not enable an attorney, without express authority, irrevocably to appoint a substitute, delegate or sub-attorney.

(4)   This Part extends to powers of attorney authorising, whether expressly or in general terms, the execution of dealings under the *Real Property Act 1900*.

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**159 Execution etc under power**

- (1) An attorney under a power of attorney may, in the exercise of the power:
- (a) execute any assurance or instrument with his or her own signature and, where sealing is required, with his or her own seal, or
  - (b) do any other thing in his or her own name.
- (2) An assurance or instrument executed, or thing done, in accordance with subsection (1) is as effectual as if executed or done by the attorney with the signature and seal or, as the case may be, in the name, of the principal.

**160 Irrevocable powers**

- (1) Where a power of attorney is, in the instrument creating the power, expressed to be irrevocable and is, or in the instrument creating the power is expressed to be, given for valuable consideration, the power is not, except to the extent (if any) that the instrument otherwise provides, revoked or otherwise terminated by, and remains effective notwithstanding:
- (a) anything done by the principal without the concurrence of the attorney,
  - (b) bankruptcy of the principal,
  - (c) mental incapacity of the principal,
  - (d) the principal becoming a patient, a protected person or an incapable person within the meaning of the *Mental Health Act 1958*, or any other event happening whereby the property or affairs of the principal becomes or become subject to care, management, collection, administration, charge or control under that Act,
  - (e) death of the principal,
  - (f) if the principal is a corporation, dissolution of the corporation.
- (2) Where the objects of a power of attorney to which this section applies have been carried out, or have become incapable of being carried out, or a power of attorney to which this section applies is otherwise exhausted, the Court may order that the power of attorney terminate and may order that the instrument creating the power be delivered up for cancellation.

- (3) This section does not apply to a power of attorney created by an instrument executed before the commencement of the *Conveyancing (Powers of Attorney) Amendment Act 1983*.

**161 Termination etc—protection of attorney**

- (1) Where:
- (a) an attorney under a power of attorney does an act within the scope of the power, and
  - (b) at that time the attorney does not have notice that the power has terminated or has been suspended,
- the attorney shall be entitled to rely on the power, as against the principal and any other person, notwithstanding any termination or suspension of the power before the time of the act, in the same manner and to the same extent as if the power had not terminated, or had not been suspended, before the time of the act.
- (2) This section applies only to an act done by an attorney after the commencement of the *Conveyancing (Powers of Attorney) Amendment Act 1983*.

**162 Termination etc—protection of strangers**

- (1) Where:
- (a) an attorney under a power of attorney does an act within the scope of the power, professing to act on behalf of another,
  - (b) at the time of the act of the attorney or afterwards, a third person:
    - (i) acts as a purchaser or incurs an obligation or otherwise acts to his or her detriment in a transaction (with the attorney or with any other person) which depends for its validity or effect on the power not having terminated, and not being suspended, at the time of the act of the attorney, or
    - (ii) acts in reliance on a right, title or interest which so depends, and
  - (c) at the time of the act of the third person he or she does not have notice that, at the time of the act of the attorney, the power had terminated, or was suspended so far as concerns the authority of the attorney to do that act,



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the third person and any person claiming under him or her shall be entitled, as against the principal and the attorney and any other person, to rely on the power notwithstanding any termination of the power before the time of the act of the attorney, and notwithstanding any suspension of the power at that time so far as concerns authority to do that act, in the same manner and to the same extent as if the power had not terminated before the time of the act of the attorney or, as the case may be, were not under suspension at that time.

- (2) Subsection (1) does not entitle an attorney to rely on a power in support of an act within the scope of the power done by him or her with notice of termination of the power or notice of suspension of the power so far as concerns authority to do that act.
- (3) This section applies only to an act done by an attorney after the commencement of the *Conveyancing (Powers of Attorney) Amendment Act 1983*.

**162A Attorney acting with knowledge of termination or suspension of power**

- (1) Where a power of attorney has terminated and an attorney under the power, knowing of the termination, does any act or thing under or in pursuance of the power, that attorney under the power is guilty of an indictable offence and liable to imprisonment for 5 years.
- (2) Where a power of attorney is suspended so far as concerns authority to an attorney to do an act or thing of any nature and an attorney under the power, knowing of the suspension, does an act or thing of that nature under or in pursuance of the power, that attorney under the power is guilty of an indictable offence and liable to imprisonment for 5 years.
- (3) This section applies only to acts or things done after the commencement of the *Conveyancing (Powers of Attorney) Amendment Act 1983*.

**162B Saving**

Sections 161, 162 and 162A, as enacted immediately before the commencement of the *Conveyancing (Powers of Attorney) Amendment Act 1983*, continue to apply to and in respect of a power of attorney executed before that commencement as if they had not been repealed.

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**163 Registration of powers of attorney**

- (1) Any instrument (whether executed before or after the commencement of this Act) creating a power of attorney for any purpose whatever may be registered.
- (2) Where such instrument is executed after the commencement of this Act no conveyance or other deed not being a lease or agreement for a lease for a term not exceeding three years, and no memorandum by this Act operating as a deed executed by the attorney under the power in pursuance of the power shall be of any force or validity whatsoever unless the instrument creating the power has been registered:  
  
Provided that on registration of the instrument creating the power every such conveyance deed or memorandum executed by the attorney under the power shall take effect as if the instrument creating the power had been registered before the execution of the conveyance deed or memorandum.
- (3) Any instrument revoking any such power may also be registered.
- (4) Every such conveyance and other deed and memorandum as is mentioned in subsection (2) executed by the attorney under a power of attorney before the commencement of the *Conveyancing (Amendment) Act 1930*, shall have the same effect as if that Act had been in operation at the time of the execution.
- (5) Nothing in the last preceding subsection shall affect the rights of any party to any proceeding at law or in equity concluded before or pending at the commencement of the *Conveyancing (Amendment) Act 1930*.

**163A Proof of powers of attorney**

- (1) Where, in the manner provided by subsection (2), a document (being a legible document) is certified to be a true and complete copy of the contents of an instrument creating a power of attorney, the document is evidence:
  - (a) as against the principal under the power of attorney—of the execution and contents of the instrument, and
  - (b) as against any other person—of the contents of the instrument.

- 
- |             |  |                            |
|-------------|--|----------------------------|
| (2)         | A document is certified in the manner provided by this subsection:   | 1                          |
| (a)         | if there is endorsed on the document a written certificate, to the effect that the document is a true and complete copy of the contents of the instrument of which it purports to be a copy, by:   | 2<br>3<br>4<br>5           |
| (i)         | the principal under the power of attorney created by the instrument, or  | 6<br>7                     |
| (ii)        | a person of a prescribed class, and  | 8                          |
| (b)         | if each page of the document bears the signature of the person who gives the certificate referred to in paragraph (a).   | 9<br>10                    |
| (3)         | Subsection (1) does not make a document better evidence than is the instrument of the contents of which it purports to be a copy.  | 11<br>12                   |
| (4)         | This section does not affect any other method of proving the execution or contents of an instrument creating a power of attorney.  | 13<br>14                   |
| (5)         | A person who gives a certificate for the purposes of this section knowing the certificate to be false is guilty of an indictable offence and liable to imprisonment for 5 years.   | 15<br>16<br>17             |
| (6)         | This section applies only to a document certified for the purposes of this section after the commencement of the <i>Conveyancing (Powers of Attorney) Amendment Act 1983</i> .   | 18<br>19<br>20             |
| <b>163B</b> | <b>Power conferred by prescribed form of instrument</b>  | 21                         |
| (1)         | Subject to this section, an instrument (whether or not under seal) in or to the effect of the form in Schedule 7 confers on the attorney thereby appointed authority to do on behalf of the person executing the instrument anything the person executing the instrument may lawfully authorise an attorney to do. | 22<br>23<br>24<br>25<br>26 |
| (2)         | The authority conferred by an instrument referred to in subsection (1) does not include:   | 27<br>28                   |
| (a)         | authority to exercise or perform any power, authority, duty or function as a trustee conferred or imposed on the person executing the instrument, or   | 29<br>30<br>31             |
| (b)         | unless it is expressly conferred by the instrument—authority to execute an assurance or other document, or do any other act, as a result of which a benefit would be conferred on the attorney appointed by the instrument.  | 32<br>33<br>34<br>35       |
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- (3) Where an instrument referred to in subsection (1) specifies any conditions or limitations to which the authority conferred by the instrument is to be subject, the authority is so conferred subject to compliance with those conditions or limitations.

## **Division 2      Unsoundness of mind etc**

### **163C    Application of Division**

This Division applies only to a power of attorney given after the commencement of the *Conveyancing (Powers of Attorney) Amendment Act 1983*.

### **163D    Definitions**

In this Division:

*incommunicate*, in relation to a person, means under such a handicap of body or mind, by way of coma or paralysis or otherwise, whether or not induced by any drug or by medical or other treatment, that the person is unable to receive communications respecting the person's property or affairs, or to express the person's will respecting the person's property or affairs.

*protected power of attorney* means a power of attorney referred to in section 163F (2).

### **163E    Initial unsoundness of mind**

- (1) Subject to this section, a power of attorney is not ineffective by reason that any act within the scope of the power is of a nature which is, at the time when the power is given, beyond the understanding of the principal through unsoundness of mind.
- (2) Subject to subsections (3) to (6), a power of attorney does not authorise an attorney under the power to do an act of a nature which is, at the time when the power is given, beyond the understanding of the principal through unsoundness of mind.
- (3) Where, on application by the principal under a power of attorney, it appears to the Court that the nature of the acts, or some one or more of the acts, within the scope of the power was not, at the time when the power was given, beyond the understanding of the principal through unsoundness of mind, the Court may by order confirm the power wholly or in part as the case requires.

- 
- (4) Where, on application by the principal under a power of attorney, it appears to the Court that the principal has, before or during the proceedings on the application, affirmed the power wholly or in part, the Court may by order confirm the power wholly or in part as the case requires, but only to the extent to which it appears to the Court that the principal was, at the time of the affirmation, sufficiently of sound mind so to affirm. 1  
2  
3  
4  
5  
6  
7
- (5) Where, on application by the principal under a power of attorney (whether or not a protected power of attorney) it appears to the Court: 8  
9  
10
- (a) that the principal is incapable of affirming the power because: 11
- (i) the principal lacks capacity by reason of the continuation of unsoundness of mind that affected the principal when the principal gave the power, or 12  
13  
14
- (ii) the principal is incommunicate, and 15
- (b) that it is for the benefit of the principal that the power be confirmed wholly or in part, 16  
17
- the Court may by order confirm the power wholly or in part as the case requires. 18  
19
- (6) Where the Court makes an order under this section confirming a power of attorney wholly or in part, an act within the scope of the power to the extent so confirmed, done after the order takes effect by an attorney under the power, shall be as good for all purposes and between all persons as if at the time when the order takes effect the principal were of full capacity and in due form confirmed the power of attorney to the extent of the order of confirmation. 20  
21  
22  
23  
24  
25  
26
- (7) Subsection (5) applies only if and so far as a contrary intention is not expressed in the instrument creating the power, and shall have effect subject to the terms of the instrument creating the power. 27  
28  
29
- 163F Supervening unsoundness of mind** 30
- (1) A power of attorney is effective so far as concerns any act within its scope, being an act of a nature which is not, at the time of the act, beyond the understanding of the principal through unsoundness of mind. 31  
32  
33  
34
-

- 
- (2) Where: 1
- (a) a power of attorney is, in the instrument creating the power, 2  
expressed to be given with the intention that it will continue 3  
to be effective notwithstanding that, after the execution of the 4  
instrument, the principal suffers loss of capacity through 5  
unsoundness of mind, 6
  - (b) the execution of the instrument is attested by a prescribed 7  
person (not being an attorney under the power), and 8
  - (c) there is endorsed on, or annexed to, the instrument a 9  
certificate by that prescribed person stating that the prescribed 10  
person explained the effect of the instrument to the principal 11  
before it was executed, 12
- the power of attorney is effective so far as concerns any act within 13  
its scope, notwithstanding that the act is of a nature which is, at the 14  
time of the act, beyond the understanding of the principal through 15  
unsoundness of mind. 16
- (3) This section does not save a power of attorney from being or 17  
becoming ineffective by reason of any matter other than an 18  
unsoundness of mind of the principal arising after the execution of 19  
the instrument creating the power. 20
- (4) This section applies only if and so far as a contrary intention is not 21  
expressed in the instrument creating the power, and shall have effect 22  
subject to the terms of the instrument creating the power. 23
- 163G Judicial control in certain circumstances** 24
- (1) This section applies to: 25
- (a) a protected power of attorney, and 26
  - (b) a power of attorney the principal under which is for the time 27  
being incommunicate. 28
- (2) Where, on application by the principal under a power of attorney, it 29  
appears to the Court to be for the principal's benefit, the Court may, 30  
on the principal's behalf, by order: 31
- (a) remove a person from office as attorney, 32
  - (b) appoint a person to fill a vacancy in the office of attorney, 33
  - (c) with the consent of the attorney and of any other interested 34  
person: 35
    - (i) alter the scope of the power, 36

- 
- |       |  |    |
|-------|--|----|
| (ii)  | otherwise alter the instrument creating the power, or  | 1  |
| (iii) | alter the rights and duties of the principal and the attorney between themselves,  | 2  |
|       |  | 3  |
| (d)   | direct an attorney to furnish accounts and other information to the Court or to a person approved by the Court, or   | 4  |
|       |  | 5  |
| (e)   | revoke the power.  | 6  |
| (3)   | For the purposes of subsection (2) (b), a vacancy in the office of attorney occurs in any of the following events:   | 7  |
|       |  | 8  |
| (a)   | renunciation of the power by an attorney,  | 9  |
| (b)   | removal of an attorney by the principal or with the principal's authority, or by the Court under subsection (2),   | 10 |
|       |  | 11 |
| (c)   | disability of an attorney,   | 12 |
| (d)   | death of an attorney,  | 13 |
| (e)   | where an attorney is a corporation, liquidation or dissolution of the corporation,   | 14 |
|       |  | 15 |
| (f)   | other event personal to an attorney whereby the attorney's authority is terminated.  | 16 |
|       |  | 17 |
| (4)   | Where the Court makes an order directing an attorney to furnish accounts or other information under subsection (2) (d), the Court may make further orders for:   | 18 |
|       |  | 19 |
|       |  | 20 |
| (a)   | preventing unnecessary disclosure of the attorney, and   | 21 |
| (b)   | inquiry and report on the conduct of the attorney.   | 22 |
| (5)   | The Court may revoke a power of attorney under subsection (2) (e) notwithstanding anything in the instrument creating the power, but otherwise subsections (2), (3) and (4) apply only if and so far as a contrary intention is not expressed in the instrument creating the power, and shall have effect subject to the terms of the instrument creating the power. | 23 |
|       |  | 24 |
|       |  | 25 |
|       |  | 26 |
|       |  | 27 |
|       |  | 28 |
| (6)   | A removal, appointment, alteration or revocation under subsection (2) (a), (b), (c) and (e) shall have effect as if done in due form by the principal, and as if the principal were of full capacity and were, so far as necessary, authorised to do the thing in question by the instrument creating the power.   | 29 |
|       |  | 30 |
|       |  | 31 |
|       |  | 32 |
|       |  | 33 |
| (7)   | This section has effect subject to section 160.  | 34 |
-

<b>163H Procedure where principal incommunicate</b>	1
(1) Where the principal under a power of attorney is incommunicate:	2
(a) proceedings under this Division by the principal:	3
(i) may be commenced and carried on as prescribed by rules of court, or	4
(ii) subject to rules of court, may be commenced and carried on as if the principal were of unsound mind, and	6
(b) subject to rules of court, all persons shall, in relation to the proceedings, be as nearly as may be in the like position in law as if the principal were of unsound mind.	8
(2) Subsection (1) does not limit the rule-making powers conferred by the <i>Supreme Court Act 1970</i> .	11

<b>Schedule 7 General power of attorney</b>	13
(Section 163B)	14

<b>Part 1</b>	15
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THIS POWER OF ATTORNEY is made on the ..... day of ..... 19 .....	16
by AB of .....	17

<b>1</b> I appoint CD of ..... to be my attorney to exercise, subject to any conditions and limitations specified in Part 2 of this instrument, the authority conferred on an attorney by section 163B of the <i>Conveyancing Act 1919</i> , to do on my behalf anything I may lawfully authorise an attorney to do.	18
<b>*2</b> In the exercise of the authority conferred on my attorney by section 163B of the <i>Conveyancing Act 1919</i> , my attorney is authorised to execute an assurance or other document, or do any other act, whereby a benefit is conferred on my attorney.	22
<b>*3</b> This general power of attorney is given with the intention that it will continue to be effective notwithstanding that after its execution I suffer loss of capacity through unsoundness of mind.	25
(*Clause 2 or 3, or clauses 2 and 3, may be omitted.)	28

<b>Part 2 Conditions and Limitations</b>	29
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## Schedule 2 Form for prescribed power of attorney

(Section 8)

### General power of attorney

#### Part 1 General

This power of attorney is made on the..... day of..... 20.....

by..... (the *principal*)

[name]

of.....

[address]

1 I appoint .....

[name(s)]

of .....

[address(es)]

to be my attorney(s). My attorney may exercise the authority conferred on my attorney by Part 2 of the *Powers of Attorney Act 2003* to do on my behalf anything I may lawfully authorise an attorney to do. My attorney's authority is subject to any additional details specified in Part 2 of this document.

\*2 I give this power of attorney with the intention that it will continue to be effective if I lack capacity through loss of mental capacity after its execution.

[\*You can cross out clause 2 if you do not want it to apply. If you want clause 2 to apply, then you need to see a solicitor, barrister, registrar of a Local Court or other prescribed witness referred to in section 19 of the *Powers of Attorney Act 2003* who must complete the certificate that is required under that section.]

\*3 This power of attorney operates:

\*immediately

\*when my attorney accepts (or as each of my attorneys accept) the appointment

\*on and from..... up to and including.....

[specify dates]

\*when my attorney considers that I need assistance managing my affairs

\*other.....

[\*If you include clause 2 above, the power of attorney will not operate to confer any authority on an attorney until the attorney accepts the power of attorney by signing this document.]

[\*Cross out the options that you do not want.]

Powers of Attorney Bill 2003

Schedule 2 Form for prescribed power of attorney

If no option is selected or the options chosen are unclear or inconsistent, I intend that the power of attorney will operate immediately or, if clause 2 is not crossed out, when my attorney accepts, or as each of my attorneys accept, the appointment.

4 If I appoint more than one attorney, then I appoint them jointly and severally.

*[Cross out “and severally” if you want your power of attorney to operate only when both attorneys act together and are both living. You should get legal advice on changing this clause.]*

**Part 2 Additional powers and restrictions**

\*5 I authorise my attorney to give reasonable gifts as provided by section 11 (2) of the Powers of Attorney Act 2003.

*[\*Cross out if you do not want to confer this authority.]*

\*6 I authorise my attorney to confer benefits on the attorney to meet the attorney’s reasonable living and medical expenses as provided by section 12 (2) of the Powers of Attorney Act 2003.

*[\*Cross out if you do not want to confer this authority.]*

\*7 I authorise my attorney to confer benefits on *[insert name(s) and address(es) of each third party]* to meet their reasonable living and medical expenses as provided by section 13 (2) of the Powers of Attorney Act 2003.

*[\*Cross out if you do not want to confer this authority.]*

\*8 This power of attorney is subject to the following conditions and limitations:

.....

*[specify conditions and/or limitations]*

*[\*Cross out if you do not want to add conditions or limitations.]*

Signed, sealed and delivered by .....  
*[principal’s signature]*

in the presence of .....  
.....  
*[witness’s name]* *[witness’s signature]*

.....  
*[witness’s address]*

*[The following certificate is to be completed only if clause 2 is retained and you want to create an enduring power of attorney.]*

**Certificate under section 19 of the Powers of Attorney Act 2003**

I, .....

*[name]*

of .....

*[address]*

certify the following:

- 1 I explained the effect of this power of attorney to the principal before it was signed.
- 2 The principal appeared to understand the effect of this power of attorney.
- 3 I am a prescribed witness.
- 4 I am not an attorney under this power of attorney.
- 5 I have witnessed the signature of this power of attorney by the principal.

dated.....

.....

\*solicitor/barrister,

\*registrar of a Local Court,

\*licensed conveyancer,

\*Public Trustee employee,

\*trustee company employee,

\*other (*specify*.....)

*[\*Delete inappropriate categories.]*

**Acceptance by attorney**

*[To be used for enduring powers of attorney only. It must be signed before the power of attorney can be used by the attorney.]*

I accept my appointment as an attorney under this enduring power of attorney.

dated.....

.....

*[attorney's signature]*

**Important information for principals and attorneys**

- (1) A power of attorney is an important and powerful legal document. You should get legal advice before you sign it.

A power of attorney gives the attorney the authority to buy and sell real estate, shares and other assets for the principal, to operate the principal's bank accounts, to spend the principal's money on behalf of the principal and to exercise many other powers. It is not to be used after the principal dies.

- (2) A power of attorney cannot be used for health or lifestyle decisions. The principal should appoint an enduring guardian under the *Guardianship Act 1987* if the principal wants a particular person to make these decisions. For further information, contact the Guardianship Tribunal (toll free 1800 463 928 or [www.gt.nsw.gov.au](http://www.gt.nsw.gov.au)) or the Public Guardian ((02) 9265 3184 or 1800 451 510 or [www.lawlink.nsw.gov.au/opg](http://www.lawlink.nsw.gov.au/opg)).
- (3) Part 2 of the power of attorney will permit the attorney to use the principal's money and assets for the attorney or anyone else as provided by clauses 5, 6 and 7. If the principal does not want this to happen, then the principal should delete the powers from Part 2 that the principal does not want to give the attorney.
- (4) An attorney must always act in the best interests of the principal. Unless the attorney is expressly authorised, the attorney cannot gain a benefit from being an attorney.
- (5) This power of attorney is for use in New South Wales only. If you need a power of attorney for interstate or overseas, you may need to make a power of attorney under their laws. The laws of some other States and Territories in Australia may give effect to this power of attorney. However, you should not assume this will be the case. You should confirm whether the laws of the State or Territory concerned will in fact recognise this power of attorney.
- (6) An attorney should keep the attorney's own money and property separate from the principal's money and property, unless they are joint owners, or operate joint bank accounts. An attorney should keep reasonable accounts and records about the principal's money and property.
- (7) If the attorney is signing documents that affect real estate, the power of attorney must be registered at Land and Property Information NSW.

For information on powers of attorney, the attorney's duties and registration, contact Land and Property Information NSW ((02) 9228 6666 for a fact sheet or [www.lpi.nsw.gov.au](http://www.lpi.nsw.gov.au)) or a solicitor, a trustee company or the Public Trustee ([www.pt.nsw.gov.au](http://www.pt.nsw.gov.au)).

## Schedule 3 Prescribed expressions and authorisations for prescribed powers of attorney

(Sections 11 (2), 12 (2) and 13 (2))

### 1 Authority to give gifts

- (1) The prescribed expression for the purposes of section 11 (2) is as follows:

I authorise my attorney to give reasonable gifts as provided by section 11 (2) of the *Powers of Attorney Act 2003*.

- (2) The prescribed expression authorises an attorney to give a gift only if:

- (a) the gift is:

- (i) to a relative or close friend of the principal, and
- (ii) of a seasonal nature or because of a special event (including, for example, a birth or marriage), or

- (b) the gift is a donation of the nature that the principal made when the principal had capacity or the principal might reasonably be expected to make,

and the gift's value is not more than what is reasonable having regard to all the circumstances and, in particular, the principal's financial circumstances and the size of the principal's estate.

- (3) In this clause:

**close friend** of a principal means another individual who has a close personal relationship with the principal and a personal interest in the principal's welfare.

**relative** of a principal means:

- (a) a mother, father, wife, husband, daughter, son, step-daughter, step-son, sister, brother, half-sister, half-brother or grandchild of the principal, or
- (b) if the principal is a party to a domestic relationship within the meaning of the *Property (Relationships) Act 1984*, any person who is a relative, of the kind mentioned in paragraph (a), of either party to the relationship.

**2 Authority to confer benefits on attorney**

- (1) The prescribed expression for the purposes of section 12 (2) is as follows:

I authorise my attorney to confer benefits on the attorney to meet the attorney's reasonable living and medical expenses as provided by section 12 (2) of the *Powers of Attorney Act 2003*.

- (2) The prescribed expression authorises an attorney to confer a benefit on the attorney only if:

- (a) the benefit meets (whether in whole or in part) any expenses incurred (or to be incurred) by the attorney in respect of any of the following:
- (i) housing,
  - (ii) food,
  - (iii) education,
  - (iv) transportation,
  - (v) medical care and medication, and
- (b) the benefit is not more than what is reasonable having regard to all the circumstances and, in particular, the principal's financial circumstances and the size of the principal's estate.

**3 Authority to confer benefits on third parties**

- (1) The prescribed expression for the purposes of section 13 (2) is as follows:

I authorise my attorney to confer benefits on *[insert name(s) and address(es) of each third party]* to meet their reasonable living and medical expenses as provided by section 13 (2) of the *Powers of Attorney Act 2003*.

- (2) The prescribed expression authorises an attorney to confer a benefit on a named third party only if:

- (a) the benefit meets (whether in whole or in part) any expenses incurred (or to be incurred) by the third party in respect of any of the following:
- (i) housing,
  - (ii) food,
  - (iii) education,
  - (iv) transportation,
  - (v) medical care and medication, and

- 
- (b) the benefit is not more than what is reasonable having regard to all the circumstances and, in particular, the principal's financial circumstances and the size of the principal's estate.

1  
2  
3

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**Schedule 4   Amendment of Acts and regulation** 1  
(Section 55) 2

**4.1   Conveyancing Act 1919 No 6** 3

**[1]   Part 16 Powers of attorney** 4

Omit the Part. 5

**[2]   Schedule 7 General power of attorney** 6

Omit the Schedule. 7

**4.2   Conveyancing (General) Regulation 2003** 8

**[1]   Clause 49 Certification of copy of power of attorney** 9

Omit the clause. 10

**[2]   Clause 50 Attestation of execution of certain powers of attorney** 11

Omit the clause. 12

**[3]   Schedule 11 Prescribed witnesses** 13

Omit “Clauses 48 and 49”. Insert instead “Clause 48”. 14

**4.3   Guardianship Act 1987 No 257** 15

**[1]   Section 25F When financial management order may be made** 16

Insert at the end of section 25F (c): 17

, or 18

- (d) following (or in the course of) proceedings under 19  
section 36 of the *Powers of Attorney Act 2003* in respect 20  
of an enduring power of attorney given by the person, 21  
being proceedings in which it has decided not to make 22  
an order under that section. 23

**[2]   Section 25H Interim financial management orders** 24

Insert “or section 37 (1) of the *Powers of Attorney Act 2003*” after “section 25  
6K (3)” in section 25H (1). 26



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**4.4 Protected Estates Act 1983 No 179****[1] Section 13 Declaration and order where person incapable of managing affairs**

Insert “(including an application arising out of the operation of section 37 (2) of the *Powers of Attorney Act 2003*)” after “this section” in section 13 (2).

**[2] Section 76 Powers of attorney**

Omit “section 160 of the *Conveyancing Act 1919*” from section 76 (15).

Insert instead “Part 3 (Irrevocable powers of attorney) of the *Powers of Attorney Act 2003*”.

**[3] Section 76 (16)**

Insert after section 76 (15):

- (16) For the avoidance of doubt, it is declared that this section extends to interstate enduring powers of attorney within the meaning of section 25 of the *Powers of Attorney Act 2003* that have effect in this State under that section.

**4.5 Retirement Villages Act 1999 No 81****Section 64 Operator not to demand power of attorney**

Omit section 64 (4) and the note to that subsection. Insert instead:

- (4) This section has effect despite the provisions of the *Powers of Attorney Act 2003* and despite the terms of any instrument creating a power of attorney.

**Note.** Part 3 of the *Powers of Attorney Act 2003* deals with irrevocable powers of attorney. Division 2 of Part 4 of that Act deals with enduring powers of attorney that are given with the intention that they will continue to be effective even if the person who gave the power loses capacity through mental incapacity.

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**4.6    Trustee Act 1925 No 14**

**Section 67**

Omit the section. Insert instead:

**67    Power of attorney**

Every delegation under this Part is taken to be a power of attorney within the meaning of the *Powers of Attorney Act 2003* and that Act (with the exception of Part 3) applies to that delegation, whether the delegation was made before or after the commencement of that Act.

**4.7    Wills, Probate and Administration Act 1898 No 13**

**Section 61B Succession to real and personal property on intestacy**

Insert after section 61B (13):

- (14) This section has effect subject to the provisions of section 24 (Effect of disposal of home shared by spouses under enduring power of attorney in cases of intestacy) of the *Powers of Attorney Act 2003*.

---

## **Schedule 5 Savings, transitional and other provisions**

(Section 56)

### **Part 1 General**

#### **1 Regulations**

- (1) The regulations may contain provisions of a savings or transitional nature consequent on the enactment of the following Acts:  
this Act
- (2) Any such provision may, if the regulations so provide, take effect from the date of assent to the Act concerned or a later date.
- (3) To the extent to which any such provision takes effect from a date that is earlier than the date of its publication in the Gazette, the provision does not operate so as:
  - (a) to affect, in a manner prejudicial to any person (other than the State or an authority of the State), the rights of that person existing before the date of its publication, or
  - (b) to impose liabilities on any person (other than the State or an authority of the State) in respect of anything done or omitted to be done before the date of its publication.

### **Part 2 Provisions consequent on enactment of this Act**

#### **2 References to this Act to be read as including references to corresponding continued provisions of Conveyancing Act 1919**

- (1) On and after the commencement of this clause, a reference in any other Act or in an instrument made under any other Act:
  - (a) subject to paragraph (b)—to this Act is to be read as including a reference to all of the continued Conveyancing Act provisions, and
  - (b) to a provision of this Act is to be read as including a reference to any continued Conveyancing Act provisions that correspond (or substantially correspond) to the provision of this Act.

- 
- (2) Subclause (1) does not apply to:
    - (a) section 67 of the *Trustee Act 1925*, or
    - (b) any other provision of another Act, or instrument made under another Act, prescribed by the regulations.
  - (3) In this clause, ***continued Conveyancing Act provisions*** means the provisions of Part 16 of, and Schedule 7 to, the *Conveyancing Act 1919* that, by operation of section 6 (3), continue to apply to powers of attorney created (or purportedly created) by instrument executed before the commencement of section 6.

### 3 Persons authorised to certify copies of powers of attorney under section 44

Until a regulation is made under this Act for the purposes of section 44 (1) (a) (ii), a person who belongs to the following classes of persons is taken to be a person who belongs to a class of persons prescribed for the purposes of that subsection:

- (a) in relation to a document that is endorsed within Australia—the class of persons referred to in clause 49 (a) of the *Conveyancing (General) Regulation 2003* as in force immediately before the repeal of that clause by this Act, or
- (b) in relation to a document that is endorsed within a foreign country—the class of persons referred to in clause 49 (b) of the *Conveyancing (General) Regulation 2003* as in force immediately before the repeal of that clause by this Act.