

# Protected Estates Act 1983 No 179

[1983-179]



New South Wales

## Status Information

### Currency of version

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### Provisions in force

The provisions displayed in this version of the legislation have all commenced.

### Notes—

- **Does not include amendments by**  
[Mental Health Act 2007 No 8](#) (not commenced)

### Authorisation

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# Protected Estates Act 1983 No 179



New South Wales

An Act to make provision with respect to the management of the property and affairs of persons who are incapable of managing their own affairs by reason of mental or other condition and certain other persons.

## Part 1 Preliminary

### 1 Name of Act

This Act may be cited as the *Protected Estates Act 1983*.

### 2 Commencement

- (1) Sections 1 and 2 shall commence on the date of assent to this Act.
- (2) Except as provided by subsection (1), this Act shall commence on such day as may be appointed by the Governor in respect thereof and as may be notified by proclamation published in the Gazette.

### 3 (Repealed)

### 4 Definitions

- (1) In this Act, except in so far as the context or subject-matter otherwise indicates or requires:

**ADT** means the Administrative Decisions Tribunal established by the *Administrative Decisions Tribunal Act 1997*.

**costs** includes fees, charges, disbursements, expenses and remuneration.

**Court** means the Supreme Court of New South Wales.

**Director-General** means the Director-General of the Attorney General's Department.

**Guardianship Tribunal** means the Guardianship Tribunal constituted under the *Guardianship Act 1987*.

**hospital** has the same meaning as in the *Mental Health Act 1990*.

**incapable person** means a person who, under the law of another country, state or territory, being the country, state or territory in which the person resides, has been found to be incapable of managing his or her affairs.

**informal patient** has the same meaning as in the [Mental Health Act 1990](#).

**investment fund** means an investment fund established under section 54.

**MHRT** means the Mental Health Review Tribunal constituted under the [Mental Health Act 1990](#).

**patient** has the same meaning as in the [Mental Health Act 1990](#).

**person under guardianship** has the same meaning as it has in Part 3 of the [Guardianship Act 1987](#).

**protected missing person** means a person in respect of whom an order is in force under Division 1A of Part 3 that the estate (or any part of it) of the person be subject to management under this Act.

**protected person** means a person (other than a protected missing person) in respect of whom an order is in force under this Act or the [Guardianship Act 1987](#) that the estate (or any part thereof) of the person be subject to management under this Act.

**Protective Commissioner** means the person for the time being holding the office of Protective Commissioner.

**regulations** means regulations made under this Act.

**reserve fund** means a reserve fund established under section 54.

**spouse** means:

- (a) a husband or wife, or
- (b) the other party to a de facto relationship within the meaning of the [Property \(Relationships\) Act 1984](#), in which the parties have cohabited for a period of not less than 2 years,

but where more than one person would so qualify as a spouse, means only the last person so to qualify.

**stock** means:

- (a) a share or other interest in a company, society or association,
- (b) a fund, annuity or security transferable:
  - (i) in books kept by a company, society or association,



- (ii) by deed alone, or
- (iii) by deed accompanied by other formalities,
- (c) money payable for the discharge or redemption of any such fund, annuity or security, and
- (d) a share or other interest in any such fund, annuity or security.

**trust fund** means the trust fund referred to in section 27 (1).

- (2) In this Act, a reference to:
  - (a) a function includes a reference to a power, authority and duty, and
  - (b) the exercise of a function includes, where the function is a duty, a reference to the performance of the duty.
- (3) (Repealed)
- (4) In this Act, a reference to the estate of a person is a reference to the property and affairs of the person. However, if a part of a person's estate is excluded from an order under any Act that the person's estate be subject to management under this Act, a reference in this Act to the estate of the person is a reference to so much of the property and affairs of the person as is subject to the order.

## Part 2 The Protective Office

### 5 Protective Commissioner and other officers

- (1) There shall be a Protective Commissioner and a Deputy Protective Commissioner, who shall be employed under, and hold office subject to, the [Public Sector Management Act 1988](#).
- (2) Such other staff as may be necessary for the administration of this Act shall be employed under, and hold office subject to, the [Public Service Act 1979](#).
- (3) (Repealed)
- (4) The Protective Commissioner shall have the functions conferred and imposed on the Protective Commissioner by or under this or any other Act or law.
- (5) The Deputy Protective Commissioner shall, during the illness or absence of the Protective Commissioner or during any vacancy in the office of the Protective Commissioner, have the functions conferred and imposed upon the Protective Commissioner by or under this or any other Act or law.
- (6) Any thing done by the Deputy Protective Commissioner while acting pursuant to subsection (5) shall be deemed to have been done as Protective Commissioner.

(7) No person shall be concerned to inquire whether or not any occasion has arisen requiring or authorising the Deputy Protective Commissioner to exercise, pursuant to subsection (5), a function conferred or imposed upon the Protective Commissioner.

(8), (9) (Repealed)

#### **5A Delegation**

(1) The Protective Commissioner may delegate to the Deputy Protective Commissioner or any member of staff referred to in section 5 (2) the exercise of any of the Protective Commissioner's functions, other than this power of delegation.

(2) Without limiting subsection (1), the Protective Commissioner may delegate to any suitably qualified person the Protective Commissioner's functions in relation to investment funds.

#### **5B Protective Commissioner to be corporation sole for certain purposes**

(1) The Protective Commissioner is, by this section, incorporated as a corporation sole under that name for the purposes of:

(a) investing money in the common fund and related accounts in accordance with this Act, and

(b) exercising any related or incidental functions.

(2) The seal of the corporation sole is to be affixed to a document only:

(a) in the presence of the Protective Commissioner, the Deputy Protective Commissioner or a member of staff referred to in section 5 (2) for the time being authorised by the Protective Commissioner for the purpose, and

(b) with an attestation by the signature of such a person of the fact of the affixing of the seal.

#### **6 Inquiries may be referred to the Protective Commissioner**

(1) The Court may, in relation to any proceedings before the Court under this Act, by order, direct the Protective Commissioner to conduct such inquiry as it may specify concerning a person or the estate of a person and to report to it the result of the inquiry.

(2) (Repealed)

#### **7 Expenses of Protective Commissioner**

All expenses incurred by or on behalf of the Crown in the care and management of the estate of a protected person or protected missing person or in the supervision of the management, under this Act, by a manager of the estate of a protected person or

protected missing person may be:

- (a) charged by the Protective Commissioner against, and paid out of and recovered from, the estate,
- (b) paid by the Protective Commissioner out of any money of the protected person or protected missing person that is received by the Protective Commissioner, or
- (c) recovered on summary application to the Court,

whether or not the management under this Act of the estate of the protected person or protected missing person has terminated.

## **8 Fees**

- (1) Fees (whether by way of percentage or otherwise) may, from time to time, be prescribed for the purposes of this section.
- (2) There shall be charged in respect of the exercise of the functions of the Protective Commissioner such fees as may be prescribed for the purposes of this section.
- (3) Such fees as may be prescribed for the purposes of this section shall be charged upon and payable out of the estate of a protected person or protected missing person whether or not, before payment, the management under this Act of the estate of the person has terminated.
- (4) Where it appears to the Protective Commissioner to be just and reasonable to do so, the Protective Commissioner may, at the discretion of the Protective Commissioner, waive, remit or reduce any of the fees chargeable under this section.
- (5) (Repealed)

## **9 Power to take evidence**

- (1) The Protective Commissioner may, in the exercise of the functions of the Protective Commissioner and in the prosecution of any inquiry or matter which the Protective Commissioner is directed to make under this Act:
  - (a) issue a subpoena in or to the effect of the form prescribed by rules of Court requiring the person to whom the subpoena is addressed to do either or both of the following things:
    - (i) to attend to give evidence before the Protective Commissioner at the time and place specified in the subpoena,
    - (ii) so to attend and produce to the Protective Commissioner any books, papers, accounts, documents or other records in the possession or under the control of the person and specified in the subpoena,

(b) administer oaths and take evidence, either orally or by affidavit or partly orally and partly by affidavit.

(c) (Repealed)

(2) For the purposes of subsection (1), a subpoena is issued by the Protective Commissioner if it is signed by the Protective Commissioner or the Deputy Protective Commissioner.

(3) Rules of Court may make provision for or with respect to authorising compliance with a subpoena to produce any books, papers, accounts, documents or other records by the production of any such records at a place specified in the subpoena at any time before the time at which the records are required to be produced.

(4) A person to whom a subpoena is addressed is entitled to receive:

(a) where the subpoena was issued by the Protective Commissioner of the Protective Commissioner's own motion, from the Protective Commissioner, or

(b) where the subpoena was issued by the Protective Commissioner on the application of a person, from the person,

his or her reasonable costs, including any loss of earnings, incurred by the person in obeying the subpoena, calculated in accordance with the scale prescribed by rules of Court.

(5) A person:

(a) who is served with a subpoena addressed to the person pursuant to subsection (1), and

(b) to whom, at the time of service, is tendered an amount that is sufficient to cover the person's travelling and other out-of-pocket expenses in attending in accordance with the subpoena and producing anything required by the subpoena to be produced,

shall not, without reasonable cause, fail or refuse to obey the subpoena or, if required by the subpoena to attend to give evidence, to refuse to be sworn or examined.

Maximum penalty: 5 penalty units.

## **10 Witness may be cross-examined**

(1) Where a person giving evidence to the Protective Commissioner by affidavit is required, by a subpoena issued under section 9, to attend before the Protective Commissioner and give evidence, the person:

(a) may be cross-examined orally by or before the Protective Commissioner on the affidavit, and

(b) after cross-examination, may be re-examined orally by or on behalf of the person filing the affidavit.

(2) The costs determined in the manner prescribed by rules of Court and relating to the cross-examination and re-examination of a person under this section shall be paid in such manner and by such person as the Protective Commissioner directs.

### **11 Advertisements**

The Protective Commissioner may cause to be published such advertisements as, in the opinion of the Protective Commissioner, are necessary or expedient with reference to the subject-matter of a proposed inquiry or with a view to the efficient exercise of the functions of the Protective Commissioner in relation to the estate of a person.

### **12 Court may give directions to Protective Commissioner**

The Court may, upon the application of the Protective Commissioner, a protected person, a relative, friend, creditor or debtor of a protected person or protected missing person or any other person having, in the opinion of the Court, a sufficient interest in any matter, give to the Protective Commissioner:

- (a) directions for such inquiries to be made and notices to be given as the Court thinks necessary, and
- (b) such directions as the Court thinks necessary with respect to the exercise by the Protective Commissioner of the functions of the Protective Commissioner.

## **Part 3 Management of estates of persons incapable of managing their affairs and missing persons**

### **Division 1 Orders for management relating to incapable persons**

#### **13 Declaration and order where person incapable of managing affairs**

- (1) Where the Court is satisfied that a person is incapable of managing his or her affairs, it may make a declaration to that effect and order that the estate of the person be subject to management under this Act.
- (2) On the hearing of an application for the purposes of this section (including an application arising out of the operation of section 37 (2) of the [Powers of Attorney Act 2003](#)), evidence of a person's capability to manage his or her affairs may be given to the Court in such form and in accordance with such procedures as the Court thinks fit and the Court may otherwise inform itself as to the person's capability to manage his or her affairs as it thinks fit.
- (3) Without limiting the generality of subsection (2), the Court may:
  - (a) personally examine a person whose capability to manage his or her affairs is in

question,

- (b) direct the Protective Commissioner to personally examine the person and to report to it on the examination, or
- (c) dispense with any such examination.

#### **14 Incapable persons in places outside New South Wales**

Where the Court is satisfied that a person has been found to be incapable of managing his or her affairs by any legal inquiry in any part of the Commonwealth of Nations outside New South Wales or in any other country, state or territory to which the Governor, by proclamation published in the Gazette, extends the provisions of this section, the Court may:

- (a) direct a copy of the inquiry or finding on the inquiry, duly certified by an officer of the court or other authority to which the finding has been returned, to be filed of record in the Court,
- (b) make a declaration that the person is incapable of managing his or her affairs, and
- (c) order that such of the estate of the person as is situated in New South Wales be subject to management under this Act.

#### **15 Notice that person's capability to manage affairs will be considered**

A medical superintendent who intends to bring a person before a Magistrate under section 38 of the *Mental Health Act 1990* shall:

- (a) when giving the information required to be given to the person under section 38 of that Act give to the person the prescribed information with respect to the question of the capability of the person to manage his or her affairs, and
- (b) when giving the notice required to be given under section 38 of that Act give to each of the persons required to be given that notice the prescribed information with respect to the question of the capability of the person being brought before the Magistrate to manage his or her affairs.

#### **16 Consideration by Magistrate of capability of patients to manage affairs**

- (1) Where, under section 51 of the *Mental Health Act 1990*, a Magistrate directs the detention of a person in a hospital as a temporary patient the Magistrate shall, except as provided by subsection (2), consider the person's capability to manage his or her affairs and, unless satisfied that the person is capable of managing his or her affairs, shall order that the estate of the person be subject to management under this Act.
- (2) A Magistrate may refer the question of a person's capability to manage his or her affairs to the MHRT.

### **17 Consideration by MHRT of capability of patients to manage affairs**

Where a Magistrate refers the question of a person's capability to manage his or her affairs to the MHRT, the MHRT shall consider the capability of the person to manage his or her affairs and, unless satisfied that the person is capable of managing his or her affairs, shall order that the estate of the person be subject to management under this Act.

### **17A, 17B (Repealed)**

### **18 Consideration of capability of forensic patients to manage affairs**

Where, under section 81, 82 or 86 of the *Mental Health Act 1990*, the MHRT reviews a person's case and makes a recommendation to the Minister that the person be detained in a hospital, it shall consider the person's capability to manage his or her affairs and, unless satisfied that the person is capable of managing his or her affairs, shall order that the estate of the person be subject to management under this Act.

### **19 Subsequent applications**

- (1) The MHRT may, on the application of any person having, in the opinion of the MHRT, a sufficient interest in the matter and whether or not it has previously considered the question, consider a patient's capability to manage his or her affairs and, unless satisfied that the patient is capable of managing his or her affairs, shall order that the estate of the patient be subject to management under this Act.
- (2) On an application under subsection (1) in relation to a patient, the MHRT may make an order that the estate of the patient be subject to management under this Act notwithstanding that there may have been no change in the patient's capability to manage his or her affairs since that capability was last considered by a Magistrate or the MHRT.
- (3), (4) (Repealed)

### **20 Interim orders**

- (1) A Magistrate or the MHRT may, if it appears to the Magistrate or MHRT necessary or convenient to do so, make an interim order under this Division for a specified period in respect of a patient pending further consideration of the patient's capability to manage his or her affairs.
- (1A) (Repealed)
- (2) Where another order under this Division is not made before the period for which an interim order made expires, the interim order shall be deemed to be revoked on the expiration of that period.

## **21 Appeals to Court against management orders**

- (1) Where a Magistrate or the MHRT makes an order that the estate of a person be subject to management under this Act, the person may, subject to and in accordance with rules of Court, appeal to the Court against the order.
- (2) An appeal shall be by way of a new hearing and fresh evidence or evidence in addition to, or in substitution for, the evidence in relation to which the order in respect of which the appeal is made may be given on the appeal.
- (2A) If the person to whom the order relates has appealed to the ADT under section 21A against the order, the person may not appeal to the Court under this section against the same order. However, the person may appeal to the Court under this section if the appeal under section 21A is withdrawn with the approval of the ADT for the purpose of enabling the Court to deal with the matter.
- (3) On an appeal, the Court may revoke or confirm the order in respect of which the appeal is made.
- (4) Neither the MHRT nor any member of the MHRT shall be liable to any costs relating to an order of the MHRT in respect of which an appeal is made or the appeal.

## **21A Appeals to ADT against estate management orders made by Magistrate or MHRT**

- (1) An appeal may be made to the ADT against an order by a Magistrate or the MHRT under this Division that the estate of a person be subject to management under this Act.
- (2) An appeal to the ADT under this section may be made by:
  - (a) the person to whom the order relates, or
  - (b) any other person who was a party to the proceedings in which the order was made.
- (3) If the person to whom the order relates has appealed to the Court under section 21 against the order, the person may not appeal to the ADT under this section against the same order. However, the person may appeal to the ADT under this section if the appeal under section 21 is withdrawn with the approval of the Court for the purpose of enabling the ADT 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](#).

## **21B Notice of reasons for orders and appeal rights**

- (1) If a Magistrate or the MHRT makes an order under this Division that the estate of a person be subject to management under this Act, the Magistrate or MHRT must, if



requested to do so by any party to the proceedings (including the person to whom the order relates), provide the party with formal written reasons for the order as soon as practicable after making the order.

- (2) In providing those reasons, the Magistrate or MHRT must also advise the party concerned that the order may be appealed against to the ADT under section 21A.

## **Division 1A Orders for management relating to missing persons**

### **21C Declaration and order where person missing**

- (1) The Court may declare that a person is a missing person and order that the estate of the person (or any part of it) be subject to management under this Act if the Court is satisfied that:
- (a) the person is a missing person, and
  - (b) the person's usual place of residence is in this State, and
  - (c) it is in the best interests of the person to do so.
- (2) The Court may be satisfied that a person is a missing person only if it is satisfied that:
- (a) it is not known whether the person is alive, and
  - (b) all reasonable efforts have been made to locate the person, and
  - (c) persons residing at the place where the person was last known to reside, or relatives or friends, with whom the person would be likely to communicate, have not heard from, or of, the person for at least 90 days.
- (3) An application for a declaration and order under this section in relation to a person may be made by any of the following persons:
- (a) the spouse of the person,
  - (b) a relative of the person,
  - (c) a business partner or employee of the person,
  - (d) the Attorney General,
  - (e) the Protective Commissioner,
  - (f) any other person who has an interest in the estate of the person.
- (4) On the hearing of an application for the purposes of this section, evidence may be given to the Court in such form and in accordance with such procedures as the Court thinks fit.

## **Division 2 Committing estates to management**

### **22 Management of estates of persons other than patients**

The Court may, by order, appoint a suitable person as manager of the estate of a person in respect of whom it has made an order under section 13 or 21C or may, by such an order, commit the management of the estate of any such person to the Protective Commissioner.

### **22A (Repealed)**

### **23 Management of estates of patients who are protected persons**

Where, pursuant to a direction or an order of a Magistrate or a prescribed authority, a protected person is detained in a hospital, the estate of the person is, without further authority than this section but subject to any special order of the Court, committed to the management of the Protective Commissioner.

### **23A Protected person cannot deal with estate committed to management**

- (1) The power of a protected person to deal with his or her estate is suspended in respect of so much of that estate as is, under this Act or the [Guardianship Act 1987](#), committed to the management of the Protective Commissioner or another person.
- (2) However, the person managing the protected person's estate may, by instrument in writing, authorise the protected person to deal with so much of the estate as the manager considers appropriate and specifies in the instrument.
- (3) The authorisation may be given at any time and may be withdrawn, wholly or in part, at any time.
- (4) More than one authorisation may be given under this section.
- (5) If the person managing the protected person's estate is not the Protective Commissioner, an authorisation must not be given or withdrawn without the approval of the Protective Commissioner.
- (6) An application may be made to the ADT for a review of the Protective Commissioner's decision under subsection (5) whether or not to approve of the giving or withdrawal of an authorisation under this section.
- (7) An application for review under subsection (6) may be made by:
  - (a) the person managing the protected person's estate, or
  - (b) the protected person, or
  - (c) the spouse of the protected person, or

- (d) any other person who, in the opinion of the ADT, has a genuine interest in the matter to which the Protective Commissioner's decision relates.

## **Division 3 Management of estates by Protective Commissioner**

### **24 Powers as to property**

- (1) In respect of the estate of a protected person or protected missing person the management of which is committed to the Protective Commissioner, the Protective Commissioner shall have, and may exercise:
  - (a) all functions necessary and incidental to its management and care, and
  - (b) such other functions as the Court may direct or authorise the Protective Commissioner to have or exercise.
- (2) Without limiting the generality of subsection (1) but subject to subsection (3), the Protective Commissioner shall have, and may exercise, the following functions in respect of the estate of a protected person or protected missing person the management of which is committed to the Protective Commissioner, that is to say, the Protective Commissioner may:
  - (a) receive money, rent, income and profit of real and personal property,
  - (b) grant leases of property,
  - (c) surrender a lease and accept a new lease,
  - (d) accept a surrender of a lease and grant a new lease,
  - (e) execute a power of leasing vested in the protected person or protected missing person having a limited estate only in the property over which the power extends,
  - (f) sell, realise, charge and mortgage real and personal property,
  - (g) settle, adjust and compromise a demand made by or against the estate,
  - (h) make exchange or partition of property and give or receive money for equality of exchange or partition,
  - (i) carry on a business which the protected person or protected missing person had carried on, so far as may appear desirable for the purpose of more advantageously disposing of, or winding up, the business or preserving the business until the protected person or protected missing person is able to carry it on,
  - (j) agree to an alteration of the conditions of a partnership into which the protected person or protected missing person has entered, for the purpose of more advantageously disposing of an interest in the partnership or terminating liability,

- (k) complete a contract for the performance of which the protected person or protected missing person is liable or enter into an agreement terminating the liability,
  - (l) surrender, assign or otherwise dispose of, with or without consideration, onerous property,
  - (m) exercise a power, or give a consent required for the exercise of a power, where the power is vested in the protected person or protected missing person for the benefit of the protected person or protected missing person or the power of consent is in the nature of a beneficial interest in the protected person or protected missing person,
  - (n) sequester the estate under the bankruptcy laws,
  - (o) bring and defend actions, suits and other proceedings, on behalf of the protected person or protected missing person,
  - (p) bring land under the *Real Property Act 1900*.
- (3) The Protective Commissioner shall not, in the exercise of any functions referred to in subsection (2), grant or accept a lease of land for a term exceeding 5 years without the direction of the Court.

## **25 Power to employ agents**

- (1) The Protective Commissioner may, instead of acting personally in the management of the estate of a protected person or protected missing person, employ and pay an agent, whether being a bank, solicitor, stockbroker or other person, to transact any business or do any act required to be transacted or done in the administration and management of the estate.
- (2) The Protective Commissioner shall not be responsible for the default of any agent employed as referred to in subsection (1).

## **26 Execution of documents**

- (1) For the purposes of managing the estate of a protected person, the Protective Commissioner shall have, and may exercise, all such functions as the protected person has and can exercise or would have and could exercise if under no incapacity.
- (1A) For the purposes of managing the estate of a protected missing person, the Protective Commissioner has, and may exercise, all the functions that the protected missing person has and can exercise or would have and could exercise if the person were not missing.
- (2) For the purpose of exercising a function of a protected person or protected missing person as referred to in subsection (1) or (1A), the Protective Commissioner may, in

the name and on behalf of the protected person or protected missing person, execute and sign deeds, instruments, transfers of shares, receipts, releases and all other documents which shall be as effective as if they were executed and signed by the protected person or protected missing person and, to the extent to which a protected person has no capacity to execute and sign any such document, as if the protected person were under no such incapacity and any such document shall be acted upon accordingly.

- (3) A person acting upon a document executed or signed by the Protective Commissioner as referred to in subsection (2) shall not be bound to inquire as to the Protective Commissioner's power to execute or sign the document or as to the application of any money paid pursuant to any dealing with the Protective Commissioner as a consequence of the document.

## **27 Payments into trust fund**

- (1) The Protective Commissioner shall at such times and in such manner as the Governor may from time to time appoint, pay all money coming into the hands of the Protective Commissioner into the Special Deposits Account in the Treasury to the credit of a trust fund.
- (2) A separate current account in respect of each estate shall be kept by the Protective Commissioner of payments to the credit of the trust fund as referred to in subsection (1) and of payments out of the trust fund.

## **28 Disposition of money in hands of Protective Commissioner**

- (1) The Protective Commissioner may apply money comprising the whole or any part of the estate of a protected person or protected missing person towards any one or more of the following purposes:
  - (a) the payment of the debts and engagements of the protected person or protected missing person and the repayment of expenses chargeable to the estate of the protected person or protected missing person,
  - (b) in the event of the death of the protected person or protected missing person, the person's funeral expenses,
  - (c) the maintenance of the spouse of the protected person or protected missing person or any child, parent or other person dependent upon the protected person or protected missing person, or for whose maintenance the protected person or protected missing person provided when not a protected person or protected missing person or would be expected to provide,
  - (d) the payment of all proper costs incurred in or about the care, protection, recovery, sale, mortgage, leasing, disposal and management of the estate of the protected person or protected missing person,

- (e) the preservation and improvement of the estate of the protected person or protected missing person,
- (f) the taking up of rights to issues of new shares, or options for new shares, to which the protected person or protected missing person may become entitled by virtue of any shareholdings,
- (g) the investment of money, being money not required for the time being for a purpose referred to in paragraphs (a)–(f) above:
  - (i) in any form of investment, or
  - (ii) if the Protective Commissioner is aware that the protected person or protected missing person prefers a particular form of investment, in the form of investment preferred by that person.

(1AA) In addition to the purposes set out in subsection (1), the Protective Commissioner may apply money comprising the whole or part of the estate of a protected person towards the maintenance, clothing, medicine and care, past and future, of the protected person.

(1A) The power to invest money under subsection (1) (g) (i) is to be exercised in accordance with the *Trustee Act 1925*.

(2) Despite section 14DA of the *Trustee Act 1925*, the Protective Commissioner may purchase real estate under subsection (1) (g) (i) if it appears to the Protective Commissioner to be desirable for the purpose of:

- (a) protecting the estate from injury or deterioration in value,
- (b) increasing the value or facilitating the sale of other lands of the estate, or
- (c) providing a home for the protected person or any dependants of the protected person or protected missing person.

(3) For the purpose of ascertaining whether or not a protected person or protected missing person prefers a particular form of investment, the Protective Commissioner may have regard to the following matters:

- (a) any investments made by the protected person or protected missing person before his or her estate became subject to management under this Act, being investments of which the Protective Commissioner is aware,
- (b) (Repealed)
- (c) any statements made to the Protective Commissioner by relatives of the protected person or protected missing person, and verified by statutory declaration, as to the views expressed to them by the protected person or protected missing person,

either before or after his or her estate became subject to management under this Act, regarding his or her preferred forms of investment.

- (4) In addition to the matters set out in subsection (3), for the purposes of ascertaining whether a protected person prefers a particular form of investment, the Protective Commissioner may have regard to any views expressed to the Protective Commissioner by the protected person regarding the person's preferred form of investment.

### **28A Review by ADT of decisions by Protective Commissioner under this Division**

- (1) An application may be made to the ADT for a review of a decision of the Protective Commissioner that:
- (a) is made in connection with the exercise of the Protective Commissioner's functions under this Division, and
  - (b) is of a class of decision prescribed by the regulations for the purposes of this section.
- (2) Subsection (1) does not apply if the decision by the Protective Commissioner was made in accordance with a direction given by the Court to the Protective Commissioner.
- (3) An application under this section may be made by:
- (a) a protected person in respect of whose estate the decision was made, or
  - (b) the spouse of a protected person or protected missing person in respect of whose estate the decision was made, or
  - (c) any other person whose interests are, in the opinion of the ADT, adversely affected by the decision.

## **Division 4 Management of estates by other persons**

### **29 Application of Division**

This Division does not apply to or in respect of a protected person or protected missing person whose estate is committed to the management of the Protective Commissioner.

### **30 Protective Commissioner may authorise and direct functions of managers**

- (1) If a person is appointed by the Court under section 22 as manager of the estate of a protected person or protected missing person, the Protective Commissioner may, by order:
- (a) authorise the person appointed as manager to have:

- (i) all, or any specified, functions necessary and incidental to the management and care of the estate, and
    - (ii) such other functions as the Protective Commissioner may direct or authorise the manager to have or exercise, and
  - (b) make such orders, and give such authorities and directions, of the kind referred to in section 32 or 33 as appear to the Protective Commissioner to be necessary or expedient or that the Protective Commissioner thinks fit (as if a reference in those sections to the Court were a reference to the Protective Commissioner), and
  - (c) give the person appointed as manager such directions in respect of the orders, authorities and directions authorised by this subsection as the Protective Commissioner thinks fit.
- (2) An order by the Protective Commissioner under subsection (1) is subject to the regulations or to any direction by the Court.
- (3) If a person is appointed by the Guardianship Tribunal under section 25M (1) (a) of the [Guardianship Act 1987](#) as manager of the estate of a protected person, the Protective Commissioner may, by order:
- (a) authorise the person appointed as manager to have:
    - (i) all, or any specified, functions necessary and incidental to the management and care of the estate, and
    - (ii) such other functions as the Protective Commissioner may direct or authorise the manager to have or exercise, and
  - (b) make such orders, and give such authorities and directions, of the kind referred to in section 32 or 33 as appear to the Protective Commissioner to be necessary or expedient or that the Protective Commissioner thinks fit (as if a reference in those sections to the Court were a reference to the Protective Commissioner), and
  - (c) give the person appointed as manager such directions in respect of the orders, authorities and directions authorised by this subsection as the Protective Commissioner thinks fit.
- (4) An order by the Protective Commissioner under subsection (3) is subject to the regulations or to any order of the Guardianship Tribunal.
- (5) Without limiting the generality of subsection (1) or (3), the Protective Commissioner may authorise the person appointed as manager of the estate of a protected person or protected missing person to have functions of the same kind as those specified in section 24 (2) in respect of an estate committed to management by the Protective Commissioner without the limitation referred to in section 24 (3).



### **30A Review by ADT of decisions by Protective Commissioner in relation to managers**

- (1) An application may be made to the ADT for a review of a decision by the Protective Commissioner under section 30 in relation to the functions of a person appointed as manager of the estate of a protected person or protected missing person.
- (2) Subsection (1) does not apply if the decision by the Protective Commissioner was made in accordance with a direction given by the Court to the Protective Commissioner.
- (3) An application under this section may be made by:
  - (a) the person appointed as manager, or
  - (b) any other person who, in the opinion of the ADT, has a genuine interest in the matter to which the Protective Commissioner's decision relates.

### **31 Security in respect of management**

- (1) Where the Court or the Guardianship Tribunal (under section 25M (1) (a) of the [Guardianship Act 1987](#)) appoints a manager of the estate of a protected person or protected missing person, it may require the manager to give security, including security comprising the assets of the protected person or protected missing person, to the Protective Commissioner in respect of the management.
- (2) Security shall be deemed not to have been given by a manager as referred to in subsection (1) unless it has been approved by the Protective Commissioner.
- (3) It is the duty of the Protective Commissioner to see that the conditions of all bonds given (whether before, on or after the day referred to in section 2 (2)) by the manager of the estate of a protected person or protected missing person or by any other person in relation to the estate of a protected person or protected missing person are faithfully and regularly observed and performed and to report immediately to the Court any breach or non-performance of any such condition.
- (4) The provisions of Part 7A of the [Bail Act 1978](#) and Part 7 of the [Fines Act 1996](#) apply to the forfeiture of any security under a bond and to the recovery of any security so forfeited in the same way as they apply to the forfeiture of bail money and to the recovery of any bail money so forfeited.
- (5) Any amount lodged with the Protective Commissioner as security under this section may, subject to any order of the Court, be invested by the Protective Commissioner in any investment in which a trustee may invest trust funds in accordance with the [Trustee Act 1925](#).

### **31A Managers may lodge estate funds with Protective Commissioner**

- (1) The manager of the estate of a protected person or protected missing person may,

subject to any order of the Court under this Division, lodge with the Protective Commissioner any money that comprises the whole or part of the estate of the protected person or protected missing person.

- (2) Any such money lodged with, and held by, the Protective Commissioner is referred to as **estate funds**.
- (3) The Protective Commissioner may invest estate funds in the same manner as money in the trust fund may be invested under Part 4.
- (4) Accordingly:
  - (a) Part 4 applies to and in respect of the investment of any estate funds by the Protective Commissioner, and
  - (b) references in that Part to money in the trust fund are taken to include references to any estate funds.

### **31B Financial plans**

- (1) The Protective Commissioner may prepare a financial plan in respect of the estate of a protected person or protected missing person (including an estate that is not managed by the Protective Commissioner).
- (2) In the case of an estate that is not managed by the Protective Commissioner, a financial plan may be prepared by the Protective Commissioner but only with the agreement of the manager of the estate.
- (3) The Protective Commissioner may, in accordance with section 8, charge a fee for the preparation of a financial plan under this section.

### **32 Orders by Court as to property**

- (1) The Court may make such orders as appear to it necessary for rendering the property and income of a protected person available for the payment of the debts of, and the maintenance and otherwise for the benefit of, the protected person and the family of the protected person and otherwise as it thinks necessary or desirable for the care and management of the estate of a protected person.
- (1A) The Court may make such orders as appear to it necessary for rendering the property and income of a protected missing person available for the following purposes:
  - (a) the payment of the debts of, and otherwise for the benefit of, the protected missing person,
  - (b) the maintenance and benefit of the family of the protected missing person,
  - (c) otherwise as it thinks necessary or desirable for the care and management of the

estate of a protected missing person.

(2) Without limiting the generality of subsection (1) or (1A), the Court may:

- (a) order that any property of a protected person or protected missing person be sold, charged, mortgaged, dealt with or disposed of as the Court thinks most expedient for the purpose of raising or securing or repaying with or without interest money which is to be or which has been applied to any one or more of the following purposes:
  - (i) payment of the protected person's or protected missing person's debts or engagements,
  - (ii) discharge of any incumbrance on property of the protected person or protected missing person,
  - (iii) payment of any debt or expenditure incurred for the maintenance, or otherwise for the benefit, of the protected person or protected missing person,
  - (iv) (Repealed)
  - (v) payment of the costs of any proceeding under this Act or of any sale or other disposition made under this Act,
  - (vi) payment of such other sum or sums to such person or persons as the Court thinks fit, and
- (b) authorise and direct the application of money comprising the whole or any part of the estate of the protected person or protected missing person to any one or more of the following purposes:
  - (i) the preservation and improvement of the estate of the protected person or protected missing person,
  - (ii) the taking up of rights to issues of new shares, or options for new shares, to which the protected person or protected missing person may become entitled by virtue of any shareholdings,
  - (iii) the investment of money, being money not required for the time being for any of the foregoing purposes, in such manner as the Court thinks fit.

(3) The Court may make an order under subsection (2) (a) for the purpose of raising or securing or repaying with or without interest money which is to be or which has been applied for the payment of, or provision for the expenses of, future maintenance of a protected person.

### **33 Orders by Court as to management of estates**

(1) The Court may make such orders as it thinks fit in relation to the administration and

management of the estates of protected persons or protected missing persons.

- (2) The Court may also make such orders as it thinks fit in connection with authorising, directing, supervising and enforcing the exercise of the functions of managers under this Act.

## **Division 5 Suspension or termination of management**

### **34 Termination of management**

- (1) The management of the estate of a protected person under this Act is terminated:
- (a) upon the order that the estate be subject to management under this Act being revoked,
  - (b) in the case of a protected person who was, but has ceased to be, a person under guardianship (being a person the management of whose estate is committed to the Protective Commissioner) or a patient, upon the Protective Commissioner certifying under section 38 that the management is terminated, or
  - (c) upon the death of the protected person.
- (2) The management of the estate of a protected missing person under this Act is terminated:
- (a) on the order that the estate be subject to management under this Act being revoked, or
  - (b) on the Protective Commissioner certifying under section 38A that the management is terminated, or
  - (c) on the death of the protected missing person.

### **35 Orders where person no longer incapable**

- (1) Where, upon application to it by a protected person (including a protected person who became a protected person while a person under guardianship or a patient), the Court is satisfied that the protected person is capable of managing his or her affairs, it may:
- (a) revoke any declaration made that the person is incapable of managing his or her affairs,
  - (b) revoke the order that the estate of the person be subject to management under this Act, and
  - (c) make such orders as appear to it necessary to give effect to the revocation of the order, including the release of the estate of the person from the control of the Court, the Protective Commissioner or a manager and the discharge of any manager.

- (2) On the hearing of an application for the purposes of this section, evidence of a person's capability to manage his or her affairs may be given to the Court in the same form and in accordance with the same procedures as any such evidence may be given to the Court on the hearing of an application for the purposes of section 13.

### **35A Orders where person no longer missing**

If, on application to it by a protected missing person or other person, the Court is satisfied that a protected missing person is alive, it may:

- (a) revoke any declaration made that the person is a missing person, and
- (b) revoke the order that the estate of the person be subject to management under this Act, and
- (c) make such orders as appear to it to be necessary to give effect to the revocation of the order, including the release of the estate of the person from the control of the Court, the Protective Commissioner or a manager and the discharge of any manager.

### **36 Revocation of order by MHRT**

Where, upon application to it by a protected person, being a protected person who was, but has ceased to be, a patient, the MHRT is satisfied that the protected person is capable of managing his or her affairs, it may revoke the order that the estate of the person be subject to management under this Act.

### **37 Absence of patient from hospital**

While a protected person, being a patient, is absent from a hospital, the Protective Commissioner may, at the discretion of the Protective Commissioner:

- (a) pay over to the patient or to any person on behalf of the patient who gives satisfactory security to the Protective Commissioner for the proper management and disposal of it, or as the patient or person directs, the whole or any part of the money standing to the credit of the current account of the patient in the trust fund, and
- (b) hand over to the patient or person, or as the patient or person directs, all or any chattels or documents forming part of the estate of the patient.

### **38 Discharge of patient from hospital etc**

- (1) Upon a protected person who was a person under guardianship (being a person the management of whose estate is committed to the Protective Commissioner) or a patient ceasing to be such a person under guardianship or a patient or at any time thereafter, the Protective Commissioner may, if satisfied that the protected person is capable of managing his or her affairs, certify that management of the estate of the protected person by the Protective Commissioner is terminated.
- (2) Where the Protective Commissioner certifies as referred to in subsection (1) in respect

of the estate of a protected person, the order that the estate be subject to management under this Act shall cease to have any further effect.

### **38A Termination by Protective Commissioner where person no longer missing**

- (1) The Protective Commissioner may, if satisfied that a protected missing person is alive, certify that management of the estate of the protected missing person is terminated.
- (2) The regulations may make provision for or with respect to information that the Protective Commissioner may take into account for the purposes of being satisfied that a protected missing person is alive.

### **39 Functions of Protective Commissioner on termination of management**

Except as provided by section 42, where the management of the estate of a protected person or protected missing person by the Protective Commissioner terminates, the Protective Commissioner shall, subject to any order of the Court:

- (a) pay over to the person, or as the person directs, all money standing to the credit of the current account of the person in the trust fund, and
- (b) hand over to the person, or as the person directs, all chattels and documents forming part of the estate of the person.

### **40 Receipt to be release**

The receipt of the patient or person to whom or in accordance with whose direction the Protective Commissioner has paid over money or handed over chattels or documents as referred to in section 37 or 39 shall be an absolute release to the Protective Commissioner from liability in respect of any action taken by the Protective Commissioner under those sections, notwithstanding any informality in, or in relation to, the patient's absence from a hospital or, as the case may be, the person's ceasing to be a patient.

### **41 Continuation of management after discharge etc**

- (1) Where:
  - (a) it comes to the attention of the Protective Commissioner that a protected person who was a person under guardianship (being a person the management of whose estate is committed to the Protective Commissioner) or a patient has ceased to be such a person under guardianship or a patient, and
  - (b) the Protective Commissioner is not satisfied that the protected person is capable of managing his or her affairs,

the Protective Commissioner shall do all such things as are reasonably practicable to inform the person that the person may apply to the Guardianship Tribunal, the Mental Health Review Tribunal or the Court, as the case may be, for the revocation of the order that the estate of the person be subject to management under this Act and that,

unless the order is revoked, management of the estate will continue at the discretion of the Protective Commissioner.

(2) Where a protected person who was a person under guardianship (being a person the management of whose estate is committed to the Protective Commissioner) or a patient ceases to be such a person under guardianship or a patient, the Protective Commissioner may, at the discretion of the Protective Commissioner, continue to have the management of the property and affairs of the person until:

- (a) the order that the estate of the person be subject to management under this Act is revoked, or
- (b) the Protective Commissioner is satisfied that the person is capable of managing his or her affairs,

whichever first occurs.

#### **42 Death of protected person or protected missing person**

(1) Where a protected person or protected missing person dies:

(a) the Protective Commissioner may, at the discretion of the Protective Commissioner:

- (i) pay any sum (not exceeding the prescribed amount) out of money standing to the credit of the current account of the protected person or protected missing person in the trust fund, or
- (ii) hand over any chattels having a value not exceeding that amount and forming part of the estate of the protected person or protected missing person or any documents having a value not exceeding that amount, or relating to property having a value not exceeding that amount, and forming part of the estate of the protected person or protected missing person,

to any person claiming to be entitled in the distribution of the estate or as legatee under the will of the protected person or protected missing person, notwithstanding that probate of the will or letters of administration has or have not been obtained, and notwithstanding that legal proof is not given of the right or title of the person so claiming, and

(b) except as provided by paragraph (a), the Protective Commissioner shall:

- (i) pay all money standing to the credit of the current account of the protected person or protected missing person in the trust fund, and
- (ii) hand over all chattels and documents forming part of the estate of the protected person or protected missing person,

to the legal personal representative of the protected person or protected missing person.

- (2) If a protected person or protected missing person dies, the Protective Commissioner may take such steps as are necessary to complete any transaction:
  - (a) that relates to the protected person's or protected missing person's estate, and
  - (b) that was commenced before the death of the protected person or protected missing person, and
  - (c) to which the protected person or protected missing person was a party immediately before the protected person's or protected missing person's death.
- (3) Subsection (2) does not empower the Protective Commissioner to do anything in contravention of:
  - (a) the directions of any executor, administrator or trustee of the protected person's or protected missing person's estate, or
  - (b) any court order.

#### **43 Protective Commissioner may act until notice of death or revocation received**

Notwithstanding the death of a protected person or protected missing person or the revocation of the order that the estate of a person be subject to management under this Act, the Protective Commissioner shall continue to have, and may continue to exercise, in respect of the estate of the person, the functions required or permitted to be exercised before the death or revocation until the Protective Commissioner is satisfied that the protected person or protected missing person has died or, as the case may be, is served with a copy of the revocation.

#### **44 Unclaimed personal effects and money**

- (1) Where the management of the estate of a person under this Act terminates, all personal effects in the hands of the Protective Commissioner belonging to the person and not claimed within 2 years from the date of the termination, may be sold by direction of the Protective Commissioner, and the proceeds of the sale shall be paid into the Consolidated Fund.
- (2) All money standing to the credit of the current account of a person in the trust fund at the end of 6 years from the date of termination of the management of the estate of the person shall be carried to and form part of the Consolidated Fund.
- (3) The owner of the proceeds of a sale referred to in subsection (1) or of any money referred to in subsection (2) shall, upon proving ownership, be entitled to recover the proceeds or money from the Treasurer.



- (4) Where a person is entitled to recover any proceeds or money as referred to in subsection (3), the proceeds are, or the money is, by virtue of this subsection, appropriated from the Consolidated Fund for the purpose of enabling its payment to the person and the Treasurer may withdraw the proceeds or money from the Consolidated Fund and pay the proceeds or money to the person accordingly.

#### **45 Protected person or legal personal representative bound by acts of Protective Commissioner**

On the termination of management by the Protective Commissioner of the estate of a person, the person or the legal personal representative of the person, as the case may be, shall be bound by and may take advantage of an act lawfully done by the Protective Commissioner on behalf of the person, as if the act had been done by the person himself or herself and, to the extent to which the person had no capacity to do the act, as if the person were under no such incapacity.

### **Division 6 General**

#### **46 Charges and mortgages**

Where a charge or mortgage in respect of property or an interest in property is created or granted under this Act for the expenses of future maintenance of a protected person, the money secured by the charge or mortgage:

- (a) may, in the case of a charge or mortgage in respect of a contingent or future interest in property, be made payable under the charge or mortgage contingently or upon the happening of an event, and
- (b) may be made payable under the charge or mortgage:
- (i) in a gross sum or in annual or other periodical sums, and
  - (ii) at any specified time and in any specified manner.

#### **47 Property exchanged and renewed lease to be to same uses as before**

Any property taken in exchange, and any renewed lease accepted, pursuant to this Act on behalf of a protected person or protected missing person shall be to the same uses and be subject to the same trusts, charges, incumbrances, dispositions, devices and conditions as the property given in exchange or the surrendered lease was or would, but for the exchange or surrender, have been subject to.

#### **48 Interest in property of certain persons not to be altered**

- (1) Any protected person or protected missing person, and any other person being an heir, next of kin, devisee, legatee, executor, administrator or assign of a protected person or protected missing person shall have 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 under this Act as the person 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) shall 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 upon the grant or renewal of a lease where the property the subject of the partition, exchange, or lease was real estate of a protected person or protected missing person shall, subject to the application thereof for any purposes authorised by this Act, be considered as real estate.
- (4) Fines, premiums and sums of money received upon the grant or renewal of leases of property of which a protected person or protected missing person was tenant for life shall be personal estate of the protected person or protected missing person.
- (5) In order to give effect to this section the Court may make such orders and direct such conveyances, deeds and things to be executed and done as it thinks fit.

#### **49 Expenses of improvements may be charged on estate**

- (1) Except as provided by subsection (2), the whole or any part of any money expended or to be expended under this Act for the permanent improvement, security or advantage of the property of a protected person or protected missing person or of any part of that property, may, with interest, be made a charge upon the improved property or any other property of the protected person or protected missing person.
- (2) No right of sale or foreclosure during the lifetime of a protected person or protected missing person shall be conferred by a charge referred to in subsection (1) on the property of the protected person or protected missing person and the interest shall be kept down during the lifetime of the protected person or protected missing person out of the income of the general estate as far as it is sufficient to bear it.
- (3) A charge referred to in subsection (1) may be made either to some person advancing money or, if the money is paid out of the protected person's or protected missing person's general estate, to some person as a trustee for the protected person or protected missing person as part of the personal estate of the protected person or protected missing person.

#### **50 Consultation by Protective Commissioner**

- (1) Before the Protective Commissioner takes any action in respect of the estate of a protected person, the Protective Commissioner must determine whether the action is of such a nature that the protected person or the relatives of the protected person should be consulted in relation to the action.

- (1A) Before the Protective Commissioner takes any action in respect of the estate of a protected missing person, the Protective Commissioner must determine whether the action is of such a nature that the relatives of the protected missing person should be consulted in relation to the action.
- (2) In determining whether action in respect of the estate of a person is of such a nature that a person referred to in subsection (1) or (1A) should be consulted in relation to the action, the Protective Commissioner shall consider all relevant circumstances and matters, including:
- (a) the value of the estate,
  - (b) the value and nature of any particular property proposed to be affected,
  - (c) the consequences of the proposed action,
  - (d) the necessity or practicality of the proposed action, and
  - (e) the extent (if any) to which the estate may be prejudiced by any delay in the proposed action being taken.
- (3) Where the Protective Commissioner determines that any proposed action in respect of the estate of a person is of such a nature that a person referred to in subsection (1) or (1A) should be consulted in relation to the action, the Protective Commissioner shall cause to be taken all such steps as are reasonably practicable in the circumstances to give notice to the person and, before making the order which will result in any such action being taken or before taking any such action, shall consider any submissions made within the period specified in any such notice in response to the notice.

#### **51 Personal items to be preserved**

In the care and management of the estate of a protected person or protected missing person, any items in the estate which are of a personal nature and which the protected person or protected missing person or relatives of the protected person or protected missing person has or have requested to be preserved, shall, as far as is reasonably practicable, be preserved.

### **Part 4 Investment of trust fund**

#### **52 Trust fund to form common fund**

- (1) Balances to the credit of all current accounts in the trust fund are, for the purposes of investment, one common fund.
- (2) The balance of a current account does not form part of the common fund if:
- (a) the current account is held by the Protective Commissioner jointly with another person, and

(b) the other person has objected in writing to it forming part of the common fund.

### **53 Investment of trust fund**

Money in the trust fund may be invested:

- (a) in accordance with the *Trustee Act 1925*, in any investment, or
- (b) to the extent of not more than \$1,000,000 at any one time, on deposit with the Treasurer for a period or periods not exceeding 12 months.

### **54 Establishment of investment funds and reserve fund**

- (1) For the purpose of investing money in accordance with section 53 (a), the Protective Commissioner is to establish:
  - (a) one or more investment funds, and
  - (b) a reserve fund.
- (2) The Protective Commissioner may from time to time transfer money from the trust fund to an investment fund or from an investment fund to the trust fund.
- (3) The Protective Commissioner may determine the classes of investments in which money in an investment fund may be invested and may vary the classes from time to time.
- (4) The Protective Commissioner is to keep an account for each investment fund showing the amounts that are from time to time to the credit of each current account from which the fund is derived.

### **55 Application of money in investment fund**

- (1) Money in an investment fund may be applied for the following purposes:
  - (a) the making of investments authorised by this Part,
  - (b) payment to the reserve fund of such amount as the Protective Commissioner may from time to time determine,
  - (c) payment of such amount as the Protective Commissioner may from time to time determine in relation to the costs incurred by the Protective Commissioner:
    - (i) in the exercise of the Protective Commissioner's functions under this Act, and
    - (ii) in the exercise of the Protective Commissioner's functions as Public Guardian under the *Guardianship Act 1987*,
  - (d) the making of periodic payments to the current accounts from which the fund is derived.

- (2) The amount referred to in subsection (1) (c) must not exceed such amount as is approved by the Director-General having regard to the Protective Commissioner's current budget.
- (3) For the purpose of making payments referred to in subsection (1) (d):
  - (a) any income arising from an investment fund must be periodically divided between each current account in the trust fund in proportion to the amounts invested from those accounts and the period of each investment, and
  - (b) any profit or loss of a capital nature arising from that fund must be periodically divided between the current accounts in proportion to the amounts invested.

### **56 Valuation of investment funds**

- (1) The Protective Commissioner is to value each investment fund (including the investments in which the fund is invested) as at the first business day of each named month and, if the Protective Commissioner thinks fit, as at such other times as may be appropriate according to the nature of the particular fund.
- (2) Investments in and withdrawals from an investment fund are to be effected on the basis of the most recent valuation under this section.

### **57 Application of money in reserve fund**

Money in the reserve fund may be applied for the following purposes:

- (a) payment to an investment fund of such amount as the Protective Commissioner may from time to time determine as the loss upon realisation of any investment made from that fund,
- (b) payment of such amount as the Protective Commissioner may from time to time determine as the costs incurred in protecting investments made from an investment fund,
- (c) payment of any costs not ordered by a court to be charged against a particular estate or otherwise not properly chargeable against a particular estate,
- (d) payment of any costs not ordered by a court to be charged against a particular estate but otherwise properly chargeable against a particular estate where there are insufficient funds in the particular estate to meet the costs,
- (e) payment of any costs incurred by the Protective Commissioner in obtaining any kind of advice or in any legal proceedings to which the Protective Commissioner is or is made a party where the costs are such that, because of general interest and the importance of the subject-matter of the advice or proceedings, they should not, in the opinion of the Protective Commissioner, be charged against a particular estate.

## **58 Submission of budgets**

- (1) Whenever directed to do so by the Director-General, the Protective Commissioner is to submit a budget to the Director-General in relation to the Protective Commissioner's costs, including projected costs, in connection with:
  - (a) the exercise of the Protective Commissioner's functions under this Act, and
  - (b) the exercise of the Protective Commissioner's functions as Public Guardian under the *Guardianship Act 1987*.
- (2) The budget is to relate to such period, and include such information, as the Director-General directs.

## **59 Advances from trust fund**

- (1) The Protective Commissioner may make advances from the trust fund for the purposes of any estate being managed by the Protective Commissioner.
- (2) Any advance bears interest at the rate fixed by the Protective Commissioner.
- (3) The advance, and any interest on the advance, are a charge on the assets of the estate for whose purposes the advance is made.
- (4) If the advance is applied towards the discharge of any debt or liability, the charge under subsection (3) ranks in the same order of priority as the debt or liability.
- (5) Any interest received by the trust fund under this section is to be divided between each current account in proportion to the amounts of the advances.

## **60 (Repealed)**

## **Part 5 Management of estates of persons who are not protected persons**

### **61 Application of Part**

This Part does not apply to or in respect of a person who is a protected person.

### **62 Applications under this Part**

An application under this Part may be made in writing to the Protective Commissioner:

- (a) in respect of a patient who is of or above the age of 18 years, by the patient, or
- (b) in respect of a patient who is under the age of 18 years by:
  - (i) if both parents of the patient are alive—the parents,
  - (ii) if only one parent of the patient is alive—the parent, or

(iii) if no parents of the patient are alive—the guardian of the patient.

### **63 Management by Protective Commissioner**

- (1) The Protective Commissioner may undertake the management of the estate of a person in respect of whom an application under this Part has been made as referred to in section 62.
- (2) Except as provided by section 64, in the management of an estate under this Part, the Court and the Protective Commissioner shall have all functions which the Court or Protective Commissioner, as the case may be, would have if the estate were the estate of a protected person and the management of the estate were committed to the Protective Commissioner under section 23.
- (3) While the estate of a person is managed by the Protective Commissioner under this Part, this Act shall apply to and in respect of the person and the estate of the person as if the person were a protected person whose estate has been committed to the management of the Protective Commissioner.

### **64 Termination of management under this Part**

- (1) The Protective Commissioner shall cease to undertake the management of the estate of a person under this Part upon receipt of a request in writing that the management terminate, being a request made:
  - (a) where the person is of or above the age of 18 years—by the person, or
  - (b) where the person is under the age of 18 years—by a parent or guardian of the person.
- (2) As soon as practicable after receipt of a request referred to in subsection (1) in respect of an estate, the Protective Commissioner shall pay to the person who made the request all money in the trust fund standing to the credit of the current account kept in respect of the estate and shall hand over to the person all chattels and documents forming part of the estate.

## **Part 6 Reciprocal arrangements with other states**

### **65 Declaration of reciprocating state**

- (1) In this Part, **reciprocating state** means any country, state or territory outside New South Wales which has been declared under subsection (2) to be a reciprocating state for the purposes of this Part.
- (2) Where the Governor is satisfied that the laws in force in any country, state or territory outside New South Wales are such as to enable powers to be exercised in that country, state or territory in cases of protected persons residing in New South Wales substantially similar to the powers conferred by this Part, being powers exercisable in

New South Wales in cases of incapable persons residing in that country, state or territory, the Governor may, by proclamation published in the Gazette, declare that country, state or territory to be a reciprocating state for the purposes of this Part.

**Editorial note—**

Western Australia and Tasmania declared reciprocating States—see Gazette No 99 of 10.6.1988, p 3083.

- (3) The Governor may, by proclamation published in the Gazette, revoke or vary any proclamation under this section.

**66 Powers of Protective Commissioner as to property in New South Wales of incapable persons in reciprocating states**

- (1) If the officer charged by the laws of a reciprocating state with the care, recovery, collection, preservation and administration of the property of incapable persons:
- (a) certifies in writing and under seal to the Protective Commissioner that a person residing in that state is incapable of managing his or her affairs and is possessed of or entitled to or appears to be possessed of or entitled to real or personal property in New South Wales, and
  - (b) by instrument in writing and under seal authorises the Protective Commissioner to collect, recover, manage, sell or otherwise dispose of and administer the property or to make inquiry respecting the property,

the Protective Commissioner shall have and may exercise in respect of the property the same powers of collection, recovery, management, sale, disposition, administration and inquiry as the Protective Commissioner would have had and may have exercised over the property if the person had been a protected person resident in New South Wales and this Act shall apply in respect of the property accordingly.

- (2) Where the Protective Commissioner has, pursuant to an authority referred to in subsection (1) (b) and in the exercise of the powers referred to in subsection (1), received any money or property, the Protective Commissioner may:
- (a) after payment of all costs incurred in the exercise of those powers pursuant to that authority, and
  - (b) after satisfying or providing for:
    - (i) debts of the incapable person named in the authority owing to persons resident in New South Wales, and
    - (ii) the claims of persons so resident against that incapable person,being debts and claims of which the Protective Commissioner has notice,
- pay or deliver the balance of the money or property to the officer of the reciprocating state who signed the authority or any successor in office, without seeing to the



application thereof and without incurring any liability in respect of the payment or delivery, and shall duly account to that officer or successor for that balance.

#### **67 Powers as to property in reciprocating state of protected persons in New South Wales**

- (1) Where a protected person is possessed of or entitled to or appears to be possessed of or entitled to real or personal property in a reciprocating state, the Protective Commissioner may authorise an officer charged by the laws of the reciprocating state with the care, recovery, collection, preservation and administration of the property of incapable persons to collect, recover, manage, sell or otherwise dispose of and administer the property or to make inquiry respecting the property in accordance with the law in force in the reciprocating state as if the protected person were resident in the reciprocating state.
- (2) Where the Protective Commissioner authorises an officer in a reciprocating state in respect of property in the reciprocating state, the Protective Commissioner shall not be bound to inquire as to the exercise of any functions by that officer in respect of that property and shall incur no liability in respect of any act, matter or thing done or omitted by that officer in respect of that property.

### **Part 7 Miscellaneous**

#### **68 Appointment of guardian**

- (1) Where the Court is satisfied that a protected person is, owing to mental illness, incapable of managing his person or her person, it may, by order, appoint a guardian of the person of the protected person.
- (2) The powers of a guardian appointed under subsection (1) shall be such as are specified by the Court in the order appointing the guardian.
- (3) The Court may, at any time, by order, discharge a guardian appointed under subsection (1).

#### **69 Court may dissolve partnership**

Where a person, being a member of a partnership, becomes a protected person or protected missing person, the Court may, by order, dissolve the partnership.

#### **70 Power to carry orders and directions into effect**

- (1) The manager of the estate of a protected person or protected missing person, or such other person as the Court or Protective Commissioner approves, shall, in the name and on behalf of the protected person or protected missing person, execute all such conveyances, deeds and transfers, and do all such things, as the Court or Protective Commissioner directs for giving effect to any order or direction under this Act.
- (2) Every conveyance, deed, transfer and thing executed or done as referred to in

subsection (1) shall be valid and effectual, and shall take effect accordingly, subject only to any prior charge to which the property affected thereby at the date of the order or direction is subject.

(3) (Repealed)

#### **70A Failure to comply with directions of Protective Commissioner**

A person must not fail to comply with any direction that is given to the person by the Protective Commissioner in accordance with the Protective Commissioner's functions under this Act.

Maximum penalty: 100 penalty units.

#### **71 Manager may act as trustee or guardian in certain cases**

- (1) Where a power is vested in a protected person or protected missing person in the capacity of a trustee or guardian, or the consent of a protected person or protected missing person to the exercise of a power is necessary in the like capacity or as a check upon the undue exercise of the power, and it appears to the Court to be expedient that the power should be exercised or the consent given, as the case may be, the Protective Commissioner or the manager of the estate of the protected person or protected missing person, as the case may be, in the name and on behalf of the protected person or protected missing person, under an order of the Court made upon the application of any person interested in the exercise of the power, may exercise the power or give the consent, as the case may be, in such manner as the order may direct.
- (2) Where under this Act the Protective Commissioner or the manager of an estate, under order of the Court, exercises in the name and on behalf of a protected person or protected missing person a power of appointing new trustees vested in the protected person or protected missing person, the persons who shall after and in consequence of the exercise of the power be the trustees shall have all the same rights and powers as they would have had if the order had been made by the Court under any law for the time being in force relating to trusts.
- (3) Where, on an application to the Court for an order under subsection (1) in relation to a trust it seems to the Court to be expedient, it may make any other order respecting the property subject to the trust which might have been made on such an application under the provisions of any law relating to trusts on the appointment of new trustees.

#### **72 Temporary provision for maintenance**

- (1) In any case where, pending the making of orders as to the management of the estate of a protected person or protected missing person, it appears to the Protective Commissioner desirable that temporary provision should be made for the expenses of the maintenance or other necessary purposes or requirements of the protected person

or any member of the family of the protected person or protected missing person out of any cash or available investments belonging to the protected person or protected missing person in the hands of a banker, or of any other person, the Protective Commissioner may, by certificate, authorise the banker or other person to pay to such person as is named in the certificate such sum as the Protective Commissioner certifies to be proper.

- (2) The Protective Commissioner may, in a certificate referred to in subsection (1), give directions as to the proper application of the sum of money to which the certificate relates for the protected person's or protected missing person's benefit by the person to whom it is to be paid, and the person shall be accountable for the application, as the Protective Commissioner directs.

### **73 Transfer of stock belonging to certain persons**

In any case:

(a) where stock:

- (i) is standing in the name of or is vested in a protected person or protected missing person beneficially entitled to the stock, or
- (ii) is standing in the name of or vested in the manager of the estate of a protected person or protected missing person in trust for the protected person or protected missing person or as part of the estate, and

(b) where:

- (i) the manager of the estate of the protected person or protected missing person dies intestate or becomes a protected person or protected missing person or is out of the jurisdiction,
- (ii) it is uncertain whether the manager of the estate of the protected person or protected missing person is living or dead, or
- (iii) the manager of the estate of the protected person or protected missing person neglects or refuses to transfer the stock and to receive and pay over the dividends thereof to a new manager or as a new manager directs for 14 days after a request in writing for that purpose made by the new manager,

the Court may order an appropriate person to transfer the stock to or into the name of a new manager or otherwise and to receive and pay over the dividends thereof, or such sums of money, and in such manner as the Court directs.

### **74 Stock in name of incapable persons residing out of State may be ordered to be transferred**

Where any stock is standing in the name of, or vested in, a person residing out of New

South Wales, the Court, upon proof to its satisfaction that:

- (a) the person is an incapable person, and
- (b) the personal estate of the person has been vested in a person appointed for the management thereof according to the laws of the place where the person is residing,

may order an appropriate person to transfer the stock to or into the name of the person so appointed or otherwise and to receive and pay over the dividends thereof as the Court thinks fit.

#### **75 Sale by protected person may be set aside**

- (1) Where a patient made or executed, before discharge and before the day appointed and notified under section 2 (2), a transfer, sale, alienation, charge or lease of any real or personal property or where a protected person, being a patient, makes or executes any such transfer, sale, alienation, charge or lease, the Court may, on application being made by the Protective Commissioner, and on notice being given to such persons as the Court may direct, set aside the transfer, sale, alienation, charge or lease and may make such consequential orders as may be just.
- (2) For the purposes of an application under subsection (1) in respect of a person who made or executed a transfer, sale, alienation, charge or lease as referred to in subsection (1), the person shall be prima facie deemed to have been mentally ill at the time when the transfer, sale, alienation, charge or lease was made or executed.

#### **76 Powers of attorney**

- (1) In this section, ***principal*** means a person who has given a power of attorney.
- (2) A power of attorney is not terminated by the estate of the principal becoming subject to management under this Act.
- (3) Subsection (2) has effect subject to the terms of the instrument creating the power.
- (4) A person may give a power of attorney notwithstanding that the estate of the person is subject to management under this Act.
- (5) A power of attorney is suspended while the estate of the principal is subject to management under this Act.
- (5A) Despite subsection (5), if the Guardianship Tribunal, in making a financial management order under section 25E of the [Guardianship Act 1987](#) in relation to a principal, excludes a specified part of the principal's estate from the order, the Guardianship Tribunal may order that the power of attorney is to remain in force in respect of so much of the estate as is excluded from the financial management order concerned.

- (5B) The Guardianship Tribunal may make a similar order in respect of so much of the estate as the principal is authorised, under section 23A of this Act, to deal with, but only if the principal is a protected person because of a financial management order made by the Guardianship Tribunal.
- (6) Notwithstanding subsection (5), where an attorney under a power of attorney does an act within the scope of the power while the estate of the principal is subject to management under this Act, the act of the attorney has no less validity and effect than the act of the attorney would have had if this section had not been enacted, but this subsection does not affect the operation of subsection (9).
- (7) While a power of attorney is suspended by this section, the Court may restore the power of attorney to operation to such extent, and on such terms and conditions, as the Court thinks fit.
- (8) The Court may restore a power of attorney to operation under subsection (7) as from any time whether before or after the order of restoration is made or takes effect.
- (9) Where the estate of a principal is subject to management under this Act, the Court may:
- (a) terminate the power of attorney, or
  - (b) order that the power of attorney be subject to such conditions as the Court thinks fit.
- (10) An attorney under a power of attorney and persons dealing with the attorney and all other persons shall have the like protections against any term or condition of any restoration of the power and against any condition or restriction to which the power is subject under this section as if the term, condition or restriction were effected by act of the principal.
- (11) For the purposes of this section:
- (a) while a person is a protected person or protected missing person, the estate of the person is subject to management under this Act,
  - (b) while the Protective Commissioner undertakes the management of the estate of a person in accordance with section 63, the estate of the person is subject to management under this Act, and
  - (c) where, in relation to a person, it is certified to the Protective Commissioner and the Protective Commissioner is authorised as mentioned in section 66, the estate of the person thereupon becomes subject to management under this Act and remains so during the life of the person or until the Court declares that the exercise of the powers of the Protective Commissioner in relation to the estate is not required.

- (12) The Court may make a declaration for the purposes of subsection (11) (c) on the application of the Protective Commissioner, the person whose power of attorney is in question or an attorney under the power of attorney.
- (13) A declaration for the purposes of subsection (11) (c) shall not have any effect otherwise than for the purpose of subsection (11) (c).
- (14) This section does not apply to a power of attorney given before the commencement of Schedule 1 to the *Conveyancing (Powers of Attorney) Amendment Act 1983*.
- (15) This section has effect subject to Part 3 (Irrevocable powers of attorney) of the *Powers of Attorney Act 2003*.
- (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.

#### **77 Costs may be paid out of estate**

- (1) The Court may order the costs of and relating to the applications, orders, directions, conveyances and transfers to be presented or made in pursuance of this Act to be paid and raised out of or from the property or the rents, income or profits in respect of which they are presented or made in such manner as it may think proper.
- (2) The Court may order such sum by way of remuneration to be paid out of the estate to the manager of the estate of a protected person or protected missing person as the Court may think fit.
- (3) A reference in subsections (1) and (2) to the Court includes a reference to the Protective Commissioner where the costs referred to in subsection (1) arise, or the remuneration referred to in subsection (2) is warranted, by reason of applications to, or orders or directions by, the Protective Commissioner under section 30.

#### **78 All deeds, transfers, payments etc made in pursuance of this Act to be valid and binding**

Every conveyance, lease, surrender, transfer, charge or other disposition made, accepted or executed and every payment made under this Act shall be valid to all intents and binding upon all persons and any person doing or permitting to be done any act or thing pursuant to this Act, or any order of the Court made or purporting to be made under this Act, is hereby indemnified and discharged from liability in respect of the act or thing.

#### **79 Directions by Protective Commissioner as to visitors**

The Protective Commissioner may:

- (a) by order, direct an authorised officer under the *Mental Health Act 1990* or any other specified person:

- (i) to visit a protected person (other than a protected person who is a patient), and
  - (ii) to report in writing to the Protective Commissioner on the state of mind, bodily health and general condition of the protected person and on the care and treatment of the protected person, and
- (b) by order, direct that such information as the Protective Commissioner thinks necessary be given to the person directed to visit the protected person as to the nature and extent of the assets of the protected person and as to the orders made under this Act in respect of the person, and
- (c) order that any fees and expenses arising in connection with the visit be paid out of the estate of the protected person.

#### **79A Evidentiary certificates in relation to financial management orders**

A certificate issued by the Protective Commissioner stating that, on a specified date or during a specified period, the estate of a specified person was or was not subject to management under this Act is admissible in any legal proceedings under this or any other Act and is evidence of the matters so certified.

#### **80 Annual report**

- (1) As soon as practicable after 30th June, but on or before 31st December, in each year, the Protective Commissioner shall prepare and forward to the Minister a report of the work and activities of the Protective Commissioner for the 12 months ending on 30th June in that year.
- (2) The Minister shall lay the report or cause it to be laid before both Houses of Parliament as soon as practicable after receiving the report.

#### **80A Proceedings for offences**

Proceedings for an offence under this Act are to be disposed of summarily.

#### **81 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 (otherwise than by rules of Court) or that is necessary or convenient to be prescribed for carrying out or giving effect to this Act.
- (1A) (Repealed)
- (2) A provision of a regulation may:
  - (a) apply generally or be limited in its application by reference to specified exceptions or factors,

- (b) apply differently according to different factors of a specified kind, or
  - (c) authorise any matter or thing to be from time to time determined, applied or regulated by any specified person or body,
- or may do any combination of those things.

## **82 Rules of Court**

- (1) Rules of Court may be made under the *Supreme Court Act 1970* for the purpose of regulating any proceedings under this Act in or before the Court and otherwise for or with respect to any matter that by this Act is required or permitted to be prescribed by rules of Court.
- (2) Subsection (1) does not limit the rule-making powers conferred by the *Supreme Court Act 1970*.
- (3) (Repealed)

## **83 Personal liability**

A matter or thing done or omitted to be done by the Protective Commissioner or any person acting under the direction of the Protective Commissioner does not, if the matter or thing was done or omitted in good faith for the purpose of executing this or any other Act, subject the Protective Commissioner or person so acting personally to any action, liability, claim or demand.

## **84 Savings and transitional provisions**

Schedule 1 has effect.

## **Schedule 1 Savings and transitional provisions**

(Section 84)

## **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:

*Protected Estates Amendment (Investment) Act 2000*

*Guardianship and Protected Estates Legislation Amendment Act 2002*, to the extent that it amends this Act

*Courts Legislation Amendment Act 2004*, to the extent that it amends this Act

*Protected Estates Amendment (Missing Persons) Act 2004*



- (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 [Protected Estates Amendment \(Investment\) Act 2000](#)**

### **2 Definition**

In this Part:

**amending Act** means the [Protected Estates Amendment \(Investment\) Act 2000](#).

### **3 Interest Account**

Any money to the credit of the Interest Account referred to in section 54 (as in force immediately before its repeal by the amending Act) is to be paid into the current accounts in the trust fund in proportion to the amounts invested from those accounts and the period of each investment.

### **4 Estates Guarantee and Reserve Account**

All money to the credit of the Estates Guarantee and Reserve Account referred to in section 55 (as in force immediately before its repeal by the amending Act) is to be paid into the reserve fund.

### **5 Investment of funds**

Pending the establishment of the first investment fund under Part 4 (as replaced by the amending Act), the trust fund is taken to be an investment fund.

### **6 Advances**

Part 4 (as replaced by the amending Act) applies to and in respect of any advance made before the commencement of that Part in the same way as it applies to and in respect of any advance made after that commencement.

## **Part 3 Provisions consequent on enactment of [Guardianship and](#)**

## Protected Estates Legislation Amendment Act 2002

### 7 Application of amendments

Subject to the regulations, an amendment made to this Act by the *Guardianship and Protected Estates Legislation Amendment Act 2002* does not apply to or in respect of any decision or order made under this Act before the commencement of the amendment.

## Part 4 Provisions consequent on enactment of Protected Estates Amendment (Missing Persons) Act 2004

### 8 Application of amendments to existing missing persons

A declaration and order may be made under Division 1A of Part 3, as inserted by the *Protected Estates Amendment (Missing Persons) Act 2004*, in relation to a person who became a missing person (as referred to in section 21C (2)) during a period commencing before the commencement of that Division and continuing after that commencement.