

# Powers of Attorney Act 2003 No 53

[2003-53]



New South Wales

## Status Information

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### Authorisation

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# Powers of Attorney Act 2003 No 53



New South Wales

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# Powers of Attorney Act 2003 No 53



New South Wales

An Act to consolidate and revise the legislation relating to powers of attorney; to make consequential amendments to the [Conveyancing Act 1919](#) and certain other legislation; and for other purposes.

## Part 1 Preliminary

### 1 Name of Act

This Act is the [Powers of Attorney Act 2003](#).

### 2 Commencement

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

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

(1) In this Act:

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

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

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

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

**dealing** has the same meaning as it has in the [Real Property Act 1900](#).

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

**disposition** includes:

(a) a conveyance, and

- (b) an acknowledgment under section 83 of the *Probate and Administration Act 1898*, and
- (c) a vesting instrument, declaration of trust, disclaimer, release and every other assurance of property by any instrument except a will, and
- (d) a release, devise, bequest or an appointment of property contained in a will.

**enduring power of attorney**—see section 19 (1).

**exercise** a function includes perform a duty.

**function** includes a power, authority or duty.

**incommunicate**—see section 4.

**instrument** includes a deed.

**irrevocable power of attorney**—see section 15.

**prescribed power of attorney**—see section 8.

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

**property** includes:

- (a) real and personal property, and
- (b) any estate or interest in any real or personal property, and
- (c) any debt, thing in action or other right or interest.

**registered** means registered as referred to in section 51.

**review tribunal**—see section 26.

**third party**, in relation to a power of attorney, means a person other than the principal or an attorney on which a power is conferred by the power of attorney.

**vacancy** in office of an attorney—see section 5.

**valuable consideration** includes marriage but does not include a nominal consideration, even if it has some value.

**will** includes codicil.

**Note—**

The *Interpretation Act 1987* contains definitions and other provisions that affect the interpretation and application of this Act.

- (2) A power of attorney does not become a different power of attorney if an attorney

appointed by the power is lawfully replaced by a different attorney, the exercise of a power conferred by it is lawfully delegated or a sub-attorney is lawfully appointed to exercise a power under it.

- (3) A reference in this Act to a **suspended** power of attorney is a reference to a power of attorney that is:
- (a) suspended or restricted in operation by reason of mental incapacity of the principal occurring after the execution of the instrument creating the power, or
  - (b) suspended by operation of section 50.
- (4) Notes included in this Act do not form part of this Act.

**Note—**

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

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

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

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

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

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

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

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



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

## 6 Application of Act

- (1) **Act applies to instruments executed on or after commencement** This Act applies to any power of attorney created (or purporting to have been created) by an instrument executed on or after the commencement of this section.
- (2) **Act does not generally apply to existing powers of attorney** This Act does not apply to any power of attorney created (or purporting to have been created) by an instrument executed before the commencement of this section, except as provided by subsection (5).
- (3) **Repealed provisions of [Conveyancing Act 1919](#) continue to apply to existing powers of attorney** Subject to subsection (5), the provisions of Part 16 of, and Schedule 7 to, the [Conveyancing Act 1919](#) (and of any regulations made under those provisions) as in force immediately before the commencement of this section continue to apply to any power of attorney created (or purporting to have been created) by an instrument executed before that commencement despite the repeal of those provisions by this Act.
- (4) **Schedule 1 contains copy of repealed provisions of [Conveyancing Act 1919](#)** Schedule 1 contains a copy of the provisions of Part 16 of, and Schedule 7 to, the [Conveyancing Act 1919](#) as in force immediately before the commencement of this section.

### Note—

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

- (5) **Certain provisions of this Act extend to existing powers of attorney** The provisions of section 25 (Recognition of enduring powers of attorney made in other States and Territories), Part 5 (Review of powers of attorney) and Division 3 of Part 6 (Registration of powers of attorney) extend to any power of attorney created (or purporting to have been created) by an instrument executed before the commencement of this section.
- (6) **Certain references in Part 5 extended to existing powers of attorney** For the purposes of subsection (5):

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

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

## 7 Application of general law to powers of attorney

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

### Note—

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

## Part 2 Prescribed powers of attorney

### 8 Creation of prescribed power of attorney

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

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

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

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

A prescribed power of attorney does not confer authority to exercise any function as a

trustee that is conferred or imposed on the principal.

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

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

**Note—**

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

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

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

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

**Note—**

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

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

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

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

**Note—**

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

attorney.

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

#### **14 Regulations may amend Schedule 3**

- (1) The regulations may replace or amend Schedule 3.
- (2) (Repealed)

#### **14A Effect of amendment of prescribed form or Schedule 3**

The amendment or repeal of a form prescribed under section 8, or a provision of Schedule 3 that prescribes an expression or specifies a kind of gift or benefit for the purposes of section 11 (2), 12 (2) or 13 (2), does not:

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

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

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

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

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

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

- (1) The power conferred by an irrevocable power of attorney is not revoked or otherwise terminated by, and remains effective despite, the occurrence of any of the following:
  - (a) anything done by the principal without the concurrence of the attorney,
  - (b) the bankruptcy of the principal,
  - (c) the mental incapacity of the principal,
  - (d) the principal becoming a mentally incapacitated person,

(d1) the principal becoming a person who is a managed missing person within the meaning of the *NSW Trustee and Guardian Act 2009*,

(e) the death of the principal,

(f) if the principal is a corporation, the dissolution of the corporation.

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

**Note—**

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

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

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

#### **17 Initial mental incapacity** (cf 1919 No 6, s 163E (1) and (2))

(1) Subject to this Act, a power of attorney is not ineffective only because any act within the scope of the power is of such a nature that it was beyond the understanding of the principal through mental incapacity at the time the power is given.

(2) However, a power of attorney does not authorise an attorney to do any such act unless it is authorised by or under this Act.

**Note—**

Division 3 of Part 5 contains provisions that enable the Supreme Court to confirm the operation of a power of attorney despite the mental incapacity of the principal at the time the power is given.

#### **18 Supervening mental incapacity does not affect validity of acts principal understands** (cf 1919 No 6, s 163F (1))

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

**Note—**

Division 2 makes provision for enduring powers of attorney, which can have effect in relation to acts that are beyond the understanding of the principal through mental incapacity at the time of the act.

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

#### **19 Creation of enduring power of attorney** (cf 1919 No 6, s 163F (2))

(1) An instrument that creates a power of attorney creates an ***enduring power of attorney*** for the purposes of this Act if:

- (a) the instrument is expressed to be given with the intention that it will continue to be effective even if the principal lacks capacity through loss of mental capacity after execution of the instrument, and
- (b) execution of the instrument by the principal is witnessed by a person who is a prescribed witness (not being an attorney under the power), and
- (c) there is endorsed on, or annexed to, the instrument a certificate by that person stating that:
  - (i) the person explained the effect of the instrument to the principal before it was signed, and
  - (ii) the principal appeared to understand the effect of the power of attorney, and
  - (iii) the person is a prescribed witness, and
  - (iv) the person is not an attorney under the power of attorney, and
  - (v) the person witnessed the signing of the power of attorney by the principal.

(2) In this section:

***prescribed witness*** means:

- (a) a registrar of the Local Court, or
- (b) an Australian legal practitioner, or
- (c) a licensee under the [Conveyancers Licensing Act 2003](#), or an employee of the NSW Trustee and Guardian or a trustee company within the meaning of the [Trustee Companies Act 1964](#), who has successfully completed a course of study approved by the Minister, by order published in the Gazette, for the purposes of this paragraph, or
- (d) a legal practitioner duly qualified in a country other than Australia, instructed and employed independently of any legal practitioner appointed as an attorney under the instrument, or
- (e) any other person (or person belonging to a class of persons) prescribed by the regulations for the purposes of this paragraph.

## **20 Enduring power of attorney does not confer authority until attorney accepts appointment**

- (1) An enduring power of attorney does not operate to confer any authority on an attorney until the attorney has accepted the appointment by signing the instrument creating the power.

- (2) If more than one attorney is appointed by an enduring power of attorney, the power of attorney operates to confer authority only in relation to such of the attorneys who accept their appointments as provided by subsection (1).
- (3) An attorney may accept the appointment at the time the instrument creating the enduring power of attorney is executed or at any time after it is executed.
- (4) To avoid doubt, this section extends to substitute attorneys.

**21 Effect of enduring power of attorney** (cf 1919 No 6, s 163F (2), (3) and (4))

- (1) Subject to this Act, an act done by an attorney that is within the scope of the power conferred by an enduring power of attorney and that is of such a nature that it is beyond the understanding of the principal through mental incapacity at the time of the act is as effective as it would have been had the principal understood the nature of the act at that time.
- (2) This section does not save a power of attorney from being or becoming ineffective by reason of any matter other than mental incapacity of the principal arising after the execution of the instrument creating the power.
- (3) This section applies only if and to the extent that a contrary intention is not expressed in the instrument creating the power and has effect subject to the terms of the instrument creating the power.

**22 Effect of adoptions of testamentary gifts by attorney under enduring power of attorney** (cf 1983 No 179, s 48)

- (1) Any person who is named as a beneficiary (a **named beneficiary**) under the will of a deceased principal who executed an enduring power of attorney has the same interest in any surplus money or other property arising from any sale, mortgage, charge or disposition of any property or other dealing with property by the attorney under the power of attorney as the named beneficiary would have had in the property the subject of the sale, mortgage, charge, disposition or dealing, if no sale, mortgage, charge, disposition or dealing had been made.
- (2) The surplus money or other property arising as referred to in subsection (1) is taken to be of the same nature as the property sold, mortgaged, charged, disposed of or dealt with.
- (3) Except as provided by subsection (4), money received for equality of partition and exchange, and all fines, premiums and sums of money received on the grant or renewal of a lease where the property the subject of the partition, exchange, or lease was real estate of a deceased principal are to be considered as real estate.
- (4) Fines, premiums and sums of money received on the grant or renewal of leases of property of which the deceased principal was tenant for life are to be considered as

the personal estate of the deceased principal.

- (5) This section has effect subject to any order of the Supreme Court made under section 23.
- (6) A person is named as a beneficiary under a will for the purposes of this section if:
  - (a) the person is referred to by name in the will as being a beneficiary, or
  - (b) the person answers a description of a beneficiary, or belongs to a class of persons specified as beneficiaries, under the will.
- (7) This section does not apply to any person to whom section 83 of the *NSW Trustee and Guardian Act 2009* applies.

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

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

### **24 (Repealed)**



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

- (1) An interstate enduring power of attorney has effect in this State as if it were an enduring power of attorney made under, and in compliance with, this Act, but only to the extent that the powers it gives under the law of the State or Territory in which it was made could validly have been given by an enduring power of attorney made under this Act.
- (2) In particular, an interstate enduring power of attorney to which subsection (1) applies:
  - (a) has effect in this State subject to any limitations on the power that apply to it under the law of the State or Territory in which it was made, and
  - (b) does not operate to confer any power on an attorney in this State that cannot be conferred on an attorney under an enduring power of attorney made in this State.
- (3) Subsection (1) does not apply to any power of attorney (or class of powers of attorney) prescribed by the regulations.
- (4) A document signed by an Australian legal practitioner that certifies that an interstate enduring power of attorney was made in accordance with the formal requirements of the law of the State or Territory in which it was made is admissible in any proceedings concerning that power and is prima facie evidence of the matter so certified.
- (5) In this section:

***interstate enduring power of attorney*** means a power of attorney made in another State or a Territory that, under the law of that State or Territory, has effect in that State or Territory as a valid power of attorney even if the principal loses capacity through mental incapacity after the execution of the instrument creating the power of attorney.

## Part 5 Review of powers of attorney

### Division 1 General

#### 26 Review tribunals

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

- (a) the Civil and Administrative Tribunal,
- (b) the Supreme Court.

#### 27 Concurrent jurisdiction of review tribunals

- (1) If a provision of this Part confers a function on any review tribunal, the jurisdiction to exercise that function is conferred on each review tribunal concurrently.

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

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

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

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

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

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

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

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

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

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

- (a) the principal has affirmed the power before or during the proceedings on the

application, and

- (b) the principal had sufficient mental capacity to affirm the power at the time the affirmation was made.

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

- (1) The Supreme Court may, on the application of a principal under a power of attorney (whether or not an enduring power of attorney), confirm (whether in whole or in part) any power to do an act under the power of attorney if it appears to the Court that:
  - (a) the principal is incapable of affirming the power because:
    - (i) the principal lacks capacity by reason of the continuation of mental incapacity that affected the principal when the principal gave the power, or
    - (ii) the principal is incommunicate, and
  - (b) it is for the benefit of the principal that the power be confirmed in whole or in part.
- (2) Subsection (1):
  - (a) applies only if and to the extent that a contrary intention is not expressed in the instrument creating the power of attorney, and
  - (b) has effect subject to the terms of the instrument creating the power of attorney.

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

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

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

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

- (1) A power of attorney is a **reviewable power of attorney** for the purposes of an application under this Division if the review tribunal to which the application is to be made has jurisdiction to deal with the application as provided by this section.
- (2) Both the Civil and Administrative Tribunal and the Supreme Court have jurisdiction to deal with an application under this Division in respect of an enduring power of attorney (including a revocation of an enduring power of attorney).

- (3) The Supreme Court (but not the Civil and Administrative Tribunal) also has jurisdiction to deal with an application under this Division in respect of any other power of attorney given by a principal who is incommunicate for the time being.
- (4) To remove any doubt, references in this Division to a reviewable power of attorney extend to a document purporting to be a reviewable power of attorney and to the making or revocation of a power of attorney extend to the purported making or revocation of a power of attorney.

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

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

### **35 Who are interested persons and parties in relation to applications**

- (1) **Interested persons who may make applications** Each of the following persons is an **interested person** in relation to the making of applications under this Division in respect of a reviewable power of attorney:
  - (a) an attorney (including an attorney whose appointment has been purportedly revoked),
  - (b) the principal,
  - (c) any person who is:
    - (i) a guardian of the principal (whether under the [Guardianship Act 1987](#) or any other Act or law), or
    - (ii) an enduring guardian of the principal under the [Guardianship Act 1987](#),
  - (d) any other person who, in the opinion of the review tribunal, has a proper interest in the proceedings or a genuine concern for the welfare of the principal.

- (2) **Parties to proceedings in respect of an application** Each of the following persons is a party to an application in respect of a reviewable power of attorney:
- (a) the applicant,
  - (b) each attorney under the power (if the attorney is not the applicant),
  - (c) the principal (if the principal is not the applicant),
  - (c1) the NSW Trustee and Guardian,
  - (d) any other person that the review tribunal concerned has joined as a party under subsection (3).
- (3) **Joinder of parties** A review tribunal may, on its own initiative or on the application of an interested person, decide to join, as a party to any proceedings before the tribunal under this Division, any person who, in the opinion of the tribunal, should be a party to the proceedings (whether because of the person's concern for the welfare of the principal or for any other reason).
- (4) (Repealed)
- (5) **Applicant to be notified of joinder** If a review tribunal joins a person as a party to any proceedings, the tribunal must, as soon as practicable, notify the applicant (or cause the applicant to be notified) accordingly.

### **36 Interested persons may apply for review** (cf 1919 No 6, s 163G)

- (1) **Tribunal may review making or operation and effect of power** A review tribunal may, on the application of an interested person, decide to review the making, revocation or the operation and effect of a reviewable power of attorney or not to carry out such a review.
- (2) As a consequence of reviewing the making, revocation or operation and effect of a reviewable power of attorney, a review tribunal may decide whether or not to make an order under this section.
- (3) **Orders relating to making of power of attorney** A review tribunal may make either or both of the following orders with respect to the making of a power of attorney:
- (a) an order declaring that the principal did or did not have mental capacity to make a valid power of attorney,
  - (b) an order declaring that the power of attorney is invalid (either in whole or in part) if the tribunal is satisfied:
    - (i) the principal did not have the capacity necessary to make it, or
    - (ii) the power of attorney did not comply with the other requirements of this Act

applicable to it, or

(iii) the power of attorney is invalid for any other reason, for example, the principal was induced to make it by dishonesty or undue influence.

**(3A) Orders relating to revocation of power of attorney** A review tribunal may make either or both of the following orders with respect to the revocation of a power of attorney:

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

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

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

approval,

(f) an order revoking all or part of the power of attorney,

(g) such other orders as the review tribunal thinks fit.

- (5) **Orders relating to mental capacity of principal** A review tribunal may make an order relating to the operation and effect of a power of attorney declaring that the principal lacked or lacks capacity because of mental incapacity at a specified time or during a specified period or for the time being. An enduring power of attorney can not be lawfully revoked by the principal while the principal is declared to be incapable by such an order.
- (6) **Effect of order declaring mental incapacity for the time being** If a review tribunal makes an order under this section declaring that a principal under a reviewable power of attorney lacks capacity through mental incapacity for the time being, the principal is to be taken, for the purposes of the operation of the power of attorney, to lack such capacity for such period (if any) specified in the order or until further order of the tribunal.
- (7) **Orders may be subject to terms and conditions** An order made under this section may be made subject to such terms and conditions as the review tribunal thinks fit.
- (8) **Further orders relating to accounts and information** If a review tribunal makes an order under this section directing an attorney to furnish accounts or other information, the tribunal may decide to make further orders for:
- (a) limiting the disclosure of accounts or other information by the attorney, and
  - (b) inquiry and report on the conduct of the attorney.
- (9) **Order reinstating lapsed power of attorney may have retrospective operation** If a review tribunal makes an order under this section reinstating a power of attorney that has lapsed by reason of a vacancy in the office of an attorney, the order may also direct that it has effect from the time at which the power of attorney originally lapsed.
- (10) **Effect of order removing or appointing attorney or altering power** The removal or appointment of an attorney, or the alteration or revocation of a power of attorney, under this section has effect as if:
- (a) it were done in due form by the principal, and
  - (b) the principal were of full capacity and were, to the extent necessary, authorised to do the thing in question by the instrument creating the power.
- (11) **Review tribunal may exercise functions despite instrument** A review tribunal may exercise a function under this section despite anything to the contrary in the instrument creating the power.

(12) **Section does not affect irrevocable powers of attorney** This section has effect subject to the provisions of Part 3 (Irrevocable powers of attorney).

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

- (1) If, on a review of the making, revocation or operation and effect of a reviewable power of attorney under section 36, the Civil and Administrative Tribunal decides not to make an order under that section in respect of the power of attorney, it may (if it considers it appropriate in all the circumstances to do so) decide to treat the application for the review as an application for a financial management order under Part 3A (Financial management) of the *Guardianship Act 1987*.
- (2) If such a decision is made, the application is taken to be an application for such a financial management order duly made in respect of the principal under that power.
- (3) If, on a review of the making, revocation or operation and effect of a reviewable power of attorney under section 36, the Supreme Court decides not to make an order under that section in respect of the power of attorney, it may (if it considers it appropriate in all the circumstances to do so) proceed instead as if an application for a declaration and order under section 41 of the *NSW Trustee and Guardian Act 2009* had been duly made in respect of the principal under that power.

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

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

## **Divisions 5**

**39-41 (Repealed)**



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

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

- (1) If the principal under a power of attorney is incommunicate:
  - (a) proceedings under this Part by the principal:
    - (i) may be commenced and carried on as prescribed by rules of court, or
    - (ii) subject to rules of court, may be commenced and carried on as if the principal were mentally incapacitated, and
  - (b) subject to rules of court, all persons are, in relation to the proceedings, to be as nearly as may be in the like position in law as if the principal were mentally incapacitated.
- (2) Subsection (1) does not limit the rule-making powers conferred by the *Supreme Court Act 1970*.
- (3) A reference to rules of court in subsection (1) includes a reference to the procedural rules of the Civil and Administrative Tribunal (within the meaning of the *Civil and Administrative Tribunal Act 2013*) in relation to proceedings in that Tribunal brought under this Part.

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

### **Division 1 General provisions**

#### **43 Attorney may execute instruments and do other things in own name** (cf 1919 No 6, s 159)

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

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

- (1) A document is a certified copy of an instrument for the purposes of this section if:
  - (a) there is endorsed on the document a written certificate, to the effect that the document is a true and complete copy of the contents of the instrument of which it purports to be a copy, by:

- (i) the principal under the power of attorney created by the instrument, or
  - (ii) a person (or person belonging to a class of persons) prescribed by the regulations for the purposes of this subsection, and
- (b) each page of the document bears the signature of the person who gives the certificate referred to in paragraph (a).
- (2) A legible document that is a certified copy of an instrument creating a power of attorney is evidence:
- (a) as against the principal under the power of attorney of the execution and contents of the instrument, and
  - (b) as against any other person of the contents of the instrument.
- (3) Subsection (2) does not make a document better evidence than is the instrument of the contents of which it purports to be a copy.
- (4) This section does not affect any other method of proving the execution or contents of an instrument creating a power of attorney.
- (5) A person must not give a certificate for the purposes of this section knowing the certificate to be false.

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

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

- (1) An attorney under a power of attorney cannot appoint a substitute, delegate or sub-attorney unless the instrument creating the power expressly provides for the attorney to do so.
- (2) Nothing in this section enables an attorney irrevocably to appoint a substitute, delegate or sub-attorney unless the instrument creating the power of attorney expressly provides for the attorney to do so.

#### **45A Appointment of substitute attorneys**

- (1) A principal may appoint a person as a substitute attorney for a specified person who is appointed by the principal as an attorney (the **specified attorney**).
- (2) The appointment of a substitute attorney may be made by expressly including the appointment in the instrument creating the power of attorney.
- (3) The principal may appoint one or more substitute attorneys.
- (4) A substitute attorney may act as attorney under the power of attorney during a vacancy in the office of the specified attorney or a vacancy of a kind specified in the

instrument creating the power of attorney.

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

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

- (1) If a power of attorney appoints 2 or more persons as joint attorneys, the power of attorney is terminated if the office of one or more of the attorneys becomes vacant.
- (1A) However, such a power of attorney is not terminated if:
  - (a) the power of attorney provides otherwise, and
  - (b) at least one of the attorneys or a substitute attorney remains in office.
- (2) If a power of attorney appoints 2 or more persons as attorneys either severally or jointly and severally, a vacancy in the office of one or more attorneys does not operate to terminate the power of attorney in relation to the other attorneys.

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

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

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

- (1) If a power of attorney is terminated or suspended, a third party who deals or otherwise transacts in good faith with the attorney without knowing of the termination or suspension is entitled to rely on the power of attorney in relation to that dealing or transaction in the same manner and to the same extent as if the power had not been terminated or suspended.
- (2) Subsection (1) does not entitle an attorney to rely on a power in support of an act within the scope of the power done by the attorney with notice of the termination or suspension of the power to the extent that it concerns authority to do that act.

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

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

Maximum penalty: 5 years imprisonment.

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

Maximum penalty: 5 years imprisonment.

## 50 Effect of management of estate

- (1) A power of attorney is not terminated by the estate of the principal becoming subject to management under the *NSW Trustee and Guardian Act 2009* (a **managed estate**).
- (2) Subsection (1) has effect subject to the terms of the instrument creating the power.
- (3) A power of attorney is suspended while the estate of the principal is a managed estate.
- (4) Despite subsection (3), if the Civil and Administrative 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 Civil and Administrative 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.
- (5) The Civil and Administrative Tribunal may make a similar order in respect of so much of the estate of the principal as is not managed estate, but only if the estate is a managed estate because of a financial management order made by the Civil and Administrative Tribunal.
- (6) Despite subsection (3), where an attorney under a power of attorney does an act within the scope of the power while the estate of the principal is a managed estate, 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 Supreme Court may restore the power of attorney to operation to such extent, and on such terms and conditions, as the Supreme Court thinks fit.
- (8) The Supreme 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) If the estate of a principal is a managed estate, the Supreme 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 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) The estate of a person whose estate is subject to management under Division 2 of Part 4.3 of the *NSW Trustee and Guardian Act 2009* is taken to be a managed estate for the purposes of this section for the life of the person or until the Supreme Court declares that the exercise of the powers of the NSW Trustee and Guardian in relation to the estate is not required. An application to the Court for a declaration may be made by the NSW Trustee and Guardian, the person whose power of attorney is in question or an attorney under the power of attorney.
- (12) A declaration for the purposes of subsection (11) has no effect otherwise than for the purpose of subsection (11).
- (13) 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*.
- (14) This section has effect subject to Part 3.

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

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

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

#### **52 Powers of attorney to be registered for dealings affecting land** (cf 1919 No 6, s 163 (2) and (4))

- (1) A conveyance or other deed affecting land executed on or after 1 July 1920 under a power of attorney has no effect unless the instrument creating the power has been registered.

**Note—**

1 July 1920 is the day on which the *Conveyancing Act 1919* commenced.

- (2) If the instrument is registered after the time when the conveyance or other deed was executed, the conveyance or other deed has effect as if the instrument had been registered before that time.
- (3) In this section, **deed** includes any memorandum, dealing or other instrument

affecting land that is deemed by an Act to have effect as a deed.

- (4) This section does not apply to a lease for a term of 3 years or less.

## **Part 7 Miscellaneous**

### **53 Regulations**

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

### **54 Nature of proceedings for offences**

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

### **55 (Repealed)**

### **56 Savings, transitional and other provisions**

Schedule 5 has effect.

### **57 Review of Act**

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

## **Schedule 1 Repealed provisions of [Conveyancing Act 1919](#) with**

## continuing operation

(Section 6 (4))

### Part 16 Powers of attorney

#### Division 1 General

##### 158 Definitions and application of Part

(1) In this Part:

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

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

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

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

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

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

(b) suspended by section 110A of the [Mental Health Act 1958](#).

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

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

##### 159 Execution etc under power

(1) An attorney under a power of attorney may, in the exercise of the power:

(a) execute any assurance or instrument with his or her own signature and, where sealing is required, with his or her own seal, or

(b) do any other thing in his or her own name.

(2) An assurance or instrument executed, or thing done, in accordance with subsection (1) is as effectual as if executed or done by the attorney with the signature and seal or, as the case may be, in the name, of the principal.

##### 160 Irrevocable powers

(1) Where a power of attorney is, in the instrument creating the power, expressed to be

irrevocable and is, or in the instrument creating the power is expressed to be, given for valuable consideration, the power is not, except to the extent (if any) that the instrument otherwise provides, revoked or otherwise terminated by, and remains effective notwithstanding:

- (a) anything done by the principal without the concurrence of the attorney,
  - (b) bankruptcy of the principal,
  - (c) mental incapacity of the principal,
  - (d) the principal becoming a patient, a protected person or an incapable person within the meaning of the *Mental Health Act 1958*, or any other event happening whereby the property or affairs of the principal becomes or become subject to care, management, collection, administration, charge or control under that Act,
  - (e) death of the principal,
  - (f) if the principal is a corporation, dissolution of the corporation.
- (2) Where the objects of a power of attorney to which this section applies have been carried out, or have become incapable of being carried out, or a power of attorney to which this section applies is otherwise exhausted, the Court may order that the power of attorney terminate and may order that the instrument creating the power be delivered up for cancellation.
- (3) This section does not apply to a power of attorney created by an instrument executed before the commencement of the *Conveyancing (Powers of Attorney) Amendment Act 1983*.

#### **161 Termination etc—protection of attorney**

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



## **162 Termination etc—protection of strangers**

(1) Where:

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

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

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

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

- (1) Where a power of attorney has terminated and an attorney under the power, knowing of the termination, does any act or thing under or in pursuance of the power, that attorney under the power is guilty of an indictable offence and liable to imprisonment for 5 years.
- (2) Where a power of attorney is suspended so far as concerns authority to an attorney to do an act or thing of any nature and an attorney under the power, knowing of the suspension, does an act or thing of that nature under or in pursuance of the power, that attorney under the power is guilty of an indictable offence and liable to imprisonment for 5 years.

- (3) This section applies only to acts or things done after the commencement of the *Conveyancing (Powers of Attorney) Amendment Act 1983*.

### **162B Saving**

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

### **163 Registration of powers of attorney**

- (1) Any instrument (whether executed before or after the commencement of this Act) creating a power of attorney for any purpose whatever may be registered.
- (2) Where such instrument is executed after the commencement of this Act no conveyance or other deed not being a lease or agreement for a lease for a term not exceeding three years, and no memorandum by this Act operating as a deed executed by the attorney under the power in pursuance of the power shall be of any force or validity whatsoever unless the instrument creating the power has been registered:

Provided that on registration of the instrument creating the power every such conveyance deed or memorandum executed by the attorney under the power shall take effect as if the instrument creating the power had been registered before the execution of the conveyance deed or memorandum.

- (3) Any instrument revoking any such power may also be registered.
- (4) Every such conveyance and other deed and memorandum as is mentioned in subsection (2) executed by the attorney under a power of attorney before the commencement of the *Conveyancing (Amendment) Act 1930*, shall have the same effect as if that Act had been in operation at the time of the execution.
- (5) Nothing in the last preceding subsection shall affect the rights of any party to any proceeding at law or in equity concluded before or pending at the commencement of the *Conveyancing (Amendment) Act 1930*.

### **163A Proof of powers of attorney**

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

- (2) A document is certified in the manner provided by this subsection:
  - (a) if there is endorsed on the document a written certificate, to the effect that the document is a true and complete copy of the contents of the instrument of which it purports to be a copy, by:
    - (i) the principal under the power of attorney created by the instrument, or
    - (ii) a person of a prescribed class, and
  - (b) if each page of the document bears the signature of the person who gives the certificate referred to in paragraph (a).
- (3) Subsection (1) does not make a document better evidence than is the instrument of the contents of which it purports to be a copy.
- (4) This section does not affect any other method of proving the execution or contents of an instrument creating a power of attorney.
- (5) A person who gives a certificate for the purposes of this section knowing the certificate to be false is guilty of an indictable offence and liable to imprisonment for 5 years.
- (6) This section applies only to a document certified for the purposes of this section after the commencement of the [Conveyancing \(Powers of Attorney\) Amendment Act 1983](#).

**163B Power conferred by prescribed form of instrument**

- (1) Subject to this section, an instrument (whether or not under seal) in or to the effect of the form in Schedule 7 confers on the attorney thereby appointed authority to do on behalf of the person executing the instrument anything the person executing the instrument may lawfully authorise an attorney to do.
- (2) The authority conferred by an instrument referred to in subsection (1) does not include:
  - (a) authority to exercise or perform any power, authority, duty or function as a trustee conferred or imposed on the person executing the instrument, or
  - (b) unless it is expressly conferred by the instrument—authority to execute an assurance or other document, or do any other act, as a result of which a benefit would be conferred on the attorney appointed by the instrument.
- (3) Where an instrument referred to in subsection (1) specifies any conditions or limitations to which the authority conferred by the instrument is to be subject, the authority is so conferred subject to compliance with those conditions or limitations.

## Division 2 Unsoundness of mind etc

### 163C Application of Division

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

### 163D Definitions

In this Division:

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

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

### 163E Initial unsoundness of mind

- (1) Subject to this section, a power of attorney is not ineffective by reason that any act within the scope of the power is of a nature which is, at the time when the power is given, beyond the understanding of the principal through unsoundness of mind.
- (2) Subject to subsections (3) to (6), a power of attorney does not authorise an attorney under the power to do an act of a nature which is, at the time when the power is given, beyond the understanding of the principal through unsoundness of mind.
- (3) Where, on application by the principal under a power of attorney, it appears to the Court that the nature of the acts, or some one or more of the acts, within the scope of the power was not, at the time when the power was given, beyond the understanding of the principal through unsoundness of mind, the Court may by order confirm the power wholly or in part as the case requires.
- (4) Where, on application by the principal under a power of attorney, it appears to the Court that the principal has, before or during the proceedings on the application, affirmed the power wholly or in part, the Court may by order confirm the power wholly or in part as the case requires, but only to the extent to which it appears to the Court that the principal was, at the time of the affirmation, sufficiently of sound mind so to affirm.
- (5) Where, on application by the principal under a power of attorney (whether or not a protected power of attorney) it appears to the Court:
  - (a) that the principal is incapable of affirming the power because:
    - (i) the principal lacks capacity by reason of the continuation of unsoundness of

mind that affected the principal when the principal gave the power, or

(ii) the principal is incommunicate, and

(b) that it is for the benefit of the principal that the power be confirmed wholly or in part,

the Court may by order confirm the power wholly or in part as the case requires.

- (6) Where the Court makes an order under this section confirming a power of attorney wholly or in part, an act within the scope of the power to the extent so confirmed, done after the order takes effect by an attorney under the power, shall be as good for all purposes and between all persons as if at the time when the order takes effect the principal were of full capacity and in due form confirmed the power of attorney to the extent of the order of confirmation.
- (7) Subsection (5) applies only if and so far as a contrary intention is not expressed in the instrument creating the power, and shall have effect subject to the terms of the instrument creating the power.

#### **163F Supervening unsoundness of mind**

- (1) A power of attorney is effective so far as concerns any act within its scope, being an act of a nature which is not, at the time of the act, beyond the understanding of the principal through unsoundness of mind.
- (2) Where:
- (a) a power of attorney is, in the instrument creating the power, expressed to be given with the intention that it will continue to be effective notwithstanding that, after the execution of the instrument, the principal suffers loss of capacity through unsoundness of mind,
- (b) the execution of the instrument is attested by a prescribed person (not being an attorney under the power), and
- (c) there is endorsed on, or annexed to, the instrument a certificate by that prescribed person stating that the prescribed person explained the effect of the instrument to the principal before it was executed,

the power of attorney is effective so far as concerns any act within its scope, notwithstanding that the act is of a nature which is, at the time of the act, beyond the understanding of the principal through unsoundness of mind.

- (3) This section does not save a power of attorney from being or becoming ineffective by reason of any matter other than an unsoundness of mind of the principal arising after the execution of the instrument creating the power.

- (4) This section applies only if and so far as a contrary intention is not expressed in the instrument creating the power, and shall have effect subject to the terms of the instrument creating the power.

**163G Judicial control in certain circumstances**

- (1) This section applies to:
- (a) a protected power of attorney, and
  - (b) a power of attorney the principal under which is for the time being incommunicate.
- (2) Where, on application by the principal under a power of attorney, it appears to the Court to be for the principal's benefit, the Court may, on the principal's behalf, by order:
- (a) remove a person from office as attorney,
  - (b) appoint a person to fill a vacancy in the office of attorney,
  - (c) with the consent of the attorney and of any other interested person:
    - (i) alter the scope of the power,
    - (ii) otherwise alter the instrument creating the power, or
    - (iii) alter the rights and duties of the principal and the attorney between themselves,
  - (d) direct an attorney to furnish accounts and other information to the Court or to a person approved by the Court, or
  - (e) revoke the power.
- (3) For the purposes of subsection (2) (b), a vacancy in the office of attorney occurs in any of the following events:
- (a) renunciation of the power by an attorney,
  - (b) removal of an attorney by the principal or with the principal's authority, or by the Court under subsection (2),
  - (c) disability of an attorney,
  - (d) death of an attorney,
  - (e) where an attorney is a corporation, liquidation or dissolution of the corporation,
  - (f) other event personal to an attorney whereby the attorney's authority is

terminated.

- (4) Where the Court makes an order directing an attorney to furnish accounts or other information under subsection (2) (d), the Court may make further orders for:
  - (a) preventing unnecessary disclosure of the attorney, and
  - (b) inquiry and report on the conduct of the attorney.
- (5) The Court may revoke a power of attorney under subsection (2) (e) notwithstanding anything in the instrument creating the power, but otherwise subsections (2), (3) and (4) apply only if and so far as a contrary intention is not expressed in the instrument creating the power, and shall have effect subject to the terms of the instrument creating the power.
- (6) A removal, appointment, alteration or revocation under subsection (2) (a), (b), (c) and (e) shall have effect as if done in due form by the principal, and as if the principal were of full capacity and were, so far as necessary, authorised to do the thing in question by the instrument creating the power.
- (7) This section has effect subject to section 160.

#### **163H Procedure where principal incommunicate**

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

### **Schedule 7 General power of attorney**

(Section 163B)

#### **Part 1**

THIS POWER OF ATTORNEY is made on the ..... day of ..... 19..... by AB of .....

- 1** I appoint CD of ..... to be my attorney to exercise, subject to any conditions and limitations specified in Part 2 of this instrument, the authority conferred on an attorney by section 163B of the [Conveyancing Act](#)

1919, to do on my behalf anything I may lawfully authorise an attorney to do.

- \*2 In the exercise of the authority conferred on my attorney by section 163B of the *Conveyancing Act 1919*, my attorney is authorised to execute an assurance or other document, or do any other act, whereby a benefit is conferred on my attorney.
- \*3 This general power of attorney is given with the intention that it will continue to be effective notwithstanding that after its execution I suffer loss of capacity through unsoundness of mind.

(\*Clause 2 or 3, or clauses 2 and 3, may be omitted.)

## Part 2 Conditions and Limitations

### Schedule 2 (Repealed)

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

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

#### 1 Authority to give gifts

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

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

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

(a) the gift is:

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

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

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

- (3) In this clause:

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

**relative** of a principal means:

- (a) a mother, father, spouse (including wife or husband), daughter, son, step-daughter, step-son, sister, brother, half-sister, half-brother or grandchild of the



principal, or

- (b) if the principal is a party to a registered relationship or interstate registered relationship, within the meaning of the *Relationships Register Act 2010*, or a domestic relationship within the meaning of the *Property (Relationships) Act 1984*, any person who is a relative, of the kind mentioned in paragraph (a), of either party to the relationship.

## **2 Authority to confer benefits on attorney**

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

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

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

- (a) the benefit meets (whether in whole or in part) any expenses incurred (or to be incurred) by the attorney in respect of any of the following:

- (i) housing,
- (ii) food,
- (iii) education,
- (iv) transportation,
- (v) medical care and medication, and

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

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

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

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

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

- (a) the benefit meets (whether in whole or in part) any expenses incurred (or to be incurred) by the third party in respect of any of the following:

- (i) housing,
  - (ii) food,
  - (iii) education,
  - (iv) transportation,
  - (v) medical care and medication, and
- (b) the benefit is not more than what is reasonable having regard to all the circumstances and, in particular, the principal's financial circumstances and the size of the principal's estate.

## **Schedule 4 (Repealed)**

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

(Section 56)

### **Part 1 General**

#### **1 Regulations**

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

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

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

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

the continued Conveyancing Act provisions, and

(b) to a provision of this Act is to be read as including a reference to any continued Conveyancing Act provisions that correspond (or substantially correspond) to the provision of this Act.

(2) Subclause (1) does not apply to:

(a) section 67 of the *Trustee Act 1925*, or

(b) any other provision of another Act, or instrument made under another Act, prescribed by the regulations.

(3) In this clause, **continued Conveyancing Act provisions** means the provisions of Part 16 of, and Schedule 7 to, the *Conveyancing Act 1919* that, by operation of section 6 (3), continue to apply to powers of attorney created (or purportedly created) by instrument executed before the commencement of section 6.

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

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

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

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

## **Part 3 Provision consequent on *Succession Amendment (Intestacy) Act 2009***

### **4 Effect of disposal of home shared by spouses under enduring power of attorney**

Section 24, as in force immediately before its repeal by the *Succession Amendment (Intestacy) Act 2009*, continues to apply to a spouse of a principal under an enduring power of attorney who dies intestate before the repeal and to whom it would have applied before the repeal as if it had not been repealed.

## **Part 4 Provisions consequent on *Powers of Attorney Amendment Act 2013***

### **5 Definition**

In this Part, the **amending Act** means the *Powers of Attorney Amendment Act 2013*.

## **6 Replacement of prescribed form for prescribed power of attorney**

The substitution of section 8 and the repeal of Schedule 2 by the amending Act does not:

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

## **7 Review of revocations of existing powers of attorney by Guardianship Tribunal**

The amendments made by Schedule 1 [8]-[14] to the amending Act extend to the review of revocations of powers of attorney created by an instrument executed before the commencement of those amendments.

## **8 Authority of substitute attorneys under enduring powers of attorney**

Section 20 (4) extends to any enduring power of attorney created by an instrument executed before the insertion of that subsection.

## **9 Existing appointments of substitute attorneys**

The insertion of section 45A by the amending Act does not affect the validity of any appointment of a substitute attorney made before the insertion of that section.

## **10 Vacation of office by joint attorneys**

The amendment of section 46 by the amending Act does not apply in relation to a power of attorney created by an instrument executed before that amendment.