



Australian Capital Territory

# Powers of Attorney Act 2006

A2006-50

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Australian Capital Territory

# **Powers of Attorney Act 2006**

**A2006-50**

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An Act about powers of attorney, and for other purposes

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The Legislative Assembly for the Australian Capital Territory enacts as follows:

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J2005-70

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## Chapter 1 Preliminary

### 1 Name of Act

This Act is the *Powers of Attorney Act 2006*.

### 2 Commencement

This Act commences on a day fixed by the Minister by written notice.

*Note 1* The naming and commencement provisions automatically commence on the notification day (see Legislation Act, s 75 (1)).

*Note 2* A single day or time may be fixed, or different days or times may be fixed, for the commencement of different provisions (see Legislation Act, s 77 (1)).

*Note 3* If a provision has not commenced within 6 months beginning on the notification day, it automatically commences on the first day after that period (see Legislation Act, s 79).

### 3 Dictionary

The dictionary at the end of this Act is part of this Act.

*Note 1* The dictionary at the end of this Act defines certain terms used in this Act, and includes references (*signpost definitions*) to other terms defined elsewhere in this Act.

For example, the signpost definition '*decision-making capacity*—see section 9 (1).' means that the term 'decision-making capacity' is defined in that subsection.

*Note 2* A definition in the dictionary (including a signpost definition) applies to the entire Act unless the definition, or another provision of the Act, provides otherwise or the contrary intention otherwise appears (see Legislation Act, s 155 and s 156 (1)).

## 4 Notes

A note included in this Act is explanatory and is not part of this Act.

*Note* See the Legislation Act, s 127 (1), (4) and (5) for the legal status of notes.

## 5 Offences against Act—application of Criminal Code etc

Other legislation applies in relation to offences against this Act.

*Note 1* *Criminal Code*

The Criminal Code, ch 2 applies to all offences against this Act (see Code, pt 2.1).

The chapter sets out the general principles of criminal responsibility (including burdens of proof and general defences), and defines terms used for offences to which the Code applies (eg *conduct*, *intention*, *recklessness* and *strict liability*).

*Note 2* *Penalty units*

The Legislation Act, s 133 deals with the meaning of offence penalties that are expressed in penalty units.

## Chapter 2 General overview and important concepts

### 6 Principal and attorney

An *attorney* is a person who is authorised under a power of attorney to make decisions and do particular other things for the person (the *principal*) who made the power of attorney.

### 7 What is a *general power of attorney*?

A *general power of attorney* is a power of attorney under this Act that operates only while the principal has decision-making capacity.

### 8 What is an *enduring power of attorney*?

An *enduring power of attorney* is a power of attorney under this Act that is not revoked by the principal becoming a person with impaired decision-making capacity.

*Note* An enduring power of attorney operates as a general power of attorney while the principal has decision-making capacity (see s 31).

### 9 What are *decision-making capacity* and *impaired decision-making capacity*?

- (1) For this Act, a person has *decision-making capacity* if the person can make decisions in relation to the person's affairs and understands the nature and effect of the decisions.

- (2) For this Act, a person has ***impaired decision-making capacity*** if the person cannot make decisions in relation to the person's affairs or does not understand the nature or effect of the decisions the person makes in relation to the person's affairs.

*Note 1* A person is not taken to have impaired decision-making capacity only because of certain attributes or behaviours (see s 91).

*Note 2* For the criteria to work out if a person understands the nature and effect of making an enduring power of attorney, see s 17.

## 10 **Meaning of *property matter***

In this Act:

***property matter***, for a principal, means a matter relating to the principal's property.

### **Examples of property matters a power of attorney may deal with**

- 1 paying maintenance and accommodation expenses for the principal and the principal's dependants
- 2 paying the principal's debts and expenses
- 3 receiving and recovering amounts payable to the principal
- 4 carrying on the principal's trade or business
- 5 performing contracts entered into by the principal
- 6 discharging a mortgage over the principal's property
- 7 paying rates, taxes and other outgoings for the principal's property
- 8 insuring the principal or the principal's property
- 9 preserving or improving the principal's estate
- 10 investing in authorised investments for the principal
- 11 continuing investments of the principal, including taking up rights to share issues, or options for new shares, to which the principal becomes entitled because of the principal's shareholding
- 12 undertaking transactions for the principal involving the use of the principal's property as security for the benefit of the principal
- 13 undertaking a real estate transaction for the principal
- 14 dealing with land under the *Land Titles Act 1925* for the principal

15 withdrawing amounts from, or depositing amounts into, an account of the principal held with an authorised deposit-taking institution

16 legal matters in relation to the principal's finances and property

*Note* An example is part of the Act, is not exhaustive and may extend, but does not limit, the meaning of the provision in which it appears (see Legislation Act, s 126 and s 132).

## 11 Meaning of *personal care matter*

In this Act:

*personal care matter*, for a principal, means a matter, other than a health care matter, special personal matter or special health care matter relating to the principal's personal care, including the principal's welfare.

### Examples of personal care matters a power of attorney may deal with

- 1 where the principal lives
- 2 who the principal lives with
- 3 whether the principal works and, if the principal works, where and how the principal works
- 4 what education or training the principal gets
- 5 whether the principal applies for a licence or permit
- 6 the principal's daily dress and diet
- 7 whether to consent to a forensic examination of the principal
- 8 whether the principal will go on holiday and where
- 9 legal matters relating to the principal's personal care

*Note 1* *Special personal matter*—see s 36. *Special health care matter*—see s 37.

*Note 2* An example is part of the Act, is not exhaustive and may extend, but does not limit, the meaning of the provision in which it appears (see Legislation Act, s 126 and s 132).

## 12      **Meaning of *health care matter***

In this Act:

***health care matter***, for a principal, means a matter, other than a special health care matter, relating to the principal's health care.

### **Examples of health care matters a power of attorney may deal with**

- 1    consenting to lawful medical treatment necessary for the principal's wellbeing
- 2    donations under the *Transplantation and Anatomy Act 1978* by the principal or someone else
- 3    withholding or withdrawal of medical treatment for the principal
- 4    legal matters relating to the principal's health care

*Note 1*    ***Special health care matter***—see s 37.

*Note 2*    An example is part of the Act, is not exhaustive and may extend, but does not limit, the meaning of the provision in which it appears (see Legislation Act, s 126 and s 132).

## **Chapter 3**            **How to appoint an attorney**

### **Part 3.1**            **What the principal needs to do**

#### **13**            **Authorisation of attorneys**

- (1) An adult (the *principal*) may, by a power of attorney, authorise 1 or more people to do anything for the principal that the principal can lawfully do by an attorney.

*Note 1* If a form is approved under s 92 for this provision, the form must be used.

*Note 2* The principal must understand the nature and effect of making the power of attorney (see s 17 and s 18).

*Note 3* Section 14 contains limits on this general power of appointment in relation to enduring powers of attorney.

*Note 4* A power to authorise a person to do something includes a power to authorise a corporation to do the thing (see Legislation Act, s 160 (1)).

- (2) By an enduring power of attorney, an adult (the *principal*) may also authorise 1 or more people to do anything in relation to 1 or more property matters, personal care matters or health care matters for the principal that the principal could lawfully do by an attorney if the principal had decision-making capacity for the matter when the power to do the thing is exercised.

*Note* Section 14 contains limits on this general power of appointment.

- (3) However, the adult must not, by a power of attorney, authorise a child as an attorney.



**14 Limit on s 13 power to appoint attorneys—enduring powers of attorney**

- (1) Under section 13, a principal must not, in an enduring power of attorney, appoint as an attorney for a property matter—
  - (a) a corporation other than—
    - (i) the public trustee; or
    - (ii) a trustee company under the *Trustee Companies Act 1947*; or
  - (b) a person who is bankrupt or has executed a personal insolvency agreement.

*Note* For the extended meaning of **bankrupt** and **personal insolvency agreement**, see the dictionary.

- (2) Under section 13, a principal must not, in an enduring power of attorney, appoint a corporation as an attorney for a personal care or health care matter.
- (3) Under section 13, a principal must not, in an enduring power of attorney, appoint the public advocate as an attorney for a matter other than a personal care or health care matter.
- (4) A person for whom a guardian or manager is appointed under the *Guardianship and Management of Property Act 1991* cannot make an enduring power of attorney unless the guardianship tribunal approves the provisions of the power.

**15 Authorisation of attorneys by name or position**

A principal may authorise an attorney to act under a power of attorney by—

- (a) naming the person authorised; or

- (b) nominating the occupant of a position (however described), at a particular time or from time to time.

*Note* The principal may revoke a power of attorney if the principal has decision-making capacity.

## **16 When and how power under power of attorney exercisable**

- (1) A principal may state in a power of attorney when, and how, power under the power of attorney is exercisable.

### **Examples of when power may be exercisable**

- 1 if I am outside Australia for more than 1 month
- 2 if the property at 13 Mae West Drive is sold
- 3 starting on 14 February 2007

*Note* An example is part of the Act, is not exhaustive and may extend, but does not limit, the meaning of the provision in which it appears (see Legislation Act, s 126 and s 132).

- (2) However, if the power of attorney does not state when the power is exercisable, the power can be exercised once the power of attorney is made.

## **17 Understanding nature and effect of making powers of attorney**

Understanding the nature and effect of making a power of attorney includes understanding each of the following:

- (a) that the principal may, in the power of attorney, state or limit the power to be given to an attorney;
- (b) that the principal may, in the power of attorney, instruct the attorney about the exercise of the power;
- (c) when the power under the power of attorney can be exercised;

- (d) that, if the power under a power of attorney can be exercised for a matter, the attorney has the power to make decisions in relation to, and will have full control over, the matter subject to terms or information about exercising the power that are included in the power of attorney;
- (e) that the principal may revoke the power of attorney at any time the principal is capable of making the power of attorney;
- (f) for enduring powers of attorney only—
  - (i) that the power given by the principal continues even if the principal becomes a person with impaired decision-making capacity; and
  - (ii) that, at any time the principal is not capable of revoking the power of attorney, the principal cannot effectively oversee the use of the power.

*Note* A person has decision-making capacity if the person can make decisions in relation to the person's affairs and understands the nature and effect of the decisions (see s 9 (1)).

## **18 Presumption that principal understands nature and effect of making power of attorney**

In the absence of evidence to the contrary, a principal who makes a power of attorney is taken, for this Act, to understand the nature and effect of making the power of attorney.

## **Part 3.2 Technical requirements**

### **19 Formal requirements for powers of attorney**

- (1) A power of attorney must be signed—
  - (a) by the principal; or
  - (b) by the direction, and in the presence, of the principal, by someone eligible to sign for the principal.

*Note* See s 20 for who is eligible to sign for the principal.

- (2) The power of attorney must—
  - (a) be signed and dated by 2 adult witnesses in the presence of the principal and each other; and
  - (b) contain a certificate signed by each witness in accordance with section 22.

*Note* Section 21 sets out who can be a witness to a power of attorney.

### **20 Who can sign for the principal?**

A person is eligible to sign a power of attorney for the principal if the person—

- (a) is an adult; and
- (b) is not a witness for the power of attorney; and
- (c) is not an attorney for the principal.

### **21 Who can be a witness?**

- (1) A person cannot be a witness to a power of attorney if the person is—
  - (a) a person signing the power of attorney for the principal; or

- (b) a person authorised as attorney under the power of attorney; or
  - (c) a child.
- (2) Only 1 of the witnesses to the power of attorney can be a relative of—
- (a) the principal; or
  - (b) a person authorised as attorney under the power of attorney.
- (3) For an enduring power of attorney, 1 witness must be a person authorised to witness the signing of a statutory declaration.

## **22 Certificates by witnesses to powers of attorney**

- (1) If a power of attorney is signed by the principal, the power of attorney must include a certificate signed by each witness stating that—
- (a) the principal signed the power of attorney voluntarily in the presence of the witness; and
  - (b) at the time the principal signed the power of attorney, the principal appeared to the witness to understand the nature and effect of making the power of attorney.

*Note* A principal must understand the matters in s 17 to understand the nature and effect of making a power of attorney. However, in the absence of evidence to the contrary, the principal is taken to understand the nature and effect of making the power of attorney (see s 18).

- (2) If a power of attorney is signed by a person for the principal, the power of attorney must include a certificate signed by each witness stating that—
- (a) the principal directed the person to sign the power of attorney for the principal; and
  - (b) the principal gave the direction voluntarily in the presence of the witness; and

- (c) the person signed the power of attorney in the presence of the principal and the witness; and
- (d) at the time the principal signed the power of attorney, the principal appeared to the witness to understand the nature and effect of making the power of attorney.

**23** **Enduring power of attorney ineffective for attorney unless accepted**

An enduring power of attorney is effective in relation to an attorney only if the attorney has accepted the appointment by signing the enduring power of attorney.

*Note* For what happens if 1 of multiple attorneys does not accept appointment, see section 28.

**24** **Powers of attorney may be made outside ACT**

For this Act, it does not matter whether a power of attorney made under this Act is made in or outside the ACT.

## Part 3.3 Appointment of 2 or more attorneys

*Note to pt 3.3*

For provisions about multiple attorneys and revocation, see s 65 to s 68.

### 25 Appointment of 2 or more attorneys under power of attorney

A principal may, under a power of attorney, authorise 2 or more attorneys in either or both of the following ways:

- (a) by authorising the attorneys to act together or separately, or in any combination;
- (b) by authorising different attorneys to act in different circumstances, on the happening of different events or in relation to different matters.

#### Examples

- 1 A power of attorney authorises Jo to act for the principal only if Wilhelm (another attorney) becomes a person with impaired decision-making capacity.
- 2 A power of attorney authorises Frank to act for the principal until Melissa turns 18 and becomes the attorney.
- 3 A power of attorney authorises Violet and Ian as attorneys act separately for the principal, except in relation to health care matters when they must make decisions together.

*Note* An example is part of the Act, is not exhaustive and may extend, but does not limit, the meaning of the provision in which it appears (see Legislation Act, s 126 and s 132).

**26 Multiple attorneys usually joint**

- (1) This section applies if—
  - (a) 2 or more attorneys are authorised under a power of attorney in relation to a matter; and
  - (b) the power of attorney does not state how they are to share a power given to them.
- (2) The attorneys are authorised to exercise the power together but not separately.

**27 If multiple attorneys cannot exercise power unanimously**

- (1) This section applies if—
  - (a) 2 or more attorneys are authorised under an enduring power of attorney by a principal in relation to a matter; and
  - (b) the power of attorney does not state how they are to share a power given to them; and
  - (c) the principal has impaired decision-making capacity; and
  - (d) it is impracticable or impossible for the attorneys to exercise the power unanimously.
- (2) One or more of the attorneys, or another interested person in relation to the power of attorney, may apply to the guardianship tribunal for directions or an order.
- (3) In this section:  
*interested person*—see section 74.



**28 Effect of joint attorney not accepting enduring power of attorney**

- (1) This section applies if—
  - (a) an enduring power of attorney authorises 3 or more attorneys to exercise a power together but not separately; and
  - (b) the power of attorney does not require a stated number of attorneys to accept the power of attorney before the attorneys may exercise the power; and
  - (c) not all, but at least 2, of the attorneys have accepted the power of attorney.
- (2) The attorneys who have accepted the power under the enduring power of attorney may exercise the power.

**Example**

Alex authorises Beryl, Claude and David to act together as attorneys under an enduring power of attorney. Beryl and David accept the power of attorney, Claude does not. Beryl and David may exercise a power under the power of attorney together. Claude accepts the enduring power of attorney later. After Claude accepts, Beryl and David cannot exercise the power without Claude.

*Note* An example is part of the Act, is not exhaustive and may extend, but does not limit, the meaning of the provision in which it appears (see Legislation Act, s 126 and s 132).

- (3) However, if the enduring power of attorney requires a stated number of attorneys to exercise a power together, the power must not be exercised unless that number of attorneys accepts the power of attorney.

## **Chapter 4            Operation of powers of attorney**

### **Part 4.1            Operation of powers of attorney generally**

#### **29            Powers of attorney are deeds**

- (1) A power of attorney that complies with this Act is, for all purposes, taken to be a deed, even though it is not expressed to be a deed or to be sealed.

*Note*      A deed may be registered (see *Registration of Deeds Act 1957*) and must be registered for a dealing with land by the attorney to be registered (see *Land Titles Act 1925*, s 130).

- (2) In this section:

*power of attorney* includes—

- (a) an amendment of a power of attorney; and
- (b) a revocation of a power of attorney.

#### **30            Principal may act despite giving power of attorney**

To remove any doubt, the giving of a power of attorney does not affect the principal's power to do anything that the principal is otherwise legally capable of doing.

#### **31            How does enduring power of attorney operate while principal has capacity?**

- (1) This section applies to an enduring power of attorney that operates while the principal has decision-making capacity.

- (2) While the principal has decision-making capacity, the power of attorney operates as a general power of attorney.

## Part 4.2 Operation of enduring powers of attorney

### 32 Enduring power of attorney—principal's impaired decision-making capacity

- (1) An enduring power of attorney giving power in relation to a matter is not revoked by the principal becoming a person with impaired decision-making capacity, either generally or in relation to the matter.
- (2) Also, a power under an enduring power of attorney can be exercised—
  - (a) while the principal has impaired decision-making capacity; and
  - (b) whether or not a condition about when the power is to start to operate is satisfied.

#### Example

An enduring power of attorney appointing Jack is stated to take effect on 3 January 2007. However, the principal becomes a person with impaired decision-making capacity on 27 October 2006. Jack can exercise a power under the enduring power of attorney starting on 27 October 2006.

*Note 1* A medical certificate can be evidence that the principal had, or did not have, impaired decision-making capacity (see s 87).

*Note 2* An example is part of the Act, is not exhaustive and may extend, but does not limit, the meaning of the provision in which it appears (see Legislation Act, s 126 and s 132).

## **Part 4.3**                    **Things attorneys can and cannot do**

### **Division 4.3.1**           **Things attorneys can and cannot do generally**

#### **33**                    **Others acting for attorney**

- (1) An attorney under a general power of attorney may authorise someone else to exercise all or any of the attorney's powers, whether or not there is express power for the authorisation.

**Examples of authorisations**

- 1 substitute decision-maker
- 2 delegate
- 3 sub-attorney

*Note 1* An example is part of the Act, is not exhaustive and may extend, but does not limit, the meaning of the provision in which it appears (see Legislation Act, s 126 and s 132).

*Note 2* If a form is approved under s 92 for this provision, the form must be used.

- (2) An enduring power of attorney does not authorise an attorney to authorise anyone else to exercise the powers of the attorney while the principal has impaired decision-making ability.
- (3) However, if an enduring power of attorney expressly authorises an attorney to authorise someone else to exercise all or any of the attorney's powers, the attorney may, in accordance with the express authorisation, authorise someone else to exercise the attorney's powers if—
- (a) the person could be appointed as an attorney under an enduring power of attorney; and

- (b) the person authorised is known to the principal, or was known to the principal when the principal had decision-making capacity.
- (4) To remove any doubt, a person authorised under this section to exercise an attorney's powers is taken to be the attorney for this Act.

**34      Powers of attorney do not generally give authority to benefit attorneys**

A power of attorney does not authorise an attorney to execute an assurance or other document, or do anything else, that would result in a benefit being given to the attorney unless the power of attorney expressly authorises the giving of a benefit of that kind to the attorney.

**35      Things that cannot be lawfully done by attorneys**

A principal cannot do the following by an attorney under a power of attorney:

- (a) authorise the attorney to exercise power in relation to special personal matters;
- (b) authorise the attorney to exercise power in relation to special health care matters.

*Note*      *Special personal matter*—see s 36.    *Special health care matter*—see s 37.

**36      Special personal matters**

For this Act, each of the following is a *special personal matter* for a principal:

- (a) making or revoking the principal's will;
- (b) making or revoking a power of attorney or enduring power of attorney for the principal;

- (c) exercising the principal's right to vote in a Commonwealth, Territory, State or local government election or referendum;
- (d) consenting to the adoption of a child of the principal who is under 18 years;
- (e) consenting to the marriage of the principal.

**37 Special health care matters**

- (1) For this Act, each of the following is a *special health care matter* for a principal:
- (a) removal of non-regenerative tissue from the principal while alive for donation to someone else;
  - (b) sterilisation of the principal if the principal is, or is reasonably likely to be, fertile;
  - (c) termination of the principal's pregnancy;
  - (d) participation in medical research or experimental health care;
  - (e) treatment for mental illness;
  - (f) electroconvulsive therapy or psychiatric surgery;
  - (g) health care prescribed by regulation.

*Note* **Health care**—see the dictionary.

(2) In this section:

***electroconvulsive therapy***—see the *Mental Health (Treatment and Care) Act 1994*, section 55.

***health care primarily to treat organic malfunction or disease***, of a principal, means health care without which an organic malfunction or disease of the principal is likely to cause serious or irreversible damage to the principal's physical health.

**Examples of health care covered by par (a)**

- 1 Health care involving sterilisation may be primarily to treat organic malfunction or disease if the principal has cancer affecting the reproductive system or cryptorchidism.
- 2 A procedure involving termination of a principal's pregnancy may be primarily to treat organic malfunction if the principal requires abdominal surgery for injuries sustained in an accident.

*Note 1* ***Health care primarily to treat organic malfunction or disease*** is used in the definitions of *sterilisation* and *termination*.

*Note 2* An example is part of the Act, is not exhaustive and may extend, but does not limit, the meaning of the provision in which it appears (see Legislation Act, s 126 and s 132).

***mental illness***—see the *Mental Health (Treatment and Care) Act 1994*, dictionary.

***non-regenerative tissue***—see the *Transplantation and Anatomy Act 1978*, section 4 (1) (Interpretation).

***psychiatric surgery***—see the *Mental Health (Treatment and Care) Act 1994*, dictionary.

***sterilisation***, of a principal—

- (a) means health care of the principal that is intended, or reasonably likely, to make the principal, or ensure the principal is, permanently infertile; but



(b) does not include health care primarily to treat organic malfunction or disease of the principal.

**Examples of sterilisation if not primarily to treat organic malfunction or disease**

- 1 endometrial ablation
- 2 hysterectomy
- 3 tubal ligation
- 4 vasectomy

*termination*, of a principal's pregnancy, does not include health care primarily to treat organic malfunction or disease of the principal.

## **Division 4.3.2 Things attorneys can and cannot do under enduring powers of attorney**

### **38 Enduring powers of attorney do not generally give authority to make gifts**

An enduring power of attorney does not authorise the attorney to make a gift of all or any of the principal's property to anyone else unless the power of attorney expressly authorises the making of the gift.

### **39 Express general authority to make gifts in enduring powers of attorney**

- (1) This section applies if an enduring power of attorney contains a general authorisation to make gifts.
- (2) A general authorisation to make gifts (however described) in an enduring power of attorney authorises the following gifts:
  - (a) a gift made to a relative or close friend of the principal for a celebration or special event;

- (b) a gift that is a donation of a kind that—
- (i) the principal made when the principal had decision-making capacity; or
  - (ii) the principal might reasonably be expected to make.

**Examples of celebrations for par (a)**

- 1 birthday
- 2 Easter
- 3 Hanukah

**Examples of special events for par (a)**

- 1 birth
- 2 marriage
- 3 graduation

*Note* An example is part of the Act, is not exhaustive and may extend, but does not limit, the meaning of the provision in which it appears (see Legislation Act, s 126 and s 132).

- (3) However, the general authorisation to make gifts in an enduring power of attorney does not authorise making a gift mentioned in subsection (2) if the value of the gift is more than is reasonable to make.
- (4) In working out what is reasonable for subsection (3), and without limiting what must be considered, the principal's financial circumstances and the size of the principal's estate must be considered.
- (5) Subsection (2) does not prevent the attorney, or a charity with which the attorney has a connection, from receiving a gift under the general authorisation to make gifts.

**40 Express general authority to provide for reasonable living expenses in enduring powers of attorney**

- (1) This section applies if an enduring power of attorney expressly authorises the payment of reasonable living expenses (however described) for a named person.
- (2) Unless the power of attorney expressly provides otherwise, the power of attorney only authorises the payment of reasonable costs of the following in relation to the named person:
  - (a) housing;
  - (b) food;
  - (c) education;
  - (d) transportation;
  - (e) medical care and medication.
- (3) In working out what are reasonable costs for subsection (2), and without limiting what must be considered, the principal's financial circumstances and the size of the principal's estate must be considered.

**41 Powers to maintain principal's dependants—enduring powers of attorney**

- (1) An attorney for a property matter under an enduring power of attorney may provide from the principal's estate for the needs of a dependant of the principal.
- (2) However, unless there is a contrary intention expressed in the enduring power of attorney, what is provided must not be more than what is reasonable considering all the circumstances and, in particular, the principal's financial circumstances.

## Part 4.4                      Obligations of attorneys and others

### Division 4.4.1              Obligations of all attorneys

#### 42                      Conflict transactions

- (1) For this section, a *conflict transaction* is a transaction that results, or may result, in conflict between—
  - (a) the duty of an attorney towards the principal; and
  - (b) either—
    - (i) the interests of the attorney, or a relative, business associate or close friend of the attorney; or
    - (ii) another duty of the attorney.
- (2) However, a transaction is not a *conflict transaction* only because, by the transaction, the attorney in the attorney's own right and on behalf of the principal—
  - (a) deals with an interest in property jointly held; or
  - (b) acquires a joint interest in property; or
  - (c) obtains a loan or gives a guarantee or indemnity in relation to a transaction mentioned in paragraph (a) or (b).
- (3) An attorney may enter into a conflict transaction only if the principal authorises the transaction, conflict transactions of that kind or conflict transactions generally, in the power of attorney.
- (4) In this section:  
*joint interest* includes an interest as a joint tenant or tenant in common.

**43      **Obligation of attorneys to keep interested people informed****

- (1) This section applies if any of the following events happen:
    - (a) a person (the *relevant person*) resigns the person's authorisation as attorney under a power of attorney;
    - (b) the authorisation of a person (the *relevant person*) as an attorney under a power of attorney is revoked;
    - (c) a court or the guardianship tribunal makes an order in relation to a power of attorney that affects the authorisation of a person (the *relevant person*) under the power of attorney.
  - (2) The relevant person must give notice of the event to—
    - (a) any other attorney or person authorised under the power of attorney to exercise the relevant person's powers as attorney; and
    - (b) if the event is the making of a court order or guardianship tribunal order in relation to the power of attorney that affects the relevant person's authorisation under the power of attorney—each person dealing with the relevant person as an attorney.
- Note*      An attorney under a general power of attorney may authorise someone to exercise the attorney's powers (see s 33).
- (3) However, the relevant person need not give notice under subsection (2) to a person (the *informed person*) about an event if the relevant person believes, on reasonable grounds, that the informed person already knows about the event.

## **Division 4.4.2            Obligations of attorneys under enduring power of attorney—principal with impaired decision-making capacity**

### **44            Principles for attorneys under enduring powers of attorney**

The principles (the *general principles*) set out in schedule 1 must be complied with to the maximum extent possible by a person who exercises the functions of an attorney under an enduring power of attorney in relation to a principal with impaired decision-making capacity.

### **45            Right of attorneys to information—enduring powers of attorney**

- (1) This section applies in relation to an enduring power of attorney if the principal has impaired decision-making capacity.
- (2) An attorney under the enduring power of attorney has a right to all the information (the *available information*) that the principal would have been entitled to if the principal had decision-making capacity.
- (3) A person who has custody or control of the available information must disclose the information to the attorney if asked.
- (4) However, subsections (2) and (3) are subject to any contrary intention, or express limitation, in the enduring power of attorney.

### **46            Conditions on exercise of power in relation to medical treatment—enduring powers of attorney**

- (1) This section applies in relation to an enduring power of attorney if the principal has impaired decision-making capacity.

- (2) An attorney under the enduring power of attorney must not ask for medical treatment to be withheld or withdrawn from the principal unless—
- (a) the attorney has consulted a doctor about—
    - (i) the nature of the principal’s illness; and
    - (ii) any alternative forms of treatment available to the principal; and
    - (iii) the consequences to the principal of remaining untreated; and
  - (b) the attorney believes, on reasonable grounds, that the principal would ask for the medical treatment to be withheld or withdrawn if the principal—
    - (i) could make a rational judgment; and
    - (ii) were to give serious consideration to the principal’s own health and wellbeing.

**47 Keeping records—enduring powers of attorney**

An attorney for a property matter under an enduring power of attorney must, while the principal has impaired decision-making capacity, keep accurate records and accounts of all dealings and transactions made under the power.

**48 Keeping property separate—enduring powers of attorney**

- (1) An attorney for a property matter under an enduring power of attorney must, while the principal has impaired decision-making capacity, keep the attorney’s property separate from the principal’s property.

*Note* **Property** includes money and financial assets (see dict).

- (2) This section does not—
- (a) apply to property owned jointly by the principal and attorney;  
or
  - (b) affect any other obligation imposed under territory law.

### **Division 4.4.3            Obligations in relation to health care**

#### **49            Obligations on health care facilities in relation to powers of attorney**

The person in charge of a health care facility must take all reasonable steps to ensure that—

- (a) each person receiving care at the facility is asked whether the person has an enduring power of attorney for personal care matters or health care matters; and
- (b) if a person has a power of attorney of that kind—a copy of the power of attorney is kept with the person's records; and
- (c) a process is in place to periodically check the currency of powers of attorney kept.



## **Part 4.5**                      **If attorneys do not comply with Act**

### **50**                      **Compensation for failure to comply with Act**

- (1) An attorney under a power of attorney may be ordered by the Supreme Court to compensate the principal (or, if the principal has died, the principal's estate) for a loss caused by the attorney's failure to comply with this Act in the exercise of a power.

*Note*            Under s 52, the attorney may be relieved from liability.

- (2) Subsection (1) applies whether or not the attorney is convicted of an offence in relation to the attorney's failure.
- (3) If the principal or attorney has died, the application for compensation must be made to a court within 6 months after the day of the death.
- (4) If the principal and the attorney have died, the application for compensation must be made to a court within 6 months after the day of the first death.
- (5) The Supreme Court may extend the application time under subsection (3) or (4).

*Note*            An application for an extension may be made before or after the end of the period to be extended (see Legislation Act, s 151C).

### **51**                      **Compensation under s 50 and later civil proceeding**

- (1) This section applies if—
  - (a) compensation for an attorney's failure to comply with this Act is paid in accordance with an order under section 50; and
  - (b) a later civil proceeding is brought in relation to the same failure.

- (2) The payment of compensation must be taken into account in assessing damages in the civil proceeding.

**52      Relief from personal liability by court**

- (1) This section applies if a court considers that—
- (a) an attorney is, or may be, personally liable for a contravention of this Act; and
  - (b) the attorney has acted honestly and reasonably and ought fairly to be excused for the contravention.
- (2) The court may relieve the attorney from all or part of the attorney's personal liability for the contravention.
- (3) If the attorney is an attorney under an enduring power of attorney, in deciding whether the attorney should be relieved of liability, the court must consider the extent to which the attorney has acted consistently with the general principles.

## Chapter 5 Ending powers of attorney

### *Note to ch 5*

An enduring power of attorney, or part of the power, may also be revoked by the guardianship tribunal.

### **53 Resignation of attorney's authorisation under power of attorney**

- (1) An attorney may resign the attorney's authorisation under a power of attorney by written notice of resignation given to the principal.
- (2) However, if a principal has impaired decision-making capacity for a matter, an attorney under an enduring power of attorney may only resign as attorney for the matter with the leave of the guardianship tribunal.

*Note* The guardianship tribunal may appoint a guardian for the principal (see *Guardianship and Management of Property Act 1991*, s 7).

- (3) To remove any doubt, a power of attorney is revoked in relation to an attorney if the attorney resigns the attorney's authorisation in accordance with this section.

### **54 No irrevocable powers of attorney**

A power of attorney may be revoked under this Act, whether or not the power states otherwise.

### **55 Advice of revocation of power of attorney**

If a principal revokes a power of attorney, the principal must take reasonable steps to tell all attorneys affected by the revocation.

**56 Revocation of power of attorney according to its terms**

If a power of attorney ceases to have effect according to its terms, the power of attorney is revoked.

**Examples**

- 1 If a general power of attorney is expressed to operate from 1 January 2006 to 25 January 2006, it is revoked at the end of that period.
- 2 If a general power of attorney is expressed to operate for the sale of a house, it is revoked once the sale is complete.

*Note* An example is part of the Act, is not exhaustive and may extend, but does not limit, the meaning of the provision in which it appears (see Legislation Act, s 126 and s 132).

**57 Principal's impaired decision-making capacity—general power of attorney**

If the principal for a general power of attorney becomes a person with impaired decision-making capacity, the power of attorney is revoked.

*Note* A person must not be taken to have impaired decision-making capacity only because of certain attributes or behaviours (see s 91).

**58 Enduring power of attorney sometimes revoked by marriage**

- (1) This section applies to an enduring power of attorney if—
  - (a) a person is appointed as attorney under the power of attorney; and
  - (b) the principal gets married; and
  - (c) the attorney is not the person the principal marries.
- (2) The enduring power of attorney is revoked in relation to the attorney unless the power of attorney expressly states that it is not revoked in the circumstances.

**59 Enduring power of attorney sometimes revoked by divorce**

- (1) This section applies to an enduring power of attorney if—
  - (a) a person is appointed as attorney under the power of attorney; and
  - (b) the principal marries, or is married to, the attorney; and
  - (c) the principal and the attorney divorce.
- (2) The enduring power of attorney is revoked in relation to the attorney.

**60 Death of principal for power of attorney**

If the principal for a power of attorney dies, the power of attorney is revoked.

**61 Death of attorney under power of attorney**

If an attorney under a power of attorney dies, the power of attorney is revoked to the extent that it gives power to the attorney.

**62 Effect of bankruptcy of individual attorney**

- (1) This section applies if—
  - (a) an attorney under an enduring power of attorney is an individual; and
  - (b) the attorney becomes bankrupt or executes a personal insolvency agreement.
- (2) The power of attorney is revoked to the extent that it gives power to the attorney in relation to property matters.

*Note* For the extended meaning of *bankrupt* and *personal insolvency agreement*, see the dictionary.

**63 Attorney's impaired decision-making capacity for power of attorney**

If an attorney under a power of attorney becomes a person with impaired decision-making capacity, the power of attorney is revoked in relation to the attorney.

*Note* A person must not be taken to have impaired decision-making capacity only because of certain attributes or behaviours (see s 91).

**64 Effect of winding up etc of corporate attorney**

- (1) This section applies if—
- (a) an attorney under a power of attorney is a corporation; and
  - (b) either—
    - (i) the attorney has been, or is being, wound up; or
    - (ii) a liquidator is appointed for the attorney.

*Note* **Liquidator**—see the dictionary.

- (2) The power of attorney is revoked to the extent that it gives power to the attorney.

**65 Multiple attorneys with separate powers—effect of revocation of powers of some attorneys**

If a power of attorney authorises 2 or more people as attorneys to act separately (whether or not in relation to a matter), the revocation of the power of attorney in relation to 1 or more attorneys does not revoke the power of attorney in relation to the other attorneys.

**66 Joint general power of attorney—effect of revocation of powers of some attorneys**

If a general power of attorney authorises 2 or more people to exercise power as attorneys together but not separately (whether or not in relation to a matter), the power of attorney is revoked if the power is revoked in relation to 1 or more of the attorneys.

**67 Joint enduring power of attorney—effect of revocation of powers of attorneys**

- (1) This section applies if—
  - (a) an attorney's power under an enduring power of attorney for a matter is revoked; and
  - (b) the attorney was authorised to exercise power for the matter under the power of attorney together with 1 or more other attorneys, but not separately; and
  - (c) the principal has impaired decision-making capacity.
- (2) If there is only 1 remaining attorney in relation to the matter, the remaining attorney may exercise power for the matter.
- (3) If there are 2 or more remaining attorneys in relation to the matter, the remaining attorneys may exercise power in relation to the matter and, if exercising power, must exercise power together.

**68 Power of attorney revoked in relation to each attorney**

A power of attorney is revoked when—

- (a) if there is only 1 attorney appointed—the power of attorney is revoked in relation to the attorney; or
- (b) if there are 2 or more attorneys appointed—the power of attorney is revoked in relation to each or the last of them.

*Note* If an attorney resigns, the power of attorney is revoked in relation to the attorney (see s 53 (3)).

**69 Revocation by later power of attorney**

A principal's power of attorney is revoked, to the extent of an inconsistency, by a later power of attorney of the principal.



## Chapter 6                      Protection and relief from liability

### 70                      Definitions—ch 6

In this chapter:

*invalidity*, of a power of attorney—

- (a) means *invalidity* because—
- (i) the power of attorney purports to have been made under the law of a State or Territory and does not comply with the requirements of that law; or
  - (ii) the person making the power of attorney could not make the power of attorney at the time the person purported to make it; or
  - (iii) the power of attorney has been revoked, either completely or in relation to the person purporting to exercise power under the power of attorney; and
- (b) includes *invalidity* of the power of attorney for any other reason.

**Example for par (a) (ii)**

A person purports to make a power of attorney but a guardian has been appointed for the person and the guardianship tribunal has not approved the provisions of the power (see s 14 (4)).

*Note*                      An example is part of the Act, is not exhaustive and may extend, but does not limit, the meaning of the provision in which it appears (see Legislation Act, s 126 and s 132).

*invalidity*, of a power under a power of attorney—

- (a) means *invalidity* because the power is not exercisable at the time it is purportedly exercised; and

(b) includes *invalidity* of the power for any other reason.

*know*, of the invalidity of a power of attorney or a power under a power of attorney, includes—

- (a) know of the happening of an event that invalidates the power of attorney or power; or
- (b) have reason to believe the power of attorney or power is invalid.

*power of attorney* includes a document purporting to be a power of attorney.

## **71 Protection if tribunal or court orders etc**

- (1) This section applies if a court, or the guardianship tribunal, gives an order or direction in relation to the exercise of power under a power of attorney.
- (2) An attorney who acts in accordance with the order or direction is taken to have complied with this Act.
- (3) However, subsection (2) does not apply in relation to the order or direction if the attorney knowingly gave the court or tribunal false or misleading information relevant to the order or direction.

## **72 Protection for attorney if unaware of invalidity**

- (1) This section applies if—
  - (a) a power of attorney is invalid; and
  - (b) the attorney purports to exercise a power under the power of attorney without knowing the power of attorney is invalid.
- (2) This section also applies if—
  - (a) a power exercised under a power of attorney is invalid; and

- (b) the attorney purports to exercise the power without knowing the power is invalid.
- (3) The attorney does not incur any liability, either to the principal or anyone else, because of the invalidity.
- (4) Anything done by the attorney in the exercise of the power under the invalid power of attorney or of an invalid power is, for all purposes, taken to have been done as if the power of attorney or power were not invalid.

**73      Protection for transaction if dealing with attorney and unaware of invalidity**

- (1) This section applies to a person who—
  - (a) deals with a person (the *attorney*) who is acting, or purporting to act, as an attorney under a power of attorney; and
  - (b) at the time of the dealing, did not know that the power of attorney, or power under the power of attorney, was invalid.
- (2) A transaction between the attorney and the person is, in favour of the person, as valid as if the power of attorney or power were not invalid.

## **Chapter 7**                    **Guardianship tribunal, Supreme Court and proceedings and rights**

### **Part 7.1**                    **Interpretation—ch 7**

#### **74**                    **Meaning of *interested person*—ch 7**

In this chapter:

*interested person*—each of the following is an *interested person* in relation to a power of attorney:

- (a) an attorney;
- (b) the principal;
- (c) a relative of the principal;
- (d) the public advocate;
- (e) the public trustee;
- (f) a guardian of the principal;
- (g) a manager of the principal.

## Part 7.2 Guardianship tribunal

### 75 Guardianship tribunal directions etc for enduring powers of attorney

- (1) This section applies in relation to an enduring power of attorney if the principal has impaired decision-making capacity.
- (2) On application, or on its own initiative on hearing a matter under the *Guardianship and Management of Property Act 1991*, the guardianship tribunal may, by order—
  - (a) give a direction, not inconsistent with this Act or the power of attorney, that the attorney do or not do a stated act; or
  - (b) direct the attorney to produce stated books, accounts or other records of transactions carried out by the attorney for the principal; or
  - (c) revoke the enduring power of attorney, or part of it; or
  - (d) make a declaration about the interpretation or effect of the enduring power of attorney.

*Note* The guardianship tribunal may only make an order if an inquiry has been held (see *Guardianship and Management of Property Act 1991*, s 33) unless the tribunal is satisfied that there is an emergency (see that Act, s 68A).

- (3) An application under subsection (2) may be made by an interested person or, with leave of the guardianship tribunal, someone else.
- (4) If the guardianship tribunal revokes an enduring power of attorney, the tribunal may, under the *Guardianship and Management of Property Act 1991*, appoint a guardian or manager for the person who was the principal for the power.

**76 Reference of power of attorney matters to Supreme Court**

- (1) This section applies in relation to an application to the guardianship tribunal under section 75 (2).
- (2) A presidential member of the guardianship tribunal may refer the matter, or part of the matter, to the Supreme Court.
- (3) In deciding whether to refer a matter to the Supreme Court, the presidential member of the guardianship tribunal—
  - (a) must take into consideration the following matters:
    - (i) whether the matter relates to the effect of the enduring power of attorney on people other than the attorney or principal;
    - (ii) whether the matter is likely to raise for consideration complex or novel legal issues that the Supreme Court is better suited to decide; and
  - (b) may take into consideration anything else the presidential member considers relevant.
- (4) In this section:  
*presidential member*—see the *Guardianship and Management of Property Act 1991*, dictionary.

**77 Giving accounts to public advocate—enduring powers of attorney**

- (1) This section applies in relation to an enduring power of attorney if the principal has impaired decision-making capacity.

- (2) The public advocate may, by written notice given to a person who is or has been an attorney under the enduring power of attorney, require the person to give the public advocate stated books, accounts or other records of transactions carried out by the person for the principal under the power of attorney.

*Note* The public trustee may be an attorney and, if the public trustee is an attorney, the public advocate may give the public trustee a notice under this section.

## **78 Declaration about decision-making capacity**

- (1) The guardianship tribunal may, on application, declare that a person who is the principal for an enduring power of attorney has decision-making capacity or impaired decision-making capacity.
- (2) A declaration under subsection (1) may be general or may relate only to a property matter, personal care matter or health care matter.

## **79 Removing attorneys**

- (1) This section applies in relation to an enduring power of attorney if the principal has impaired decision-making capacity.
- (2) The guardianship tribunal may, by order, remove an attorney under the enduring power of attorney if satisfied that it is in the interests of the principal to remove the attorney.

## Part 7.3 Supreme Court orders

### 80 Supreme Court—confirming powers understood by principal

- (1) A principal with decision-making capacity may apply to the Supreme Court for an order confirming that an attorney had power under a power of attorney to do an act.
- (2) The Supreme Court may make an order confirming (whether completely or in part) that the attorney had the power to do the act if satisfied that the principal understood the nature and effect of making the power of attorney when the principal made the power of attorney.

*Note* In the absence of evidence to the contrary, the principal is taken to have understood the nature and effect of making a power of attorney when the principal made the power of attorney (see s 18).

### 81 Supreme Court—confirming powers subsequently affirmed by principal

- (1) This section applies if—
  - (a) a principal had impaired decision-making capacity when the principal made a power of attorney; and
  - (b) an attorney acted, or purported to act, under the power of attorney.
- (2) The principal may apply to the Supreme Court for an order confirming that the attorney had power under the power of attorney to do the act.



- (3) The Supreme Court may make an order confirming (whether completely or in part) that the attorney had power to do the act if satisfied that—
- (a) the principal affirmed the power of attorney before or during the proceeding on the application; and
  - (b) the principal had decision-making capacity when affirming the power of attorney.

**82 Effect of pt 7.3 orders on future acts**

- (1) This section applies if the Supreme Court makes an order under this part confirming (whether completely or in part) the power of an attorney to do an act under a power of attorney.
- (2) Any act done by the attorney after the order takes effect that is within the scope of the power confirmed is taken to be as valid for all purposes and between all people as if, when the order took effect, the principal did not have impaired decision-making capacity and had confirmed the power of attorney to the extent of the order of confirmation.

## **Part 7.4                      Other proceedings and rights**

### **83                      Public trustee to assist if asked**

- (1) This section applies in relation to an enduring power of attorney if the principal has impaired decision-making capacity.
- (2) The public trustee must, if asked by the guardianship tribunal, assist the tribunal by examining and reporting on the books, accounts or other records of transactions carried out by an attorney for the principal under the enduring power of attorney.
- (3) The public trustee must, if asked by the public advocate, assist the public advocate by examining and reporting on the books, accounts or other records of transactions carried out by an attorney for the principal under the enduring power of attorney.

### **84                      Access to principal**

- (1) This section applies in relation to an enduring power of attorney if the principal has impaired decision-making capacity.
- (2) The public advocate is entitled to reasonable access to the principal.
- (3) An interested person may apply to the guardianship tribunal for access to the principal.
- (4) The guardianship tribunal may, by order, grant the interested person access to the principal, whether with or without conditions, if satisfied that—
  - (a) an attorney has denied the person access to the principal; and
  - (b) it is reasonable to allow the access.

(5) In this section:

*interested person*, for an application mentioned in subsection (3), includes—

- (a) a relative of the principal; and
- (b) a person who is a carer of the principal or has been a carer of the principal in the last 12 months; and
- (c) a lawyer, or doctor, acting on behalf of a member of the principal's family or relative of the principal.

*Note* *Interested person*—see s 74.

## **85 Attorney's health care decision not in principal's interest**

(1) In this section:

*relevant person*, in relation to a person who is a principal for a power of attorney, means—

- (a) a health professional who is treating, or has at any time treated, the principal; or
- (b) a person in charge of a health care facility where the principal is being, or has at any time been, treated.

(2) This section applies if—

- (a) an attorney makes a decision in relation to the health care of the principal; and
- (b) a relevant person believes, on reasonable grounds, that the decision is not in the best interests of the principal.

(3) The relevant person may tell the public advocate about the decision and explain why the relevant person believes the decision is not in the best interests of the principal.

*Note* Giving information to the public advocate honestly and without recklessness is protected (see *Public Advocate Act 2005*, s 15).

**86 Adequate pain relief**

- (1) This section applies if—
  - (a) an attorney has made a decision that medical treatment be withheld or withdrawn from the principal; and
  - (b) the principal is under the care of a health professional.
- (2) The principal has a right to—
  - (a) receive relief from pain, suffering and discomfort to the maximum extent that is reasonable in the circumstances; and
  - (b) the reasonable provision of food and water.
- (3) In providing relief from pain, suffering and discomfort to the principal, the health professional must give adequate consideration to the principal's account of the principal's level of pain, suffering and discomfort.

**87 Medical certificate about impaired decision-making capacity**

- (1) This section applies if, in a proceeding, a question arises about whether, on a particular day or during a particular period, the principal for an enduring power of attorney had impaired decision-making capacity, whether generally or in relation to a particular matter.
- (2) A certificate by a doctor stating that the principal had, or did not have, impaired decision-making capacity either generally or in relation to a particular matter on the day or during the period is evidence of that fact.

## Chapter 8 Interstate documents equivalent to powers of attorney

### 88 Recognition of general powers of attorney made under other laws

- (1) This section applies if—
  - (a) a document (the *interstate general power of attorney*) is expressed to be a power of attorney made under the law of a State or another Territory; and
  - (b) the interstate general power of attorney is not expressed to operate when the principal has impaired decision-making capacity (however described).
- (2) The interstate general power of attorney is taken to be a general power of attorney made under, and in compliance with, this Act to the extent that the powers it gives could validly have been given by a general power of attorney made under this Act.

### 89 Recognition of enduring powers of attorney made under other laws

- (1) This section applies if—
  - (a) a document (the *interstate enduring power of attorney*) is expressed to be a power of attorney or guardianship document made under the law of a State or another Territory; and
  - (b) the interstate enduring power of attorney is not—
    - (i) revoked if the principal loses decision-making capacity;  
or

- (ii) expressed to be irrevocable, whether completely or for a stated period.
- (2) An interstate enduring power of attorney to which this section applies is taken to be an enduring power of attorney made under, and in compliance with, this Act, to the extent that the powers it gives could validly have been given by an enduring power of attorney made under this Act.

## Chapter 9                      Miscellaneous

### 90                      **Dishonestly inducing making etc of power of attorney**

A person must not dishonestly induce someone else to make or revoke a power of attorney.

Maximum penalty: 100 penalty units, imprisonment for 1 year or both.

### 91                      **Things that do not indicate impaired decision-making capacity**

- (1) For this Act, a person is not taken to have impaired decision-making capacity only because the person—
  - (a) is eccentric; or
  - (b) makes unwise decisions; or
  - (c) does or does not express a particular political or religious opinion; or
  - (d) has a particular sexual orientation or expresses a particular sexual preference; or
  - (e) engages or has engaged in illegal or immoral conduct; or
  - (f) takes or has taken drugs, including alcohol.
- (2) However, in deciding whether a person has impaired decision-making capacity, any effect of drug-taking on the person may be taken into account.

### 92                      **Approved forms**

- (1) The Minister may approve forms for this Act.

- (2) If the Minister approves a form for a particular purpose, the approved form must be used for that purpose.

*Note*      The Legislation Act contains provisions about forms (see s 255).

- (3) An approved form is a notifiable instrument.

*Note*      A notifiable instrument must be notified under the Legislation Act.

### **93      Regulation-making power**

The Executive may make regulations for this Act.

*Note*      Regulations must be notified, and presented to the Legislative Assembly, under the Legislation Act.



## Chapter 20 Transitional provisions

### 150 Definitions—ch 20

In this chapter:

*commencement day* means the day this Act commences.

*previous Act* means the *Powers of Attorney Act 1956*.

### 151 Repeal of Powers of Attorney Act 1956

The *Powers of Attorney Act 1956* A1956-17 is repealed.

### 152 Transitional—application of Act

- (1) This Act applies to a general power of attorney or enduring power of attorney whenever entered into (whether before or after the commencement day).
- (2) However, if a general power of attorney or enduring power of attorney made before commencement day complied with the previous Act when made, the power of attorney is not taken to be invalid only because it does not comply with a provision of this Act about the making of powers of attorney.
- (3) This section is a law to which the Legislation Act, section 88 (Repeal does not end effect of transitional laws etc) applies.

### 153 Transitional—powers of attorney under previous Act, s 6 and s 7

- (1) This section applies to a power of attorney made before commencement day if—
  - (a) the power of attorney was in force immediately before commencement day; and

- (b) the previous Act, section 6 or section 7 applied to the power of attorney immediately before commencement day.

*Note* The *Powers of Attorney Act 1956*, s 6 dealt with irrevocable powers of attorney for value and s 7 dealt with powers of attorney that were irrevocable for a fixed period.

- (2) The previous Act continues to apply in relation to the power of attorney despite its repeal.
- (3) This section is a law to which the Legislation Act, section 88 (Repeal does not end effect of transitional laws etc) applies.

**154 Transitional—powers of attorney made under Medical Treatment Act 1994**

- (1) This section applies to a power of attorney made under the *Medical Treatment Act 1994* that was in force immediately before commencement day.
- (2) The power of attorney is taken to be an enduring power of attorney made under this Act for a health care matter.
- (3) However, if the power of attorney complied with the *Medical Treatment Act 1994* when made, the power of attorney is not taken to be invalid only because it does not comply with a provision of this Act about the making of powers of attorney.
- (4) This section is a law to which the Legislation Act, section 88 (Repeal does not end effect of transitional laws etc) applies.

**155 Legislation amended—sch 2**

This Act amends the legislation mentioned in schedule 2.

**156 Transitional regulations**

- (1) A regulation may prescribe transitional matters necessary or convenient to be prescribed because of the enactment of the *Medical Treatment (Health Directions) Act 2006* or this Act.

- (2) A regulation may modify this chapter to make provision in relation to anything that, in the Executive's opinion, is not, or is not adequately or appropriately, dealt with in this chapter.
- (3) A regulation under subsection (2) has effect despite anything elsewhere in this Act.

**157      Expiry—ch 20**

This chapter expires 2 years after commencement day.

## **Schedule 1      General principles for enduring powers of attorney**

(see s 44)

### **1.1      Access to family members and relatives**

- (1) An individual's wish and need to have access to family members and relatives, and for them to have access to the individual, must be recognised and taken into account.
- (2) An individual's wish to involve family members and relatives in decisions affecting the individual's life, property, health and finance must be recognised and taken into account.

### **1.2      Human worth and dignity**

An individual with impaired decision-making capacity has an inherent right to respect for the individual's human worth and dignity as an individual.

### **1.3      Role as a member of society**

- (1) An individual has a right to be a valued member of society.
- (2) Because of this right, it is important to encourage and support the individual to perform social roles valued in society.

### **1.4      Participation in community life**

It is important to encourage and support an individual to live a life in the general community, and to take part in activities enjoyed by the community.

### **1.5      Quality of life**

An individual's need and wish to have a reasonable quality of life must be recognised and taken into account.

## 1.6 Participation in decision making

- (1) An individual has a right to take part in decisions affecting the individual's life to the greatest extent practicable.
- (2) Without limiting subsection (1), an individual also has a right to take part in decisions affecting the individual's property and finance to the greatest extent practicable.
- (3) The right of the individual to make the individual's own decisions must be preserved to the greatest extent practicable.

### Examples of preserving individual's right to make own decisions

- 1 The individual must be given any necessary support, and access to any necessary information, to allow the individual to take part in decisions affecting the individual's life to the greatest extent practicable.
- 2 To the greatest extent practicable, the individual's views and wishes must be sought and taken into account before exercising power in relation to the individual.
- 3 Power in relation to the individual must be exercised in the way that is least restrictive of the individual's rights.

*Note* An example is part of the Act, is not exhaustive and may extend, but does not limit, the meaning of the provision in which it appears (see Legislation Act, s 126 and s 132).

- (4) If an individual's wishes or needs cannot be expressed by the individual, the person exercising power in relation to the individual must try to work out, as far as possible, from the individual's past actions, what the individual's wishes and needs would be if the individual could express them and take those wishes and needs into account.
- (5) However, a person exercising a function in relation to an individual must do so in a way consistent with the individual's proper care and protection.
- (6) An individual's views and wishes may be expressed orally, in writing or in another way, including, for example, by conduct.

**1.7 Individual taken to be able to make decisions**

An individual must not be treated as unable to take part in making a decision only because the individual makes unwise decisions.

**1.8 Maintenance of existing supportive relationships**

The importance of maintaining an individual's existing supportive relationships must be taken into account.

**1.9 Maintenance of environment and values**

- (1) The importance of maintaining an individual's cultural and linguistic environment, and set of values (including any religious beliefs) must be taken into account.
- (2) For an individual who is a member of an Aboriginal community or a Torres Strait Islander, this means the importance of maintaining the individual's Aboriginal or Torres Strait Islander cultural and linguistic environment, and set of values (including Aboriginal tradition or Island custom) must be taken into account.
- (3) In this section:

***Aboriginal tradition***—

- (a) means the body of traditions, observances, customs and beliefs of Aboriginal people generally, or of a particular community or group of Aboriginal people; and
- (b) includes any traditions, observances, customs and beliefs mentioned in paragraph (a) that relate to particular people, areas, objects or relationships.

***Island custom***, known in the Torres Strait as Ailan Kastom—

- (a) means the body of customs, traditions, observances and beliefs of Torres Strait Islanders generally, or of a particular community or group of Torres Strait Islanders; and

- (b) includes any traditions, observances, customs and beliefs mentioned in paragraph (a) that relate to particular people, areas, objects or relationships.

### **1.10 Confidentiality**

An individual's right to confidentiality of information about the individual must be respected.

### **1.11 Health care**

- (1) An individual is entitled to have decisions about health care matters made by an attorney—
  - (a) in the way least restrictive of the individual's rights and freedom of action; and
  - (b) only if the exercise of power—
    - (i) is, in the attorney's opinion, necessary and appropriate to maintain or promote the individual's health and wellbeing; or
    - (ii) is, in all the circumstances, in the individual's best interests.
- (2) An individual's wishes in relation to health care matters, and any information provided by the individual's health care provider, must be taken into account when an attorney decides what is appropriate in the exercise of power for a health care matter.

## Schedule 2 Consequential amendments

(see s 155)

### Part 2.1 Guardianship and Management of Property Act 1991

#### [2.1] Section 7 (1), note

*substitute*

*Note 1* See s 8B in relation to appointment of a guardian for a child.

*Note 2* A person's needs may be met, or the person's interests protected, under an enduring power of attorney (see *Powers of Attorney Act 2006*).

#### [2.2] New section 8AB

*insert*

#### 8AB Effect on guardian or manager of enduring power of attorney in relation to health care

- (1) This section applies if—
- (a) a person (the *principal*) has made an enduring power of attorney giving power in relation to health care matters; and
  - (b) the principal has become a person with impaired decision-making capacity; and
  - (c) the tribunal appoints a guardian for the principal after the making of the power of attorney; and
  - (d) the tribunal revokes the enduring power of attorney, or part of it.

*Note* The tribunal may revoke the enduring power of attorney, or part of it, under the *Powers of Attorney Act 2006*, s 75 (2) (c).



- (2) If the guardian has power to consent to medical treatment for the person, the guardian must consider the terms of the enduring power of attorney before the enduring power of attorney, or part of it, was revoked.

**[2.3] Section 33**

*substitute*

**33 Need for inquiry**

The tribunal must not make an order, whether under this Act or the *Powers of Attorney Act 2006*, unless the tribunal has held an inquiry in the relevant matter.

*Note* The tribunal may make an order without holding an inquiry in some circumstances (see s 67, s 68 and s 68A).

**[2.4] New section 35 (1) (i)**

*insert*

- (i) if the matter relates to an enduring power of attorney—each attorney under the power of attorney.

**[2.5] Section 40, new note**

*insert*

*Note* The public trustee must, if asked by the tribunal, assist the tribunal by examining and reporting on the books, accounts or other records of transactions carried out by an attorney for a principal under an enduring power of attorney (see *Powers of Attorney Act 2006*, s 83).

**[2.6] Section 56 (1) (c)**

*substitute*

- (c) for a matter relating to an enduring power of attorney—
- (i) who made the application (the *relevant application*) in relation to which the order, direction or decision was made; or

- (ii) who, with the leave of the tribunal, would have been allowed to be heard on the relevant application; or
- (d) in relation to whom the order, direction or decision was made.

**[2.7] Section 58**

*substitute*

**58 Functions and powers**

The tribunal has the functions and powers given to it under this Act and the *Powers of Attorney Act 2006*.

*Note* The power to exercise a function also includes the powers necessary and convenient to exercise the function (see Legislation Act, s 196).

**[2.8] Section 66B (1), new note**

*insert*

*Note* A presidential member of the tribunal may refer a matter, or part of a matter, relating to an enduring power of attorney to the Supreme Court (see *Powers of Attorney Act 2006*, s 76).

**[2.9] New sections 68A and 68B**

*insert*

**68A Emergency orders—enduring powers of attorney**

- (1) This section applies if the tribunal is satisfied that there are special circumstances of urgency that make it proper to make an order under this section.
- (2) The tribunal may make an order under the *Powers of Attorney Act 2006*, section 75 (Guardianship tribunal directions etc for enduring powers of attorney) in relation to an enduring power of attorney without holding an inquiry under part 3.

**68B Tribunal's power to revoke health direction**

- (1) This section applies if—
  - (a) a person has made a health direction under the *Medical Treatment (Health Directions) Act 2006*; and
  - (b) the person becomes a person with impaired decision-making capacity; and
  - (c) the tribunal appoints a guardian for the principal after the making of the health direction.
- (2) The tribunal may revoke the health direction, or part of it, if the tribunal considers appropriate.

**[2.10] Dictionary, new definition of *enduring power of attorney***

*insert*

*enduring power of attorney*—see the *Powers of Attorney Act 2006*, section 8.

**[2.11] Further amendments, mentions of *community advocate***

*omit*

community advocate

*substitute*

public advocate

*in*

- section 9 (1), (2), (4) and (5)
- section 10 (2) and (3)
- section 32 (3), (4), (5) and (6)
- section 67 (1)
- section 68 (1), (6) (a), (b) and (c) and (7)
- section 70 (2)

## Part 2.2 Land Titles Act 1925

### [2.12] Section 130 (2)

*substitute*

- (2) An instrument executed under a power of attorney must not be registered under this Act unless the power of attorney has been registered under the *Registration of Deeds Act 1957*.

### [2.13] Section 131

*omit*

## Part 2.3 Mental Health (Treatment and Care) Act 1994

### [2.14] Section 25 (2)

*substitute*

- (2) If the person has an attorney appointed under the *Powers of Attorney Act 2006*, the tribunal must also consider consulting the attorney.

### [2.15] Section 32 (4) (c)

*substitute*

- (c) if the person has an attorney appointed under the *Powers of Attorney Act 2006*—the attorney.

### [2.16] Section 36D (3) (b) (ii)

*substitute*

- (ii) if the person has an attorney appointed under the *Powers of Attorney Act 2006*—the attorney; and

**[2.17] Section 105 (1) (e) and (f)**

*substitute*

- (e) if the person has made a power of attorney under the *Powers of Attorney Act 2006*—the attorney under the power of attorney;  
and

**[2.18] Section 105 (1) (g) to (k)**

*renumber as section 105 (1) (f) to (j)*

**[2.19] Section 143**

*omit*

*Powers of Attorney Act 1956*

*substitute*

*Powers of Attorney Act 2006*

## **Part 2.4 Registration of Deeds Act 1957**

**[2.20] Section 3**

*substitute*

### **3 General register of deeds**

The registrar-general must keep a register (the *general register of deeds*) in the form the Minister directs.

## Part 2.5 Trustee Act 1925

### [2.21] Section 67

*substitute*

#### 67 Power of attorney

A delegation under this part is taken to be a power of attorney under the *Powers of Attorney Act 2006*.

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## Dictionary

(see s 3)

*Note 1* The Legislation Act contains definitions and other provisions relevant to this Act.

*Note 2* For example, the Legislation Act, dict, pt 1, defines the following terms:

- authorised deposit-taking institution
- child
- corporation
- domestic partner (see s 169 (1))
- exercise
- guardianship tribunal.

***affinity*** means affinity derived through marriage or any other domestic partnership.

***attorney***—see section 6.

***bankrupt***—without limiting when a person becomes bankrupt, a person is taken to become ***bankrupt*** if the person takes advantage of a law of a foreign country corresponding to the *Bankruptcy Act 1966* (Cwlth).

***close friend***, of a person, means someone who has a close personal relationship with the person and a personal interest in the person's welfare.

***day hospital*** means a facility where a person is admitted for surgical or medical treatment and discharged on the same day.

***disability care*** means care that is provided to a person with a disability in a residential facility in which the person is also provided with accommodation that includes—

- (a) appropriate staffing to meet the nursing and personal care needs of the person; and
- (b) meals and cleaning services; and

- (c) furnishings, furniture and equipment for the provision of the care and accommodation.

*decision-making capacity*—see section 9 (1).

*enduring power of attorney*—see section 8.

*general power of attorney*—see section 7.

*general principles*—see section 44 and schedule 1.

*health care*, for a person who is a principal for a power of attorney—

- (a) includes withholding or withdrawal of a life-sustaining measure for the principal if starting or continuing the measure for the principal would be inconsistent with good medical practice; but
- (b) does not include—
  - (i) first-aid treatment; or
  - (ii) a non-intrusive examination made for diagnostic purposes; or
  - (iii) the administration of a pharmaceutical drug if—
    - (A) a prescription is not needed for the drug; and
    - (B) the drug is normally self-administered; and
    - (C) the administration is for a recommended purpose and at a recommended dosage level.

**Example for par (b)**

a visual examination of a principal's mouth, throat, nasal cavity, eyes or ears

*Note* An example is part of the Act, is not exhaustive and may extend, but does not limit, the meaning of the provision in which it appears (see Legislation Act, s 126 and s 132).



**health care facility** means a hospital, residential aged care facility or residential disability care facility.

*Note* **Hospital, residential aged care facility** and **residential disability care facility** are defined in this dictionary.

**health care matter**—see section 12.

**health care provider**, for a person who is a principal for a power of attorney, means a health professional who provides health care to the principal.

**health professional** means a person who provides health care in the practice of a profession or the ordinary course of business.

**hospital** means a public hospital, private hospital or day hospital.

**impaired decision-making capacity**—see section 9 (2).

**interested person**, for chapter 7 (Guardianship tribunal, Supreme Court and proceedings and rights)—see section 74.

**invalidity**, of a power of attorney or a power under a power of attorney, for chapter 6 (Protection and relief from liability)—see section 70.

**know**, of the invalidity of a power of attorney or a power under a power of attorney, for chapter 6 (Protection and relief from liability)—see section 70.

**legal matter**, for a person who is a principal for a power of attorney, means—

- (a) the use of legal services for the principal's benefit; or
- (b) bringing or defending a proceeding, including settling a claim before or after a proceeding starts, on behalf of the principal.

**Examples of use of legal services**

- 1 use of legal services to get information about the principal's legal rights
- 2 use of legal services to make a transaction

- 3 use of legal services to bring or defend a proceeding before a court, tribunal or other entity

*Note* An example is part of the Act, is not exhaustive and may extend, but does not limit, the meaning of the provision in which it appears (see Legislation Act, s 126 and s 132).

***liquidator***, of an attorney, includes—

- (a) the official manager of the attorney; or
- (b) the receiver of the attorney's property; or
- (c) the receiver and manager of the attorney's property; or
- (d) the managing controller of the attorney's property.

***personal care matter***—see section 11.

***personal insolvency agreement***—without limiting when a person executes a personal insolvency agreement, a person is taken to execute a ***personal insolvency agreement*** if the person executes an agreement under a law of a foreign country corresponding to the *Bankruptcy Act 1966* (Cwlth).

***power of attorney***—

- (a) means a general power of attorney or an enduring power of attorney; and
- (b) for chapter 6 (Protection and relief from liability)—see section 70.

***principal***, in relation to an attorney—see section 6.

***property*** includes money and financial assets.

***property matter***—see section 10.

***relative***, of a person (the ***related person***), means—

- (a) a person related by blood, affinity or adoption to the related person; or

(b) a domestic partner.

*Note* For the meaning of *domestic partner*, see the Legislation Act, s 169.

*residential aged care facility* means a residential facility that provides residential care to residents at the facility.

*residential care*—see the *Aged Care Act 1997* (Cwlth), section 41-3 (Meaning of *residential care*).

*residential disability care facility*—

(a) means a residential facility that provides disability care to people with disabilities; but

(b) does not include a residential aged care facility.

*special health care matter*, for a principal—see section 37.

*special personal matter*, for a principal—see section 36.

*will* includes a codicil.

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## Endnotes

**1 Presentation speech**

Presentation speech made in the Legislative Assembly on 21 September 2006.

**2 Notification**

Notified under the Legislation Act on 30 November 2006.

**3 Republications of amended laws**

For the latest republication of amended laws, see [www.legislation.act.gov.au](http://www.legislation.act.gov.au).

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I certify that the above is a true copy of the Powers of Attorney Bill 2006, which was passed by the Legislative Assembly on 21 November 2006.

Clerk of the Legislative Assembly

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