

1992

AUSTRALIAN CAPITAL TERRITORY LEGISLATIVE ASSEMBLY

POWERS OF ATTORNEY (AMENDMENT) BILL 1992

EXPLANATORY MEMORANDUM

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Outline

This Bill amends the *Powers of Attorney Act 1956*.

The ACT Legislative Assembly passed legislation in 1989 which introduced the enduring power of attorney to the ACT by way of a simple standard form. This reform overcame a gap in the existing law which meant that ordinary general powers of attorney lapsed if the person giving the power became incapacitated, making them of little use to persons who wished to enable a relative or friend to look after their affairs in the event they were disabled by illness or trauma.

The enduring power of attorney has been well received by users and legal practitioners, but some financial institutions have sought modifications which would satisfy their concerns about the enduring power of attorney form (which is a Schedule to the Act). The Bill addresses those concerns by ensuring that the form operates as a deed.

The Bill also provides a simple general power of attorney form as a new Form 1 in the Schedule. The demand for a simple form to create a general power has become apparent since the introduction of the enduring power. This form is consistent with standard forms available in other jurisdictions such as New South Wales.

The Bill also makes some minor technical modifications to the Act and to the enduring power of attorney form.

Financial Considerations

There are no financial considerations involved.

CLAUSES OF BILL

Formal Clauses

Clauses 1 and 2 formally identify the titles of the Act and the Principal Act.

Definitions

Clause 3 includes new definitions to -

- cover the new general power of attorney form; and
- ensure that references in powers of attorney to the donee (the person receiving the power) covers situations where two or more donees are appointed, and that references to property cover both real estate and other property.

General Powers of Attorney

Clause 4 enables Form 1 in the Schedule to be used to create a general power of attorney. The new Form 1 is inserted by clause 10.

Powers of Attorney operate as deeds, confer authority of a certain scope, and may appoint several attorneys with different authorities.

Clause 4 also sets out how both types of powers of attorney are to operate in several respects:

- Two or more attorneys, or only some of them, may be appointed to act jointly or severally or both (s 3AB).
- Different attorneys can be appointed to act in different circumstances or deal with different property (s 3AB).
- If the person giving the power is a trustee or personal representative, he or she may not give the powers associated with those positions to an attorney (s 3AC(2)(a)).
- A power of attorney confers no power to sign a document or do some other thing giving a benefit to the attorney himself or herself, unless the power of attorney expressly authorises this (s 3AC(2)(b)).
- An attorney may appoint a delegate or sub-attorney but retains the ability to revoke that sub-authority, unless the power of attorney expressly says otherwise (s 3AC(3)).
- A power of attorney may place conditions or limitations on the authority it confers (s 3AC(4)).
- A power of attorney shall operate as a deed (section 3AD). This is an important provision ensuring that there should be no question about the validity of a power of attorney in transactions required to be effected by deed (eg dealings in land).

Enduring Powers of attorney

Clause 5 amends section 12 of the Act. Section 12 is the key enduring power of attorney provision, enabling an enduring power to be created by filling out the relevant parts of the standard form and having it signed and witnessed. The amendment makes it clear that -

- . the form does not have to be reproduced exactly to be effective; and
- . some parts of the form (Parts B and C dealing with guardianship and medical treatment) may be omitted if not needed, provided the intention to omit is made apparent by means of a notation on the form.

Guardianship and consent to medical treatment under enduring power of attorney
Clause 6 makes it clear that an attorney authorised to make decisions about medical treatment may only consent to lawful medical treatment of the donor necessary for his or her well-being. The clause also makes a minor correction by adding "if" to paragraph 13(2)(d).

Evidence in proceedings

Clause 7 inserts a new provision which says that a certificate of a medical practitioner is evidence that a person was incapacitated at a material time. This will help to avoid costly disputes that may arise when a donor has periodic lapses in mental lucidity and the attorney has acted in good faith during a lapse.

Relief for breach of duty - enduring powers of attorney

Clause 8 ensures that trustee companies have standing to seek relief from the court for breach of duty by an attorney.

Other Powers of Court - enduring Powers of Attorney

Clause 9 removes a restriction on the role of the Public Trustee. The Public Trustee, with the approval of a court, may intervene in a range of circumstances when an enduring power of attorney cannot be exercised, including when the attorney "resigns or dies". That is unnecessarily restrictive since an attorney may be unable to exercise his or her functions for a variety of reasons making it desirable for the Public Trustee to assist. For example, the attorney may leave the country or become incapacitated.

New Forms

Clause 10 inserts the new forms. Form 1 is the general power of attorney. Form 2 is the enduring power of attorney.

Saving Provision

Clause 11 preserves the validity of "old" enduring power of attorney forms already executed by saying that they are to be regarded as if they were executed in the new form. This avoids the inconvenience to persons of executing a fresh form, particularly those who have become incapacitated and are unable to do so.