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AUSTRALIAN CAPITAL TERRITORY LEGISLATIVE ASSEMBLY

POWERS OF ATTORNEY (AMENDMENT) BILL 1991

EXPLANATORY MEMORANDUM

Circulated by Authority of
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Attorney General

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Outline

1. In 1989 the ACT Legislative Assembly passed legislation which introduced the Enduring Power of Attorney to the Territory by way of a simple standard form. This reform has been well received by users and legal practitioners, but some financial institutions have sought modifications which would satisfy their concerns about some provisions in the Enduring Power of Attorney form (which is a schedule to the Act). The main concern was to ensure that the form should operate as a deed.
2. The Bill also provides for some minor technical modifications to the Principal Act and to the standard form used for an Enduring Power of Attorney.
3. The Bill also provides a simple General Power of Attorney form as a new Form 1. This form is consistent with standard forms available in other jurisdictions such as New South Wales.
4. To ensure that those persons who have already executed the "old" standard Enduring Power of Attorney form are not disadvantaged, the Bill contains a saving provision which deems those forms to be as valid as if they were executed using the form included in this Bill.

Financial Considerations

5. There are no financial considerations involved.

CLAUSES OF BILL

Clause 1: Short title

This Act may be cited as the *Powers of Attorney (Amendment) Act 1991*.

Clause 2: Principal Act

This clause identifies the Principal Act as the *Powers of Attorney Act 1956*.

Clause 3: Interpretation

This clause provides definitions to assist in the interpretation of the Principal Act.

Clause 4: Insertion

This clause inserts new sections 3AA, 3AB, 3AC and 3AD in the Principal Act. Section 3AA provides legislative authority for a new general Power of Attorney as set out in the Schedule to the Principal Act as "Form 1". This form is essentially the same as used in other jurisdictions such as New South Wales and it is a simple general purpose authority for one or more persons to be appointed to transact business on behalf of another person. Section 3AB makes it clear that 2 or more attorneys may be appointed and be appointed for different matters. Section 3AC specifies the scope of the authority given to an Attorney and states the limits on that authority.

The new section 3AD is a key provision and it deems that both Form 1 (General Power of Attorney) and Form 2 (Enduring Power of Attorney) in the Schedule to the Principal Act, operate as a deed, irrespective of the fact that, in appearance, the form is not expressed in the usual style of a deed.

Also of importance is the notation to that effect in the headings on the first page of Form 2 (Enduring Power of Attorney).

Clause 5: Enduring Powers of attorney

This clause adds words to the existing section 12 of the Principal Act to make it clear that in preparing an Enduring Power of Attorney the law only requires substantial compliance with the form as expressed in Part A of Form 2 in the Schedule to the Principal Act. Although desirable, it is not necessary that Part A be reproduced and followed word for word to be effective. For example, a person may wish to appoint two attorneys but want to modify the wording to make it clear that Attorney A is first choice but if Attorney A is unable to perform the function Attorney B does so. This situation may arise for an aged parent whose two children are over the age of 18 but the age difference is substantial, or one is living interstate. The clause also allows Parts B and C of the form to be omitted if not required by a donor.

Clause 6: Guardianship and consent to medical treatment under enduring power of attorney

This clause adds the word "lawful" to that part of section 13 of the Principal Act which provides the statutory authority for an attorney (where expressly authorised by the donor) to consent to medical treatment necessary for the well-being of the donor. An attorney may only consent to lawful medical treatment. The clause also makes a minor correction by adding an omitted "if" to paragraph 13(2)(d).

Clause 7: Insertion

This clause inserts a new section 13A which specifies that in proceedings the issue of whether a donor was "incapacitated" when the attorney acted on behalf of a donor is evidenced by a certificate of a medical practitioner. The section is useful to avoid, where possible, disputes that may arise when a donor has reached a state of health where there are lapses in mental lucidity and the attorney has acted in good faith during that lapse. It would be costly and unnecessary for the attorney to seek a range of expert opinions to satisfy a challenge that the donor was not incapacitated at the time the attorney acted.

Clause 8: Relief for breach of duty - enduring powers of attorney

This clause makes a minor improvement to the Principal Act to ensure that trustee companies have standing to seek relief from the court for breach of duty by people acting under powers of attorney.

Clause 9: Other Powers of Court - Enduring Powers of Attorney

Section 17 of the Principal Act is modified to remove an unnecessary limitation on the circumstances when the Public Trustee may apply to the Court when an enduring power of attorney cannot be exercised.

Clause 10: Substitution

This clause inserts the new Form 1 (General Power of Attorney) and the revised Form 2 (Enduring Power of Attorney) in the Schedule to the Principal Act. The revised Enduring Power of Attorney form includes a specific notation in the headings on the first page that "THIS INSTRUMENT HAS EFFECT AS A DEED". The revised form also has a new notation reminding users that witnesses must not be related to the donor or donee(s).

Clause 11: Saving

This clause "saves" any of the "old" Enduring Power of Attorney forms already executed since the forms were introduced in 1989. The clause specifies that the old forms are to be regarded as if they were executed in the modified form now expressed as Form 2 in the Schedule to the Principal Act. This avoids inconvenience to persons who have already executed a form and do not want to

complete a fresh form, or who have become incapacitated and are unable to execute a new form.