

**POWERS OF ATTORNEY
(Powers of Attorney Act 2003)**

AND

**APPOINTMENTS OF GUARDIAN
(Guardianship Act 1987)**

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About the Presenter

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I would like to acknowledge the generosity of Richard Neal, partner in the firm of Teece Hodgson & Ward. He is an Accredited Specialist in Wills and Estate Law, and Chairperson of the Advisory Committee for specialist accreditation in Wills and Estates. He has consented to my using his most recent paper on the Powers of Attorney Act 2003. That part of this paper which relates to the Powers of Attorney Act 2003, has been prepared by Mr Neal, though it contains some minor alterations and additions, inserted by me. Those alterations and additions are italicised. I would like to thank Mr Neal for allowing us to have the benefit of his vast knowledge and experience in the area of Powers of Attorney.

Powers of Attorney Act 2003

1. *The Powers of Attorney Act 2003 commenced on 16 February 2004, when it was proclaimed.* There are a number of provisions in the Powers of Attorney Act 2003 which re-enact relevant parts of Part 16 of the *Conveyancing Act 1919* which was *the statutory source* in New South Wales, before 16 February 2004, concerning Powers of Attorney, in addition to the common law. With some exceptions, no detailed reference will be made here to those re-enactments, which, for convenience, are set out in Schedule 1 to the legislation.¹ Relevant definitions and regulations are not set out in that Schedule. Subject to this, the following more detailed commentary relates to the provisions of the Act which are either new or provide for express statements of the law not previously stated expressly in the *Conveyancing Act*. The Act does not apply to existing instruments except in respect of the review provisions and interstate recognition which do apply to them.

¹ The paragraphs in this paper on Sections introducing new provisions are from the Explanatory Note to the Act.

Name, commencement, definitions, *incommunicate*

2. Section 1 names the Act as the Powers of Attorney Act 2003.
3. Section 3 sets out certain definitions. Section 4 specifically defines incommunicate as "... if the person suffers from a physical or mental disability (whether of a temporary or permanent nature) that makes the person unable to receive communications respecting the person's property or affairs or to express the person's will respecting the person's property or affairs".

Vacancy in the office of Power of Attorney

4. Section 5 provides that there is a vacancy in the office of an attorney for the purposes of the Act if:
 - (a) the appointment of the attorney is revoked, or
 - (b) the attorney renounces the power, or
 - (c) the attorney dies, or
 - (d) the attorney becomes bankrupt, or
 - (e) where the attorney is a corporation, the corporation is dissolved, or
 - (f) the attorney, by reason of physical or mental illness or incapacity, ceases to have the capacity to continue to act as an attorney, or
 - (g) in such other circumstances as may be prescribed by the regulations.

Only new instruments

5. Section 6 provides that, as a general rule, the Act will apply only to powers of attorney created (or purportedly created) by an instrument executed on or after the commencement of the *Powers of Attorney Act* (the *commencement date*). The provisions of Part 16 of, and Schedule 7 to, the *Conveyancing Act 1919* will continue to apply to powers of attorney created (or purportedly created) before the commencement date despite the repeal of those provisions by Schedule 4.1 to the Act.

There are two exceptions to this general rule.

Exception: interstate recognition

6. First, section 25 (Recognition of enduring powers of attorney made in other States and Territories) will extend to any power of attorney created by instrument executed before the commencement date.

Exception: review of power of attorney

7. Second, Part 5 (Review of the operation and effect of powers of attorney) of the Act will extend to any power of attorney created (or purportedly created) by instrument executed before the commencement date.

Not affect any principle or rule of the common law or equity except to the extent it provides otherwise

8. Section 7 provides that the Act does not affect the operation of any principle or rule of the common law or equity in relation to powers of attorney except to the extent that the Act provides otherwise, whether expressly or by necessary intendment. It also provides that the Act does not affect the operation of Part 3 of the *Conveyancing Act 1919* (which deals with the execution and effect of deeds) except to the extent that the Act provides otherwise, whether expressly or by necessary intendment.

Form - prescribed power of attorney

- 9.1 Section 8 provides that a duly executed instrument in or to the effect of the form in the Second Schedule is a prescribed power of attorney. *Annexed and marked with the letter "A" is a copy of that form.*

Joint and Several Authority

9.2 Berna Collier and Shannon Lindsay in "Powers of Attorney in Australia and New Zealand"² comment as follows:

"The concept of 'joint or several authority' is well understood. Guthrie v Anderson³ establishes that a power given to a number of attorneys to act jointly and severally will be interpreted as a power to all or any of them, whereas an authority conferred on attorneys jointly will be interpreted as an authority which must be exercised by the donees acting together.

Leedes and Crompton's case⁴ suggests that authority given to A or B is valid, and will be interpreted as a several authority. Where authority is given to A or B, it is necessary to determine whether the authority is joint or several. Where the power does not specify the nature of the authority, it will be treated as joint,⁵ unless there are circumstances indicating that the authority is intended to be several. In Moore v Ullcoats Mining Company Ltd⁶ it was held that an authority to inspect a mine given to A and B was an authority to A or B, on the basis that it would be extremely inconvenient if both A and B had to be physically present at an inspection.⁷ The most recent case in which the presumption in favour of joint authority has been discussed appears to be Ford Motor Co Ltd v Amalgamated Union of Engineering and Foundry Workers⁸ where Geoffrey Lane J said that where a number of agents are charged with negotiating or agreeing, they cannot (in the absence of express enabling powers) bind their principals unless they

² Collier B & Lindsay S, "Powers of Attorney in Australia and New Zealand", The Federation Press, 1992

³ (1822) 5B & Ald 628; 106 ER 1320

⁴ (1653) Godbolt 93; 78 ER 57

⁵ Brown v Andrew (1849) 18 LJQB 153

⁶ (1908) 97 LT 845

⁷ At 848.

⁸ [1969] 1 All ER 481

act unanimously.⁹ His Honour did not, however, refer to Moore v Ullcoats Mining Company Ltd."

9.3 Suggested precedent wording:

9.3.1 alternative attorney/s, (as opposed to joint and several attorneys) – insert in clause 8:

"Notwithstanding the provisions of clause 4, the authority conferred on [names of attorneys] pursuant to Clause 1 of this General Power of Attorney must not be exercised unless:

- i. my husband/wife, the said [husband/wife's name], has predeceased me or dies during his/her office as my attorney, or
- ii. my husband/wife, the said [husband/wife's name], by reason of any physical or mental incapacity ceases to have the capacity to continue to act as an attorney, or
- iii. my husband/wife, the said [husband/wife's name] is outside Australia."

9.3.2 where there is a joint and several appointment of attorney, or the appointment of an alternative attorney and the principal wishes the benefits of clauses 5 & 6 to apply to his or her spouse only - insert in clause 8:

"The authority conferred pursuant to clause 5 of this General Power of Attorney to give reasonable gifts as provided by section 11(2) of the Powers of Attorney Act 2002 is given to my husband/wife, the said [husband/wife's name], only."

OR:

"The authority conferred pursuant to clause 6 of this General Power of Attorney permits the conferring of benefits only on my husband/wife, the said [husband/wife's name], to meet his/her reasonable living and medical expenses as provided by section 12(2) of the Powers of Attorney Act 2002."

9.3.3 joint attorneys where the principal wishes one to act solely on the death or incapacity of the other joint attorney - insert in clause 8:

"Notwithstanding the provisions of clause 4, if one of [name of first co-attorney], or [name of second co-attorney],:

⁹ At 497

- i. has predeceased me, or dies during his/her office as my attorney, or
 - ii. by reason of any physical or mental incapacity ceases to have the capacity to continue to act as an attorney, or
 - iii. is outside Australia,
- then the authority conferred by Clause 1 of this General Power of Attorney shall be exercised by the survivor of them, or, in the case of one of them, by reason of any physical or mental incapacity ceasing to have the capacity to continue to act as an attorney, or one of them being outside Australia, the other of them."*

Disclaimer: The above precedents have been prepared by McPhee Kelshaw, Solicitors, for the use of their own clients. McPhee Kelshaw makes no warranties, or representations, as to their suitability, or legality, other than to their own clients. The precedents are necessarily of a general nature and must be varied, depending upon the circumstances, and instructions received from individual principals. Any person using those precedents does so at their own risk and, by using one or more of them, releases McPhee Kelshaw from any liability which may arise as a result of such use.

- 9.4 Note also Section 9 (general agency authority subject to any specified conditions or limitations) and Section 10 (not authorise action as a trustee; however see Clause 4.6 of Schedule 4 relating to section 67 of the Trustee Act 1925).

Not authorise gift

10. Section 11 provides that a prescribed power of attorney does not authorise an attorney to give a gift of all or any property of the principal to any other person unless the instrument creating the power expressly authorises the giving of the gift.

Exception: Schedule 3 wording

11. However, the section also provides that if a prescribed power of attorney includes a certain expression set out in Schedule 3, this will authorise an attorney to give the kinds of gifts that are specified by that Schedule for that expression.

No attorney benefit

12. Section 12 restates the existing rule.

Exception: Schedule 3 wording

13. However, the section also provides that if a prescribed power of attorney includes a certain expression set out in Schedule 3, this will authorise an attorney to confer on the attorney the kinds of benefits that are specified by that Schedule for that expression.

No third party benefit

14. Section 13 provides that a prescribed power of attorney does not authorise an attorney to execute an assurance or other document, or to do any other act, as result of which a benefit would be conferred on a third party unless the instrument creating the power expressly authorises the conferral of the benefit.

Exception: Schedule 3 wording

15. However, the section also provides that if a prescribed power of attorney includes a certain expression set out in Schedule 3, this will authorise an attorney to confer on a third party the kinds of benefits that are specified by that Schedule for that expression.

Regulations (form of power and wording)

16. Section 14 enables the Governor to make regulations that replace or amend Schedule 2 or 3 (or both). As noted above, Schedule 2 sets out the form for a prescribed power of attorney and Schedule 3 specifies expressions that may be included in a prescribed power of attorney for the purposes of sections 11, 12 and 13 that, if included in a prescribed power of attorney, will authorise the attorney to give gifts or confer certain benefits of the kind specified in that Schedule.

Irrevocable powers of attorney

17. Sections 15 and 16 restate the rules relating to irrevocable powers of attorney. The review provisions of the Act enables the Supreme Court to order the termination of an irrevocable power of attorney in certain circumstances.

Initial and supervening mental capacity

18. Section 17 provides that, subject to the Act, a power of attorney is not ineffective because *the Power of Attorney was beyond the understanding of the principal, at the time it was given, due to mental incapacity*. However, the attorney is not authorised to do such an act unless authorised under the Act. The review provisions of the Act enables the Supreme Court to confirm the operation of a power of attorney despite the mental incapacity of the principal at the time the power is given. *Query whether, if the Power of Attorney is an Enduring one, the Certificate under Section 19 which states, inter alia, "2. The principal appeared to understand the effect of this Power of Attorney" should have been given in those circumstances.*
19. Section 18 restates the rule relating to supervening mental incapacity so that the act under the power needs to be not beyond the understanding of the principal at the time of the act. This is then affected by the next Section relating to enduring powers of attorney.

Enduring powers of attorney

20. Section 19 restates the rules relating to the creation of enduring powers of attorney with an additional requirement which is also in the prescribed form of certificate, namely that the prescribed witness certifies that the principal appeared to understand the affect of the power of attorney. The persons who are prescribed witnesses are expanded to include a licensed conveyancer or an employee of the Public Trustee or a trustee company who has successfully completed a course of study approved by the Minister. At the time of writing, there is no such course. Other persons or classes of persons can be prescribed by Regulation. In addition, where the power of attorney is signed outside Australia, a legal practitioner duly qualified in the country concerned,

employed independently of any legal practitioner who is an attorney under the instrument is a prescribed witness.

Acceptance of enduring power of attorney

21. Section 20 provides that an enduring power of attorney does not operate to confer any authority on an attorney until the attorney has accepted the appointment by signing the instrument creating the power. There was *no* similar requirement in relation to protected powers of attorney under the *Conveyancing Act 1919*.

Effect of enduring power of attorney

22. Section 21 restates the rule that if the instrument is an enduring power it is not ineffective if at the time of the act concerned, the act is beyond the understanding of the principal due to mental incapacity.

Ademption relief

23. Section 22 provides that a person who is named as a *beneficiary* (*a named beneficiary*) under the will of a deceased principal, *who executed* an enduring power of attorney *has the same interest in any surplus money or property arising from any sale, mortgage, charge or disposition of property (which includes real and personal property – see Definition in Section 3) or other dealing with property by the attorney under the Power of Attorney as the named beneficiary would have had in the property the subject of the sale, mortgage, charge, disposition, or dealing, if no sale, mortgage, charge, disposition or dealing had been made*. The purpose of the provision is to protect against the ademption of testamentary gifts by the attorney. Currently, there is no similar protection in respect of protected powers of attorney under the *Conveyancing Act 1919*. ‘Named beneficiary’ includes a person described as a beneficiary or class of beneficiary.

Adjustment of ademption relief

24. Section 23 enables a named beneficiary to apply to the Supreme Court for orders either confirming the operation of section 22 or varying the operation of the proposed section so as to avoid any one or more named beneficiaries gaining an unjust or disproportionate advantage or disadvantage of the kind not intended by the principal. *The Supreme Court application must be made within six months from the grant or reseal of probate.*

Ademption relief in intestacy (spouse)

25. Section 24 enables the spouse of a deceased principal under an enduring power of attorney who dies intestate to have a greater proportion of the principal's estate where their shared home (to which the spouse would have been entitled under sections 61B and 61D of the *Wills, Probate and Administration Act 1898*) has been disposed of by the attorney under the power of attorney and the spouse has no claim in respect of any replacement shared home at the time of the principal's death. *Example: value of estate \$1.1 million, which includes the former shared home worth \$1 million, and there are 6 children, the surviving spouse would, under ss61B & 61D of the Wills, Probate and Administration Act, receive \$200,000 plus half the balance of the estate, totalling \$650,000, whereas the spouse might be entitled to receive, under s24, the total proceeds of sale of the house, namely \$1 million, that is, an additional \$350,000.00.* An element of speculation arises as it must be the case that if the property had not been sold it would have remained as the principal residence up until death. Currently, there is no similar protection in respect of protected powers of attorney under the *Conveyancing Act 1919*. Note also clause 4.8 of Schedule 4.

Interstate recognition

26. Section 25 provides for the recognition in New South Wales of enduring powers of attorney made in other States or Territories.

27. An interstate power of attorney is subject to any limitations applicable to it under the law of the place of its making and cannot authorise an act which could not take place under an enduring power of attorney made in New South Wales.
28. An interstate legal practitioner (admitted in the state where the power was made, who has the equivalent of a New South Wales practising certificate under the law of the state and who practises there) can certify that an interstate power was made in accordance with the formal requirements of the law of that state. Such a certificate is admissible in proceedings concerning that power and is *prima facie* evidence of the matter so certified.

Review tribunals

29. Section 26 provides that, for the purposes of reviewing powers of attorney under the Part, both the Guardianship Tribunal and the Supreme Court are review tribunals.

Concurrent and exclusive jurisdiction

30. Section 27 confers concurrent jurisdiction on both the Guardianship Tribunal and Supreme Court in respect of provisions of the Part that confer functions on a review tribunal. However, if a function is conferred on the Guardianship Tribunal or Supreme Court expressly, the jurisdiction to exercise that function can only be exercised by the expressly named body.
31. Section 28 restates the exclusive jurisdiction of the Supreme Court concerning irrevocable powers of attorney.

Confirmation of powers of attorney

32. Section 29 restates the exclusive jurisdiction of the Supreme Court on the application of the principal concerning confirmation of an act under a power of attorney, where there is no mental incapacity found.
33. Section 30 restates the exclusive jurisdiction of the Supreme Court on the application of the principal concerning confirmation of an act under a power of

- attorney, where mental incapacity is found, but the principal is later able to affirm the act.
34. Section 31 restates the exclusive jurisdiction of the Supreme Court on the application of the principal concerning confirmation of an act under a power of attorney, where mental incapacity is found, and the principal is unable to affirm the act, but is either incommunicate or the act, in whole or in part, is found by the court to be for the principal's benefit. This is subject to the terms of the instrument including any contrary intention.
 35. Section 32 restates the rule concerning the validating effect of the confirmation order of the court.

Reviewable powers of attorney

36. Section 33 provides that the following powers of attorney are reviewable under the Division (*reviewable powers of attorney*) as follows:
 - (a) enduring powers of attorney are reviewable by both the Guardianship Tribunal and the Supreme Court,
 - (b) any other power of attorney where the principal is currently incommunicate is reviewable by the Supreme Court (but not the Guardianship Tribunal).

Currently, the Supreme Court has exclusive jurisdiction to review such powers of attorney under section 163B of the *Conveyancing Act 1919*.

Transfer to Supreme Court

37. Section 34 enables the Guardianship Tribunal to decline to deal with certain applications under the Division over which it has jurisdiction if it considers that it would be more appropriate for the Supreme Court to deal with the application (for instance, because of the complexity or novelty of legal issues raised by the application).

'Interested person' applications

38. Section 35 provides for who may make, and who are to be the parties to, applications under the Division. For instance, a person is an *interested person*

for the purposes of making applications in respect of a reviewable power of attorney if the person is any of the following:

- (a) an attorney,
- (b) the principal,
- (c) any person who is:
 - (i) a guardian of the principal (whether under the Guardianship Act 1987 or any other Act or law), or
 - (ii) an enduring guardian of the principal under the Guardianship Act 1987,
- (d) any other person who, in the opinion of the review tribunal, has a proper interest in the proceedings or a genuine concern for the welfare of the principal.

Currently, section 163B (2) of the Conveyancing Act 1919 limits the making of applications to review such powers of attorney to the principal.

Tribunal powers on review

39. Section 36 enables a review tribunal to review the operation and effect of a reviewable power of attorney on the application of an interested person.

The section confers a number of new powers on a review tribunal beyond those currently listed in section 163B of the Conveyancing Act 1919.

The new review powers differ from the current provisions of section 163B of the Conveyancing Act 1919 in at least two other respects. First, the jurisdiction conferred by section 163B on the Supreme Court can, except to a limited extent, be ousted by the instrument creating the power of attorney. This is not the case with the new provisions, unless the power of attorney is an irrevocable power of attorney.

Second, a review tribunal will have the power to reinstate a lapsed power of attorney and direct that the order have effect from the date on which it lapsed. There is no similar power in section 163B.

40. Section 36 (3) gives the review tribunal power to make orders relating to the making of the power of attorney, namely,
- (a) an order declaring that the principal did or did not have mental capacity to make a valid power of attorney,
 - (b) an order declaring that the power of attorney is invalid (either in whole or in part) if the tribunal is satisfied:
 - (i) the principal did not have the capacity necessary to make it, or
 - (ii) the power of the attorney did not comply with the other requirements of this Act applicable to it, or
 - (iii) the power of attorney is invalid for any other reason, for example, the principal was induced to make it by dishonesty or undue influence.
41. Section 36 (4) deals with orders relating to operation and effect of the power of attorney so that if the review tribunal is satisfied it will be in the best interest of the principal or better reflect the wishes of the principal it may make:
- (a) an order varying a term of, or a power conferred by, the power of attorney,
 - (b) an order removing a person from office as an attorney,
 - (c) an order appointing a substitute attorney to replace an attorney who has been removed from office as an attorney by a review tribunal or who otherwise vacates the office,
 - (d) an order reinstating a power of attorney that has lapsed by reason of any vacancy in the office of an attorney and appointing a substitute attorney to replace the attorney who vacated office,
 - (e) an order directing or requiring any one or more of the following:
 - (i) that an attorney furnish accounts and other information to the tribunal or to a person nominated by the tribunal,

- (ii) that an attorney lodge with the tribunal a copy of all records and accounts kept by the attorney of dealings and transactions made by the attorney under the power,
 - (iii) that those records and accounts be audited by an auditor appointed by the tribunal and that a copy of the report of the auditor be furnished to the tribunal,
 - (iv) that the attorneys submit a plan of financial management to the tribunal for approval,
- (f) an order revoking all or part of the power of attorney,
- (g) such other orders as the review tribunal thinks fit.
42. Section 36 (5) gives the tribunal power to make orders relating to mental capacity of the principal including that the principal lacked capacity at a specified time or during a specified period or for the time being and while such order is in effect an enduring power of attorney cannot be lawfully revoked by the principal. Section 36 (6) specifies that the period of incapacity so declared will continue until further order of the tribunal. Section 36 (7) enables orders to be made subject to such terms and conditions as the review tribunal thinks fit.
43. Section 36 (8) enables the review tribunal to direct or to make orders in the context of directing the furnishing of accounts or other information for the limiting of disclosure of accounts or information and for enquiry and report on the conduct of the attorney.
44. In reinstating the power of attorney that has lapsed by reason of vacancy in office the order can direct that the reinstatement operate from the time of original lapsing.
45. Section 36 (10) treats the removal or appointment or alteration to have effect as if it was done in due form by a principal of full capacity.
46. The Section 36 powers can be exercised despite anything to the contrary in the instrument – see Section 36 (11). However, Section 36 does not affect irrevocable powers of attorney – Section 36 (12).

Financial management order

47. Section 37 enables the Guardianship Tribunal, on an application for the review of a reviewable power of attorney, to proceed instead as if an application for a financial management order under Part 3A (Financial management) of the Guardianship Act 1987 had been duly made in respect of the principal under that power if it considers it appropriate in all the circumstances to do so. Also, the section enables the Supreme Court, on an application for the review of a reviewable power of attorney, to proceed instead as if an application for a declaration and order under section 13 (declaration and order where person incapable of managing affairs) of the Protected Estates Act 1983 had been duly made in respect of the principal under that power if it considers it appropriate in all the circumstances to do so. The Guardianship Tribunal's web site is www.gt.nsw.gov.au.

Tribunal advice or direction

48. Section 38 enables a review tribunal, on the application of an attorney under a reviewable power of attorney, to give advice or direction on any matter relating to the scope of the attorney's appointment or the exercise of any function by the attorney under the power of attorney. If any such advice or direction is given (or an act approved), no proceedings will lie against an attorney for or on account of any act, matter or thing done or omitted to be done by the attorney in good faith and in accordance with any approval, advice or direction given by the review tribunal.

Referral of questions of law to Supreme Court

49. Section 39 enables the Guardianship Tribunal, in determining an application in respect of a reviewable power of attorney, on its own initiative or at the request of a party to refer questions of law to the Supreme Court for the opinion of the Court.
50. Section 40 enables a party before the Guardianship Tribunal to appeal to the Supreme Court as a right on a question of law or by leave of the court on any question – Section 40 (1). Where an appeal has been made to the Administrative Decisions Tribunal ('ADT') there cannot be a concurrent appeal

to the Supreme Court – Section 40 (2). The appeal must be instituted within 28 days after the day in which the decision is made – Section 40 (3). The court has wide powers in determining the appeal – Section 40 (4) and (5). Subject to any interlocutory order of the court an appeal operates as a stay – Section 40 (6). The Guardianship Tribunal is not liable for costs – Section 40 (7).

51. An appeal can be made to the ADT by a party under Section 41 and an appeal is an external appeal within the meaning of the Administrative Decisions Tribunal Act 1997.

Procedure in relation to incommunicate principals

52. Section 42 gives concurrent jurisdiction, subject to the rules of the court or tribunal applying as if the principal was a person of unsound mind.
53. Section 42 (3) provides that the reference to rules of court includes a reference to rules of the Guardianship Tribunal under section 75 of the Guardianship Act 1987.

Powers of attorney generally

54. Section 43 restates the rules concerning doing acts and signing in the principal's or attorney's names.
55. Section 44 restates the *Conveyancing Act* concerning certified copies of the instrument in order to prove it. Note that each page of the instrument must be certified.
56. Section 45 restates the rules concerning no authorisation for there to be a substitute, delegate or sub-attorney unless this is expressly stated in the instrument.

Termination of joint or several powers of attorney

57. Section 46 provides that if a power of attorney appoints 2 or more persons as joint attorneys, the power of attorney is terminated if the office of one or more of the attorneys becomes vacant. It also provides that if a power of attorney appoints 2 or more persons as attorneys either severally or jointly and severally, a vacancy in the office of one or more attorneys does not operate to

terminate the power of attorney in relation to the other attorneys. *This is a restatement of the principle recognized in Guthrie v Anderson.¹⁰* There are currently no corresponding provisions in the *Conveyancing Act 1919*. An *instrument executed or thing done by an attorney is as effectual in law as is executed or done by the principal.*

Termination or suspension of powers of attorney

58. Sections 47 and 48 restate the rules concerning reliance by the attorney or third parties (in good faith) where the instrument has been terminated or suspended.
59. Section 49 provides for criminal offences where the attorney acts knowing of the termination or suspension.

Section 76, Protected Estates Act

60. Section 50 indicates that section 76 of the *Protected Estates Act 1983* makes provision in respect of powers of attorney made by principals who are subject to management under that Act. Section 76 of that Act provides that a power of attorney is not terminated only because the estate of the principal has become subject to management under that Act. It also provides that a power of attorney is suspended while the estate of the principal is subject to management under that Act.

Registration (*deed*)

61. Section 51 repeats the provisions allowing for registration of a power of attorney in the General Registry of Deeds and also registration of an instrument of revocation.
62. Section 52 defines *deed* as a memorandum, dealing instrument or other deed (other than a lease for less than 3 years) affecting land and providing that a defined deed does not have any force or validity when executed under power

¹⁰ (1822) 5B & Ald 628; 106 ER 1320

of attorney unless the power is so registered. Registration can occur after execution of the deed.

Miscellaneous

63. Sections 53, 54, 55 and 56 deal with the power to make Regulations, offences under the Act being indictable and under the Regulations summary, amendments of Acts and Regulations as noted in Schedule 4 and savings, transitional and other provisions as noted in Schedule 5, respectively.
64. Section 57 provides for a review of the operation of the Act to be undertaken after 5 years from the date of assent to the Act.

Schedules 2 and 3

65. The terms of Schedule 2 (form, see Section 8) and Schedule 3 (wording, see Sections 11, 12 and 13) should be particularly noted.
66. In relation to the Schedule 2 form for prescribed power of attorney, in the course of the drafting of the Bill, provision was made for the appointment of a sub attorney or delegate but this provision has now been deleted from the form.
67. The certificate by the prescribed witness now includes as its second Section: "the principal appeared to understand the effect of this power of attorney". This may present a difficulty for reasons similar to those that obtained in the giving of solicitor's certificates in other contexts.

Schedule 4 (financial management order)

68. The Guardianship Act 1987 is amended to include as one of the circumstances where a financial management order may be made, as following or in the course of proceedings under Section 36 where no order is to be made under that Section.

**Guidelines for solicitors preparing an enduring Power of Attorney –
Law Society of NSW, December 2003**

69. *Annexure "B" is a copy of the Law Society Guidelines for preparing an enduring Power of Attorney.*

Appointment of enduring guardian under

Guardianship Act 1987

70. *Basically, an attorney, appointed pursuant to the Powers of Attorney Act 1993, has power, subject to the provisions of the Power of Attorney, to conduct the financial affairs of the principal. The enduring guardian has power to make decisions in relation to the lifestyle, or matters affecting the person, of the appointor, though that appointment does not come into effect until the appointor has lost his or her mental or physical capacity.*
71. *Section 6C of the Guardianship Act 1987 refers to the Form of Appointment of Guardian. This form was amended by the Guardianship Amendment (Enduring Guardians) Act 2002. The new form is very similar to that set out in the Guardianship Act 1987. Annexed and marked "C" is a copy of the current Form of Appointment of Guardian. You should ensure that your precedent reflects the amendments, though section 6C(1)(a) only requires the form to be in, "or to the effect of" the form prescribed by the Regulations. Therefore, the old form is probably still a valid appointment. The major difference in the new form is that it makes provision for the appointment of an alternative enduring guardian. Query whether an alternative, or substitute, guardian could be appointed under the old form. Note the terms of the Solicitor's Certificate, and the fact that there needs to be a separate Certificate for each witness, if execution by the appointor and the guardian (of his or her acceptance of the appointment), is witnessed by different persons.*

Revocation by marriage

72. *Section 6HA states that the appointment of a person as enduring guardian is revoked if the appointor marries, or re-marries, a person (other than the appointee) after the date on which the person was appointed as an enduring guardian*

Resignation

73. *Section 6HB allows a guardian to resign if the appointor is not in need of a guardian. If he or she is, then the guardian may only resign with the approval of the Guardianship Tribunal.*

Automatic suspension of guardian

74. *Section 6I provides that a guardianship order (whether made by the Guardianship Tribunal or the Supreme Court), in respect of a person who has appointed an enduring guardian, operates to suspend, for the duration of the order, all authority for the enduring guardian to act as guardian. Any attempt by the person who is subject to the guardianship order, to appoint an enduring guardian during the currency of a Guardianship Tribunal or Supreme Court order, is of no effect.*

Review of Appointment

75. *Section 6J allows the Guardianship Tribunal to review, of its own volition, or at the request of any person who, in the opinion of the Tribunal, has a genuine concern for the welfare of the appointor, the appointment of an enduring guardian.*
76. *Section 6K allows the Tribunal to revoke the appointment or to vary the guardian's functions under the appointment. If it determines to revoke the appointment, it may appoint a replacement guardian (Section 6MA).*
77. *The Supreme Court may also review the appointment of an enduring guardian and make such orders as it thinks appropriate (Section 6L).*

GUARDIANSHIP ACT 1987

Guardianship orders

78. *An application for a guardianship order can be made by the person, the Public Guardian, or any other person who, in the opinion of the Tribunal, has a genuine concern for the welfare of the person. An application cannot be made in respect of a person who is under the age of sixteen (16) years.*
79. *Section 14 sets out the matters which the Tribunal must take into account in making a guardianship order, including the views of the person, the person's spouse, the views of any person who has the care of the person, the importance of preserving existing family relationships and cultural and linguistic environment, and the practicability of services being provided to the person without the need for making of such an order.*
80. *The Guardianship Tribunal does not have power to make a guardianship order in respect of a person who is the subject of a Supreme Court guardianship order, unless the Supreme Court consents (Section 15).*
81. *Section 18 sets out the term of a guardianship order. It is usually for a specified term, after which it will be reviewed.*

Financial Management

82. *The Guardianship Tribunal, under Part 3A, may order that the estate of a person be subject to management under the Protected Estates Act 1983. This enables the financial manager to, in effect, act as the attorney of the principal, subject to that the financial manager must, if he or she is other than the Protective Commissioner, operate under the supervision of the Protective Commissioner.*

Directions to Guardians

83. *The guardian may apply to the Tribunal for directions as to exercise of the guardian's functions (but not if the order has been made by the Supreme Court, unless the Supreme Court consents to same).*

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84. Section 30 provides that no proceedings shall lie against the guardian in respect of any act etc. by the guardian in good faith.

Medical and dental treatment (Part 5 Guardianship Act 1987)

- 85.1 Under Section 33A, there is a hierarchy of persons to establish the “person responsible” for giving consent to the carrying out of medical or dental treatment to a person (who, as provided in Section 33(2), is incapable of:

- A understanding the general nature and effect of the proposed treatment,
or
- B indicating whether or not he or she consents, or does not consent, to
the treatment being carried out.

That hierarchy, in descending order, is:

- a the person’s guardian (but only if the guardianship order, or the instrument appointing the guardian, provides for the guardian to exercise the function of giving consent to the carrying out of medical or dental treatment);
- b the spouse of the person;
- c a person who has the care of the person;
- d a close friend or relative of the person.

- 85.2 If the person who is, in accordance with the above hierarchy, the “person responsible”, declines, in writing, to exercise the functions under Part 5 of the Act, or a medical practitioner (or other qualified person) certifies that the person responsible is not capable of carrying out those functions, the next person in the hierarchy is the person responsible.

- 85.3 The person’s guardian is the first person in the s33A hierarchy, to become the person responsible for consenting medical or dental treatment. However, an enduring guardian does not generally have any wider power to consent to medical and dental treatment than the “person responsible”, under s33A.

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There may be other decisions which an enduring guardian could make but could not be made if there was no appointed guardian. If that occurred, then an application for appointment of guardian may have to be made to the Guardianship Tribunal.

- 85.4 *The person responsible cannot consent to medical or dental treatment if the person objects. Section 33(3) says that a person shall be taken to object to the carrying out of medical or dental treatment if the person indicates that he or she does not want the treatment, or has previously indicated that he or she did not want the treatment (and has not subsequently indicated to the contrary).*
86. *Section 35 provides that a person must not carry out medical or dental treatment on a patient to whom Part 5 applies unless:*
- (a) *consent has been given in accordance with this Part, or*
 - (b) *the carrying out of the treatment is authorised by this Part without any such consent, or*
 - (c) *the treatment is carried out in accordance with an Order made by the Supreme Court (though s35(1A) states that the Supreme Court does not have jurisdiction to consent to treatment which is likely to have the effect of rendering permanently infertile the person on whom it is carried out).*
- 87.1 *Section 36 states that consent to the carrying out of medical or dental treatment may be given:*
- (a) *in the case of minor or major treatment, by the person responsible for the patient*
- (s33 defines:*
- “Major treatment” as treatment [other than special treatment or treatment in the course of a clinical trial] that is declared by the Regulations to be major treatment for purposes of this Part. Regulation 8 of the Guardianship Regulation 2000 defines major medical treatment to include a number of major medical procedures.*

GUARDIANSHIP ACT 1987

“Minor treatment” is defined as treatment that is not special treatment, major treatment, or treatment in the course of a clinical trial.

“Special treatment” means:

- (i) *any treatment that is likely to have the effect of rendering permanently infertile the person on whom it is carried out, or*
- (ii) *any new treatment that has not gained the support of a substantial number of medical practitioners or dentists specialising in that area of practice, or*
- (iii) *any other kind of treatment declared by the Regulations to be special treatment.*

Regulation 6 of the Guardianship Regulation 2000 declares the following additional medical treatments to be special treatment for the purposes of Part 5 of the Act:

- (A) *administration of a drug of addiction (other than for treatment of cancer or palliative care) over periods totalling more than 10 days in any period of 30 days,*
- (B) *termination of pregnancy,*
- (C) *vasectomy or tubal occlusion,*
- (D) *use of an aversive stimulus, whether mechanical, chemical, physical or otherwise.*

The person responsible cannot consent to special treatment).

- (b) *in any other case, by the Tribunal. The Tribunal has exclusive jurisdiction to consent to special treatment. The Supreme Court does not have any such jurisdiction.*
- 87.2 *Section 36(2) allows a guardian to consent to the carrying out of continuing or further special treatment, if the Guardianship Tribunal has previously consented to same and authorised the guardian to give consent to the continuation of that treatment or to further treatment of a similar nature.*

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88. *Section 37 sets out when treatment may be carried out without consent (eg to save the patient's life, prevent serious damage to the patient's health, to prevent the patient from suffering significant pain or distress).*
89. *Minor treatment may be carried out without consent in certain circumstances.*
(Section 37)
90. *An application may be made to the Guardianship Tribunal for consent to the carrying out of medical or dental treatment (Section 42).*

Restrictions on Tribunal's power to give consent

91. *Section 45 requires the Tribunal to only consent to medical or dental treatment which is the most appropriate form of treatment for promoting the patient's health and well-being. The Tribunal may only give consent to carrying out of special treatment if it is satisfied that the treatment is necessary to save the patient's life or to prevent serious damage to the patient's health, though s45 allows consent by the Tribunal to certain defined special treatment on a less restrictive basis.*

Right of appearance before Guardianship Tribunal

92. *Section 58 allows parties to appear in person, or to, by leave of the Tribunal, be represented by a barrister, solicitor or agent.*

Appeals from decisions of the Guardianship Tribunal

93. *Section 67 permits an appeal from the Tribunal to the Supreme Court, as of right, on a question of law, and by leave of the Supreme Court, on any other question.*
94. *Section 67A allows an appeal to the Administrative Decisions Tribunal in respect of certain of the Tribunal's decisions.*

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The Public Guardian

95. *Section 77 says that the Protective Commissioner shall be the Public Guardian.*