THE LAW SOCIETY
OF NEW SOUTH WALES

POWERS OF ATTORNEY ACT 2003:
A COMMENTARY

Compiled by the
Elder Law and Succession Committee
Updated, July 2014

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INTRODUCTION

The *Powers of Attorney Act 2003: A Commentary* has been developed by the Elder Law and Succession Committee of the Law Society of NSW, prompted by amendments in 2013 to the *Powers of Attorney Act 2003* ("Act") and the *Powers of Attorney Regulation 2011* ("Regulation").

The Elder Law and Succession Committee's objective in providing this Commentary is to assist the legal profession to gain a better understanding of powers of attorney, both in the context of the Act and more broadly. The decade of Supreme Court and Guardianship Tribunal (as it was known) decisions on the Act and on powers of attorney generally has increased the understanding of the legislation. This Commentary provides notes about important court decisions relating to many sections of the Act and comments on the practical impact of those decisions. The new form for an enduring power of attorney is reproduced in a manner which demonstrates a possible means of completion. Accompanying comments explain the application of court decisions to the form.

A decade of court decisions

Along with much more, the comments on over a decade of judicial decisions concerning sections of the Act, its precursor or the common law (which, unless excluded by the Act, continues to apply to powers of attorney):

- explain the ambit of the authority that can be lawfully conferred upon an attorney
- reference the decisions which confirm that the Act does not generally apply to pre-Act powers of attorney, even where the power of attorney has been varied by orders which could only have been made pursuant to the Act
- explain the prohibition on an attorney acting as a trustee where the principal is appointed to that position (other than where allowed pursuant to the *Trustee Act 1925*, the trust instrument or by order of the court)
- explain that the prohibition on an attorney benefiting, unless expressly allowed, may extend to indirect as well as direct benefits
- confirm that an attorney appointed under an irrevocable power of attorney does not owe a fiduciary duty to the principal
- provide assistance in assessing a principal's mental capacity
- explain the presumption of a principal's capacity
- explain the ambit of the provision concerning the absence of authority in an attorney to perform an act which the principal lacked the mental capacity to understand
- emphasise the responsibilities placed on a solicitor when completing the prescribed certificate for an enduring power of attorney
- draw attention to the court's jurisdiction to terminate an irrevocable power of attorney, whenever made
- explain that a principal's silence can amount to ratification of an attorney's unauthorised acts
- draw attention to a reluctance to vary a term of a power of attorney to override a limitation deliberately inserted in the instrument or which may substantially interfere with the principal's testamentary intentions
- illustrate the application of the legal principles for rectification of powers of attorney executed by the incorrect spouse
- explain the ambit of an attorney's obligation to account, and the principal's obligation to satisfy the attorney's costs of doing so
- give instances of orders varying and, thereby, reinstating lapsed powers of attorney
- draw attention to the Guardianship Division of NCAT's ability to review a power of attorney made outside NSW

confirm the requirements for the proper execution of a deed by an attorney.

There is recognition that judicial decisions have not resolved all issues about the Act. For instance, there remains debate in the Equity Division of the Supreme Court about the extent to which an attorney can benefit from his/her position - where that is not in the best interest of the principal - without a clear and unequivocal statement to that effect. Accordingly, the relevant decisions on both sides of the debate are referenced in the Commentary.

2013 amendments

The Amending Act of 2013 brought four changes to the legislation. The first moved the prescribed form for a power of attorney from the Act to supporting Regulations. Complementary amendment to the Regulations introduced two new forms, one for a general power of attorney and the other for an enduring power of attorney. The Commentary includes detailed comment on each clause of the new enduring power of attorney form.

The Commentary contains many more observations of a similar ilk for the purpose of meeting its objective of serving the profession's needs.

Darryl Browne
Chair, Elder Law and Succession Committee
July 2014

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POWERS OF ATTORNEY ACT 2003: COMMENTARY

The commentary is provided in black text. Reference to the "Act" is a reference to the *Powers of Attorney Act 2003* as amended. Reference to the "Regulation" is a reference to the *Powers of Attorney Regulation 2011,* recently amended by the *Powers of Attorney Amendment Act 2013* and the *Powers of Attorney Amendment Regulation 2013.*

PART 1 - PRELIMINARY

Section 3 – Definitions

(1) In this Act:

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

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

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

- By reason of this definition, a corporate principal or attorney may be bankrupt. For an attorney this has relevance as a bankrupt attorney vacates office (s 5(d) of the Act). With an irrevocable power of attorney the bankruptcy of the principal does not revoke the appointment (s 6(1)(b) of the Act).

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

"**dealing**" has the same meaning as it has in the *Real Property Act 1900.*

"**deed**", in relation to land under the provisions of the *Real Property Act 1900,* includes a dealing having the effect of a deed under that Act.

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

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

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

"**instrument**" includes a deed.

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

"**property**" includes:
a) real and personal property, and
b) any estate or interest in any real or personal property, and
c) any debt, thing in action or other right or interest.

- In *Willmott Growers Group Inc v Willmott Forests Limited (Receivers and Managers Appointed) (In Liquidation)* [2013] HCA 51 the plurality (French CJ, Hayne and Kiefel JJ) counselled: "Care must always be exercised in understanding how the word "property" is used in legal discourse. The word may be used in different senses and the very concept of "property" may be elusive". The Court made reference to *White v DPP (WA)* [2011] HCA 20, [12] where it was stated that, when used in a statute, "property" may have its ordinary meaning, its broad legal meaning or both.

- Given the inclusive definition above, "property" is likely to have a broad legal meaning in the Act, being "a bundle of rights" and "a legally endorsed concentration of power over things and resources": *White* [10]. This is consistent with the meaning of a similarly defined "property" in the *Corporations Act 2001* about which the High Court in *Willmott* said: "The word "property" should be understood as referring to the company's possession of any of a wide variety of legal rights against others in respect of some tangible or intangible object of property": [36].

- This has relevance because of the definitions of "assurance" (which is used in ss 12 and 13 of the Act, concerning the conferral of benefits), "conveyance" and "disposition". It is also used in s 11 of the Act (concerning the gifting of property) and s 22 of the Act (concerning avoiding ademptions).

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

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

- This definition is relevant to s 13 of the Act whereby the attorney is not able to confer benefits on a third party without express authority. Also, pursuant to s 48 of the Act, a third party has protection against the effect of termination or suspension of a power of attorney if the third party acted in good faith without knowledge of the termination or suspension.

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

- This definition is relevant to irrevocable powers of attorney which must be given for valuable consideration: s 15(b) of the Act.

- The reference to marriage being valuable consideration suggests that other relationships of love and affection may constitute valuable consideration. In *The Commonwealth v Australian Capital Territory* [2013] HCA 55 the High Court stated that "marriage" could be now understood as "a consensual union formed between natural persons in accordance with legally prescribed requirements which is not only a union the law recognises as intended to endure and be terminable only in accordance with law but also a union to which the law accords a status affecting and defining mutual rights and obligations" [33]. This includes same sex relationships. Another example is polygamous relationship recognised as "marriage" by the law of another country: [33].

- Valuable consideration may also be provided by other relationships, such as those involving care, attention, companionship and /or personal services.

"**will**" includes codicil.

(2) A power of attorney does not become a different power of attorney if an attorney appointed by the power is lawfully replaced by a different attorney, the exercise of a power conferred by it is lawfully delegated or a sub-attorney is lawfully appointed to exercise a power under it.

- This subsection appears to contemplate the appointment of a substitute attorney by the Court or review tribunal pursuant to s 36(4)(c) of the Act, the appointment of a substitute, delegate or sub-attorney pursuant to a power to delegate appearing in the power of attorney pursuant to s 45(1) and the appointment of a substitute attorney pursuant to s 45A of the Act.

(3) A reference in this Act to a "suspended" power of attorney is a reference to a power of attorney that is:

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

(b) suspended by operation of section 50.

(4) Notes included in this Act (other than in Schedule 2) do not form part of this Act.

- The expression "power of attorney" is not defined in the Act. In s 158(1) of the *Conveyancing Act 1919*, which was repealed by the Act, "power of attorney" was defined to include "an authorized substitution, delegation or appointment of sub-attorney". In *Scott v Scott* [2012] NSWSC 1541, by reference to *Vella v Permanent Mortgages Pty Ltd* [2008] NSWSC 505 and *Szozda v Szozda* [2010] NSWSC 804, the Court remarked that "[i]t probably means a formal grant of agency powers": [176].

- In *Despot v Registrar-General of NSW* [2013] NSWCA 313 the Court of Appeal stated: "A power of attorney is a formal instrument by which authority or power to represent the donor [now called the principal] is conferred on the donee [the attorney]" at [48]. In *Vella v Permanent Mortgages Pty Ltd* [2008] NSWSC 505 the Court said it "probably means a formal grant of agency powers": [205].

- The definition of "Guardianship Tribunal" was deleted from 1 January 2014. A reference was made to "review tribunal" in its stead. "[R]eview tribunal" was stated to be defined in s 26 of the Act. The definition includes the Civil and Administrative Tribunal.

Section 4 – When is a person incommunicate?

(1) For the purposes of this Act, a person is "incommunicate" if:

(a) the person suffers from any physical or mental incapacity (whether of a temporary or permanent nature) that makes the person unable:

(i) to understand communications respecting the person's property or affairs, or
(ii) to express the person's intentions respecting the person's property or affairs, or

(b) the person is unable to receive communications respecting the person's property or affairs because the person cannot be located or contacted.

(2) Without limiting subsection (1) (a), a person may be incommunicate even if the incapacity concerned is induced by any drug or by medical or other treatment.

- This definition is very different to that found in s 163D of the *Conveyancing Act 1919*, which was repealed by the Act.

Section 5 – Vacancy in Office of Attorney

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

(a) the appointment of the attorney is revoked, or

(b) the attorney renounces the power, or

(c) the attorney dies, or

(d) the attorney becomes bankrupt, or

(e) where the attorney is a corporation, the corporation is dissolved, or

(f) the attorney, by reason of any physical or mental incapacity, ceases to have the capacity to continue to act as an attorney, or

(g) in such other circumstances as may be prescribed by the regulations for the purposes of this paragraph.

- In relation to s 5(a), in *Hallani v Hallani* [2013] NSWSC 91 the court stated: "A power of attorney can be revoked or modified by informal means", relying on *Vickery v JJP Custodians Pty Ltd* [2002] NSWSC 782. This appears to contemplate an oral revocation as well as one implied from later inconsistent conduct (an example of which is supplied *by Cousins v International Brick Company Ltd* [1931] 2 Ch 90, where the power to vote was impliedly revoked by the principal attending to do so himself).

- The position stated at s 5(b) reflects the common law position: see, for instance *Rayner v NJ Sheaffe Pty Ltd* [2010] NSWSC 810 [97].

- Clause 1(b) of the forms prescribed by the *Powers of Attorney Regulations* 2011 treat "resigns" as equivalent to "renounces" in s 5(b).

- By reason of the definition of "bankruptcy" s 5(d) applies to an individual as well as a corporate attorney.

- In relation to s 5(g), no regulations currently prescribe other circumstances for the purpose of this section.

- A similar version of this section appeared as s 163G(3) *Conveyancing Act 1919*, but that subsection referred only enduring powers of attorney (which were then called protected powers of attorney).

Section 6- Application of Act

(1) Act applies to instruments executed on or after commencement
This Act applies to any power of attorney created (or purporting to have been created) by an instrument executed on or after the commencement of this section.

(2) Act does not generally apply to existing powers of attorney
This Act does not apply to any power of attorney created (or purporting to have been created) by an instrument executed before the commencement of this section, except as provided by subsection (5).

- This is the position even if the power of attorney is varied after the commencement of the section (being 16 February 2004): *Hay v Aynsley* [2013] NSWSC 1689.

(3) Repealed provisions of *Conveyancing Act 1919* continue to apply to existing powers of attorney
Subject to subsection (5), the provisions of Part 16 of, and Schedule 7 to, the *Conveyancing Act 1919* (and of any regulations made under those provisions) as in force immediately before the commencement of this section continue to apply to any power of attorney created (or purporting to have been created) by an instrument executed before that commencement despite the repeal of those provisions by this Act.

(4) Schedule 1 contains copy of repealed provisions of Conveyancing Act 1919
Schedule 1 contains a copy of the provisions of Part 16 of, and Schedule 7 to, the *Conveyancing Act 1919* as in force immediately before the commencement of this section.

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

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

(6) Certain references in Part 5 extended to existing powers of attorney
For the purposes of subsection (5):

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

(b) a reference in Part 5 to an irrevocable power of attorney is taken to include a reference to a power of attorney to which section 160 of the *Conveyancing Act 1919* applied immediately before its repeal.

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

Section 7 - Application of general law to powers of attorney

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

(2) This Act does not affect the operation of Part 3 of the *Conveyancing Act 1919* except to the extent that this Act provides otherwise, whether expressly or by necessary intention.

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

PART 2 – PRESCRIBED POWERS OF ATTORNEY

Section 8 - Creation of prescribed power of attorney

Before the amendments this section read:
"An instrument (whether or not under seal) that is in or to the effect of the form set out in Schedule 2 (the "prescribed form") and is duly executed creates a "prescribed power of attorney" for the purposes of this Act."

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

- The effect of this section is that the prescribed forms have been moved from the Act to the Regulation.

- An instrument will be a prescribed power of attorney even if it is not in a prescribed form; it will be a prescribed power of attorney if it is *to the effect of* a prescribed form. This is consistent with the philosophy against requiring exactitude but allowing substantial compliance (which is contained in the *Interpretation Act 1987*, s 80(1)).

- The transition provisions in Schedule 5, clause 6, provide that the substitution of section 8 and the repeal of Schedule 2 by the amending Act does not:

  a) confer any additional authority on an attorney under a power of attorney that was a prescribed power of attorney in force immediately before the commencement of that substitution and repeal (an "existing authority"); or

  b) remove any authority conferred on a principal by an existing authority; or

  c) otherwise affect the continued operation of an existing authority.

Section 9 - Powers conferred by prescribed power of attorney

(1) Subject to this Act, a prescribed power of attorney confers on the attorney the authority to do on behalf of the principal anything that the principal may lawfully authorise an attorney to do.

- The following are activities that a principal **cannot** authorise an attorney to do:

  a) Unlawful acts, which include criminal conduct but also conduct which is not lawful, such as not paying debts that are properly due.[1]

  b) Activities personal to the principal (*see R v Burchill and Salway; ex parte Kretschmar* [1947] St R Qld 249), such as:

     i. personal contractual obligations like employment;
     ii. decisions about health care, medical treatment, welfare or lifestyle – it is this limitation which spawned legislation allowing enduring guardian appointments;
     iii. deciding to marry or divorce;
     iv. making a will;

[1] G E Dal Pont, Powers of Attorney LexisNexis Butterworths, Australia 2011 at [5.20]

v. commencing proceedings seeking the principal's bankruptcy: *In re Moses* [1906] QWN 8; *Orix Australia Corporation Limited v McCormick* [2005] FCA 1032, although an attorney can commence or defend other legal proceedings for the principal: *Sewell v Sewell* (1840) Notes of Cases 33; *Campbell v Pye* (1954) 54 SR(NSW) 308; *Spellson v George and others* (1987) 11 NSWLR 300, 313; *Urquhart and Another v Lanham and Others* [2002] NSWSC 119, 16; *Steinecke (bht Gardos) v Wayne, Lindner, Stricker, Levy; Re Estate of Stricker& Karl Heinz Lindner* [2011] NSWSC 428;

vi. swearing an affidavit or making a declaration about events within the personal knowledge of the principal (see *Clauss –v- Pir [*1987] 2 All ER 752 and *Fast Funds Pty Ltd v Coppola; Coppola v Hall* [2010] NSWSC 470, [169]);

vii. acting as a business partner;

viii. acting as a company director (see *Mancini v Mancini* [1999] NSWSC 799, [30], *Cheerine Group (International) Pty Ltd* [2006] NSWSC 1047, [10], *In the matter of Ledir Enterprises Pty Limited* [2013] NSWSC 1332) but now see s 201F(2) of the *Corporations Act 2001* (Cth) for the exception that can exist for a sole director/ single shareholder company and compare the New Zealand decision of *Cately Farms Ltd v ANZ Banking Group (NZ) Ltd* (1980) 1 NZCLC 95-037;

ix. revoking a power of attorney, will, enduring guardian appointment, and the like;

x. meeting requirements which by legislation are imposed personally on the principal.

c) It was sometimes said that these restrictions extend to:

i. voting, although an attorney can vote a principal's shares as a proxy under most company constitutions and possibly in other circumstances: *Cousins v International Brick Company Ltd* [1931] 2 Ch 90, *Cordiant Communications (Australia) Pty Ltd v The Communications Group Holdings Pty Ltd* [2005] NSWSC 1005 and *Quest Rose Hill Pty Ltd v White* [2010] NSWSC 939, [50];

ii. deciding to divorce[2], however now *see Sewell –v- Sewell* (1840) 1 Notes of Cases 33 and *Price v Underwood* [2008] FamCA 567, [1];

iii. making a binding death benefit nomination (because it is similar to the activity required to make a will) but see D07-08/30 [2007] SCT 93, [17], [25] and [34];

iv. acting as a trustee, but see in relation to self-managed superannuation funds SMSFR/2 [41] and [44], and also note s 53 and s 64 *Trustee Act 1925* (NSW) (referred to in the commentary on s 10 below);

v. acting as appointor of a discretionary trust which is consistent with an appointor exercising fiduciary powers, like a trustee (*Re Burton, Wily v Burton* [1994] FCA 1146, [10] *Brady Street Development Pty Ltd v ME Asset Investments Pty Ltd* [2013] NSWSC 1755, [13]), but see *Raynor v NJ Sheaffe Pty Ltd* [2010] NSWSC 810, [94];

vi. activities which breach an attorney's fiduciary obligations, i.e. to not gift property or make payments for the attorney's or another's benefit. It is this restriction which has led to ss 11 -13 allowing these activities if the power of attorney so expressly provides.

- This section is similar to its forerunner, s 163B(1) of the *Conveyancing Act 1919*.

[2] Dal Pont at [5.25]

(2) A prescribed power of attorney has effect subject to compliance with any conditions or limitations specified in the instrument creating the power.

Despite the reference to conditions and limitations *specified* in the power of attorney many court decisions have held that an attorney's authority can be limited, or made conditional, by implication. An example is *Vickery v Jjp Custodians Pty Ltd* [2002] NSWSC 782 where the principal spoke to the attorney before he left for an overseas trip and orally directed the attorney to use the power of attorney whilst the principal was away. The Court found that this conversation implied a limitation on the power of attorney, namely that the attorney was to use the power of attorney whilst the principal was away but not after the principal's return without particular authority: [30]. This finding was made even though the Conditions and Limitations part of the power of attorney was completed with "Nil": [6].

- Such an unexpressed limitation imposes potential risk to the attorney as well as third parties with whom the attorney deals on the principal's behalf. It is better to avoid these potential problems by encouraging a principal to clearly and comprehensively express all conditions and limitations in the power of attorney. For similar reasons, if the principal does not wish to place any conditions or limitations on the attorney's authority, the clause should be completed (preferably by a statement such as "There are no conditions or limitations on the attorney's authority other than those that arise by reason of law") rather than be left blank or incomplete.

- This section is similar to its forerunner, s 163B(3) of the *Conveyancing Act 1919*.

Section 10 – Prescribed power of attorney does not confer authority to act as trustee

A prescribed power of attorney does not confer authority to exercise any function as a trustee that is conferred or imposed on the principal.

- There is no definition of "trustee" or "as a trustee" in the Act. Two possible meanings of this section were that it prohibited an attorney acting as a fiduciary or that it prevented an attorney acting in the capacity of a trustee where the trustee was the principal. This ambiguity was resolved by *Belfield v Belfield* [2012] NSWCA 416, [67]:

  > In light of th[e] history, and the existing law concerning delegation by trustees, it is clear that the purpose sought to be achieved by [s10]... was to enable a simple form of power of attorney to be effective in all circumstances, ... except when the power of attorney purports to delegate any power, authority, duty or function that a person has by virtue of occupying the office of a trustee.

- This section would not prevent a trustee," instead of acting personally, employing and paying an agent, ...to transact any business or do any act required to be transacted or done in the execution of the trust or in the administration of the estate" provided it cannot be said that "a person acting with prudence would not employ the agent to transact the business or do the act, if the business or act was required to be transacted or done in such person's own affairs": s 53(1) and (5) of the *Trustee Act 1925*. Similarly, a trustee may delegate the execution of a trust in the circumstances specified in s 64 of the *Trustee Act 1925*.

- The ATO's ruling in SMSFR/2 states that a trustee of a self-managed superannuation fund may appoint an attorney to act as the trustee of the fund in certain circumstances. The ruling maintains that position while acknowledging the contrary position of State legislation, such as this section.

- This section is similar to its forerunner, s 63B(2)(a) of the *Conveyancing Act 1919*.

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

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

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

- A decision in which the common law position is expressed is *Re R* [2000] NSWSC 886, [39]. (See also *Tobin v Broadbent* (1947) 75 CLR 378 at 401, per Dixon J.)

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

- The prescribed expression is: "I authorise my attorney to give reasonable gifts as provided by s 11 (2) of the *Powers of Attorney Act 2003*". The prescribed expression authorises an attorney to give a gift only if:

  a) the gift is:

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

  b) the gift is a donation of the nature that the principal made when the principal had capacity or the principal might reasonably be expected to make, and the gift's value is not more than what is reasonable having regard to all the circumstances and, in particular, the principal's financial circumstances and the size of the principal's estate.

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

  a) a mother, father, wife, husband, daughter, son, step-daughter, step-son, sister, brother, half-sister, half-brother or grandchild of the principal; or

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

- The ambit of the expression "gift of ... property of the principal" was considered in *In the matter of Ledir Enterprises Pty Limited* [2013] NSWSC 1332. The Court stated that "dividends made by a company or distributions made by a trust, consequential upon the [principal's] interest in the company or the [principal's] status as a beneficiary of the trust" were not a gift of property of the principal. Also "the use of a power of attorney by a shareholder to exercise votes in a general meeting to elect or remove directors to a company does not... constitute every subsequent distribution from or payment by that company approved by those directors, or every distribution from a trust that is funded by a dividend or loan made by the company, a "gift" made by means of the power of attorney": [243].

Section 12 – Prescribed power of attorney does not generally confer authority to confer benefits on attorneys

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

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

- A decision in which the common law position is expressed is *Sweeney v Howard* [2007] NSWSC 852: [59].

- This section is similar to its forerunner, s 163B(2)(b) of the *Conveyancing Act 1919*.

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

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

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

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

    i. housing;
    ii. food;
    iii. education;
    iv. transportation;
    v. medical care and medication, and

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

- Until the decision of the Court of Appeal in *Taheri v Vitek* [2014] NSWCA 209 the effect of this section and its precursor (s 163B of the *Conveyancing Act 1919)* was the subject of debate. Decisions such as *Spina v Conran Associates Pty Ltd; Spina v M&V Endurance Pty Ltd* [2008] NSWSC 326*Spina v Permanent Custodians* [2008] NSWSC 561, *Hughes v Hughes* [2011] NSWSC 729, *Peroschinsky v Kirschner* [2013] NSWSC 400 and *Peter Vitek –v- Estate Homes Pty Ltd* [2013] NSWSC 1764 had adopted contradictory positions. The Court of Appeal has resolved the resulting uncertainty by specifically deciding that an instrument which includes a benefit clause in accordance with s 163(2)(b) [or s12(1)] authorises the attorney to act other than in the interests or for the benefit of the donor: [111].

- The concept of "benefit" is potentially a wide one. For instance, in *Dimitrovski v Australian Executor Trustees Ltd* [2013] NSWSC 337 the suggestion that an attorney "received a benefit because the mortgage of [property] secured a guarantee by [the principal] which was given in support of a loan…to a company in which [the attorney] had an interest" was described as "arguable" but "not straightforward": [5].

In *Peter Vitek v Estate Homes Pty Ltd* [2013] NSWSC 1764 the wife's attorney guaranteed a company's obligations. The wife had no direct interest in the company but her husband was the company's sole director and shareholder. Rein J considered that the wife obtained a benefit from the guarantee because she either had a financial interest in the company or she wanted to support her husband and the company: [31]. However the power of attorney in *Vitek* authorised the attorney to do anything the principal could lawfully authorise an attorney to do. These words were of "very wide import and…imposed no relevant limitation": [33(6)].

In *Despot v Registrar-General of NSW* [2013] NSWCA 313 the Court said: "A benefit has been conferred where there is a direct link between the exercise of the power and the benefit; that is, the act of the attorney must be the cause of the benefit: *Orr v Slender* [2005] NSWSC 1175 at [30] per Nicholas J": [155]. The Court analysed the facts and concluded that as an entity "received more than its entitlement… there is a benefit conferred…" The attorney exercised control over the entity benefited as a director, and the Court stated: "I would have thought a benefit was also conferred on [the attorney]. In any event, it is a benefit conferred upon a third party": [169].

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

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

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

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

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

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

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

    i. housing;
    ii. food;
    iii. education;
    iv. transportation;
    v. medical care and medication, and

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

- Commentary on the meaning of "benefit" appears at s 12 of the Act above.

Section 14 – Regulations may amend Schedules 2 and 3

Before the amendments this section read:

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

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

(a) confer any additional authority on an attorney under a power of attorney that was a prescribed power of attorney in force immediately before the day on which the amendment or repeal takes effect (an "existing authority"), or

(b) remove any authority conferred on a principal by an existing authority, or

(c) otherwise affect the continued operation of an existing authority.

By reason of the amendment, "Schedule 2 or 3 (or both)" was changed to "Schedule 3" only, and s 14(2) was deleted. In addition, the following section was inserted:

Section 14A - Effect of amendment of prescribed form or Schedule 3

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

(a) confer any additional authority on an attorney under a power of attorney that was a prescribed power of attorney in force immediately before the day on which the amendment or repeal takes effect (an "existing authority"), or

(b) remove any authority conferred on a principal by an existing authority, or

(c) otherwise affect the continued operation of an existing authority.

PART 3 – IRREVOCABLE POWERS OF ATTORNEY

At common law:

- While the interest of the attorney (which gave rise to the irrevocable power of attorney) subsists an irrevocable power of attorney cannot be revoked by the principal without suffering liability except with the consent of the attorney: *Despot v Registrar-General of NSW* [2013] NSWSC 273 at [175].

- An attorney appointed under an irrevocable power of attorney does not owe a fiduciary duty to the principal, and therefore can act in its best interests irrespective of (and contrary to) the interests of the principal, subject to any contractual provisions to the contrary: see for example *Quest Rose Hill v White* [2010] NSWSC 939 at [68], [73], [84] and *Cordiant Communications (Australia) Pty Ltd v The Communications Group Holdings Pty Ltd* [2005] NSWSC 1005 at [152], [156], [158].

- Common examples of documents containing common law irrevocable powers are:

  a) mortgages, where the lender may obtain the right to sell the principal's property to satisfy the debt;

  b) commercial leases, where the lessor may obtain the right to execute a surrender of lease on behalf of the lessee; and

  c) leases of licensed premises, where the lessor may take action to protect the licence attaching to the leased premises.

- However the grant of an irrevocable power of attorney does not deprive the principal of the ability to itself act in relation to the power contained in the irrevocable power of attorney: *James v Nesbitt* (1954) 28 ALJR 482 , *Cordiant Communications (Australia) Pty Ltd v The Communications Group Holdings Pty Ltd* [2005] NSWSC 1005 at [66] – [68].

Section 15 - Irrevocable powers of attorney

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

(a) the instrument is expressed to be irrevocable, and

(b) the instrument is given for valuable consideration or is expressed to be given for valuable consideration.

- An irrevocable power of attorney may be made other than "for the purposes of this Act": see *Despot v Registrar-General of NSW* [2013] NSWCA 313 at [52]. However, if the power of attorney is made for the purposes of the Act and does not express that it is irrevocable it is not an "irrevocable power of attorney" within the meaning of this Part of the Act: *Despot* at [55]. Similarly, if the power of attorney does not express that it is given for valuable consideration it is not an "irrevocable power of attorney" within the meaning of this Part of the Act."

- "valuable consideration" is defined in s 3.

Section 16 - Effect of irrevocable powers of attorney

(1) The power conferred by an irrevocable power of attorney is not revoked or otherwise terminated by, and remains effective despite, the occurrence of any of the following:

(a) anything done by the principal without the concurrence of the attorney,

(b) the bankruptcy of the principal,

(c) the mental incapacity of the principal,

(d) the principal becoming a mentally incapacitated person,

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

(e) the death of the principal,

- This reverses the position under the common law: see *Despot v Registrar-General of NSW* [2013] NSWCA 313 at [52].

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

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

Note: *Division 2 of Part 5 enables the Supreme Court to order the termination of an irrevocable power of attorney in certain circumstances. (This refers to s28 of the Act.)*

- The note refers to s 28 of the Act whereby the Supreme Court can order the termination if it considers that:

a) the objects of the irrevocable power of attorney have been carried out; or

b) the objects of the irrevocable power of attorney have become incapable of being carried out; or

c) the irrevocable power of attorney is otherwise exhausted.

- The utility of an irrevocable power of attorney should be explored:

a) in financial agreements made pursuant to the *Family Law Act 1975*, in place of the usual course of action of appointing the Registrar to sign documents on behalf of the parties;

b) in a business contract where protection is needed for a party providing a benefit to another party before the performance by the other party of its obligations under the contract.

- Sections 15 and 16 largely reproduce s 160(1) of the *Conveyancing Act 1919*, which was repealed by the Act.

PART 4 – INCAPACITY AND ENDURING POWERS OF ATTORNEY

- "Mental incapacity" is mentioned in ss 17, 18 and 21 of this Part (and s 30 of the Act), and "lack of mental capacity" is referred to in s 19 of the Act. "Mental capacity" is referred to in s 36(3)(a), wherein a review tribunal has jurisdiction declaring a principal had or did not have mental capacity to make a power of attorney (as well as s 29 and s 31 of the Act).

- In making assessments of incapacity and capacity, the following comments from *Scott v Scott* [2012] NSWSC 1541 at [199] – [205], may assist:

  "Attention must be focussed on all the circumstances of the case, including

  a) the identities of the [principal] and [attorney] of a disputed power of attorney;
  b) their relationship;
  c) the terms of the instrument;
  d) the nature of the business that might be conducted pursuant to the power;
  e) the extent to which the [principal] might be affected in his or her person or property by an exercise of the power;
  f) the circumstances in which the instrument came to be prepared for execution, including any particular purpose for which it may ostensibly have been prepared; and
  g) the circumstances in which it was executed. [sub-paragraphs added]

- A longitudinal assessment of mental capacity, along a time line extending either side of the focal point, may be necessary, or at least permissible, in order to examine the subject's mental capacity in context.

- Where an Enduring Power of Attorney confers on an attorney power to dispose of the principal's property to or for the benefit of the attorney or third parties, the nature and degree of mental capacity required to grant such a power may approximate that required for the making of a valid will. In that event, the "standard" laid down by *Banks v Goodfellow* (1870) LR 5 QB 549 at 564-565 might apply or be approximated.

- An Enduring Power of Attorney limited in its terms, or effect, to authorisation of acts for the benefit of the principal may require consideration of factors different from those considered upon an assessment of mental capacity for the making of a valid will.

- It is not, literally, a matter of imposing, or recognising, a different "standard" of mental capacity in the evaluation of the validity of different transactions. What is required, rather, is an appreciation that the concept of "mental capacity" must be assessed relative to the nature, terms, purpose and context of the particular transaction. Nothing more, or less, is required than a focus on whether the subject of inquiry had the capacity to do, or to refrain from doing, the particular thing under review."

- Also, in making an assessment on mental capacity it is important to recognise the presumption of capacity, which is also called the presumption of sanity. In *Szozda v Szozda* [2010] NSWSC 804 the Supreme Court applied the principle in a challenge to the validity of a power of attorney on the basis of capacity. Barrett J attributed the origins of the presumption to *Attorney-General v Parnther* [1792] Eng R 2455; (1792) 3 Bro CC 441; (1792) 29 ER 632. It has been described as both "long cherished": *Masterman-Lister v Brutton &Co* [2003] 3 All ER 162 at 169 and "longstanding": *Owners Strata Plan No 23007 v Cross* [2006] FCA 900 at [66]. A recent example of its application, in a local intermediate appellate court, is *Murphy v Doman* [2003] NSWCA 249 (2003) 58 NSWLR 51 at [36].

- Generally the burden of proving a fact lies with the person asserting the existence of the fact: "he who alleges must prove" (see, most recently, French CJ, Gummow, Hayne, Heydon and Kiefel JJ in *Wallaby Grip Limited v QBE Insurance (Australia) Limited* [2010] HCA 9 at [36]). However as a result of the presumption of capacity the onus of establishing incapacity lies on the party who seeks to rebut the presumption: similarly *Lake v Crawford* [2010] NSWSC 232 at [13].

- *Lake v Crawford* [2010] NSWSC 232 is also authority that "for the power of attorney to be void for incapacity it must be established that [the principal's] incapacity was known by each of the persons who procured its execution": [15].

- Similarly, *Perochinsky v Kirschner* [2013] NSWSC 400 establishes that the action of the principal made without mental capacity to undertake the transaction is not void but voidable: [115].

Division 1 - Initial and supervening mental incapacity

Section 17 - Initial mental incapacity

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

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

Note: Division 3 of Part 5 (ss 29 - 32) contains provisions that enable the Supreme Court to confirm the operation of a power of attorney despite the mental incapacity of the principal at the time the power is given.

- In *Szozda v Szozda* [2010] NSWSC 804, Barrett J commented that the section applies to all powers of attorney, not just those of the special kinds for which the Act makes particular provision.

- In *Szozda v Szozda* [2010] NSWSC 804 at [39]-[41], Barrett J commented on the effect of this section as follows: "Section 17 takes as its starting point the existence of a valid power of attorney. It operates in the context of the valid power of attorney and, in the case with which it deals, reduces the effective scope of that power of attorney". Section 17 was first enacted in 1983 as s 163E(1) and (2) of the *Conveyancing Act 1919* (added by the *Conveyancing (Powers of Attorney) Act 1983).* The purpose of the new provision was explained by the New South Wales Law Reform Commission in Report No 20 (1975) – *Powers of Attorney and Unsoundness of Body or Mind* (at Part 8, paragraph 8.3) as follows:

> The draft section on this subject (draft section 163E) is not concerned with cases where the instrument is void because, by reason of unsoundness of mind, the execution by the principal of the instrument creating the power is not accompanied by an intention to execute an instrument affecting his legal position, or he does not understand the nature of a power of attorney. The draft section is concerned with cases where the principal knows that he is executing an instrument creating a power of attorney and understands the nature of a power of attorney, but does not (or may not) understand, by reason of unsound mind, the nature of some or all of the acts within the scope of the power. In other words, the aim of the draft section is to provide a means for removing doubt about the effectiveness of a power of attorney which the principal intended to create and did create, not to give legal effect to an instrument which, by reason of initial unsoundness of mind, is merely an empty gesture.

- Section 17 does not define or describe the extent or quality of mental capacity required for the creation of a valid power of attorney. It merely removes from the scope of the authority (created by a valid power of attorney) acts the nature of which mental incapacity at inception puts beyond the donor's understanding. While the power of attorney is valid, it is ineffectual as a source of authority for the attorney to do acts (within the scope of the power) the nature of which was beyond the grantor's understanding because of mental incapacity at the time the power of attorney was made. The section deems acts invalid to the extent that they are beyond the donor's mental capacity at the time of making the power of attorney. This is assuming there is no validating intervention of a provision of the Act.

- This section therefore poses significant risks for attorneys and third parties with whom the attorney deals. Those risks arise if the principal has capacity to make the power of attorney but at that time lacks understanding of the act subsequently performed by the attorney for the principal. The risk is only removed if the attorney's act is "authorised by or under this Act": ss (2). The note makes reference to ss 29 to 32 of the Act. However:

  a) Section 29 has no relevance to the issue;

  b) Section 30 only allows the Supreme Court to confirm the attorney's acts on an application of the principal, and only if the principal has affirmed the attorney's act;

  c) Section 31 is the most likely source of possible authorisation by or under the Act. (By the section the Court may "confirm" the attorney's act.) That section only allows authorisation if it is upon application of the principal and the act "is for the benefit of the principal". It is possible that determination of the beneficial nature of the attorney's act will be made at the time of the hearing of the application for authorisation (and no doubt with the assistance of hindsight) rather than the date of the attorney's act;

  d) Section 32 facilitates the effectiveness of a confirmation made pursuant to ss 30 or 31 of the Act.

  These provisions mean that there is only limited prospect of an attorney's unauthorised act being authorised by or under the Act.

- This section is reminiscent of s 163E(1) and (2) of the *Conveyancing Act 1919*.

Section 18 - Supervening mental incapacity does not affect validity of acts principal understands

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

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

- A similar version of this section appeared as s 163F(1) *Conveyancing Act 1919*.

Division 2 - Enduring powers of attorney

Section 19 - Creation of enduring power of attorney

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

(a) the instrument is expressed to be given with the intention that it will continue to be effective even if the principal lacks capacity through loss of mental capacity after execution of the instrument, and

(b) execution of the instrument by the principal is witnessed by a person who is a prescribed witness (not being an attorney under the power), and

(c) there is endorsed on, or annexed to, the instrument a certificate by that person stating that:

(i) the person explained the effect of the instrument to the principal before it was signed, and
(ii) the principal appeared to understand the effect of the power of attorney, and
(iii) the person is a prescribed witness, and
(iv) the person is not an attorney under the power of attorney, and
(v) the person witnessed the signing of the power of attorney by the principal.

(2) In this section:

"prescribed witness" means:

(a) a registrar of the Local Court, or

(b) a barrister or solicitor of a court of any State or Territory of the Commonwealth, or

(c) a licensee under the *Conveyancers Licensing Act 2003* , or an employee of the NSW Trustee and Guardian or a trustee company within the meaning of the *Trustee Companies Act* 1964 , who has successfully completed a course of study approved by the Minister, by order published in the Gazette, for the purposes of this paragraph, or

(d) a legal practitioner duly qualified in a country other than Australia, instructed and employed independently of any legal practitioner appointed as an attorney under the instrument, or

(e) any other person (or person belonging to a class of persons) prescribed by the regulations for the purposes of this paragraph.

- To satisfy the requirement of having explained the power of attorney before it is signed by the principal (that is, s 19(1)(c)(i) of the Act), the prescribed witness should, in the absence of any person who is a potential attorney (and, preferably, in the absence of any person who may influence the principal's decision making) explain various aspects relating to the effect of the power of attorney. Where appropriate, this may include the following:

a) the nature of a power of attorney;

b) the different features of the various types of powers of attorney, with particular attention to the distinguishing feature of an enduring power of attorney;

c) the attributes most desired in an attorney;

d) the obligations that an attorney owes the principal;

e) the different ways that multiple attorneys may be appointed (being joint, several and consecutive) and the pros and cons with each approach;

f) the limit on an attorney's authority imposed by law;

g) the additional powers that may be conferred on an attorney, and the pros and cons of those powers in the principal's circumstances;

h) the conditions and limitations that may be imposed on the attorney's authority, and the pros and cons thereof, and

i) the prescribed and other options concerning the operation of the power of attorney.

- To satisfy the requirement that the principal appeared to understand the effect of the power of attorney (ie s 19(1)(c)(ii) of the Act), the prescribed witness should reach the conclusion that the principal understands the ramifications and consequences of the power of attorney (per *Szozda v Szozda* [2010] NSWSC 804, [32]), which, in relation to an enduring power of attorney, appears to require an appreciation of:

  a) the extent of the attorney's authority. Namely, that:

     i. the attorney will be able to make decisions about the principal's legal and financial affairs;
     ii. subject to the limitation that certain powers that cannot be conferred on an attorney; and
     iii. subject to the conditions and limitations specified in the power of attorney;

  b) the circumstances in which the attorney has the principal's authority – which essentially is an understanding of clause 4 of the new power of attorney forms;

  c) the continuing operation of the power of attorney notwithstanding the principal's subsequent loss of mental capacity; and

  d) the absence of any authority to revoke the power of attorney if the principal lacks mental capacity to do so other than by recourse to the Supreme Court or a review tribunal.

  (These items have been slightly adjusted from those contained in *Re K* [1988] Ch 310 to reflect the statutory regime in NSW.)

- Seemingly the prescribed witness' satisfaction of the existence of the understanding may be formed either before or after the principal signs the power of attorney. Justice Barrett has stated that the prescribed witness' "clear responsibility is to undertake sufficient explanation **and sufficient probing** to come to an informed view about the state of the principal's understanding" [emphasis added]. His Honour added that "an attempt should be made to get from the [principal's] own mouth some statements indicating their appreciation of the significance of what they are about to do."[3];

[3] Speech of Justice R I Barrett, Law Society of NSW Elder Law and Succession Committee "Listen to the Judges" series 11 September 2012 available online: http://supremecourt.lawlink.nsw.gov.au/agdbasev7wr/assets/supremecourt/m670001731657/barrett110912.pdf [accessed 11 March 2014]

- In *Scott v Scott* [2012] NSWSC 1541, the Court referred to a s 19 certificate as giving courts and those who rely on an enduring power of attorney "some comfort" about the mental capacity of the principal to make it: [238]-[239]. Comments of this nature, and the outcome of decisions like *Legal Service Commissioner v Ford* [2008] LPT 12 (where a solicitor was disciplined for preparing a power of attorney for a person who lacked the mental capacity to do so), emphasise the level of responsibility upon a solicitor to ensure that the principal understands the power of attorney before the solicitor provides the s 19 certificate.

- A similar version of this section appeared as s 163F(2) of the *Conveyancing Act 1919*.

Section 20 - Enduring power of attorney does not confer authority until attorney accepts appointment

Before the amendments this section read:

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

(2) If more than one attorney is appointed by an enduring power of attorney, the power of attorney operates to confer authority only in relation to such of the attorneys who accept their appointments as provided by subsection (1).

(3) An attorney may accept the appointment at the time the instrument creating the enduring power of attorney is executed or at any time after it is executed.

By reason of the amendment, the following additional sub-section has been added:

(4) To avoid doubt, this section extends to substitute attorneys.

- Clause 8 of the transitional provisions in Schedule 5 of the Act provides that s 20(4) extends to any enduring power of attorney created by an instrument executed before the insertion of that subsection. Accordingly, this amendment ensures that substitute attorneys are allowed in enduring powers of attorney whether made before or after the date of the amendment.

Section 21 - Effect of enduring power of attorney

(1) Subject to this Act, an act done by an attorney that is within the scope of the power conferred by an enduring power of attorney and that is of such a nature that it is beyond the understanding of the principal through mental incapacity at the time of the act is as effective as it would have been had the principal understood the nature of the act at that time.

(2) This section does not save a power of attorney from being or becoming ineffective by reason of any matter other than mental incapacity of the principal arising after the execution of the instrument creating the power.

(3) This section applies only if and to the extent that a contrary intention is not expressed in the instrument creating the power and has effect subject to the terms of the instrument creating the power.

- This section saves an act performed by an attorney appointed under an enduring power of attorney from being invalid by reason of the principal lacking mental capacity at the time the act is performed. It protects attorneys and third parties who rely on the enduring power of attorney without overt knowledge of the principal's mental capacity at the time of the attorney's act. This counters the suggestion that, under the common law, if the principal loses mental capacity, the power of attorney ceases to be effective. However, in relation to that suggestion the Australian Law Reform Commission's *Community Law Reform for the ACT: Third Report on Enduring Powers of Attorney* in 1988 commented: "Yet the legal authority for this proposition is very thin. Courts have either simply asserted that this is the case, without saying why, or disagreed among themselves about the question" at [10]. The position with the validity of general powers of attorney after the principal loses mental capacity may therefore not be conclusively decided.

- This section does not prevent an attorney's act being found invalid on any other basis.

- A similar version of this section appeared as s 163F(3) and (4) of the *Conveyancing Act 1919* but there supported sections which are the equivalent of ss 18 and 19 of this Act.

Section 22 - Effect of ademptions of testamentary gifts by attorney under enduring power of attorney

(1) Any person who is named as a beneficiary (a "named beneficiary") under the will of a deceased principal who executed an enduring power of attorney has the same interest in any surplus money or other property arising from any sale, mortgage, charge or disposition of any property or other dealing with property by the attorney under the power of attorney as the named beneficiary would have had in the property the subject of the sale, mortgage, charge, disposition or dealing, if no sale, mortgage, charge, disposition or dealing had been made.

(2) The surplus money or other property arising as referred to in subsection (1) is taken to be of the same nature as the property sold, mortgaged, charged, disposed of or dealt with.

(3) Except as provided by subsection (4), money received for equality of partition and exchange, and all fines, premiums and sums of money received on the grant or renewal of a lease where the property the subject of the partition, exchange, or lease was real estate of a deceased principal are to be considered as real estate.

(4) Fines, premiums and sums of money received on the grant or renewal of leases of property of which the deceased principal was tenant for life are to be considered as the personal estate of the deceased principal.

(5) This section has effect subject to any order of the Supreme Court made under section 23.

(6) A person is named as a beneficiary under a will for the purposes of this section if:

(a) the person is referred to by name in the will as being a beneficiary, or

(b) the person answers a description of a beneficiary, or belongs to a class of persons specified as beneficiaries, under the will.

(7) This section does not apply to any person to whom section 83 of the *NSW Trustee and Guardian Act 2009* applies.

- By reason of s 6(1) of the Act, this section only applies to dealings of an attorney appointed under an enduring power of attorney made on or after 16 February 2004. *Hay v Aynsley* [2013] NSWSC 1689 confirms that ss 22 and 23 do not apply to pre-2004 Enduring Powers of Attorney, even if there is a post 2004 decision varying the pre 2004 Enduring Power of Attorney (which variation decision enabled the ademption to be made, and even though the variation decision could only be made pursuant to the 2004 Act).

- The law on ademptions that applies to dealings of an attorney appointed under an earlier power of attorney, or a power of attorney made on or after 16 February 2004 which is not an enduring power of attorney, is contained in *RL v NSW Trustee and Guardian* [2012] NSWCA 39. An example of the application of an attorney's actions leading to an ademption is *NSWTG v Bensley* [2012] NSWSC 655. *The Trust Company Ltd v Gibson* [2012] QSC 183 is an example of an attorney's actions forming part of a planned ademption (and supported by appropriate releases).

Section 23 - Supreme Court may make orders confirming or varying operation of section 22

(1) On the application of a named beneficiary referred to in section 22 (1) or such other person as the Supreme Court considers has a proper interest in the matter, the Supreme Court may:

(a) make such orders and direct such conveyances, deeds and things to be executed and done as it thinks fit in order to give effect to section 22, or

(b) if it considers that the operation of section 22 (1) and (2) would result in one or more named beneficiaries gaining an unjust and disproportionate advantage, or suffering an unjust and disproportionate disadvantage, of the kind not contemplated by the will of the deceased principal-make such other orders as the Court thinks fit to ensure that no named beneficiary gains such an advantage or suffers such a disadvantage.

(2) An order made by the Supreme Court under subsection (1) (b):

(a) may provide that it has effect as if it had been made by a codicil to the will of the deceased principal executed immediately before his or her death, and

(b) has effect despite anything to the contrary in section 22.

(3) An application under subsection (1) must be made within 6 months from the date of the grant or resealing in this State of probate of the will or letters of administration unless the Supreme Court, after hearing such of the persons affected as the Supreme Court thinks necessary, extends the time for making the application.

(4) An extension of time granted under subsection (3) may be granted:

(a) on such conditions as the Supreme Court thinks fit, and

(b) whether or not the time for making an application under this section has expired.

Section 24 - (Repealed)

This section made provision in favour of a principal's spouse in the event of the principal dying intestate, but the principal's attorney having acted in a manner which would adeem the shared home of the principal and spouse. This section was repealed upon commencement of Chapter 4 of the *Succession Act 2006* (and the concomitant repeal of ss 61B and 61D of the *Probate and Administration Act 1898* on 1 March 2010).

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

(1) An interstate enduring power of attorney has effect in this State as if it were an enduring power of attorney made under, and in compliance with, this Act, but only to the extent that the powers it gives under the law of the State or Territory in which it was made could validly have been given by an enduring power of attorney made under this Act.

(2) In particular, an interstate enduring power of attorney to which subsection (1) applies:

(a) has effect in this State subject to any limitations on the power that apply to it under the law of the State or Territory in which it was made, and

(b) does not operate to confer any power on an attorney in this State that cannot be conferred on an attorney under an enduring power of attorney made in this State.

(3) Subsection (1) does not apply to any power of attorney (or class of powers of attorney) prescribed by the regulations.

(4) A document signed by a qualified interstate legal practitioner that certifies that an interstate enduring power of attorney was made in accordance with the formal requirements of the law of the State or Territory in which it was made is admissible in any proceedings concerning that power and is prima facie evidence of the matter so certified.

(5) In this section:

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

"**qualified interstate legal practitioner**", in relation to an interstate enduring power of attorney, means an individual:

(a) who has been admitted to legal practice in the State or Territory in which the power of attorney was made, and

(b) who holds a certificate or other form of authorisation that confers an authority to practise in that State or Territory that corresponds to the authority conferred by a practising certificate issued under Part 3 of the Legal Profession Act 1987 , and

(c) who practises in that State or Territory.

- This section allows for the recognition in NSW of a power of attorney made in accordance with the formal requirements of the law of another Australian State or Territory. In this regard, a power of attorney made in Tasmania pursuant to the *Powers of Attorney Act 2000* (Tas) is ineffective unless registered. In the Northern Territory and Queensland an attorney only has authority to undertake certain transactions (being essentially relating to land) if the power of attorney is registered.
- In relation to the interstate recognition of a power of attorney made in NSW, in Queensland, Victoria and the ACT, a power of attorney made in NSW will be recognised to the extent that it gives powers which could validly be given by an enduring power of attorney made in the State or Territory. In WA an enduring power of attorney may be recognised if it corresponds sufficiently to a power of attorney created under WA legislation. An enduring power of attorney validly made in NSW can be registered in the Northern Territory.
- There are currently no regulations prescribing powers of attorney for the purpose of s 25(3) of the Act.
- By reason of s 6(5) of the Act, this section applies to powers of attorney whether made before or after the commencement of the legislation, being 16 February 2004.

PART 5 – REVIEW OF POWERS OF ATTORNEY

- By reason of s 6(5), this Part applies to powers of attorney, whether made before or after the commencement of the legislation, being 16 February 2004.

Division 1 - General

Section 26 - Review tribunals

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

(a) the Civil and Administrative Tribunal,

(b) the Supreme Court.

- Until 1 January 2014, s 26(a) read "the Guardianship Tribunal".

Section 27 - Concurrent jurisdiction of review tribunals

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

(2) A person cannot make an application to a review tribunal for the exercise of a function conferred on the tribunal by this Part if the person has already applied to another review tribunal for the exercise of the same function in respect of the same (or substantially the same) matter.

(3) However, subsection (2) does not prevent a person from making an application to a review tribunal for the exercise of a function under this Part if the earlier application for the exercise of the same function has been withdrawn with the approval of the review tribunal in which the application was made.

(4) Subsections (1)-(3) do not apply to a provision of this Part that confers a function on the Civil and Administrative Tribunal or the Supreme Court expressly.

- Function is defined to include a power, authority or duty.

Division 2 - Termination of irrevocable powers of attorney

Section 28 - Supreme Court may order the termination of irrevocable power of attorney

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

(a) the objects of the power of attorney have been carried out, or

(b) the objects of the power of attorney have become incapable of being carried out, or

(c) the power of attorney is otherwise exhausted.

- This section is not stated to only apply to irrevocable powers of attorney "for the purposes of this Act": see s 15 of the Act. It therefore confers jurisdiction on the Supreme Court in relation to all irrevocable powers of attorney, whenever made: *Wong v Wong* [2008] NSWSC 330.

Division 3 - Confirmation of powers conferred when principal mentally incapacitated

Section 29 - Supreme Court may make orders confirming powers understood by principal

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

- Pursuant to section 29 of the Act, the Supreme Court may confirm that the principal had capacity. The legal tests for capacity (in various circumstances) are discussed in *KTC* [2011] NSWGT 23 at [19-32]. See also *Szozda v Szozda* [2010] NSWSC 804 at [12]-[19] and [27]-[42]; *Gibbons v Wright* [1954] HCA 17 (1954) 91 CLR 423 at 437-438 and *Scott v Scott* [2012] NSWSC 1541 at [171 to 241].

- This section is reminiscent of s 163E(3) of the *Conveyancing Act 1919*.

Section 30 - Supreme Court may make orders confirming powers subsequently affirmed by principal

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

(a) the principal has affirmed the power before or during the proceedings on the application, and

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

- Only unequivocal words or acts will suffice to establish ratification or affirmation: *Petersen v Maloney* (1951) 84 CLR 91, but the ratification may be expressed or implied (such as from conduct showing that the principal adopts the transaction, which can be silence): *Vitek v Estate Homes Pty Ltd* [2013] NSWSC 1764 at [55].

- The principal must be shown to have had full knowledge of all the material circumstances (being those which are sufficient for the principal to be able to decide whether to adopt the unauthorised transaction: *Vitek v Estate Homes Pty Ltd* [2013] NSWSC 1764) before his words or conduct can amount to ratification or affirmation: *Taylor v Smith* [1926] HCA 16; (1926) 38 CLR 48; see also *Bird v Bird (No 4)* [2012] NSWSC 648 at [65] and *Perochinsky v Kirschner* [2013] NSWSC 400 at [150].

- If, having learned of all the material circumstances, the principal does not disown the unauthorised transaction, the principal may be treated as having ratified the transaction: *Vitek v Estate Homes Pty Ltd* [2013] NSWSC 1764.

- It appears that for a principal to affirm a transaction that otherwise is in breach of the attorney's fiduciary duty or beyond the power the principal must give informed consent: *Perochinsky v Kirschner* [2013] NWSC 400 at [150]. The High Court has recently had occasion to comment on the requirement for "informed consent", albeit in very different circumstances. In *Reeves v The Queen* [2013] HCA 57, French CJ, Crennan, Bell and Keane JJ stated that "The nature of the consent to a medical procedure that is required in order to negative the offence of battery is described in the joint reasons in *Rogers v Whitaker*. It is sufficient that the patient consents to the procedure having been advised in broad terms of its nature": [35].

- In *Burns v The Queen* [2012] HCA 35, which also involved a criminal setting, Gummow, Hayne, Crennan, Kiefel and Bell JJ described the criminal's decision as "informed because he knew what he was doing" even though he did not know the effect that that decision would have. "[A] foolish decision…not knowing its likely effects is nonetheless the [criminal's] voluntary and informed decision": [87].

- This section is reminiscent of s 163E(4) of the *Conveyancing Act 1919*.

Section 31 - Supreme Court may make orders confirming powers in best interests of principal

(1) The Supreme Court may, on the application of a principal under a power of attorney (whether or not an enduring power of attorney), confirm (whether in whole or in part) any power to do an act under the power of attorney if it appears to the Court that:

(a) the principal is incapable of affirming the power because:
(i) the principal lacks capacity by reason of the continuation of mental incapacity that affected the principal when the principal gave the power, or
(ii) the principal is incommunicate, and

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

- "incommunicate" is defined in s 4 of the Act.

(2) Subsection (1):

(a) applies only if and to the extent that a contrary intention is not expressed in the instrument creating the power of attorney, and

(b) has effect subject to the terms of the instrument creating the power of attorney.

- An application by a principal who is incommunicate will need to be made by the principal's tutor: *Gouder* [2005] NSWSC 1116 at [5]. As rule 7.18 of the Uniform Civil Procedure Rules requires a tutor to not have an interest in the proceedings adverse to that of the principal, the attorney is, arguably, not an appropriate person to be the principal's tutor: *Gouder* at [4].

- *In Gouder* [2005] NSWSC 116, the Court rectified a power where a husband and wife signed each other's documents and did not apply s 31 of the Act.

- The Supreme Court, but not Civil and Administrative Tribunal, has jurisdiction to deal with powers granted by an incommunicate principal.

- This section is reminiscent of ss 163E(5) and (7) of the *Conveyancing Act 1919*.

Section 32 - Effect of orders made by Supreme Court under this Division

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

- This section is reminiscent of s 163E(6) of the *Conveyancing Act 1919*.

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

Section 33 - Reviewable powers of attorney

Before the amendments this section read:

(1) A power of attorney is a "reviewable power of attorney" for the purposes of an application under this Division if the review tribunal to which the application is to be made has jurisdiction to deal with the application as provided by this section.

(2) Both the Civil and Administrative Tribunal and the Supreme Court have jurisdiction to deal with an application under this Division in respect of an enduring power of attorney.

(3) The Supreme Court (but not the Civil and Administrative Tribunal) also has jurisdiction to deal with an application under this Division in respect of any other power of attorney given by a principal who is incommunicate for the time being.

(4) To remove any doubt, references in this Division to a reviewable power of attorney extend to a document purporting to be a reviewable power of attorney and to the making of a power of attorney extend to the purported making of a power of attorney.

After amendment, this section now reads:

(1) A power of attorney is a "reviewable power of attorney" for the purposes of an application under this Division if the review tribunal to which the application is to be made has jurisdiction to deal with the application as provided by this section.

(2) Both the Civil and Administrative Tribunal and the Supreme Court have jurisdiction to deal with an application under this Division in respect of an enduring power of attorney (including a revocation of an enduring power of attorney).

(3) The Supreme Court (but not the Civil and Administrative Tribunal) also has jurisdiction to deal with an application under this Division in respect of any other power of attorney given by a principal who is incommunicate for the time being.

(4) To remove any doubt, references in this Division to a reviewable power of attorney extend to a document purporting to be a reviewable power of attorney and to the making or revocation of a power of attorney extend to the purported making or revocation of a power of attorney.

- By reason of the amendment, the words “including a revocation of an enduring power of attorney” were inserted after “enduring power of attorney” in s 33(2) above and “or revocation” was inserted in s 33(4) after “making” wherever occurring.

- The amendment gives the Civil and Administrative Tribunal jurisdiction to deal with the revocation of an enduring power of attorney. By clause 7 of the transitional provisions in Schedule 5 of the Act, the enlarged jurisdiction conferred on the Tribunal by this and cognate amendments extends to enduring powers of attorney made before the commencement of the amendments.

- The courts have eschewed the possibility that “the *Powers of Attorney Act* creates an exclusive code with respect to enduring powers of attorney, in the sense that a review by a “review tribunal” (being this court or the Guardianship Tribunal [now known as Civil and Administrative Tribunal])...is the only available path to a binding legal conclusion that the effectiveness of such a power of attorney is compromised because of lack of mental capacity on the part of the donor at the time of creation. A question of that kind can arise in a range of proceedings”: *Szozda v Szozda* [2010] NSWSC 804 at [16].

Section 34 - Referral of application to different review tribunal

Before the amendments this section read:

(1) Whether or not on its own initiative, the Supreme Court may refer an application made to it under this Division in respect of an enduring power of attorney to the Civil and Administrative Tribunal and the Civil and Administrative Tribunal may refer such an application made to it to the Supreme Court.

(2) Without limiting the matters that a review tribunal may take into account in deciding whether or not to refer such an application, the review tribunal may take into account any one or more of the following matters:

(a) whether the application relates to the effect of the enduring power of attorney on third parties,

(b) whether the application is likely to raise for consideration complex or novel legal issues that the Supreme Court is better suited to determine,

(c) any other matter it considers relevant.

After amendment, this section now reads:

(1) Whether or not on its own initiative, the Supreme Court may refer an application made to it under this Division in respect of an enduring power of attorney or a revocation of an enduring power of attorney to the Civil and Administrative Tribunal and the Civil and Administrative Tribunal may refer such an application made to it to the Supreme Court.

(2) Without limiting the matters that a review tribunal may take into account in deciding whether or not to refer such an application, the review tribunal may take into account any one or more of the following matters:

(a) whether the application relates to the effect of the enduring power of attorney or revocation of enduring power of attorney on third parties,

(b) whether the application is likely to raise for consideration complex or novel legal issues that the Supreme Court is better suited to determine,

(c) any other matter it considers relevant.

- By reason of the amendment, the words "or a revocation of an enduring power of attorney" are added after "enduring power of attorney" in s 34(1) and "or revocation of enduring power of attorney" is inserted after "enduring power of attorney" in s (2)(a) of the Act.

- This amendment complements the amendment to s 33 of the Act.

Section 35 - Who are interested persons and parties in relation to applications

Before the amendments this section read:

(1) **Interested persons who may make applications**
Each of the following persons is an "interested person" in relation to the making of applications under this Division in respect of a reviewable power of attorney:

(a) an attorney,
(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.

- The requirements for "genuine concern for the welfare of" the principal are considered in *ACJ* [2007] NSWCT 15 and *QAC* [2007] NSWGT 12, and applied to powers of attorney in *KTC* [2011] NSWGT 23 at [55]-[59]. The different requirements of "proper interest in the proceedings" were considered in *KTC* at [60]-[71] and examples given at [73].

(2) **Parties to proceedings in respect of an application**
Each of the following persons is a party to an application in respect of a reviewable power of attorney:

(a) the applicant,

(b) each attorney under the power (if the attorney is not the applicant),

(c) the principal (if the principal is not the applicant),

(d) any other person that the review tribunal concerned has joined as a party under subsection (3).

(3) **Joinder of parties**
A review tribunal may, on its own initiative or on the application of an interested person, decide to join, as a party to any proceedings before the tribunal under this Division, any person who, in the opinion of the tribunal, should be a party to the proceedings (whether because of the person's concern for the welfare of the principal or for any other reason).

(5) **Applicant to be notified of joinder**
If a review tribunal joins a person as a party to any proceedings, the tribunal must, as soon as practicable, notify the applicant (or cause the applicant to be notified) accordingly.

Section 36 - Interested persons may apply for review

(1) **Tribunal may review making or operation and effect of power**
A review tribunal may, on the application of an interested person, decide to review the making, revocation or the operation and effect of a reviewable power of attorney or not to carry out such a review.

(2) As a consequence of reviewing the making, revocation or operation and effect of a reviewable power of attorney, a review tribunal may decide whether or not to make an order under this section.

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

(a) an order declaring that the principal did or did not have mental capacity to make a valid power of attorney,

(b) an order declaring that the power of attorney is invalid (either in whole or in part) if the tribunal is satisfied:

(i) the principal did not have the capacity necessary to make it, or
(ii) the power of attorney did not comply with the other requirements of this Act applicable to it, or
(iii) the power of attorney is invalid for any other reason, for example, the principal was induced to make it by dishonesty or undue influence.

- By reason of the amendment, the word "revocation" is inserted after "making" in ss 36(1) and (3). Also, the following subsection is inserted:

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

(a) an order declaring that the principal did or did not have mental capacity to revoke a power of attorney,

(b) an order declaring that the power of attorney remains valid (either in whole or in part) if the tribunal is satisfied:

(i) the principal did not have the capacity necessary to revoke it, or
(ii) the revocation is invalid for any other reason, for example, the principal was induced to make the revocation by dishonesty or undue influence.

- *FNB* [2010] NSWGT 9 is a decision where the Guardianship Tribunal reviewed the power of attorney, found there was a clear breach of the power of attorney and ss 11 and 12 of the Act ([147]), found there was no other person suitable for appointment as a substitute attorney, and made an order revoking the power of attorney.

- In *TAX* [2010] NSWGT 17 the Guardianship Tribunal decided that this section allowed it to review a power of attorney made outside NSW and in another State: [31].

- A similar version of this section appeared as s 163G of the *Conveyancing Act 1919*.

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

(a) an order varying a term of, or a power conferred by, the power of attorney,

(b) an order removing a person from office as an attorney,

(c) an order appointing a substitute attorney to replace an attorney who has been removed from office by a review tribunal or who otherwise vacates the office,

(d) an order reinstating a power of attorney that has lapsed by reason of any vacancy in the office of an attorney and appointing a substitute attorney to replace the attorney who vacated office,

(e) an order directing or requiring any one or more of the following:

(i) that an attorney furnish accounts and other information to the tribunal or to a person nominated by the tribunal,
(ii) that an attorney lodge with the tribunal a copy of all records and accounts kept by the attorney of dealings and transactions made by the attorney under the power,
(iii) that those records and accounts be audited by an auditor appointed by the tribunal and that a copy of the report of the auditor be furnished to the tribunal,
(iv) that the attorney submit a plan of financial management to the tribunal for approval,

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

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

(5) **Orders relating to mental capacity of principal**
A review tribunal may make an order relating to the operation and effect of a power of attorney declaring that the principal lacked or lacks capacity because of mental incapacity at a specified time or during a specified period or for the time being. An enduring power of attorney can not be lawfully revoked by the principal while the principal is declared to be incapable by such an order.

(6) **Effect of order declaring mental incapacity for the time being**
If a review tribunal makes an order under this section declaring that a principal under a reviewable power of attorney lacks capacity through mental incapacity for the time being, the principal is to be taken, for the purposes of the operation of the power of attorney, to lack such capacity for such period (if any) specified in the order or until further order of the tribunal.

(7) **Orders may be subject to terms and conditions**
An order made under this section may be made subject to such terms and conditions as the review tribunal thinks fit.

(8) **Further orders relating to accounts and information**
If a review tribunal makes an order under this section directing an attorney to furnish accounts or other information, the tribunal may decide to make further orders for:

(a) limiting the disclosure of accounts or other information by the attorney, and

(b) inquiry and report on the conduct of the attorney.

(9) **Order reinstating lapsed power of attorney may have retrospective operation**
If a review tribunal makes an order under this section reinstating a power of attorney that has lapsed by reason of a vacancy in the office of an attorney, the order may also direct that it has effect from the time at which the power of attorney originally lapsed.

(10) **Effect of order removing or appointing attorney or altering power**
The removal or appointment of an attorney, or the alteration or revocation of a power of attorney, under this section has effect as if:

(a) it were done in due form by the principal, and

(b) the principal were of full capacity and were, to the extent necessary, authorised to do the thing in question by the instrument creating the power.

(11) **Review tribunal may exercise functions despite instrument**
A review tribunal may exercise a function under this section despite anything to the contrary in the instrument creating the power.

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

Before the amendments this section read:

(1) **Tribunal may review making or operation and effect of power**
A review tribunal may, on the application of an interested person, decide to review the making or the operation and effect of a reviewable power of attorney or not to carry out such a review.

(2) As a consequence of reviewing the making or operation and effect of a reviewable power of attorney, a review tribunal may decide whether or not to make an order under this section.

- In *Parker v Higgins* [2012] NSWSC 1516 the Supreme Court explained that "a "review tribunal" has a two-step discretion under *Powers of Attorney Act*, s 36(1) and (2). The [review tribunal] may first exercise a discretion under *Powers of Attorney Act*, s 36 to "decide to review" the making, operation or effect of a reviewable power of attorney or "not to carry out such review": s.36(1). After deciding in the affirmative to review the making or operation and effect of a reviewable power of attorney, the review tribunal may further exercise its discretion, "whether or not to make an order under" s 36": [427].

- The fact that the principal does not want a review or that there is no suggestion of maladministration under the power of attorney are good reasons why the court should not perform a review: *Parker v Higgins* [2012] NSWSC 1516 at [16].

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

(a) an order declaring that the principal did or did not have mental capacity to make a valid power of attorney,

- An example of the Tribunal making an order of this nature is *VRH* [2013] NSWGT 5. The Supreme Court made this order in *Scott v Scott* [2012] NSWSC 1541.

(b) an order declaring that the power of attorney is invalid (either in whole or in part) if the tribunal is satisfied:

(i) the principal did not have the capacity necessary to make it, or
(ii) the power of attorney did not comply with the other requirements of this Act applicable to it, or
(iii) the power of attorney is invalid for any other reason, for example, the principal was induced to make it by dishonesty or undue influence.

- Whether "dishonesty" equates to deceit or involves a lesser or different standard has not been decided.

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

(a) an order varying a term of, or a power conferred by, the power of attorney,

- In *Pakis v Pakis* [2011] NSWSC 1073 the Court evinced a reluctance to vary a term of the power of attorney where that variation would "override a limitation deliberately inserted in the power of attorney" or "might result in a substantial interference with the [principal's] testamentary intentions": [8].

(b) an order removing a person from office as an attorney,

(c) an order appointing a substitute attorney to replace an attorney who has been removed from office by a review tribunal or who otherwise vacates the office,
(d) an order reinstating a power of attorney that has lapsed by reason of any vacancy in the office of an attorney and appointing a substitute attorney to replace the attorney who vacated office,

- "vacancy" is defined in s 5 of the Act.

(e) an order directing or requiring any one or more of the following:

(i) that an attorney furnish accounts and other information to the tribunal or to a person nominated by the tribunal,
(ii) that an attorney lodge with the tribunal a copy of all records and accounts kept by the attorney of dealings and transactions made by the attorney under the power,
(iii) that those records and accounts be audited by an auditor appointed by the tribunal and that a copy of the report of the auditor be furnished to the tribunal,
(iv) that the attorney submit a plan of financial management to the tribunal for approval,

- In *Byrnes v Kendle* [2011] HCA 26, Gummow and Hayne JJ remark that the term "duty to account" may be used in several senses, "namely, (i) a duty to keep records, (ii) a duty to report to the beneficiaries or to the court concerning the administration of the trust, and (iii) a duty to pay amounts the trustee is obliged to pay to the beneficiaries":[42]. In s 36(4)(e) of the Act, "accounts" appears to be used in the second sense mentioned.

- In *Parker v Higgins* [2012] NSWSC 1516 the obligation to account was explained as follows: "The attorney's obligation is really one to keep accurate primary accounting records, for which the principal can call, if necessary, for the principal's examination": [64]. The Court approved the following statement about the costs of keeping those records: "It also stands to reason that, in the usual case, the cost of providing and maintaining the records should be recoverable, whether directly or by way of indemnity, from the principal": [60].

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

- An example of the Civil and Administrative Tribunal revoking a power of attorney is *FNB* [2010] NSWGT 9.

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

(5) **Orders relating to mental capacity of principal**
A review tribunal may make an order relating to the operation and effect of a power of attorney declaring that the principal lacked or lacks capacity because of mental incapacity at a specified time or during a specified period or for the time being. An enduring power of attorney can not be lawfully revoked by the principal while the principal is declared to be incapable by such an order.

(6) **Effect of order declaring mental incapacity for the time being**
If a review tribunal makes an order under this section declaring that a principal under a reviewable power of attorney lacks capacity through mental incapacity for the time being, the principal is to be taken, for the purposes of the operation of the power of attorney, to lack such capacity for such period (if any) specified in the order or until further order of the tribunal.

(7) **Orders may be subject to terms and conditions**
An order made under this section may be made subject to such terms and conditions as the review tribunal thinks fit.

(8) **Further orders relating to accounts and information**
If a review tribunal makes an order under this section directing an attorney to furnish accounts or other information, the tribunal may decide to make further orders for:

(a) limiting the disclosure of accounts or other information by the attorney, and

(b) inquiry and report on the conduct of the attorney.

(9) **Order reinstating lapsed power of attorney may have retrospective operation**
If a review tribunal makes an order under this section reinstating a power of attorney that has lapsed by reason of a vacancy in the office of an attorney, the order may also direct that it has effect from the time at which the power of attorney originally lapsed.

- In both *FDT* [2010] NSWGT 4 and *YNB* [2012] NSWGT 4 the Guardianship Tribunal exercised its jurisdiction under this section to retrospectively reinstate a power of attorney which had lapsed because of the death of the attorney and appoint a substitute attorney. In *FDT* the joint appointment was changed to a joint and several appointment thus reviving the otherwise lapsed appointment.

(10) **Effect of order removing or appointing attorney or altering power**
The removal or appointment of an attorney, or the alteration or revocation of a power of attorney, under this section has effect as if:

(a) it were done in due form by the principal, and

(b) the principal were of full capacity and were, to the extent necessary, authorised to do the thing in question by the instrument creating the power.

- In relation to an order made pursuant to this subsection, the Supreme Court stated *in Szozda v Szozda* [2010] NSWSC 804 that "such an order is made by statute to operate upon and in relation to the world at large. Unlike an order of the court in an ordinary suit, it is not an order affecting the parties only": [18].

(11) **Review tribunal may exercise functions despite instrument**
A review tribunal may exercise a function under this section despite anything to the contrary in the instrument creating the power.

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

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

(1) If, on a review of the making, revocation or operation and effect of a reviewable power of attorney under section 36, the Civil and Administrative Tribunal decides not to make an order under that section in respect of the power of attorney, it may (if it considers it appropriate in all the circumstances to do so) decide to treat the application for the review as an application for a financial management order under Part 3A (Financial management) of the Guardianship Act 1987.

(2) If such a decision is made, the application is taken to be an application for such a financial management order duly made in respect of the principal under that power.

(3) If, on a review of the making, revocation or operation and effect of a reviewable power of attorney under section 36, the Supreme Court decides not to make an order under that section in respect of the power of attorney, it may (if it considers it appropriate in all the circumstances to do so) proceed instead as if an application for a declaration and order under section 41 of the NSW Trustee and Guardian Act 2009 had been duly made in respect of the principal under that power.

Before the amendments this section read:

(1) If, on a review of the making or operation and effect of a reviewable power of attorney under section 36, the Civil and Administrative Tribunal decides not to make an order under that section in respect of the power of attorney, it may (if it considers it appropriate in all the circumstances to do so) decide to treat the application for the review as an application for a financial management order under Part 3A (Financial management) of the Guardianship Act 1987.

(2) If such a decision is made, the application is taken to be an application for such a financial management order duly made in respect of the principal under that power.

(3) If, on a review of the making or operation and effect of a reviewable power of attorney under section 36, the Supreme Court decides not to make an order under that section in respect of the power of attorney, it may (if it considers it appropriate in all the circumstances to do so) proceed instead as if an application for a declaration and order under section 41 of the *NSW Trustee and Guardian Act 2009* had been duly made in respect of the principal under that power.

- By reason of the amendment, the word "revocation" is inserted after "making" in ss 37(1) and (3).

- As explained in *KV v Protective (No.2)* [2004] NSWADT 48: "The combined effect of s 36 and s 37 is as follows:

  a) The Tribunal must first decide whether to review the making of or effect of a power of attorney: s 36(1);

  b) If the Tribunal decides to review the making or the operation and effect of the power of attorney, it may decide whether or not to make certain orders: s 36(2);

  c) If the Tribunal decides not to make any orders, it may decide to treat the application for the review as an application for a financial management order: s 37(1)".

- As the decision of *AGM v NSW Trustee and Guardian* [2012] NSWADTAP 18 explains, once the Civil and Administrative Tribunal decides to make an order under s 36 (which in *AGM* was an order removing the attorney), the Tribunal has no jurisdiction to make a financial management order pursuant to s 37 of its own motion. It may nevertheless make such an order on application by the parties: see, for instance, *FNB* [2010] NSWGT 9.

- In *NAQ* [2013] NSWGT 15, where the attorney had committed an inadvertent breach of fiduciary duty (by making unauthorised gifts) and been involved in a financial conflict of interest, the Tribunal declined to make an order under s 36 but appointed a financial manager under s 37 (which order had the effect of suspending the power of attorney: s 50).

Section 38 - Advice or directions concerning reviewable powers of attorney

(1) An attorney under a reviewable power of attorney may apply for advice or direction by a review tribunal on any matter relating to the scope of the attorney's appointment or the exercise of any function by the attorney under a reviewable power of attorney.

(2) In determining any such application, a review tribunal may decide to:

  (a) approve or disapprove of any act proposed to be done by the attorney, or

  (b) give such advice or direction as it considers appropriate, or

  (c) vary the effect of the enduring power of attorney or make any other order it could make in an application under section 36.

(3) No proceedings lie against an attorney under a reviewable power of attorney for or on account of any act, matter or thing done or omitted to be done by the attorney in good faith and in accordance with any approval, advice or direction given under this section.

- Section 38 of the Act allows an attorney to seek advice or direction by a review tribunal about the scope of the appointment or exercise of any function. The attorney is then protected against proceedings if they acted in good faith and in accordance with any approval, advice or direction of the review tribunal. This section is reminiscent of s 63 of the *Trustee Act 1925* and the jurisdiction relevant to judicial advice to trustees (see, for instance, *Re Estate Late Chow Cho-Poon; Application for Judicial advice* [2013] NSWSC 844) may be relevant to an application under this section.

- In *Parker v Higgins* [2012] NSWSC 1516 the Court noted that "[a]ttorneys may invoke this provision analogously with trustees seeking advice under *Trustee Act*, s 63, when they need clear and risk free guidance about the future discharge of their functions":[50].

- The Civil and Administrative Tribunal may refer questions of law to the Supreme Court. The Civil and Administrative Tribunal can also transfer proceedings to the Supreme Court if it is of the view that it does not have jurisdiction to deal with all issues in dispute: *TCM* [2012] NSWGT 9.

- Appeals from the decisions of the Civil and Administrative Tribunal may be made within 28 days to the Supreme Court as of right on a question of law or by leave on any other question.

Division 5 - Reference of questions of law – (Repealed)

Division 6 - Appeals from decisions of Guardianship Tribunal – (Repealed)

Section 39 (references of questions of law to the Supreme Court by the Guardianship Tribunal), s 40 (Appeals to the Supreme Court) and s 41 (Appeals to Administrative Decisions Tribunal) were repealed by *Civil and Administrative Legislation (Repeal and Amendment) Act 2013*, Schedule 5, part 5.10, which commenced on 1 January 2014.

Division 7 - Procedure in relation to incommunicate principals

Section 42 - Procedure where principal incommunicate

(1) If the principal under a power of attorney is incommunicate:

(a) proceedings under this Part by the principal:

(i) may be commenced and carried on as prescribed by rules of court, or
(ii) subject to rules of court, may be commenced and carried on as if the principal were mentally incapacitated, and

(b) subject to rules of court, all persons are, in relation to the proceedings, to be as nearly as may be in the like position in law as if the principal were mentally incapacitated.

(2) Subsection (1) does not limit the rule-making powers conferred by the *Supreme Court Act 1970*.

(3) A reference to rules of court in subsection (1) includes a reference to the procedural rules of the Civil and Administrative Tribunal (within the meaning of the *Civil and Administrative Tribunal Act 2013*) in relation to proceedings in that Tribunal brought under this Part.

- "incommunicate" is defined in s 4 of the Act.

PART 6 – REVIEW OF POWERS OF ATTORNEY

- The Act empowers an attorney under a power of attorney, in exercising the power, to execute any assurance or instrument with the attorney's own signature [and with the attorney's own seal (if needed)], or to do any other thing in the attorney's name. In doing so, the execution has the same effect as if it was executed by the principal.

Division 1 – General provisions

Section 43 - Attorney may execute instruments and do other things in own name

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

(a) execute any assurance or instrument with the attorney's own signature and, where sealing is required, with the attorney's own seal, or

(b) do any other thing in the attorney's own name.

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

- This is consistent with the common law: see *Lift Capital Partners Pty Ltd v Merrill Lynch International* [2009] NSWSC 7 at [70].

- This section is essentially identical to s 159 of the *Conveyancing Act 1919*, which was repealed by the Act.

Section 44 - Proof of powers of attorney

(1) A document is a certified copy of an instrument for the purposes of this section if:

(a) there is endorsed on the document a written certificate, to the effect that the document is a true and complete copy of the contents of the instrument of which it purports to be a copy, by:

(i) the principal under the power of attorney created by the instrument, or
(ii) a person (or person belonging to a class of persons) prescribed by the regulations for the purposes of this subsection, and

(b) each page of the document bears the signature of the person who gives the certificate referred to in paragraph (a).

(2) A legible document that is a certified copy of an instrument creating a power of attorney is evidence:

(a) as against the principal under the power of attorney of the execution and contents of the instrument, and

(b) as against any other person of the contents of the instrument.

(3) Subsection (2) does not make a document better evidence than is the instrument of the contents of which it purports to be a copy.

(4) This section does not affect any other method of proving the execution or contents of an instrument creating a power of attorney.

(5) A person must not give a certificate for the purposes of this section knowing the certificate to be false.

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

- Particular attention is drawn to the requirement of s 44(1)(b) that **each** page of the power of attorney must be signed by the certifier before the copy amounts to a certified copy of the power of attorney.

- The Regulation provides that the following classes of persons are prescribed for the purpose of s 44(1)(a)(ii):

  (a) in the case of any document endorsed within Australia: accountants; bank managers; barristers; chancellors, deputy chancellors or deans of faculties of universities; commissioned officers in the defence forces of the Commonwealth of Australia; commissioners for taking affidavits; dentists; judges; justices of the peace; licensed conveyancers; magistrates; mayors or general managers of local government councils; medical practitioners; members of parliament of the Commonwealth or of any State or Territory; members of the police force of the Commonwealth or of any State or Territory; ministers of religion; notaries public; officers in charge of police stations; pharmacists; postal managers of post offices; principals or deputy principals of schools or colleges; registered surveyors; registrars of local courts or magistrates courts; solicitors; stockbrokers and veterinary surgeons.

  (b) in the case of any document endorsed within a foreign country: Australian or British Consular Officers exercising functions in the country where the document is executed or witnessed; commissioned officers in the defence forces of the Commonwealth of Australia; commissioners for taking affidavits; judges; justices of the peace; legal practitioners; magistrates; mayors or general managers of local government corporations; medical practitioners; notaries public and officers in charge of police stations.

- In exercising the power of attorney, an attorney may be required to deal with third parties and therefore it is not unusual for copies of the instrument to be made.

- If the copy of the power of attorney is appropriately certified or verified, there should be no requirement to produce the original instrument: s 44.

- This section is similar to its forerunner, s 163A of the *Conveyancing Act 1919*.

Section 45 - Delegation of power of attorney

(1) An attorney under a power of attorney cannot appoint a substitute, delegate or sub-attorney unless the instrument creating the power expressly provides for the attorney to do so.

(2) Nothing in this section enables an attorney irrevocably to appoint a substitute, delegate or sub-attorney unless the instrument creating the power of attorney expressly provides for the attorney to do so.

- It is advisable for the attorney to delegate in writing, by reference to the specific clause in the power of attorney allowing the delegation, and for the delegated attorney to accept the delegation by signing the delegating document. Similarly, a revocation of delegation should be in writing and notice of the revocation given to the delegated attorney.

By reason of the amendments an additional section was inserted in the Act:

Section 45A - Appointment of substitute attorneys

(1) A principal may appoint a person as a substitute attorney for a specified person who is appointed by the principal as an attorney (the "specified attorney").

(2) The appointment of a substitute attorney may be made by expressly including the appointment in the instrument creating the power of attorney.

(3) The principal may appoint one or more substitute attorneys.

- It is considered that the words "one or more substitute attorneys" encompass the appointment of one or more concurrent substitute attorneys as well as the appointment of one or more consecutive substitute attorneys. The position may be different in England: *The Public Guardian v Boff* [2013] WTLR 1349.

(4) A substitute attorney may act as attorney under the power of attorney during a vacancy in the office of the specified attorney or a vacancy of a kind specified in the instrument creating the power of attorney.

- The phrase "during a vacancy" appears to contemplate that authority is only conferred on the substitute attorney while there is a vacancy in the office of the earlier attorney. The position that exists with the authority of the earlier attorney, if the reason for the vacancy in the earlier attorney's office is removed, is not specifically dealt with by the subsection. The possibility that the authority of the earlier attorney is thereby revived is one of at least two possible outcomes. The outcome which will eventually prevail will need to be resolved by court decision or appropriate amendment.

- The effect of this amendment is to remove doubt about the legality of a principal appointing a substitute attorney. Clause 9 of the transitional provisions in Schedule 5 of the Act provides that this section does not affect the validity of any appointment of a substitute attorney made before the insertion of the section.

- The attorney however may only appoint a substitute, delegate or sub-attorney, if the document expressly provides authority for the attorney to do so.

- The distinction between a person to whom an attorney delegates authority (referred to in s 45(1) as a "substitute, delegate or sub-attorney") and the person whom the principal appoints an alternate attorney if the initial attorney/s vacate/s office (referred to in s 45A as a "substitute attorney") should be noted. To avoid confusion, the first type of attorney may be better called a "delegated" attorney and the second a "substitute" attorney.

Division 2 - Termination and suspension of powers of attorney

Section 46 - Effect of vacation of office of joint and several attorneys

(1) If a power of attorney appoints 2 or more persons as joint attorneys, the power of attorney is terminated if the office of one or more of the attorneys becomes vacant.

(1A) However, such a power of attorney is not terminated if:

(a) the power of attorney provides otherwise, and

(b) at least one of the attorneys or a substitute attorney remains in office.

(2) If a power of attorney appoints 2 or more persons as attorneys either severally or jointly and severally, a vacancy in the office of one or more attorneys does not operate to terminate the power of attorney in relation to the other attorneys.

Before the amendments this section read:

(1) If a power of attorney appoints 2 or more persons as joint attorneys, the power of attorney is terminated if the office of one or more of the attorneys becomes vacant.

(2) If a power of attorney appoints 2 or more persons as attorneys either severally or jointly and severally, a vacancy in the office of one or more attorneys does not operate to terminate the power of attorney in relation to the other attorneys.

- By reason of the amendments, ss 46(1A) was inserted. The effect of this amendment is to remove doubt about the legality of a power of attorney made after the date of the amendment in which a principal states that a jointly appointed attorney may continue as attorney even if the appointment of another joint attorney is vacated. Clause 10 of the transitional provisions in Schedule 5 of the Act specifically provides that the amendment of the section does not apply in relation to a power of attorney created by an instrument executed before that amendment.

- The Act provides that it is an offence for an attorney who is terminated, or suspended, to do any act or thing under the power of attorney **if the attorney knows of the termination or suspension** at the time the attorney does the act or thing: s.49.

Section 47 - Attorney entitled to rely on power of attorney if unaware of termination or suspension of power

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

- This section and s 48 give protection to an attorney or third party who relies on a power of attorney without knowledge of its termination or revocation. What constitutes "knowledge" in this context? In some contexts, as was explained in *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* [2007] HCA 22, (2007) 230 CLR 89 at [160]- [164], knowledge may mean: (1) actual knowledge; or (2) willfully shutting one's eyes to the obvious, or (3) willfully and recklessly failing to make such enquiries as an honest and reasonable man would make, or (4) knowledge of circumstances which would indicate the facts to an honest and reasonable man. In *Vickery v JJP Custodians* [2002] NSWSC 782, Austin J said: "It appears that the third party's claim to uphold a contract made by an agent under a power of attorney that has been terminated will be defeated not only where the third party has actual knowledge of revocation of the power, but also where the circumstances surrounding the use of the power create reasonable grounds for suspicion and therefore reasonable grounds to make further inquiries which, if made by the third party, would have led him to discover the revocation": [93].

- In *Halani v Halani* [2013] NSWSC 91 the Court said: "Section 47 is predicated on an assumption that a power of attorney can be "terminated" prior to communication to the attorney of any intention on the part of the principal to terminate it. Cf, Dal Pont, *Law of Agency* (2nd ed, 2008), paras [26.9]-[26.10]". Also, "[s]ection 47 is directed towards protection of an attorney who is entitled to assume that a sufficient power has continuity as well as sufficiency".

- This section is similar to its forerunner, s 161 of the *Conveyancing Act 1919*. A notable difference is the reference to "knowing" in s 47 and "notice" in s 161.

Section 48 - Certain third parties entitled to rely on acts done under terminated or suspended powers of attorney

(1) If a power of attorney is terminated or suspended, a third party who deals or otherwise transacts in good faith with the attorney without knowing of the termination or suspension is entitled to rely on the power of attorney in relation to that dealing or transaction in the same manner and to the same extent as if the power had not been terminated or suspended.

(2) Subsection (1) does not entitle an attorney to rely on a power in support of an act within the scope of the power done by the attorney with notice of the termination or suspension of the power to the extent that it concerns authority to do that act.

- This section was relied upon in *Despot v Registrar-General of NSW* [2013] NSWSC 273 where the power of attorney was suspended by operation of the provisions of the *Home Building Act 1989* but there was no suggestion that the third parties who relied on the attorney's authority pursuant to the power of attorney had any knowledge of the lack of licence or insurance: [176].

- Attention is drawn to the use of the words "knowing" in s 48(1) and "notice" in s 48(2). Section 48(2) is reminiscent of s 162(2) of the *Conveyancing Act 1919* as well as s 161 of that Act.

Section 49 - Attorney acting with knowledge of termination or suspension of power

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

Maximum penalty: 5 years imprisonment.

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

Maximum penalty: 5 years imprisonment.

- This section is similar to its forerunner, s 162A of the *Conveyancing Act 1919,* including the use of "knowing", while ss 161 and 162 of the *Conveyancing Act* used "notice".

Section 50 - Effect of management of estate

(1) A power of attorney is not terminated by the estate of the principal becoming subject to management under the *NSW Trustee and Guardian Act 2009* (a "managed estate").

(2) Subsection (1) has effect subject to the terms of the instrument creating the power.

(3) A power of attorney is suspended while the estate of the principal is a managed estate.

(4) Despite subsection (3), if the Civil and Administrative Tribunal, in making a financial management order under section 25E of the *Guardianship Act 1987* in relation to a principal, excludes a specified part of the principal's estate from the order, the Civil and Administrative Tribunal may order that the power of attorney is to remain in force in respect of so much of the estate as is excluded from the financial management order concerned.

(5) The Civil and Administrative Tribunal may make a similar order in respect of so much of the estate of the principal as is not managed estate, but only if the estate is a managed estate because of a financial management order made by the Civil and Administrative Tribunal.

(6) Despite subsection (3), where an attorney under a power of attorney does an act within the scope of the power while the estate of the principal is a managed estate, the act of the attorney has no less validity and effect than the act of the attorney would have had if this section had not been enacted, but this subsection does not affect the operation of subsection (9).

(7) While a power of attorney is suspended by this section, the Supreme Court may restore the power of attorney to operation to such extent, and on such terms and conditions, as the Supreme Court thinks fit.

(8) The Supreme Court may restore a power of attorney to operation under subsection (7) as from any time whether before or after the order of restoration is made or takes effect.

(9) If the estate of a principal is a managed estate, the Supreme Court may:

(a) terminate the power of attorney, or

(b) order that the power of attorney be subject to such conditions as the Court thinks fit.

- In *Scott v Scott* [2012] NSWSC 1541 the Supreme Court terminated the power of attorney and ordered that it be delivered up to the Court for cancellation.

(10) An attorney under a power of attorney and persons dealing with the attorney and all other persons have the like protections against any term or condition of any restoration of the power and against any condition or restriction to which the power is subject under this section as if the term, condition or restriction were effected by act of the principal.

(11) The estate of a person whose estate is subject to management under Division 2 of Part 4.3 of the *NSW Trustee and Guardian Act 2009* is taken to be a managed estate for the purposes of this section for the life of the person or until the Supreme Court declares that the exercise of the powers of the NSW Trustee and Guardian in relation to the estate is not required. An application to the Court for a declaration may be made by the NSW Trustee and Guardian, the person whose power of attorney is in question or an attorney under the power of attorney.

(12) A declaration for the purposes of subsection (11) has no effect otherwise than for the purpose of subsection (11).

(13) This section does not apply to a power of attorney given before the commencement of Schedule 1 to the *Conveyancing (Powers of Attorney) Amendment Act 1983*.

(14) This section has effect subject to Part 3.

- If the estate of the principal becomes subject to "management" under the *NSW Trustee and Guardian Act 2009*, the power of attorney is suspended, but not terminated: s 50(3).

- If the Civil and Administrative Tribunal excludes a specific part of the principal's estate from the management order, the Civil and Administrative Tribunal may also order that the power of attorney is to remain in force in respect of that part of the estate: s 50(4).

- It is important to note that while a power of attorney is suspended, in relation to an Order of the Civil and Administrative Tribunal, the Supreme Court may restore the power of attorney to operation: s 50(7).

Division 3 - Registration of powers of attorney

- This Division applies to powers of attorney whether made before or after the commencement of the legislation on 16 February 2004.

Section 51 - Powers of attorney may be registered

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

(2) An instrument revoking a registered power of attorney may also be registered by the Registrar-General in that Register.

- This section is similar to its forerunner, s 163(1) and (3) of the *Conveyancing Act 1919*.

Section 52 -Powers of attorney to be registered for dealings affecting land

(1) A conveyance or other deed affecting land executed on or after 1 July 1920 under a power of attorney has no effect unless the instrument creating the power has been registered.
Note: *1 July 1920 is the day on which the Conveyancing Act 1919 commenced.*

(2) If the instrument is registered after the time when the conveyance or other deed was executed, the conveyance or other deed has effect as if the instrument had been registered before that time.

(3) In this section, "deed" includes any memorandum, dealing or other instrument affecting land that is deemed by an Act to have effect as a deed.

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

- A power of attorney may be registered by the Registrar General in the General Register of Deeds, kept under the *Conveyancing Act 1919*.

- An instrument revoking a registered power of attorney may also be registered by the Registrar General in that register, and it is suggested that this occur.

- In *Vella v Permanent Mortgages Pty Ltd* [2008] NSWSC 505 the Court said that where an attorney "is authorised to execute a deed on behalf of his principal, the authority must be given by deed even at common law over and above what is in the *Powers of Attorney Act*." The Court considered that the deed was not properly executed by the attorney as the attorney "was not authorised: (a) by deed; nor (b) an instrument that was registered as required by statute": [206].

- This section is similar to its forerunner, s 163(2) of the *Conveyancing Act 1919*. In *Taheri v Vitek* [2014] NSWCA 209 the Court of Appeal stated: "Former s 163(2) of the *Conveyancing Act* and current s52 of the *Powers of Attorney Act* are (speaking generally) to the effect that most conveyances and deeds if executed by power of attorney only have "force or validity" if the instrument creating the power has been registered": [42].

PART 7 – REVIEW

Section 53 - Regulations

(1) The Governor may make regulations, not inconsistent with this Act, for or with respect to any matter that by this Act is required or permitted to be prescribed or that is necessary or convenient to be prescribed for carrying out or giving effect to this Act.

(2) A regulation may create an offence punishable by a penalty not exceeding 25 penalty units.

Section 54 - Nature of proceedings for offences

(1) Subject to subsection (2), an offence under this Act is to be prosecuted on indictment.

(2) Proceedings for an offence under the regulations may be dealt with summarily before the Local Court.

Section 55 (Repealed)

- Before its repeal, this section and Schedule 4 provided for the amendment of various Acts and Regulations by reason of the commencement of this Act.

Section 56 - Savings, transitional and other provisions

Schedule 5 has effect.

Section 57 - Review of Act

(1) The Minister is to review this Act to determine whether the policy objectives of the Act remain valid and whether the terms of the Act remain appropriate for securing those objectives.

(2) The review is to be undertaken as soon as possible after the period of 5 years from the date of assent to this Act.

(3) A report on the outcome of the review is to be tabled in each House of Parliament within 12 months after the end of the period of 5 years.

THE SCHEDULES

SCHEDULE 1

- Section 6(4) of the Act provides that this Schedule contains the provisions of Part 16 of, and Schedule 7 to, the *Conveyancing Act 1919* that were in force immediately before 16 February 2004. Those provisions and Schedule are not now reproduced.

SCHEDULE 2 (Repealed)

- By reason of the amendment to s 8 of the Act, the prescribed form for powers of attorney has been moved to the Regulation and this Schedule has been removed. By reason of the *Powers of Attorney Amendment Regulation 2013*, the form of power of attorney contained in this Schedule has been removed as a prescribed form from 1 March 2014.

SCHEDULE 3

- Prescribed expressions and authorisations for prescribed powers of attorney.

SCHEDULE 4 (Repealed)

- Before its repeal, this Schedule and s 55 of the Act provided for the amendment of various Acts and Regulations by reason of the commencement of this Act.

SCHEDULE 5

- The relevant transitional provisions, which appear in this Schedule, have been included in the commentary on the text of the Act.

Powers of Attorney Amendment Regulation 2013

The Regulation is amended by inserting after clause 4:

Clause 4A - Prescribed forms for power of attorney

(1) The forms set out in Schedule 2 are prescribed for the purposes of section 8 of the Act.

(2) The form set out in Schedule 2 to the Act, immediately before its repeal by the Powers of Attorney Amendment Act 2013, is also prescribed for the purposes of section 8 of the Act.

(3) Subclause (2) ceases to have effect on 1 March 2014.

- The effect of this clause is that the new forms in Schedule 2 of the Regulation were prescribed forms from 13 September 2013. The form prescribed by the Act before being amended continue to be a prescribed form for the purpose of the Regulation but only until 1 March 2014.

Schedule 2 Prescribed forms for power of attorney

- This Schedule contains 2 prescribed forms:
  a) Form 1 is a General Power of Attorney.
  b) Form 2 is an Enduring Power of Attorney.
- As it is the more commonly used power of attorney, the Enduring Power of Attorney is referred to below.
- The new prescribed forms contain some new or expanded features:
  a) Two clauses allow multiple choices but the choices are inconsistent. These are clause 1 (appointment of multiple concurrent attorney) and clause 4 (commencement). To assist the completion of the clauses in a manner that does not lead to inconsistent choices, each of these clauses contains a default choice. The default choice applies where no option is selected or the chosen option is unclear or inconsistent. Further, the prescribed form contains a note warning that "only one" option should be chosen.
  b) Experience with the prescribed form under the 2003 Act (being the form that ceased to be a prescribed form on 28 February 2014) suggests that the default provision and notes about completion of the clause will be omitted from some software versions of the new forms. Experience with the form prescribed under the 2003 Act suggests that those omissions may lead to the new forms being completed in a manner which is inconsistent with the Act or in a manner which renders the meaning unclear. Consequently, the removal of the default provisions and the notes in the new forms should be approached with great care.
  c) Notes, such as those appearing under Background information at the commencement of the form, or the definitions of Principal and Attorney at the commencement of clause 1, may be deleted from some software versions of the forms. The issue that may arise if that occurs is whether the omission of the notes from those contained in the prescribed form means that the form with the omission is "in or to the effect of" the prescribed form. If it is not, the altered form would not constitute a prescribed power of attorney for the purposes of the Act.
  d) The version of the prescribed forms that appears on the LPI website www.lpi.nsw.gov.au contains margin notes. These margin notes are not part of the forms which appear in the Regulation. The forms reproduced below are those contained in the Regulation and therefore do not contain the LPI's margin notes.
  e) The prescribed forms have various types of print and print sizes to distinguish different aspects of the form. The introductory comments and the main body of the form are in Times New Roman point 11. Definitions and some comments are in Arial point 9. Instructions and some comments are italicized Times New Roman point 11. Headings are Arial point 11. Headings and some directions are in bold print. These variations are not reproduced in the following text.

Enduring power of attorney

This prescribed form begins with the following:

Background information

An enduring power of attorney is a legal document that allows you (the ***principal***) to nominate one or more persons (referred to as ***attorneys***) to act on your behalf. An enduring power of attorney gives the attorney the authority to manage your legal and financial affairs, including buying and selling real estate, shares and other assets, operating your bank accounts and spending money on your behalf.

The attorney's power continues even if for any reason you lose your mental capacity to manage your own affairs. Once you lose your mental capacity you cannot revoke this power of attorney. If you want the power of attorney to cease if you lose your mental capacity, use the general power of attorney form.

An attorney under an enduring power of attorney cannot make decisions about your lifestyle or health. These decisions can only be made by a guardian (whether an enduring guardian appointed by you or a guardian appointed by the Civil and Administrative Tribunal or the Supreme Court).

The prescribed witness certificate in clause 6 of this form must be completed.
Before acting as your attorney/s, the attorney/s (including any substitute attorney/s) must sign the acceptance in clause 7 of this form.

Please read the **Important information** set out at the end of this document. It includes notes to assist in completing this document and more fully explains the role and responsibilities of an attorney.

1 Appointment of attorney by the principal

I, [PRINCIPAL] of [PRINCIPAL'S ADDRESS] appoint [ATTORNEY ONE OF ATTORNEY'S ONE'S ADDRESS] and also appoint [ATTORNEY TWO of ATTORNEY TWO'S ADDRESS] to be my attorney(s).

- Reports are replete with instances of attorneys abusing power. Examples are *Watson v Watson* [2002] NSWSC 919, *Woodlands v Rodriguez* [2004] NSWSC 1167 *and Pakis v Pakis* [2011] NSWSC 1073, but there are many others. The moral is that a principal should take great care in selecting an attorney.

- In *Szozda v Szozda* [2010] NSWSC 804 the Court made the following comments about the attributes of the person who the principal should appoint as an attorney: "Is that person someone who is trustworthy and sufficiently responsible and wise to deal prudently with my affairs and to judge when to seek assistance and advice? The decision is one in which considerations of surrender of personal independence and considerations of trust and confidence play an overwhelmingly predominant role: am I satisfied that I want someone else to be in a position to dictate what happens at all levels of my affairs and in relation to each and every item of my property and that the particular person concerned will act justly and wisely in making decisions?": [34].

My attorneys are appointed:

☐ 1. Jointly

☐ (a) I want the appointment to be terminated if one of the attorneys dies, resigns or otherwise vacates office.
or

☐ (b) I do not want the appointment to be terminated if one of the attorneys dies, resigns or otherwise vacates office.

☐ 2. Jointly and severally

- The option contained at clause 1(b) became available by reason of s 46(1A) of the Act which became effective on 13 September 2013.

- In *Kendle v Melsom* [1998] HCA 13 Brennan CJ and McHugh J explained joint and several as follows:

  a) powers that must be exercised by them jointly...[are] powers in which each must join in the exercise;

  b) powers that can be exercised by them severally...[are] powers which each may exercise independently of the other: [5]

- The circumstances in which an attorney vacates office are contained in s 5 of the Act.

If no option is selected or the option chosen is unclear or inconsistent, I intend my attorneys to act jointly and severally.

- This default option reverses the common law position, which favours joint appointments when the choice is not clear: *Ford Motor Co Ltd v Amalgamated Union of Engineering and Foundry Workers* [1969] 2 QB 303; *Lake v Crawford* [2010] NSWSC 232, [14].

Nomination of substitute attorney

If either of my attorneys vacates office, I appoint **ATTORNEY THREE of ATTORNEY THREE'S ADDRESS** to be my substitute attorney/s.

- Section 45A makes it clear that a substitute attorney may be appointed by a power of attorney made before or after the date of the amendment, i.e. on or after 13 September 2013.

My substitute attorney is to be appointed:

☐ 1. Jointly

Or

☐ 2. Jointly or severally.

- The repeated numbering of 1 and 2 in this part of clause 1 and the previous part of the clause may cause confusion unless care is taken.

- If option 1 (which is immediately above is chosen), consideration should be given to adding options (a) and (b) as they appear under the first part of clause 1.

- This clause makes it apparent that there are at least three ways to appoint more than one attorney. These are:

  a) the attorneys are appointed jointly; or

  b) the attorneys are appointed severally (or jointly and severally, as this is essentially the same); or

  c) an initial attorney is appointed (either singularly, jointly or severally) and a substitute attorney is appointed (either singularly, jointly or severally) if the (or an) initial attorney vacates the office of attorney

- Where attorneys are appointed jointly the attorneys' appointment is regarded as a unity: *Beath v Kousal [*2010] VSC 24, *Sky v Body* (1970) 92 WN (NSW) 934; *In the estate of William Just* (1973) 7 SASR 508; *Union Bank of Australia –v- Harrison Jones and Devlin Ltd* [1910] HCA 44, (1910) 11 CLR 492; *Charlton –v- Earl of Durham* (1868-69) LR 4 Ch App 433. This means that all attorneys need to agree to reach a decision. Unless the power of attorney provides otherwise, a majority decision is no decision. A decision in which one jointly appointed attorney abstains or is absent is, similarly, no decision. If the principal wishes to decide otherwise, consideration should be given to whether the appointment should be several rather than joint. Any variation from the unity approach should be recorded in clause 3, under Conditions and Limitations.

- Where a principal is considering appointing two or more attorneys with authority to act concurrently (whether as joint attorneys or several attorneys) the principal should have a high degree of confidence in the attorneys' ability to make complementary rather than inconsistent or conflicting decisions.

2 Powers

My attorneys may exercise the authority conferred on my attorney/s by Part 2 of the *Powers of Attorney Act 2003* to do anything on my behalf I may lawfully authorise an attorney to do.

- Whether action is on behalf of the principal is determined from the attorney's perspective: *Perochinsky v Kirschner* [2013] NSWSC 400 at [123].

I give this power of attorney with the intention that it will continue to be effective if I lack the capacity through loss of mental capacity after its execution.

- This clause is essential for the instrument to amount to an Enduring Power of Attorney: see s 19(1)(a) of the Act, noting however, that the word "the" which appears before "capacity" does not appear in s 19(1)(a).

Additional powers

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

- The common law position, which is repeated in s 11(1) of the Act, is that an attorney cannot gift the principal's property without specific authority: *Re R* [2000] NSWSC 886.

- For the purpose of completing this subclause the principal must decide whether to allow the attorney to have the authority to make gifts. If so, the principal must decide whether the "statutory formula" contained in s 11(2) of the Act (and set out in full in the commentary to that section) adequately conveys the power that the principal wishes to confer on the attorney. In this context the principal should consider issues such as:

  a) the persons or entities to whom gifts or donations may be given by the attorney;

  b) the occasion or regularity of those payments; and

  c) the size of any gift or donation.

  If the "statutory formula" does not accurately or adequately reflect the principal's wishes, a gift clause that does reflect the principal's wishes should be included in this clause.

- If this part of the clause is relevant the following comments made in *Bird v Bird (No 4)* [2012] NSWSC 648 at [96] should be considered: "it would be more productive of clarity if in these forms reference were made under that heading to a limitation on benefit to the donee of the power [the attorney], rather than striking through words prior to that, which words having been struck through might not be read even by a prudent person".

☐ (b) I authorise my attorneys to confer benefits on the **ATTORNEY ONE** to meet his/her reasonable living and medical expenses as provided by sections 12(2) of the *Powers of Attorney Act 2003*.

- The common law position, which is repeated in s 12(1) of the Act, is that an attorney cannot do any act whereby a benefit is conferred on the attorney without specific authority: *Sweeney v Howard* [2007] NSWSC 852 at [59].

- For the purpose of completing this subclause the principal must decide whether to allow the attorney to confer benefits on the attorney. If so, the principal must decide whether the "statutory formula" contained in s 12(2) of the Act (and set out in full in the commentary to that section) adequately conveys the power that the principal wishes to confer on the attorney. In this context the principal should consider issues such as:

  a) the relationship between the principal and the attorney,
  b) the history of dependency between the principal and attorney, if any,
  c) the likelihood of future or continued dependency, and
  d) the nature and extent of any dependency.

  If the "statutory formula" does not accurately or adequately reflect the principal's wishes, a benefits clause that does reflect the principal's wishes should be included in this clause below.

- This clause is commonly included where the attorney is the principal's spouse or dependant. Arguably, without such as subclause, a spouse appointed as the attorney could not use the principal's property (understood in the broad legal sense referred to in the commentary on s 3 of the Act) if the spouse obtained any benefit for him or herself. However, in *Perochinsky v Kirschner* [2013] NSWSC 400 it was argued that "if a husband gave his wife an enduring power of attorney (without an appropriate benefits authority) and she exercised it to spend his money to buy clothes or groceries for herself, she would be acting beyond the power conferred": [91]. In response the Court stated, in obiter: "I do not think this necessarily follows. The question in each case would be whether the attorney, although deriving a benefit for himself or herself was acting on behalf of the principal. In my view, in the hypothetical case posed by counsel, it could well be said that the wife was acting on her husband's behalf if she exercised the power of attorney to spend money on herself if she was thereby only doing what the husband would do himself if he were present and capable. In such a case, the wife would be discharging what would be at least a moral obligation of the husband to provide support": [92].

- Particular care will be needed when completing this sub-clause if there is more than one attorney, or a substitute attorney, and the principal does not wish all attorneys to be able to use the principal's property for their benefit. In that situation, the sub-clause will require careful amendment**.**

- Before including this sub-clause or adding an extra authority the principal may need advice that the concept of "benefit" is potentially a wide one. An illustration of that position is in *Dimitrovski v Australian Executor Trustees Ltd* [2013] NSWSC 337 the suggestion that an attorney "received a benefit because the mortgage of [property] secured a guarantee by [the principal] which was given in support of a loan...to a company in which [the attorney] had an interest" was described as "arguable" but "not straightforward:"": [5].

☐ (c) I authorise my attorneys to confer benefits on the following persons to meet their reasonable living and medical expenses as provided by section 13 (2) of the *Powers of Attorney Act 2003*:

- This clause is commonly included where the attorney is not the principal's spouse or dependant but the principal wishes to ensure that the spouse and/or dependant (such as minor children) continue to receive benefits from the principal. Arguably, without such as sub-clause, the attorney could not use the principal's property (understood in the broad legal sense referred to in the commentary on s 3 of the Act) to benefit the spouse and/or dependant.

☐ (d) I authorise my attorneys to .....

- Other "additional powers" may be added as sub-clauses (d), (e) and so forth. Common examples are:

  a) where expenses, categorised as "reasonable living and medical expenses", are considered too restrictive on an attorney or third party. Examples of expenses that are not contained in the statutory formula are maintenance (including clothing), entertainment, expenses on the attorney's enjoyment and advancement in life;

  b) where the principal wishes to pay the attorney for so acting (something which the attorney could not do without express authorisation, see *Gray v Hart* [2012] NSWSC 1435 at [319]); and

  c) authority for the attorney to appoint a substitute, delegate or sub-attorney (s 45(1)). Consideration should be given to expressly stating the occasion for delegation (such as overseas travel by the initial attorney), the period of delegation (such as whilst the initial attorney is overseas), whether all or only some of the initial attorney's powers are delegable, and the persons to whom delegation is allowed.

- Whether the powers are "additional powers" (and therefore listed under this clause 2) or "conditions and limitations" (and listed under clause 3), care is needed to ensure that the clause is worded so that it precisely records the principal's instructions. This follows from the approach to interpretation of powers of attorney which means that powers are constrained to the exact authority conferred. For instance, the power to sell and lease does not include the power to grant a lease with an option to purchase (*Blake v Lane* (1876) 2 VLR (L) 54), and the power to sell does not include the power to sell subject to finance (*Wride v Holberton* [1963] SASR 231). With every power, specific and unambiguous expression is needed: *Tobin v Broadbent* [1947] HCA 46, (1947) 75 CLR 378 at 401.

3 Conditions and limitations

- This clause reflects s 9(2) of the Act, which provides as follows: "A prescribed power of attorney has effect subject to compliance with any conditions or limitations specified in the instrument creating the power". Despite the reference to conditions and limitations *specified in* the power of attorney, many court decisions have held that an attorney's authority can be limited, or made conditional, by implication. An example is *Vickery v JJP Custodians Pty Ltd* [2002] NSWSC 782 where the principal spoke to the attorney before he left for an overseas trip and orally directed the attorney to use the power of attorney while the principal was away. The Court found that this conversation implied a limitation on the power of attorney, namely that the attorney was to use the power of attorney while the principal was away but not after the principal's return without particular authority: [30]. This finding was made even though the Conditions and Limitations part of the power of attorney was completed with "Nil": [6].

- Such an unexpressed limitation imposes potential risk to the attorney and third parties with whom the attorney deals on the principal's behalf. It is suggested that better practice would be to avoid these potential problems by encouraging a principal to clearly and comprehensively express all conditions and limitations in the power of attorney. For similar reasons, if the principal does not wish to place any conditions or limitations on the attorney's authority, the clause should be completed (preferably by a statement such as "There are no conditions or limitations on the attorney's authority other than those that arise by reason of law") rather than left blank or incomplete.

I place the following limits and/or conditions on the authority of my attorneys:

- A principal may wish to impose conditions and limitations of the type mentioned in *Vickery v JJP Custodians Pty Ltd* [2002] NSWSC 782 (namely while the principal is overseas, although that condition may be better expressed as a requirement for operation of the power of attorney, and therefore mentioned at clause 4(d) below).

- Limitations and conditions which a principal may wish to impose on the attorney's authority follow (although, arguably, these could also be included as Additional Powers in clause 2):

  a) a restriction on the attorney's power to act in relation to the principal's property in a manner which is inconsistent with a specific gift in the principal's will. This may assist to avoid an ademption. Three comments are made about this limitation:

     i. relief against ademptions, caused by the actions of an attorney appointed under an enduring power of attorney made pursuant to the Act, is contained in s 22 and s 23 of Act. Nevertheless, this sub-clause may ensure that the attorney does not act in a manner which causes the ademption, thereby enabling the intended testamentary beneficiary to receive the benefit of the testamentary gift rather than the substituted payment made pursuant to s 22;
     ii. it may be appropriate to include an exception whereby the attorney can act in a manner inconsistent with the testamentary gift if there is no other feasible alternative. This exception may be appropriate where the principal's only significant asset is real estate and, despite it being specifically given in the principal's will, the sale of the real estate during the principal's lifetime may be desirable (such as where a large sum of money is needed for an accommodation bond and it is not available by other means);
     iii. the attorney will only be able to act in a manner which is consistent with a gift provision in the principal's will if the attorney has access to the will. This may be achieved by:

        1. the principal providing a copy of the will to the attorney when the attorney accepts the appointment – although the possibility that the principal may later change that will should be considered;

        2. the principal authorising the bailee of the will to provide the will or a copy to the attorney (and, usually, this authority will be expressed to apply when the enduring power of attorney operates (as to which see clause 4 below)); and/or
        3. the principal authorising the attorney to obtain the principal's will, or a copy thereof (and, usually this authority will be contained in the enduring power of attorney and will therefore only apply when the enduring power of attorney operates.) An authority of this nature in referred to at (b) below.

  b) that the attorney has access (or no access) to the principal's records, including the principal's will. A reason for granting an undoubted right to access the principal's will is outlined at (a)(iii) above;

c) directions to assist an attorney conduct the principal's business. Alternatively, the principal may wish the attorney to wind-up or dispose of the business, especially if the principal is unlikely to be able to return to conduct the business. In either situation, it may be advisable for the principal to include details of the acts which the attorney should undertake. This will be especially relevant if particular skills are required to conduct the business and the attorney is not chosen because he/she possesses those skills. Such a direction may assist an attorney who manages a principal's business because the attorney must take "all precautions which an ordinary man of business would take in managing similar affairs of his own": *Austin v Austin* [1906] HCA 5, (1906) 3 CLR 516;

d) permission, either general or specific, to deal with the principal's superannuation entitlements. This may include making, remaking or amending death benefit nominations for the principal – something which is likely to arise for an attorney's attention if the death benefit nominations are the lapsing variety. Also, in some circumstances there may be advantages to the principal's estate if the attorney redeems the principal's superannuation entitlement before the principal's death;

e) clarification of the expenses that the attorney will be reimbursed from the principal's property. As a fiduciary an attorney is able to obtain reimbursement of reasonable expenses: *Octavo Investments Pty Ltd v Knight* [1979] HCA 61; (1979) 144 CLR 360 at 367; *J A Pty Ltd v Jonco Holdings Pty Ltd* [2000] NSWSC 147; (2000) 33 ACSR 691 at [50]; *Nick Kritharas Holdings Pty Ltd (In Liq) v Gatsios Holdings Pty Ltd* [2001] NSWSC 343 at [9] to [11]; , *Hempseed v Ward & Anor* [2013] QSC 348, but the principal may wish to define the expenses which will be treated as reasonable to avoid a disputed claim. Alternatively, the principal may wish to allow all expenses incurred by the attorney, even if they were unreasonably incurred;

f) permission to delegate the attorney's authority. Section 45 of the Act reflects the common law position: an attorney cannot delegate unless expressly authorised to do so. Where a principal wishes to allow the attorney to delegate, the principal should consider the circumstances, persons, powers and period in which or to whom the delegation may occur;

g) permission for an attorney to act even if there is a conflict between the attorney's interest or duty and the principal's interest. It is considered to be an essential obligation on a person holding a fiduciary position to avoid such conflicts: see *Chan v Zacharia* [1984] HCA 36; *Breen v Williams* [1996] HCA 57; *Howard –v- Commissioner of Taxation* [2014] HCA 21 (and, in relation to powers of attorney specifically, see *Watson v Watson* [2002] NSWSC 919). Accordingly, in the absence of a sub-clause allowing an attorney to act with that conflict, the attorney would be exposed to personal liability in acting or the attorney would need to not act. Such a conflict may exist with jointly owned property. In that situation the principal may wish to allow the attorney to act generally, notwithstanding the conflict, or at least act in relation to some assets (such as the jointly owned property) even though the attorney has a conflict;

h) specifying the occasions on which the attorney may undertake land transactions on behalf of the principal and/or the type of transactions that may be undertaken. Improper land transactions are regularly the source of litigation that arises from powers of attorney. The principal's careful attention to this issue when making the power of attorney may lessen the incidents of litigation. The principal should be informed that the power of attorney will require registration to enable the attorney to undertake most types of land transactions for the principal: see s 52 of the Act. Alternatively, the attorney may be directed to not undertake land transactions or only do so in certain circumstances (such as where the principal is unlikely to again have personal use of the land);

i) revoking earlier powers of attorney. In most instances a later power of attorney will be intended to replace and supersede an earlier power of attorney. However, the earlier powers of attorney may, nevertheless, continue to have legal effect. If the earlier power of attorney was registered, the instrument revoking the earlier power of attorney (which may be a stand-alone revocation form or the later power of attorney) should also be registered;

j) enabling co-existence with powers of attorneys granted in other jurisdictions. If a principal owns property located outside NSW, rather than rely on recognition of the NSW power of attorney in the other jurisdiction, the principal may prefer to make a power of attorney in the other jurisdiction. In that situation, each power of attorney may refer to the existence and intended operation of the other power of attorney. In the absence of that recognition, it is arguable that a later power of attorney, even if made in a different jurisdiction, impliedly revoked the earlier power of attorney;

k) direction that the attorney makes payment of the principal's debts by recourse to particular property of the principal. This is likely where the principal is keen to preserve specific property that is the subject of testamentary disposition;

l) direction that the attorney takes specified action to maintain, or dispose of, the principal's pets;

m) allowance for the attorney to undertake investments which would be considered risky or speculative, and therefore could not be made by an attorney without specific authority from the principal;

n) permission for the attorney to undertake certain proceedings on behalf of the principal, or conduct them in a particular manner.

4 Commencement

This power of attorney operates: [*tick the option that applies*]

☐ (a) Once the attorney/s have accepted his/her appointment by signing this document.

☐ (b) Once a medical practitioner considers that I am unable to manage my affairs (and provides a document to that effect).

☐ (c) Once my attorney considers that I need assistance managing my affairs.

☐ (d) Other [*insert other commencement here*].

If no option is selected or the options chosen are unclear or inconsistent, I intend that the power of attorney will operate once my attorney/s have accepted their appointment by signing this document.

- The phrasing of sub-clauses (b) and (c) is important as there has been debate about whether the similarly worded standard of "incapable of managing his or her affairs" in *NSW Trustee and Guardian Act 2009* conveys an objective or subjective test: see, for instance, *PB v BB* [2013] NSWSC 1223 at [4]. The wording in these sub-clauses ensures that the test is subjective, being the opinion of the medical practitioner in (b) and the attorney in (c). Caution should be exercised in introducing any option which is not similarly subjective.

- With option (b), care should be taken to ensure that the medical practitioner documents his or her assessment of the functionality of the principal's management capacity by using the phrasing contained in the sub-clause; i.e. the medical practitioner should state that the principal "is unable to manage his/her affairs". In *Power v Power* [2011] NSWSC 288 the power of attorney was only to be used "upon my treating medical practitioner certifying that I am no longer physically or mentally able to sign documents or look after my own affairs". The medical practitioner's certificate stated that "She has reached the stage which I feel that she may not be capable of looking after her own affairs". This did not satisfy the trigger for the commencement of the power of attorney, which meant that the attorney was liable for acting without authority.

- *PB v BB* [2013] NSWSC 1223 makes clear that in examining options (b) and (c) "central significance" is given to "the functionality of management capacity" of the principal, [8].

- Although the heading of this clause is "Commencement", this clause enables the principal to specify when the power of attorney operates, and the notion of operation involves not merely commencement but also ending. An example of this type of operational provision, which may be included in clause 4(d), is "whilst I am overseas". If this type of operation provision is used, some attention should be given as to the manner by which an attorney can satisfy a third party that the principal is overseas.

5 Your signature to make the appointment

Signature:
Date:
Signature of prescribed witness:
Name of prescribed witness:

6 Certificate under section 19 of the Powers of Attorney Act 2003

I **PRESCRIBED PERSON of PRESCRIBED PERSON'S ADDRESS** certify the following:

a) I explained the effect of this power of attorney to the principal before it was signed.

b) The principal appeared to understand the effect of this power of attorney.

c) I am a prescribed witness.

d) I have witnessed the signature of this power of attorney by the principal.

e) I am not an attorney under this power of attorney.

Signature:
Date:
Solicitor:

- To satisfy the requirement of having explained the power of attorney before it is signed by the principal, the prescribed witness should, in the absence of any person who is a potential attorney (and, preferably, in the absence of any person who may influence the principal's decision making) explain :

  a) the nature of a power of attorney;

  b) the different features of the various types of powers of attorney, with particular attention to the distinguishing feature of an enduring power of attorney;

  c) the attributes most desired in an attorney;

  d) the obligations that an attorney owes the principal;

  e) the different ways that multiple attorneys may be appointed (being joint, several and consecutive) and the pros and cons with each approach;

  f) the limit on an attorney's authority imposed by law;

  g) the additional powers that may be conferred on an attorney, and the pros and cons of those powers in the principal's circumstances;

  h) the conditions and limitations that may be imposed on the attorney's authority, and the pros and cons thereof; and

  i) the prescribed and other options concerning the operation of the power of attorney.

- To satisfy the requirement that the principal appeared to understand the effect of the power of attorney, the prescribed witness should reach the conclusion that the principal understands the ramifications and consequences of the power of attorney (per *Szozda v Szozda* [2010] NSWSC 804 at [32]), which, in relation to an enduring power of attorney, appears to require an appreciation of:

a) the extent of the attorney's authority. For instance, if this is consistent with the power of attorney, that:
   i. the attorney will be able to make decisions about the principal's legal and financial affairs;
   ii. subject to the limitations on powers that cannot be conferred on an attorney; and
   iii. subject to the conditions and limitations specified in the power of attorney;

b) the circumstances in which the attorney has the principal's authority – which essentially is an understanding of clause 4 of the prescribed power of attorney;

c) the continuing operation of the power of attorney notwithstanding the principal's subsequent loss of mental capacity; and

d) the absence of any authority to revoke the power of attorney if the principal lacks mental capacity to do so other than by recourse to the Supreme Court or Guardianship Division of the Civil and Administrative Tribunal.

- These items have been slightly adjusted from those contained in *Re K* [1988] Ch 310 to reflect the statutory regime in NSW.

- The time at which the understanding must exist is not stated. At the latest it must have existed before the time the prescribed witness completes the certificate but arguably the prescribed witness' satisfaction of the existence of the understanding should exist at the time the principal signs the power of attorney.

- Justice Barrett has stated that the prescribed witness' "clear responsibility is to undertake sufficient explanation **and sufficient probing** to come to an informed view about the state of the principal's understanding" (emphasis added). His Honour added that "an attempt should be made to get from the [principal's] own mouth some statements indicating their appreciation of the significance of what they are about to do."[4]

- In *Scott v Scott* [2012] NSWSC 1541, the Court referred to a s 19 certificate as giving courts and those who rely on an enduring power of attorney "some comfort" about the mental capacity of the principal to make it: [238]-[239]. Comments of this nature, and the outcome of decisions like *Legal Services Commissioner v Ford* [2008] LPT 12 (where a solicitor was disciplined for preparing a power of attorney for a person who lacked the mental capacity to do so), emphasise the level of responsibility upon a solicitor to ensure that the principal understands the power of attorney before the solicitor provides the s 19 certificate.

- Before the *Powers of Attorney Amendment Form Regulation 2013*, gazetted on 21 February 2014, the regulated form contained two errors. First, sub-clause (e) was omitted, thereby casting doubt on whether any form completed in accordance with the Regulations in existence before 21 February 2014 is an enduring power of attorney. Second, the description of a prescribed witness was misstated in some respects, leading to similar doubts with forms completed in accordance with the (then) Regulation but not meeting the requirements of the Act.

[4] Ibid.

7 Acceptance by attorney

a) I accept that I must always act in the principal's best interests.

b) I accept that as attorney I must keep my own money and property separate from the principal's money and property.

c) I accept that I should keep reasonable accounts and records of the principal's money and property.

- In *Parker v Higgins* [2012] NSWSC 1516 the obligation to account was explained as follows: "The attorney's obligation is really one to keep accurate primary accounting records, for which the principal can call, if necessary, for the principal's examination": [64]. The Court approved the following statement about the costs of keeping those records: "It also stands to reason that, in the usual case, the cost of providing and maintaining the records should be recoverable, whether directly or by way of indemnity, from the principal": [60].

d) I accept that, unless expressly authorised, I cannot gain a benefit from being an attorney.

- This is considered to be an essential obligation on a person holding a fiduciary position: see *Chan v Zacharia* [1984] HCA 36; *Breen v Williams* [1996] HCA 57 and *Howard –v- Commissioner of Taxation* [2014] HCA 21 (An attorney is a fiduciary: Ward v Ward (No 2) [2011] NSWSC 1292.)

e) I accept that I must act honestly in all matters concerning the principal's legal and financial affairs.

- In *KTC* [2011] NSWGT this obligation was expressed as: "Where an agent, such as an attorney, has discretion as to what course to take, the agent must be guided by the honest exercise of his or her own judgment and the interests of the principal (*Jones v Canavan* [1972] 2 NSWLR 236 at 242 and 247)": [171].

Failure to do any of the above may incur civil and/or criminal penalties.

- An attorney may also be subject to other duties. These include obligations to act in good faith and for a proper purpose: see *Harris v Rothery (estate of Harris)* [2013] NSWSC 1275 at [167]. An attorney has a duty to obey a principal's directions: *Dynayski v Grant* [2004] NSWSC 1187. (The position is different with an irrevocable power of attorney: *Cordiant Communications (Australia) Pty Ltd v The Communications Group Holdings Pty Ltd* [2005] NSWSC 1005 at [152] – [153].) An attorney owes the principal a duty of care

Signature:
Name:
Date:

and

Signature:
Name:
Date:

LPI OFFICE USE ONLY

Important information

- A power of attorney is an important and powerful legal document. You should get legal advice before you sign it.

- It is important that you trust the person you are appointing as attorney to make financial decisions on your behalf. They must be over 18 years old and must not be bankrupt or insolvent. If your financial affairs are complicated, you should appoint an attorney who has the skills to deal with complex financial arrangements.

- Two additional matters should be observed:
  a) the attorney must also have mental capacity to act, and
  b) the attorney's decisions may affect the principal's legal as well as financial affairs.

- A power of attorney cannot be used for health or lifestyle decisions. You should appoint an enduring guardian under the *Guardianship Act 1987* if you want a particular person to make these decisions. For further information, contact the Civil and Administrative Tribunal or NSW Trustee and Guardian.

- Clause 2 of the power of attorney contains powers which will permit your attorney to use your money and assets for the attorney or anyone else as provided. You should only tick those boxes in clause 2 if you choose that your attorney is to have those power/s.

- This power of attorney is for use in New South Wales only. If you need a power of attorney for interstate or overseas, you may need to make a power of attorney under their laws. The laws of some other States and Territories in Australia may give effect to this power of attorney. However, you should not assume this will be the case. You should confirm whether the laws of the State or Territory concerned will in fact recognise this power of attorney.

- Your attorney must keep the attorney's own money and property separate from your money and property, unless you are joint owners, or operate joint bank accounts. Your attorney should keep reasonable accounts and records about your money and property. The cost of providing and maintaining these records by the attorney may be recoverable from you.

- If your attorney is signing certain documents that affect real estate, the power of attorney must be registered at Land and Property Information. Please contact LPI on 1300 052 637 to see whether the power of attorney must be registered.

- An attorney must always act in your best interest. If your attorney does not follow your directions or does not act in your best interest, you should consider revoking the power of attorney. You will be only able to do so whilst you retain your mental capacity. If you revoke the power of attorney you should notify the attorney, preferably in writing, that they are no longer your attorney. The attorney must stop acting immediately once they have knowledge of the revocation.

- This power of attorney does not automatically revoke earlier powers of attorney made by you. If you have made an earlier power of attorney which you do not want to continue, you must revoke the earlier power of attorney and give notice of the revocation to your earlier attorneys, if you have not already done so. You should also give notice of the revocation to anyone who is aware of the earlier power of attorney.

Notes for completion

Joint attorneys

If you appoint more than one attorney, you should indicate whether the attorneys are to act jointly, or jointly and severally. Attorneys who are appointed jointly are only able to act and make decisions together.

Attorneys who are appointed jointly and severally (i.e. together or separately) are able to act and make decisions independently of each other. However, you can specify that a simple majority (if you appoint 3 or more attorneys) must agree before they can act.

Substitute attorney/s

If you appoint a substitute attorney, they will only have authority to act as your attorney if the first appointed attorney dies, resigns or vacates their position.

You can specify for whom the substitute is to act (e.g. if you appoint A and B as attorneys and X and Y as substitutes, you can specify that X takes A's place if A vacates office).

A substitute attorney must sign an acceptance of their appointment in Clause 7 before they can act as attorney.

If you have appointed a substitute attorney, it may be helpful that some sort of documentation evidencing the vacation of the original attorney is attached to this power of attorney, when that vacancy happens. This will assist to satisfy a third party that the substitute attorney is entitled to act for you.

Attorney vacates office

Section 5 of the *Powers of Attorney Act 2003* states that there is a vacancy in the office of attorney if the attorney dies, resigns, becomes bankrupt, loses mental capacity or the authority to act is revoked. If you have appointed a substitute attorney, it may be helpful that some sort of documentation evidencing the vacation of the original attorney is attached to this power of attorney when that vacancy happens. This will assist to satisfy a third party that the substitute attorney is entitled to act for you.

Further information

For information on powers of attorney, the attorney's duties and registration, contact Land and Property Information www.lpi.nsw.gov.au, the NSW Trustee and Guardian www.tag.nsw.gov.au, a solicitor, or a trustee company.

The NSW Government's Planning Ahead Tools website www.planningaheadtools.com.au provides up-to-date information and resources about powers of attorney, enduring guardianship, wills and advanced care planning.

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