

South Australia

Powers of Attorney Bill 2021

A BILL FOR

An Act to provide for general and enduring powers of attorney, to repeal the *Powers of Attorney and Agency Act 1984*, and for other purposes.

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- 1 Repeal of Act

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The Parliament of South Australia enacts as follows:**Part 1—Part 1****1—Short title**

This Act may be cited as the *Powers of Attorney Act 2021*.

2—Commencement

This Act comes into operation on a day to be fixed by proclamation.

3—Interpretation

- (1) In this Act, unless the contrary intention appears—

accommodation provider, in relation to a person, means a person who is, in a professional or administrative capacity, directly or indirectly responsible for or involved in the provision of accommodation for the person;

approved form means a form approved by the Minister;

associate—see subsection (2);

attorney means a person to whom a power is given under a power of attorney;

authorised witness means—

- (a) a Commissioner for taking affidavits in the Supreme Court of South Australia; or
- (b) a Justice of the Peace; or
- (c) a police officer, other than a police cadet, police medical officer or special constable; or
- (d) a person who is authorised to take affidavits under a law of another State or a Territory; or
- (e) a person of a class prescribed by the regulations;

care worker, in relation to a person, means a person who provides services for the care of the person and receives remuneration for those services from any source, but does not include—

- (a) a person who receives a carer payment or other benefit from the Commonwealth or a State or Territory for providing home care to the person; or
- (b) a person who is a health provider;

child means a person under the age of 18 years;

close friend, in relation to a person, means a person who has a close personal relationship with the first person and a personal interest in the person's welfare;

close relative means—

- (a) a spouse or domestic partner; or
- (b) a son or daughter, or a step-son or step-daughter; or
- (c) a parent or step-parent; or
- (d) a sibling or step-sibling; or
- (e) a grandparent; or
- (f) a grandchild; or
- (g) an uncle or aunt; or
- (h) a nephew or niece;

Court means the Supreme Court of South Australia;

domestic partner means a domestic partner within the meaning of the *Family Relationships Act 1975*, whether declared under that Act or not;

enduring power of attorney—see section 9;

health provider means a person who provides health care in the practice of a profession or in the ordinary course of business;

legal capacity—see section 4;

principal, in relation to a power of attorney, means the person who makes the power of attorney;

property includes any form of financial asset or money.

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- (2) For the purposes of this Act, a person is an associate of another if—
- (a) they are partners; or
 - (b) 1 is a close relative of another; or
 - (c) they are both trustees or beneficiaries of the same trust, or 1 is a trustee and the other is a beneficiary of the same trust; or
 - (d) 1 is a body corporate or other entity (whether inside or outside Australia) and the other is a director or member of the governing body of the body corporate or other entity; or
 - (e) 1 is a body corporate or other entity (whether inside or outside Australia) and the other is a person who has a legal or equitable interest in 5% or more of the share capital of the body corporate or other entity; or
 - (f) they are related bodies within the meaning of the *Corporations Act 2001* of the Commonwealth; or
 - (g) a relationship of a prescribed kind exists between them; or
 - (h) a chain of relationships can be traced between them under any 1 or more of the above paragraphs.
- (3) For the purposes of subsection (2), a beneficiary of a trust includes an object of a discretionary trust.
- (4) For the purposes of this Act, a reference to a decision made by the attorney of a power of attorney will be taken to include a reference to the exercise of power by the attorney.

4—Capacity and legal capacity

- (1) For the purposes of this Act, a person will be taken, in the absence of evidence or a law of the State to the contrary, to possess the capacity to enter into a power of attorney.
- (2) For the purposes of this Act, a person will be taken to lack legal capacity in relation to a power of attorney if the person is not capable of—
- (a) understanding the nature and effect of what they are doing; or
 - (b) understanding or retaining any information that may be relevant to the power of attorney (including the consequences of making a particular decision); or
 - (c) making their own decisions about the power of attorney; or
 - (d) communicating the person's intentions about the power of attorney.
- (3) For the purposes of this Act—
- (a) a person will not be taken to be incapable of understanding information merely because the person is not able to understand matters of a technical or trivial nature; and
 - (b) a person will not be taken to be incapable of retaining information merely because the person can only retain the information for a limited time; and
 - (c) a person will not be taken to lack legal capacity in relation to a power of attorney merely because—

- (i) the person's understanding about a matter is episodic; or
- (ii) a decision made by the person has or may have an adverse outcome for the person.

5—Conflict transactions

- (1) For the purposes of this Act, a conflict transaction, in relation to a power of attorney, is a transaction that results, or may result, in a conflict between—
- (a) the duty of an attorney towards the principal; and
 - (b) either—
 - (i) the interests of the attorney, or an associate or close friend of the attorney; or
 - (ii) another duty of the attorney.
- (2) However, a transaction is not a conflict transaction merely because, by the transaction, the attorney in the attorney's own right and on behalf of the principal—
- (a) deals with an interest in property held jointly by the attorney and the principal (whether as joint tenants or tenants in common); or
 - (b) acquires an interest in property to be held jointly by the attorney and the principal (whether as joint tenants or tenants in common); or
 - (c) obtains a loan or gives a guarantee or indemnity in relation to a transaction referred to in paragraph (a) or (b); or
 - (d) undertakes any other transaction of a prescribed class or in prescribed circumstances.

6—Application of Act

- (1) This Act applies in relation to a power of attorney of which the law of this State is the proper law, or which arises by virtue of a transaction of which the law of this State is the proper law.
- (2) This Act applies within the State and outside the State to the full extent of the extraterritorial power of the Parliament.
- (3) This section does not derogate from the operation of section 51.

Part 2—Objects and principles

7—Objects

The objects of this Act include the following:

- (a) to provide for general and enduring powers of attorney;
- (b) to provide for the protection of people whose affairs are being dealt with under a power of attorney, especially in relation to enduring powers of attorney;

- (c) to set out principles, requirements and duties to be applied by persons who act under powers of attorney, including by recognising the importance of the wishes and preferences of persons who give powers of attorney even when specific instructions have not been given in relation to a particular matter;
- (d) to provide processes for the resolution of matters that may arise in relation to the operation or effect of powers of attorney, including review proceedings in the Court.

8—Principles

The following principles must be taken into account by an attorney exercising a power of attorney, and by the Court or any other court, person, body or authority exercising a power under this Act or otherwise connected with the administration, operation or enforcement of this Act:

- (a) a decision made in relation to a principal—
 - (i) must, as far as is reasonably practicable, reflect the decision that the principal is likely to have made in the circumstances (assuming the possession of legal capacity on the part of the principal); and
 - (ii) must not unreasonably restrict the basic rights and freedoms of the principal;
- (b) subject to any provision made in a power of attorney or direction or indication given by a principal, an attorney should consider whether the principal is reasonably able to act themselves before the attorney acts under the power of attorney;
- (c) the wishes and preferences of the principal are important and must be sought and taken into account as far as is reasonably practicable and appropriate;
- (d) consideration must be given, in respect of a principal who lacks legal capacity, to any relevant wishes and preferences expressed by the principal in the past to the extent that those wishes and preferences are reasonably ascertainable.

Part 3—General characteristics of powers of attorney

Division 1—General principles

9—General powers of attorney and enduring powers of attorney

- (1) There are 2 types of powers of attorney—
 - (a) a general power of attorney; and
 - (b) an enduring power of attorney.
- (2) A power of attorney will be taken to be a general power of attorney unless subsection (3) applies.
- (3) An enduring power of attorney is a power of attorney that specifies or indicates that a power conferred by the power of attorney will be exercised—
 - (a) in the event of the principal's subsequent legal incapacity; or

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Part 3—General characteristics of powers of attorney

Division 1—General principles

- (b) regardless of whether or not the principal lacks legal capacity.
- (4) Despite any rule of law to the contrary, and subject to this Act and to any provision specified in the power of attorney, an enduring power of attorney is not revoked by the principal, after making the power of attorney, becoming a person who does not have the legal or decision making capacity for any matters to which the power of attorney applies.

10—Persons not permitted to make a power of attorney

- (1) A child cannot make a power of attorney.
- (2) A person who lacks legal capacity cannot make a power of attorney.

Division 2—Powers**11—Powers conferred by a power of attorney**

- (1) Subject to this Act and to any provision specified in the power of attorney, an attorney may do anything on behalf of the principal that a person can lawfully do by an attorney.
- (2) A person making a power of attorney may—
- (a) place, impose or specify conditions, limitations or exclusions in respect of the exercise of any power; or
 - (b) give instructions about the exercise of any power.
- (3) Without limiting the operation of subsections (1) and (2), the following are examples of powers that may be exercised under a power of attorney:
- (a) paying maintenance and accommodation expenses for the principal and the principal's dependants including, for example, purchasing an interest in, or making another contribution to, an establishment that will maintain or accommodate the principal or a dependant of the principal;
 - (b) paying the principal's debts and expenses;
 - (c) receiving and recovering amounts payable to the principal;
 - (d) carrying out the principal's trade or business;
 - (e) entering into contracts on behalf of the principal;
 - (f) discharging a mortgage over the principal's property;
 - (g) paying rates, taxes, insurance premiums and other outgoings for the principal's property;
 - (h) insuring the principal or the principal's property;
 - (i) otherwise preserving or improving the principal's estate;
 - (j) continuing or making investments on behalf of the principal, including taking up rights to share issues, or options for new shares, to which the principal becomes entitled because of the principal's shareholding, or selling, transferring, substituting, purchasing or otherwise acquiring shares and other investments;
 - (k) undertaking a real estate transaction for the principal;

- (l) dealing with land under the *Real Property Act 1886* or the *Law of Property Act 1936*;
- (m) undertaking a transaction for the principal involving the use of the principal's property as security (for example, for a loan or by way of guarantee) for an obligation the performance of which is beneficial to the principal;
- (n) withdrawing amounts from, or depositing amounts into, an account of the principal held in an ADI;
- (o) establishing or closing accounts in the name of the principal at an ADI.
- (4) An attorney under a power of attorney is not able to—
- (a) make or revoke a will for the principal; or
- (b) make or revoke a power of attorney for the principal; or
- (c) perform a function or exercise a power that the principal has as a trustee or personal representative; or
- (d) manage the estate of the principal on the death of the principal; or
- (e) vote on the principal's behalf in a Commonwealth, State or local government election, referendum or poll; or
- (f) delegate a power under the power of attorney; or
- (g) consent to the adoption of a child of the principal; or
- (h) consent to an unlawful act; or
- (i) exercise any other prescribed power.
- (5) This section does not—
- (a) limit the operation of section 39(2)(i) of the *Guardianship and Administration Act 1993*; or
- (b) authorise an attorney to act under another law—
- (i) where it would be contrary to an intention (express or implied) that a power under that law be exercised personally; or
- (ii) where it otherwise appears to be necessary for a power under that law to be exercised personally.
- (6) In this section—
- will* includes codicil.

12—When a power is exercisable by an attorney

- (1) A principal may specify, in a power of attorney, a time from which, a circumstance in which or an occasion on which the power for all matters or the power for a specified matter under the power of attorney is exercisable, which may be—
- (a) immediately on the making of the power; or
- (b) in the case of an enduring power of attorney—in the event of the principal's legal incapacity; or
- (c) any other time, circumstance or occasion.

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Division 2—Powers

- (2) If a specification is not made in a power of attorney under subsection (1), the power for all matters under the power of attorney is exercisable on and from the making of the power of attorney.
- (3) Despite a specification being made under subsection (1)(c) in an enduring power of attorney, if, before the specified time, circumstance or occasion for a matter, the principal does not have legal capacity to make a decision for a particular matter (being a matter that is capable of being dealt with under the power of attorney), an attorney who has the power for the matter may exercise that power during any period when the principal does not have that capacity.
- (4) This section does not derogate from the operation of section 21.

Division 3—Attorneys**13—Appointment of more than 1 attorney**

- (1) A principal under a power of attorney may appoint more than 1 person as attorney under the power of attorney.
- (2) If 2 or more persons are appointed as attorneys, the power of attorney may specify that the power is to be exercised by the attorneys—
- (a) jointly; or
 - (b) severally; or
 - (c) by decision made by a majority,
- subject to the qualification that if the principal does not specify the basis on which the attorneys are appointed, the attorneys are taken to have been appointed to act jointly.
- (3) A power of attorney may specify that a power is to be exercised by a specified attorney or specified attorneys only for specified matters or under specified circumstances.
- (4) If, during a period of legal incapacity of the principal—
- (a) 2 or more attorneys are authorised to exercise the power of attorney in relation to a matter; and
 - (b) the power of attorney does not specify how the power is to be shared; and
 - (c) it is not practicable or possible for the attorneys to exercise the power jointly,
- any of the attorneys, a close relative of the principal, the Public Advocate or a guardian or administrator of the principal, may apply to the Court for direction in the matter.
- (5) If 3 or more attorneys are authorised under an enduring power of attorney to exercise a power jointly only, and not all but at least 2 of the attorneys have accepted the power, the attorneys who have accepted the power may exercise the power (unless the contrary intention is specified).

14—Appointment of alternative attorneys

- (1) A principal under a power of attorney may appoint 1 or more persons as alternative attorneys under the power of attorney.

- (2) The principal may specify in the power of attorney the circumstances in which any alternative attorney may act under the power of attorney.
- (3) If no circumstances are specified in the power of attorney, an alternative attorney is authorised to act under the power of attorney if the attorney for whom the alternative is appointed—
- (a) dies; or
 - (b) does not have the legal capacity for the matters to which the appointment applies; or
 - (c) is otherwise not willing or able to act; or
 - (d) ceases to be authorised to act as an attorney by virtue of the operation of section 39; or
 - (e) resigns under section 41.
- (4) To avoid doubt, the other provisions of this Act apply to alternative attorneys in the same manner as they apply to the attorney for whom the alternative attorney is appointed.

15—Bodies corporate

- (1) Subject to subsection (2), the power to appoint a person as an attorney includes the power to appoint a body corporate as an attorney.
- (2) In the case of an enduring power of attorney, a body corporate may only be appointed as an attorney if the body corporate is—
- (a) the Public Trustee; or
 - (b) a trustee company within the meaning of Chapter 5D of the *Corporations Act 1988* of the Commonwealth; or
 - (c) a body corporate brought within the ambit of this subsection by the regulations.

Note—

See also section 16 about other limitations on the appointment of persons as an attorney under a power of attorney.

16—Persons not permitted to act as an attorney

- (1) The following persons may not be appointed as an attorney under a power of attorney:
- (a) a child;
 - (b) a person who lacks legal capacity;
 - (c) a witness to the power of attorney;
 - (d) a person against whom an intervention order has been issued under the *Intervention Orders (Prevention of Abuse) Act 2009* where the person who would be making the appointment is a person for whose protection the intervention order was issued;
 - (e) in relation to an enduring power of attorney—

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Division 3—Attorneys

- (i) a person who, at the time that the principal signs the power of attorney, is a health provider, care worker or accommodation provider for the principal; or
- (ii) a person who has been convicted of an offence involving dishonesty within the period of 5 years immediately preceding the date on which the principal signs the power of attorney; or
- (iii) a person who is bankrupt or personally insolvent, or has been bankrupt or personally insolvent within the period of 5 years immediately preceding the date on which the principal signs the power of attorney;
- (f) a person of a prescribed class.

(2) However—

- (a) subsection (1)(d) ceases to apply at the expiration of the period of 5 years from the date on which the intervention order ceases to apply; and
- (b) a person within the ambit of subsection (1)(e)(ii) or (iii) may be appointed as an attorney if—
 - (i) the person has specifically disclosed to the principal the circumstance that would otherwise disqualify them from being appointed (the *prescribed circumstance*); and
 - (ii) in the case of a person who has been bankrupt or personally insolvent, the person is no longer bankrupt or insolvent; and
 - (iii) the principal has indicated, by express provision in the power of attorney and in accordance with any prescribed requirement, that they are making the appointment despite the prescribed circumstance.

(3) An appointment in contravention of this section is void and of no effect.

(4) This section does not limit any other provision of this Act.

Part 4—Formal requirements**Division 1—General powers of attorney****17—General powers of attorney**

- (1) A general power of attorney must—
 - (a) be created—
 - (i) in the approved form; or
 - (ii) in a form to the same effect as the approved form and expressed to be made in pursuance of this section; and
 - (b) be executed—
 - (i) by the principal signing the power of attorney; or
 - (ii) by another person signing the power of attorney on behalf of the principal, in the presence of and at the direction of the principal; and

- (c) be executed in the presence of a witness (subject to the operation of section 18); and
- (d) be signed and dated by the witness in the presence of the principal; and
- (e) comply with any other requirement prescribed by the regulations.

- 5 (2) A general power of attorney that does not comply with the requirements of subsection (1) is void and of no effect.
- (3) However, a general power of attorney is not invalid merely because the principal did not complete a particular part of the form approved by the Minister (other than a part specified as being a part that must be completed).
- 10 (4) This section does not limit—
- (a) the operation of section 24; or
 - (b) the ability to obtain an order under Part 8.

18—Persons not permitted to act as a witness

15 The following persons may not act as a witness to the signing of a general power of attorney:

- (a) a child;
- (b) a person who is signing the power of attorney on behalf of the principal;
- (c) a person who is to be appointed as an attorney under the power of attorney;
- (d) a person of a prescribed class.

Division 2—Enduring powers of attorney

19—Enduring powers of attorney

- (1) An enduring power of attorney must—
- (a) be created—
 - (i) in the approved form; or
 - 25 (ii) in a form to the same effect as the approved form and expressed to be made in pursuance of this section; and
 - (b) be executed—
 - (i) by the principal signing the power of attorney; or
 - 30 (ii) by another person signing the power of attorney on behalf of the principal, in the presence of and at the direction of the principal; and
 - (c) be executed in the presence of an authorised witness; and
 - (d) be signed and dated by the authorised witness in the presence of the principal; and
 - (e) contain a statement that—
 - 35 (i) specifies the person's qualification to act as the authorised witness (subject to the operation of section 20); and

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Division 2—Enduring powers of attorney

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- (ii) declares that the person is not disqualified from acting as the authorised witness; and
- (f) contain a certificate signed by the authorised witness certifying—
- (i) if the power of attorney is signed by the principal—
- 5 (A) that the principal signed the power of attorney voluntarily and in the presence of the witness; and
- (B) that, at the time of signing, the principal appeared to the witness to understand the nature and effect of giving the power of attorney; or
- 10 (ii) if the power of attorney is signed by another person acting on behalf of the principal—
- (A) that the principal directed the person to sign the power of attorney for the principal; and
- (B) that the principal gave the direction voluntarily and in the presence of the witness; and
- 15 (C) that the person signed the power of attorney in the presence of the principal and the witness; and
- (D) that, at the time of signing, the principal appeared to the witness to understand the nature and effect of giving the power of attorney; and
- 20 (g) comply with any other requirement prescribed by the regulations.
- (2) An enduring power of attorney that does not comply with the requirements of subsection (1) is void and of no effect.
- (3) However, an enduring power of attorney is not invalid—
- 25 (a) merely because the principal did not complete a particular part of the form approved by the Minister (other than a part specified as being a part that must be completed); or
- (b) the proposed attorney, or any or all of the proposed attorneys, have not indicated their acceptance of the appointment under the power of attorney in
- 30 accordance with the requirements of this Act.
- (4) This section does not limit—
- (a) the operation of section 21 or 24; or
- (b) the ability to obtain an order under Part 8.

20—Persons not permitted to act as a witness

35 The following persons may not act as a witness to the signing of an enduring power of attorney:

- (a) a child;
- (b) a person who is signing the power of attorney at the direction of the principal;
- (c) a person who is to be appointed as an attorney under the power of attorney;
- 40 (d) a close relative of the principal;

- (e) a close relative of a person who is to be appointed as an attorney under the power of attorney;
- (f) a person who, at the time that the principal signs the power of attorney, is a care worker or accommodation provider for the principal;
- (g) a person of a prescribed class.

21—Acceptance of appointment by attorney

- (1) An enduring power of attorney is not effective to appoint a particular person as an attorney under the power of attorney unless or until—
 - (a) the person signs a statement of acceptance—
 - (i) in the approved form; or
 - (ii) in a form to the same effect as the approved form and expressed to be made in pursuance of this section; and
 - (b) an authorised witness witnesses the signing of the statement under paragraph (a) and signs that the person has witnessed the signing.
- (2) The statement of acceptance must be to the effect that the attorney—
 - (a) is eligible to act as an attorney under the enduring power of attorney; and
 - (b) understands the responsibilities, duties and obligations of an attorney under an enduring power of attorney; and
 - (c) undertakes to act in accordance with the provisions of this Act that relate to enduring powers of attorney.
- (3) The regulations may make an alternative provision for the provision of a statement of acceptance by the Public Trustee or other body corporate acting under section 15(2).

Division 3—Related matters

22—Witness may request evidence of capacity

- (1) To avoid doubt, a person who is requested to act as a witness to the execution of a power of attorney may ask for evidence to establish that the principal has the legal capacity required to make the power of attorney.
- (2) This section does not limit any other provision of this Act.

23—Witness may be an employee of principal or attorney

To avoid doubt, a person is not excluded from being eligible to witness the signing of an instrument creating a power of attorney merely because the person is an employee of the principal or an employee of an attorney appointed under the power of attorney.

Part 5—Validity and operation of powers of attorney

24—Provisions associated with preserving validity

A power of attorney is not invalid merely because—

- (a) the principal was not fully informed in relation to each matter or circumstance to which the power of attorney relates; or

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Part 5—Validity and operation of powers of attorney

- (b) the principal did not seek legal or other professional advice in relation to the power of attorney; or
- (c) the power of attorney contains a minor error (being an error that does not affect the ability to understand the wishes or instructions of the principal); or
- 5 (d) instructions in the power of attorney are expressed in informal language; or
- (e) the principal has expressed their wishes in general terms rather than in specific terms; or
- (f) the principal's wishes in relation to a particular matter need to be inferred from the power of attorney.

25—Request for evidence about capacity by third party

If an attorney is acting under an enduring power of attorney as to a matter because the principal lacks legal capacity in relation to the matter, a person dealing with the attorney may ask for evidence to establish that the principal actually lacks legal capacity.

26—Regaining capacity does not prevent exercise of power by attorney

- (1) If an attorney under an enduring power of attorney has commenced exercising the power for any matter under the power of attorney because the principal lacks legal capacity, the attorney may continue to exercise that power even if the principal regains legal capacity.
- 20 (2) Nothing in subsection (1) is to be taken to enable a person to exercise power under an enduring power of attorney that is invalid or has been revoked.

27—Principal may continue to exercise power

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

28—Ability to rely on power of attorney

- (1) An attorney who—
 - (a) purports to exercise a power under a power of attorney; and
 - (b) does so in good faith and without knowing that the power being exercised or the power of attorney is invalid or has been revoked,
- 30 is entitled to rely on the power of attorney as against the principal and any other person, despite the invalidity or revocation.
- (2) If a person—
 - (a) acts in reliance on the purported exercise of a power by an attorney under a power of attorney; and
 - 35 (b) acts in good faith without knowing that the power is invalid or has been revoked,

that person (and any person claiming under that person) is entitled to rely on the purported exercise of the power as against the principal and any other person, despite the invalidity or revocation.

29—Protection from liability

- (1) An attorney or other person incurs no criminal or civil liability for an act or omission done or made in good faith, without negligence and in accordance with, or purportedly in accordance with, a power of attorney.
- 5 (2) For the purposes of this section, a reference to a civil liability of a person includes a reference to a liability arising under disciplinary or similar proceedings.

Part 6—Duties of attorneys**Division 1—General provisions****30—Preliminary**

- 10 Nothing in this Part is to be taken to affect any duty or other obligation that an attorney has at common law.

31—General duties

- (1) An attorney under a power of attorney must, in acting under the power of attorney—
- 15 (a) act in accordance with the requirements of this Act; and
- (b) act in accordance with any relevant requirement or direction specified in the power of attorney; and
- (c) act in good faith and with reasonable care; and
- 20 (d) except during any period of legal incapacity of the principal, insofar as is reasonably practicable (and subject to any provision made in the power of attorney or direction or indication given by the principal)—
- (i) consult with the principal before exercising a power under the power of attorney; and
- (ii) notify the principal after exercising a power under the power of attorney.
- 25 (2) This section does not—
- (a) derogate from any other steps that may be taken to achieve consistency with section 8; and
- (b) derogate from the operation of section 29.

Division 2—Specific duties—enduring powers of attorney**32—Keeping records**

30 An attorney under an enduring power of attorney must keep accurate records and accounts of all dealings and transactions made in pursuance of the power.

Maximum penalty: \$2 500.

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Part 6—Duties of attorneys

Division 2—Specific duties—enduring powers of attorney

33—Separation of property

- (1) An attorney under an enduring power of attorney must keep the attorney's property separate from the principal's property.

Maximum penalty: \$5 000.

- (2) Subsection (1) does not apply to—

- (a) property owned jointly by the principal and the attorney; or
- (b) property acquired jointly by the principal and the attorney in place of property owned jointly by the principal and attorney; or
- (c) any other circumstance prescribed by the regulations.

34—Conflict transactions

- (1) An attorney under—

- (a) a general power of attorney; or
- (b) an enduring power of attorney during a period of legal capacity of the principal,

must not enter into a conflict transaction in relation to the power of attorney unless—

- (c) the power of attorney authorises—
 - (i) the transaction; or
 - (ii) conflict transactions of that kind; or
 - (iii) conflict transactions generally; or

- (d) the attorney is acting in prescribed circumstances; or

- (e) the attorney is acting with the permission of the principal.

Maximum penalty: \$10 000.

- (2) An attorney under an enduring power of attorney must not, during a period of legal incapacity of the principal, enter into a conflict transaction in relation to the power of attorney unless—

- (a) the power of attorney authorises—
 - (i) the transaction; or
 - (ii) conflict transactions of that kind; or
 - (iii) conflict transactions generally; or

- (b) the attorney is acting in prescribed circumstances; or

- (c) the attorney is acting with permission of the Court.

Maximum penalty: \$10 000.

Part 7—Revocation and relinquishment of powers

Division 1—Revocation by death

35—Revocation by death

A power of attorney is revoked on the death of the principal.

Division 2—Revocation by principal

36—Revocation by principal

- (1) A principal may revoke a power of attorney at any time if the principal has legal capacity in relation to the making of a power of attorney.
- (2) A revocation of a power of attorney by a principal must—
 - (a) be by instrument—
 - (i) in the approved form; or
 - (ii) in a form to the same effect as the approved form and expressed to be made in pursuance of this section; and
 - (b) be executed—
 - (i) by the principal signing the instrument; or
 - (ii) by another person signing the instrument on behalf of the principal, in the presence of and at the direction of the principal; and
 - (c) be executed in the presence of a witness (subject to the operation of section 37); and
 - (d) be signed and dated by the witness in the presence of the principal; and
 - (e) comply with any other requirement prescribed by the regulations.
- (3) A revocation that does not comply with the requirements of this section is of no effect.
- (4) However, an instrument of revocation is not invalid merely because the principal did not complete a particular part of the form approved by the Minister (other than a part specified as being a part that must be completed).
- (5) If a principal revokes a power of attorney, the principal must take reasonable steps to give the attorney or attorneys notice in writing of the revocation (but a failure to give a notice under this subsection does not affect the validity of the revocation).
- (6) Subsection (3) does not limit the ability to obtain an order under Part 8.

37—Persons not permitted to act as a witness

- (1) The following persons may not act as a witness to the signing of an instrument revoking a power of attorney:
 - (a) a child;
 - (b) a person signing the instrument at the direction of the principal;
 - (c) a person who is an attorney under the power of attorney;

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Part 7—Revocation and relinquishment of powers

Division 2—Revocation by principal

(d) a person of a prescribed class.

- (2) To avoid doubt, a person is not excluded from being eligible to witness the signing of an instrument revoking a power of attorney merely because the person is an employee of the principal or an employee of an attorney appointed under the power of attorney.

38—Witness may request evidence of capacity

- (1) To avoid doubt, a person who is requested to act as a witness to the execution of an instrument revoking a power of attorney may ask for evidence to establish that the principal has the legal capacity required to execute the instrument.
- (2) This section does not limit any other provision of this Act

Division 3—Revocation in prescribed circumstances**39—Automatic revocation**

- (1) Subject to this section, a power of attorney is taken to have been revoked in relation to a particular attorney in the following circumstances:

(a) in the case of—

- (i) an attorney who is a natural person—on the death of the attorney; or
- (ii) an attorney that is a body corporate—on the dissolution of the body corporate;

(b) in the case of an attorney who is a natural person—if the attorney ceases to have the legal capacity to act as an attorney;

(c) on the resignation of the attorney under Division 4;

(d) if events have occurred such that an attorney would not, under section 16(1)(d) or (e)(ii) or (iii), be entitled to be appointed as an attorney under the power of attorney;

(e) at such time as the power of attorney ceases to have effect in accordance with its terms;

(f) in the case of an enduring power of attorney where the principal and the attorney are married or domestic partners, unless the principal otherwise specifies in the power of attorney—on the dissolution or annulment of the marriage or the cessation of the domestic relationship.

- (2) Subsection (1)(d) does not prevent a principal appointing a person as an attorney under a new power of attorney under section 16(2)(b) (in a case where section 16(1)(e)(ii) or (iii) applies).

- (3) Subsection (1)(f) does not apply in relation to the cessation of a domestic relationship where the parties have ceased to live together because 1 of the parties has moved into separate accommodation but the parties still view themselves as partners.

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

- (5) If a power of attorney authorises 2 or more people as attorneys to act together but not separately, the power of attorney is taken to be revoked if the power is revoked in relation to 1 or more attorneys under this section.
- (6) Subsection (5) applies subject to any provision made in the power of attorney that allows 1 or more attorneys to continue to act in any event.
- (7) Despite a preceding subsection, if—
- (a) an attorney's power under an enduring power of attorney for a matter is revoked; and
 - (b) the attorney was authorised to exercise power for the matter under the power of attorney together with 1 more other attorneys, but not separately; and
 - (c) the principal lacks legal capacity,
- then—
- (d) if there is only 1 remaining attorney in relation to the matter, the remaining attorney may exercise power for the matter; and
 - (e) if there are 2 or more remaining attorneys in relation to the matter, the remaining attorneys may exercise power in relation to the matter and, if exercising power, must exercise power together.
- (8) In connection with the operation of a preceding subsection, a power of attorney is revoked if—
- (a) in the case of a power of attorney where only 1 attorney is appointed—the power of attorney is revoked in relation to the attorney; or
 - (b) in the case of a power of attorney where 2 or more attorneys are appointed—the power of attorney is revoked in relation to the last of them.
- (9) This section does not limit the ability to obtain an order under Part 8.

40—Revocation by later power of attorney

- (1) An enduring power of attorney is revoked by a later enduring power of attorney of the principal.
- (2) Subsection (1) does not apply if the principal specifies otherwise in the later enduring power of attorney.

Division 4—Resignation of attorney

41—Resignation of attorney

- (1) Subject to subsection (2), an attorney may resign by giving the principal notice in writing to that effect in the approved form and in accordance with the regulations.
- (2) If there is only 1 attorney under a power of attorney and the principal lacks legal capacity, the attorney may only resign with the permission of the Court.
- (3) If—
 - (a) an attorney (the *resigning attorney*) resigns under subsection (1); and
 - (b) a person holds a position as an alternative attorney for the resigning attorney,

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Part 7—Revocation and relinquishment of powers

Division 4—Resignation of attorney

the resigning attorney must take reasonable steps to give the alternative attorney a copy of the notice given to the principal under subsection (1) in accordance with the regulations.

Maximum penalty: \$1 000.

Part 8—Review and resolution of matters**42—Preliminary**

(1) In this Part—

eligible person, in respect of a power of attorney, means—

- (a) the principal; or
- (b) an attorney under the power of attorney; or
- (c) a close relative of the principal; or
- (d) a person who can demonstrate a valid interest in the affairs or care of the principal; or
- (e) any other person acting with leave of the Court.

(2) For the purposes of this Part—

- (a) a reference to a power of attorney includes a reference to a document purporting to be a power of attorney; and
- (b) a reference to the making of a power of attorney includes a reference to the purported making of a power of attorney.

(3) This Part does not limit any other application or process envisaged by the other provisions of this Act.

43—Ability to apply to Court in relation to making, effect or operation of power of attorney

(1) Subject to subsection (2), an eligible person in respect of a power of attorney may apply to the Court for 1 or more of the following orders:

- (a) an order declaring that the principal lacked or did not lack the legal capacity to make or revoke the power of attorney;
- (b) an order declaring that the principal lacked or did not lack legal capacity at a specified time or during a specified period, or lacks or does not lack legal capacity for the time being;
- (c) an order declaring that the power of attorney should have effect despite a failure to comply with a provision of this Act;
- (d) an order declaring that the power of attorney or its revocation is invalid;
- (e) an order varying a term of, or a power conferred by, the power of attorney;
- (f) an order removing a person from office as an attorney;
- (g) an order appointing a person in substitution for an attorney whose appointment has been revoked under this Act or who otherwise vacates the office;

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- (h) an order reinstating a power of attorney that has been revoked by reason of a vacancy in the office of an attorney and appointing a substitute attorney to replace the attorney who vacated the office;
- (i) an order doing 1 or both of the following:
- 5 (i) reinstating a power of attorney that has been revoked;
- (ii) reinstating an attorney whose appointment has been revoked, by virtue of the operation of section 39(1)(d) (and any other relevant provision), where the Court is satisfied that it is in the best interests of the principal that the power of attorney, or the attorney (or both) be reinstated in the particular circumstances;
- 10 (j) an order approving or disapproving an act proposed to be undertaken by the attorney;
- (k) an order authorising an attorney to undertake a transaction that the attorney is not otherwise authorised to undertake or may not otherwise be authorised to undertake;
- 15 (l) an order directing or requiring 1 or more of the following:
- (i) that an attorney (or former attorney) furnish accounts, documents or other information to the Court or to a person nominated by the Court;
- (ii) that an attorney (or former attorney) file with the Court a copy of all records and accounts kept by the attorney of dealings and transactions carried out by the attorney under the power of attorney;
- 20 (iii) that records or accounts be audited by an auditor appointed by the Court and that a copy of the report of the auditor be furnished to the Court and any other person specified by the Court;
- 25 (m) an order revoking all or part of the power of attorney;
- (n) such other orders as the Court thinks fit.
- (2) An order may only be made under subsection (1)(e) to (l) (inclusive) in relation to an enduring power of attorney and if the Court is satisfied that the principal does not have legal capacity.
- 30 (3) The Court may take into account the following matters (and such other matters as the Court thinks fit) in determining whether to remove or reinstate an attorney under this section:
- (a) whether the attorney is willing or able to act as an attorney;
- (b) whether the attorney is a suitable person to act as an attorney;
- 35 (c) whether the attorney has failed to act—
- (i) in accordance with the requirements of this Act; or
- (ii) in accordance with any requirement specified in the power of attorney; or
- 40 (d) whether the attorney has a financial or personal interest that may detract from the attorney's ability to act in accordance with the requirements of this Act; or
- (e) whether the attorney has been charged with, or convicted of—

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- (i) an offence against this Act; or
- (ii) any other offence that calls into question the suitability of the person to act as an attorney.
- (4) The removal or appointment of an attorney, or the alteration or revocation of a power of attorney, under this section has effect—
- (a) as if it were done in accordance with the formalities required by this Act; and
- (b) if relevant, as if the principal—
- (i) did not lack legal capacity; and
- (ii) has duly authorised the removal, appointment, alteration or revocation under the power of attorney.
- (5) If the Court makes an order reinstating a power of attorney, or reinstating an attorney, the order may also direct that it has effect from the time at which the power of attorney lapsed or the attorney's appointment was revoked (as the case may be).
- (6) If the Court makes an order declaring that a principal lacks legal capacity for the time being, the principal will 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 by the Court.
- (7) The Court may make an order under this section despite a contrary intention specified in a power of attorney.
- (8) The Court may make an order subject to such terms and conditions as the Court thinks fit.

44—Advice, direction or approval relating to power of attorney

- (1) An attorney in respect of a power of attorney may apply to the Court—
- (a) for advice or direction as to the exercise of the power of attorney under this Act or any other Act or law; or
- (b) for advice or direction as to the scope of the power of attorney; or
- (c) for permission to take any action for which the permission of the Court is required under this Act.
- (2) On hearing an application under this section, the Court may—
- (a) approve or prohibit any act proposed to be done by the attorney; or
- (b) give such advice, direction or permission as the Court considers appropriate; or
- (c) make any order that it may make under section 43 as it considers appropriate; or
- (d) make such other orders or give such other directions as the Court thinks fit.

45—Applications by beneficiaries of will of deceased principal

- (1) If—
- (a) the principal of an enduring power of attorney dies leaving a will; and

(b) the principal had, while the enduring power of attorney was in force, suffered a period of legal incapacity; and

(c) it appears at the death of the principal that, in consequence of any exercise of power by an attorney under the enduring power of attorney during that period of legal incapacity, the share of a beneficiary under the will has been affected,

the Court may, on application by a person who has, in the opinion of the Court, a proper interest in the matter, make such orders as it thinks fit to ensure that no beneficiary gains a disproportionate advantage, or suffers a disproportionate disadvantage, of a kind not contemplated by the will, in consequence of the exercise of the attorney's powers during the period of legal incapacity of the principal.

(2) An order made by the Court under subsection (1) operates and will take effect as if it had been made by a codicil of the will of the principal executed immediately before the principal's death.

(3) The Court must, on making an order under subsection (1), direct that a certified copy of the order be attached to the grant of probate of the will, or grant of letters of administration with the will annexed, and may, for that purpose, require the production of the relevant grant.

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

(5) An extension of time under subsection (4) may be granted—

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

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

(6) An application for extension of time must be made before the final distribution of the estate.

(7) A distribution of any part of the estate before an application for extension of time will not be disturbed by reason of the application or any order made on the application.

(8) If the Court makes an order under this section, a copy of the order must be provided to each beneficiary under the will.

Part 9—Compensation

46—Compensation for acts of attorney

(1) The Court may order an attorney under an enduring power of attorney to compensate the principal for a loss caused by the attorney contravening any provision of this Act that relates to enduring powers of attorney when acting as an attorney under the power of attorney.

(2) Subsection (1) applies—

(a) even if the attorney is convicted of an offence in relation to the attorney's contravention; and

- (b) even if the principal has died, in which case compensation is payable to the estate of the principal; and
- (c) even if the enduring power of attorney is invalid or has been revoked or, at the time of the contravention, was invalid or had been revoked.

(3) This section does not apply if section 29 applies.

47—Ability to apply for compensation

A person may apply for an order under section 46 if the person is—

- (a) the principal; or
- (b) any attorney under the power of attorney; or
- (c) an executor or administrator of the principal's estate; or
- (d) a close relative of the principal; or
- (e) a person who can demonstrate a valid interest in the affairs or care of the principal.

48—Time limit for application for compensation

(1) An application for an order for compensation under this Part must be made—

- (a) if the principal has died, within 6 months after that death; or
- (b) if the attorney has died, within 6 months after that death; or
- (c) if both the principal and the attorney have died, within 6 months after the first death.

(2) The Court may extend the time specified under subsection (1).

Part 10—Miscellaneous

49—Publication of approved forms

- (1) The Minister must ensure that a current version of an approved form under this Act is kept available for public inspection and use on a website.
- (2) The Minister may, in conjunction with the provision of an approved form, publish explanatory, guidance or other materials to assist with any process associated with the operation of this Act, or to provide further information or advice about the creation, effect, operation or revocation of powers of attorney.

50—Remuneration of attorney

An attorney under an enduring power of attorney is not entitled to any remuneration unless it is specifically authorised by the enduring power of attorney or by law.

51—Recognition of powers of attorney made in other States and Territories

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

- (2) An interstate 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 a power of attorney made in this State.
- (3) Subsection (1) does not apply to a power of attorney of a prescribed class.
- (4) In any proceedings relating to a power of attorney, a document signed by a qualified interstate legal practitioner that certifies that an interstate 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 evidence in such proceedings and constitutes, in the absence of proof to the contrary, proof of the matters so certified.
- (5) In this section—
- interstate power of attorney*** means a power of attorney made in another State or a Territory that, under a law of that State or Territory, has effect in that State or Territory as a valid power of attorney and, in the case of an enduring power of attorney, even if the principal of the power of attorney loses capacity through legal incapacity after the execution of the instrument creating the power of attorney;
- qualified interstate legal practitioner***, in relation to an interstate power of attorney, means a person who is entitled to practise law in the State or Territory in which the power of attorney was made on account of holding a practising certificate that corresponds to a practising certificate issued under the *Legal Practitioners Act 1981*.

52—Administration or management of estate of principal under an enduring power of attorney

- (1) This section applies if the administration of the estate, or a part of the estate, of a principal under an enduring power of attorney is vested in a person holding an appointment as—
- (a) an administrator under the *Guardianship and Administration Act 1993*; or
 - (b) a manager under the *Aged and Infirm Persons' Property Act 1940*.
- (2) In a case where this section applies—
- (a) an attorney appointed under the power of attorney is accountable to the person holding the appointment as if that person were the principal; and
 - (b) the person holding the appointment has the same power to vary or revoke the power of attorney as the principal would have if the principal were competent and not incapacitated.

53—False or misleading statements

A person must not knowingly make a false or misleading statement in, or in relation to, a power of attorney.

Maximum penalty: \$10 000.

54—Inappropriate exercise of power

A person must not purport to act as an attorney under a power of attorney knowing that—

- (a) the power of attorney has been revoked; or
- (b) the person is not an attorney under the power of attorney; or
- (c) the power of attorney does not authorise that act.

Maximum penalty: \$10 000

55—Liability of directors

- (1) If a body corporate commits an offence against this Act, each director of the body corporate is, subject to the general defence under section 56, guilty of an offence and liable to the same penalty as is fixed for the principal offence.
- (2) A director of a body corporate may be prosecuted and convicted of an offence under this section whether or not the body corporate has been prosecuted or convicted of the offence committed by the body corporate.

56—General defence

It is a defence to a charge of an offence against this Act if the defendant proves that the alleged offence was not committed intentionally and did not result from any failure on the part of the defendant to take reasonable care to avoid the commission of the offence.

57—Regulations

- (1) The Governor may make such regulations as are contemplated by, or as are necessary or expedient for the purposes of, this Act.
- (2) Without limiting the generality of subsection (1), the regulations may—
 - (a) exempt classes of persons from the application of this Act or specified provisions of this Act, either unconditionally or subject to specified conditions; and
 - (b) prescribe fines, not exceeding \$5 000, for offences against the regulations; and
 - (c) facilitate proof of the commission of offences against the regulations.
- (3) Regulations under this Act may—
 - (a) be of general application or limited application; and
 - (b) make different provision according to the matters or circumstances to which they are expressed to apply; and
 - (c) provide that a matter or thing in respect of which regulations may be made is to be determined according to the discretion of the Minister.

58—Review of Act

- (1) The Minister must, as soon as practicable after the expiry of 5 years from the commencement of this section, cause a review of the operation of this Act to be conducted and a report on the results of the review to be submitted to the Minister.

- (2) Without limiting the matters to be considered in a review, the review must include a report on the form, content and use of the approved forms under this Act.
- (3) The Minister must cause a copy of the report submitted under subsection (1) to be laid before both Houses of Parliament within 6 sitting days after receiving the report.

Schedule 1—Repeal and transitional provisions

Part 1—Repeal of *Powers of Attorney and Agency Act 1984*

1—Repeal of Act

The *Powers of Attorney and Agency Act 1984* is repealed.

Part 2—Transitional provisions

2—Application of Act

- (1) This Act applies to a power of attorney created (or purportedly created) after the commencement of this clause.
- (2) This Act does not apply to a power of attorney created (or purportedly created) before the commencement of this Act, except as provided by subclause (3).
- (3) The provisions of Part 6, Part 7 and Part 8 extend to a power of attorney created (or purportedly created) before the commencement of this Act as if a reference to a power of attorney (or enduring power of attorney) extended to a reference to such a power of attorney under the *Powers of Attorney and Agency Act 1984*.

3—Other provisions

- (1) The Governor may, by regulation, make provisions of a saving or transitional nature consequent on the enactment of this Act.
- (2) A provision of a regulation made under subclause (1) may, if the regulations so provides, take effect from the commencement of this Act or from a later day.
- (3) To the extent that a provision takes effect under subclause (2) from a day earlier than the day of the regulation's publication in the Gazette, the provision does not operate to the disadvantage of a person by—
 - (a) decreasing the person's rights; or
 - (b) imposing liabilities on the person.