



New South Wales

Protected Estates Amendment (Missing Persons) Bill 2004

Explanatory note

This explanatory note relates to this Bill as introduced into Parliament.

Overview of Bill

The object of this Bill is to amend the *Protected Estates Act 1983* (the **Principal Act**) to enable the estates of missing persons to be subject to management under that Act.

Outline of provisions

Clause 1 sets out the name (also called the short title) of the proposed Act.

Clause 2 provides for the commencement of the proposed Act on a day or days to be appointed by proclamation.

Clause 3 is a formal provision that gives effect to the amendments to the *Protected Estates Act 1983* set out in Schedule 1.

Clause 4 is a formal provision that gives effect to the amendments to the Acts specified in Schedule 2.

Schedule 1 Amendment of Protected Estates Act 1983

Schedule 1 [1] inserts a definition of *protected missing person* into section 4 of the Principal Act. **Schedule 1 [2]** makes a consequential amendment.

Schedule 1 [3] amends section 7 of the Principal Act to enable the Crown's expenses for the care and management of the estate of a protected missing person to be recovered from the estate, paid out of money of the person received by the Protective Commissioner or recovered on application to the Supreme Court.

Schedule 1 [4] amends section 8 of the Principal Act to enable the Protective Commissioner's fees to be recovered as a charge on the estate of a protected missing person.

Schedule 1 [5] gives relatives, friends, creditors or debtors of protected missing persons or other interested persons the right to apply to the Supreme Court under section 12 of the Principal Act for the giving of directions to the Protective Commissioner relating to inquiries, notices or the exercise of the Commissioner's functions.

Schedule 1 [8] inserts proposed Division 1A of Part 3 (section 21C) into the Principal Act. The proposed Division enables the Supreme Court to declare that a person is a missing person and to order that the whole or part of the estate of the person be subject to management under the Principal Act (as a *protected missing person*) if satisfied that the person is a missing person, that the person's usual place of residence is in this State and that it is in the best interests of the person. Such a declaration may be made only if the Court is satisfied that it is not known whether the person is alive, that all reasonable efforts have been made to locate the person and that persons residing at the same place, or relatives or friends, with whom the person would be likely to communicate, have not heard from, or of, the person for at least 90 days. Applications for a declaration and order may be made by a spouse, relative, business partner or employee of a person or the Attorney General, Protective Commissioner or any other person who has an interest in the estate of a person. **Schedule 1 [6] and [7]** make consequential amendments.

Schedule 1 [9] enables the Supreme Court to make an order, under section 22 of the Principal Act, appointing a suitable person or the Protective Commissioner to manage the estate of a protected missing person. **Schedule 1 [10]** makes a consequential amendment.

Schedule 1 [11] confers on the Protective Commissioner the powers contained in section 24 of the Principal Act for the purposes of managing the estate of a protected missing person. The powers conferred include powers relating to the disposition of property, the carrying on of a business, the alteration of a partnership and other powers relating to consents, contracts and legal proceedings.

Schedule 1 [12] gives the Protective Commissioner power, under section 25 of the Principal Act, to employ agents to transact business or do other acts for the administration and management of the estate of a protected missing person.

Schedule 1 [13] inserts proposed section 26 (1A) into the Principal Act which confers on the Protective Commissioner power to exercise any function that a protected missing person has and can exercise or would have and could exercise if the person were not missing. **Schedule 1 [15]** makes a consequential amendment.

Schedule 1 [14] authorises the Protective Commissioner, under section 26 of the Principal Act, to execute documents on behalf of a protected missing person and gives those documents the same effect as if they had been executed by the protected missing person. **Schedule 1 [16]** makes a consequential amendment.

Schedule 1 [17] enables the Protective Commissioner to apply money in the estate of a protected missing person for the purposes set out in section 28 of the Principal Act. They include the payment of debts and expenses, maintenance of a spouse, child, parent or other person dependent on the protected missing person, the preservation and improvement of the estate of the protected missing person, taking up shares and options and investment of the money. **Schedule 1 [18]–[21]** make consequential amendments.

Schedule 1 [23] extends to spouses of protected missing persons the right to make an application to the Administrative Decisions Tribunal under section 28A of the Principal Act for a review of a decision of the Protective Commissioner. **Schedule 1 [22]** makes a consequential amendment.

Schedule 1 [24] makes it clear that provisions applying to management of estates by other persons do not apply to the estates of protected missing persons committed to the management of the Protective Commissioner.

Schedule 1 [25] applies to the estates of protected missing persons the provisions of section 30 of the Principal Act, which enable the Protective Commissioner to confer powers on persons other than the Protective Commissioner who manage estates under the Principal Act and to give directions in respect of those powers.

Schedule 1 [26] confers a right on a person who manages the estate of a protected missing person to make an application to the Administrative Decisions Tribunal under section 30A of the Principal Act for a review of a decision of the Protective Commissioner in relation to the conferral of functions on the person.

Schedule 1 [27] enables the Supreme Court to require a manager of the estate of a protected missing person to give security, under section 31 of the Principal Act, to the Protective Commissioner in respect of the management of the estate.

Schedule 1 [28] amends section 31A of the Principal Act to enable the manager of the estate of a protected missing person to lodge money comprising the whole or part of the estate with the Protective Commissioner. Such funds may be invested by the Protective Commissioner.

Schedule 1 [29] confers on the Protective Commissioner power to prepare a financial plan, under section 31B of the Principal Act, in respect of the estate of a protected missing person.

Schedule 1 [30]–[32] enable the Supreme Court, under section 32 of the Principal Act, to make orders that appear to it to be necessary to make the property and income of a protected missing person available for paying debts, the benefit of the protected missing person, the maintenance and benefit of the family of the protected missing person and otherwise as it thinks necessary or desirable for the care and management of the estate of the protected missing person. The orders that may be made include orders for the sale or disposition of property and the application of the whole or part of the estate. **Schedule 1 [33]–[35]** make consequential amendments.

Schedule 1 [36] confers on the Supreme Court power, under section 33 of the Principal Act, to make such orders as it thinks fit in relation to the administration and management of the estates of protected missing persons.

Schedule 1 [37] inserts proposed section 34 (2) into the Principal Act which sets out when the management of the estate of a protected missing person is terminated. The management of the estate is terminated when an order that the estate be subject to management is revoked, the Protective Commissioner certifies under proposed section 38A that it is terminated or the protected missing person dies.

Schedule 1 [38] inserts proposed section 35A into the Principal Act. The proposed section enables the Supreme Court, on the application of a protected missing person or other person, to revoke a declaration that a person is a missing person and an order that the person's estate be subject to management under the Principal Act, if satisfied that the person is alive.

Schedule 1 [39] inserts proposed section 38A into the Principal Act. The proposed section enables the Protective Commissioner to certify that management of the estate of a protected missing person is terminated if the Commissioner is satisfied that the protected missing person is alive.

Schedule 1 [40] amends section 39 of the Principal Act to require the Protective Commissioner, on termination of management of the estate of a protected missing person, to pay money standing to the credit of the person in the Commissioner's trust fund to the person and to hand over chattels and documents forming part of the estate of the person.

Schedule 1 [41] and [42] confer on the Protective Commissioner powers, under section 42 of the Principal Act, to pay certain money and deal with chattels of a protected missing person on the death of the person. The Commissioner may pay money or give chattels to a person claiming to be entitled in the distribution of an estate or as a legatee under a will or to the legal personal representative of the protected missing person.

Schedule 1 [43] confirms the power of the Protective Commissioner, under section 43 of the Principal Act, to continue to act in the management of the estate of a protected missing person until satisfied that the protected missing person has died or that the relevant order has been revoked.

Schedule 1 [44] amends section 47 of the Principal Act to make it clear that property taken in exchange, or a lease renewed, on behalf of a protected missing person under the Principal Act is subject to the same uses, trusts, charges, incumbrances, dispositions, devices and conditions as the property given in exchange or the surrendered lease was or would, but for the exchange or surrender, have been subject to.

Schedule 1 [45] amends section 48 of the Principal Act to make it clear that a protected missing person retains the same interest in any surplus money or other property arising from any sale, mortgage, charge or disposition of property or other dealing with property under the Principal Act as the person would have had in property the subject of the sale, mortgage, charge, disposition or dealing if no sale, mortgage, charge, disposition or dealing had been made.

Schedule 1 [46] and [47] amend section 49 of the Principal Act to provide for money expended for the improvement, security or advantage of the property of a protected missing person, together with interest, to be a charge on the improved property or other property of the person.

Schedule 1 [48] inserts proposed section 50 (1A) into the Principal Act to require the Protective Commissioner to determine whether to consult with relatives of a protected missing person before taking any action in respect of the estate of the protected missing person.

Schedule 1 [49] applies to estates of protected missing persons provisions in section 50 of the Principal Act that set out the circumstances and matters to be considered by the Protective Commissioner when determining whether to consult and the steps to be taken with respect to any such consultation. **Schedule 1 [50] and [51]** make consequential amendments.

Schedule 1 [52] amends section 51 of the Principal Act to require items of a personal nature in the estate of a protected missing person, that have been requested to be preserved by the person or the person's relatives, to be preserved as far as reasonably practicable.

Schedule 1 [53] confers on the Supreme Court power under section 69 of the Principal Act to dissolve a partnership when a member of the partnership becomes a protected missing person.

Schedule 1 [54] amends section 70 of the Principal Act to authorise the manager of the estate of a protected missing person, or another person approved by the Supreme Court or the Protective Commissioner, to execute conveyances, deeds and transfers and do other things directed by the Court or Commissioner to give effect to an order or direction under the Principal Act.

Schedule 1 [55] amends section 71 of the Principal Act to enable the Protective Commissioner or manager of the estate of a protected missing person to exercise a power of that person as a trustee or to give a consent for that person. The amendment also provides for the exercise of the power or the consent to have effect.

Schedule 1 [56] enables the Protective Commissioner, under section 72 of the Principal Act, to issue a certificate authorising a banker or other person holding cash or investments of a protected missing person to pay the amount specified in the certificate to a specified person. The certificate may be issued if the Commissioner is satisfied that it is necessary for the expenses of the maintenance or other necessary purposes or requirements of the protected missing person or any member of the family of a protected missing person. **Schedule 1 [57]** makes a consequential amendment.

Schedule 1 [58] enables the Supreme Court to make an order, under section 73 of the Principal Act, to require an appropriate person to transfer stock of a protected missing person or stock held in trust by the manager of the estate of a protected missing person if the manager dies or it is not known whether the manager is alive or dead or the manager refuses to transfer stock to a new manager.

Schedule 1 [59] amends section 76 of the Principal Act to apply in respect of protected missing persons provisions suspending the operation of powers of attorney while the principal's estate is subject to management under the Principal Act.

Schedule 1 [60] enables the Supreme Court or the Protective Commissioner to make an order, under section 77 of the Principal Act, that remuneration be paid to the manager of the estate of a protected missing person.

Schedule 1 [61] enables savings and transitional regulations to be made as a consequence of the enactment of the proposed Act.

Schedule 1 [62] inserts a transitional provision as a consequence of the enactment of the proposed Act.

Schedule 2 Amendment of other Acts

Schedule 2.1 amends the *Powers of Attorney Act 2003* to provide that the power conferred by an irrevocable power of attorney is not revoked or otherwise terminated by, or remains effective despite, the principal becoming a protected missing person. This is the same as in relation to protected persons under the *Protected Estates Act 1983*.

Schedule 2.2 amends the *Real Property Act 1900* to enable the Protective Commissioner or the manager of the estate of a protected missing person to withdraw a caveat lodged under that Act by the protected missing person. The same power currently exists in relation to protected persons under the *Protected Estates Act 1983*.

First print



New South Wales

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New South Wales

Protected Estates Amendment (Missing Persons) Bill 2004

No. , 2004

A Bill for

An Act to amend the *Protected Estates Act 1983* to provide for the management of the estates of missing persons; and related matters.

The Legislature of New South Wales enacts:	1
1 Name of Act	2
This Act is the <i>Protected Estates Amendment (Missing Persons) Act 2004</i> .	3 4
2 Commencement	5
This Act commences on a day or days to be appointed by proclamation.	6
3 Amendment of Protected Estates Act 1983 No 179	7
The <i>Protected Estates Act 1983</i> is amended as set out in Schedule 1.	8
4 Amendment of other Acts	9
The Acts specified in Schedule 2 are amended as set out in that Schedule.	10 11

Schedule 1	Amendment of Protected Estates Act 1983	1
		2
	(Section 3)	3
[1] Section 4 Definitions		4
	Insert in alphabetical order in section 4 (1):	5
	<i>protected missing person</i> means a person in respect of whom an order is in force under Division 1A of Part 3 that the estate (or any part of it) of the person be subject to management under this Act.	6
		7
		8
[2] Section 4 (1), definition of “protected person”		9
	Insert “(other than a protected missing person)” after “means a person”.	10
[3] Section 7 Expenses of Protective Commissioner		11
	Insert “or protected missing person” after “protected person” wherever occurring.	12
		13
[4] Section 8 Fees		14
	Insert “or protected missing person” after “protected person” in section 8 (3).	15
[5] Section 12 Court may give directions to Protective Commissioner		16
	Insert “or protected missing person” after “protected person” where secondly occurring.	17
		18
[6] Part 3, heading		19
	Insert “and missing persons” after “affairs”.	20
[7] Part 3, Division 1, heading		21
	Insert “relating to incapable persons” after “management”.	22
[8] Part 3, Division 1A		23
	Insert after Division 1:	24
Division 1A	Orders for management relating to missing persons	25
		26
21C Declaration and order where person missing		27
	(1) The Court may declare that a person is a missing person and order that the estate of the person (or any part of it) be subject to management under this Act if the Court is satisfied that:	28
		29
		30
	(a) the person is a missing person, and	31

Protected Estates Amendment (Missing Persons) Bill 2004

Schedule 1 Amendment of Protected Estates Act 1983

(b)	the person’s usual place of residence is in this State, and	1
(c)	it is in the best interests of the person to do so.	2
(2)	The Court may be satisfied that a person is a missing person only if it is satisfied that:	3
		4
(a)	it is not known whether the person is alive, and	5
(b)	all reasonable efforts have been made to locate the person, and	6
		7
(c)	persons residing at the place where the person was last known to reside, or relatives or friends, with whom the person would be likely to communicate, have not heard from, or of, the person for at least 90 days.	8
		9
		10
		11
(3)	An application for a declaration and order under this section in relation to a person may be made by any of the following persons:	12
		13
(a)	the spouse of the person,	14
(b)	a relative of the person,	15
(c)	a business partner or employee of the person,	16
(d)	the Attorney General,	17
(e)	the Protective Commissioner,	18
(f)	any other person who has an interest in the estate of the person.	19
		20
(4)	On the hearing of an application for the purposes of this section, evidence may be given to the Court in such form and in accordance with such procedures as the Court thinks fit.	21
		22
		23
[9]	Section 22 Management of estates of persons other than patients	24
	Omit “protected person” wherever occurring. Insert instead “person”.	25
[10]	Section 22	26
	Insert “or 21C” after “section 13”.	27
[11]	Section 24 Powers as to property	28
	Insert “or protected missing person” after “protected person” wherever occurring.	29
		30
[12]	Section 25 Power to employ agents	31
	Insert “or protected missing person” after “protected person” in section 25 (1).	32

[13] Section 26 Execution of documents	1
Insert after section 26 (1):	2
(1A) For the purposes of managing the estate of a protected missing person, the Protective Commissioner has, and may exercise, all the functions that the protected missing person has and can exercise or would have and could exercise if the person were not missing.	3 4 5 6 7
[14] Section 26 (2)	8
Insert “or protected missing person” after “protected person” where firstly, secondly and thirdly occurring.	9 10
[15] Section 26 (2)	11
Insert “or (1A)” after “subsection (1)”.	12
[16] Section 26 (2)	13
Omit “to which the protected person”.	14
Insert instead “to which a protected person”.	15
[17] Section 28 Disposition of money in hands of Protective Commissioner	16
Insert “or protected missing person” after “protected person” wherever occurring (except where firstly occurring in section 28 (2) (c)).	17 18
[18] Section 28 (1) (b)	19
Omit the paragraph. Insert instead:	20
(b) in the event of the death of the protected person or protected missing person, the person’s funeral expenses,	21 22
[19] Section 28 (1AA)	23
Insert after section 28 (1):	24
(1AA) In addition to the purposes set out in subsection (1), the Protective Commissioner may apply money comprising the whole or part of the estate of a protected person towards the maintenance, clothing, medicine and care, past and future, of the protected person.	25 26 27 28 29
[20] Section 28 (3) (b)	30
Omit the paragraph.	31

[21] Section 28 (4)	1
Insert after section 28 (3):	2
(4) In addition to the matters set out in subsection (3), for the purposes of ascertaining whether a protected person prefers a particular form of investment, the Protective Commissioner may have regard to any views expressed to the Protective Commissioner by the protected person regarding the person’s preferred form of investment.	3 4 5 6 7 8
[22] Section 28A Review by ADT of decisions by Protective Commissioner under this Division	9 10
Omit “the protected person” from section 28A (3) (a).	11
Insert instead “a protected person”.	12
[23] Section 28A (3) (b)	13
Omit “the protected person”.	14
Insert instead “a protected person or protected missing person in respect of whose estate the decision was made”.	15 16
[24] Section 29 Application of Division	17
Insert “or protected missing person” after “protected person”.	18
[25] Section 30 Protective Commissioner may authorise and direct functions of managers	19 20
Insert “or protected missing person” after “protected person” wherever occurring in section 30 (1) and (5).	21 22
[26] Section 30A Review by ADT of decisions by Protective Commissioner in relation to managers	23 24
Insert “or protected missing person” after “protected person” in section 30A (1).	25 26
[27] Section 31 Security in respect of management	27
Insert “or protected missing person” after “protected person” wherever occurring in section 31 (1) and (3).	28 29
[28] Section 31A Managers may lodge estate funds with Protective Commissioner	30 31
Insert “or protected missing person” after “protected person” wherever occurring in section 31A (1).	32 33

[29] Section 31B Financial plans	1
Insert “or protected missing person” after “protected person” in section 31B (1).	2 3
[30] Section 32 Orders by Court as to property	4
Insert after section 32 (1):	5
(1A) The Court may make such orders as appear to it necessary for rendering the property and income of a protected missing person available for the following purposes:	6 7 8
(a) the payment of the debts of, and otherwise for the benefit of, the protected missing person,	9 10
(b) the maintenance and benefit of the family of the protected missing person,	11 12
(c) otherwise as it thinks necessary or desirable for the care and management of the estate of a protected missing person.	13 14 15
[31] Section 32 (2)	16
Insert “or (1A)” after “subsection (1)”.	17
[32] Section 32 (2)	18
Insert “or protected missing person” after “protected person” wherever occurring.	19 20
[33] Section 32 (2) (a) (i)	21
Insert “or protected missing person’s” after “protected person’s”.	22
[34] Section 32 (2) (a) (iv)	23
Omit the subparagraph.	24
[35] Section 32 (3)	25
Insert after section 32 (2):	26
(3) The Court may make an order under subsection (2) (a) for the purpose of raising or securing or repaying with or without interest money which is to be or which has been applied for the payment of, or provision for the expenses of, future maintenance of a protected person.	27 28 29 30 31
[36] Section 33 Orders by Court as to management of estates	32
Insert “or protected missing persons” after “protected persons” in section 33 (1).	33 34

[37] Section 34 Termination of management	1
Insert after section 34 (1):	2
(2) The management of the estate of a protected missing person under this Act is terminated:	3
(a) on the order that the estate be subject to management under this Act being revoked, or	4
(b) on the Protective Commissioner certifying under section 38A that the management is terminated, or	5
(c) on the death of the protected missing person.	6
[38] Section 35A	7
Insert after section 35:	8
35A Orders where person no longer missing	9
If, on application to it by a protected missing person or other person, the Court is satisfied that a protected missing person is alive, it may:	10
(a) revoke any declaration made that the person is a missing person, and	11
(b) revoke the order that the estate of the person be subject to management under this Act, and	12
(c) make such orders as appear to it to be necessary to give effect to the revocation of the order, including the release of the estate of the person from the control of the Court, the Protective Commissioner or a manager and the discharge of any manager.	13
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[39] Section 38A	1
Insert after section 38:	2
38A Termination by Protective Commissioner where person no longer missing	3
	4
(1) The Protective Commissioner may, if satisfied that a protected missing person is alive, certify that management of the estate of the protected missing person is terminated.	5
	6
	7
(2) The regulations may make provision for or with respect to information that the Protective Commissioner may take into account for the purposes of being satisfied that a protected missing person is alive.	8
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	10
	11
[40] Section 39 Functions of Protective Commissioner on termination of management	12
	13
Insert “or protected missing person” after “protected person”.	14
[41] Section 42 Death of protected person or protected missing person	15
Insert “or protected missing person” after “protected person” wherever occurring.	16
	17
[42] Section 42 (2) and (3) (a)	18
Insert “or protected missing person’s” after “protected person’s” wherever occurring.	19
	20
[43] Section 43 Protective Commissioner may act until notice of death or revocation received	21
	22
Insert “or protected missing person” after “protected person” wherever occurring.	23
	24
[44] Section 47 Property exchanged and renewed lease to be to same uses as before	25
	26
Insert “or protected missing person” after “protected person”.	27
[45] Section 48 Interest in property of certain persons not to be altered	28
Insert “or protected missing person” after “protected person” wherever occurring in section 48 (1), (3) and (4).	29
	30
[46] Section 49 Expenses of improvements may be charged on estate	31
Insert “or protected missing person” after “protected person” wherever occurring.	32
	33

[47] Section 49 (3)	1
Insert “or protected missing person’s” after “protected person’s”.	2
[48] Section 50 Consultation by Protective Commissioner	3
Insert after section 50 (1):	4
(1A) Before the Protective Commissioner takes any action in respect of the estate of a protected missing person, the Protective Commissioner must determine whether the action is of such a nature that the relatives of the protected missing person should be consulted in relation to the action.	5 6 7 8 9
[49] Section 50 (2) and (3)	10
Omit “a protected person” wherever occurring. Insert instead “a person”.	11
[50] Section 50 (2) and (3)	12
Omit “the protected person and relatives of the protected person or any of those persons” wherever occurring.	13 14
Insert instead “a person referred to in subsection (1) or (1A)”.	15
[51] Section 50 (3)	16
Omit “those persons” where secondly occurring. Insert instead “the person”.	17
[52] Section 51 Personal items to be preserved	18
Insert “or protected missing person” after “person” wherever occurring.	19
[53] Section 69 Court may dissolve partnership	20
Insert “or protected missing person” after “protected person”.	21
[54] Section 70 Power to carry orders and directions into effect	22
Insert “or protected missing person” after “protected person” wherever occurring in section 70 (1).	23 24
[55] Section 71 Manager may act as trustee or guardian in certain cases	25
Insert “or protected missing person” after “protected person” wherever occurring in section 71 (1) and (2).	26 27
[56] Section 72 Temporary provision for maintenance	28
Insert “or protected missing person” after “protected person” wherever occurring in section 72 (1) (except where secondly occurring).	29 30

[57] Section 72 (2)	1
Insert “or protected missing person’s” after “protected person’s”.	2
[58] Section 73 Transfer of stock belonging to certain persons	3
Insert “or protected missing person” after “protected person” wherever occurring.	4 5
[59] Section 76 Powers of attorney	6
Insert “or protected missing person” after “protected person” in section 76 (11) (a).	7 8
[60] Section 77 Costs may be paid out of estate	9
Insert “or protected missing person” after “protected person” in section 77 (2).	10
[61] Schedule 1 Savings and transitional provisions	11
Insert at the end of clause 1 (1):	12
<i>Protected Estates Amendment (Missing Persons) Act 2004</i>	13
[62] Schedule 1, Part 4	14
Insert after Part 3:	15
Part 4 Provisions consequent on enactment of Protected Estates Amendment (Missing Persons) Act 2004	16 17 18
8 Application of amendments to existing missing persons	19
A declaration and order may be made under Division 1A of Part 3, as inserted by the <i>Protected Estates Amendment (Missing Persons) Act 2004</i> , in relation to a person who became a missing person (as referred to in section 21C (2)) during a period commencing before the commencement of that Division and continuing after that commencement.	20 21 22 23 24 25

Schedule 2	Amendment of other Acts	1
	(Section 4)	2
2.1	Powers of Attorney Act 2003 No 53	3
	Section 16 Effect of irrevocable powers of attorney	4
	Insert after section 16 (1) (d):	5
	(d1) the principal becoming a person who is a protected missing person within the meaning of the <i>Protected Estates Act 1983</i> ,	6 7 8
2.2	Real Property Act 1900 No 25	9
	Section 74M Withdrawal of caveats	10
	Insert “or a protected missing person” after “protected person” in section 74M (1) (g).	11 12