Powers of Attorney Bill.

Second Reading

The Hon. JOHN HATZISTERGOS (Minister for Justice, and Minister Assisting the Premier on Citizenship) [8.31 p.m.]: I move:

That this bill be now read a second time.

I seek leave to have the second reading speech incorporated in *Hansard*.

Leave granted.

The Powers of Attorney bill removes the statutory provisions governing powers of attorney from part 16 of the Conveyancing Act 1919 and substantially re-enacts them, with some changes, in a new Act to be called the Powers of Attorney Act. The changes are aimed at remedying problems that currently exist in practice. This bill is the result of an extensive and lengthy consultation process, which sought the views of a wide range of organisations to identify problems with the existing legislation and generate solutions. A power of attorney is a document whereby one person, called the principal, authorises another, called the attorney, to act on his or her behalf. It can be limited to authorise very specific actions, for example, signing certain documents, or it can be general, authorising the attorney to do anything the principal may legally do. It can be limited to a certain period of time, for example, where the principal is going overseas for a period.

Prior to 1983, all powers of attorney automatically terminated at law when the principal suffered a loss of mental capacity through unsoundness of mind. In 1983 the law was changed to allow a principal to make a power of attorney that continued to be effective after he or she lost mental capacity. Such a document is called a "protected power of attorney" under the present legislation, but this bill will change the name to "enduring power of attorney" to bring it into line with the name used in other States. An enduring power of attorney can be a particularly useful tool in planning for later life. It enables people to choose who they want to make financial decisions for them when they are no longer able to do so themselves, thereby giving people greater control over their future welfare.

I will outline some of the other changes regarding enduring powers of attorney. An enduring power of attorney will not commence to operate until the attorney has accepted appointment by signing the power of attorney document. At present only the principal is required to sign an enduring power of attorney and this can cause confusion in practice if an attorney does not know he or she has been appointed. Requiring an attorney to sign an enduring power of attorney will bring the law in New South Wales into step with other States. It is also consistent with the procedure for appointing enduring guardians under the Guardianship Act 1987. It will make the attorney aware that he or she has been appointed and give him or her an opportunity to refuse to act. This is important because some people may not want to accept what can be an onerous responsibility. An attorney will also have the opportunity to obtain instructions from the principal about the principal's preferences. The new requirement will also provide a specimen of the attorney's signature for comparison by persons dealing with the attorney.

I should point out that the requirement for an attorney to sign would not apply to ordinary powers of attorney. It is considered that the requirement for the attorney to sign would make the use of ordinary powers of attorney in the business context more difficult, because companies often appoint multiple attorneys in different States. It is considered preferable to limit the requirement for an attorney's signature to enduring powers of attorney. One of the distinguishing features of an enduring power of attorney is the certificate by a prescribed witness stating that he or she has explained the effect of making the enduring power of attorney to the principal. The certificate changes an ordinary power of attorney into an enduring one, allowing it to continue to be effective after the principal has lost mental capacity.

This bill expands the category of "prescribed witnesses". Currently only a solicitor, barrister or clerk of a Local Court can give the certificate. It is proposed to add licensed conveyancers and employees of the Public Trustee or a trustee company who have successfully completed an appropriate course of study approved by the Minister. The intention is to make it easier for people to make an enduring power of attorney, while at the same time ensuring that the only people who can give the certificate are those who understand the legal effect of making an enduring power of attorney, either because they are lawyers or because they have undergone an appropriate course of study.

An important innovation introduced by this bill is to recognise enduring powers of attorney made in other States and Territories of Australia. At present each State and Territory has its own requirements for the formalities for creating a valid enduring power of attorney. This means that an enduring power of attorney made in another State currently is not valid in New South Wales, if it does not meet the legal requirement for a certificate from a prescribed witness. This is causing inconvenience for people who, for example, have moved interstate in retirement but still have property in New South Wales. It is particularly difficult if the principal has already lost mental capacity, for example through dementia,

when the attorney attempts to use the power of attorney in New South Wales. The principal cannot make a new power of attorney because he or she has lost mental capacity, so the only way to deal with the New South Wales property is to have a "manager" appointed by either the Guardianship Tribunal or the Supreme Court.

Under this bill, if an enduring power of attorney is validly made in another State or Territory according to the requirements of that State or Territory, then it will be recognised as valid in New South Wales and the attorney will be able to act under its authority in New South Wales even if it does not meet the New South Wales formal requirements. These provisions arise out of the endorsement of draft mutual recognition provisions for powers of attorney by the Standing Committee of Attorneys-General in March 2000. The bill replaces the current statutory short form of power of attorney with a more comprehensive form. The new form contains more information and more choices to enable people to make a better-informed decision about what they want to authorise their attorney to do. The new form—called a "prescribed power of attorney"—will authorise the attorney to do anything that the principal may lawfully authorise an attorney to do, but will be subject to any conditions or limitations set out in the document. The prescribed form can be used to create either an ordinary power of attorney or, by having a prescribed witness complete the required certificate, create an enduring power of attorney.

The bill introduces provisions that will help clarify what an attorney can or cannot do in several common situations that have sometimes caused confusion in practice. A prescribed power of attorney does not authorise an attorney to give a gift of all or any of the principal's property to any other person unless the power of attorney expressly authorises the giving of the gift. In this regard, the proposed section provides that if a prescribed power of attorney includes a certain expression, set out in schedule 3, this will authorise an attorney to give the kinds of gifts specified in the schedule for that expression. The types of gifts authorised in this schedule are gifts to a relative or close friend of the principal on occasions such as birthdays or marriages. Or the gift may be a donation of a kind that the principal would make if he or she had capacity to do so. In addition, the value of the gift must be reasonable having regard to all the circumstances and, in particular, the principal's financial circumstances and the size of the principal's estate.

Similar provisions apply to an attorney signing any document or doing anything that would result in the attorney gaining a benefit at the expense of the principal or conferring a benefit on third parties. If the prescribed expression is used, it will allow an attorney to confer on the attorney or third party a benefit only for expenses for housing, food, education, transportation and medical care or medication. These provisions will allow, for example, a person who is an attorney for their spouse to use the spouse's money to pay for housing, food, et cetera, for the attorney and their children. The new form of prescribed power of attorney set out in the bill contains the prescribed expressions within the printed form, so that if left unamended, the attorney will only be able to do the things referred to in schedule 3 as discussed above. This will help clarify for both the principal and the attorney what the attorney is authorised to do. If the principal wants to give the attorney more extensive powers, the principal can change the form.

Another important innovation in this bill is the provision to overcome hardship which currently may be caused in certain circumstances by a rule of common law called ademption. This concept is perhaps best explained by an example. Say a person, a testator, leaves a will in which he or she gives a particular item, such as a car or a piece of jewellery, to a beneficiary. If the testator sells that item before he or she dies, so that, at the time the will is put into effect, the item is not part of the estate, the law says that the beneficiary gets nothing, not even the monetary value of the item. The gift is said to be adeemed, or lost. The law assumes that the testator could have changed the will after selling the item, to give the beneficiary either money or another object, and if the testator does not change the will the beneficiary is to receive nothing.

The ademption rule can operate particularly harshly where a testator, who has made a gift of a specific item in a will, loses mental capacity and his or her attorney sells the item under an enduring power of attorney. In this case the testator has no chance to alter the will after losing mental capacity. To overcome this situation and prevent injustice to the beneficiary, the bill introduces a provision which will entitle the beneficiary to any surplus left from the proceeds of the sale of the item sold by an attorney under an enduring power of attorney. The provision is modelled on section 48 of the Protected Estates Act, which protects beneficiaries from sales by a manager appointed under that Act to administer the estate of a protected person. The new provision will protect not only named beneficiaries but also classes of beneficiaries—for example, where an item is left to "my children".

In addition, the bill enables the spouse of a person who dies intestate, that is, without a will, to have a greater proportion of the deceased's estate, where their shared home has been disposed of by the attorney under an enduring power of attorney, and the spouse has no claim in respect of any replacement shared home. The bill also expands the jurisdiction of the Supreme Court and the Guardianship Tribunal with regard to the review of powers of attorney. At present only the Supreme Court has jurisdiction. The Guardianship Tribunal will be given a range of powers in relation to enduring powers of attorney, including the ability to review, revoke, alter, or confirm the enduring power of attorney, as well as to adjudicate on whether the principal lacks mental capacity. The Supreme Court will have the same powers in relation to enduring powers of attorney, so an applicant will have a choice of forum. Proceedings before the tribunal should be cheaper, quicker, and less formal than in the Supreme Court.

If the tribunal considers that a particular matter would be more appropriately dealt with by the Supreme Court, the tribunal may refer the matter to the court, and vice versa. Appeals from decisions of the Guardianship Tribunal will be to either the Supreme Court or the Administrative Decisions Tribunal. The bill also clears up the current uncertainty about what happens when two or more attorneys are appointed and one dies. When the attorneys are appointed to act jointly—that is, both must act together—the death of one will terminate the power of attorney. However, if the attorneys

are appointed severally, that is, either one can act alone, or jointly and severally, the death of one will not terminate the power of attorney.

The definition of "incommunicate" is being expanded. At present the Supreme Court may make orders concerning a power of attorney where the principal is "incommunicate". The current definition of "incommunicate" refers to persons under such a handicap of body or mind that they are unable to receive communications about their property or affairs, or to express their intentions. The definition is being expanded to include a person who is unable to receive communications because they cannot be located or contacted. This amendment is being made at the request of the Supreme Court, as the result of a court decision where a person on a yacht at sea, and unable to be contacted, did not come within the current definition.

The changes to the law contained in this bill will, in the main, apply only to powers of attorney made after the commencement of the bill. However, there are three exceptions. First, the new provisions relating to the review of powers of attorney by the Supreme Court and Guardianship Tribunal will apply to powers of attorney that are already in existence, as well as those made after the commencement. Second, the recognition of intestate enduring powers of attorney will apply to existing powers of attorney. It is considered that these provisions are beneficial and there would be a hardship if they did not apply to existing powers of attorney. Thirdly, the provisions dealing with registration of powers of attorney will apply regardless of when they were made. Finally, the bill will commence on a date or dates to be proclaimed. This is necessary to allow time to educate the public and the legal profession about the changes introduced by the bill. I commend the bill to the House.