

CONCURRENCE COPY

CONVEYANCING (POWERS OF ATTORNEY) AMENDMENT BILL, 1983

EXPLANATORY NOTE

(This Explanatory Note relates to this Bill as introduced into Parliament)

The following Bills are cognate with this Bill:—

- Mental Health (Powers of Attorney) Amendment Bill, 1983;
- Trustee (Powers of Attorney) Amendment Bill, 1983.

The object of this Bill is, with a minor exception to repeal and substitute Part XVI of the Conveyancing Act, 1919—

- (a) to sanction, for the benefit of an attorney appointed under such a power and persons dealing with him, the irrevocability of a power of attorney given for valuable consideration (proposed section 160);
- (b) to ensure that an attorney under a power of attorney and persons dealing with him may rely on the power if they act without notice that the power has been revoked or is otherwise ineffective (proposed sections 161 and 162);
- (c) to provide that an attorney under a power of attorney who knowingly exceeds his authority commits an offence (proposed section 162A);
- (d) to provide that a power of attorney may be proved by a certified copy (proposed section 163A);
- (e) to facilitate the employment of a short form of power of attorney (proposed section 163B and proposed Schedule VII);
- (f) to make provision with respect to a power of attorney given by a person of unsound mind in certain respects at the time of execution of the power of attorney (proposed section 163E);
- (g) to make provision with respect to a power of attorney given by a person who later becomes of unsound mind or unable to communicate (proposed section 163F);
- (h) to enable the Supreme Court to take certain action in relation to a power of attorney referred to in paragraph (g) above (proposed section 163G);

- (i) to provide for procedural matters where the person who gave a power of attorney becomes unable to communicate (proposed section 163H);
and
 - (j) to make other provisions of a consequential or ancillary nature.
-

**CONVEYANCING (POWERS OF ATTORNEY)
AMENDMENT BILL, 1983**

No. , 1983.

A BILL FOR

An Act to amend Part XVI of the Conveyancing Act, 1919, relating to powers of attorney.

[MR WALKER—9 *March*, 1983.]

See also: Mental Health (Powers of Attorney) Amendment Bill, 1983; Trustee (Powers of Attorney) Amendment Bill, 1983.

Conveyancing (Powers of Attorney) Amendment.

BE it enacted by the Queen's Most Excellent Majesty, by and with the advice and consent of the Legislative Council and Legislative Assembly of New South Wales in Parliament assembled, and by the authority of the same, as follows:—

5 Short title.

1. This Act may be cited as the "Conveyancing (Powers of Attorney) Amendment Act, 1983".

Commencement.

2. (1) Except as provided by subsection (2), this Act shall commence on 10 the date of assent to this Act.

(2) Section 3 and Schedule 1 shall commence on such day as may be appointed by the Governor in respect thereof and as may be notified by proclamation published in the Gazette.

Amendment of Act No. 6, 1919.

15 **3.** The Conveyancing Act, 1919, is amended in the manner set forth in Schedule 1.

SCHEDULE 1.

(Sec. 3.)

AMENDMENTS TO THE CONVEYANCING ACT, 1919.

20 **(1) Section 2—**

Omit the matter relating to Part XVI, insert instead:—

PART XVI.—POWERS OF ATTORNEY.

DIVISION 1.—General—ss. 158–163B.

DIVISION 2.—Unsoundness of mind, etc.—ss. 163C–163H.

Conveyancing (Powers of Attorney) Amendment.

SCHEDULE 1—*continued.*

AMENDMENTS TO THE CONVEYANCING ACT, 1919—*continued.*

(2) Part XVI—

Omit the heading, insert instead:—

5

PART XVI.

POWERS OF ATTORNEY.

DIVISION 1.—*General.*

(3) Sections 158–162B—

Omit sections 158–162A, insert instead:—

10

Interpretation and application of Part.

158. (1) In this Part—

“attorney”, in relation to a power of attorney, means an attorney under the power;

15

“commencement”, in relation to the Conveyancing (Powers of Attorney) Amendment Act, 1983, means the commencement of section 3 of, and Schedule 1 to, that Act;

“power of attorney” or “power” includes an authorised substitution, delegation or appointment of sub-attorney;

20

“principal”, in relation to a power of attorney, means the person giving the power.

(2) In sections 161, 162 and 162A, “suspended”, in relation to a power of attorney, means—

25

(a) suspended or restricted in operation by reason of unsoundness of mind of the principal occurring after the execution of the instrument creating the power; or

(b) suspended by section 110A of the Mental Health Act, 1958.

Conveyancing (Powers of Attorney) Amendment.

SCHEDULE 1—*continued.*

AMENDMENTS TO THE CONVEYANCING ACT, 1919—*continued.*

5 (3) This Part does not enable an attorney, without express authority, irrevocably to appoint a substitute, delegate or sub-attorney.

(4) This Part extends to powers of attorney authorising, whether expressly or in general terms, the execution of dealings under the Real Property Act, 1900.

Execution, etc., under power.

10 159. (1) An attorney under a power of attorney may, in the exercise of the power—

(a) execute any assurance or instrument with his own signature and, where sealing is required, with his own seal; or

(b) do any other thing in his own name.

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

Irrevocable powers.

20 160. (1) Where a power of attorney is, in the instrument creating the power, expressed to be irrevocable and is, or in the instrument creating the power is expressed to be, given for valuable consideration, the power is not, except to the extent (if any) that the instrument otherwise provides, revoked or otherwise terminated by,
25 and remains effective notwithstanding—

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

(b) bankruptcy of the principal;

(c) mental incapacity of the principal;

Conveyancing (Powers of Attorney) Amendment.

SCHEDULE 1—*continued.*AMENDMENTS TO THE CONVEYANCING ACT, 1919—*continued.*

- 5 (d) the principal becoming a patient, a protected person or an incapable person within the meaning of the Mental Health Act, 1958, or any other event happening whereby the property or affairs of the principal becomes or become subject to care, management, collection, administration, charge or control under that Act;
- (e) death of the principal;
- 10 (f) if the principal is a corporation, dissolution of the corporation.

15 (2) Where the objects of a power of attorney to which this section applies have been carried out, or have become incapable of being carried out, or a power of attorney to which this section applies is otherwise exhausted, the Court may order that the power of attorney terminate and may order that the instrument creating the power be delivered up for cancellation.

(3) This section does not apply to a power of attorney created by an instrument executed before the commencement of the Conveyancing (Powers of Attorney) Amendment Act, 1983.

20 **Termination, etc.—protection of attorney.**

161. (1) Where—

- (a) an attorney under a power of attorney does an act within the scope of the power; and
- 25 (b) at that time the attorney does not have notice that the power has terminated or has been suspended,

30 he shall be entitled to rely on the power, as against the principal and any other person, notwithstanding any termination or suspension of the power before the time of the act, in the same manner and to the same extent as if the power had not terminated, or had not been suspended, before the time of the act.

Conveyancing (Powers of Attorney) Amendment.

SCHEDULE 1—*continued.*AMENDMENTS TO THE CONVEYANCING ACT, 1919—*continued.*

5 (2) This section applies only to an act done by an attorney after the commencement of the Conveyancing (Powers of Attorney) Amendment Act, 1983.

Termination, etc.—protection of strangers.

162. (1) Where—

(a) an attorney under a power of attorney does an act within the scope of the power, professing to act on behalf of another;

10 (b) at the time of the act of the attorney or afterwards, a third person—

15 (i) acts as a purchaser or incurs an obligation or otherwise acts to his detriment in a transaction (with the attorney or with any other person) which depends for its validity or effect on the power not having terminated, and not being suspended, at the time of the act of the attorney; or

(ii) acts in reliance on a right, title or interest which so depends; and

20 (c) at the time of the act of the third person he does not have notice that, at the time of the act of the attorney, the power had terminated, or was suspended so far as concerns the authority of the attorney to do that act,

25 the third person and any person claiming under him shall be entitled, as against the principal and the attorney and any other person, to rely on the power notwithstanding any termination of the power before the time of the act of the attorney, and notwithstanding any suspension of the power at that time so far as concerns authority to do that act, in the same manner and to the same extent as if the power had not terminated before the time of the act of the attorney
30 or, as the case may be, were not under suspension at that time.

Conveyancing (Powers of Attorney) Amendment.

SCHEDULE 1—*continued.*AMENDMENTS TO THE CONVEYANCING ACT, 1919—*continued.*

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

(3) This section applies only to an act done by an attorney after the commencement of the Conveyancing (Powers of Attorney) Amendment Act, 1983.

10 **Attorney acting with knowledge of termination or suspension of power.**

15 162A. (1) Where a power of attorney has terminated and an attorney under the power, knowing of the termination, does any act or thing under or in pursuance of the power, he is guilty of a misdemeanour.

20 (2) Where a power of attorney is suspended so far as concerns authority to an attorney to do an act or thing of any nature and an attorney under the power, knowing of the suspension, does an act or thing of that nature under or in pursuance of the power, he is guilty of a misdemeanour.

(3) This section applies only to acts or things done after the commencement of the Conveyancing (Powers of Attorney) Amendment Act, 1983.

Saving.

25 162B. Sections 161, 162 and 162A, as enacted immediately before the commencement of the Conveyancing (Powers of Attorney) Amendment Act, 1983, continue to apply to and in respect of a power of attorney executed before that commencement as if they had not been repealed.

Conveyancing (Powers of Attorney) Amendment.

SCHEDULE 1—*continued.*

AMENDMENTS TO THE CONVEYANCING ACT, 1919—*continued.*

(4) Section 163—

Omit “donee of” wherever occurring, insert instead “attorney under”.

5 (5) Sections 163A, 163B—

After section 163, insert:—

Proof of powers of attorney.

10 163A. (1) Where, in the manner provided by subsection (2), a document (being a legible document) is certified to be a true and complete copy of the contents of an instrument creating a power of attorney, the document is evidence—

(a) as against the principal under the power of attorney of the contents of which it purports to be a copy—of the execution and contents of the instrument; and

15 (b) as against any other person—of the contents of the document of the contents of which it purports to be a copy.

(2) A document is certified in the manner provided by this subsection—

20 (a) if there is endorsed on the document a written certificate by—
(i) the principal under the instrument of the contents of which the document purports to be a copy; or

(ii) a person of a prescribed class, to the effect that the document is a true and complete copy of the instrument of which it purports to be a copy; and

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

(3) Subsection (1) does not make a document better evidence than is the instrument of the contents of which it purports to be a copy.

Conveyancing (Powers of Attorney) Amendment.

SCHEDULE 1—*continued.*

AMENDMENTS TO THE CONVEYANCING ACT, 1919—*continued.*

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

(5) A person who gives a certificate for the purposes of this section knowing the certificate to be false is guilty of a misdemeanour.

10 (6) This section applies only to a document certified for the purposes of this section after the commencement of the Conveyancing (Powers of Attorney) Amendment Act, 1983.

Power conferred by prescribed form of instrument.

15 163B. (1) Subject to this section, an instrument (whether or not under seal) in or to the effect of the form in Schedule VII confers on the attorney thereby appointed authority to do on behalf of the person executing the instrument anything the person executing the instrument may lawfully authorise an attorney to do.

(2) The authority conferred by an instrument referred to in subsection (1) does not include—

20 (a) authority to exercise or perform any power, authority, duty or function as a trustee conferred or imposed on the person executing the instrument; or

25 (b) unless it is expressly conferred by the instrument—authority to execute an assurance or other document, or do any other act, as a result of which a benefit would be conferred on the attorney appointed by the instrument.

(3) Where an instrument referred to in subsection (1) specifies any conditions or limitations to which the authority conferred by the instrument is to be subject, the authority is so conferred subject to compliance with those conditions or limitations.

Conveyancing (Powers of Attorney) Amendment.

SCHEDULE 1—*continued.*AMENDMENTS TO THE CONVEYANCING ACT, 1919—*continued.*

(6) Part XVI, Division 2—

At the end of Part XVI, insert:—

5 DIVISION 2.—*Unsoundness of mind, etc.***Application of Division.**

163C. This Division applies only to a power of attorney given after the commencement of the Conveyancing (Powers of Attorney) Amendment Act, 1983.

10 **Interpretation.**

163D. In this Division—

“incommunicate”, in relation to a person, means under such a handicap of body or mind, by way of coma or paralysis or otherwise, whether or not induced by any drug or by medical
15 or other treatment, that he is unable to receive communications respecting his property or affairs, or to express his will respecting his property or affairs;

“protected power of attorney” means a power of attorney referred to in section 163F (2).

20 **Initial unsoundness of mind.**

163E. (1) Subject to this section, a power of attorney is not ineffective by reason that any act within the scope of the power is of a nature which is, at the time when the power is given, beyond the understanding of the principal through unsoundness of mind.

Conveyancing (Powers of Attorney) Amendment.

SCHEDULE 1—*continued.*AMENDMENTS TO THE CONVEYANCING ACT, 1919—*continued.*

5 (2) Subject to subsections (3) to (6), a power of attorney does not authorise an attorney under the power to do an act of a nature which is, at the time when the power is given, beyond the understanding of the principal through unsoundness of mind.

10 (3) Where, on application by the principal under a power of attorney, it appears to the Court that the nature of the acts, or some one or more of the acts, within the scope of the power was not, at the time when the power was given, beyond the understanding of the principal through unsoundness of mind, the Court may by order confirm the power wholly or in part as the case requires.

15 (4) Where, on application by the principal under a power of attorney, it appears to the Court that the principal has, before or during the proceedings on the application, affirmed the power wholly or in part, the Court may by order confirm the power wholly or in part as the case requires, but only to the extent to which it appears to the Court that the principal was, at the time of the affirmation, sufficiently of sound mind so to affirm.

20 (5) Where, on application by the principal under a power of attorney (whether or not a protected power of attorney) it appears to the Court—

(a) that the principal is incapable of affirming the power because—

25 (i) he lacks capacity by reason of the continuation of unsoundness of mind that affected him when he exercised the power; or

(ii) he is incommunicate; and

30 (b) that it is for the benefit of the principal that the power be confirmed wholly or in part,

the Court may by order confirm the power wholly or in part as the case requires.

Conveyancing (Powers of Attorney) Amendment.

SCHEDULE 1—*continued.*AMENDMENTS TO THE CONVEYANCING ACT, 1919—*continued.*

5 (6) Where the Court makes an order under this section confirming a power of attorney wholly or in part, an act within the scope of the power to the extent so confirmed, done after the order takes effect by an attorney under the power, shall be as good for all purposes and between all persons as if at the time when the order takes effect the principal were of full capacity and in due form confirmed the power of attorney to the extent of the order of
10 confirmation.

(7) Subsection (5) applies only if and so far as a contrary intention is not expressed in the instrument creating the power, and shall have effect subject to the terms of the instrument creating the power.

15 **Supervening unsoundness of mind.**

163F. (1) A power of attorney is effective so far as concerns any act within its scope, being an act of a nature which is not, at the time of the act, beyond the understanding of the principal through unsoundness of mind.

20 (2) Where—

(a) a power of attorney is, in the instrument creating the power, expressed to be given with the intention that it will continue to be effective notwithstanding that, after the execution of the instrument, the principal suffers loss of capacity through
25 unsoundness of mind;

(b) the execution of the instrument is attested by a prescribed person (not being an attorney under the power); and

Conveyancing (Powers of Attorney) Amendment.

SCHEDULE 1—*continued.*AMENDMENTS TO THE CONVEYANCING ACT, 1919—*continued.*

5 (c) there is endorsed on, or annexed to, the instrument a certificate by that prescribed person stating that he explained the effect of the instrument to the principal before it was executed,

the power of attorney is effective so far as concerns any act within its scope, notwithstanding that the act is of a nature which is, at the time of the act, beyond the understanding of the principal through
10 unsoundness of mind.

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

15 (4) This section applies only if and so far as a contrary intention is not expressed in the instrument creating the power, and shall have effect subject to the terms of the instrument creating the power.

Judicial control in certain circumstances.

20 163G (1) This section applies to—

- (a) a protected power of attorney; and
- (b) a power of attorney the principal under which is for the time being incommunicate.

25 (2) Where, on application by the principal under a power of attorney, it appears to the Court to be for his benefit, the Court may, on his behalf, by order—

- (a) remove a person from office as attorney;
- (b) appoint a person to fill a vacancy in the office of attorney;
- (c) with the consent of the attorney and of any other interested
30 person—
 - (i) alter the scope of the power;
 - (ii) otherwise alter the instrument creating the power; or

Conveyancing (Powers of Attorney) Amendment.

SCHEDULE 1—*continued.*AMENDMENTS TO THE CONVEYANCING ACT, 1919—*continued.*

- (iii) alter the rights and duties of the principal and the attorney between themselves;
- 5 (d) direct an attorney to furnish accounts and other information to the Court or to a person approved by the Court; or
- (e) revoke the power.
- (3) For the purposes of subsection (2) (b), a vacancy in the office of attorney occurs in any of the following events:—
- 10 (a) renunciation of the power by an attorney;
- (b) removal of an attorney by the principal or with his authority, or by the Court under subsection (2);
- (c) disability of an attorney;
- (d) death of an attorney;
- 15 (e) where an attorney is a corporation, liquidation or dissolution of the corporation;
- (f) other event personal to an attorney whereby his authority is terminated.
- (4) Where the Court makes an order directing an attorney to furnish accounts or other information under subsection (2) (d), the Court may make further orders for—
- 20 (a) preventing unnecessary disclosure of the attorney; and
- (b) inquiry and report on the conduct of the attorney.
- (5) The Court may revoke a power of attorney under subsection (2) (e) notwithstanding anything in the instrument creating the power, but otherwise subsections (2), (3) and (4) apply only if and so far as a contrary intention is not expressed in the instrument creating the power, and shall have effect subject to the terms of the instrument creating the power.
- 25

Conveyancing (Powers of Attorney) Amendment.

SCHEDULE 1—*continued.*

AMENDMENTS TO THE CONVEYANCING ACT, 1919—*continued.*

5 (6) A removal, appointment, alteration or revocation under subsection (2) (a), (b), (c) and (e) shall have effect as if done in due form by the principal, and as if he were of full capacity and were, so far as necessary, authorised to do the thing in question by the instrument creating the power.

(7) This section has effect subject to section 160.

Procedure where principal incommunicate.

10 163H. (1) Where the principal under a power of attorney is incommunicate—

(a) proceedings under this Division by the principal—

(i) may be commenced and carried on as prescribed by rules of court; or

15 (ii) subject to rules of court, may be commenced and carried on as if the principal were of unsound mind; and

20 (b) subject to rules of court, all persons shall, in relation to the proceedings, be as nearly as may be in the like position in law as if the principal were of unsound mind.

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

(7) Schedule VII—

Omit the Schedule, insert instead:—

25 SCHEDULE VII. (Sec. 163B.)

General Power of Attorney.

PART 1.

30 THIS POWER OF ATTORNEY is made on the day of, 19.... by AB of

Conveyancing (Powers of Attorney) Amendment.

SCHEDULE 1—*continued.*

AMENDMENTS TO THE CONVEYANCING ACT, 1919—*continued.*

5 1. I appoint CD of to be my attorney to exercise, subject to any conditions and limitations specified in Part 2 of this instrument, the authority conferred on him by section 163B of the Conveyancing Act, 1919, to do on my behalf anything I may lawfully authorise an attorney to do.

10 *2. In the exercise of the authority conferred on him by section 163B of the Conveyancing Act, 1919, my attorney is authorised to execute an assurance or other document, or do any other act, whereby a benefit is conferred on him.

15 *3. This general power of attorney is given with the intention that it will continue to be effective notwithstanding that after its execution I suffer loss of capacity through unsoundness of mind.

(* Clause 2 or 3, or clauses 2 and 3, may be omitted.)

PART 2.

CONDITIONS AND LIMITATIONS.



