

Powers of Attorney Amendment Bill 2008

CLAUSE NOTES

PART 1 – PRELIMINARY

Clause 1 Short Title

This clause provides for the citing of the Amendment Bill.

Clause 2 Commencement

This clause provides for the commencement of the Bill on the day on which the Act receives Royal Assent.

Clause 3 Principal Act

This clause provides that the Powers of Attorney Act 2000 is the Principal Act.

Clause 4 Section 3 amended (Interpretation)

This clause inserts in section 3(1) a definition of ‘instrument’ which includes registration application. The definition has been inserted to make it clear that a registration application is an instrument for the purposes of the Act.

This clause also inserts in section 3(1) a definition of ‘registration application’ meaning a registration application in accordance with form 5.

A registration application is to accompany all powers of attorney and other instruments lodged with the Recorder of Titles for registration. The registration application provides a summary of information required to be entered into the Register.

This clause further amends section 3(1) of the Principal Act to remove the definition of “person acting judicially” as this term is not used in the Act.

Clause 5 Section 4 amended (Register of powers of attorney)

Section 4 provides that the Recorder must keep a register of that the Register consists of original powers of attorneys and other all powers of attorney. The current wording of subsection (2) infers instruments, for example revocations or variations of powers of attorney. This is not the case. The clause amends subsection (2) to reflect that the Register actually consists of a combination of original powers of attorneys and other instruments and copies of original powers of attorneys and other instruments.

Current practice is that a copy of the power of attorney or other instrument is made after registration with the original returned to the lodging party. The attorney(s) require the original power of attorney as authorisation to act on behalf of the donor.

Subsection (2) is amended further by deleting the reference to any other Act, thus limiting the Register to powers of attorney, instruments varying or revoking a power of attorney and other instruments relating to powers of attorney that are lodged with the Recorder under this Act. No powers of attorney, instruments varying or revoking a power of attorney and other instruments relating to powers of attorney are lodged with the Recorder under any other Act. The amended section 4(2) reflects this. The purpose of the Register is as a register of powers of attorney and other instruments created or made in accordance with the Powers of Attorney Act 2000 and registered under that Act.

A new subsection (5) to is inserted into section 4 to allow for the adoption and utilisation of new copying methods and technology. Currently documents are scanned into the Register but a more appropriate technology may become available in the future. Subsection (5) provides the Recorder with the legislative power to use new methods and technology as they arise, thus allowing for future electronic lodgment of powers of attorney.

Clause 6 Sections 9 and 10 substituted

- 9. Formal Requirements**
- 10. Requirements for other instruments**

Sections 9 and 10 list the formal requirements for a power of attorney or other instrument under the Act. Section 9 refers to both powers of attorney and other instruments whilst section 10 refers only to other instruments. Other instruments such as revocations or variations of powers of attorney account for a very small percentage of the documents lodged under the Act.

This clause repeals sections 9 and 10 replacing them with new sections 9 and 10, with the new section 9 dealing solely with formal requirements for powers of attorney and section 10 dealing solely with formal requirements for other instruments. Section 10, does however, incorporate the relevant parts of section 9 that will apply to other instruments.

The new section 9 succinctly sets out the formal requirements for a power of attorney. The new section incorporates the formal requirements of the old section 9 with additional requirements in paragraphs (a)-(c) and (g)-(j) in subsection (1). The new formal requirements provide a fuller description of how a power of attorney should be presented when lodged and address a number of issues that have arisen since the introduction of the Act in 2000.

The new section 9 refers to a power of attorney made or created under section 18 (ordinary power of attorney) or 30 (enduring power of attorney) reflecting that the making of a power of attorney is separate from the formal requirements which relate to the presentation and composition of a power of attorney.

The new section 9(1)(a) explicitly provides that a power of attorney must not have more than one donor and subsection (1)(b) provides that the donor must sign the power of attorney. The proposed amendments clearly establish that a power of attorney can only have a single donor who must sign the power of attorney. Section 10 includes the requirement for the donor to sign other instruments, for example revocation of a power of attorney, that are to be lodged for registration under the Act.

The new subsection (1)(b) provides that the donor's signature must be witnessed. In the case of an enduring power of attorney, by two witnesses, and for any other power of attorney, one witness. The witnesses must not be a party to the power of attorney and when two witnesses are required they must have witnessed the enduring power of attorney in the presence of the donor and each other. These amendments provide for the proper execution of a power of attorney in order to protect the interests of the donor.

The new subsection (1)(c) provides that a power of attorney must comply with the Act, that is that a power of attorney must comply with all relevant provisions of the Act that apply to its type of power of attorney, ordinary, enduring or foreign.

The formal requirements in the new section 9(1)(g)-(j) relate to the form of a power of attorney. For example, subparagraph (g) requires that a power of attorney be on A4 sized paper and subparagraph (h) requires that if it consists of more than one page, have each page consecutively numbered and be stapled or pinned in the top left hand of the corner. These requirements assist in the scanning of the power of attorney and in streamlining the examination and registration process to make them more administratively easier to handle, and leading to faster registration time.

The benefits of the more detailed formal requirements are two-fold. The first being that the person creating the power of attorney is fully aware of what the formal requirements are and the second being that they are administratively easier to process.

This clause reintroduces the requirement for a registration application form to accompany a power of attorney or other instrument lodged with the Recorder of Titles for registration. As an oversight this requirement was not brought forward with the original Bill in 2000.

A registration application form will save time and resources processing a power of attorney, decrease registration times and reduce the number of documents that are incapable of being registered as they do not comply with formal requirements when initially lodged or staff are unable to determine the type of power of attorney.

The registration application provides a summary of information required to be entered into the Powers of Attorney Register such as the name of the donor, the name(s) of the attorney(s), and a description of the type of power of attorney

This clause inserts a new requirement, in subsection (5), that alterations to any power of attorney are to be initialled by the donor and by two witnesses for an enduring power of attorney and an annexure to an enduring power of attorney, and one witness for any other power of attorney or annexure to such a power of attorney. To protect the interests of the donor and ensure the validity of any alteration the witnesses can not to be a party to the power of attorney. Further, in the case of an enduring power of attorney or annexure an enduring power of attorney the witnesses must witness the alteration in the presence of each other and the donor, and in the case of any other power of attorney or annexure to any other power of attorney must witness the alteration in the presence of the donor.

A new subsection (6) provides that the witness(es) to an alteration need not be the same as those that witnessed the power of attorney or annexure. This provides flexibility in situations where the original witness(es) are unable to witness an alteration.

The new section 10 separates the formal requirements for other instruments from those for powers of attorney whilst through

subsection (1) picking up the relevant requirements that apply to both. All of the requirements in section 9 apply to other instruments except for subsection (1)(a) and (1)(b), which solely relate to powers of attorney.

An instrument referred to in section 32A is excluded from complying with these requirements, as it is different to other instruments under the Act. It is a stand-alone set form in Schedule 1, that is it cannot be altered and therefore does not require specific guidelines such as formal requirements compared to a revocation of a power of attorney which is not a set form and to which guidelines in the form of formal requirements apply.

Subsection (2) and (3) bring forward requirements contained in the old subsections 10(1) and 10(2).

Clause 7 Section 11 amended (Powers of attorney not to be registered except in accordance with this Act)

Section 11 establishes that the Recorder of Titles must not register powers of attorney or other instruments except in accordance with the Act.

The wording in subsection (1) has been simplified to provide that the Recorder of Titles cannot register any power of attorney or other instrument unless it complies with the Act. The underlying principle has not been altered that to be capable of being registered the power of attorney or other instrument must comply with the Act.

This clause also adds an additional requirement to subsection (1) that any power of attorney or instrument cannot be registered unless it is accompanied by a registration application.

A compulsory registration application will now accompany all powers of attorney and other instruments when lodged with the Recorder of Titles for registration. The registration application form provides a summary of information required to be entered into the Powers of Attorney Register such as the name of the donor, the name(s) of the attorney(s), and a description of the type of power of attorney.

The availability of this information in the registration application saves the time taken to find this information by examining the power of attorney or other instrument after it has been lodged. It does not, however, replace examination of the power of attorney or other

instrument to ensure that it complies with the formal requirements and other relevant provisions of the Act.

Subsections (3) and (4) provide the Recorder with the ability to specify corrections to be made which would render an otherwise unregistrable power of attorney or other instrument registrable if those specific corrections are made.

However, subsections (3) and (4) do not reflect current practice when a power of attorney or other instrument is lodged which does not comply with the Act. Subsections 3 and 4 have been omitted and new subsections (3) and (4) inserted that reflect current practice.

For example, subsection (4) currently provides that if corrections are to be made the person who lodged the power of attorney or other instrument is authorised to remove it for the purpose of making the corrections and relodge it. However in practice the Recorder returns the power of attorney or other instrument to the lodging party and informs them what corrections are to be made. The new subsection (3)(b) reflects this process.

Subsection (4)(c) required that corrections made were to be initialled by each person who signed the power of attorney as a party or as a witness. In practice this requirement is too restrictive as it may not be possible to get all of those people involved in the original power of attorney or other instrument to initial the corrections.

A new subsection (4B) has been inserted which provides that the witnesses to an initialling of a correction need not be the same as those that witnessed the power of attorney or other instrument.

A new subsection (5A) has been inserted which provides that notwithstanding anything in this section the Recorder of Titles with the power to accept for registration a power of attorney, annexure or alteration to a power of attorney that does not comply with the Act if the Recorder considers it appropriate to do so in the particular circumstances.

For example, in the case of a foreign power of attorney which has been lodged and is gummed rather than stapled. This clause gives the Recorder the flexibility to accept for registration the power of attorney on the basis that given that it is a foreign power of attorney the cost of returning it to be stapled rather than gummed may not be justified.

Section 12 deals with lodgment of powers of attorney and other instruments. This clause amends section 12 by substituting a new subsection (2) that reflects current practice and procedure when a power of attorney is lodged with the Recorder. Firstly the power of attorney or other instrument is identified by endorsing it with a bar code including distinctive numbers and letters, then a copy of the endorsed power of attorney or other instrument is made and finally after registration the original powers of attorney or other instrument is returned to the person who lodged it.

Consistent with other amendments, the amendments to section 12 provide for the making of a copy of a power of attorney and the return of the original to the lodging party. The original power of attorney is required for use by the attorney(s) as their authority to act.

Clause 9 Section 18 amended (Form of power of attorney)

Section 18 provides the form in which a power of attorney may be made. This clause amends subsection (1) to clarify that powers of attorney, other than an enduring power of attorney may be made in accordance with subsection (1), and enduring powers of attorney may be made in accordance with subsection (2).

Clause 10 Section 26 amended (Appointment of attorney by class)

Section 26 enables institutions such as banks to appoint attorneys by a class of people rather than individual appointments. It recognises that a number of people undertake the same function in different offices, and that over time different people fill a position. The ability to appoint an attorney by class removes the need to register a revocation and appointment every time a person leaves a position, as would be the case if individuals were appointed by name.

Subsection (2) currently provides that a person purporting to act as an attorney under an appointment of attorney by class is required to state in writing that they are authorised to act as a member of that specified class.

The requirement for a written statement is an additional unnecessary burden. Reliance on a person executing or signing a document purporting to sign execute or sign as a member of the specified class, or reliance on a person doing any act purporting to do that act as a member of the specified class is sufficient.

If the credit manager at a financial institution nominated as the attorney has authority to sign by virtue of his/her writing the words ‘credit manager’ it is sufficient for persons dealing with him/her to be satisfied that he/she has the power to sign in that capacity.

If the credit manager at a financial institution nominated as the attorney does an act in the role of credit manager it is sufficient for persons dealing with him/her to be satisfied that he/she has the power to sign in that capacity

There is an onus however, on a person dealing with an attorney to check the power of attorney to ensure the specified class exists.

Subsection (2) has been amended to provide that the signing of a power of attorney by a person signing as a member of the specified class of attorney is sufficient.

A new subsection (3) has been inserted to provide that section 26 does not apply to enduring powers of attorney.

Clause 11 Section 30 amended (Creation and effect of enduring powers of attorney)

Section 30 deals with the creation and effect of enduring powers of attorney. This clause amends section 30 by removing subsection (2)(b) which dealt with witness provisions regarding the attesting of a deed or instrument in light of the new section 9 which includes witness provisions as part of the formal requirements.

A practical problem had arisen with the wording in Forms 3 and 4 which required in effect that all four parties being the donor, attorney and two witnesses should be in the same room at the time the donor and attorney sign. Quite often an attorney may live interstate or even overseas. At that time section 30 did not require the witnesses to certify anything in relation to the attorney.

A new subsection (5) has been inserted to deal with any enduring powers of attorney that may not have been witnessed in accordance with forms 3 and 4. In effect, subsection 5 provides that the fact that an attesting witness was not present when an attorney signed the form of acceptance, accepting to be an attorney, the enduring power of attorney is not and has never been by that reason alone invalid, and any act done, or document signed or executed by the attorney is not and has never been by that reason alone invalid.

Forms 4 and 5 have been amended to remove the need for the attorney's acceptance to be witnessed. The attorney will either accept or decline as signified by the existence or absence of their signature.

Clause 12 Section 32 amended (Duties of attorney under enduring power of attorney)

Section 32 provides what the duties of an attorney under an enduring power of attorney are. Subsection (3) provides that unless a contrary intention appears in an enduring power of attorney, an attorney may appoint The Public Trustee to act as attorney in his or her place.

This clause amends section 32 by omitting subsection (3) that provided for an attorney to appoint The Public Trustee to act in his or her place unless a contrary intention appears in an enduring power of attorney and by an instrument in writing. Subsection (3) is no longer required given the new section 32A.

This clause amends section 32(2) by removing the reference to subsection (3).

Clause 13 Section 32A inserted

32A. Substitution of The Public Trustee as attorney

This clause inserts a new section after section 32 to provide that an attorney(s) may seek the appointment of The Public Trustee to act in his/her/their place. This appointment must be in accordance with Form 6 in Schedule 1, be signed by the attorney(s) and accepted by The Public Trustee in accordance with the form. This clause also provides that the appointment is of no effect until registered by the Recorder in which case The Public Trustee is taken to be the attorney under the Act.

This clause recognizes the limits in the Public Trustee Act 1930 on the Public Trustee acting as power of attorney. Section 12(4) of the Public Trustee Act 1930 does not allow The Public Trustee to accept any appointment jointly with any other person. The clause provides that if there is more than one attorney all must seek to appoint The Public Trustee as substitute attorney.

Previously, section 32(3) provided for an attorney to appoint The Public Trustee to act in his/her place, by an instrument in writing, unless a contrary intention appeared in an enduring power of attorney.

An attorney(s) seeking to revoke his/her/their obligations under a power of attorney may now do so in accordance with this section.

Clause 14 Section 33 amended (Power of Board to make orders in respect of enduring power of attorney)

Section 33 details the powers of the Guardianship and Administration Board to make orders in respect of enduring powers of attorney. This clause amends section 33 by inserting four new subsections (6A)-(6D) to complement section 73A of the Guardianship and Administration Act 1995 in respect of an enduring power of attorney.

Section 73A had been included in the Guardianship and Administration Act 1995 to enable the Board to make an interim order on the same grounds as the Board would usually make an emergency order, but to tie the Board over between adjournments.

However, it is not clear whether the section within the Act extends to allowing directions that, if the Board considers appropriate in the circumstances, continue the suspension of the enduring power of attorney for the period of the adjournment and any subsequent adjournment. To put this matter beyond doubt the Act has been amended to specifically provide that the Board has this power in relation to enduring powers of attorney.

The amendments ensure consistency and cooperation between the provisions of the Powers of Attorney Act 2000 and the Guardianship and Administration Act 1995.

Clause 15 Section 55A substituted

55A. Prescribed fees

Section 55A incorporates sections 169E(2) and (3) of the Land Titles Act 1980 and provides that they have the same application under this Act as they have to the payment of a prescribed fee under that Act. This clause amends section 55A by repealing and substituting the section with an amended section.

The amendment inserts the relevant subsections of the Land Titles Act 1980, which were previously referenced in this section, in order to clarify the intent and purpose of the section. The current requirement is for payment of fee up front upon lodgment of a power of attorney or other instrument. The amendment provides the Recorder with the flexibility to accept payment after lodgment to facilitate the advent of electronic lodgment and provide for bulk regular lodgers.

Clause 16 Schedule 1 substituted

This clause repeals Schedule 1 of the Principal Act and substitutes a new Schedule 1.

Previously, the forms in this Schedule included: Form 1 (Particular Power of Attorney); Form 2 (General Power of Attorney); Form 3 (Particular Enduring Power of Attorney)

and, Form 4 (General Enduring Power of Attorney). These forms have been brought forward with amendments.

Newly created forms in this Schedule include: Form 5 (Registration Application); and, Form 6 (Appointment of Public Trustee as Attorney under Enduring Power of Attorney).

Form 5 and Form 6 are intended to be compulsory and must be used as specified within the Act.

The format of Forms 1 and 2 has changed but the content has not. The changes increase the useability of the forms and remove duplication of information such as dates.

Forms 3 and 4 have been amended as follows:

- Removal of the requirement for the witnesses to certify that the donor and the attorney have signed the power of attorney and acceptance respectively freely and voluntarily;
- Removal of the requirement that the witnesses certify that both the donor and the attorney appear to understand the effect of the power of attorney and form of acceptance respectively;
- The witnesses are only required to be in the presence of the donor and certify that the donor signed the power of attorney in their presence;
- The attorney's signature on the acceptance does not require witnessing;
- The title 'Form of Acceptance' has been replaced with 'Statement of Acceptance'; and
- The 'Statement of Acceptance' provides for multiple attorney's.

Form 5 is the new Registration Application form to be completed and accompany any power of attorney or other instrument lodged for registration. It contains a summary of information to be entered into the Powers of Attorney Register. The person who completes the form is required to certify that the information contained in the registration application is correct to the best of their knowledge.

Form 6 is the new form that appoints the Public Trustee as attorney under an enduring power of attorney. The form requires both the appointment by the existing attorney(s) and acceptance by The Public Trustee.

The form once registered notifies searchers of the Powers of Attorney Register that The Public Trustee has been appointed attorney in place of the original attorney(s).