

## **POWERS OF ATTORNEY AMENDMENT BILL 2007**

### **Second Reading**

Mr LLEWELLYN (Lyons - Attorney-General - 2R) - Mr Speaker, I move –

That the bill be now read the second time.

The bill before the House contains amendments to the Powers of Attorney Act 2000 and will amend particular provisions of the act which relate to the formal requirements of a power of attorney, provide for the completion of a registration application form when a power of attorney or other instrument is lodged, clarify the witness provisions, and improve the practical implementation of the act.

The bill reflects government policy that legislation be clear and unambiguous. The bill benefits all parties involved in the process of creating a power of attorney and its subsequent registration by ensuring that the most effective and efficient framework is in place for the creation and subsequent registration of powers of attorney and related instruments.

In line with this Government's policy of ensuring that legislation remains relevant and effective, in 2005 the Recorder of Titles initiated a post-implementation review of the act as it had then been in effect for five years. The review assessed whether the operation of the legislation had been effective and whether any significant problems had been identified with its practical implementation.

Key stakeholders were consulted during the review process, including the Guardianship and Administration Board, Trustee Companies and the legal profession. It should be noted that most powers of attorney are lodged and/or drafted by legal practitioners as opposed to members of the public. In general the act was found to be working effectively procedurally, however, there was opportunity to make changes to the formal requirements and clarify the witness provisions.

#### **Formal Requirements**

The review found that since the act's inception in 2000 practical issues regarding the application of formal requirements have been identified. The formal requirements stipulate how a power of attorney or other instrument is to be created and subsequently presented for registration under the act.

The bill clarifies existing formal requirements where required and introduces new formal requirements. Further, the formal requirements for powers of attorney have been separated from the requirements for other instruments. The amended set of formal requirements should provide a more complete description of how a power of attorney or other instrument should be created and presented for registration

The changes include amending the act to:

- provide that a power of attorney may only have one donor. This is in response to a practice that has arisen whereby a power of attorney is lodged with purportedly multiple donors. Some of these documents are over 100 pages long. Advice was received from the Solicitor-General that they are, in fact, a collection of individual powers of attorney rather than a single power of attorney; and
- provide that the donor must actually sign the power of attorney for the power to be effective; and
- reflect that the Powers of Attorney Register consists of copies of a power of attorney and that the original is always returned to the lodging party; and
- require that documents must be pinned or stapled in the top left hand corner, that each page of the document must have a correct page number and that the document must be submitted on A4 size paper. Currently documents are received that have been glued or gummed together and require to be separated, and/or are too large to be scanned; and
- provide that alterations to a power of attorney, other instruments or annexures must be initialled. In practice alterations are sometimes made to a power of attorney without having been initialled. Currently there is no way of identifying whether alterations have been made before or after the power of attorney was executed; and
- provide that any power of attorney or other instrument lodged under the act must be accompanied by a registration application form. 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.

Prior to the Powers of Attorney Act 2000 the registration of a power of attorney was governed by the Registration of Deeds Act 1935. Under the Registration of Deeds Regulations 1976 a power of attorney was submitted with an application form which included information such as the names of the parties, a description of the type of power of attorney, and was dated and signed by the lodging party. As an oversight this requirement was not included in the Powers of Attorney Act 2000 and consequently powers of attorney are no longer lodged with an application form.

The reintroduction of an application form, the registration application form, will save time and resources processing a power of attorney or other instrument, and benefit clients by decreasing registration times and assists where staff were previously unable to determine the type of power of attorney.

Witness provisions

During the review concerns were raised regarding the wording of the witness provisions contained in forms in Schedule 1 of the act and in specific provisions in the body of the act. There are differences between the two that need to be removed.

For an enduring power of attorney Forms 3 and 4 provide that both witnesses, the attorney and the donor be present when the enduring power of attorney is signed by the donor and the acceptance signed by the attorney.

There is no such section in the act requiring this. Further, Forms 3 and 4 provide that for an enduring power of attorney the witnesses certify that the donor and attorney signed the enduring power of attorney and acceptance respectively freely and voluntarily in their presence. There is no section in the act that contains such a requirement.

To remove these differences and increase the use of the forms in Schedule 1, Forms 3 and 4 have been amended to provide that the witnesses certify only that the donor signed the enduring power of attorney in the presence of the witnesses. This removes the requirement for the witnesses, the attorney and the donor being present when the enduring power of attorney is signed.

Further the acceptance of the attorney does not have to be witnessed with the signature of the attorney being sufficient evidence of acceptance. Finally, the witnesses are not required to certify that the donor signed the enduring power of attorney freely and voluntarily.

The bill introduces consistent witnessing requirements for initialling of alterations, or witnessing corrections made in accordance with a request by the Recorder of Titles. Two witnesses are required for initialling of alterations or witnessing corrections for an enduring power of attorney and one for any other power of attorney. The witnesses need not be the same as those that witnessed the enduring power of attorney, other power of attorney, or other instrument.

The bill will also validate any power of attorney that may have been witnessed incorrectly under the act prior to the commencement of the Bill. In addition to the two main areas described, other amendments relate to improving its practical implementation. These changes include amending the act to:

- provide that where an attorney(s) under an enduring power of attorney appoint the Public Trustee to act in their stead if they no longer wish to act as attorney(s), they will be required to complete the new Form 6 to appoint the Public Trustee as attorney under an enduring power of attorney. Form 6 contains an Acceptance by the Public Trustee that if signed by the Public Trustee signifies acceptance of the appointment. This is not currently in the act. Anyone searching the Powers of Attorney Register will be made aware of the change of attorney; and

- provide that a person can rely on an attorney's signature as authorisation to act as a member of a specified class of persons. Section 26 of the act currently provides that a statement in writing is necessary; and
- provide the Guardianship and Administration Board with the power to suspend the operation of an enduring power of attorney where a hearing, under section 33 of the Powers of Attorney Act 2000, in respect of that enduring power of attorney is adjourned, under section 73A of the Guardianship and Administration Act 1995. During the suspension of the operation of the enduring power of attorney the Guardianship and Administration Board may appoint the Public Trustee as administrator of that estate; and
- provide for the payment of a prescribed fee after the transaction to which it relates rather than at the time of lodgment thus facilitating electronic lodgment and regular bulk lodgments; and
- reflect current practice when a power of attorney or other instrument is lodged which does not comply with the act and requires correction.

The recent review made it clear that the act has two distinct functions. The first is to provide for the establishment and maintenance of a register of powers of attorney, a matter which is properly within the province of the Recorder of Titles and the Minister for Primary Industries and Water.

The second function of the act relates to the Guardianship and Administration Board's role in overseeing enduring powers of attorney. It is more appropriate that this part of the act be administered by the Minister for Justice as it relates to the powers of a tribunal. As a result the act will now be jointly administered, with the Attorney-General assuming responsibility for the parts of the act that relate to the Guardianship and Administration Board. The joint administration was given effect in the Administrative Arrangements Order 2008 (Statutory Rule No. 5 of 2008).

As part of a whole-of-government elder abuse strategy, further consideration is to be given to potential amendments identified by the Guardianship and Administration Board as desirable to guard against misuse of enduring powers of Attorney. These suggested amendments, after appropriate consultation, will most likely form the basis of a separate bill to be introduced later this year. It was not considered appropriate to delay amendment to the administrative matters contained in this Bill while more detailed policy amendments relating to misuse of enduring powers of attorney were the subject of consultation.

In summary, the proposed amendments in this Bill will amend particular provisions of the act which relate to the formal requirements of a power of attorney, provide for the completion of a registration application form when a power of attorney or other instrument is lodged, clarify the witness provisions, and improve the practical implementation of the act.

The bill reflects government policy that legislation be clear and unambiguous. The bill will benefit all parties involved in the process of creating a power of attorney and its subsequent registration.

I commend the bill to the House.