

Queensland



POWERS OF ATTORNEY ACT 1998

**Reprinted as in force on 18 November 2003
(includes commenced amendments up to 2003 Act No. 87)**

Reprint No. 2F

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Queensland



POWERS OF ATTORNEY ACT 1998

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POWERS OF ATTORNEY ACT 1998

[as amended by all amendments that commenced on or before 18 November 2003]

An Act consolidating, amending and reforming the law about general powers of attorney and enduring powers of attorney and providing for advance health directives, and for other purposes

CHAPTER 1—PRELIMINARY

1 Short title

This Act may be cited as the *Powers of Attorney Act 1998*.

2 Commencement

This Act commences on a day to be fixed by proclamation.

3 Dictionary

The dictionary in schedule 3 defines particular words used in this Act.

4 Act binds all persons

This Act binds all persons, including the State, and, so far as the legislative power of the Parliament permits, the Commonwealth and the other States.

5 General overview

(1) An “**attorney**” is a person who is authorised to make particular decisions and do particular other things for another person (the “**principal**”).

(2) After the commencement of this Act, principals may authorise attorneys by—

- (a) general powers of attorney, enduring powers of attorney or advance health directives; or
- (b) powers of attorney under the common law.

(3) In addition to replacing the statutory provisions for powers of attorney and enduring powers of attorney,¹ this Act introduces advance health directives and statutory health attorneys.

(4) An advance health directive is a document containing directions for a principal's future health care and special health care and may authorise an attorney to do particular things for the principal in relation to health care.²

(5) A statutory health attorney is the person authorised by this Act³ to do particular things for a principal in particular circumstances in relation to health care.⁴

6 Scope of Act

Except where otherwise provided, this Act applies only to documents made, whether under this Act⁵ or otherwise, after the commencement of this Act.

6A Relationship with Guardianship and Administration Act 2000

(1) This Act is to be read in conjunction with the *Guardianship and Administration Act 2000* which provides a scheme by which—

1 The *Property Law Act 1974*, part 9 (Powers of attorney) was repealed by section 182.

However, see section 163 (Powers of attorney under Property Law Act 1974) for a transitional provision.

2 Advance health directives are dealt with in chapter 3.

3 See section 62 (Statutory health attorney).

4 See *Guardianship and Administration Act 2000*, section 66(5) (Adult with impaired capacity—order of priority in dealing with health matter).

5 A general power of attorney, or enduring power of attorney, made under the *Property Law Act 1974* and of force and effect before the commencement of section 163 is taken to be a general power of attorney, or enduring power of attorney, made under this Act—section 163.

- (a) the tribunal may appoint a guardian for an adult with impaired capacity for personal matters⁶ to make particular decisions and do particular other things for the adult in relation to the matters; and
- (b) the tribunal may appoint an administrator for an adult with impaired capacity for financial matters to make particular decisions and do particular other things for the adult in relation to the matters; and
- (c) the tribunal may consent to the withholding or withdrawal of a life-sustaining measure and to particular special health care.⁷

(2) The *Guardianship and Administration Act 2000* also provides a scheme for health care and special health care for adults with impaired capacity for the matter concerned, including an order of priority for dealing with health care and special health care.⁸

(3) The *Guardianship and Administration Act 2000* also provides for the adult guardian, the public advocate and community visitors.

(4) If there is an inconsistency between this Act and the *Guardianship and Administration Act 2000*, the *Guardianship and Administration Act 2000* prevails.

6 Personal matters do not include special personal matters or special health matters—schedule 2, section 2.

7 However, the tribunal may not consent to electroconvulsive therapy or psychosurgery—*Guardianship and Administration Act 2000*, section 68(1).

8 See *Guardianship and Administration Act 2000*, sections 65 and 66.

CHAPTER 2—POWERS OF ATTORNEY OTHER THAN ENDURING POWERS OF ATTORNEY

PART 1—INTRODUCTION

7 Application of ch 2

(1) This chapter does not apply to enduring powers of attorney.

(2) Except where otherwise provided, this chapter applies to all other powers of attorney made, whether under this Act⁹ or otherwise, after the commencement of this Act.¹⁰

8 Powers of attorney

By a “**general power of attorney made under this Act**”, a person (“**principal**”) may—

- (a) authorise 1 or more other persons (“**attorneys**”) to do for the principal anything (other than exercise power for a personal matter¹¹) that the principal can lawfully do by an attorney; and
- (b) provide terms or information about exercising the power.

9 When attorney’s power exercisable

(1) A principal may specify in a power of attorney a time when, circumstance in which, or occasion on which, the power is exercisable.

(2) However, if the power of attorney does not specify a time when, circumstance in which, or occasion on which, the power is exercisable, the power becomes exercisable once the power of attorney is made.

9 A general power of attorney made under the *Property Law Act 1974* and of force and effect before the commencement of section 163 is taken to be a general power of attorney made under this Act—section 163.

10 For provisions applying to attorneys, see chapter 5 (Exercising power for a principal), part 1 (Provisions applying to attorneys).

11 Only an attorney under an enduring power of attorney may exercise power for a personal matter for a principal.

10 Powers of attorney given as security

(1) A “**power of attorney given as security**” is a power of attorney (other than an enduring power of attorney)—

- (a) whether made under this Act or otherwise and whether made before or after the commencement of this Act; and
- (b) given by a principal as security for a proprietary interest of the attorney or the performance of an obligation owed to the attorney; and
- (c) that states it is irrevocable.

(2) Despite chapter 2, part 3, a power of attorney given as security is incapable of revocation except with the consent of the attorney while—

- (a) the attorney has the proprietary interest, or persons deriving title to the interest under the attorney have the proprietary interest, secured by the power of attorney; or
- (b) the obligation, the performance of which is secured by the power of attorney, remains undischarged.¹²

(3) A power of attorney given as security for a proprietary interest may be given to—

- (a) the person entitled to the interest and the persons deriving title under the person to the interest; or
- (b) a representative of a person mentioned in paragraph (a) who may be a specified officer, or the holder of a specified office,¹³ by reference to the title of the office concerned.

(4) The persons deriving title are taken to be attorneys of the power of attorney for all purposes.

(5) Subsection (4) does not affect a right in the power of attorney to appoint substitute attorneys.

(6) The power of a registered proprietor under the *Land Title Act 1994* to revoke a power of attorney is subject to this section.

12 Also, revocation by attorney provisions dealing with revocation because of impaired capacity, bankruptcy or insolvency or death of an attorney (sections 22 to 24) do not apply to powers of attorney given as security.

13 “**Office**” includes position—see *Acts Interpretation Act 1954*, section 36.

PART 2—MAKING A POWER OF ATTORNEY OTHER THAN AN ENDURING POWER OF ATTORNEY

11 Form of general power of attorney made under Act

A general power of attorney made under this Act must be in the approved form.¹⁴

12 Execution of powers of attorney

(1) This section does not apply to a power of attorney created by and contained in another instrument, for example, a mortgage or lease, that is signed by, or by direction of, the principal.

(2) An instrument creating a power of attorney must be signed by, or by direction and in the presence of, the principal.

(3) This section does not affect—

- (a) a requirement in or having effect under another Act about witnessing of instruments creating powers of attorney; or
- (b) the rules about the execution of instruments by corporations.

13 Appointment of 1 or more attorneys

(1) By a general power of attorney made under this Act, a principal may—

- (a) appoint 1 attorney, or more than 1 attorney, being joint or several, or joint and several, attorneys; and
- (b) appoint as attorney—
 - (i) a person by name; or
 - (ii) a specified officer, or the holder of a specified office,¹⁵ by reference to the title of the office concerned.

14 An approved form is a form approved by the chief executive under section 161—schedule 3 (Dictionary). Strict compliance with the form is not necessary and substantial compliance is sufficient—*Acts Interpretation Act 1954*, section 49 (Forms).

15 “Office” includes position—see *Acts Interpretation Act 1954*, section 36.

(2) If a specified officer or the holder of a specified office is appointed as an attorney—

- (a) the appointment does not cease to have effect merely because the person who was the specified officer or the holder of the specified office when the appointment was made ceases to be the officer or the holder of the office; and
- (b) the power may be exercised by the person for the time being occupying or acting in the office concerned.

14 Proof of power of attorney

(1) A power of attorney may be proved by a copy of the power of attorney certified under this section.

(2) Each page, other than the last page, of the copy must be certified to the effect that the copy is a true and complete copy of the corresponding page of the original.

(3) The last page of the copy must be certified to the effect that the copy is a true and complete copy of the original.

(4) Certification must be by 1 of the following persons—

- (a) the principal;
- (b) a justice;¹⁶
- (c) a commissioner for declarations;
- (d) a notary public;
- (e) a lawyer;¹⁷
- (f) a trustee company under the *Trustee Companies Act 1968*;
- (g) a stockbroker.

(5) If a copy of a power of attorney has been certified under this section, the power of attorney may also be proved by a copy, certified under this section, of the certified copy.

16 “**Justice**” means justice of the peace—see *Acts Interpretation Act 1954*, section 36.

17 “**Lawyer**” means a barrister, solicitor, barrister and solicitor or legal practitioner of the High Court or the Supreme Court of a State (including the Australian Capital Territory and the Northern Territory)—see *Acts Interpretation Act 1954*, sections 33A and 36.

(6) This section does not prevent a power of attorney being proved in another way.

(7) This section also applies to a power of attorney made before the commencement of this Act.¹⁸

PART 3—REVOKING A POWER OF ATTORNEY OTHER THAN AN ENDURING POWER OF ATTORNEY

Division 1—Introduction

15 Relationship with other law

This part does not limit the events by which, or circumstances in which, a power of attorney is revoked orally or in another way or terminated by implication or operation of law.

Division 2—Revocation by principal

16 Advice of revocation

If a power of attorney is revoked under this division, the principal must take reasonable steps—

- (a) to advise all attorneys affected by the revocation; and
- (b) for a power of attorney registered in the power of attorney register—to deregister it.

17 Written revocation

(1) If a power of attorney is or becomes revocable, it may be revoked by an instrument in the approved form executed in the same way as the power of attorney.

¹⁸ See also section 7 (Application of ch 2).

(2) Subsection (1) does not affect the rules about the execution of instruments by corporations.

(3) This section also applies to a power of attorney made before the commencement of this Act.¹⁹

18 Impaired capacity

(1) If a principal becomes a person who has impaired capacity, the power of attorney is revoked.²⁰

(2) However, if a principal becomes incommunicate, the court may by order confirm that, from the date of the order, all or part of the power of attorney remains in full force and effect if the court is satisfied that the confirmation is for the benefit of the principal.

(3) For this section, a person becomes “**incommunicate**” if the person becomes incapable of communicating decisions about the person’s financial, property or legal affairs in some way.

19 Death

When a principal dies, the power of attorney is revoked.

Division 3—Revocation according to terms

20 According to terms

A power of attorney is revoked according to its terms.

Examples—

1. If a power of attorney is expressed to operate for or during a specified period, it is revoked at the end of the period.
2. If a power of attorney is expressed to operate for a specific purpose, it is revoked when the purpose is achieved.

19 See also section 7 (Application of ch 2).

20 However, for a power of attorney given as security, see section 10.

Division 4—Revocation by attorney**21 Resignation**

If an attorney resigns,²¹ the power of attorney is revoked to the extent it gives power to the attorney.

22 Impaired capacity

If an attorney becomes a person who has impaired capacity, the power of attorney is revoked to the extent it gives power to the attorney.²²

23 Bankruptcy or insolvency

(1) If an individual attorney becomes bankrupt or insolvent or takes advantage of the laws of bankruptcy as a debtor under the *Bankruptcy Act 1966* (Cwlth) or a similar law of a foreign jurisdiction, the power of attorney is revoked to the extent it gives power to the attorney.²³

(2) If a corporate attorney is wound up or dissolved or a receiver (other than a receiver for a limited purpose) or administrator is appointed of the attorney, the power of attorney is revoked to the extent it gives power to the attorney.

Example—

X is an attorney under a power of attorney that is not given as security. X becomes bankrupt. Therefore, the power of attorney is revoked to the extent it gives power to X.

If X was a joint and several attorney with Y, the power of attorney is only revoked to the extent it gives power to X. Y can continue to exercise the power.

The same applies if X was a joint attorney with Y because of section 68.²⁴

21 An attorney may resign by signed notice to the principal—section 72(1).

22 However, for a power of attorney given as security, see section 10.

23 However, for a power of attorney given as security, see section 10.

24 Section 68 (Effect of disqualification of 1 joint attorney) allowed the remaining joint attorney to exercise a power that another joint attorney is unable to exercise. Now see section 59A (Effect of power ending) and the *Acts Interpretation Act 1954*, section 14H.

If X was not a joint and several attorney and the power of attorney gives power to an alternative or successive attorney, the alternative or next attorney may then exercise power.

If none of these apply, no one is able to exercise power under the power of attorney.

24 Death

When an attorney dies, the power of attorney is revoked to the extent it gives power to the attorney.

PART 4—OTHER PROVISIONS

25 Registration of powers of attorney and instruments revoking powers

(1) A power of attorney may be registered.

(2) An instrument revoking a power of attorney may be registered.

(3) Subject to another Act or a contrary intention in the power of attorney, if the power of attorney has been registered under an Act, it does not cease to authorise the attorney to do for the principal anything relevant to the purpose for which it was registered until an instrument revoking the power of attorney has been registered.

(4) This section also applies to a power of attorney made before the commencement of this Act.²⁵

26 Offence to dishonestly induce the making or revocation of power of attorney

(1) A person must not dishonestly induce a person to make or revoke a power of attorney.

Maximum penalty—200 penalty units.

(2) This section also applies to a power of attorney made before the commencement of this Act.²⁶

25 See also section 7 (Application of ch 2).

26 See also section 7 (Application of ch 2).

CHAPTER 3—ENDURING DOCUMENTS

PART 1—APPLICATION AND INTERPRETATION

27 Application of ch 3

Except where otherwise provided, this chapter applies only to enduring documents.

28 Meaning of “enduring document”

An “enduring document” is an enduring power of attorney²⁷ or an advance health directive.

29 Meaning of “eligible attorney”

(1) An “eligible attorney”, for a matter under an enduring power of attorney, means—

- (a) a person who is—
 - (i) at least 18 years; and
 - (ii) not a paid carer, or health provider, for the principal;²⁸ and
 - (iii) if the person would be given power for a financial matter—not bankrupt or taking advantage of the laws of bankruptcy as a debtor under the *Bankruptcy Act 1966* (Cwlth) or a similar law of a foreign jurisdiction; or
- (b) the public trustee; or
- (c) a trustee company under the *Trustee Companies Act 1968*; or
- (d) for a personal matter only—the adult guardian.

27 An enduring power of attorney made under the *Property Law Act 1974* and of force and effect before the commencement of section 163 is taken to be an enduring power of attorney made under this Act—section 163.

28 “Paid carer” and “health provider” are defined in schedule 3 (Dictionary).

(2) An **“eligible attorney”**, for a matter under an advance health directive, means—

- (a) a person who has capacity for the matter who is—
 - (i) at least 18 years; and
 - (ii) not a paid carer, or health provider, for the principal;²⁹ or
- (b) the public trustee; or
- (c) the adult guardian.

30 Meaning of “eligible signer”

(1) An **“eligible signer”**, to sign a document for a principal, is a person who—

- (a) is at least 18 years; and
- (b) is not the witness for the document; and
- (c) is not an attorney of the principal.

(2) To avoid any doubt, it is declared that a person is not excluded from being an eligible signer merely because the person is an attorney’s employee who signs the document while acting in the ordinary course of employment.

(3) In this section—

“attorney”, for a document, means—

- (a) a person who is an attorney of the principal whether under the document or otherwise; or
- (b) if the document is all or part of an enduring document—a person who will be an attorney of the principal under the enduring document.

31 Meaning of “eligible witness”

(1) An **“eligible witness”**, for a document, is a person who—

²⁹ **“Paid carer”** and **“health provider”** are defined in schedule 3 (Dictionary).

- (a) except for a document revoking an advance health directive—is a justice,³⁰ commissioner for declarations, notary public or lawyer;³¹ and
- (b) is not the person signing the document for the principal; and
- (c) is not an attorney of the principal; and
- (d) is not a relation of the principal or a relation of an attorney of the principal; and
- (e) if the document gives power for a personal matter—is not a paid carer or health provider of the principal; and
- (f) for an advance health directive—is at least 21 years and not a beneficiary under the principal’s will.

(2) To avoid any doubt, it is declared that a person is not excluded from being an eligible witness merely because the person is an attorney’s employee who is the witness for the document while acting in the ordinary course of employment.

(3) In this section—

“attorney”, for a document, means—

- (a) a person who is an attorney of the principal whether under the document or otherwise; or
- (b) if the document is all or part of an enduring document—a person who will be an attorney of the principal under the enduring document.

30 “Justice” means justice of the peace—see *Acts Interpretation Act 1954*, section 36.

31 “Lawyer” means a barrister, solicitor, barrister and solicitor or legal practitioner of the High Court or the Supreme Court of a State (including the Australian Capital Territory and the Northern Territory)—see *Acts Interpretation Act 1954*, sections 33A and 36.

PART 2—ENDURING POWER OF ATTORNEY PROVISIONS

32 Enduring powers of attorney

(1) By an “enduring power of attorney”, an adult (“principal”) may—

- (a) authorise 1 or more other persons who are eligible attorneys (“attorneys”) to do anything in relation to 1 or more financial matters or personal matters³² for the principal that the principal could lawfully do by an attorney if the adult had capacity for the matter when the power is exercised; and
- (b) provide terms or information about exercising the power.

(2) An enduring power of attorney³³ giving power for a matter is not revoked by the principal becoming a person with impaired capacity for the matter.

33 When attorney’s power exercisable

(1) A principal may specify in an enduring power of attorney a time when, circumstance in which, or occasion on which, a power for a financial matter is exercisable.

(2) However, if the enduring power of attorney does not specify a time when, circumstance in which, or occasion on which, power for a financial matter becomes exercisable, the power becomes exercisable once the enduring power of attorney is made.

(3) Also, if—

- (a) a time when, circumstance in which, or occasion on which, power for a financial matter is exercisable is specified; and
- (b) before the specified time, circumstance or occasion, the principal has impaired capacity for the matter;

32 “Personal matters” includes health matters but does not include special personal matters or special health matters—schedule 2, section 2.

33 An enduring power of attorney made under the *Property Law Act 1974* and of force and effect before the commencement of section 163 is taken to be an enduring power of attorney made under this Act—section 163.

power for the matter is exercisable during any or every period the principal has the impaired capacity.

(4) Power for a personal matter under the enduring power of attorney is exercisable during any or every period the principal has impaired capacity for the matter and not otherwise.³⁴

(5) If an attorney's power for a matter depends on the principal having impaired capacity for a matter, a person dealing with the attorney may ask for evidence, for example, a medical certificate, to establish that the principal has the impaired capacity.

34 Recognition of enduring power of attorney made in other States

If an enduring power of attorney is made in another State and complies with the requirements in the other State, then, to the extent the powers it gives could validly have been given by an enduring power of attorney made under this Act, the enduring power of attorney must be treated as if it were an enduring power of attorney made under, and in compliance with, this Act.

PART 3—ADVANCE HEALTH DIRECTIVE PROVISIONS

35 Advance health directives

- (1) By an “**advance health directive**”, an adult principal may—
- (a) give directions, about health matters and special health matters, for his or her future health care; and
 - (b) give information about his or her directions; and

34 However, the priority of an attorney's power for a health matter is decided by the *Guardianship and Administration Act 2000*, section 66 (Adult with impaired capacity—order of priority in dealing with health matter). See, in particular, section 66(4).

- (c) appoint 1 or more persons who are eligible attorneys to exercise power for a health matter³⁵ for the principal in the event the directions prove inadequate; and
- (d) provide terms or information about exercising the power.

(2) Without limiting subsection (1), by an advance health directive the principal may give a direction—

- (a) consenting, in the circumstances specified, to particular future health care of the principal when necessary and despite objection by the principal when the health care is provided; and
- (b) requiring, in the circumstances specified, a life-sustaining measure to be withheld or withdrawn; and
- (c) authorising an attorney to physically restrain, move or manage the principal, or have the principal physically restrained, moved or managed, for the purpose of health care when necessary and despite objection by the principal when the restraint, movement or management is provided.

(3) A direction in an advance health directive has priority over a general or specific power for health matters given to any attorney.

(4) An advance health directive is not revoked by the principal becoming a person with impaired capacity.

36 Operation of advance health directive

(1) A direction in an advance health directive—

- (a) operates only while the principal has impaired capacity for the matter covered by the direction; and
- (b) is as effective as if—
 - (i) the principal gave the direction when decisions about the matter needed to be made; and
 - (ii) the principal then had capacity for the matter.³⁶

(2) A direction to withhold or withdraw a life-sustaining measure³⁷ can not operate unless—

35 Note this does not include a special health matter.

36 See also section 101 (No less protection than if adult gave health consent).

37 Defined in schedule 2, section 5A.

- (a) 1 of the following applies—
- (i) the principal has a terminal illness or condition that is incurable or irreversible and as a result of which, in the opinion of a doctor treating the principal and another doctor, the principal may reasonably be expected to die within 1 year;
 - (ii) the principal is in a persistent vegetative state, that is, the principal has a condition involving severe and irreversible brain damage which, however, allows some or all of the principal's vital bodily functions to continue, including, for example, heart beat or breathing;
 - (iii) the principal is permanently unconscious, that is, the principal has a condition involving brain damage so severe that there is no reasonable prospect of the principal regaining consciousness;³⁸
 - (iv) the principal has an illness or injury of such severity that there is no reasonable prospect that the principal will recover to the extent that the principal's life can be sustained without the continued application of life-sustaining measures; and
- (b) for a direction to withhold or withdraw artificial nutrition or artificial hydration—the commencement or continuation of the measure would be inconsistent with good medical practice; and
- (c) the principal has no reasonable prospect of regaining capacity for health matters.

(3) An attorney's power for a health matter under an advance health directive is exercisable during any or every period the principal has impaired capacity for the matter and not otherwise.³⁹

(4) While power for a health matter is exercisable under an advance health directive, the directive gives the attorney for the matter power to do, for the principal, anything in relation to the matter the principal could lawfully do if the principal had capacity for the matter.

38 This is sometimes referred to as 'a coma'.

39 However, the priority of an attorney's power for a health matter is decided by the *Guardianship and Administration Act 2000*, section 66 (Adult with impaired capacity—order of priority in dealing with health matter). See, in particular, section 66(4).

(5) However, the power given is subject to the terms of the advance health directive and this Act.

(6) A person dealing with the attorney may ask for evidence, for example, a medical certificate, to establish that the principal has impaired capacity for the matter.

37 Act does not authorise euthanasia or affect particular provisions of Criminal Code

To avoid any doubt, it is declared that nothing in this Act—

- (a) authorises, justifies or excuses killing a person; or
- (b) affects the Criminal Code, section 284 or chapter 28.⁴⁰

38 Act's relationship with Mental Health Act

(1) For an involuntary patient under the *Mental Health Act 2000* who has given a direction about the person's health care or special health care, whether by giving a direction in an advance health directive or otherwise, an interpretation of that Act that is consistent with this Act and the direction is to be preferred to any other meaning.

40 Criminal Code—

284 Consent to death immaterial

Consent by a person to the causing of the person's own death does not affect the criminal responsibility of any person by whom such death is caused.

Chapter 28 (Homicide—suicide—concealment of birth), including—

296 Acceleration of death

A person who does any act or makes any omission which hastens the death of another person who, when the act is done or the omission is made, is labouring under some disorder or disease arising from another cause, is deemed to have killed that other person.

311 Aiding suicide

Any person who—

- (a) procures another to kill himself or herself; or
- (b) counsels another to kill himself or herself and thereby induces the other person to do so; or
- (c) aids another in killing himself or herself;

is guilty of a crime, and is liable to imprisonment for life.

(2) However, the *Mental Health Act 2000* prevails in the case of inconsistency.

39 Common law not affected

This Act does not affect common law recognition of instructions about health care given by an adult that are not given in an advance health directive.

40 Recognition of enduring health care document made in other States

If a document prescribed by regulation is made in another State and complies with the requirements for the document in the other State, then, to the extent the document's provisions could have been validly included in an advance health directive made under this Act, the document must be treated as if it were an advance health directive made under, and in compliance with, this Act.

PART 4—MAKING AN ENDURING DOCUMENT

41 Principal's capacity to make an enduring power of attorney

(1) A principal may make an enduring power of attorney only if the principal understands the nature and effect of the enduring power of attorney.⁴¹

(2) Understanding the nature and effect of the enduring power of attorney includes understanding the following matters⁴²—

- (a) the principal may, in the power of attorney, specify or limit the power to be given to an attorney and instruct an attorney about the exercise of the power;

41 However, under the general principles, a person is presumed to have capacity—schedule 1, section 1.

42 If there is a reasonable likelihood of doubt, it is advisable for the witness to make a written record of the evidence as a result of which the witness considered that the principal understood these matters.

- (b) when the power begins;
- (c) once the power for a matter begins, the attorney has power to make, and will have full control over, the matter subject to terms or information about exercising the power included in the enduring power of attorney;
- (d) the principal may revoke the enduring power of attorney at any time the principal is capable of making an enduring power of attorney giving the same power;
- (e) the power the principal has given continues even if the principal becomes a person who has impaired capacity;
- (f) at any time the principal is not capable of revoking the enduring power of attorney, the principal is unable to effectively oversee the use of the power.

42 Principal's capacity to make an advance health directive

(1) A principal may make an advance health directive, to the extent it does not give power to an attorney, only if the principal understands the following matters⁴³—

- (a) the nature and the likely effects of each direction in the advance health directive;
- (b) a direction operates only while the principal has impaired capacity for the matter covered by the direction;
- (c) the principal may revoke a direction at any time the principal has capacity for the matter covered by the direction;
- (d) at any time the principal is not capable of revoking a direction, the principal is unable to effectively oversee the implementation of the direction.

(2) A principal may make an advance health directive, to the extent it gives power to an attorney, only if the principal also understands the matters necessary to make an enduring power of attorney giving the same power.⁴⁴

43 If there is a reasonable likelihood of doubt, it is advisable for the witness to make a written record of the evidence as a result of which the witness considered that the principal understood these matters.

44 See section 41 (Principal's capacity to make an enduring power of attorney).

43 Appointment of 1 or more eligible attorneys

(1) Only a person who is an eligible attorney⁴⁵ may be appointed as an attorney by an enduring document.

(2) A principal may appoint 1 or more of the following—

- (a) a single attorney for a matter or all matters;
- (b) different attorneys for different matters;
- (c) a person to act as an attorney for a matter or all matters in a circumstance stated in the enduring document;
- (d) alternative attorneys for a matter or all matters so power is given to a particular attorney only in a circumstance stated in the enduring document;
- (e) successive attorneys for a matter or all matters so power is given to a particular attorney only when power given to a previous attorney ends;
- (f) joint or several, or joint and several, attorneys for a matter or all matters;
- (g) 2 or more joint attorneys for a matter or all matters, being a number less than the total number of attorneys for the matter or all matters.

44 Formal requirements

(1) An enduring power of attorney must be in an approved form.⁴⁶

(2) An advance health directive must be written and may be in the approved form.

(3) An enduring document must—

- (a) be signed—
 - (i) by the principal; or
 - (ii) if the principal instructs—for the principal and in the principal's presence, by an eligible signer;⁴⁷ and

45 See section 29 (Meaning of “eligible attorney”).

46 An approved form is a form approved by the chief executive under section 161—schedule 3 (Dictionary).

47 See section 30 (Meaning of “eligible signer”).

(b) be signed and dated by an eligible witness.⁴⁸

(4) If an enduring document is signed by the principal, it must include a certificate signed by the witness stating the principal—

- (a) signed the enduring document in the witness's presence; and
- (b) at the time, appeared to the witness to have the capacity necessary to make the enduring document.

(5) If an enduring document is signed by a person for the principal, it must include a certificate signed by the witness stating—

- (a) the principal, in the witness's presence, instructed the person to sign the enduring document for the principal; and
- (b) the person signed it in the presence of the principal and witness; and
- (c) the principal, at the time, appeared to the witness to have the capacity necessary to make the enduring document.

(6) An advance health directive must also include a certificate signed and dated by a doctor mentioned in subsection (7) stating the principal, at the time of making the advance health directive, appeared to the doctor to have the capacity necessary to make it.

(7) The doctor must not be—

- (a) the person witnessing the advance health directive; or
- (b) the person signing the advance health directive for the principal; or
- (c) an attorney of the principal; or
- (d) a relation of the principal or a relation of an attorney of the principal; or
- (e) a beneficiary under the principal's will.

(8) An enduring document is effective in relation to an attorney only if the attorney has accepted the appointment by signing the enduring document.

48 See section 31 (Meaning of "eligible witness").

It is advisable for the witness to make a written record of the evidence as a result of which the witness considered that the principal understood the necessary matters. For a power of attorney—see section 41 and for an advance health directive—see section 42.

45 Proof of enduring document

(1) An enduring document⁴⁹ may be proved by a copy of the enduring document certified under this section.

(2) Each page, other than the last page, of the copy must be certified to the effect that the copy is a true and complete copy of the corresponding page of the original.

(3) The last page of the copy must be certified to the effect that the copy is a true and complete copy of the original.

(4) Certification must be by 1 of the following persons—

- (a) the principal;
- (b) a justice;⁵⁰
- (c) a commissioner for declarations;
- (d) a notary public;
- (e) a lawyer;⁵¹
- (f) a trustee company under the *Trustee Companies Act 1968*;
- (g) a stockbroker.

(5) If a copy of an enduring document has been certified under this section, the enduring document may also be proved by a copy, certified under this section, of the certified copy.

(6) This section does not prevent an enduring document being proved in another way.

49 An enduring power of attorney made under the *Property Law Act 1974* and of force and effect before the commencement of section 163 is taken to be an enduring power of attorney made under this Act—section 163.

50 “**Justice**” means justice of the peace—see *Acts Interpretation Act 1954*, section 36.

51 “**Lawyer**” means a barrister, solicitor, barrister and solicitor or legal practitioner of the High Court or the Supreme Court of a State (including the Australian Capital Territory and the Northern Territory)—see *Acts Interpretation Act 1954*, sections 33A and 36.

PART 5—REVOKING AN ENDURING DOCUMENT

Division 1—Revocation by principal

46 Advice of revocation

If an enduring document⁵² is revoked under this division, the principal must take reasonable steps—

- (a) to advise all attorneys under the enduring document of its revocation; and
- (b) for an enduring power of attorney registered under the *Land Title Act 1994*—to deregister it.

47 Principal’s capacity for written revocation of power of attorney

(1) A principal may revoke an enduring power of attorney in writing only if the principal has the capacity necessary to make an enduring power of attorney giving the same power.⁵³

(2) However, a principal may revoke an enduring power of attorney in writing, to the extent it gives power for a health matter, if the principal has the capacity necessary to make an enduring power of attorney giving the same power for the health matter.

48 Principal’s capacity for written revocation of advance health directive

(1) A principal may revoke an advance health directive in writing, to the extent it includes a direction about a health matter or special health matter, only if the principal has capacity for the matter.

(2) A principal may revoke an advance health directive in writing, to the extent it gives power to an attorney, only if the principal has the capacity necessary to make an advance health directive giving the same power.

52 An enduring power of attorney made under the *Property Law Act 1974* and of force and effect before the commencement of section 163 is taken to be an enduring power of attorney made under this Act—section 163.

53 See section 41 (Principal’s capacity to make an enduring power of attorney).

49 Formal requirements for written revocation of enduring document

(1) A written revocation of an enduring power of attorney must be in the approved form.

(2) However, a written revocation of an enduring power of attorney, to the extent it gives power for a health matter, or a written revocation of an advance health directive need not be in the approved form.

(3) The revocation of an enduring power of attorney must—

(a) be signed—

(i) by the principal; or

(ii) if the principal revoking it instructs—for the principal and in the principal's presence, by an eligible signer;⁵⁴ and

(b) be signed and dated by an eligible witness.⁵⁵

(4) If the revocation is signed by the principal, it may include a certificate signed by the witness stating the principal—

(a) signed the revocation in the witness's presence; and

(b) at the time, appeared to the witness to have the capacity necessary for the revocation.

(5) If the revocation is signed by a person for the principal, it must include a certificate signed by the witness stating—

(a) the principal, in the witness's presence, instructed the person to sign the revocation on the principal's behalf; and

(b) the person signed it in the presence of the principal and witness; and

(c) the principal, at the time, appeared to the witness to have the capacity necessary for the revocation.

54 See section 30 (Meaning of "eligible signer").

55 See section 31 (Meaning of "eligible witness").

It is advisable for the witness to make a written record of the evidence as a result of which the witness considered that the principal understood the necessary matters. For a power of attorney—see section 47 and for an advance health directive—see section 48.

50 Later enduring document

(1) A principal's enduring power of attorney is revoked, to the extent of an inconsistency, by a later enduring document of the principal.

Example—

If a principal gives—

- (a) power for a matter to an attorney by an enduring power of attorney; and
- (b) either—
 - (i) power for the matter to a different attorney by a later enduring power of attorney; or
 - (ii) a direction about the matter in a later advance health directive;

the earlier enduring power of attorney is revoked to the extent it gives power for the matter.

(2) A principal's advance health directive is revoked, to the extent of an inconsistency, by a later advance health directive.⁵⁶

51 Death

When a principal dies, the enduring document is revoked.

52 Marriage

Unless there is a contrary intention expressed in the enduring document, if a principal marries after making an enduring document, the enduring document is revoked to the extent it gives power to someone other than the principal's husband or wife.

53 Divorce

If a principal divorces after making an enduring document, the enduring document is revoked to the extent it gives power to the divorced spouse.

⁵⁶ If there is a direction about a health matter in an advance health directive and a later enduring power of attorney giving an attorney power for the health matter, the direction prevails. See the *Guardianship and Administration Act 2000*, section 66 (Adult with impaired capacity—order of priority in dealing with health matter).

Division 2—Revocation according to terms**54 According to terms**

An enduring document is revoked according to its terms.

Examples—

1. If an enduring power of attorney is expressed to operate for or during a specified period, it is revoked at the end of the period.
2. If an enduring power of attorney is expressed to operate for a specific purpose, it is revoked when the purpose is achieved.

Division 3—Revocation by attorney**55 Resignation**

If an attorney resigns⁵⁷ as attorney for a matter, the enduring document is revoked to the extent it gives power to the attorney for the matter.

56 Impaired capacity

If an attorney for a matter becomes a person who has impaired capacity for the matter, the enduring document is revoked to the extent it gives power to the attorney for the matter.

57 Bankruptcy or insolvency

(1) This section applies only to enduring powers of attorney.

(2) If an individual attorney for a financial matter becomes bankrupt or insolvent or takes advantage of the laws of bankruptcy as a debtor under the *Bankruptcy Act 1966* (Cwlth) or a similar law of a foreign jurisdiction, the power of attorney is revoked to the extent it gives power for financial matters to the attorney.

(3) If a corporate attorney is wound up or dissolved or a receiver (other than a receiver for a limited purpose) or administrator is appointed of the

⁵⁷ An attorney may resign by signed notice to the principal if the principal has capacity for the matter (section 72 (Resignation of attorney)) or otherwise with the court's leave (section 82 (Resignation of attorney while principal has impaired capacity)).

attorney, the power of attorney is revoked to the extent it gives power to the attorney.

Example—

Under an enduring power of attorney, X, an individual, exercises power for financial matters generally. X becomes bankrupt. Therefore, the enduring power of attorney is revoked to the extent it gives power for financial matters to X.

If X was a joint and several attorney with Y, the enduring power of attorney is only revoked to the extent it gives power to X. Y can continue to exercise the power.

The same applies if X was a joint attorney with Y because of section 68.⁵⁸

If X was not a joint and several attorney and the enduring power of attorney gives an alternative or successive attorney power for financial matters, the alternative or next attorney then has power for financial matters.

If none of these apply, no one is able to exercise power for financial matters under the enduring power of attorney.

58 Death

When an attorney dies, the enduring document is revoked to the extent it gives power to the attorney.

59 Paid carer or health provider

If an attorney becomes a paid carer, or health provider, for the principal, the enduring document is revoked to the extent it gives power for a personal matter to the attorney.

59A Effect of power ending

If an attorney's power for a matter ends and the attorney was a joint attorney for the matter—

- (a) if, of the joint attorneys, there is 1 remaining attorney, the remaining attorney may exercise power for the matter; and

58 Section 68 (Effect of disqualification of 1 joint attorney) allowed the remaining joint attorney to exercise a power that another joint attorney is unable to exercise. Now see section 59A (Effect of power ending) and the *Acts Interpretation Act 1954*, section 14H.

- (b) if, of the joint attorneys, there are 2 or more remaining attorneys, the remaining attorneys may exercise power for the matter and, if exercising power, must exercise power jointly.

PART 6—OTHER PROVISIONS

60 Registration of powers of attorney and instruments revoking powers

(1) An enduring power of attorney⁵⁹ may be registered.

(2) An instrument revoking an enduring power of attorney may be registered.

(3) Subject to another Act, if an enduring power of attorney has been registered, it may not, unless a different intention appears from the enduring power of attorney, cease to authorise the attorney to deal with land for the principal until an instrument revoking the enduring power of attorney has been registered.

61 Offence to dishonestly induce the making or revocation of enduring document

A person must not dishonestly induce a person to make or revoke an enduring document.

Maximum penalty—200 penalty units.

⁵⁹ An enduring power of attorney made under the *Property Law Act 1974* and of force and effect before the commencement of section 163 is taken to be an enduring power of attorney made under this Act—section 163.

CHAPTER 4—STATUTORY HEALTH ATTORNEYS

62 Statutory health attorney

(1) This Act authorises a statutory health attorney for an adult’s health matter⁶⁰ to make any decision about the health matter that the adult could lawfully make if the adult had capacity for the matter.

(2) A statutory health attorney’s power for a health matter is exercisable during any or every period the adult has impaired capacity for the matter.⁶¹

63 Who is the statutory health attorney

(1) For a health matter, an adult’s “**statutory health attorney**” is the first, in listed order, of the following people who is readily available and culturally appropriate to exercise power for the matter—

- (a) a spouse of the adult if the relationship between the adult and the spouse is close and continuing;
- (b) a person who is 18 years or more and who has the care of the adult and is not a paid carer for the adult;
- (c) a person who is 18 years or more and who is a close friend or relation of the adult and is not a paid carer for the adult.⁶²

(2) If no-one listed in subsection (1) is readily available and culturally appropriate to exercise power for a matter, the adult guardian is the adult’s “**statutory health attorney**” for the matter.

(3) Without limiting who is a “**person who has the care of the adult**”, for this section, a person has the care of an adult if the person—

- (a) provides domestic services and support to the adult; or
- (b) arranges for the adult to be provided with domestic services and support.

60 Note this does not include a special health matter.

61 However, the priority of an attorney’s power is decided by the *Guardianship and Administration Act 2000*, section 66 (Adult with impaired capacity—order of priority in dealing with health matter). See, in particular, section 66(5).

62 If there is a disagreement about which of 2 or more eligible people should be the statutory health attorney or how the power should be exercised, see the *Guardianship and Administration Act 2000*, section 42 (Disagreement about health matter).

(4) If an adult resides in an institution (for example, a hospital, nursing home, group home, boarding-house or hostel) at which the adult is cared for by another person, the adult—

- (a) is not, merely because of this fact, to be regarded as being in the care of the other person; and
- (b) remains in the care of the person in whose care the adult was immediately before residing in the institution.

CHAPTER 5—EXERCISING POWER FOR A PRINCIPAL

PART 1—PROVISIONS APPLYING TO ATTORNEYS

65 Application of pt 1

Except where otherwise provided, this part applies to an attorney under—

- (a) a general power of attorney made under this Act;⁶³ or
- (b) an enduring document; or
- (c) a power of attorney made otherwise than under this Act, whether before or after its commencement.

66 Act honestly and with reasonable diligence

(1) An attorney must exercise power honestly and with reasonable diligence to protect the principal's interests.

Maximum penalty—200 penalty units.

⁶³ A general power of attorney, or enduring power of attorney, made under the *Property Law Act 1974* and of force and effect before the commencement of section 163 is taken to be a general power of attorney, or enduring power of attorney, made under this Act—section 163.

(2) In addition to any other liability the attorney may incur, the court may order the attorney to compensate the principal for a loss caused by the attorney's failure to comply with subsection (1).

67 Subject to terms of document

An attorney who may exercise a power under a document must, when exercising the power, exercise it subject to the terms of the document.

69 Execution of instrument etc.

(1) If necessary or convenient for the exercise of power given to an attorney, the attorney may—

- (a) execute an instrument with the attorney's own signature and, despite the fact that the power of attorney was given under hand, if sealing is required or used, with the attorney's own seal; and
- (b) do any other thing in the attorney's own name.

(2) An instrument executed by an attorney must be executed in a way showing that the attorney executes it as attorney for the principal.

(3) An instrument executed, or thing done, in the way specified in this section is as effective as if executed or done by the principal—

- (a) with the principal's signature; or
- (b) with the principal's signature and seal; or
- (c) in the principal's name.

(4) This section applies subject to the *Property Law Act 1974*, section 46.⁶⁴

70 Subject to guardian or administrator

(1) If a person is appointed under the *Guardianship and Administration Act 2000* as guardian or administrator for a principal, an attorney for the principal may exercise power only to the extent authorised by the tribunal.

(2) In this section—

“attorney” includes a statutory health attorney.

64 This section deals with the execution of documents by corporations.

71 Not exercise revoked power

An attorney, who knows a power given to the attorney has been revoked, must not exercise, or purport to exercise, the power.

Maximum penalty— 200 penalty units.

72 Resignation of attorney

(1) An attorney may resign as attorney for a matter by signed notice given to the principal.⁶⁵

(2) This section does not affect another way an attorney may resign allowed by law.⁶⁶

73 Avoid conflict transaction

(1) An attorney for a financial matter may enter into a conflict transaction only if the principal authorises the transaction, conflict transactions of that type or conflict transactions generally.⁶⁷

(2) A “**conflict transaction**” is a transaction in which there may be conflict, or which results in conflict, between—

- (a) the duty of an attorney towards the principal; and
- (b) either—
 - (i) the interests of the attorney, or a relation, business associate or close friend of the attorney; or
 - (ii) another duty of the attorney.

Examples—

1. A conflict transaction happens if an attorney for a financial matter buys the principal’s car.
2. A conflict transaction does not happen if an attorney for a financial matter is acting under section 89 to maintain the principal’s dependants.

65 However, for an enduring document, see also section 82 (Resignation of attorney while principal has impaired capacity).

66 For example, an attorney under a power of attorney made under the common law or the *Property Law Act 1974*, may resign orally.

67 However, see section 105 (Relief from personal liability).

(3) However, a transaction is not a conflict transaction merely because by the transaction the attorney in the attorney's own right and on behalf of the principal—

- (a) deals with an interest in property jointly held; or
- (b) acquires a joint interest in property; or
- (c) obtains a loan or gives a guarantee or indemnity in relation to a transaction mentioned in paragraph (a) or (b).

(4) In this section—

“joint interest” includes an interest as a joint tenant or tenant in common.

74 Preservation of confidentiality

(1) If a person gains confidential information because of being, or an opportunity given by being, an attorney, the person must not make a record of the information or intentionally or recklessly disclose the information to anyone other than under subsection (2).

Maximum penalty—200 penalty units.

(2) A person may make a record of confidential information, or disclose it to someone else—

- (a) to discharge a function under this Act or another law; or
- (b) for a proceeding in a court or relevant tribunal; or
- (c) if authorised under a regulation or another law; or
- (d) if authorised by the person to whom the information relates; or
- (e) if authorised by the court in the public interest because a person's life or physical safety could otherwise reasonably be expected to be endangered.

(3) This section also applies to a statutory health attorney.

(4) In this section—

“confidential information” includes information about a person's affairs but does not include—

- (a) information already publicly disclosed unless further disclosure of the information is prohibited by law; or

- (b) statistical or other information that could not reasonably be expected to result in the identification of the person to whom the information relates.

PART 2—PROVISIONS APPLYING TO ATTORNEYS UNDER ENDURING DOCUMENTS AND STATUTORY HEALTH ATTORNEYS

75 Application of pt 2

Except where otherwise provided, this part applies to—

- (a) an attorney under an enduring document; and
- (b) a statutory health attorney.

76 General principles for adults with impaired capacity

The principles set out in schedule 1 (the “**general principles**” and, for a health matter, the “**health care principle**”) must be complied with by a person or other entity who performs a function⁶⁸ or exercises a power⁶⁹ under this Act, or an enduring document, for a matter in relation to an adult who has impaired capacity.

Example—

If a principal of an enduring power of attorney or advance health directive has impaired capacity for a matter, an attorney who may exercise power for the matter must—

- (a) comply with the general principles; and
- (b) if the matter is a health matter, also comply with the health care principle.

77 Attorney has maximum power if not otherwise stated

To the extent an enduring document does not state otherwise, an attorney is taken to have the maximum power that could be given to the attorney by the enduring document.

68 “**Function**” includes duty—see *Acts Interpretation Act 1954*, section 36.

69 “**Power**” includes authority—see *Acts Interpretation Act 1954*, section 36.

Example—

If an adult's enduring power of attorney merely states that 'I appoint [full name] as my attorney', the appointee is taken to have power for all financial matters and all personal matters for the adult.

78 Multiple attorneys are joint if not otherwise stated

Two or more attorneys for a matter are appointed as joint attorneys for the matter if the enduring document does not state how they are to share the power given to them.

79 Consult with principal's other appointees or attorneys

(1) If there are 2 or more persons who are guardian, administrator or attorney for a principal, the persons must consult with one another on a regular basis to ensure the principal's interests are not prejudiced by a breakdown in communication between them.⁷⁰

(2) However, failure to comply with subsection (1) does not affect the validity of an exercise of power by a guardian, administrator or attorney.

80 Act together with joint attorneys

(1) Attorneys for a principal who may exercise power for a matter jointly must exercise the power unanimously unless the enduring document concerned provides otherwise.

(2) If it is impracticable or impossible to exercise the power unanimously, 1 or more of the attorneys, or another interested person for the adult, may apply for directions to the court.

81 Right of attorney to information

(1) An attorney has a right to all the information that the principal would have been entitled to if the principal had capacity and that is necessary to make, for the principal, informed decisions about anything the attorney is authorised to do.

⁷⁰ Note *Guardianship and Administration Act 2000*, sections 41 (Disagreement about matter other than health matter), 42 (Disagreement about health matter) and 43 (Acting contrary to health care principle).

(2) A person who has custody or control of the information must disclose the information to the attorney on request.

(3) This section overrides—

- (a) any restriction, in an Act or the common law, about the disclosure or confidentiality of information; and
- (b) for an attorney under an enduring power of attorney—any claim of confidentiality or privilege, including a claim based on legal professional privilege; and
- (c) for another attorney—any claim of confidentiality or privilege, excluding a claim based on legal professional privilege.

82 Resignation of attorney while principal has impaired capacity

(1) Despite section 72,⁷¹ while a principal has impaired capacity for a matter, an attorney under an enduring document may only resign as attorney for the matter with the court's leave.

(2) If the court gives leave for an attorney to resign for a matter, the court may appoint a new attorney⁷² to replace the attorney for the matter.

PART 3—PROVISIONS ABOUT FINANCIAL MATTERS

83 Application

Except where otherwise provided, this part applies only to enduring powers of attorney.⁷³

71 Section 72 (Resignation of attorney)

72 The court is not limited to appointing an “eligible attorney” (defined in section 29) as the new attorney.

73 An enduring power of attorney made under the *Property Law Act 1974* and of force and effect before the commencement of section 163 is taken to be an enduring power of attorney made under this Act—section 163.

84 Power to invest

(1) This section does not apply to an enduring power of attorney made under the *Property Law Act 1974*.

(2) An attorney for financial matters may invest only in authorised investments.

(3) However, if, when the power became exercisable, the principal had investments that were not authorised investments, an attorney for financial matters may continue the investments, including by taking rights to issues of new shares, or options for new shares, to which the principal becomes entitled by the principal's existing shareholding.

(4) In this section—

“authorised investment” means—

- (a) an investment which, if the investment were of trust funds by a trustee, would be an investment by the trustee exercising a power of investment under the *Trusts Act 1973*, part 3; or
- (b) an investment approved by the tribunal.

85 Keep records

An attorney for a financial matter must keep and preserve accurate records and accounts of all dealings and transactions made under the power.⁷⁴

86 Keep property separate

(1) An attorney for a financial matter must keep the attorney's property separate from the principal's property.

Maximum penalty—300 penalty units.

(2) Subsection (1) does not apply to—

- (a) property owned jointly by the principal and attorney; or
- (b) property acquired jointly by the principal and attorney in place of property owned jointly by the principal and attorney.

(3) Subsection (1) does not affect another obligation imposed by law.

⁷⁴ See also *Guardianship and Administration Act 2000*, chapter 8 (Adult guardian), part 2 (Investigative powers).

87 Presumption of undue influence

The fact that a transaction is between a principal and 1 or more of the following—

- (a) an attorney under an enduring power of attorney or advance health directive;
- (b) a relation, business associate or close friend of the attorney;

gives rise to a presumption in the principal's favour that the principal was induced to enter the transaction by the attorney's undue influence.

88 Gifts

(1) Unless there is a contrary intention expressed in the enduring power of attorney, an attorney for financial matters for an individual may give away the principal's property only if—

- (a) the gift is—
 - (i) to a relation or close friend of the principal; and
 - (ii) of a seasonal nature or because of a special event (including, for example, a birth or marriage); or
- (b) the gift is a donation of the nature that the principal made when the principal had capacity or that the principal might reasonably be expected to make;

and the gift's value is not more than what is reasonable having regard to all the circumstances and, in particular, the principal's financial circumstances.

(2) The attorney or a charity with which the attorney has a connection is not precluded from receiving a gift under subsection (1).

89 Maintain principal's dependants

(1) An attorney for financial matters for an individual may provide from the principal's estate for the needs of a dependant of the principal.

(2) However, unless there is a contrary intention expressed in the enduring power of attorney, what is provided must not be more than what is reasonable having regard to all the circumstances and, in particular, the principal's financial circumstances.

PART 5—PROTECTION AND RELIEF FROM LIABILITY

96 Interpretation

In this part—

“**invalidity**”, of a power under a document, means invalidity because—

- (a) the document was made in another State and does not comply with the other State’s requirements; or
- (b) the power is not exercisable at the time it is purportedly exercised; or
- (c) the document has been revoked.

“**know**”, of a power’s invalidity, includes—

- (a) know of the happening of an event⁷⁵ that invalidates the power; or
- (b) have reason to believe the power is invalid.

97 Protection if court advice, directions or recommendations

An attorney who acts in compliance with the court’s advice, directions or recommendations is taken to have complied with this Act unless the attorney knowingly gave the court false or misleading information relevant to the court’s advice, directions or recommendations.

98 Protection for attorney if unaware of invalidity

(1) This section applies to an attorney under—

- (a) a general power of attorney made under this Act; or
- (b) an enduring document; or
- (c) a power of attorney made otherwise than under this Act, whether before or after its commencement.

⁷⁵ For example, a principal’s enduring power of attorney is revoked if the principal dies (section 24) or, to the extent an attorney was given power, if the attorney becomes a health provider for the principal (section 59).

(2) An attorney who, without knowing a power is invalid,⁷⁶ purports to exercise the power does not incur any liability, either to the principal or anyone else, because of the invalidity.

99 Protection for person dealing with attorney and next person if unaware of invalidity

(1) A person who—

- (a) deals with an attorney under a general power of attorney made under this Act, or an enduring document, (the “**document**”);⁷⁷ and
- (b) does not know, or have reason to believe, the principal did not have capacity to make the document;

is entitled to rely on the certificate of the witness to the document as evidence of the principal’s capacity to make the document.

(2) A transaction between—

- (a) an attorney purporting to use a power that is invalid; and
- (b) someone else (the “**third person**”) who does not know of the invalidity;

is, in favour of the third person, as valid as if the power were not invalid.

(3) If the interest of a purchaser depends on whether a transaction between an attorney and a third person was valid because of subsection (2), it is conclusively presumed in favour of the purchaser that the third person did not at the material time know of the invalidity of the attorney’s power if—

- (a) the third person makes a statutory declaration before or within 3 months after the completion of the purchase that the third person did not at the material time know of the invalidity of the attorney’s power; or
- (b) the transaction between the attorney and the third person was completed within 1 year after the power of attorney was made.

⁷⁶ See section 113 (Declaration about validity).

⁷⁷ A general power or attorney, or enduring power of attorney, made under the *Property Law Act 1974* and of force and effect before the commencement of section 163 is taken to be a general power of attorney, or enduring power of attorney, made under this Act—section 163.

(4) In subsections (2) and (3)—

“attorney” means an attorney under—

- (a) a general power of attorney made under this Act; or
- (b) an enduring document; or
- (c) a power of attorney made otherwise than under this Act, whether before or after its commencement.

100 Additional protection if unaware of invalidity in health context

A person, other than an attorney, who, without knowing an advance health directive or a power for a health matter under an enduring document is invalid, acts in reliance on the directive or purported exercise of the power, does not incur any liability, either to the adult or anyone else, because of the invalidity.

101 No less protection than if adult gave health consent

A person, other than an attorney, acting in accordance with a direction in an advance health directive, or a decision of an attorney for a health matter, is not liable for an act or omission to any greater extent than if the act or omission happened with the principal’s consent and the principal had capacity to consent.

102 Protection of health provider unaware of advance health directive

A health provider is not affected by an adult’s advance health directive to the extent the health provider does not know the adult has an advance health directive.

103 Protection of health provider for non-compliance with advance health directive

(1) This section applies if a health provider has reasonable grounds to believe that a direction in an advance health directive is uncertain or inconsistent with good medical practice or that circumstances, including advances in medical science, have changed to the extent that the terms of the direction are inappropriate.

(2) The health provider does not incur any liability, either to the adult or anyone else, if the health provider does not act in accordance with the direction.

(3) However, if an attorney is appointed under the advance health directive, the health provider has reasonable grounds to believe that a direction in the advance health directive is uncertain only if, among other things, the health provider has consulted the attorney about the direction.

104 Protection for person carrying out forensic examination with consent

(1) A person carrying out a forensic examination of a principal to which an attorney for the principal has consented is not liable for an act or omission to any greater extent than if the act or omission happened with the principal's consent and the principal had capacity to consent.

(2) A forensic examination, to which the attorney has consented, is not unlawful.

105 Relief from personal liability

(1) If the court considers—

- (a) an attorney is, or may be, personally liable for a breach of this Act; and
- (b) the attorney has acted honestly and reasonably and ought fairly to be excused for the breach;

the court may relieve the attorney from all or part of the attorney's personal liability for the breach.

(2) In this section—

“attorney” means—

- (a) an attorney under a general power of attorney made under this Act; or
- (b) an attorney under an enduring document; or
- (c) an attorney under a power of attorney made otherwise than under this Act, whether before or after its commencement; or
- (d) a statutory health attorney.

PART 6—COMPENSATION

106 Compensation for failure to comply

(1) An attorney may be ordered by a court to compensate the principal (or, if the principal has died, the principal's estate) for a loss caused by the attorney's failure to comply with this Act in the exercise of a power.

(2) Subsection (1) applies even if the attorney is convicted of an offence in relation to the attorney's failure.

(3) If the principal or attorney has died, the application for compensation must be made to a court within 6 months after the death.

(4) If the principal and attorney have died, the application for compensation must be made to a court within 6 months after the first death.

(5) A court may extend the application time.

(6) Compensation paid under a court order must be taken into account in assessing damages in a later civil proceeding in relation to the attorney's exercise of the power.

(7) In this section—

“attorney” means an attorney under—

- (a) a general power of attorney made under this Act; or
- (b) an enduring document; or
- (c) a power of attorney made otherwise than under this Act, whether before or after its commencement.

“court” means any court.

107 Power to apply to court for compensation for loss of benefit in estate

(1) This section applies if a person's benefit in a principal's estate under the principal's will, on intestacy, or by another disposition taking effect on the principal's death, is lost because of a sale or other dealing with the principal's property by an attorney of the principal.

(1A) This section applies even if the person whose benefit is lost is the attorney by whose dealing the benefit is lost.

(2) The person, or the person's personal representative, may apply to the Supreme Court for compensation out of the principal's estate.

(3) The court may order that the person, or the person's estate, be compensated out of the principal's estate as the court considers appropriate but the compensation must not exceed the value of the lost benefit.

(4) The *Succession Act 1981*, sections 41(2) to (8), (10) and (11) and 44 apply to an application and an order made on it as if the application was an application under part 4 of that Act⁷⁸ by a person entitled to make an application.

(5) In this section—

“attorney” means an attorney under—

- (a) a general power of attorney made under this Act; or
- (b) an enduring document; or
- (c) a power of attorney made otherwise than under this Act, whether before or after its commencement.

CHAPTER 6—SUPREME COURT

PART 1—GENERAL

108 Powers extend to powers of attorney made otherwise than under this Act

(1) The court's powers under this Act are not limited to general powers of attorney made under this Act and enduring documents.

(2) The court's powers under this Act extend to powers of attorney made otherwise than under this Act, whether made before or after its commencement.

78 *Succession Act 1981*, part 4 (Family provision)

109 Inherent jurisdiction and litigation guardian process not affected

(1) This Act does not affect the court's inherent jurisdiction, including its *parens patriae* jurisdiction, or the powers the court has other than under this Act.⁷⁹

(2) This Act does not affect rules of court of the Supreme Court, District Court or Magistrates Courts about a litigation guardian for a person under a legal incapacity.

109A Guardianship and Administration Tribunal also has jurisdiction and powers about enduring documents

(1) The tribunal is given the same jurisdiction and powers for enduring documents as the Supreme Court.

(2) For subsection (1), this Act applies, with necessary changes, as if references to the Supreme Court were references to the tribunal.

PART 2—COURT'S POWERS**110 Application and participation**

(1) An application may be made to the court for a declaration, order, direction, recommendation or advice about something in, or related to, this Act.

(2) The application may be by the principal concerned or another interested person unless this Act states otherwise.

(3) Each of the following persons may apply to the court for it to do something under this chapter about a power of attorney, enduring power of attorney or advance health directive, or the exercise of an attorney's power—

- (a) the principal;

⁷⁹ This jurisdiction is based on the need to protect those who lack the capacity to protect themselves. It allows the Supreme Court to appoint attorneys for people who, because of mental illness, intellectual disability, illness, accident or old age, are unable to adequately safeguard their own interests.

- (b) a member of the principal's family;
- (c) an attorney;
- (d) the adult guardian or public trustee;
- (e) if the document is an advance health directive or the application involves power for a health matter—the adult guardian or a health provider of the principal;
- (f) an interested person.

(4) A person joined as a party to a proceeding under this Act or a person the court considers an interested person may participate in the proceeding.

(5) In this section—

“**family**”, of a principal, consists of the following members—

- (a) the principal's spouse;
- (b) each of the principal's children who is 18 years or more (including a stepchild, an adopted child, and a person for whom the principal was foster-parent or guardian when the person was a child);
- (c) each of the principal's parents (including a step-parent, adoptive parent, foster-parent and guardian);
- (d) if there is no person mentioned in paragraph (a), (b) or (c) who is reasonably available—each of the principal's siblings who is 18 years or more (including a step-sibling, adopted sibling, and foster-sibling).

111 Determination of capacity

The court may make a declaration about a person's capacity.

112 Effect of declaration about capacity to enter contract

A declaration about whether a person had capacity to enter a contract is binding in a subsequent proceeding in which the validity of the contract is in issue.

113 Declaration about validity

(1) The court may decide the validity of a power of attorney, enduring power of attorney or advance health directive.

(2) The court may declare a document mentioned in subsection (1) invalid if the court is satisfied—

- (a) the principal did not have the capacity necessary to make it;⁸⁰ or
- (b) it does not comply with the other requirements of this Act;⁸¹ or
- (c) it is invalid for another reason, for example, the principal was induced to make it by dishonesty or undue influence.

(3) If the court declares the document invalid, the court may, at the same time, appoint 1 or more attorneys⁸² for the principal.

114 Effect of invalidity

If the court declares a document invalid under section 113, the document is void from the start.

115 Declaration about commencement of power

The court may make a declaration that—

- (a) a power, under a power of attorney, enduring power of attorney or advance health directive, has begun; or
- (b) the principal has impaired capacity for a matter or all matters.

116 Order removing attorney or changing or revoking document

The court may, by order—

- (a) remove an attorney and appoint a new attorney⁸³ to replace the removed attorney; or

80 See sections 41 (Principal's capacity to make an enduring power of attorney) and 42 (Principal's capacity to make an advance health directive).

81 See chapter 2, part 2 (Making a power of attorney other than an enduring power of attorney) and chapter 3, part 4 (Making an enduring document), particularly section 44 (Formal requirements).

82 The court is not limited to appointing an "eligible attorney" (defined in section 29).

83 The court is not limited to appointing an "eligible attorney" (defined in section 29).

- (b) remove a power from an attorney and give the removed power to another attorney or to a new attorney; or
- (c) change the terms of a power of attorney, enduring power of attorney or advance health directive; or
- (d) revoke all or part of a document mentioned in paragraph (c).

117 Changed circumstances as basis for change or revocation

Without limiting the grounds on which the court may make an order changing the terms of a power of attorney, enduring power of attorney or advance health directive, or revoking all or part of 1 of these documents, the court may make the order if the court considers the principal's circumstances or other circumstances (including, for a health power, advances in medical science) have changed to the extent that 1 or more terms of the document are inappropriate.

118 Advice, directions and recommendations etc.

(1) On an application about a matter, the court may give directions or advice or make a recommendation, order or declaration about the matter or another matter related to this Act, including about—

- (a) the interpretation of the terms of, or another issue involving, a power of attorney, enduring power of attorney or advance health directive; or
- (b) the exercise of an attorney's power or another issue involving an attorney's power.

(2) Without limiting subsection (1), if the court considers it in the best interests of the principal, the court may, by order and subject to the terms the court considers appropriate, authorise an attorney, either generally or in a specific case, to undertake a transaction that the attorney is not otherwise authorised to undertake or may not otherwise be authorised to undertake.

120 Court may proceed without all relevant material

(1) If the court considers urgent or special circumstances justify it doing so, the court may proceed to decide a matter on the information before it without receiving all relevant material.

(2) If all the participants in a proceeding agree, the court may also proceed to decide a matter in the proceeding on the information before it when the agreement was reached without receiving all relevant material.

(3) Before the participants agree, the court must ensure they are aware of the material on which the matter will be decided.

121 Report by adult guardian or public trustee

(1) The court may—

- (a) receive in evidence in a proceeding a written report by the adult guardian or public trustee on a matter in the proceeding; and
- (b) have regard to the matter contained in the report.

(2) If the court receives a report in evidence in a proceeding, the principal concerned in the proceeding and each participant in the proceeding must be given a copy of the report unless the court directs otherwise.

122 Records and audit

(1) For an attorney for a financial matter under an enduring power of attorney, the court may make an order that—

- (a) the attorney files in the court, and serves on the applicant, a summary of receipts and expenditure under the power for a specified period; or
- (b) the attorney files in the court, and serves on the applicant, more detailed accounts of dealings and transactions under the power for a specified period; or
- (c) the accounts be audited by an auditor appointed by the court and that a copy of the auditor's report be given to the court and the applicant; or
- (d) the attorney present a plan of management for approval.

(2) The court may make the order on its own initiative or on the application of the principal or another interested person.

(3) The court may make an order about payment of the auditor's costs, including security for the costs.

123 Court may dismiss frivolous etc. applications

(1) The court may dismiss an application if the court is satisfied the application is—

- (a) frivolous, trivial or vexatious; or
- (b) misconceived or lacking in substance.

(2) If the court considers it appropriate, the court may also—

- (a) order that the applicant pay the costs of another participant in the proceeding; and
- (b) direct that the applicant must not, without the court's leave, make a subsequent application to the court of a type stated in the direction.

(3) The court may discharge or change a direction under subsection (2).

124 Written reasons for decision

On application by a person the court considers has a sufficient interest in obtaining reasons for its decision, the court must give written reasons for the decision within 28 days after the application.

125 Costs

- (1) The costs of a proceeding are within the court's discretion.
- (2) However, unless the court otherwise orders, costs follow the event.

CHAPTER 8—OTHER**161 Chief executive may approve forms**

The chief executive may approve forms for use under this Act.

162 Regulation-making power

The Governor in Council may make regulations under this Act.

CHAPTER 9—TRANSITIONAL PROVISIONS

PART 1—TRANSITIONAL PROVISION FOR ACT NO. 22 OF 1998

163 Powers of attorney under Property Law Act 1974

Except where this Act expressly provides otherwise, on the commencement of this section, a general power of attorney, or enduring power of attorney, made under the *Property Law Act 1974* and of force and effect immediately before the commencement of this section is taken to be a general power of attorney, or enduring power of attorney, made under this Act.

PART 2—TRANSITIONAL PROVISION FOR GUARDIANSHIP AND ADMINISTRATION ACT 2000

164 Subject to committee or manager

(1) If a person, other than an attorney, is committee or manager of a principal, or all or part of a principal's estate, the attorney may exercise power for the principal only to the extent authorised by the committee or manager.

(2) In this section—

“attorney” includes a statutory health attorney.

**PART 3—TRANSITIONAL PROVISIONS FOR
GUARDIANSHIP AND ADMINISTRATION AND
POWERS OF ATTORNEY AMENDMENT ACT 2001**

165 References to special life-sustaining measures

A reference in an enduring document of force and effect immediately before the commencement of this section to special life-sustaining measures or a special life-sustaining measure, however described, is, from the commencement of this section, taken to be a reference to life-sustaining measures or a life-sustaining measure.

166 Power for health matters excludes power for withholding or withdrawal of life-sustaining measure

An enduring document of force and effect immediately before the commencement of this section that authorises an attorney to exercise power for health matters does not, from the commencement of this section, authorise the attorney to exercise power for the withholding or withdrawal of a life-sustaining measure.

SCHEDULE 1

PRINCIPLES

section 76

PART 1—GENERAL PRINCIPLES

1 Presumption of capacity

An adult is presumed to have capacity for a matter.

2 Same human rights

(1) The right of all adults to the same basic human rights regardless of a particular adult's capacity must be recognised and taken into account.

(2) The importance of empowering an adult to exercise the adult's basic human rights must also be recognised and taken into account.

3 Individual value

An adult's right to respect for his or her human worth and dignity as an individual must be recognised and taken into account.

4 Valued role as member of society

(1) An adult's right to be a valued member of society must be recognised and taken into account.

(2) Accordingly, the importance of encouraging and supporting an adult to perform social roles valued in society must be taken into account.

5 Participation in community life

The importance of encouraging and supporting an adult to live a life in the general community, and to take part in activities enjoyed by the general community, must be taken into account.

SCHEDULE 1 (continued)

6 Encouragement of self-reliance

The importance of encouraging and supporting an adult to achieve the adult's maximum physical, social, emotional and intellectual potential, and to become as self-reliant as practicable, must be taken into account.

7 Maximum participation, minimal limitations and substituted judgment

(1) An adult's right to participate, to the greatest extent practicable, in decisions affecting the adult's life, including the development of policies, programs and services for people with impaired capacity for a matter, must be recognised and taken into account.

(2) Also, the importance of preserving, to the greatest extent practicable, an adult's right to make his or her own decisions must be taken into account.

(3) So, for example—

- (a) the adult must be given any necessary support, and access to information, to enable the adult to participate in decisions affecting the adult's life; and
- (b) to the greatest extent practicable, for exercising power for a matter for the adult, the adult's views and wishes are to be sought and taken into account; and
- (c) a person or other entity in performing a function or exercising a power under this Act must do so in the way least restrictive of the adult's rights.

(4) Also, the principle of substituted judgment must be used so that if, from the adult's previous actions, it is reasonably practicable to work out what the adult's views and wishes would be, a person or other entity in performing a function or exercising a power under this Act, or an enduring document, must take into account what the person or other entity considers would be the adult's views and wishes.

(5) However, a person or other entity in performing a function or exercising a power under this Act, or an enduring document, must do so in a way consistent with the adult's proper care and protection.

(6) Views and wishes may be expressed orally, in writing or in another way, including, for example, by conduct.

SCHEDULE 1 (continued)

8 Maintenance of existing supportive relationships

The importance of maintaining an adult's existing supportive relationships must be taken into account.

9 Maintenance of environment and values

(1) The importance of maintaining an adult's cultural and linguistic environment, and set of values (including any religious beliefs), must be taken into account.

(2) For an adult who is a member of an Aboriginal community or a Torres Strait Islander, this means the importance of maintaining the adult's Aboriginal or Torres Strait Islander cultural and linguistic environment, and set of values (including Aboriginal tradition⁸⁴ or Island custom⁸⁵), must be taken into account.

10 Appropriate to circumstances

Power for a matter should be exercised by an attorney for an adult in a way that is appropriate to the adult's characteristics and needs.

11 Confidentiality

An adult's right to confidentiality of information about the adult must be recognised and taken into account.

84 “**Aboriginal tradition**” means the body of traditions, observances, customs and beliefs of Aboriginal people generally or of a particular community or group of Aboriginal people, and includes any such traditions, observances, customs and beliefs relating to particular persons, areas, objects or relationships—see *Acts Interpretation Act 1954*, section 36.

85 “**Island custom**”, known in the Torres Strait as Ailan Kastom, means the body of customs, traditions, observances and beliefs of Torres Strait Islanders generally or of a particular community or group of Torres Strait Islanders, and includes any such customs, traditions, observances and beliefs relating to particular persons, areas, objects or relationships—see *Acts Interpretation Act 1954*, section 36.

SCHEDULE 1 (continued)

PART 2—HEALTH CARE PRINCIPLE**12 Health care principle**

(1) The “**health care principle**” means that power for a health matter for an adult should be exercised by an attorney—

- (a) in the way least restrictive of the adult’s rights; and
- (b) only if the exercise of power—
 - (i) is necessary and appropriate to maintain or promote the adult’s health or wellbeing; or
 - (ii) is, in all the circumstances, in the adult’s best interests.

Example of exercising power in the way least restrictive of the adult’s rights—

If there is a choice between a more or less intrusive way of meeting an identified need, the less intrusive way should be adopted.

(2) In deciding whether the exercise of a power is appropriate, the attorney must, to the greatest extent practicable—

- (a) seek the adult’s views and wishes and take them into account; and
- (b) take the information given by the adult’s health provider⁸⁶ into account.

(3) The adult’s views and wishes may be expressed orally, in writing (for example, in an advance health directive) or in another way, including, for example, by conduct.

(4) The health care principle does not affect any right an adult has to refuse health care.

⁸⁶ See section 81 of the Act (Right of attorney to information).

SCHEDULE 2

TYPES OF MATTERS

schedule 3

PART 1—FINANCIAL MATTER

1 Financial matter

A “**financial matter**”, for a principal, is a matter relating to the principal’s financial or property matters, including, for example, a matter relating to 1 or more of the following—

- (a) paying maintenance and accommodation expenses for the principal and the principal’s dependants, including, for example, purchasing an interest in, or making another contribution to, an establishment that will maintain or accommodate the principal or a dependant of the principal;
- (b) paying the principal’s debts, including any fees and expenses to which an administrator is entitled under a document made by the principal or under a law;
- (c) receiving and recovering money payable to the principal;
- (d) carrying on a trade or business of the principal;
- (e) performing contracts entered into by the principal;
- (f) discharging a mortgage over the principal’s property;
- (g) paying rates, taxes, insurance premiums or other outgoings for the principal’s property;
- (h) insuring the principal or the principal’s property;
- (i) otherwise preserving or improving the principal’s estate;
- (j) investing for the principal in authorised investments;
- (l) continuing investments of the principal, including taking up rights to issues of new shares, or options for new shares, to which the principal becomes entitled by the principal’s existing shareholding;

SCHEDULE 2 (continued)

- (m) undertaking a real estate transaction for the principal;
- (n) dealing with land for the principal under the *Land Act 1994* or *Land Title Act 1994*;
- (o) undertaking a transaction for the principal involving the use of the principal's property as security (for example, for a loan or by way of a guarantee) for an obligation the performance of which is beneficial to the principal;
- (p) a legal matter relating to the principal's financial or property matters.

PART 2—PERSONAL MATTER**2 Personal matter**

A “**personal matter**”, for a principal, is a matter, other than a special personal matter or special health matter, relating to the principal's care, including the principal's health care, or welfare, including, for example, a matter relating to 1 or more of the following—

- (a) where the principal lives;
- (b) with whom the principal lives;
- (c) whether the principal works and, if so, the kind and place of work and the employer;
- (d) what education or training the principal undertakes;
- (e) whether the principal applies for a licence or permit;
- (f) day-to-day issues, including, for example, diet and dress;
- (g) whether to consent to a forensic examination of the principal;⁸⁷
- (h) health care of the principal;

⁸⁷ See also section 104 (Protection for person carrying out forensic examination with consent).

SCHEDULE 2 (continued)

- (i) a legal matter not relating to the principal's financial or property matters.

3 Special personal matter

A **“special personal matter”**, for a principal, is a matter relating to 1 or more of the following—

- (a) making or revoking the principal's will;
- (b) making or revoking a power of attorney, enduring power of attorney or advance health directive of the principal;
- (c) exercising the principal's right to vote in a Commonwealth, State or local government election or referendum;
- (d) consenting to adoption of a child of the principal under 18 years;
- (e) consenting to marriage of the principal.⁸⁸

4 Health matter

A **“health matter”**, for a principal, is a matter relating to health care, other than special health care, of the principal.

5 Health care

(1) **“Health care”**, of a principal, is care or treatment of, or a service or a procedure for, the principal—

- (a) to diagnose, maintain, or treat the principal's physical or mental condition; and
- (b) carried out by, or under the direction or supervision of, a health provider.

(2) **“Health care”**, of a principal, includes withholding or withdrawal of a life-sustaining measure for the principal if the commencement or continuation of the measure for the principal would be inconsistent with good medical practice.

(3) **“Health care”**, of a principal, does not include—

⁸⁸ An attorney or guardian may not be given power for a special personal matter.

SCHEDULE 2 (continued)

- (a) first aid treatment; or
- (b) a non-intrusive examination made for diagnostic purposes; or
- (c) the administration of a pharmaceutical drug if—
 - (i) a prescription is not needed to obtain the drug; and
 - (ii) the drug is normally self-administered; and
 - (iii) the administration is for a recommended purpose and at a recommended dosage level.

Example of paragraph (b)—

A visual examination of a principal's mouth, throat, nasal cavity, eyes or ears.

5A Life-sustaining measure

(1) A **“life-sustaining measure”** is health care intended to sustain or prolong life and that supplants or maintains the operation of vital bodily functions that are temporarily or permanently incapable of independent operation.

(2) Without limiting subsection (1), each of the following is a **“life-sustaining measure”**—

- (a) cardiopulmonary resuscitation;
- (b) assisted ventilation;
- (c) artificial nutrition and hydration.

(3) A blood transfusion is not a **“life-sustaining measure”**.

5B Good medical practice

“Good medical practice” is good medical practice for the medical profession in Australia having regard to—

- (a) the recognised medical standards, practices and procedures of the medical profession in Australia; and
- (b) the recognised ethical standards of the medical profession in Australia.

SCHEDULE 2 (continued)

6 Special health matter

A “**special health matter**”, for a principal, is a matter relating to special health care of the principal.⁸⁹

7 Special health care

“**Special health care**”, of a principal, is health care of the following types—

- (a) removal of tissue from the principal while alive⁹⁰ for donation to someone else;
- (b) sterilisation of the principal;
- (c) termination of a pregnancy of the principal;
- (d) participation by the principal in special medical research or experimental health care;
- (e) electroconvulsive therapy or psychosurgery for the principal;
- (f) prescribed special health care of the principal.

8 Removal of tissue for donation

(1) For an adult, “**removal of tissue for donation**” to someone else includes removal of tissue from the principal so laboratory reagents, or reference and control materials, derived completely or partly from pooled human plasma may be given to the other person.

(2) “**Tissue**” is—

- (a) an organ, blood or part of a human body; or
- (b) a substance that may be extracted from an organ, blood or part of a human body.

⁸⁹ An attorney or guardian may not be given power for a special health matter.

However, a principal may give a direction about a special health matter in an advance health directive. Alternatively, in particular circumstances the tribunal may consent to special health care. See the *Guardianship and Administration Act 2000*, section 68 (Special health care).

⁹⁰ For the situation after the principal has died, see the *Transplantation and Anatomy Act 1979*, particularly section 22.

SCHEDULE 2 (continued)

9 Sterilisation

(1) **“Sterilisation”** is health care of a principal who is, or is reasonably likely to be, fertile that is intended, or reasonably likely, to make the principal, or ensure the principal is, permanently infertile.

Examples of sterilisation—

Endometrial ablation, hysterectomy, tubal ligation and vasectomy.

(2) Sterilisation does not include health care primarily to treat organic malfunction or disease of the principal.

10 Termination

“Termination”, of a pregnancy of a principal, does not include health care primarily to treat organic malfunction or disease of the principal.

11 Primary reason for treatment

“Health care primarily to treat organic malfunction or disease”, of a principal, is health care without which an organic malfunction or disease of the principal is likely to cause serious or irreversible damage to the principal’s physical health.

Examples—

1. Health care involving sterilisation may be primarily to treat organic malfunction or disease if the principal has cancer affecting the reproductive system or cryptorchidism.
2. A procedure involving termination of a pregnancy may be primarily to treat organic malfunction if the principal is a pregnant woman requiring abdominal surgery for injuries sustained in an accident.

12 Special medical research or experimental health care

(1) **“Special medical research or experimental health care”**, for a principal, means—

- (a) medical research or experimental health care relating to a condition the principal has or to which the principal has a significant risk of being exposed; or

SCHEDULE 2 (continued)

- (b) medical research or experimental health care intended to gain knowledge that can be used in the diagnosis, maintenance or treatment of a condition the principal has or has had.

(2) “**Special medical research or experimental health care**” does not include—

- (a) psychological research; or
(b) an approved clinical research.

13 Approved clinical research

(1) “**Clinical research**” is—

- (a) medical research intended to diagnose, maintain or treat a condition affecting the participants in the research; or
(b) a trial of drugs or techniques involving the carrying out of health care that may include the giving of placebos to some of the participants in the trial.

(1A) However, a comparative assessment of health care already proven to be beneficial is not medical research.

Examples—

- a comparative assessment of the effects of different forms of administration of a drug proven to be beneficial in the treatment of a condition, for example, a continuous infusion, as opposed to a once-a-day administration, of the drug
- a comparative assessment of the angle at which to set a tilt-bed to best assist a principal’s breathing.

(2) “**Approved clinical research**” is clinical research approved by the tribunal under the *Guardianship and Administration Act 2000*, schedule 2, section 13.⁹¹

14 Electroconvulsive therapy

“**Electroconvulsive therapy**” is the application of electric current to specific areas of the head to produce a generalised seizure that is modified by general anaesthesia and the administration of a muscle relaxing agent.

91 *Guardianship and Administration Act 2000*, schedule 2 (Types of matters), section 13 (Approved clinical research)

SCHEDULE 2 (continued)

15 Psychosurgery

“**Psychosurgery**” is a neurosurgical procedure to diagnose or treat a mental illness, but does not include a surgical procedure for treating epilepsy, Parkinson’s disease or another neurological disorder.

17 Prescribed special health care

“**Prescribed special health care**” means health care prescribed under the *Guardianship and Administration Act 2000*.

PART 3—LEGAL MATTER**18 Legal matter**

A “**legal matter**”, for a principal, includes a matter relating to—

- (a) use of legal services to obtain information about the principal’s legal rights; and
- (b) use of legal services to undertake a transaction; and
- (c) use of legal services to bring or defend a proceeding before a court, tribunal or other entity, including an application under the *Succession Act 1981*, part 4⁹² or an application for compensation arising from a compulsory acquisition; and
- (d) bringing or defending a proceeding, including settling a claim, whether before or after the start of a proceeding.

92 This enables the Supreme Court to make provision for a dependant of a deceased person from the deceased person’s estate if adequate provision is not made from the estate for the dependant’s proper maintenance and support.

SCHEDULE 3**DICTIONARY**

section 3

“administrator” means an administrator appointed under the *Guardianship and Administration Act 2000*.

“adult guardian” means the adult guardian appointed under the *Guardianship and Administration Act 2000*.

“advance health directive” see section 35.

“approved clinical research” see schedule 2, section 13.

“approved form” means a form approved by the chief executive under section 161.

“attorney” means—

- (a) an attorney under a power of attorney, enduring power of attorney or advance health directive; or
- (b) a statutory health attorney.

“capacity”, for a person for a matter, means the person is capable of—

- (a) understanding the nature and effect of decisions about the matter; and
- (b) freely and voluntarily making decisions about the matter; and
- (c) communicating the decisions in some way.

“clinical research” see schedule 2, section 13(1).

“close friend”, of a person, means another person who has a close personal relationship with the first person and a personal interest in the first person’s welfare.

“commissioner for declarations” see the *Justices of the Peace and Commissioners for Declarations Act 1991*.

“conflict transaction” see section 73.

“court” means the Supreme Court.

SCHEDULE 3 (continued)

“**dependant**”, of a principal, means a person who is completely or mainly dependent on the principal.

“**electroconvulsive therapy**” see schedule 2, section 14.

“**eligible attorney**” see section 29.

“**eligible signer**” see section 30.

“**eligible witness**” see section 31.

“**enduring document**” see section 28.

“**enduring power of attorney**” see section 32.

“**financial matter**” see schedule 2, section 1.

“**forensic examination**” of a principal means a medical or dental procedure for the principal that is carried out for forensic purposes, other than because the principal is suspected of having committed a criminal offence.⁹³

“**general power of attorney made under this Act**” see section 8.

“**general principles**” see schedule 1, part 1.

“**good medical practice**” see schedule 2, section 5B.

“**guardian**” means a guardian appointed under the *Guardianship and Administration Act 2000*.

“**health care**” see schedule 2, section 5.

“**health care primarily to treat organic malfunction or disease**” see schedule 2, section 11.

“**health care principle**” see schedule 1, section 12.

“**health matter**” see schedule 2, section 4.

“**health provider**” means a person who provides health care in the practice of a profession or the ordinary course of business.

Example—

dentist

93 For procedures in relation to a principal suspected of having committed an indictable offence, see the *Police Powers and Responsibilities Act 2000*, chapter 8 (Powers in relation to persons in custody), part 3 (Medical and dental procedures).

SCHEDULE 3 (continued)

“impaired capacity”, for a person for a matter, means the person does not have capacity for the matter.

“insolvent” includes external administration (for example, liquidation, receivership or compromise entered into with creditors) under the Corporations Act or a similar law of a foreign jurisdiction.

“interested person”, for another person, means a person who has a sufficient and continuing interest in the other person.⁹⁴

“legal matter” see schedule 2, section 18.

“life-sustaining measure” see schedule 2, section 5A.

“matter” includes a type of matter.

Example—

A reference in section 10(1)(a) to a person appointing an attorney to exercise power for a matter includes a reference to a person appointing an attorney to exercise power for a type of matter (for example, particular, but not all, financial matters).

“paid carer”, for a principal, means someone who—

- (a) performs services for the principal’s care; and
- (b) receives remuneration from any source for the services, other than—
 - (i) a carer payment or other benefit received from the Commonwealth or a State for providing home care for the principal; or
 - (ii) remuneration attributable to the principle⁹⁵ that damages may be awarded by a court for voluntary services performed for the principal’s care.

“personal matter” see schedule 2, section 2.

94 See *Guardianship and Administration Act 2000*, section 126 (Tribunal to decide who are interested persons).

95 This principle was established in *Griffiths v Kerkemeyer* (1977) 139 CLR 161—see Queensland Law Reform Commission Report No. 45, *The assessment of damages in personal injury and wrongful death litigation, Griffiths v Kerkemeyer, Section 15C Common Law Practice Act 1867*, October 1993. The *Common Law Practice Act 1867*, section 15C has been relocated to the *Supreme Court Act 1995* as section 23.

SCHEDULE 3 (continued)

“power”, for a matter, means power to make all decisions about the matter and otherwise exercise the power.

“power of attorney given as security” see section 10(1).

“prescribed special health care” see schedule 2, section 17.

“principal” means—

- (a) in the context of a power of attorney, enduring power of attorney or advance health directive or an attorney under 1 of these documents—the person who made the document or appointed the attorney; or
- (b) in the context of a statutory health attorney—the person for whom the statutory health attorney is statutory health attorney.

“psychosurgery” see schedule 2, section 15.

“relation”, of a person, means—

- (a) a spouse of the first person; or
- (b) a person who is related to the first person by blood, marriage or adoption or because of a de facto relationship, foster relationship or a relationship arising because of a legal arrangement; or

Example of legal arrangement—

- 1. Court order for custody.
- 2. Trust arrangement between trustee and beneficiary.
- (c) a person on whom the first person is completely or mainly dependent; or
- (d) a person who is completely or mainly dependent on the first person; or
- (e) a person who is a member of the same household as the first person.

“removal of tissue for donation” see schedule 2, section 8(1).

“special health care” see schedule 2, section 7.

“special health matter” see schedule 2, section 6.

“special medical research or experimental health care” see schedule 2, section 12.

SCHEDULE 3 (continued)

“special personal matter” see schedule 2, section 3.

“statutory health attorney” see section 63.

“sterilisation” see schedule 2, section 9.

“term” includes condition, limitation and instruction.

“termination” see schedule 2, section 10.

“tissue” see schedule 2, section 8(2).

“tribunal” means the Guardianship and Administration Tribunal under the *Guardianship and Administration Act 2000*.

ENDNOTES

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2 Date to which amendments incorporated

This is the reprint date mentioned in the Reprints Act 1992, section 5(c). Accordingly, this reprint includes all amendments that commenced operation on or before 18 November 2003. Future amendments of the Powers of Attorney Act 1998 may be made in accordance with this reprint under the Reprints Act 1992, section 49.

3 Key

Key to abbreviations in list of legislation and annotations

Key	Explanation	Key	Explanation
AIA	= Acts Interpretation Act 1954	(prev)	= previously
amd	= amended	proc	= proclamation
amdt	= amendment	prov	= provision
ch	= chapter	pt	= part
def	= definition	pubd	= published
div	= division	R[X]	= Reprint No.[X]
exp	= expires/expired	RA	= Reprints Act 1992
gaz	= gazette	reloc	= relocated
hdg	= heading	renum	= renumbered
ins	= inserted	rep	= repealed
lap	= lapsed	(retro)	= retrospectively
notfd	= notified	rv	= revised edition
o in c	= order in council	s	= section
om	= omitted	sch	= schedule
orig	= original	sdiv	= subdivision
p	= page	SIA	= Statutory Instruments Act 1992
para	= paragraph	SIR	= Statutory Instruments Regulation 2002
prec	= preceding	SL	= subordinate legislation
pres	= present	sub	= substituted
prev	= previous	unnum	= unnumbered

4 Table of reprints

Reprints are issued for both future and past effective dates. For the most up-to-date table of reprints, see the reprint with the latest effective date.

If a reprint number includes a letter of the alphabet, the reprint was released in unauthorised, electronic form only.

TABLE OF REPRINTS

Reprint No.	Amendments included	Effective	Reprint date
1	none	1 June 1998	1 June 1998
2	to 2000 Act No. 16	1 July 2000	7 July 2000
2A	to 2001 Act No. 95	15 February 2002	15 February 2002
2B	to 2001 Act No. 95	28 February 2002	1 March 2002
2C	to 2001 Act No. 95	21 April 2002	3 May 2002 (Column discontinued) Notes
2D	to 2002 Act No. 34	16 August 2002	
2E	to 2002 Act No. 74	1 April 2003	
2F	to 2003 Act No. 87	18 November 2003	

5 List of legislation

Powers of Attorney Act 1998 No. 22

date of assent 14 May 1998

ss 1–2, 3 chs 7–8, schs 1–3 commenced on date of assent

remaining provisions commenced 1 June 1998 (1998 SL No. 123)

amending legislation—

Guardianship and Administration Act 2000 No. 8 ss 1–2, 263 sch 3

date of assent 20 April 2000

ss 1–2 commenced on date of assent

sch 3 amds 10, 13 (to the extent it omits s 68) commenced 21 April 2002 (automatic commencement under AIA s 15DA(2) (2001 SL No. 34 s 2))

remaining provisions commenced 1 July 2000 (2000 SL No. 125)

Mental Health Act 2000 No. 16 ss 1–2, 590 sch 1 pt 2

date of assent 8 June 2000

ss 1–2, 590 commenced on date of assent (see s 2(1))

remaining provisions commenced 28 February 2002 (2002 SL No. 27) (provisions were to commence 8 June 2002 (automatic commencement under AIA s 15DA(2) (2001 SL No. 46 s 2)))

Corporations (Ancillary Provisions) Act 2001 No. 45 ss 1–2, 29 sch 3

date of assent 28 June 2001

ss 1–2 commenced on date of assent

sch 3 commenced 15 July 2001 (see s 2(2) of Act 2001 No. 45 (Qld) and Corporations Act 2001 No. 50 (Cwlth) and proc pubd Cwlth of Australia gaz 13 July 2001, No. S285)

remaining provision commenced immediately before 15 July 2001 (see s 2(1) of Act 2001 No. 45 (Qld) and Corporations Act 2001 No. 50 (Cwlth) and proc pubd Cwlth of Australia gaz 13 July 2001, No. S285)

Guardianship and Administration and Other Acts Amendment Act 2001 No. 95 ss 1, 2(2), pt 3

date of assent 10 December 2001

ss 1–2 commenced on date of assent

remaining provisions commenced 15 February 2002 (2002 SL No. 15)

Justice and Other Legislation (Miscellaneous Provisions) Act 2002 No. 34 s 1, pt 12

date of assent 16 August 2002

commenced on date of assent

Discrimination Law Amendment Act 2002 No. 74 ss 1–2, 90 sch

date of assent 13 December 2002

ss 1–2 commenced on date of assent

s 90 commenced 31 March 2003 (2003 SL No. 51)

remaining provisions commenced 1 April 2003 (2003 SL No. 51)

Guardianship and Administration and Other Acts Amendment Act 2003 No. 87 pts 1, 5

date of assent 18 November 2003

commenced on date of assent

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Form 3—Version 2—Enduring Power of Attorney (Long Form)

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Form 4—Version 3—Advance Health Directive

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Form 5—Version 3—Revocation of General Power of Attorney

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