

## POWERS BY DEED

In general, a person cannot execute a deed on behalf of another unless authorised by deed.<sup>1</sup> For this reason, powers of attorney are typically made by deed.<sup>2</sup>

Common law requirements for creation of a deed by an individual are affected by legislation in all jurisdictions in Australia:

- Conveyancing Act 1919 (NSW) s 38 (the operation of which is unaffected by the Powers of Attorney Act 2003 (NSW): s 7(2) )
- Conveyancing Act 1919 (ACT) s 38
- Property Law Act 1958 (Vic) ss 73 , 73A and 73B
- Law of Property Act 2000 (NT) ss 46 , 47 and 49
- Property Law Act 1974 (Qld) ss 44 , 45 and 47
- Law of Property Act 1936 (SA) ss 34(2) , 41 and 41AA
- Property Law Act 1969 (WA) ss 9 and 12
- Conveyancing and Law of Property Act 1884 (Tas) s 63 .<sup>3</sup>

A company may execute a document as a deed if the document is expressed to be executed as a deed and is executed in accordance with subs (1) (without using a common seal) or subs (2) (using a common seal) of s 127 of the Corporations Act 2001 (Cth): see s 127(3) . This section does not limit the ways in which a company may execute a document (including a deed): s 127(4).

1. *Powell v London and Provincial Bank* [1893] 2 Ch 555 at 563 ; *Butler v Duckett* (1891) 17 VLR 439 . This rule has been abrogated by statute in Victoria, so far as it relates to authority to deliver a deed on behalf of another: see Property Law Act 1958 (Vic) s 73B . In Queensland an attorney acting under a power of attorney given under hand may execute a document for which sealing is required or used, with the attorney's own seal: see Powers of Attorney Act 1998 (Qld) s 69(1)(a) .

2. In some jurisdictions legislation expressly provides that a power of attorney made in accordance with a statutory provision or in a statutory form is as effectual as if made by deed: Powers of Attorney Act 1956 (ACT) s 3AD (Forms 1 and 2 and see Prr 30.43 and 30.62 ) ; Powers of Attorney Act 2000 (Tas) s 49 (Forms 1 , 2 , 3 and 4 and see Prr 30.42A , 30.42B , 30.61 and 30.61A ) . In other jurisdictions the legislation or the statutory form itself provides that the power confers on the attorney authority to do anything that the donor could lawfully authorise an attorney to do, which would include executing a deed: Conveyancing Act 1919 (NSW) s 163B(1) (repealed) (Sch 7 in so far as it continues to operate in powers of attorney created before the commencement of s 6 of the Powers of Attorney Act 2003 (NSW) and see Prr 30.30 and 30.50 ) ; Powers of Attorney Act 2003 (NSW) s 8 (Sch 2 and see Prr 30.31 and 30.51 ) ; Powers of Attorney Act 1998 (Qld) ss 8(a) and 32(1)(a) (see Prr 30.40 , 30.58 and 30.58A ) ; Instruments Act 1958 (Vic) ss 107(1) and 115(1)(a) ; Guardian and Administration Act 1990 (WA) s 104(1)(a) (Form 1 in Sch 3 and see Pr 30.60 ) . In South Australia the statutory general power and enduring power must be created by deed: Powers of Attorney and Agency Act 1984 ss 5(1) and 6(1)(a) (first schedule and see Prr 30.42 and 30.59A ) .

3. See further Dean R Corkery, *Halsbury's Laws of Australia* , Vol 10, *Deeds and Other Instruments* .

## POWERS OF ATTORNEY

A power of attorney is essentially an authority conferred on an agent, the attorney, to act for or manage the financial affairs of another person, who is the principal (or as referred to in my paper, the Donor). Accordingly, a power of attorney refers to the 'unilateral grant of authority by a Donor for someone else to act on their behalf'.<sup>1</sup>

<sup>1</sup> See House of Representatives Standing Committee on Legal and Constitutional Affairs. (2007) Older people and the law. Commonwealth of Australia above Attorney-General's Department, *Submission No. 100*, p. 1.

The two main types of power of attorney are 'general' and 'enduring'. A general power of attorney is used where the Donor grants authority to the Donee to act on the Donor's behalf for a particular period of time or for a particular purpose. At common law, a general power of attorney lapses when the agreement expires, or the Donor revokes the instrument, or the Donor no longer has legal capacity to make decisions.

An enduring power of attorney is broadly similar in operation to a general power of attorney, but is authorized by the various laws of the states and territories to endure or survive the otherwise terminating event of mental incapacity. In that way, the common law outcome of lapsing has been avoided, and a useful and increasingly popular means for dealing with financial responsibilities, in anticipation of what many experience as increasing disability and morbidity as they enter the last stages of their lives, has been adopted with the exception that an enduring power of attorney continues "to endure" even after the Donor has lost mental capacity. However, once Donors have lost capacity, they cannot revoke the enduring power of attorney. State and Territory legislation provides for guardianship tribunals to review, revoke or reinstate enduring powers of attorney and appoint guardians and administrators.

What may be included in an enduring power of attorney is covered by State or Territory legislation. Enduring powers of attorney were traditionally used by principals to delegate their authority to act in relation to financial matters. Increasingly, enduring powers of attorney are being used to cover personal and lifestyle matters where provided for in State and Territory legislation.<sup>2</sup>

A further complexity is that not only does the legislation of each jurisdiction vary in terms of the tests of capacity required for the Donor to execute the power of attorney, there are also different requirements for witnesses.

This lack of consistency across the jurisdictions unfortunately means that the assistance that can be derived from decided cases is somewhat diminished. It also creates a greater level of complexity in determining exactly what the law is on the question of capacity. From a practical perspective, it means that assessment processes need to be tailored in accordance with the requirements of each particular jurisdiction. Otherwise, applying a test based on the standard in one jurisdiction could well mean that a person in the early stages of dementia, wishing to make an enduring power of attorney in another State or Territory, could be denied the opportunity of doing so. The risk is that if the level of the statutory test for capacity is too low, the likelihood of enduring documents being misused will be greater and the vulnerability of people with a decision-making disability will increase.<sup>3</sup> Alternatively, setting the standard too high could exclude many who are most in need from the intended benefits.

## WHO CAN EXECUTE AN ENDURING POWER OF ATTORNEY?

As a general rule, a person of legal capacity may execute a power of attorney.<sup>4</sup> This is the same position as under the general law of agency, and generally this has meant an adult<sup>5</sup> of full mental capacity,<sup>6</sup> who is not insolvent,<sup>7</sup> nor an alien enemy.<sup>8</sup>

While general powers of attorney could be executed both by natural persons and bodies corporate, enduring powers of attorney were specifically developed to benefit natural persons. The mischief enduring powers of

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<sup>2</sup> Enduring powers of attorney were first introduced into State legislation in Australia in the early 1980s: for example, in Victoria the relevant legislation was the *Instruments (Enduring Powers of Attorney) Act 1981* (Vic) which commenced 3 March 1982. The last State to introduce enduring powers of attorney was Western Australia in the *Guardianship and Administration Act 1990* (WA). Statutes permitting the appointment of an agent to make medical decisions on behalf of a principal were a later phenomenon, for example, in Victoria the relevant legislation was the *Medical Treatment Act 1988* (Vic).

<sup>3</sup> See Berna Collier, Chris Coyne and Karen Sullivan (eds). (2005) *Mental Capacity: Powers of Attorney and Advance Health Directives*. The Federation Press, Leichhardt, NSW, page 33

<sup>4</sup> See Berna Collier, Chris Coyne and Karen Sullivan (eds). (2005) *Mental Capacity: Powers of Attorney and Advance Health Directives*. The Federation Press, Leichhardt, NSW, above page 12

<sup>5</sup> In some instances, a minor can execute a valid power of attorney, eg. in New South Wales (*Minors (Property and Contracts) Act 1970* (NSW) s 46(1)); and members of the Defence Forces under 21 years. The position that a Donor must be at least 18 years to execute a valid enduring power of attorney is clarified in *Powers of Attorney Act 1998* (Qld) s 32(1). As a general rule, an attorney must be an adult of full mental capacity (see, for example, *Powers of Attorney Act 1998* (Qld) s 29; *Powers of Attorney Act 1956* (ACT) s 12(d).

<sup>6</sup> *McLaughlin v Daily Telegraph Newspaper Co Ltd* (1904) 1 CLR 243; *Gibbons v Wright* (1954) 91 CLR 423.

<sup>7</sup> *Mackwick v Hardingham* (1880) 15 Ch D 339.

<sup>8</sup> For discussion of this issue, see B Collier and S Lindsay *Powers of Attorney in Australia and New Zealand* (Federation Press, Sydney, 1992)74-76.

attorney are designed to overcome is the termination of an agency arrangement with the loss of mental capacity of the Donor,<sup>9</sup> not a problem that afflicts a body corporate. In Queensland the legislation specifies that enduring powers of attorney may be given by “adults”<sup>10</sup> (therefore excluding Donors that are corporations).

## CAPACITY TO EXECUTE AN ENDURING POWER OF ATTORNEY: GENERAL PRINCIPLES

The term ‘legal capacity’ broadly refers to ‘the competence of a person to act as Donor or Agent’ to make decisions that will be upheld by the legal system.<sup>11</sup> Under law, all adults are presumed to be ‘of sound mind’ and have the capacity to make decisions about important areas of their lives including managing personal finances, medical treatment, buying and selling and making contracts.<sup>12</sup> Mental capacity therefore constitutes the necessary element in determining legal capacity. In this context, the references to “legal capacity”, “mental capacity” or “capacity” are interchangeable.

Because the subject of powers of attorney forms a branch of the law relating to principal and agent, every person, being *sui juris*, may delegate authority to perform all lawful acts by means of a power of attorney unless specific statutory<sup>1</sup> or common law provision excludes the right. At the time the power is given, the principal must have the mental capacity to understand both the act of appointment and also the nature of the transactions the attorney is to carry out under the power.<sup>2</sup>

1. See for example Opal Mining Act 1995 (SA) s 98 .

2. See Powers of Attorney Act 2003 (NSW) s 17 . Subject to that Act, a power of attorney is not invalid only because an act within the scope of the power is beyond the understanding of the donor when the power is given: s 17(1) . The power does not authorise the attorney to do such an act unless it is authorised by or under the Act, but is effective to the extent of any act within its scope that is of such a nature that it is not beyond the understanding of the principal at the time of the act: ss 17(2) , 18 . For the equivalent provisions applying to powers of attorney executed before the commencement of s 6 of the Act, see Conveyancing Act 1919 (NSW) ss 163E , 163F(1) . Division 3 of Part 5 of the Act contains provisions under which the Supreme Court may make an order confirming a power in whole or in part -- see ss 29-33 . Part 5 extends to any power created (or purporting to have been created) by an instrument executed before the commencement of s 6 of that Act: s 6(5) . See also Powers of Attorney Act 1956 (ACT) s 3A whereby a power of attorney is not invalid on the ground of the donor’s incapacity when the power was created if, at the time, the donor was able to understand the nature and effect of the power.

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<sup>9</sup> See, for example, *Re T (Adult – Refusal of Treatment)*[1993] Fam 95 and *In re F (Mental Patient: Sterilisation)*[1990] 2 AC 1. In *Caldwell v McClelland* [1999] QSC 182, where the mental capacity of the donor at the time of execution of an enduring power of attorney was challenged, McKenzie J noted that, in light of the general principles set out in *Powers of Attorney Act 1998* (Qld) Sch 1 s 1, the onus lay on the applicants to prove positively that the donor lacked capacity at the time of execution of the instrument (at [13]). The court also emphasised that the task of doing so was substantial (at [14]). See also *In re W (Enduring Power of Attorney)*[2001] 1 All ER 175 in this regard.

<sup>10</sup> *Powers of Attorney Act 1998* (Qld) s 32(1)S

<sup>11</sup> Lexis Nexis, ‘Capacity’, *Encyclopaedic Australian Legal Dictionary*, Butterworths; Alzheimer’s Australia, *Legal Planning and Dementia*, Position Paper No. 5, 2005, p. 5.

<sup>12</sup> See House of Representatives Standing Committee on Legal and Constitutional Affairs. (2007) Older people and the law. Commonwealth of Australia above page 88 and also see Young J in *Re C (TH) and the Protected Estates Act* [1999] NSWSC 456 at [17]: “There is no room in the legislation for benign paternalism. A person is allowed to make whatever decision she likes about her property, good or bad, with happy or disastrous effect so long as she is capable”.

## OVERVIEW OF STATE & TERRITORY LEGISLATION

### NEW SOUTH WALES

#### Legislation

The Powers of Attorney Act 2003 (NSW) (the Act) commenced on 16 February 2004.<sup>1</sup> Section 6(1) provides that the Act applies to any power of attorney created (or purporting to have been created) by an instrument executed on or after the commencement of s 6. The Act does not apply to any power of attorney created (or purporting to have been created) by an instrument executed before the commencement of s 6, except as provided by s 6(5).

#### Registration

By the operation of s 6(5) of the Powers of Attorney Act 2003 (NSW), the provisions of Div 3 of Pt 6 (Registration of powers of attorney) of that Act extend to any power of attorney created (or purporting to have been created) by an instrument executed before the commencement of s 6. Pursuant to s 51(1), any instrument executed before or after the commencement of the Act may be registered by the Registrar-General in the General Register of Deeds kept under the Conveyancing Act 1919 (NSW). An instrument revoking a registered power of attorney may also be registered in that Register: s 51(2).<sup>1</sup>

Division 1 of Pt 23 of the Conveyancing Act 1919 contains the provisions governing registration in the General Register of Deeds. Procedure and requirements for registration are set out in Pt 2 of the Conveyancing (General) Regulation 2003 (NSW). The Registrar-General may refuse to accept an instrument for registration, or refuse to register an instrument, or reject an instrument lodged for registration, if the instrument is not accompanied by a certificate in an approved form setting out particulars of or relating to the instrument and signed as prescribed: Conveyancing Act 1919 s 184D.

Regulation 8 of the Conveyancing (General) Regulation 2003 lists the persons who may sign the certificate. In appropriate cases, the court will restrain the registration of a power of attorney.<sup>2</sup>

1. For a form of revocation, see Prr 30.44A and 30.450.

2. *Williams v Marac Australia Ltd* (1985) 3 BPR 9638.

### QUEENSLAND

#### Legislation

Pursuant to the Powers of Attorney Act 1998 (Qld), principals may authorise attorneys by general powers of attorney, enduring powers of attorney or advance health directives, as well as by powers of attorney under the common law: Powers of Attorney Act 1998 s 5(2). The Act also introduced statutory health attorneys: ss 5(5) and 62. Chapter 2 applies to all powers made, whether under the Act or otherwise, after the commencement of the Act. Chapter 3 deals with enduring documents.

#### Health matters

An enduring power of attorney created under the Powers of Attorney Act 1998 (Qld) Ch 3 Pt 2 may confer power in relation to one or more personal matters: s 32(1)(a). A personal matter is a matter relating to the principal's care (including health care) or welfare, other than a special personal matter or special health matter: Sch 2 cl 2. The phrases "health care", "special personal matter" and "special health matter" (among others) are defined in Sch 2. An enduring power of attorney giving power for a matter is not revoked by the principal becoming a person of impaired capacity for the matter: s 32(2), but power for a personal matter is exercisable during any or every period the principal has impaired capacity for the matter and not otherwise: s 33(4). A person dealing with the attorney may ask for evidence that the principal has impaired capacity for the matter: s 33(5). An adult principal may also, in an advance health directive, appoint an attorney to exercise power for a "health matter" (defined in Sch 2 cl 4) for the principal, in the event of the directions proving inadequate. An advance health directive must be written and may be in a form approved by the chief executive under s 161: s 44(2) and see Pr 30.58B. The requirements for execution are as for an enduring power of attorney: ss 28, 44(3). An advance health directive is not revoked by the principal becoming a person of impaired capacity: s 35(4), but an attorney's power for a health matter under an advance health directive is exercisable during any and every period the principal has impaired capacity for the matter and not otherwise: s 36(3). While the power is exercisable, the attorney for the matter has power to do, for the principal, anything in relation to the matter that the principal could lawfully do if the principal had capacity for the matter, but subject to the terms of the directive and the Act: s 36(4), (5). A person dealing with the attorney may ask for evidence that the principal has impaired capacity for the matter: s 36(6).

#### Registration

A power of attorney and an instrument revoking a power of attorney may be registered, whether it is an enduring power or not: Powers of Attorney Act 1998 (Qld) ss 27, 60 (enduring power of attorney); ss 7, 25 (other).

Registration is provided for in s 241 of the Property Law Act 1974 (Qld), and is effected by lodging a signed and certified copy in the land registry kept under the Land Title Act 1994 (Qld) .

## **SOUTH AUSTRALIA**

### **The statutory general and enduring powers**

Section 5(1) of the Powers of Attorney and Agency Act 1984 (SA) provides that a general power of attorney (which may be subject to specified conditions, limitations or exclusions) may be created by deed in the form set out in the first schedule of the Act (see Pr 30.42 ) or in a form to the same effect but expressed to be made in pursuance of s 5 . A general power operates to confer on the donee authority to do on behalf of the donor anything that the donor can lawfully do by an attorney: s 5(3) , but does not operate to confer authority on the donee to perform functions that the donor has as a trustee or personal representative: s 5(4) .

Section 6(1) of the Act provides that an enduring power of attorney may be created by deed expressed to be made pursuant to that section, or by a deed indicating an intention that the authority conferred is to be exercised notwithstanding the donor's subsequent legal incapacity, or in the event of the donor's subsequent legal incapacity: see Pr 30.59 and 30.59A . In order to create an enduring power of attorney, the deed must be attested by a witness authorised by law to take affidavits and must have endorsed on it, or annexed to it, a statement of acceptance in the form set out in the second schedule ( Pr 30.63 ) or in a form to the same effect. Acts done pursuant to such a power during the legal incapacity of the donor are as effective as if the donor were competent: s 6(3) . The donee may not renounce the power during a period of incapacity of the donor except with leave of the Supreme Court: s 9 , but a person interested in the matter, or the donee, may at any time apply to the Supreme Court for an order revoking or varying the terms of an enduring power of attorney: s 11(1)(c) , 11(2)(a) . The donee has the right to apply to the Supreme Court for advice and directions in respect of the power of attorney created pursuant to the Act: s 11(2)(b) .

### **Medical treatment**

A person of or over 18 years of age, while of sound mind, may by medical power of attorney appoint an agent ("medical agent") with power to make decisions on the grantor's behalf about medical treatment, pursuant to s 8 of the Consent to Medical Treatment and Palliative Care Act 1995 (SA). A medical power of attorney may be registered in the register maintained by the person ("Registrar") appointed by the Minister to administer the register: s 14(3) . Registration is made on application to the Registrar accompanied by a copy of the power (to be retained by the Registrar) and the prescribed fee: s 14(4) . A medical power of attorney must be in the form prescribed by Sch 1 or in a form to similar effect, and witnessed by an authorised witness (for definition see s 4 ) who completes a certificate in the form or to the effect of the certificate in Sch 1 : s 8(2) and see Pr 30.59B .The form in Sch 1 contains provision for the medical agent to accept appointment. To be eligible for appointment as a medical agent, a person must be over 18 years of age, and to be entitled to act, must be of full legal capacity: ss 8(3) , 9(1)(c) .A person is not eligible to be appointed if directly or indirectly responsible for the medical care or treatment of the grantor, and a medical agent who becomes so responsible is thereby disqualified from acting as medical agent: s 8(5) , but the fact that a person has an interest under the will, or in the estate, of the grantor does not invalidate the appointment of, or the exercise of any power by, that person under a medical power of attorney: s 8(4) . A medical power of attorney authorises the medical agent, subject to any conditions and directions contained in the power of attorney, and any anticipatory direction (s 7(8)(b) ), to make decisions about the medical treatment (for definition see s 4 ) of the grantor if the grantor is incapable of making decisions in his or her own behalf: s 7(7) . The power does not however authorise the agent to refuse the natural provision or administration of food and water, or the administration of drugs to relieve pain or distress, or medical treatment that would result in the grantor regaining capacity to make decisions about his or her own medical treatment (unless the grantor is in the terminal phase of a terminal illness): s 8(7) . The grantor may revoke a medical power of attorney by any form of representation that indicates an intention to withdraw or terminate the power: s 8(9) , and on regaining capacity may revoke or vary any decision made by the medical agent during the period of incapacity: s 8(10) . The Registrar must, on application by the grantor of a registered medical power of attorney, register the revocation and remove the power of attorney from the register: s 14(6) .

### **Registration**

A power of attorney affecting land not under Torrens title may be registered in the general registry office under Pt 2 of the Registration of Deeds Act 1935 (SA): ss 9 , 10 . Registration is effected by production of the power of attorney together with a memorial ( s 11 ) complying with s 26 and as nearly as may be in the form set out in Sch 5 to the Act ( s 14 and Pr 30.68 ), containing the date of the power, the names, addresses and occupations of all the parties thereto, and a statement of the nature of the instrument: s 14 . Provision is made in s 12 for an attesting witness to prove, and the donor to acknowledge, the due execution of the power by oath or affirmation before the registrar and for endorsement on the instrument of a certificate of such proof or acknowledgment having been made. (For proof and acknowledgment otherwise than before the registrar see s 13.) The original or a duplicate original of the power may also be deposited under Pt 3 of the Act: s 31.

## **TASMANIA**

### **The statutory general and particular powers**

A power of attorney may be made by deed or in accordance with Form 1 in Sch 1 (conferring particular powers) or Form 2 in Sch 1 (conferring power to do all things that a donor may lawfully authorise an attorney to do): Powers of Attorney Act 2000 (Tas) s 18(1) and see Prr 30.42A and 30.42B .

### **Enduring power of attorney**

Part 4 of the Powers of Attorney Act 2000 (Tas) provides for an enduring power of attorney, which may be created either by deed containing words indicating an intention that the authority conferred is to be exercisable notwithstanding the donor's subsequent mental incapacity or in the event of the donor's subsequent mental incapacity, or by an instrument in accordance with Form 3 in Sch 1 (conferring particular powers) or Form 4 of Sch 1 (conferring power to do all things that a donor may lawfully authorise an attorney to do): Powers of Attorney Act 2000 ss 18(2) , 30(1) and 31(1)(a) and see Prr 30.61 and 30.61A . Part 4 applies notwithstanding any contract or arrangement between the donor and attorney to the contrary: s 37 , but nothing in that Part is to be taken to derogate from the law relating to powers of attorney, except as provided by that Part: s 38 .

A deed or instrument is not effective to create an enduring power of attorney unless the donor understands the matters set out in s 30(3) . There must be at least two attesting witnesses to the deed or instrument, neither of whom may be a party or a relation of a party to it, and each must witness it in the presence of the donor and each other. The deed or instrument must be endorsed with, or have annexed to it, a statement of acceptance in accordance with Form 3 or 4 in Sch 1, or in a form to the same effect, executed by the attorney: see s 30(2) and Prr 30.61 and 30.61A .

An enduring power of attorney may confer general authority to act in respect of all of the property and affairs of the donor, or a specified part thereof, or may confer authority to do specified acts, and may be expressed to operate only during a specified period or periods, and may in any case be subject to conditions or restrictions: s 31(1) . If the instrument confers a general authority, it operates (subject to any conditions or restrictions) to confer authority on the attorney to do on behalf of the donor any act that the donor can lawfully do by an attorney: s 31(2) . Unless the power is expressed to the contrary, the attorney may not give away property of the donor except as set out in s 31(3) or as authorised by the Guardianship and Administration Board pursuant to s 31(5). An attorney may not appoint another person to perform any of the attorney's functions or powers as attorney except that (unless the power is expressed to the contrary) an attorney may by instrument in writing appoint the Public Trustee to act as attorney in his or her place. The attorney is taken to be a trustee of the property and affairs of the donor, according to the tenor of the power, during any period of mental incapacity of the donor, and must exercise the powers as attorney to protect the interests of the donor: s 32(1) . Acts done by the attorney during a period of mental incapacity of the donor are as effective as if the donor were competent: s 30(4) . The Guardianship and Administration Board may not make an administration order (except under Pt 8 -- Emergency Orders ) in respect of that part of a proposed represented person's estate to which an enduring power of attorney relates: Guardianship and Administration Act 1995 (Tas) s 53 . The Board may, however, of its own motion or on application by the attorney or by or on behalf of the donor or by any other person who the Board believes to have a proper interest in the matter, hold a hearing to review an enduring power of attorney: Powers of Attorney Act 2000 s 33(1) . On review, the Board may make an order of the kinds set out in s 33(2) , including an order to vary or revoke the power or declare that it is invalid, or appoint a substitute attorney or an administrator of the estate of the donor. A copy of an order under s 33 revoking or varying an enduring power of attorney must be registered: s 17(2)(d) .

### **Registration**

The Powers of Attorney Act 2000 (Tas) provides for registration of all powers of attorney with the Recorder of Titles. The Recorder must keep a register of all powers of attorney: s 4(1) , and may include in the register any power of attorney that, immediately before the commencement of the Powers of Attorney Act 2000 , was registered under the Registration of Deeds Act 1935 (Tas) : s 4(4) . By s 15 of the Powers of Attorney Act 2000, a document creating, or varying, revoking or otherwise relating to a power of attorney may be registered notwithstanding that it was executed before the commencement of that section. The register consists of all powers of attorney, instruments varying or revoking a power of attorney and other instruments relating to powers of attorney that are lodged with the Recorder: s 4(2) .

A power of attorney or other instrument under the Powers of Attorney Act 2000 may be lodged with the Recorder by delivery of the original document or by one of the methods (including by transmission of a transparency or print from a transparency or from a machine copy, or by facsimile process) authorised or approved by the Recorder pursuant to ss 12 and 13 . The instrument must have all writing, printing, signatures, seals and plans clear and legible to the satisfaction of the Recorder, and be capable of being stored or reproduced on the media or devices used by the Recorder for storing and reproducing copies of the register: s 9(1)(a) . It must contain any matter intended to be in addition to the instrument in a page of the instrument itself or in the form of an annexure: s

9(1)(b) , and any annexure must comply with the requirements of s 9(2) . An instrument that refers to a power of attorney is taken as not being in registrable form unless it complies with the requirements of s 10 . The Recorder must not register any power of attorney or other instrument except as provided in the Act and unless the instrument is in accordance with the Act: s 11(1) .

An act, deed or instrument done, executed or signed by an attorney under a power of attorney has no legal effect unless the power of attorney has previously been registered under the Powers of Attorney Act 2000 or, in the case of an enduring power of attorney subject to an order of the Guardianship and Administration Board under s 33 of the Powers of Attorney Act 2000, a copy of the order is so registered: Powers of Attorney Act 2000 s 16 . Notice of the death, bankruptcy or insolvency of the donor or revocation by the donor must be registered by registering a declaration by a person of that fact or an instrument or notice or order of revocation: s 17 .

## **VICTORIA**

### **Legislation**

As from the commencement of the Instruments (Enduring Powers of Attorney) Act 2003 (Vic), Pt XI (Powers of Attorney) (ss 104-113 ) of the Instruments Act 1958 (Vic) applies to powers of attorney generally but (except as expressly provided in Pt XIA) not to enduring powers of attorney, and Pt XIA (Enduring Powers of Attorney) (ss 114-125ZP ) applies to enduring powers of attorney: Instruments Act 1958 s 105(3) . An enduring power of attorney under Pt XI existing immediately before the commencement of the Instruments (Enduring Powers of Attorney) Act 2003 has effect on and after the commencement of that Act as if it had been made under Pt XIA Div 2 of the Instruments Act 1958: Instruments Act 1958 s 125ZN .

### **Registration**

Before the commencement of s 6 of the Transfer of Land (Single Register) Act 1998 (Vic), a power of attorney in the form of a deed, affecting any land in Victoria (not being an instrument affecting land under the Transfer of Land Act 1958 (Vic) ) could be registered in the office of the Registrar-General: Property Law Act 1958 (Vic) s 6 . Section 6(2) now provides that, despite subs (1) , on and from the commencement of s 6 of the Transfer of Land (Single Register) Act 1998, no deed conveyance or other instrument may be registered in the office of the Registrar-General under that subsection.

### **Medical treatment**

Separate provision is made in Victoria for a person to appoint an agent to make decisions about medical treatment<sup>1</sup> of the person, to take effect if and only if the person becomes incompetent: Medical Treatment Act 1988 (Vic) s 5A . The power extends to a refusal of medical treatment, but only if the treatment would cause unreasonable distress to the patient or there are reasonable grounds for believing that the patient, if competent and after giving serious consideration to the matter, would have considered the treatment unwarranted.<sup>2</sup> Appointment is by way of an enduring power of attorney (medical treatment) in the form in Sch 2 of the Act: see s 5A and Pr 30.57 . The appointment must be witnessed by two persons, one authorised to take statutory declarations and neither being the agent. The power of attorney is not revoked by the subsequent incapacity of the donor, but an earlier power is revoked by the giving of a later power, and a power may be revoked in any way in which a general power might be revoked: s 5A(3) , (4) , or may be suspended or revoked by the Victorian Civil and Administrative Tribunal on application of the Public Advocate, a person having a special interest in the affairs of the donor, or the agent: s 5C . An alternate agent may also be appointed, to make decisions if the agent is dead, incompetent or cannot be contacted, or the agent's whereabouts are unknown: s 5AA .

1. The phrase "medical treatment" is defined in s 3 of the Medical Treatment Act 1988, and does not include "palliative care", also defined.

2. If treatment is refused, the agent must complete a refusal of treatment certificate in the form of Sch 3: Medical Treatment Act 1988 s 5B(3) and see Pr 30.57A .

## **WESTERN AUSTRALIA**

### **Enduring power of attorney**

Provision is made in Pt 9 of the Guardianship and Administration Act 1990 (WA) for an enduring power of attorney. The donor of the power may appoint one person or two persons (whether jointly or severally), and may appoint a substitute attorney, to become attorney under the power only on, or during, the occurrence of events of circumstances specified in the instrument: s 104B . The power must be in or substantially in the form of Form 1 in Sch 3: see s 104(1)(a) and Pr 30.60 . A power of attorney in this form is effective for the purposes of the Transfer of Land Act 1893 (WA) as if it were in the form provided for by s 143 of that Act: s 103 . (For the normal Transfer of Land Act 1893 form see [3205] and Pr 30.135 .) Form 1 is expressed to grant authority to do anything which the donor could lawfully do by attorney, but may be given subject to conditions or restrictions. The power must be declared either to continue in force notwithstanding the donor's subsequent legal incapacity, or to be in force only during a period when a declaration of the Board under s 106 is in force that the donor does not have legal capacity: s 104(1)(b) , and will not be affected by the subsequent legal incapacity of the donor: s 105 . The

instrument must be attested by two witnesses, both being persons authorised by law to take declarations, and have endorsed on or annexed to it an executed statement of acceptance in or substantially in the form of Form 2 in Sch 3: see s 104(2) and Pr 30.64 . The donee may not renounce a power during the incapacity of the donor: s 107(1)(c) , but a person having a proper interest in the matter, or the donee, may apply to the Board for an order revoking or varying the terms of an enduring power of attorney, or appointing a substitute donee: s 109 , and where the Board makes an administration order or an order under s 65 or s 66 in respect of the estate of the donor, the Board may revoke or vary the power: s 108 . The Board may, on application by the donee of a power of attorney created under the laws of another jurisdiction, make an order recognising that power of attorney as an enduring power of attorney for the purposes of Pt 9 : s 104A . The Board may revoke recognition pursuant to s 108 , or at any time pursuant to s 108(4) on the application of a person who in the opinion of the Board has a proper interest in the matter.

### **Registration**

A power of attorney may be registered or deposited in the Office for the Registration of Deeds, etc: Registration of Deeds Act 1856 (WA) ss 2 , 13 .

Registration is effected by delivery of a memorial containing the date of the power, the nature and object thereof and the names (and when known the additions) of all the parties and witnesses thereto, and signed either by a legal practitioner (as defined in the Legal Practice Act 2003 (WA) ), or by any other person requiring the registration thereof, in which case that person's signature must be attested by a witness qualified to attest the execution of instruments under the Transfer of Land Act 1893 (WA) : Registration of Deeds Act 1856 ss 6 , 8 .

## **AUSTRALIAN CAPITAL TERRITORY**

### **Enduring power of attorney**

Provision is made in ss 12-18 of the Powers of Attorney Act 1956 (ACT) for an enduring power of attorney which does not lapse by reason only of the donor's incapacity. In order to create an enduring power of attorney, Part A of Form 2 in Sch 1 (see Pr 30.62 ) must be completed and signed by the donor or by another person in the presence of and by the direction of the donor, the signature must be witnessed by two persons, neither of whom is the donee or a relative of the donee or donor, the donee must sign Part D to indicate acceptance, and the donee must have attained the age of 18 years: s 12 . Part A confers a general power (see also s 3AC ), but may also confer specified powers or place limits on the general power. Parts B and C, which respectively confer powers to make personal decisions, and powers to make medical decisions, need not be reproduced in the instrument provided that the instrument bears a notation that those parts have been omitted with the consent of both donor and donee: s 12(1A) .

While the donor is incapacitated, the donee under an enduring power of attorney is required to act, so far as possible, as the donor would have acted if not incapacitated: s 14 . On application by the public trustee or a trustee company within the meaning of the Trustee Companies Act 1947 (ACT) or (by leave) some other person, the court may by order give directions or make declarations concerning, or terminate an enduring power of attorney: s 17 , and where the Guardianship and Management of Property Tribunal appoints a guardian for a person or manager for a person's property, it may make such order as it thinks fit concerning the continued operation of an enduring power of attorney executed by the person: s 18 .

The powers conferred by an enduring power of attorney (see Pr 30.62 ) may be expressed to include powers to make decisions as to the donor's day-to-day affairs (other than those relating to property or money) (Pt B) or to give consent, on the donor's behalf, to medical treatment or the donation of body parts, blood or tissue, or to the withholding or withdrawal of medical treatment (Pt C), but those powers only subsist while the principal is incapacitated: s 13 . A certificate of a medical practitioner that the donor was incapacitated at a particular time is evidence of that fact: s 13A .

### **Medical treatment**

A power may also be given under Div 2.2 of Pt 2 of the Medical Treatment Act 1994 (ACT), by instrument in accordance with Form 2 in Sch 1 to that Act ( Pr 30.62A ), to consent on behalf of the grantor to the withholding or withdrawal of medical treatment if the grantor becomes incapacitated, but not exercisable unless a medical practitioner declares the grantor to be incapacitated: Medical Treatment Act 1994 ss 13 , 14 . On the granting of a power of this nature, any enduring power of attorney created under the Powers of Attorney Act 1956 (ACT) then in effect is taken to have been revoked to the extent that it applies to the withholding or withdrawal of medical treatment, but otherwise remains in effect: s 18(4) . Exercise of the power to consent to the withholding or withdrawal of medical treatment is subject to conditions set out in s 16 . The instrument granting the power must be signed by the grantor or by another person in the presence of and at the direction of the grantor, the signature being witnessed by two persons, neither of whom is the grantee or a relative of the grantee, and the grantee must have attained the age of 18 years and sign the instrument to indicate acceptance: s 13 . The power does not lapse

by reason only of the incapacity of the grantor: s 13(3) , or upon the appointment of a guardian under the Guardianship and Management of Property Act 1991 (ACT) in respect of the grantor, but may be revoked in any way in which a power of attorney under the Powers of Attorney Act 1956 may be revoked: s 15 , and is taken to be revoked by the creation of an enduring power of attorney under the Powers of Attorney Act 1956: Medical Treatment Act 1994 s 18(3) .

## **Registration**

A power of attorney may be registered in the general register of deeds under the Registration of Deeds Act 1957 (ACT) . Requirements for registration are set out in s 4 . A conveyance or deed executed by the donee, not being a lease or agreement for a lease for a term not exceeding three years has, by s 11 of the Powers of Attorney Act 1956 (ACT), no validity until the power is registered, but on registration takes effect as if registration had occurred before execution.

## **NORTHERN TERRITORY**

### **Legislation**

The Powers of Attorney Act (NT) applies, unless the contrary intention appears, only to powers created after the commencement of the Act. The Act extends to powers authorising dealings with land: s 4(2) .

### **Creation of power of attorney**

The Powers of Attorney Act (NT) requires that, except where the donor is a body corporate, a power of attorney must be signed by the donor, or by direction and in the presence of the donor, in which case the instrument must be attested by two other persons present as witnesses: Powers of Attorney Act s 6 . The instrument is valid and effectual although not under seal: s 6(3) . The Act does not prescribe a form of instrument for creation of a power of attorney or enduring power of attorney. The Powers of Attorney Regulations (NT) provide that a power of attorney may be in accordance with Form 1 in Sch 2 to the Regulations: reg 5(1A)(a) and see Pr 30.44 . Subject to reg 5(1B) , a power of attorney will only be registered (for registration see [3280] ) if it complies with the requirements of reg 5(1)(b) . Regulation 5(1B) allows for registration of an instrument as a power of attorney (but not an enduring power, as to which see [3300] ) if the instrument expressly evidences an intention that the power continue in effect notwithstanding the subsequent legal incapacity of the donor, but is not an enduring power within the meaning of the Act because of the absence of a statement of acceptance in or to the effect of Sch 1 to the Act.

### **Enduring powers of attorney**

Part III of the Powers of Attorney Act (NT) provides for an enduring power of attorney which is not revoked by any subsequent legal incapacity of the donor. The power must expressly evidence such an intention on the part of the donor (see Pr 30.62B ) , must have endorsed thereon or annexed thereto a statement of acceptance to the effect of Sch 1 (see Pr 30.67 ) by the donee and must be registered: s 13 . The execution of an enduring power of attorney must be attested by a witness who is not the donee or a near relative of the donee: s 14 . The donee of an enduring power may not retire without the leave of the Supreme Court: s 15 . The Supreme Court may, on application by the Public Trustee or any other person who has an interest in any property which may be dealt with by the donee, made at any time after the donor is legally incapacitated, make an order revoking or varying the terms of the instrument creating an enduring power of attorney, including the appointment of a substitute donee, which may be the Public Trustee: s 15 .

### **Registration**

An instrument creating or revoking a power may be registered as prescribed: Powers of Attorney Act (NT) ss 5 , 7 . Regulation 3 of the Powers of Attorney Regulations (NT) provides for the establishment of a "Register of Powers of Attorney" which shall be kept and maintained by the Registrar-General. The procedure for registration is dealt with in reg 5 which requires deposit with the Registrar-General of a duplicate or attested copy of the instrument together with the original for purpose of comparison, and prescribes requirements for both the original and the duplicate or attested copy.

A dealing in relation to land purporting to take effect in pursuance of the exercise of a power is of no force or effect unless the instrument creating the power is registered: Powers of Attorney Act s 8 , but on registration of the instrument subsequent to such a dealing, the dealing takes effect as if the instrument creating the power were registered before the instrument purporting to give effect to the dealing. No form of power of attorney is prescribed, but Form 1 in Sch 2 to the Powers of Attorney Regulations may be used: see reg 5(1A)(a) and Pr 30.44 .

## LEGISLATION

Each State and Territory of Australia permits the execution of both general and enduring powers of attorney which does not terminate on the loss of mental capacity of the Donor,<sup>13</sup> compared with general powers of attorney which as a general rule terminate in these circumstances.<sup>14</sup>

In summary, the primary legislation dealing with powers of attorney and advance health directives throughout Australia is set out below:

### **Australian Capital Territory**

- *Powers of Attorney Act 1956*
- *Guardianship and Management of Property Act 1991*
- *Medical Treatment (Health Directions) Act 2006*

### **New South Wales**

- *Powers of Attorney Act 2003*
- *Guardianship Act 1987*
- *Protected Estates Act 1983*

### **Northern Territory**

- *Powers of Attorney Act 1980*
- *Adult Guardianship Act 1988*

### **Queensland**

- *Powers of Attorney Act 1998*
- *Guardianship and Administration Act 2000*

### **South Australia**

- *Powers of Attorney and Agency Act 1984*
- *Guardianship and Administration Act 1993*
- *Consent to Medical Treatment and Palliative Care Act 1995*

### **Tasmania**

- *Powers of Attorney Act 2000*
- *Guardianship and Administration Act 1995*

### **Victoria**

- *Instruments Act 1958*
- *Guardianship and Administration Act 1986*
- *Medical Treatment Act 1988*

### **Western Australia**

- *Property Law Act 1969*
- *Guardianship and Administration Act 1990*

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<sup>13</sup> *Powers of Attorney Act 2003 (NSW) s 6(4), 19(10(a) and Sch 1; Powers of Attorney Act 1998 (Qld) s 32; Powers of Attorney and Agency Act 1984 (SA) s 6; Powers of Attorney Act 2000 (Tas) s 30; Instruments Act 1958 (Vic) s 114; Guardianship and Administration Act 1990 (WA) s 104; Powers of Attorney Act 1956 (ACT) s 12; Powers of Attorney Act 2003 (NT) s 13.*

<sup>14</sup> As powers of attorney are forms of agency, they terminate as a matter of law according to the general rule of law. The fact that general powers of attorney terminate on the loss of mental capacity of the Donor is implied by *Powers of Attorney Act 2003 (NSW) s 6(4), ss 15-16 and Sch 1; Powers of Attorney Act 2000 (Tas) s 24; Instruments Act 1958 (Vic) s 109; Property Law Act 1969 (WA) s 86; and Powers of Attorney Act 1956 (ACT) s5.* Specific recognition of this rule appears, however, in *Powers of Attorney Act 1998 (Qld) s 18 and Powers of Attorney Act 2003 (NT) s 16.*

## LEGISLATION IN CONTEXT<sup>15</sup>

### **New South Wales, South Australia, Tasmania and Victoria: Financial and Legal**

In New South Wales, South Australia, Tasmania and Victoria, legislation dealing with financial and legal powers of attorney are:

- *Instruments Act 1958* (Victoria);
- *Powers of Attorney Act 2003* (New South Wales);
- *Powers of Attorney and Agency Act 1984* (South Australia); and
- *Powers of Attorney Act 2000* (Tasmania).

### **Western Australia and the Northern Territory: Power of Attorney**

In Western Australia and the Northern Territory, power of attorney legislation can be found in:

- *Guardianship and Administration Act 1990* (Western Australia); and
- *Powers of Attorney Act* (Northern Territory).

### **New South Wales, South Australia, Tasmania and Victoria: Guardianship**

In New South Wales, South Australia, Tasmania and Victoria, power of attorney legislation guardianship legislation dealing with lifestyle matters (guardians) and financial matters (administrators) are:

- *Guardianship and Administration Act 1986* (Victoria);
- *Guardianship Act 1987* (New South Wales);
- *Guardianship and Administration Act 1993* (South Australia); and
- *Guardianship and Administration Act 1995* (Tasmania).

### **Queensland and Australian Capital Territory: Financial, Legal, personal and Health**

The Queensland and Australian Capital Territory legislation on powers of attorney are the broadest in Australia and cover financial, legal, personal and health matters:

- *Powers of Attorney Act 1998* (Queensland); and
- *Powers of Attorney Act 2006* (Australian Capital Territory).

Western Australia and the Northern Territory do not have specific legislation addressing the appointment of guardians for personal and lifestyle matters<sup>16</sup>

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<sup>15</sup> See House of Representatives Standing Committee on Legal and Constitutional Affairs. (2007) Older people and the law. Commonwealth of Australia above, pages 73 and 74

<sup>16</sup> See House of Representatives Standing Committee on Legal and Constitutional Affairs. (2007) Older people and the law. Commonwealth of Australia above, page 74: Human Rights and Equal Opportunity Commission, *Submission No. 92*, p. 31; Ms Michelle Scott, Office of the Public Advocate Western Australia, *Transcript of Evidence*, 30 July 2007, p. 12.