

# NSW Law Reform Commission

## REPORT 18 (1974) - POWERS OF ATTORNEY

### Table of Contents

|  |    |
|--|----|
| Table of Contents .....  | 1  |
| Preface .....  | 2  |
| Report .....   | 3  |
| Appendix A - Extracts From The Conveyancing Act, 1919.....       | 10 |
| Appendix B - Draft Bill To Amend The Conveyancing Act, 1919..... | 14 |
| Appendix C - List of Commentators on Working Paper .....         | 19 |
| Appendix D - Copy of Working Paper.....                          | 20 |

## REPORT 18 (1974) - POWERS OF ATTORNEY

### Preface

The Law Reform Commission is constituted by the Law Reform Commission Act, 1967. The Commissioners are-

Chairman: The Honourable Mr Justice C. L. D. Mearns.

Deputy Chairman: Mr R. D. Conacher.

Others:

Mr C. R. Allen.

Mr D. Gressier.

His Honour Judge R. F. Loveday, Q.C.

Professor K. C. T. Sutton.

The Honourable Mr Justice Reynolds was Chairman of the Commission, and Professor D. G. Benjafield was a Commissioner, during part of the period of the Commission's work on the subject matter of this Report.

The offices of the Commission are in the Goodsell Building, 8-12 Chifley Square, Sydney. The Secretary of the Commission is Mr R. J. Watt. Letters should be addressed to him.

This is the eighteenth report of the Commission on a reference from the Attorney General. Its short citation is L.R.C. 18.

## REPORT 18 (1974) - POWERS OF ATTORNEY

# Report

### Report on Powers of Attorney

To the Honourable K. M. McCaw, Q.C., M.L.A.,  
Attorney General for New South Wales.

### INTRODUCTION

1. We make this report in pursuance of your reference to us:

“To review the law relating to powers of attorney and incidental matters”.

2. We issued a Working Paper on Powers of Attorney in April, 1973. It proposed for consideration a number of changes to the law, influenced in several cases by changes effected in the United Kingdom under the Powers of Attorney Act 1971. A copy of that Working Paper forms appendix D to this report.

3. The proposals made in our Working Paper were considered by commentators widely representative of legal and commercial interests in this State. We publish, as appendix C, a list of those from whom substantial comments were received, or who indicated concurrence in what we proposed. We are grateful to them.

4. We do not consider that a special Powers of Attorney Act is called for in New South Wales. Those who have occasion to consider the law on the subject are accustomed to find it in the present Part XVI of the Conveyancing Act, 1919, to which, we think, any desired amendments may be made.

5. Accordingly, in appendix B, we set out a draft bill to amend the Conveyancing Act, 1919, so far as it relates to powers of attorney. We recommend the enactment of legislation along those lines.

6. In appendix A we reproduce for convenience of reference extracts from section 7 (1), and the present Part XVI, of the Conveyancing Act, 1919.

7. The reasons for the proposed amendments are set out under the following headings.

### DEFINITION (Present Section 158 - Proposed Section 158)

8. We recommend a change of terminology. The expressions “donor” and “donee”, so far as they relate to powers of attorney, are neither as clear nor as precise as could be wished. The relationship of agency is essential to the relationship between the parties to a power of attorney, although other relationships are often involved. The law will, we think, be more clearly stated if the “donor” of a power is termed the “principal”, and the “donee” the “attorney under the power”.

### SIGNATURE (Present Section 159 - Proposed Section 159)

9. We recommend that the existing section 159 should stand in substance, but that the form of words now found in section 7 (1) of the Powers of Attorney Act 1971 (U.K.) should be adopted because of their greater clarity (Working Paper, paras 31 to 34). The expression “assurance”, which is defined in section 7 (1) of the Conveyancing Act, 1919, should be retained in section 159.

10. We direct attention to further remarks on this subject in paragraphs 56 to 58 below.

### IRREVOCABLE POWERS (Present Sections 161 and 162 - Proposed Section 160)

11. In our Working Paper (paragraphs 61 to 85) we discussed the existing law in this State relating to irrevocable powers of attorney. We concluded that the law was unsatisfactory, particularly because perpetuated obscurities and anachronisms.

12. The Law Commission reached somewhat similar conclusion about the state of comparable English law in their *Report on Powers of Attorney* [(1970) Law Com. No. 30] and, in keeping with their recommendations, section 4 of the Powers of Attorney Act 1971 (U.K made the following provisions about "Powers of attorney given security":

4. (1) Where a power of attorney is expressed to be irrevocable and is given to secure:

- (a) a proprietary interest of the donee of the power;
- (b) the performance of an obligation owed to the donee,

then, so long as the donee has that interest or the obligation remains undischarged, the power shall not be revoked:

- (i) by the donor without the consent of the donee;
- (ii) by the death, incapacity or bankruptcy of the donor, if the donor is a body corporate, by its winding up or dissolution.

(2) A power of attorney given to secure a proprietary interest may be given to the person entitled to the interest any persons deriving title under him to that interest, and those persons shall be duly constituted donees of the power for all purposes of the power but without prejudice to any right to appoint substitutes given by the power.

(3) This section applies to powers of attorney whenever, created.

13. For the reasons given in paragraphs 77 to 79 of our Working Paper, we are disposed to think that legislation governing irrevocable powers of attorney needs to go beyond powers given "by way of security".

14. We believe that the ingredients of an irrevocable power are that it should express itself to be irrevocable and should be given or be expressed to be given for valuable consideration. So constituted, it should not be revoked by the principal without the concurrence of the attorney under the power. Our proposed section 160 (1) indicates other circumstances that will not cause the power to terminate, and leaves it open to the parties to regulate the matter in other ways, if desired, by the terms of the instrument.

15. We draw attention to paragraphs (c) and (d) of our proposed section 160 (1). We there distinguish between mental incapacity of the principal on the one hand, and the principal's falling within certain categories under the Mental Health Act, 1958, on the other hand. We do so because, for example, a principal whose person is under detention or restraint may not, so far as concerns his property and affairs, be mentally incapable. He may in those respects, at all times or for prolonged intervals, be lucid. Our proposal should cover all possibilities.

16. We see no reason why the irrevocability of a power should, as in the present section 161, operate only "in favour of a purchaser". Nor, to us, is there any justification, as our commentators agree, in retaining the present subsection (1) (c) of that section, relating to notice (Working Paper, para. 67).

17. We have not thought it appropriate in our proposed section 160 to qualify references to irrevocable powers by the words "whether executed in or out of New South Wales". Those words appear in the present sections 161 and 162 of the Conveyancing Act, 1919, but, in our view, they are inapt, as the matter falls ordinarily to be determined by the rules governing the conflict of laws.

18. Most comments received by us in response to our Working Paper support our opinion (Working Paper, para. 83) that the present section 162 of the Conveyancing Act, 1919, if it has practical application is of such limited use that it should be repealed. We propose its repeal.

19. Instead of it, we are recommending a new section covering all irrevocable powers. It should, we suggest, become section 160, so that the Act will, by juxtaposition, more effectively contrast ordinary powers with irrevocable powers.

20. There is an anomaly in the present state of the law concerning irrevocable powers of attorney to which we draw attention in the following paragraphs 21 to 24.

21. Where there is an irrevocable power of attorney, one of the advantages accruing to a purchaser is that “any act done by the donee of the power in pursuance of the power shall be as valid as if anything done by the donor without the concurrence of the donee . . . had not been done . . .” (section 161 (1) (b)). Literally, the effect of this that, for example, if A, being seised in fee of Blackacre, gives an irrevocable power of attorney to B authorizing B to sell and convey Blackacre, and afterwards A sells and conveys Blackacre to C, and later again B sells and conveys Blackacre to D, D takes Blackacre free of the defeasance of C.

22. That this is the effect of the provision has some support dicta of the High Court in an extempore judgment in *James v. Nesb* [(1954) 28 A.L.J. 482, 484]. However, this has no support, so far we know, elsewhere in the law reports or in the books. If this is indeed the effect of the legislation, we think that it is not an intended effect in the context of section 161 (1) (a), we think that “anything done” in section 161 (1) (b) should have been qualified by something like “by way of revocation”.

23. The consequences of giving effect to the words of section 161 (1) (b) without some such qualification are startling. In the example we have put, C has no way of finding out whether A has given a power of attorney, except by requisition or inquiry to A, for what that may be worth. There is no need to have the power of attorney registered until after C has taken his conveyance and paid his money (section 163 (2)). Section 161 (1) (b) may therefore create an undiscoverable defect of title. The Registration of Deeds Act would not cure this defect, because registration of the conveyance A to C under that Act could hardly give a priority to an instrument which, by section 161 (1) (b), must be deemed not to have been executed. What would be the effect of registration under the Real Property Act of a transfer A to C is a hard problem to answer. But an effect such as we have described is quite beyond the concept of a power of attorney whether irrevocable or not.

24. If parties wish to take away or qualify the powers of disposition inherent in rights of property, they have other means at hand, less perilous to purchasers. We have therefore framed our draft legislation in a way which gives no foothold for this possible construction of the present section 161 (1) (b).

25. We draw attention to the authority proposed to be conferred upon the Court under our draft section 160 (2) to order that a irrevocable power of attorney terminate. That authority will prevent any impasse arising where the object of an irrevocable power has been attained but no other means exist at that time to secure its termination.

26. Section 162A, in its present form, will become redundant our proposals below concerning termination are adopted.

### **TERMINATION (Present Section 160 - Proposed Sections 161, 164 162A)**

27. We are recommending the use of the expressions “terminate” and “termination”, instead of “revoke” and “revocation”, concerning the ending of powers of attorney. “Revoke” connotes some active step on the part of the principal and leads to the need, exemplified in Part XVI of the Conveyancing Act, 1919, as it stands, to use such phrases as “death or other revocation”.

28. Since preparing our Working Paper we have taken a new approach to the drafting of what is now contained in section 160 of the Conveyancing Act. That section combines a number of concepts concerning the termination of a power. In particular, it provides that where a “donee” discloses in a prescribed manner that at the time of doing or suffering an act “by virtue of” the power he had no “notice or information” of the revocation of the power, that is conclusive proof of non-revocation “in favour of all persons dealing with the donee in good faith and for valuable consideration without notice . . . .”

29. Apart from its inconvenience, to which we refer in paragraph 35 below, the existing system is defective in a material respect. It protects only those dealing for value with the “donee”. It gives no protection to persons, such as registrars or bankers, who may be dealing with the “donee” *bona fide* and without notice, but not for valuable

consideration, nor (expressly at least) to persons, such as a subsequent purchaser, who may deal *bona fide*, without notice, and for valuable consideration, but not with the attorney.

30. There are two consequences of revocation to be provided for in the statute. First is the need to protect the attorney who acts within the scope of the power and without notice of its termination. That protection will be given by our proposed section 161. Second is the need to protect third parties. Similar protections are given by section 5 of the Powers of Attorney Act 1971 (U.K.) but we have, for reasons stated below, presented our draft legislation in a different form so far as its details are concerned.

31. Section 161 in our draft bill is intended to protect the attorney himself where he has acted within the scope of the power and without notice of its termination. As we stated in our Working Paper (paras 44 and 45), we think the concept of “notice” of termination preferable to the concept of “knowledge” of termination as used in the English enactment.

32. Section 162 in our draft bill is novel and calls for explanation. Its intention is to protect third parties, and claimants under third parties, who have acted without notice of the termination of a power of attorney and in reliance upon it. The section is likely to involve a substantial change to, and facilitation of, current conveyancing practice.

33. At present, under subsections (3), (3A) and (4) of section 160 of the Conveyancing Act, 1919, provision is made for the donee of a power of attorney to make a statutory declaration in or to the effect of the form set out in the Act’s Seventh Schedule. The declaration states that the donee has not received “any notice or information of the revocation of the [power] . . . by death, lunacy, unsoundness mind, bankruptcy, act of the donor or otherwise”. Subsection (3) renders the declaration “conclusive proof of such non-revocation at the time when such act or thing was so done or suffered in favour of persons dealing with the donee of the power in good faith and for valuable consideration without notice of such death or other revocation”.

34. Subsection (4) provides that the donee’s, statement of no revocation in the body of, or in a memorandum endorsed on, an instrument made in exercise of a power of attorney, has the same force and effect as a statutory declaration under the Seventh Schedule.

35. We have altered the opinion expressed in paragraphs 59 and 60 of our Working Paper where we said “our inclination is to prefer for the purposes of this State, a continuance of subsections (3), (3A) and (4) of section 160, of the Conveyancing Act”. In the light comments made on the point we are satisfied that the need to secure a declaration or memorandum of non-revocation from the attorney has become increasingly inconvenient in practice. We believe that can be abandoned without in any way adding to a conveyancer’s responsibilities. We explain our proposal in paragraphs 38 to 43 below.

36. But first, we comment on what was done in this connection under the Powers of Attorney Act 1971 (U.K.). Section 5 of the Act provides protection to an attorney under power and to third persons who have acted under a power not knowing of its revocation (subsections (1) and (2)). Subsection (4) is in the following terms:

(4) Where the interest of a purchaser depends on whether a transaction between the donee of a power of attorney and another person was valid by virtue of subsection (2) of the section, it shall be conclusively presumed in favour of the purchaser that that person did not at the material time know of the revocation of the power if:

- (a) the transaction between that person and the donee was completed within twelve months of the date on which the power came into, operation or
- (b) that person makes a statutory declaration, before or within three months after the completion of the purchase, that he did not at the material time know of the revocation of the power.

37. We are not making a similar recommendation. On the view we are proposing there will be no need to create conclusive presumptions, nor to employ declarations or statements of non-revocation.

38. Our proposed section 162 stipulates three ingredients necessary to secure protection to third parties who have, relied on a power of attorney without notice of its revocation. In the first place, there must be an act under a power of attorney done by the attorney within the scope of the power and professing to act on behalf of another. The last phrase means that where a person who, is in fact an attorney under power exercises his authority as

attorney but does not disclose it as, for instance, where an attorney sells a chattel without revealing that he acts for a principal the proposed section 162 will not apply.

39. Second, at or after the time of the attorney's act, a third person (for instance a purchaser from the attorney, or any purchaser thereafter) must act to his detriment in a transaction, or act in reliance on a right title or interest, the validity of which depends on the power's not having terminated.

40. Third, the third person at the time of acting must have had no notice of the termination of the power before the act done by the attorney.

41. Given those ingredients, our draft section extends protection, notwithstanding the termination of the power before the material time of acting upon it, to that third person and to any person claiming under him.

42. In transactions affecting land, the result will be, in effect, that the first purchaser without notice perfects the chain of title. We again draw attention to the definition of "purchaser" in section 7 (1) of the Conveyancing Act, 1919, and to the fact that good faith is not a necessary ingredient in our proposals (cf. Working Paper, paras 46 to 48). The conveyancer acting for a purchaser without notice need ordinarily raise no requisition and will ordinarily require no declarations concerning the non-revocation of the power. In no case will memoranda of non-revocation be required as at present. But it may be that a practice will develop whereby the solicitor for the first purchaser from the attorney will obtain his client's declaration of having no notice of revocation, the declaration to remain with the title deeds.

43. Even if it has become notorious that a power of attorney was terminated when, the attorney acted under it, a purchaser, when taking with notice from a vendor who had no notice, will receive a good title under our proposals because he is "any person claiming under" a third person without notice.

44. The draft section applies to acts done after the commencement of the proposed amending Act under powers of attorney created by instruments executed before that commencement (subsection (3)).

45. There should, we think, be some statutory sanction against attorneys under power who act knowing their authority to have been terminated. Our proposed section 162A renders such action a misdemeanour.

### **REGISTRATION (Present Section 163)**

46. It has been strongly represented to us that the suggestion put forward for discussion in our Working Paper (paras 95 to 101), that registration of powers of attorney be made optional, would cause difficulty for conveyancers in some cases.

47. While we adhere to the view that the present law on the point is in some respects anomalous, we think that, as the current practice is now settled and understood, and may be an aid in proof of some titles, it should not be disturbed under the present terms of reference.

### **COPIES OF POWERS OF ATTORNEY (Proposed Section 163A)**

48. The use of photographic and other copies of powers as proof of their contents was discussed in our Working Paper (paras 102 to 106).

49. There we referred to section 3 of the Powers of Attorney Act 1971 (U.K.). In essence, that section allows for proof of the contents of an instrument creating a power of attorney by means of a certified photographic or other mechanical facsimile copy. The certification, which must appear at the end of each page and state that the copy is a true and complete copy of the original, may be made by the principal or by a solicitor or stockbroker.

50. Most of the commentators on our Working Paper favoured the use in this State of a similar recognition of certified copies. But some commentators objected because of the risk of fraud and because any proliferation of copies might prejudice the prompt effectiveness of notice of termination.

51. We are mindful of the importance of maintaining the stature of instruments appointing attorneys under power as instruments in aid of title. At the same time we think that, if the principal wishes, for convenience in managing his affairs and property, to approve of the use of copies of his power of attorney, the law should facilitate his wish.

52. We recommend, in section 163A of our draft bill, that a document, of whatever nature, when certified as a true and complete copy of an instrument creating a power of attorney shall be, as against the principal, evidence of the execution and contents of the instrument and, as against other persons, evidence of the contents of the instrument. The certificate must be in writing for the purposes of the section and must be given by the principal or by a person of a prescribed class. Such persons, we think, might include solicitors, accountants, stockbrokers, and bankers.

#### **GENERAL POWER OF ATTORNEY (Proposed Section 163B)**

53. All those who commented on our Working Paper agreed that a statutory short form of power of attorney would be desirable. We have considered a suggestion that such a power should operate by reference to authorized acts specified in a comprehensive list in a statutory schedule but we think that it would be impracticable to devise a list to suit every case.

54. We prefer that the statute give effect to a power authorizing the attorney under it to "do on behalf of the principal anything that the principal may lawfully authorize an attorney to do". But we think that the principal should be able, within the terms of the instrument, to limit or qualify the authority or otherwise regulate the operation of the power. These proposals are given effect to in our suggested section 163B which also contemplates a model "short form" of statutory power to be set out as Schedule VII of the Conveyancing Act.

#### **MATTERS EXCLUDED FROM DRAFT LEGISLATION**

55. We have given attention to the practicability, under this reference, of proposing codification of the law relating to signature by physically disable persons; of amending the Trustee Act, 1925, in relation to powers of attorney; and of providing for powers of attorney to survive certain mental or physical disability of the principal. We are not suggesting that any action be taken about those matters under this Report for the reasons which follow.

56. So far as concerns *codifying the common law about the signature of documents* by physically disable persons, we adhere to the recommendation, in paragraph 30 of our Working Paper, that the common law should stand. We do this despite strong opinions to the contrary expressed by two of our commentators.

57. The problem raised by those commentators appears to us not to reflect difficulty about the state of the law itself, but rather to reflect difficulty for practitioners in establishing what the law is, given the limits of time for research imposed by the pressures of professional practice.

58. We are not convinced that legislation on the subject can foresee all the situations now covered by the common law. And we adhere to our view that: "In a field like this, legislation may cause harm in some situation not adverted to by the draftsman". No problem has been shown to exist in the operation of the common law in these respects. We apprehend that by interfering with the common law, problems may be created where none now exists.

59. We adhere also to the conclusions expressed in our Working Paper (para. 1 18) not to propose *amendments to the Trustee Act, 1925*, under the present terms of reference.

60. All commentators on our Working Paper supported with enthusiasm our suggestion that provision should be made to enable *power of attorney to survive certain mental or physical disability* of the principal.

61. However, we are not taking action about the matter in the report. It more properly falls within the terms of reference quoted paragraph 164 of our Working Paper. A report under those terms reference, when issued, will supplement, where relevant, the proposed in the present Report.

28th June, 1974.



R. D. CONACHER,  
Deputy Chairman.

D. GRESSIER,  
Commissioner.

## Appendix A - Extracts From The Conveyancing Act, 1919

### PART I - INTERPRETATION

7. (1) In the interpretation of this Act, and of any rules or regulations madethereunder, unless the context or subject matter otherwise indicates or requires-

Interpretation.

“Assurance” includes a conveyance and a disposition made otherwise than by will; and “assure” has a corresponding meaning.

“Purchaser” means a purchaser for valuable consideration, and includes a lessee, mortgagee, or other person who for valuable consideration acquires an interest in property, except that in Part IV, Divisions 5 and 6 of this Act “purchaser” means only a person who acquires an interest in or charge on property for money’s worth; and purchase has a meaning corresponding with that of “purchaser”.

### PART XVI - POWERS OF ATTORNEY.

158. (1) In this Part the expression “power of attorney” or “power” shall include an authorised substitution, delegation, or appointment of sub-attorney : Provided that nothing in this Part shall enable the donee of a power irrevocably to appoint a substitute, delegate, or sub-attorney, unless expressly authorised so to do.

Definition.

New subsection added, Act No.23, 1920, s.2.

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

Application of Part XVI to land under Real Property Act, 1900.  
Amended, Act No.17, 1972, s.12(a).

159. (1) The donee of a power of attorney may execute or do any assurance, instrument, or thing in and with his own name and signature and his own seal (where sealing is required) by the authority of the donor of the power; and every assurance, instrument, and thing so executed and done shall be as effectual in law, to all intents as if it had been executed or done by the donee of the power in the name and with the signature and seal of the donor thereof.

Execution under power of attorney, 44 & 45 Vic., c.41, s.46.

(2) This section applies to powers of attorney created by instruments executed either before or after the commencement of this Act.

160. (1 ) Subject to any stipulation to the contrary contained in the instrument creating a power of attorney,

Powers of attorney to continue in force until notice of death or revocation.  
See Ibid.

such power shall, so far as concerns any act or thing done or suffered thereunder in good faith, operate and continue in force until notice of the death of the donor of the power, or, until notice of other revocation thereof has been received by the donee of the power.

s.47.  
1901, No.37, s.14.

(2) Every act or thing, within the scope of the power done or suffered in good faith by the donee of the power after such death or other revocation as aforesaid, and before notice thereof has been received by him, shall be as effectual in all respects as if such death or other revocation had not happened or been made.

All acts to be valid if done before receipt of any such notice.

(3) A statutory declaration by the donee of the power in or to the effect of the form set out in the Seventh Schedule hereto, if made at the time such act or thing was done or suffered, or at any time after shall be taken to be conclusive proof of such non-revocation at the time when such act or thing was so done or suffered in favour of all persons dealing with the donee of the power in good faith and for valuable consideration without notice of such death or other revocation.

Declaration by donee of power of non-receipt of notice to be proof of non-revocation.  
Seventh Schedule.

(3A) Where the donee of the power is a corporation aggregate the declaration may be made by any officer of the corporation appointed for that purpose either generally or in the particular instance by the board of directors, council, or other governing body by resolution or otherwise; and where the declaration contains a statement that the declarant is an officer of the corporation appointed for the purpose of making the declaration, that statement shall be conclusive evidence in favour of the persons mentioned in subsection three of this section.

cf. 15 Geo. V. c.20, s.124(2).  
New subsection added, Act No.44, 1930, s.29(a).

(4) (a) Where any instrument made after the commencement of this Act is made or purports to be made in exercise of a power of attorney, a statement that the donee of the power has no notice of the revocation of the power of attorney at the time of the making, by him of such instrument if contained-

Amended Act No.65, 1932, s.3(1)(i).

(i) in the body of the instrument; or  
(ii) in a memorandum indorsed on the instrument signed by the donee of the power at the time of making such instrument, and stating the date and place of signature, such signature being attested by one witness,

shall have the same force and effect as the statutory declaration mentioned in subsection three.

(b) Any donee of a power of attorney or person purporting to act as a substitute, delegate, or sub-attorney who signs any such instrument or memorandum knowing such statement to be untrue, or falsely states in such memorandum the date of the signature thereof, shall be guilty of a misdemeanour.

Amended Act No.23, 1920, s.2.

(4A) \* \* \* \* \*

New subsection added, Act No.8, 1943, s.2(a).  
Amended Act No.29, 1943,s.2(1).  
Repealed Act No.17, 1972, s.12(b).

(4B) \* \* \* \* \*

New subsection added, Act No.29, 1943, s.2(2).  
Repealed Act No.17, 1972, s.12(b).

(5) In this section "revocation" includes the determination of the power otherwise than by the expiration of a fixed period of time.

(6) \* \* \* \* \*

Repealed Act No.23, 1920, s.2.

(7) This section applies to powers of attorney executed in or out of New South Wales, and whether executed before or after the commencement of this Act.

161. (1) Where a power of attorney given for valuable consideration (whether executed in or out of New South Wales) is in the instrument creating the power expressed to be irrevocable, then, in favour of a purchaser,-

Irrevocable power of attorney for value.  
See 45 & 46 Vic., c.39, s.8.

(a) the power shall not be revoked at any time, either by anything done by the donor of the power without, the concurrence of the donee, or by the death, mental disability or bankruptcy of the donor; and

Amended Act No.17, 1972, s.12(c).

(b) any act done at any time by the donee of the power in pursuance of the power shall be as valid as if anything done by the donor without the concurrence of the donee, or the death, mental disability or bankruptcy of the donor, had not been done or had not happened; and

Amended, Ibid.

(c) neither the donee of the power nor the purchaser shall at any time be prejudicially affected by notice of anything done by the donor without the concurrence of the donee, or of the death, mental disability or bankruptcy of the donor.

Amended Act No.17, 1972, s.12(c).

(2) This section applies only to powers of attorney created by instruments executed after the commencement of this Act.

162. (1) Where a power of attorney (whether executed in or out of New South Wales, and whether given for valuable consideration or not) is in the instrument creating the power expressed to be irrevocable for a fixed time therein specified, not exceeding two years from the date of the instrument, then, in favour of a purchaser,-

Power of attorney made irrevocable for fixed time.  
See 45 & 47 Vic., c.39, s.9.

(a) the power shall not be revoked for and during that fixed time, either by anything done by the donor of the power without the concurrence of the donee, or by the death, mental disability or bankruptcy of the donor; and  
(b) any act done within that fixed time by the donee of the power in pursuance of the power shall be as valid as if anything done by the donor without the concurrence of

Amended, Ibid.  
s.12(d).

Amended, Ibid.

the donee, or the death, mental disability or bankruptcy of the donor had not been done or had not happened; and (c) neither the donee of the power nor the purchaser shall at any time be prejudicially affected by notice, either during or after that fixed time, of anything done by the donor during that fixed time without the concurrence of the donee, or of the death, mental disability or bankruptcy of the donor within that fixed time.

Amended, Ibid.

(2) This section applies to powers of attorney created by instruments executed before or after the commencement of this Act.

162A. Any act done, whether before or after the commencement of the Conveyancing (Amendment) Act, 1930, in professed exercise of a power mentioned in either section one hundred and sixty-one or section one hundred and sixty-two of this Act, and within the time, if any, fixed by the power, shall, in favour of a purchaser without notice of the revocation of the power with the concurrence of the donee thereof, be as valid as if the power had not been so revoked.

Protection of purchaser under irrevocable power.

New section added, Act No.44, 1930, s.29(b).

163. (1) Any instrument (whether executed before or after the commencement of this Act) creating a power of attorney for any purpose whatever may be registered.

Registration of powers of attorney.

See Vict. Act No.2, 6/2, s.219.

(2) Where such instrument is executed after the commencement of this Act no conveyance or other deed not being a lease or agreement for a lease for a term not exceeding three years, and no memorandum by this Act operating as a deed executed by the donee of the power in pursuance of the power shall be of any force or validity whatsoever unless the instrument creating the power has been registered:

See 44 & 45 Vic., c.41, s.48.

Provided that on registration of the instrument creating the power every such conveyance deed or memorandum executed by the donee of the power shall take effect as if the instrument creating the power had been registered before the execution of the conveyance deed or memorandum.

Proviso added, Ibid s.29(c)(i).

(3) Any instrument revoking any such power may also be registered.

(4) Every such conveyance and other deed and memorandum as is mentioned in subsection two executed by the donee of a power of attorney before the commencement of the Conveyancing (Amendment) Act, 1930, shall have the same effect as if that Act had been in operation at the time of the execution.

New section added, Ibid. s.29(c)(i).

(5) Nothing in the last preceding subsection shall affect the rights of any party to any proceeding at law or in equity concluded before or pending at the commencement of the Conveyancing (Amendment) Act, 1930.

New subsection added, Ibid.

## Appendix B - Draft Bill To Amend The Conveyancing Act, 1919

To alter the law relating to powers of attorney and for that purpose to amend the Conveyancing Act, 1919; and for purposes connected therewith.

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

1. This Act may be cited as the "Conveyancing (Amendment) Act, 1974".

Short title.

2. This Act shall commence on 1st January, 1975.

Commencement.

3. The Conveyancing Act, 1919, is, in this Act, referred to as the Principal Act.

Principal Act.

4. The Principal Act is amended by omitting from section 2 in the matter relating to Part XVI the figures "163" and by inserting instead the figures "163B".

Amendment of Act No.6, 1919, sec.2.

5. The Principal Act is further amended by omitting section 158 and by inserting instead the following section - 158. (1) In this Part-

Further amendment of act No.6, 1919, sec.158.  
Definition.

"attorney", in relation to a power of attorney, means an attorney under the power.

"power of attorney" or "power" includes an authorized substitution, delegation, or appointment of sub-attorney.

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

(2) This Part shall not enable an attorney irrevocably to appoint a substitute, delegate, or sub-attorney, unless expressly authorized so to do.

(3) This Part shall extend to powers of attorney authorizing, whether expressly or in general terms, the execution of dealings under the Real Property Act, 1900.

6. The Principal Act is further amended by omitting section 159 and by inserting instead the following section-

Further amendment of Act No.6, 1919.  
Sec.159.  
Execution under power.

159. (1) An attorney under a power of attorney may -

cf. 1971 c.2 of attorney s.7(1).

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

seal; and  
(b) do any other thing in his own name;

by the authority of the principal.

(2) An assurance or instrument executed or thing done in that manner shall be as effectual as if executed or done by the attorney with the signature and seal, or, as the case may be, in the name, of the principal.

7. The Principal Act is further amended by omitting section 160 and by inserting instead the following section-

Further amendment of Act No.6, 1919. sec.160. Irrevocable powers.

160. (1) Where a power of attorney is, in the instrument creating the power, expressed to be irrevocable and is given, or in the instrument creating the power is expressed to be given, for valuable consideration, then, subject to the terms of the instrument, the power is not revoked nor otherwise terminated by and remains effective notwithstanding-

- (a) anything done by the principal without, the concurrence of the attorney;
- (b) bankruptcy of the principal;
- (c) mental incapacity of the principal;
- (d) the principal becoming a patient, a protected person or an incapable person within the meaning of the Mental Health Act, 1958, or any other event happening whereby the property or affairs of the principal become subject to care, management, collection, administration, charge or control under that Act;
- (e) death of the principal;
- (f) if the principal is a corporation, dissolution of the corporation.

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

(3) This section does not apply to a power of attorney created by an instrument executed before the commencement of the Conveyancing (Amendment) Act, 1974.

8. The Principal Act is further amended by omitting sections 161, 162 and 162A and by inserting instead the following sections

Further amendment of act No.6, 1919. secs.161, 162, 162A.

161. (1) Where-

Termination: protection of attorney.

- (a) an attorney under a power of attorney does an act within the scope of the power; and
- (b) at that time the attorney does not have notice that the

power had terminated;

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

(2) This section applies only to an act done by an attorney after the commencement of the Conveyancing (Amendment) Act, 1974.

162. (1) Where-

Termination: protection of strangers.

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

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

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

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

(c) at the time of the act of the third person he does not have notice that the power had terminated before the time of the act of the attorney;

the third person -and any person claiming under him shall be entitled, as against the principal and the attorney and any other person, to rely on the power, notwithstanding any termination of the power before the time of the act of the attorney, in the same manner and to the same extent as if the power had not terminated before the time of the act of the attorney.

(2) Sub-section (1) shall not entitle an attorney to rely on a power in support of an act within the scope of the power done by him with notice of termination of the power.

(3) This section applies only to an act done by an attorney after the commencement of the Conveyancing (Amendment) Act, 1974.

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

Attorney acting with knowledge of termination of power.

(2) This section applies only to acts or things done after the commencement of the Conveyancing (Amendment) Act, 1974, under a power of attorney whenever given.

9. The Principal Act is further amended by omitting from section 163 the words "donee of" wherever occurring and

Further amendment of act No.6, 1919, sec.163.



by inserting instead the words “attorney under”.

10. The Principal Act is further amended by inserting next after section 163 the following new sections- Further amendment of Act No.6, 1919.

163A. (1) Where it is certified in writing for the purposes of this section by the principal or by a person of a prescribed class that a document is a true and complete copy of an instrument creating a power of attorney that document shall be evidence of Proof of powers of attorney.

(a) the execution and the contents of the instrument, as against the principal; and of

(b) the contents of -the instrument, as against any other person.

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

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

(4) A person (otherthan the principal under a power of attorney) who gives a certificate for the purposes of this section in respect of a document purporting to be a copy of a power of attorney and-

(a) is not a person of a class prescribed for the purposes of subsection (1) ; or

(b) is not authorized by the principal to give the certificate;

shall be guilty of a misdemeanour.

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

(6) This section applies only to a document certified under subsection (1) after the commencement of the Conveyancing (Amendment) Act, 1974.

163B. (1) Where the instrument creating a power of attorney is expressed to authorize an attorney under the power to do on behalf of the principal any thing that the principal may lawfully authorize an attorney to do (in this section called a general authority), whether or not subject to conditions or limitations expressed in the instrument, the instrument shall have effect in accordance with its terms. General power of attorney.

(2) A general authority may be given by means of an instrument in or to the effect of the form set out inthe Seventh Schedule.

11. The Principal Act is further amended by omitting Further amendment of Act No.6, 1919, Schedule VII.

Schedule VII and by insertmg instead the following-

Sec.163B.

## **SCHEDULE VII**

### *General Power of Attorney*

THIS GENERAL POWER OF ATTORNEY is made on the \_\_\_\_\_ day of \_\_\_\_\_ 19\_\_\_\_ by AB of \_\_\_\_\_ in pursuance of section 163B of the Conveyancing Act, 1919.

1. I APPOINT CD of \_\_\_\_\_ to be my attorney.

2. I AUTHORIZE my attorney, subject to clause 3, to do on my behalf any thing that I may lawfully authorize an attorney to do.

3. THE AUTHORITY of my attorney is subject to the following conditions or limitations:-

IN WITNESS, etc.

12. The omission by this Act of sections 161, 162 and savings 162A of the Principal Act does not affect the operation of those sections in relation to a power of attorney created by an instrument executed before the commencement of this Act.

## Appendix C - List of Commentators on Working Paper

Australian Finance Conference  
Bank of New South Wales  
Commonwealth Banking Corporation  
Dibbs, Crowther and Osborne (Solicitors, Sydney)  
Institute of Chartered Accountants in Australia, The  
Institute of Chartered Secretaries and Administrators, The  
Law Society of New South Wales, The  
Perpetual Trustee Company Limited  
Priddle Gosling (Solicitors, Sydney)  
Public Trust Office

\* The following bodies indicated that they had no comment to make:

Australian Institute of Management, N.S.W. Division  
Commercial Bank of Australia Limited, The  
Institute of Directors in Australia, The  
Sydney Stock Exchange Limited, The

## Appendix D - Copy of Working Paper

### Table of Contents

#### Preface

Introduction

Part 1-Conveyancing Act, 1919-

- A. Section 38-Signature
- B. Section 159-Execution under Power of Attorney
- C. Section 160-Effects of Revocation of Powers of Attorney
- D. Sections 161, 162, and 162A-Irrevocable Powers of Attorney
- E. Section 163-Registration of Powers of Attorney

Part 2-Trustee Act, 1925: Section 58-Powers of Attorney

Part 3-Powers of Attorney and Mental Illness

Part 4-Statutory Form of Power of Attorney

Part 5-A Summary of Matters on which Comment is Invited

Appendix A-Powers of Attorney Act 1971 (U.K.)

Appendix B-Extract from English Law Commission's *Published Working Paper No. 11* on Powers of Attorney (1967)

Table of Cases