



# Update from Oz: The Powers of Attorney Act 2003 NSW

By Andrew Johnstone of APEARS, Sydney, Australia

**The NSW Government has introduced a new Act which heralds significant changes to powers of attorney.**

While this may not be earth-shattering news for Institute members in New Zealand, it may be wise to consider the implications for any clients who are domiciled in both jurisdictions or have assets in Australia.

The NSW Government has enacted the Powers of Attorney Act 2003, which came into force on 16 February 2004. This is the first time in the history of NSW that those acting under power of attorney have had their own all-encompassing legislation. Prior to this the only relevant legislation was the Conveyancing Act 1919.

When the government first proposed the legislation there was across-the-board support for the concept. With our ageing population clear guidance was required to ensure that the affairs of elderly people - particularly their financial affairs - were properly supported. It is perhaps not surprising that this area of the law would eventually have its own legislation as there are well-reported cases of abuse of the attorney system. Many an individual has lost money, been removed from their home and even had medical decisions made for them without ever really understanding their 'approval' of those actions.

The new legislation prescribes a new form of power of attorney and includes significant changes to an attorney's powers to provide gifts and other benefits. Furthermore the Guardianship Tribunal, together with the Supreme Court, has

been given extensive powers to oversee amendments to and supervision of powers of attorney.

In relation to enduring powers of attorney, there is now a new obligation on solicitors (and others prescribed in the Act) to explain all of consequences of the document they are executing. They must certify that the principal understood the effect thereof. Previously the principal only had to be advised that the document would be effective after they became incapacitated.

The new form of attorney does not authorise any attorney to use the principal's funds to provide gifts or other benefits to themselves or any third party, unless expressly authorised by the principal to do so. The effect of this is to remove any uncertainty that previously existed. If the power of attorney is silent about the giving of any benefits, then none can be given.

There is also a provision enabling any property disposed of by an attorney that may have been specifically given under a will to be considered, so that those beneficiaries retain the same interest in the residue. A similar adjustment can be made in the case of intestate estates.

The new form also advises that any health and lifestyle decisions are only allowed to be made by a guardian and not the attorney. This has until now been a contentious issue. By making these 'health' decisions in the past, the attorney could often have benefited financially by the making of that decision, which in itself ensured that there was a bias in the decision-making process.

There is also an obligation of the attorney, similar to the long existing obligations on trustees, to keep all monies separate from their own and to keep proper accounts.

Under the new legislation, powers of attorney can be tailored specifically to the individual's circumstances. Prior to this there was a 'carte blanche' to the attorney. The new form clearly requires the principal to set out exactly what can and cannot be done by the attorney. However any abuses under the old system could still occur for a number of years, as existing powers of attorney still fall under the provisions of the old Act.

## Update on previous article

In the December issue I discussed the potential change in the Wills Probate and Administration Regulation 2003 NSW regulation, regarding the provision of a prescribed amount to which a surviving spouse is entitled in an intestate estate. The regulation has now been amended, in accordance with the review's proposal, to increase the threshold amount to A\$200,000.

**Regards from Australia,  
Andrew Johnstone  
APEARS**

Level 2, 275 George Street  
GPO Box 4859, Sydney NSW 2001  
Australia  
Ph: 61 2 9279 0516  
Fax: 61 2 9279 0514  
Email: APEARS@bigpond.com

# APEARS

**Australian Probate Estate & Asset Related Services**

Assisting New Zealand executors, trustees and their legal advisors in the administration of a variety of matters in Australia, including:

- Resealing of Probates and Letters of Administration
- Issue of Insurance Indemnity Bonds
- Transfer and Realisation of assets
- Stamp Duty assessment
- Location of Beneficiaries

**For assistance please contact Andrew Johnstone**

GPO Box 4859, Sydney NSW 2001, Australia, Email: APEARS@bigpond.com, Phone: 61 2 9279 0516, Fax: 61 2 9279 0514, Mobile: 61 409 832 144

