



Wealth & Estate Planning Law update April 2011

By Stacey Smith and Peter McCrohon

Powers of Attorney – minimising and dealing with abuse

Powers of attorney are often included in 'estate planning' packages with little thought being given to attorney abuse of the power.

In April 2011, this firm delivered a seminar to the CPA Australia Forensic and Investigative Accounting Group on minimising and dealing with abuse of powers of attorney.

A copy of the paper delivered by us is reproduced below.

1 Introduction

- 1.1 Powers of attorney have for many years been misunderstood and misused to the detriment of principals when the provision of appropriate advice prior to making the relevant appointment could prevent or at least diminish the loss suffered.
- 1.2 Advisers have a responsibility to ensure that a principal understands how the power of attorney operates and, in particular, how the attorney is able to exercise the power. A simple explanation by an adviser that the attorney can 'look after your affairs' may not be sufficient in the light of increasing attorney abuse.
- 1.3 All too often, completely unrestricted powers of attorney are granted when a restriction at least as to the scope of what the attorney is empowered to do on behalf of the principal could be imposed.
- 1.4 It is impossible to prevent unknown abuse of a power of attorney by an appointed attorney – however many powers of attorney in existence and being created daily do nothing to limit the occurrence of such abuse or to protect the principal.
- 1.5 This paper discusses the operation and effect of powers of attorney, the measures available to prevent or limit abuse, the impact of the *Powers of Attorney Act 2003* and the avenues available to redress abuse by an attorney.

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2 Relationship of an attorney to his principal

- 2.1 An attorney under a power of attorney becomes the appointed agent for the principal and is required to act in accordance with the instrument (document) that appoints the attorney. The general law (being common law and the law of equity) regulates the relationship¹ between attorney and principal.
- 2.2 The general law recognises that an attorney is the contractual agent for the principal but it is also clear law that in many situations, the attorney is also the fiduciary of the principal. However an agent is not always a fiduciary of the principal – and this is often the case where a power of attorney is included in a commercial contract

Powers of Attorney in commercial contracts

- 2.3 Consider for example a normal commercial contract between 2 or more contracting parties which often makes one party the attorney of the other. For example, in a shareholders' agreement, it is not unusual to find the following type of clause

Power of attorney

Each shareholder who is required to transfer shares but who declines to undertake or complete such transfer is in default and such defaulting shareholder appoints each member of the Board (other than any Director(s) appointed by that defaulting shareholder) as its attorney with the discretion to do all things that the Board considers necessary to effect that transfer.

- 2.4 The attorney (ies) appointed under this clause are the agent for the defaulting shareholder who is the principal. In this case however, the agent's role is to ensure that the defaulting shareholder transfers its shares in the company in accordance with the terms of the shareholders' agreement. It is highly unlikely that the attorney owes any fiduciary duty to the defaulting shareholder – rather, the principal's rights are limited to ensuring that the attorney is dealing with the shares in a manner that conforms with the parties agreement as set out in the shareholders' agreement. If the attorney acts in a manner that is inconsistent with the shareholders' agreement then the principal can resort to general law remedies. Whilst this form of commercial power of attorney is governed by provisions of the NSW *Powers of Attorney Act*², it does not direct itself to commercial powers of attorney and generally relies on the general law to regulate the rights of the parties³.
- 2.5 The *Powers of Attorney Act* 2003 (NSW) commenced in February 2004.
- 2.6 The *Powers of Attorney Act* 2003 does not apply to powers of attorney created pursuant to the provisions of the *Conveyancing Act* 1919 NSW. Powers of attorney already in existence continue to be governed by the former provisions of the *Conveyancing Act* (which are repeated for convenience in Schedule 1 of the *Powers of Attorney Act* 2003. Most importantly, the *Powers of Attorney Act* 2003 does not affect the operation of any principle or rule of the common law or equity except where the Act specifically overrides such general law principle or rule.⁴

¹ in addition to the Power of Attorney Act 2003

² section 6(1) of the Powers of Attorney Act 2001

³ In this paper we focus on non commercial powers of attorneys.

⁴ section 6(3) of the Powers of Attorney Act (2003).

Prescribed powers of attorney

- 2.7 For the purposes of this paper, we focus on what are known as prescribed powers of attorney.
- 2.8 A prescribed power of attorney arises if the instrument or document that establishes the power of attorney adopts the Schedule 2 prescribed form under the *Powers of Attorney Act* 2003. It is important to note that s.8 of the *Powers of Attorney Act* (2003) states that **an instrument that is in or to the effect of the** Schedule 2 form creates a prescribed power of attorney.
- 2.9 This means that it is the substance of the instrument and NOT the form of the instrument that is important. If in substance the instrument is seeking to create a prescribed power of attorney, then the fact that it does not adopt the statutory format does not mean that it is not a prescribed power of attorney.
- 2.10 As such, a commercial power of attorney as described above clearly does not in substance, seek to incorporate the features of the prescribed form. We assume that in determining this issue the courts would look at the intention of the principal, the circumstances in which the power of attorney was granted, the relationship between the attorney and the principal and other extraneous matters to determine whether in substance the principal intended to create a prescribed power of attorney.
- 2.11 At a practical level, it would be very rare for a court not to make a finding that a ‘mum and dad’ power of attorney which did not comply with the Schedule 2 form is therefore not a prescribed power of attorney. At a practical level however, the Schedule 2 prescribed form of the a power of attorney is now almost universally adopted and it would be exceptionally rare for the matter to arise in practice.

Attorney’s obligations under prescribed power of attorney

- 2.12 The *Powers of Attorney Act* 2003 states that “a prescribed power of attorney confers on the attorney the authority to do on behalf of the principal anything that the principal may lawfully authorise an attorney to do”⁵.
- 2.13 As such, an attorney under a prescribed power of attorney must act for the benefit of and on behalf of the principal and can do what the principal can lawfully authorise the attorney to do.

The essential nature of an attorney’s lawful powers

- 2.14 The attorney is not just the agent of the principal, but clearly also owes fiduciary duties to the principal. This is implied by the Act⁶ and has been clarified and confirmed by the courts. In the case of *Spina v Conran Associates Pty Ltd*⁷, the court stated that:

“[the Act] does not confer on the attorney the authority to do anything the grantor may lawfully authorise another person to do. It only gives the attorney authority to act “on [the grantor’s] behalf”, and it only authorises things that the grantor may lawfully authorise *an attorney* to do. These words are very important. They make it plain that **the person to whom the authority is given is limited to acting in an agency capacity, subject to the constraints of a fiduciary position**. In particular, the person receiving

⁵ section 9(1) of the Act.

⁶ s9 Powers of Attorney Act 2003

⁷ [2008] NSWSC 326

the authority, being a fiduciary, is subject to the **obligation to act on the grantor's behalf in the grantor's interests.** "(emphasis added)

- 2.15 The exercise of such powers by the attorney must also be lawful. This means that a principal cannot allow an attorney to carry out an unlawful act for the benefit of the principal and for the principal to then deny that the act was done by them because the act was done by the attorney. For example, in a situation where a principal is facing personal bankruptcy, a transfer of the principal's property to an associate of the principal, being a transfer undertaken by an attorney for less than the property's market value consideration, does not mean that the transaction is not void under the *Bankruptcy Act* because the principal has, by virtue of the transfer, sought to defeat the claims of creditors.

The attorney's fiduciary obligations

- 2.16 It is important to understand the nature of a fiduciary relationship – especially since many of you reading this article are probably fiduciaries on many occasions. As such, set out below is a general summary of what it means to be a fiduciary and to owe fiduciary duties:
- (a) Fiduciary duties arise out of the special relationship between two parties in circumstances in which obligations of trust and confidence arise. The relationship arises when one party – the fiduciary – undertakes to act for or on behalf of the other party – the principal.
 - (b) Because the fiduciary has authority to act as the representative of the principal and has undertaken to do so on their behalf, the fiduciary is obliged to place the interests of their principal before their own.
 - (c) Sometimes the existence of vulnerability on the part of the principal will indicate a fiduciary relationship but this is not always the case⁸. All the circumstances of the relationship must be examined to determine whether one party has authorised the other party to act on their behalf and trusts them to do so only in their best interests.
 - (d) The law prohibits a fiduciary from acting otherwise than in the interests of their principal. The fiduciary must act in good faith, must not make a profit from the relationship of trust and confidence, must not allow any personal interest to conflict with his duty to the principal and must not act for his own benefit (or the benefit of any third party) without the informed consent of his principal.
 - (e) An overriding obligation of loyalty to the principal is imposed on the fiduciary.
 - (f) An attorney is usually appointed by the principal to act on their behalf and are trusted to do so for the benefit of the principal. In these circumstances the attorney and principal have a fiduciary relationship and the attorney (being the fiduciary) must not allow any personal interest to conflict with his duty to act in the interests of his principal.
 - (g) As such, an attorney must only deal with the principal's assets in the interests of the principal and not for their own personal gain. If the attorney is to benefit from any transaction undertaken in his capacity as attorney then full disclosure must be made to the principal and the informed consent of the principal must be obtained. Only the principal's full disclosure and informed consent will excuse a conflict of interest undertaken by an attorney.

⁸ for example, a patient is vulnerable to their doctor but this does not make their relationship fiduciary. Laws relating to contract, negligence and undue influence may apply but these do not constitute fiduciary obligations.

- (h) In cases when a person is appointed attorney of another under the terms of a commercial contract, the person appointed as attorney does not undertake to act in the interests of the principal. In fact, the appointment is made to ensure that the attorney is capable to securing its legal entitlements under the contract – an act which is for the benefit of the attorney, not the principal. Accordingly, no fiduciary relationship arises between this attorney and their principal and the attorney is not subject to the fiduciary obligations described above.

3 Requirements for an enduring power of attorney

- 3.1 As discussed, it is common for powers of attorney to be granted by elderly or ill people who are concerned that they will soon become unable to deal with their own financial matters. These are known as enduring powers of attorney and the attorney will continue to have the power to act on the principal's behalf after the principal has lost their mental capacity⁹.
- 3.2 Once a principal has lost their mental capacity they no longer have the ability to revoke the enduring power of attorney - only the Guardianship Tribunal or Supreme Court has the ability to remove an attorney after mental capacity is lost.
- 3.3 In order for the power of the attorney to continue after the loss of mental capacity by the principal, the principal must state on the face of the instrument of appointment that it is their intention for the appointment to continue after they have lost such mental capacity.
- 3.4 Pursuant to the *Powers of Attorney Act 2003*, the enduring power of attorney only becomes effective after:
 - (a) a prescribed person¹⁰ has given a certificate confirming that they have explained to the principal the effect of the power of attorney before it was signed and that the principal appeared to understand such effect; and
 - (b) the attorney has accepted their appointment.
- 3.5 The prescribed form of appointment under the *Powers of Attorney Act 2003* allows the principal to state on the face of the document when the power is to commence. The principal may declare the power to be immediately granted, granted from a specified time or for a specified time, on the occurrence of a particular event or on and from the principal losing their mental capacity.
- 3.6 This is a new addition to the prescribed form of appointment and was inserted after issues arose from the principal intending for the power of attorney to commence only after they have lost their mental capacity but the power of attorney instead commencing immediately.
- 3.7 If no time is indicated then an enduring power of attorney will commence from the date on which the attorney accepts their appointment.

⁹ A general power of attorney will cease to have effect once the principal has lost their mental capacity. The requirements for an enduring power of attorney are discussed below.

¹⁰ being a solicitor, barrister, registrar of the Local Court, licensed conveyancer, NSW Trustee and Guardian employee, trustee company employee or other specified person

4 Exceptions and limitations

An attorney under a Power of Attorney is not a trustee

- 4.1 An attorney is not a trustee. This is implicitly stated in the Act¹¹. As such, an attorney cannot exercise a trust power that is personal to his principal¹².
- 4.2 A trustee owes duties to the beneficiaries of the trust estate and the trustee's conduct is governed by the trust deed, the general law and the *Trustee Act 1925*¹³. Trustees have a duty to act with care, diligence and skill when dealing with trust assets¹⁴. By comparison, because an attorney is not a trustee, the attorney is not bound to act with the same level of care when dealing with the principal's property.

Can a individual trustee appoint an attorney to exercise trustee powers?

- 4.3 The answer is no. A power of attorney only grants to the attorney the authority to **do on behalf of the principal** anything that the principal may lawfully authorise an attorney to do¹⁵.
- 4.4 A trustee does not act on behalf of himself or herself, but for the benefit of the beneficiaries. Whereas, an attorney under a prescribed power of attorney is only entitled to do something on behalf of the principal and not for a third party (such as trust beneficiaries).
- 4.5 Furthermore, there is a general principle in trust law that unless specifically permitted by the relevant trust deed or a specific statute, a trustee cannot delegate its duties as trustee.
- 4.6 However, if a principal is the controller of a corporate trustee, the trust power is exercised by the company, not the individual. This trust power may be vulnerable to attorney abuse because an attorney could exercise his power of attorney remove the principal and appoint himself as controller of the company. The attorney will then have effective control of the trust and trust assets.
- 4.7 By way of example, in *Ghosn v Principle Focus Pty Ltd (No 2)*¹⁶ the court considered the validity of a power of attorney which, following the improper exercise of the power of attorney, resulted in the disposal of two trust properties in breach of the principal's fiduciary obligation to the beneficiaries. The court commented that:

"As [the principal] was the sole director of the companies was, he in a practical sense was the trustee.... It must be proved that [the principal] knew that when he executed the powers of attorney, he was giving [the attorney] control over trust properties in a real, if not legal, sense.

Given that there were significant assets, it was necessary that he understood at the time of the execution of the powers of attorney that [the attorney] would have the ability to transfer the shareholdings and the directorship of the trust companies to others (including himself) and to effect the sale of the

¹¹ s10 Powers of Attorney Act 2003.

¹² this does not apply to superannuation trusts – this is discussed below

¹³ in NSW, each State has its own legislation governing the conduct of trustees

¹⁴ Division 2, Trustee Act 1925

¹⁵ s9(1) Powers of Attorney Act 2003

¹⁶ [2008] VSC 574 (commentary extracted in the case of *Szozda v Szozda [2010] NSWSC 804*

properties which were the subject of the trust deed at a price determined by [the attorney].”

Wills

- 4.8 An attorney cannot make, vary or revoke the Will of his principal.
- 4.9 The *Succession Act* 2006 provides that a person may dispose of their property by Will as they see fit (s4). s6 of the *Succession Act* states that a will is not valid unless it is in writing and signed by the testator.
- 4.10 While ‘testator’ is not defined by the Act, case law has confirmed that the power granted is personal to the testator and cannot be delegated to or exercised by another.
- 4.11 In the leading case of *Tatham v Huxtable*¹⁷, the High Court referred to the well-established rule stated by Lord Haldane in *Houston v Burns*¹⁸ that a testator cannot leave it to another person to make a disposition of the beneficial interest of his estate unless he has passed the beneficial interest to that person to dispose of as his own. Fullagar J referred to the legislation under which the power to dispose of property is granted to a testator and commented that “it is inherent in the very nature of the power so given that it cannot be delegated or exercised by an agent for the testator”.

Effect of bankruptcy

- 4.12 A power of attorney only grants to the attorney the authority to do on behalf of the principal anything that the principal may lawfully authorise an attorney to do¹⁹.
- 4.13 On bankruptcy, the assets of the bankrupt vest in the trustee in bankruptcy and the bankrupt is no longer lawfully permitted to deal with his assets. As such, the principal cannot lawfully authorise its attorney to deal with its assets.
- 4.14 Save for the exception described below, the power of attorney, whether general or enduring, is not revoked **but becomes ineffective** during the period bankruptcy. The trustee in bankruptcy may be permitted to apply for the revocation of the power of attorney.
- 4.15 The exception to a power of attorney becoming ineffective during bankruptcy is an irrevocable power of attorney. s16 of the *Powers of Attorney Act* 2003 states that “the power conferred by an irrevocable power of attorney is not revoked or otherwise terminated by, and remains effective despite, the occurrence of any of the following.... the bankruptcy of the principal”. This being said, the *Bankruptcy Act* which is Commonwealth legislation prevails and the assets of the principal vest in the trustee in bankruptcy. Nevertheless, activities undertaken by the principal as an undischarged bankrupt can be undertaken by an attorney who has been appointed irrevocably in accordance with the *Power of Attorney Act* 2003.

Need for registration of power of attorney

- 4.16 In relation to property transactions, the NSW *Powers of Attorney Act* 2003 states that no conveyance or other deed affecting land will be effective unless the power of attorney has been registered at the Department of Lands²⁰.

¹⁷ [1950] HCA 56

¹⁸ (1918) AC 337

¹⁹ s9(1) Powers of Attorney Act 2003

²⁰ s52 - this requirements relates to the *Conveyancing Act 1919*, division 3 requirement that dealings in land be in writing

5 Limiting abuse by Attorneys

- 5.1 Abuse occurs when the attorney breaches his fiduciary duties or otherwise obtains a personal benefit that is not permitted for himself or his associates.
- 5.2 There are 2 avenues available to limit abuse by attorneys:
 - (a) restricting the powers of the attorney in the power of attorney instrument itself; and
 - (b) limiting attorney benefits either by
 - (1) relying on the total general law and statute law prohibition preventing an attorney from benefiting, or
 - (2) relying on the limited entitlements permitted by Schedule 3 of the *Powers of Attorney Act* which allow attorneys limited powers.

6 Preventing abuse by restricting powers of attorneys

- 6.1 Nothing in the instrument of appointment can prevent undetected attorney abuse. But, if such abuse does occur, having restrictions included in the instrument of appointment that the attorney has clearly breached gives better rights for recovery of any loss incurred as a result of the attorney breach.
- 6.2 If no restrictions or obligations are specified in the instrument of appointment then the principal (or their estate if the abuse is not discovered until after the principal has died) will need to show breach of the attorney's contractual or fiduciary duties in order to pursue the appropriate remedy.
- 6.3 In most cases of attorney abuse, this fiduciary obligation has been misunderstood or ignored by the attorney.
- 6.4 The best way to ensure that an attorney does not undertake transactions or conduct himself in a manner that is not contemplated by the principal is to ensure that appropriate restrictions are specified in the instrument of appointment and a principal's adviser should enquire from the principal why the power of attorney is being granted.
- 6.5 The *Powers of Attorney Act* 2003 attempts to emphasise these constraints by the inclusion of Schedule 3 to the Act which sets out the type of gifts and benefits that an attorney may confer on himself and others. However, Schedule 3 is merely a guideline for the scope of that power and does not prevent an attorney acting contrary to its provisions.
- 6.6 We set out below some potential strategies which can be considered to limit an attorney's powers.

Example of limiting enduring power of attorney

- (a) If the principal is approaching old age and if the principal is concerned about future medical intellectual incapacity, then an adviser would probably recommend an enduring power of attorney. However consideration should be given to the commencement date of such power of attorney. As such, whilst a power of attorney instrument may be

executed by the principal and the prescribed witness and certified by the prescribed witness on 14 April 2011, there is no reason why such power of attorney has to commence on 14 April 2011. The commencement date can be made for a later date – say in 5 years time or when the first sign of say Alzheimer's is diagnosed and the attorney considers that the principal needs assistance in managing the principal's affairs.

Example of limiting a power of attorney for a specific transaction

- (b) In cases where an attorney is being appointed to undertake a particular transaction whilst the principal is say interstate or overseas, then the power can be limited to the anticipated transaction. For example, the instrument of appointment may specify that the attorney is only entitled to act on behalf of the principal in respect of a South Australian property transaction which the principal, who resides in NSW, is unable to undertake himself. This power of attorney may even specify the types of actions the attorney is entitled to take on behalf of the principal such as
- (1) negotiating the purchase price, agreeing a purchase price only if such price falls within specified parameters,
 - (2) retaining lawyers for the transaction, and
 - (3) signing a contract and transfer of the property.
 - (4) The attorney may, however, be prohibited from dealing with the principal's bank (or any other lender) in arranging finance and granting a mortgage for the transaction. These would be specifically excluded powers on the instrument of appointment.
- (c) In the above example, the attorney would only have the right to act for the principal in respect of the SA property transaction. The attorney could not deal with the principal's other assets or commercial ventures elsewhere in Australia or, indeed, SA. There would be no need to impose a timeframe restriction on this attorney because once the SA property transaction was concluded the power of attorney would cease to have effect.
- (d) Alternatively, if the principal only wanted the attorney to undertake dealings in respect of the SA property transaction during a period when the principal was overseas, then an a specified timeframe or description of such time restriction could also be included in the instrument of appointment. For example, the power of attorney could be stated to only be effective from and until a particular date or 'for such time that I am not present in Australia'.

Limiting a power of attorney by using joint attorneys

- (e) Another method to prevent attorney abuse is to appoint more than one attorney and require them to act jointly. This will be particularly important if the proposed attorney has little experience in business and commercial matters or is perceived as being generally unwise when it comes to money matters.
- (f) It may be appropriate to recommend to the principal that proposed attorney act jointly with 'professional' attorney such as a lawyer, accountant or other professional commercial adviser, being a person with more experience when it comes to dealing with financial and business matters.

- (g) For example, using the above scenario, if the principal appointed his brother (a bricklayer with little commercial experience) to be his attorney for the purpose of the SA property transaction then the principal might also appoint an independent South Australian accountant to act jointly with his brother to ensure that proper business decisions are made in his absence.

Investments

- (h) The attorney may be prohibited from making particular 'risky' investments that are specified in the instrument or he may be required to undertake the same level of care, diligence and skill that is required of trustees pursuant to the *Trustee Act 1925*.
- 6.7 If, in the examples above, no restrictions were placed on the attorney then showing a breach of the attorney's fiduciary duty may not be successful. The attorney may have negotiated in good faith a purchase price that was well below market value under an honest but mistaken belief of the value of the property. Similarly, the attorney may have entered into investments which were risky but which he honestly believed would result in profit for the principal but which failed, potentially causing significant loss to the principal. In these examples, the attorney may not have breached his fiduciary duty nor acted outside the power granted to him. But the principal will still have suffered loss and will be unlikely to be able to recover such loss.
- 6.8 As such, the inclusion of restrictions and specific attorney rights, powers or duties in the instrument of appointment can provide for the principal better security and access to better remedies in the event of the principal suffering loss at the hands of their attorney.

7 Preventing abuse by limiting attorney benefits and gifts under general and statute law.

Limiting attorney's benefit

- 7.1 Under the general law a fiduciary is not permitted to benefit from his fiduciary position. This is a 'blanket' prohibition on an attorney conferring any benefits on himself or others.
- 7.2 This general law prohibition is also contained in the *Powers of Attorney Act*²¹ in relation to prescribed powers of attorney. The Act contains a 'blanket' prohibition on the attorney conferring benefits on himself unless the instrument of appointment expressly permits the attorney to do so.
- 7.3 The prescribed power of attorney form *does* include the express permission for an attorney to confer a benefit on himself which is to be struck through if it is not to apply. If the prescribed words are struck through then the 'blanket' prohibition on an attorney conferring benefits on himself will apply.
- 7.4 If the prescribed words are allowed to remain in the power of appointment then the power that is granted will be limited by the parameters set out in Schedule 3 of the Act. Schedule 3 limits the benefits which an attorney may confer on himself to living and medical expenses of the attorney in an amount that is reasonable having regard to the principal's financial circumstances and the size of the principal's estate.

²¹ s12 Powers of Attorney Act 2003

- 7.5 If a principal wishes to confer on their attorney an unrestricted right to confer a benefit upon themselves then such express and unrestricted right should be specifically inserted by additional wording in the instrument of appointment.
- 7.6 Principals should bear in mind that an unrestricted right of an attorney to use the principal's assets and their fiduciary position to benefit themselves leaves the principal and their estate vulnerable to significant and unlimited abuse by the attorney.

Limiting gifts and benefits to third parties

- 7.7 The general law prohibits an attorney from using the principal's assets or their fiduciary relationship to enable the attorney to confer a benefit on or give a gift to a third party unless such conduct was in the interests of the principal.
- 7.8 The *Powers of Attorney Act 2003*²² also prohibits an attorney from giving a benefit or gift to third parties unless the power of attorney expressly permits it.
- 7.9 The prescribed power of attorney form *does* include the express right for an attorney to give benefits or gifts to third parties with the intention that such power be struck through if it is not to apply. If the prescribed words are struck through then the 'blanket' prohibition on an attorney giving benefits or gifts to third parties will apply.
- 7.10 If the prescribed words are allowed to remain in the power of appointment then the power that is granted will be limited by the parameters set out in Schedule 3 of the Act. Schedule 3 limits the benefits and gifts that an attorney may give to third parties to
- (a) gifts to close friends and relatives of the principal of a seasonal (such as Christmas) or special occasion (such as birthday, wedding) nature that are reasonable having regard to the principal's financial circumstances and the size of the principal's estate; and
 - (b) benefits to named third parties in respect of living and medical expenses of those named third parties which are reasonable having regard to the principal's financial circumstances and the size of the principal's estate.
- 7.11 If a principal wishes to confer on their attorney an unrestricted right to give benefits and gifts to third parties then such express and unrestricted right should be specifically inserted by additional wording in the instrument of appointment.
- 7.12 Again, such an unrestricted right will enable an attorney unlimited access to the principal's property which may be misused by the attorney.

Issues arising from attorneys giving benefits and gifts prior to the *Powers of Attorney Act 2003*

- 7.13 Prior to the *Powers of Attorney Act*, the standard form of power of attorney contained an express right for an attorney to confer a benefit on himself and to give benefits and gifts to third parties. If these words were struck through then the general law prohibition on a fiduciary obtaining a benefit or conferring benefits or gifts on third parties unless it is in the interests of the principal would apply.

²² ss 11 and 13 and Schedule 3

- 7.14 However, if the words were not struck through there was no limitation on the type or amount of benefit or gift that could be given by the attorney to third parties or himself.
- 7.15 Schedule 3 of the Act now imposes a limit unless additional express words extend the scope of Schedule 3 by expressing the power to be unrestricted.
- 7.16 But, before the Schedule 3 limitation was enacted, attorneys would use the principal's assets to confer a benefit on themselves or third parties which did not align with the attorney's duties to their principal.
- 7.17 These abuses were sometimes innocent but misguided - the principal believing that he was entitled to use the assets for his own benefit because the transaction benefited the principal in some indirect way. For example, an attorney justifying the use of the principal's money to purchase an expensive car that almost exclusively was used for the attorney's benefit on the basis of needing the car to visit the principal²³. However this use of the principal's assets preferred the interests of the attorney over the interests of principal.
- 7.18 In many other cases the attorney's actions were a deliberate and significant abuse of their power. For example, in the case of *Spina v Conran Associates Pty Ltd*²⁴ the attorney exercised his power of attorney to grant 2 mortgages over the property of the principal to secure loans made to the attorney for use in his business. The transactions did not benefit the principal and, in fact, caused detriment to her. However, the power of attorney expressly permitted the attorney to enter into assurances and do things that conferred a benefit on the attorney. The court held that the power to give gifts and confer benefits on the attorney (or third parties) is not to be read in isolation but must instead be considered in the context of the fiduciary duties owed by the attorney to the principal. The court stated that:

“[the Act] does not confer on the attorney the authority to do anything the grantor may lawfully authorise another person to do. It only gives the attorney authority to act “on [the grantor's] behalf”, and it only authorises things that the grantor may lawfully authorise *an attorney* to do. These words are very important. They make it plain that **the person to whom the authority is given is limited to acting in an agency capacity, subject to the constraints of a fiduciary position.** In particular, the person receiving the authority, being a fiduciary, is subject to the obligation to act on the grantor's behalf in the grantor's interests. **By no conceivable stretch of the English language could the use of a general power of attorney for the execution of a mortgage over the grantor's land to secure a borrowing solely for the benefit of the attorney be regarded as a use “on behalf of” the grantor, or as something that “an attorney” might do.**” (emphasis added)

8

What remedies are available if abuse does occur

- 8.1 The remedies comprise essentially
- (a) a very wide range of general law remedies, and
 - (b) the remedies available under the *Powers of Attorney Act 2003*.

²³ an example identified by the Land Titles Office Green Paper on Powers of Attorney

²⁴ [2008] NSWSC 326

- (c) These are discussed below. The discussion of the general law remedies is very brief because of the wide ranging nature of the remedies available and the technical nature of such remedies – areas of discussion which are well outside the ambit of this summary paper.

9 Remedies for abuse under the general law

- 9.1 The *Powers of Attorney Act 2003* in itself does not provide any right to seek compensation or damages from an attorney²⁵.
- 9.2 In NSW, a principal will need to bring proceedings under an appropriate area of law. A remedy available to a principal who has suffered abuse as a result of actions by his attorney arises from the legal relationship between the principal and the attorney. As previously canvassed, the relationship between a principal and attorney is both contractual and fiduciary – although it is not a trust relationship.
- 9.3 As such, if the abuse includes a breach of the principal and agency contract, then a principal can sue for both direct and foreseeable loss and damages but also in the appropriate case, for indirect consequential damages if the attorney reasonably knew when undertaking such abuse that it would result in probable indirect consequential damage also being suffered by the principal.
- 9.4 If the abuse involves a breach of the attorney's fiduciary duty, then the attorney as fiduciary will be held accountable for any benefit or gain acquired by the attorney through breach of his or her duty. The actual nature of the remedy however may vary according to the factual nature of the abuse and the surrounding circumstances.
 - (a) In some cases, any ill-gotten gains by the attorney can result in the court ordering that the attorney holds the whole of such gains on constructive trust for the benefit of the principal;
 - (b) in other cases, the court may award to the principal an account of profits or equitable damages and compensation for a breach of fiduciary duties by the attorney; or
 - (c) such an abuse may result in the attorney being ordered to pay restitution to the principal even though the attorney itself may not have benefited by any gain.
- 9.5 Reported decisions to date in respect of power of attorney abuse have included the following
 - (a) **Restitution for unjust enrichment**
in *Lake v Crawford*²⁶ a principal sought restitution from a third party claiming unjust enrichment where the third party coerced an attorney into transferring \$3,900,000 to him from a term deposit account belonging to the principal;
 - (b) **Declaration of invalidity**
in *Szozda v Szozda*²⁷ a principal obtained declarations that a power of attorney was invalid because of incapacity of the principal, that a proxy given by the attorney which was used for the purpose of voting at a general meeting of a company to change the

²⁵ We note that the powers of attorney legislation in other States do provide the right for a principal to seek compensation from their attorneys if the attorneys fail to properly undertake their fiduciary duties

²⁶ [2010] NSWSC 232

²⁷ [2010] NSWSC 804

composition of the board of directors was invalid and that the resolutions passed at the general meeting were invalid and have no effect; and

- (c) **Orders under the *Contracts Review Act 1980* for unconscionable dealing**
In *Spina v Conran Associates Pty Ltd*²⁸ a principal obtained orders that the attorney had acted outside his authority in granting 2 mortgages over the principal's asset to secure a loan made for the purpose of the attorney's business and, on the basis that the lender had constructive knowledge of the attorney abuse²⁹, orders that the mortgages be set aside and discharged and that the principal's liability under the mortgages be reduced to nil.

9.6 There is a plethora of available causes of action available to a principal if an attorney abuses his powers.

10 Remedies for abuse available under the *Powers of Attorney Act 2003*

- 10.1 The *Powers of Attorney Act 2003* has three key features that differ from the prior law:
- (a) it provides an easy and accessible way for an abusing attorney to be removed or for his ability to deal with the principal's assets to be nullified by the appointment of a financial manager³⁰.
 - (b) it gives rights to the beneficiaries of a principal's deceased estate where an attorney has disposed of the assets of the principal which had been specifically gifted to those beneficiaries in the principal's Will³¹; and
 - (c) it identifies the types of gifts and benefits that an attorney is permitted to confer on himself and third parties³²
- 10.2 What is missing in the legislation however is any right to seek compensation from the attorney in circumstances where the principal's assets have been mistreated or, indeed, wasted by the attorney. By comparison, we note that the powers of attorney Acts in other states³³ do allow for compensation to be paid by an attorney for any loss caused by the attorney's failure to comply with the Act in the exercise of a power³⁴.
- 10.3 The revocation of a power of attorney will only protect a principal's assets from future and further depletion by the attorney. The revocation will not address any loss the principal has already suffered. In order to recover any such loss, the principal must undertake further proceedings for recovery under the available general law remedies (see below), if such recovery is even possible.

²⁸ [2008] NSWSC 326

²⁹ on the basis that the loan was express on the face of all documents to be for the benefit of the attorney (not the principal) and the principal did not sign any of the documents

³⁰ Part 5, Division 4 Powers of Attorney Act 2033

³¹ s22 Powers of Attorney Act 2003 - prior to the Act, see *Orr v Slender* (Estate of Godfrey Raymond Orr) 64 NSWLR 671, discussed below

³² Schedule 3, Powers of Attorney Act 2003

³³ including Queensland and South Australia

³⁴ s107 Powers of Attorney Act 1998 (Qld)

Removing an enduring attorney

- 10.4 Once a principal has lost their mental capacity, such a principal cannot revoke a power of attorney. If the power of attorney is an enduring power of attorney, the attorney will continue to exercise his powers despite the mental incapacity of the principal³⁵.
- 10.5 Prior to the commencement of the *Powers of Attorneys Act 2003* in 2004, the removal of an enduring attorney after the principal had lost their mental capacity could only be achieved by an application to the Supreme Court by the principal.

Application to Guardianship Tribunal or Supreme Court

- 10.6 Pursuant to the *Powers of Attorney Act 2003*, both the Guardianship Tribunal and the Supreme Court are able to hear applications for review of a power of attorney and make orders for the revocation, re-instatement or variation of a power of attorney.

Application for review of a Power of Attorney

- 10.7 Under the Act, any “interested person” can bring proceedings for review including an attorney, the principal, a guardian or enduring guardian of the principal³⁶ and any other person who, in the opinion of the tribunal or court, has a proper interest in the proceedings or a genuine concern for the welfare of the principal.
- 10.8 This means that joint or several attorneys, family members and even concerned neighbours or friends may be able to bring proceedings to have a power of attorney reviewed and, potentially, revoked.

Orders that can be made

- 10.9 The orders that can be made are also far wider than before and include orders:
- (a) declaring that the principal either did or did not have the mental capacity to make a valid power of attorney;
 - (b) declaring that the principal lacked mental capacity at a specified time or during a specified period of time;
 - (c) declaring that the power of attorney is invalid (either in whole or in part);
 - (d) varying a term of, or a power conferred by, the power of attorney;
 - (e) reinstating a power of attorney and appointing a substitute attorney to replace any vacant attorney; and
 - (f) such other orders as the review tribunal thinks fit.

³⁵ if the power of attorney is a general power of attorney it will be automatically revoked by the mental incapacity of the principal

³⁶ appointed under the *Guardianship Act 1987*

Ability to appoint financial manager instead of revocation of attorney

- 10.10 Importantly, the tribunal and court have the power to not decide an application for review lodged with it but to instead treat the application as an application for a financial management order pursuant to the *Guardianship Act 1987*³⁷ or as an application for a declaration and order under the *NSW Trustee & Guardian Act 2009*³⁸.
- 10.11 This is an important amendment because, in cases where the attorney has **not** acted outside their fiduciary duty and it cannot be shown that the principal lacked mental capacity when the power of attorney was made, the tribunal or court still have ability to effectively remove the power of the attorney by appointing a financial manager over the affairs of the principal.
- 10.12 The tribunal or court is able to make the decision to treat an application for review as an application for a financial management order independently without the need for a separate or amended application to be lodged by the applicant.
- 10.13 This new power was applied by the Guardianship Tribunal in the case of *BSX*³⁹. That case concerned an application for review of a power of attorney brought by a principal's son who was concerned that the attorney (who was the principal's other son) was misusing the principal's assets for his own benefit. The applicant asserted that at least \$100k had been misappropriated by the attorney and sought a revocation of the power of attorney on the basis that the principal lacked mental capacity at the time the appointment was made.
- 10.14 The Tribunal was not satisfied that there was sufficient evidence to show that the principal lacked mental capacity and was not prepared to order a revocation of the power of attorney on that basis. However, the Tribunal did recognise that the attorney was abusing his position by making undisclosed and uncommercial loans to himself from the principal's assets and that the principal was unaware of her attorney's actions.
- 10.15 Accordingly, the Tribunal decided not to make any orders under s36 of the *Powers of Attorney Act 2003* but to instead elect to treat the application for review as an application for the appointment of a financial manager pursuant to s37 of the Act.

Test for the appointment of a financial manager

- 10.16 The key test for the appointment of a financial manager (under the *Guardianship Act*) or manager/NSW Trustee (under the *NSW Trustee & Guardian Act*) is that the principal is not capable of managing their affairs⁴⁰.
- 10.17 Given that applications for review of a power of attorney are most commonly brought at a time after the principal has lost their mental capacity and as a result of abuse by an attorney, the relevant test will usually be easily satisfied.

Effect of the appointment of a financial manager

- 10.18 By making a financial management order or appointing a manager/NSW Trustee over the assets and affairs of the principal, the tribunal or court removes the power of the abusing

³⁷ s37(a) Powers of Attorney Act 2003 and s25F(d) Guardianship Act 1987 – in respect of decisions made by the Guardianship Tribunal

³⁸ s37(b) Powers of Attorney Act 2003 and s 41 NSW Trustee and Guardian Act 2009 – in respect of decisions made by the Supreme Court

³⁹ [2009] NSWGT 5

⁴⁰ the *Guardianship Act 1987* also requires the tribunal to determine that there is a need for another person to manage the affairs of the principal and that making the financial management order is in the best interests of the principal

attorney to continue wasting the assets of the principal, even if the actual appointment of that attorney is not itself revoked.

11 Ademption caused by Attorney's disposal of assets specifically gifted under the principal's will

- 11.1 If, during the lifetime of the principal, an attorney disposes of an asset that was the subject of a specific gift in the principal's will, the gift will fail by ademption. Prior to the commencement of the *Powers of Attorney Act 2003*, the beneficiary who lost the benefit of the gift would have no direct remedy under the prior law and would instead have to rely on the common law to attempt to recovery their loss.
- 11.2 In some cases, the disposal of the asset by the attorney may not have been in breach of the attorney's duties, as was the case in *Orr v Slender (Estate of Godfrey Raymond Orr)*⁴¹
- 11.3 In *Orr v Slender*, the enduring attorney (Mr Orr - the nephew of the deceased principal) had, prior to the death of the principal, sold the principal's home unit in order to pay an accommodation bond for the principal at a hostel which the principal needed to be transferred to after he became unable to care for himself. The balance of the sale proceeds were deposited in the bank and used for the principal's medical and living expenses until his death.
- 11.4 Some years prior to granting the power of attorney to his nephew, the principal made a will in which the home unit in Randwick was left as a specific legacy to the principal's surviving sibling, grand nieces and grandnephew in equal shares. The residuary of the principal's deceased estate was left to the attorney, John Orr.
- 11.5 The attorney was also appointed the executor and trustee of the principal's deceased estate.
- 11.6 On the death of the principal, the Randwick property was no longer owned by the deceased principal and the specific gift to the principal's surviving sibling, grandnieces and grandnephew was adeemed. The remaining proceeds from the sale of the property formed the residuary of the deceased estate to which the attorney was entitled.
- 11.7 The principal's surviving sibling, grandnieces and grandnephew brought proceedings against the attorney asserting that he had acted outside the power granted by s163B entitling the attorney to confer a benefit on himself. The parties asserted that s163B(2)(b) was limited by s 163B(1) which imposes an overriding fiduciary duty on the attorney.
- 11.8 The attorney asserted that, because the sale of the property was undertaken for the benefit of the principal and the proceeds of sale were used solely for that purpose, the limitation of s163B(1) had not been offended.
- 11.9 The court agreed and stated that, in order for s163B to be breached, there would need to be a direct link between the exercise of power and the benefit conferred on the attorney. That is, that the "relevant act of the attorney is, or would be, the effective cause of the benefit being conferred on him."
- 11.10 The receipt by the attorney of the sale proceeds as the residuary beneficiary of the principal's estate did not occur as a result of the actions of the attorney in selling the property but rather arose because of the operation of the principal's will.

⁴¹ [2005] NSWSC 1175

This issue has now been dealt with in the Powers of Attorney Act 2003.

- 11.11 By virtue of s22 of the Act, any person who is named as a beneficiary under a will of a deceased principal who executed an enduring power of attorney has the same interest in any surplus money or property arising from the sale of the property in which the beneficiary would have had an interest had the property not been disposed of by the attorney.

12 Superannuation issues

- 12.1 There are two main issues relating to attorneys and superannuation:
- (a) an attorney can be properly appointed as the trustee of a self managed super fund which would give them access to the superannuation assets and may allow them to determine how any death benefit is to be paid; and
 - (b) an attorney can make, vary or revoke a binding death benefit nomination on behalf of the principal.

Enduring attorney can be SMSF trustee

- 12.2 Pursuant to the *Superannuation Industry (Supervision) Act 1993* ("SISA"), a person appointed as attorney under an enduring power of attorney may be appointed as trustee of a self managed superannuation fund ("SMSF") or director of a trustee company without causing the fund to cease being an SMSF⁴².
- 12.3 As explained by the Commissioner of Taxation in SMSFR 2010/2⁴³, "a person who holds an enduring power of attorney for a member qualifies as a legal personal representative"⁴⁴. To be effective, the member must cease to be a trustee of the SMSF or director of the corporate trustee and the attorney must be appointed as trustee (or director of the corporate trustee) pursuant to the terms of the trust deed, constitution (if relevant) and SISA.
- 12.4 In relation to the delegation of trust power, the Commissioner states that:
- "The legal personal representative performs their duties as trustee of the SMSF, or a director of the corporate trustee of the SMSF, **pursuant to their appointment to that position rather than as an attorney or agent for the member. Consequently, any proscriptions** contained in State or Territory **legislation against conferring trustee duties and powers via a power of attorney** or common law restrictions on attorneys undertaking directors duties **are not relevant** to the application of the exception contained in subparagraph 17A(3)(b)(ii)." (emphasis added)
- 12.5 The appointment of an attorney as an individual trustee or director of a trustee company of a self managed super fund must be undertaken in accordance with SISA, the super fund deed and the constitution (in the case of a corporate trustee). The member must also resign as trustee before the attorney's appointment will be effective.

⁴² s17A(3)(b)(ii) SISA

⁴³ issued under the self managed superannuation fund ruling program

⁴⁴ paragraph 6 – SMSFR 2010/2 – s10(1) SISA

- 12.6 Principal's should be aware, however, that if they properly appoint their attorney as trustee of their superannuation fund, the attorney will then have access to the superannuation assets and may misuse, waste or fail to properly deal with such assets for the benefit of the principal.
- 12.7 Once the attorney has been appointed as trustee of the SMSF, the attorney will also have the discretion, in the absence of a binding death benefit nomination, to determine how any death benefit paid from the super fund on the principal's death is to be paid. The attorney, as the LPR of the principal, is capable of paying any such death benefit to himself rather than to the family members of the principal.

Binding death benefit nomination

- 12.8 SISA allows a member of a superannuation fund to lodge a binding death benefit nomination which will instruct the super trustee as to how the member's death benefit should be paid after their death.
- 12.9 The super trustee is bound to comply with a binding death benefit nomination.
- 12.10 Pursuant to the rule established in the case of *Tatham v Huxtable*⁴⁵, an attorney is not permitted to make a testamentary disposition on behalf of the principal.
- 12.11 While a binding death benefit nomination deals with the disposal of the principal's assets after their death, the nomination is not a testamentary disposition because it is effected pursuant to the rights of the member under SISA and the super trust deed. Accordingly, the prohibition on the attorney making a testamentary disposition on behalf of the principal does not apply to a binding death benefit nomination.
- 12.12 This means that an attorney may be permitted to make, vary or revoke a binding death benefit nomination in respect of their principal.
- 12.13 The result of such an act would be for the attorney to have the ability to compel the super trustee to pay any super death benefit to the attorney rather than to the principal's family.

13 Powers of attorney in other states

- 13.1 In NSW, an enduring power of attorney made in another Australian state will be recognised and treated as an enduring power of attorney made under the *Powers of Attorney Act 2003*⁴⁶ but only to the extent of the powers permitted by the NSW Act.
- 13.2 An interstate enduring power of attorney will also be limited to the powers that attorneys may exercise in the state in which the power was granted.
- 13.3 As such,
- (a) if the state in which the enduring power of attorney was granted permits fewer powers than the NSW legislation allows, the attorney will not receive more powers by exercising the power of attorney in NSW; and

⁴⁵ [1950] HCA 56

⁴⁶ s25

- (b) if the state in which the enduring power of attorney was granted allows greater powers to be exercised by attorneys, the attorney will be limited to those powers permitted under the NSW legislation when exercising the power of attorney in NSW.
- 13.4 The *Powers of Attorney Act 2003* is silent on the recognition of interstate general powers of attorney – the NSW Act only refers to enduring powers of attorney. However the Act is stated to apply to “any power of attorney created (or purporting to have been created) by an instrument executed on or after the commencement of [the Act]”⁴⁷. There appears to be no requirement that the instrument be created in NSW in order for the Act to apply to it – but note the relevant provisions of the Act only relate to powers of attorney that are in or to the effect of the prescribed form. If an interstate general power of attorney does not comply in form or effect with the prescribed form then the principal will need to rely on the common law for relief.

14 Conclusion

- 14.1 The enactment of the *Powers of Attorney Act 2003* has made significant advances in the prevention of continuing abuse by attorney and has provided relief to beneficiaries of a deceased estate when the asset gift to them has been adeemed because of the actions of the attorney.
- 14.2 However, the recovery of misappropriated assets by an attorney remains the subject of separate proceedings depending on the abuse that has been undertaken.
- 14.3 The new requirement for a certificate to be given by a prescribed person will hopefully allow the opportunity for an informed person to advise the principal about the above potential issues and to warn them to be vigilant in monitoring the actions of their attorney. If there is any concern on the part of the principal about the power that the attorney will have over their assets, particularly after the principal has lost their mental capacity, specific exclusions and limitations should be included in the instrument of appointment.
- 14.4 Of course, if an attorney wishes to abuse its position, no provision of the Act or limitation on the face of the power of attorney will prevent such abuse from occurring. Regular monitoring of the attorney’s conduct to prevent ongoing misuse of the principal’s assets is the only real solution to reduce, if not prevent, such abuse.

⁴⁷ s6(1) Powers of Attorney Act 2003