

CLAUSE NOTES

POWERS OF ATTORNEY AMENDMENT BILL 2013

- Clause 1: Short title**
This is a standard clause that provides that the Act may be cited as the Powers of Attorney Amendment Act 2013
- Clause 2: Commencement**
Provides that the Act commences on a day or days to be proclaimed.
- Clause 3: Principal Act**
Provides a definition of the term “Principal Act”. Where used in this Act the term refers to the *Powers of Attorney Act 2000*
- Clause 4: Section 3 amended (Interpretation)**
Inserts two new definitions to the Principal Act – a definition of “close relative” and a definition of “spouse”. This is because these amendments introduce these two terms.
- Clause 5: Section 9 amended (Formal requirements)**
At present, a witness to an enduring power of attorney cannot be a party to the enduring power of attorney. This amendment inserts an additional requirement that witnesses to an enduring power of attorney cannot be a close relative of a party to the enduring power of attorney. Further, it provides that those witnessing an enduring power of attorney must sign a declaration stating that they are neither a party to the enduring power of attorney nor

a close relative of a party to it. The relevant forms are amended in clause 20.

Clause 6: Section 11 amended (Powers of attorney not to be registered except in accordance with this Act)

Amends the witnessing requirements in relation to corrections made to an enduring power of attorney to provide that a close relative of a party to the enduring power of attorney cannot witness the amendment. A new subsection (7) is inserted which provides that the Recorder of Titles is not personally liable for any damage or loss caused to a person by, or as a consequence of, the registration of a number of listed documents.

Clause 7: Section 17 amended (Death, &c. of donor of power may be registered)

This amendment omits the words “by the donor” from subsection (1) as there are many ways a revocation can be made, not just by the donor. The words “by the donor” incorrectly restrict what may be registered. The clause also inserts a new paragraph providing for the registration of revocations of enduring powers of attorney and clarifies that the death, insolvency or bankruptcy of an attorney under an enduring power of attorney may also be registered.

Clause 8: Section 20 amended (Authority conferred by power of attorney)

Section 20 of the Principal Act outlines the nature of the authority a power of attorney confers on an attorney. Due to amendments made in this Act, enduring powers of attorney

will have their authority further limited by section 31(2B), so the general statement in section 20 needs to be amended to reflect this new restriction.

Clause 9: Section 21 amended (Nature of authority conferred)

Section 21 provides the nature that the conferred authority may take. Due to amendments in this Act, enduring powers of attorney will have their authority further limited by section 31(2B), so the general statement in section 21 needs to be amended to reflect this new restriction.

Clause 10: Section 22 amended (Duration of power of attorney)

Subsection (b) is omitted as section 17(2) makes no reference to termination, therefore subsection (b) is superfluous.

Clause 11: Part 3, Division 4: Heading amended

This Act will introduce new provisions which specifically relate to how enduring powers of attorney are revoked. As such, the heading of Part 3, Division 4 is no longer an accurate reflection of what the Part 3, Division 4 will now do.

Clause 12: Section 27AA inserted – application of division

This Bill will introduce new provisions which specifically relate to how enduring powers of attorney are revoked. This new section clarifies that Part 3, Division 4, which deals with revocation or powers of attorney, does

not apply in relation to an enduring power of attorney.

Clause 13: Section 31 amended (Scope of authority, &c., of attorney under enduring power of attorney)

Subclause (a) fixes a typographical error in the Principal Act.

Subclause (b) inserts new subsections into the Principal Act which provides examples of what an attorney may and may not do on behalf of a donor under an enduring power of attorney. New Subsection (2A) provides a non-exhaustive list of the acts an attorney may do, these acts are essentially powers to make property and financial decisions on behalf of the donor. New Subsection (2B) clarifies that, notwithstanding subclause (2A), an attorney under an enduring power of attorney cannot make a decision on a personal matter in relation to the donor. New subsection (2C) provides a non-exhaustive list of matters that are considered personal matters. New subsection(6) provides that an administration order under the *Guardianship and Administration Act 1995* takes precedence over an enduring power of attorney where the subject matter of the two instruments overlap. This new subclause interacts with section 53 of the *Guardianship and Administration Act 1995*. Section 53 of that Act provides that where an enduring power of attorney is operational (which occurs when the donor loses capacity) then the Board cannot make a guardianship order in relation to subject matter covered in the enduring power of attorney. If the

enduring power of attorney is not yet operational then new subclause (6) clarifies that a guardianship order that is already in force prevails over the enduring power of attorney to the extent of any inconsistency.

Clause 14: Section 32 amended (Duties of attorney under enduring power of attorney)

Inserts new subsections to section 32 to further clarify how the attorney must act in exercising the power. This includes clarifying that the attorney must act in the best interests of the donor, and that acting in the donor's best interests includes exercising their powers in a way which the donor would have done had they retained capacity. This clause also inserts a duty on the attorney to keep the property of the donor separate from the property of the attorney.

Clause 15: Sections 32AA, 32AB, 32AC, 32AD, 32AE, 32AF, 32AG and 32AH inserted

Section 32AA Right of Attorney to information

Subsection (1) provides that an attorney under an enduring power of attorney has the right to all the information to which the donor is, or would be but for mental incapacity, entitled to, provided that information is necessary to enable them to carry out their powers and functions under the enduring power of attorney. Subsection (2) provides the attorney with a right to obtain a certified copy of the will of the donor if the donor has lost capacity. Subsection (3) places a duty on person with

custody or control of the information mentioned in (1) or (2) to disclose that information to the attorney. Subsection (4) provides that subsections (1), (2) and (3) are subject to any contrary intention or express limitation contained in the enduring power of attorney.

Section 32AB Power to take action to the benefit of the attorney

Provides that, unless the enduring power of attorney specifically provides that it is allowed, an attorney cannot do anything under the power that would result in a benefit being received by the attorney. Subclause (2) provides that the Public Trustee is still able to collect their usual fees despite the fact that it is a benefit being received by them. This is in recognition of the fact that when a power of attorney is drafted it may contemplate an individual acting as the attorney, but the Act allows an individual to pass that responsibility on to the Public Trustee. In such circumstances the power of attorney will not specifically allow for recovery of fees by the Public Trustee, so legislative provision needs to be made for this.

Section 32AC Transactions that may involve conflict of duty

Prohibits an attorney from entering into a “conflict transaction” unless this is specifically authorised in the instrument of appointment. A conflict transaction is a transaction that results in, or may result in, conflict between the duty of the attorney and the donor and either the interests of the attorney or a

relative, business associate or close friend of the attorney or another duty of the attorney. Subsection(3) specifically exempts certain dealings with property held jointly by the donor and the attorney.

Section 32AD Keeping of records, &c.

Inserts a requirement that the attorney must keep an accurate record of all dealings and transactions made under the power. When a person ceases to be an attorney, they must either retain the records for 7 years or provide the records to the Board. A person with a proper interest in the matter may apply to the Board to request the attorney to provide the records to the Board. If the Attorney fails to comply with this request they are liable to a fine of 20 penalty units.

Section 32AE Revocation of enduring powers of attorney

Sets out the circumstances and manners in which an enduring power of attorney is revoked.

Section 32AF. Effect of power of attorney when inconsistent with subsequent enduring power of attorney

Specifies the precedence to be given to first made and subsequent powers of attorney.

Section 32AG. Effect on dealings with attorneys in good faith in respect of enduring power

Provides that if an enduring power of attorney has been revoked or suspended, and notice of the revocation or suspension has not been

given to the Recorder of Titles, and the person themselves has no knowledge of the revocation or suspension, then that person is not affected by the revocation or suspension.

Section 32AH Effect of adempments of testamentary gifts by attorney under enduring power of attorney

Provides that a person who is referred to in the will of a deceased donor under an enduring power of attorney as the beneficiary of property of the donor that has been disposed of by the attorney under that power retains the same interest in any surplus money or other property arising from the disposition as the beneficiary would have had if the property had not been disposed of. Such a beneficiary may apply to the Supreme Court for orders either confirming or varying the operation of this section so as to avoid any one or more beneficiaries under the will gaining an unjust and disproportionate advantage or disadvantage of the kind not intended by the donor. The purpose of the provision is to protect against the ademption of testamentary gifts.

Clause 16: Section 32A amended (Substitution of The Public Trustee as attorney)

Makes minor amendments to section 32A(1) of the Principal Act to clarify that the section applies to enduring powers of attorney only.

Clause 17: Section 33 amended (Power of Board to make orders in respect of enduring power of attorney)

Gives the Board the power to summarily dismiss an application to review an EPA where the application is frivolous, vexatious or lacking in substance. The Board is also given the power to see the donor's will where there is an application to review an enduring power of attorney. The Board is given further power to suspend the attorney under an enduring power of attorney if the attorney fails to comply with a direction given by the Board. The Public Trustee or any other person may be appointed by the Board in place of the attorney while the suspension is in place, and the Board may make any other orders it sees fit in relation to the exercise of the power. The Board can later either revoke the suspension or revoke the power altogether if the attorney continues to fail to comply. If the Board wishes to revoke the power they can only do so after holding a hearing in accordance with Division 1 of Part 10 of the Guardianship and Administration Act 1995.

Clause 18: Section 51 amended (Validity of payment by attorney under power without notice of death, &c.)

New subsection (1A) protects a person making a payment or doing any act, in good faith, under an enduring power of attorney from liability if the enduring power of attorney had, in fact, been revoked, and the person was not aware of this. An amendment is also made to subsection (1), which deals with validity of payments in relation to powers of attorney, so that the protection offered in (1) is consistent with that under (1A) for enduring powers of attorney.

Clause 19: Section 58B inserted – Application of certain amendments made by Powers of Attorney Amendment Act 2013

Outlines whether provisions of this Bill apply to powers of attorney created before the commencement of this Bill or not.

Clause 20: Schedule I amended (Forms)

Replaces Forms 3 and 4 in the Principal Act with new forms which reflect the new witnessing requirements introduced in this Bill.

Clause 21: Repeal of Act

Is a standard clause in all amending legislation which automatically repeals the amending legislation after the Act commences. The provisions that the amending legislation inserts into the Principle Act still remain in force after the repeal of the Amending Act.