Powers of Attorney Amendment Bill 2013

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Extract from NSW Legislative Council Hansard and Papers Wednesday 27 February 2013.

POWERS OF ATTORNEY AMENDMENT BILL 2013

Second Reading

The Hon. GREG PEARCE (Minister for Finance and Services, and Minister for the Illawarra) [3.33 p.m.]: I move:

That this bill be now read a second time.

The Powers of Attorney Amendment Bill 2013, which I was pleased to introduce today, makes a number of small but significant amendments to the Powers of Attorney Act 2003 that will clarify issues over which doubts have been raised and simplify the process of appointing an attorney. The bill has been prepared after wide public consultation and with close cooperation and assistance from the legal profession and other stakeholders. The bill demonstrates this Government's commitment to listen to the community and simplify laws where simplification is required. A power of attorney is an important legal document that enables a person to give someone else the ability to make financial decisions on their behalf. Powers of attorney are used by corporations to allow employees or designated officers to enter into transactions on behalf of the company. They are also widely used by individuals to allow trusted associates or family members to assist them with their financial affairs when they are unavailable or otherwise unable to do so themselves. It is with regard to this second category of powers of attorney that this bill is primarily concerned.

Powers of attorney fall into two main categories: general powers and enduring powers. A general power of attorney operates whilst the person who granted it, called the "principal", retains mental capacity. The principal can therefore monitor the attorney's actions and terminate the power if he or she chooses. General powers of attorney are often used to allow a specific transaction, such as the sale of a property. They can also be given for a defined period, such as while the principal is on holidays. As the name suggests, an enduring power of attorney continues to operate after the principal loses mental capacity. This makes an enduring power of attorney a particularly useful tool in planning for later life. It enables people to choose who they want to make financial decisions for them when they are no longer able to do so themselves, thereby giving people greater control over their future welfare. An enduring power of attorney must be signed in the presence of a solicitor or legal practitioner, who must explain the effect of granting an enduring power.

The first of the amendments proposed by this bill is to substantially redesign the prescribed form of power of attorney. The current prescribed power of attorney is a single form that can be used to create either a general power of attorney or an enduring power, depending on how the form is completed. When the Act was introduced it was thought that a single form would make it easier and quicker for someone to complete a power of attorney. However, the review revealed that many people found the current single form confusing. An overwhelming majority of people preferred the form to be split into two separate forms, one for general powers of attorney and one for enduring powers. Separate forms will eliminate confusion as to the type of power the principal is giving to his or her attorney. This amendment also brings the prescribed form of power of attorney in line with those in other States, such as Queensland and Victoria, which have separate forms for different types of powers of attorney.

The new proposed prescribed forms have been made available for public consultation. Numerous helpful comments were received from the legal profession and the general public, which has enabled the forms to be presented in a format that is informative, easy to use and clear. The new forms contain more information as to what is expected of an attorney. The forms make it clear that the attorney is to act in the best interest of the principal and failure to do so may incur civil and criminal penalties. Though a clear majority of attorneys do act in the best interest of the principal, many lack experience in the role and need some guidance. The information on the form is designed to assist and guide attorneys in their duties.

This bill will also remove the prescribed form from its current place in the Act and insert it in the Powers of Attorney Regulation. This will allow the prescribed form to be changed quickly and easily to meet any changes in the law and in practice. The proposed new forms of power of attorney in the regulation will be timed to

commence operation once this bill has been proclaimed, which is anticipated to be in July 2013. Another important amendment that this bill makes to the Act is to amend section 46 to allow some flexibility in the manner of appointing joint attorneys. Currently the effect of this section is that if a principal appoints two or more attorneys to act jointly—that is, both must act together—and one dies then the death of one will automatically terminate the power of attorney. If the attorneys are appointed severally—that is, either one can act alone—then the death of one will not terminate the power of attorney.

This section was intended to provide clarity as to the effect of joint appointments; however, the review found that in practice it has proved to be quite restrictive. Many people want the flexibility to appoint family members jointly but want the power of attorney to continue if one of the attorneys dies or vacates office. Section 46 is to be amended to clarify the default position, which is that where attorneys are appointed to act jointly the power will terminate on the death of one of them. This default provision will not apply where the principal has made an election in the power of attorney stating that it is to continue despite the death of a joint attorney. The amendment to section 46 has been reflected in the redesigned prescribed forms, which will make it clear that the principal can choose whether the power is to continue despite the death of a joint attorney.

This proposal received wide support from the general public and legal profession in the review as it provides both flexibility and clarification for the appointment of joint attorneys. Another amendment that this bill makes is to clarify the position of substitute attorneys. A substitute attorney is a person nominated by the principal to act as an attorney if the original attorney no longer can act. A typical scenario for the use of a substitute attorney is when a father or mother appoints each other as attorneys with their children as substitutes. The review found that many people have appointed a substitute attorney despite the fact that substitute attorneys are not dealt with in the Act. This makes the position of a substitute attorney unclear. The common law of attorney and agency recognises a substitute attorney and most other States in Australia specifically refer to substitute attorneys in their legislation. This bill will clarify the position of a substitute attorney in New South Wales to put beyond doubt that a principal may appoint a substitute attorney.

The final amendment that this bill makes is to give the Guardianship Tribunal the jurisdiction to consider disputes relating to the revocation of an enduring power of attorney. A principal may terminate a power of attorney by serving the attorney with a notice in writing stating that the attorney's power is terminated and the attorney no longer can act. Although the Guardianship Tribunal has jurisdiction to hear matters relating to powers of attorney, the wording of the Act casts doubt upon whether that jurisdiction extends to determining issues relating to a revocation of a power of attorney. Currently the practice of the tribunal is to refer any matters relating to revocations to the Supreme Court of New South Wales. For example, when it is doubtful that a principal had the requisite mental capacity to revoke a power of attorney the matter must be dealt with by the Supreme Court. Most people would prefer to have the tribunal deal with such issues because it is cheaper and quicker than having the dispute dealt with by the Supreme Court.

Powers of attorney legislation in other States allows for their equivalent tribunals to determine the validity of a revocation of a power of attorney, so there is no reason why the New South Wales Guardianship Tribunal should not be able to do the same. The Supreme Court of New South Wales and the Attorney General do not oppose this proposal. I acknowledge the involvement of the Elder Law Committee of the Law Society of New South Wales in assisting with the redesign of the prescribed forms. The committee provided valuable input and suggestions as to the look and feel of the new forms. The committee has been kind enough to assist Land and Property Information in bringing the forms to the attention of the legal profession and the wider public. The Powers of Attorney Act gives people the ability to take control of their financial and legal affairs and allows people to plan ahead for their future. The proposals in this amending bill will encourage more people to use a power of attorney by making the form more flexible and easier to use as well as understand. I commend the bill to the House.