



New South Wales

# Powers of Attorney Amendment Bill 2013

## Explanatory note

This explanatory note relates to this Bill as introduced into Parliament.

## Overview of Bill

The object of this Bill is to amend the *Powers of Attorney Act 2003* (the *Principal Act*) as follows:

- (a) to make specific provision for the appointment by principals of substitute attorneys (being persons who may act as attorney under the power of attorney during certain vacancies in the office of a specified attorney),
- (b) to remove the prescribed form for a power of attorney from the Principal Act and enable such forms to be prescribed by the regulations made under the Principal Act,
- (c) to give the Guardianship Tribunal the power to review the revocation of an enduring power of attorney,
- (d) to allow a person who appoints two or more persons as joint attorneys under a power of attorney to provide for the continuation of the power of attorney where the office of one or more of the attorneys becomes vacant (currently, the power of attorney is terminated if the office of one or more of the attorneys becomes vacant),

- (e) to make other consequential amendments and insert savings and transitional provisions.

## Outline of provisions

**Clause 1** sets out the name (also called the short title) of the proposed Act.

**Clause 2** provides for the commencement of the proposed Act on a day or days to be appointed by proclamation.

## **Schedule 1      Amendment of Powers of Attorney Act 2003 No 53**

**Schedule 1 [3]** inserts a provision to enable the making of regulations prescribing the form that may be used to create a power of attorney that, once duly executed, is a *prescribed power of attorney* for the purposes of the Principal Act. **Schedule 1 [17]** removes the current form for a power of attorney from the Principal Act and **Schedule 1 [1], [2] and [4]–[6]** make consequential amendments.

**Schedule 1 [7]** makes it clear that an enduring power of attorney does not confer any authority on a substitute attorney until the substitute attorney has accepted the appointment by signing the instrument creating the power.

**Schedule 1 [8]** gives the Guardianship Tribunal (in addition to the Supreme Court) jurisdiction to deal with an application for review of a revocation of an enduring power of attorney. **Schedule 1 [14]** makes specific provision for the orders that may be made following such review (including orders declaring that the power of attorney remains valid despite a purported revocation). **Schedule 1 [9]–[13]** make consequential amendments.

**Schedule 1 [15]** provides for the appointment by principals of substitute attorneys (to act as attorney under a power of attorney during a vacancy in the office of a specified attorney) or during a vacancy of a kind specified in the instrument creating the power of attorney. **Schedule 1 [19]** makes it clear that this amendment does not affect the validity of the previous appointment of a substitute attorney.

**Schedule 1 [16]** allows a person who appoints two or more persons as joint attorneys under a power of attorney to provide for the continuation of the power of attorney where the office of one or more of the attorneys becomes vacant so long as:

- (a) the power of attorney provides for that continuation, and
- (b) at least one of the attorneys or a substitute attorney remains in office.

**Schedule 1 [18]** enables the making of regulations of a savings or transitional nature consequent on the enactment of the amending Act (or any other Act that amends the Principal Act).

**Schedule 1 [19]** inserts savings and transitional provisions.

First print



New South Wales

# **Powers of Attorney Amendment Bill 2013**

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New South Wales

# **Powers of Attorney Amendment Bill 2013**

No. , 2013

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## **A Bill for**

An Act to amend the *Powers of Attorney Act 2003* to make further provision with respect to powers of attorney; and for related purposes.

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<b>The Legislature of New South Wales enacts:</b>	1
<b>1 Name of Act</b>	2
This Act is the <i>Powers of Attorney Amendment Act 2013</i> .	3
<b>2 Commencement</b>	4
This Act commences on a day or days to be appointed by proclamation.	5

<b>Schedule 1</b>	<b>Amendment of Powers of Attorney Act 2003 No 53</b>	1 2
[1]	<b>Section 3 Definitions</b> Omit the definition of <i>prescribed form</i> from section 3 (1).	3 4
[2]	<b>Section 3 (4)</b> Omit “(other than in Schedule 2)”.	5 6
[3]	<b>Section 8</b> Omit the section. Insert instead:	7 8
	<b>8 Creation of prescribed power of attorney</b>	9
	An instrument (whether or not under seal) that is in or to the effect of a form prescribed by the regulations for the purposes of this section and is duly executed creates a <i>prescribed power of attorney</i> for the purposes of this Act.	10 11 12 13
[4]	<b>Section 14 Regulations may amend Schedule 3</b> Omit “Schedule 2 or 3 (or both)” from section 14 (1). Insert instead “Schedule 3”.	14 15 16
[5]	<b>Section 14 (2)</b> Omit the subsection.	17 18
[6]	<b>Section 14A</b> Insert after section 14:	19 20
	<b>14A Effect of amendment of prescribed form or Schedule 3</b>	21
	The amendment or repeal of a form prescribed under section 8, or a provision of Schedule 3 that prescribes an expression or specifies a kind of gift or benefit for the purposes of section 11 (2), 12 (2) or 13 (2), does not:	22 23 24 25
	(a) confer any additional authority on an attorney under a power of attorney that was a prescribed power of attorney in force immediately before the day on which the amendment or repeal takes effect (an <i>existing authority</i> ), or	26 27 28 29 30
	(b) remove any authority conferred on a principal by an existing authority, or	31 32

	(c) otherwise affect the continued operation of an existing authority.	1 2
<b>[7]</b>	<b>Section 20 Enduring power of attorney does not confer authority until attorney accepts appointment</b>	3 4
	Insert after section 20 (3):	5
	(4) To avoid doubt, this section extends to substitute attorneys.	6
<b>[8]</b>	<b>Section 33 Reviewable powers of attorney</b>	7
	Insert “(including a revocation of an enduring power of attorney)” after “enduring power of attorney” in section 33 (2).	8 9
<b>[9]</b>	<b>Section 33 (4)</b>	10
	Insert “or revocation” after “making” wherever occurring.	11
<b>[10]</b>	<b>Section 34 Referral of application to different review tribunal</b>	12
	Insert “or a revocation of an enduring power of attorney” after “enduring power of attorney” in section 34 (1).	13 14
<b>[11]</b>	<b>Section 34 (2) (a)</b>	15
	Insert “or revocation of enduring power of attorney” after “enduring power of attorney”.	16 17
<b>[12]</b>	<b>Section 35 Who are interested persons and parties in relation to applications</b>	18 19
	Insert “(including an attorney whose appointment has been purportedly revoked)” after “an attorney” in section 35 (1) (a).	20 21
<b>[13]</b>	<b>Sections 36 (1) and (2) and 37 (1) and (3)</b>	22
	Insert “, revocation” after “making” wherever occurring.	23
<b>[14]</b>	<b>Section 36 Interested persons may apply for review</b>	24
	Insert after section 36 (3):	25
	(3A) <b>Orders relating to revocation of power of attorney</b>	26
	A review tribunal may make either or both of the following orders with respect to the revocation of a power of attorney:	27 28
	(a) an order declaring that the principal did or did not have mental capacity to revoke a power of attorney,	29 30



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	(b) an order declaring that the power of attorney remains valid (either in whole or in part) if the tribunal is satisfied:	1
		2
	(i) the principal did not have the capacity necessary to revoke it, or	3
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	(ii) the revocation is invalid for any other reason, for example, the principal was induced to make the revocation by dishonesty or undue influence.	5
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<b>[15]</b>	<b>Section 45A</b>	8
	Insert after section 45:	9
	<b>45A Appointment of substitute attorneys</b>	10
	(1) A principal may appoint a person as a substitute attorney for a specified person who is appointed by the principal as an attorney (the <i>specified attorney</i> ).	11
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	(2) The appointment of a substitute attorney may be made by expressly including the appointment in the instrument creating the power of attorney.	14
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	(3) The principal may appoint one or more substitute attorneys.	17
	(4) A substitute attorney may act as attorney under the power of attorney during a vacancy in the office of the specified attorney or a vacancy of a kind specified in the instrument creating the power of attorney.	18
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<b>[16]</b>	<b>Section 46 Effect of vacation of office of joint and several attorneys</b>	22
	Insert after section 46 (1):	23
	(1A) However, such a power of attorney is not terminated if:	24
	(a) the power of attorney provides otherwise, and	25
	(b) at least one of the attorneys or a substitute attorney remains in office.	26
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<b>[17]</b>	<b>Schedule 2 Form for prescribed power of attorney</b>	28
	Omit the Schedule.	29
<b>[18]</b>	<b>Schedule 5 Savings, transitional and other provisions</b>	30
	Omit clause 1 (1). Insert instead:	31
	(1) The regulations may contain provisions of a savings or transitional nature consequent on the enactment of this Act or any Act that amends this Act.	32
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<b>[19] Schedule 5, Part 4</b>	1
Insert after clause 4:	2
<b>Part 4 Provisions consequent on Powers of Attorney Amendment Act 2013</b>	3
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<b>5 Definition</b>	5
In this Part, the <i>amending Act</i> means the <i>Powers of Attorney Amendment Act 2013</i> .	6
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<b>6 Replacement of prescribed form for prescribed power of attorney</b>	8
The substitution of section 8 and the repeal of Schedule 2 by the amending Act does not:	9
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(a) confer any additional authority on an attorney under a power of attorney that was a prescribed power of attorney in force immediately before the commencement of that substitution and repeal (an <i>existing authority</i> ), or	11
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(b) remove any authority conferred on a principal by an existing authority, or	15
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(c) otherwise affect the continued operation of an existing authority.	17
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<b>7 Review of revocations of existing powers of attorney by Guardianship Tribunal</b>	19
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The amendments made by Schedule 1 [8]–[14] to the amending Act extend to the review of revocations of powers of attorney created by an instrument executed before the commencement of those amendments.	21
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<b>8 Authority of substitute attorneys under enduring powers of attorney</b>	25
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Section 20 (4) extends to any enduring power of attorney created by an instrument executed before the insertion of that subsection.	27
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<b>9 Existing appointments of substitute attorneys</b>	29
The insertion of section 45A by the amending Act does not affect the validity of any appointment of a substitute attorney made before the insertion of that section.	30
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**10 Vacation of office by joint attorneys**

The amendment of section 46 by the amending Act does not apply in relation to a power of attorney created by an instrument executed before that amendment.

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