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**2016, No. 17**

**AN ACT to regulate the establishment and management of a  
foundation and for related purposes.** *[20<sup>th</sup> October 2016]*

**BE IT ENACTED** by the Legislative Assembly of Samoa in  
Parliament assembled as follows:

**PART 1**  
**PRELIMINARY**

**1. Short title and commencement:**

This Act may be cited as the Foundations Act 2016 and commences on the date of assent.

**2. Interpretation:**

(1) In this Act, unless the context otherwise requires:

**“accounting records”** includes any underlying documentation, such as invoices, receipts and contracts, and details of property given by a person to the foundation (including the name and address of that person);

**“address”** of a person, means (unless the Registrar determines otherwise in any particular case) the physical address, telephone numbers or email or other electronic address;

**“approved form”** means a form approved under section 89(2);

**“bankrupt”** means a person who becomes insolvent under any laws of Samoa or another country;

**“beneficiary”** means a person who may benefit from a foundation and who is:

- (a) so identified in the constitution by name; or
- (b) whose identity is ascertainable from the terms of the constitution by reference to -
  - (i) a class; or
  - (ii) a relationship to another person, whether or not living at the time of the creation of the foundation or at the time by reference to which, under the terms of the constitution, members of a class are to be determined,

and may be a notifiable beneficiary or a non-notifiable beneficiary.

**“breach of duty”** means a breach of any duty imposed on an official under this Act, including a duty imposed under section 30, 31, 33 or 35, or the constitution;

**“capital endowment”**:

- (a) means the initial capital of the foundation; and
- (b) includes any further property which may subsequently be given to the foundation by any person if the constitution so permits.

**“charter”** means the charter of a foundation specified under section 4;

**“commencement of winding-up”** means the commencement of the winding-up of a foundation on the earlier of the following:

- (a) the date of the occurrence of the council’s winding-up event; or
- (b) the date of the winding-up order under section 80(1).

**“constitution”** means:

- (a) the charter which governs a foundation; and
- (b) the rules which provides for the running and administration of a foundation.

**“council”** means the council of a foundation required under section 9;

**“council’s winding-up event”** means an event in Schedule 6;

**“Court”** means the Supreme Court;

**“Court’s winding-up event”** means an event in Schedule 7;

**“country”** includes state, province, principality or other defined area with the country;

**“default recipient”** means any person to whom all the property of the foundation must pass if the foundation is terminated;

**“disposition”** includes any means by which property or any interest in it is created, transferred, dealt with, extinguished or charged;

**“endowment”** means the dedicating of property to a foundation;

**“entitlement”** means an entitlement to any interest in the property of a foundation;

**“establishment”** the establishment of a foundation under clause 5 of Schedule 4;

**“foreign heirship right”** means any rights, claim or interest arising under the law of another country in, against or to the property of any person arising, accruing or existing in consequence of, or in anticipation of, that person’s death, except any right, claim or interest created by will or expressed in any other voluntary disposition by that person or resulting from an express limitation in the disposition of the property to that person;

**“formalities”**, for a disposition of property:

- (a) means the documentary and other actions required generally by the law of Samoa or another country for the disposition of the property; and
- (b) includes any special formalities required by reason of the party affecting the disposition being a minor, a person under legal disability or a corporation.

**“foundation”** means the legal entity created by the founder under this Act;

**“founder”** means, subject to section 16, a person who creates a foundation by:

- (a) endowing the foundation with its initial capital;
- (b) subscribing to the constitution by signing it in his or her own name, either personally or by his or her resident agent on his or her behalf; and
- (c) otherwise complying with the requirements of this Act in respect of the registration and establishment of the foundation.

**“function”** includes a right, power, discretion, privilege, obligation, liability or duty;

**“guardian”** means a person who holds that role in a foundation by its constitution or under this Act;

**“initial capital”** means the capital, which may comprise any property, endowed by the founder upon the foundation in order that the requirements of the charter may be met and that the foundation may be established;

**“incapable”** means that an individual:

- (a) is mentally incapable within the meaning of the Mental Health Act 2007; or
- (b) is declared by two (2) medical practitioners of at least 10 years relevant practice to be incapable of properly carrying out the role and the duties of a member of the council or other official; or
- (c) is serving a prison sentence in excess of six (6) months; or
- (d) has been and is kidnapped; or
- (e) is subject to house arrest; or

- (f) has failed to respond to communications from the council for a period of six (6) months.

**“interest”** means an interest in the property of a foundation;

**“member”** means a member of a council;

**“minor”** means a person under the age of 18 years;

**“notifiable beneficiary”** means a beneficiary entitled to the matters under section 18;

**“non-notifiable beneficiary”** means a beneficiary who is not entitled to information on the foundation under section 19;

**“officer”**:

- (a) means a person appointed under section 43 or clause 5 of Schedule 3 to manage a foundation on the instructions of the council; and
- (b) includes the secretary.

**“official”**:

- (a) means a member of the council of a foundation; and
- (b) includes an officer of the foundation, any supervisory person or any guardian.

**“official liquidator”** means a person appointed as such under section 78;

**“participants”** of a foundation:

- (a) means -
- (i) the founder;
  - (ii) any notifiable beneficiaries;
  - (iii) any guardian; and
- (b) includes any other person identified as a participant by the constitution.

**“personal relationship”**:

- (a) includes -

- (i) all forms of relationship by blood, adoption, marriage or cohabitation regardless of whether the law of Samoa or another country recognises the validity, legitimacy or existence of the relationship; or
  - (ii) a former personal relationship which has in law or in fact terminated; and
- (b) also exists between two (2) persons if a personal relationship exists between each of them and a third person.

**“personal representative”** means the executor or administrator of the estate of a deceased person or the guardian of a person;

**“profit”** includes gain or advantage;

**“property”**:

- (a) means any assets, whether corporeal or incorporeal, movable or immovable, tangible or intangible, however acquired; and
- (b) includes any legal document or instrument, including electronic or digital, evidencing title to or interest in, any assets in paragraph (a), such as bank cheques, money orders, shares, securities, bonds, bank drafts and letters of credit.

**“purpose”**:

- (a) means any purpose or object (whether to benefit any person or a class of persons or to carry out any purpose whether charitable or non-charitable), for which the foundation is established; and

- (b) includes -
  - (i) the management of the property of the foundation; and
  - (ii) any purpose or object which is not unlawful, immoral or contrary to the public policy of the law of Samoa except that the foundation cannot carry out any commercial activities except those necessary for, and ancillary or incidental to, its purpose.

**“records of a foundation”** includes:

- (a) any document filed with the Registrar;
- (b) the constitution;
- (c) the accounting records; and
- (d) any other document required to be kept by the foundation under this Act or any other enactment.

**“Registrar”** means the Registrar of International and Foreign Companies appointed under the International Companies Act 1988;

**“Register”** means the Register of foundations established and maintained under clause 3 of Schedule 4;

**“resident agent”** means:

- (a) a Samoan licensed trustee company appointed as such if no official of the foundation is a Samoan licensed trustee company;
- (b) if an official of the foundation is a Samoan licensed trustee company, the official is taken to be so appointed; or

- (c) if more than one official of the foundation is a Samoan licensed trustee company, the officials must choose which of them is to be taken to be so appointed.
- “rules”** means the rules of a foundation specified under section 5;
- “secretary”** means a Samoan licensed trustee company (which may also be the resident agent) appointed as such under the Act;
- “supervisory person”** means a person appointed as such under section 10.
- (2) If the carrying out of any power or action under this Act is by a person in the order of priority listed in section 24(2)(a) to (g), a person listed in the lower order of priority in that section must not carry out the power or action unless the person in the higher order of priority is dead or incapable.

## PART 2

### CREATION AND CONSTITUTION

#### 3. **Creation and registration:**

- (1) A founder of a foundation must:
- (a) endow the foundation with the initial capital;
  - (b) subscribe to the constitution by signing it in his or her own name, either personally or by his or her resident agent on his or her behalf; and
  - (c) by complying with this Act on the registration and establishment of the foundation.
- (2) The resident agent must:
- (a) apply to register the foundation, in the form and manner published by the Registrar; and

- (b) submit any other document or information required by the Registrar, including the documents and information in Schedule 1 and clause 6(3) of Schedule 4.
- (3) The application for registration must be accompanied by a declaration signed on behalf of the resident agent stating:
  - (a) that the resident agent has in its possession and will retain in its possession a copy of the constitution of the foundation approved by both the founder and the resident agent;
  - (b) that the address specified in the declaration -
    - (i) is the address of the resident agent in Samoa;
    - (ii) is the registered office of the foundation; and
    - (iii) is the business address of the foundation;
  - (c) that, if so required by this Act, a guardian of the foundation has been appointed and confirming the full name and address of the guardian;
  - (d) whether or not the resident agent is also the secretary of the foundation and, if not, confirming or stating the name and address in Samoa of the secretary;
  - (e) that the details contained in the charter are correct and are an accurate reflection of the purpose; and
  - (f) whether or not there are, or are intended to be, any non-notifiable beneficiaries.

**4. Charters:**

- (1) A foundation must have a charter.

- (2) The charter:
  - (a) must contain the information set out in Schedule 1; and
  - (b) may contain any other matter and in particular
    - 
    - (i) the manner in which the charter or the rules may be amended;
    - (ii) any provisions which must or may be included in the rules; or
    - (iii) the provisions set out in Schedule 3 are taken to apply unless and to the extent that they or any of them are expressly excluded by the charter or the rules as initially registered or as subsequently varied.
- (3) The charter is valid if created in any other language but, if that language is not English:
  - (a) there must be an accurate English translation certified by an independent person with the necessary competence to provide the translation; and
  - (b) a copy of the English translation must be retained by the resident agent.

**5. Rules:**

- (1) A foundation must have rules which comply with this Act (this requirement is met if the charter contains the matter required to be in the rule).
- (2) The rules:
  - (a) must provide for the matters set out in Schedule 2; and
  - (b) may contain any other matter and in particular
    -

- (i) the manner in which the charter or the rules may be amended;
  - (ii) the appointment, retirement, removal and remuneration of officers;
  - (iii) the provisions set out in Schedule 3 are taken to apply unless and to the extent that they or any of them are excluded by the charter or the rules as initially registered or as subsequently varied.
- (3) The rules are valid if they are written in any language.
- (4) However, if the language of the rules is not in English:
- (a) there must be an accurate English translation certified by an independent person with the necessary competence to provide the translation; and
  - (b) a copy of the English translation must be retained by the resident agent.

**6. Default recipient:**

- (1) A constitution may identify the default recipient and the proportions of the property of the foundation which each person constituting the default recipient must receive on the termination of the foundation, if the default recipient is constituted by more than one person.
- (2) Subject to the terms of the constitution, the default recipient:
- (a) is not entitled to information about the foundation;
  - (b) has no interest; and
  - (c) is not a participant of the foundation.
- (3) If:
- (a) no default recipient is named in the constitution; or

(b) no person constituting the default recipient exists,  
property of the foundation existing at the termination of the foundation vests in the State.

**7. Purpose:**

- (1) The charter must state the purpose of the foundation.
- (2) The purpose of a foundation may only be amended:
  - (a) if there is an express power to amend the foundation in the charter; or
  - (b) by order of the Court under subsection (3).
- (3) If there is no express power to amend the purpose in the charter, the purpose may be amended by an order of the Court on application (“application”) of:
  - (a) the Attorney General; or
  - (b) the council; or
  - (c) the participants.
- (4) Subject to subsection (5), the Court may amend the purpose if:
  - (a) the purpose has been, as far as may be, fulfilled;
  - (b) the purpose cannot be carried out, or not according to its spirit;
  - (c) the purpose provides a use for part only of the property of the foundation;
  - (d) the purpose was laid down by reference to a class of persons or a matter which has for any reason since ceased to be -
    - (i) suitable; or
    - (ii) practicable for the administration of the foundation;
  - (e) for a charitable purpose, the purpose has ceased to be charitable (being useless or harmful to the community or otherwise); or

- (f) the purpose has ceased in any other way to provide a suitable and effective method of using the property of the foundation,  
and in these cases the property, or the remainder of the property, is to be held for any other charitable or non-charitable purpose or objects as the Court in accordance with the application, may declare to be consistent with the original intention of the founder or the spirit in which the foundation was established.
- (5) The application may only be made upon notice to the participants.

**8. Special features of a foundation:**

- (1) (*Protective foundation*): The constitution of a foundation may make:
  - (a) the entitlement of a beneficiary liable to termination; and
  - (b) without limiting paragraph (a), the entitlement of the beneficiary to the income or capital of the whole or any part of the property of the foundation subject to -
    - (i) a restriction on alteration or disposal; or
    - (ii) a diminution or termination if the beneficiary becomes a bankrupt or any of his or her property becomes liable to sequestration for the benefit of his or her creditors.
- (2) For purpose of subsection (1):
  - (a) a foundation under which the entitlement of a beneficiary is subject to restriction, diminution or termination under that subsection is a protective foundation; and

- (b) any provision in the constitution of a foundation requiring that the entitlement of a beneficiary is to be treated as, or deemed to be, a protective foundation is to be construed as a requirement that the entitlement of the beneficiary be subject to any restriction, diminution or termination under subsection (1).
- (3) (*Charitable purpose*): The purpose of a foundation is charitable if:
  - (a) the purpose is for any one or more of the following purposes -
    - (i) the relief or eradication of property;
    - (ii) the advancement of education;
    - (iii) the promotion of art, science or religion;
    - (iv) the protection of the environment;
    - (v) the advancement of human rights or fundamental freedom;
    - (vi) any other purpose which is beneficial to the community; and
  - (b) the fulfillment of any purpose in paragraph (a) is for the benefit of the community or a substantial section of the community having regard to the type and nature of that purpose.
- (4) The following further provisions apply to subsection (3) having regard to the charitable purposes of a foundation:
  - (a) the purpose may be regarded as charitable whether it is -
    - (i) to be carried out in Samoa or another country; and
    - (ii) beneficial to the community in Samoa or another country;
  - (b) if the constitution does not by its purpose indicate -

- (i) a particular charitable purpose or charitable beneficiary; or
  - (ii) a means by which a particular charitable purpose or beneficiary may be selected,
- the Court may select one or more charitable purposes or charitable beneficiaries pursuant to the founder's intention to the extent it can be ascertained;
- (c) subject to paragraph (d), if a particular charitable purpose becomes unlawful, impracticable, impossible to achieve, contrary to public policy in Samoa, or obsolete in that, by means of changed circumstances, it fails to meet the purpose -
    - (i) the constitution does not fail in whole or part;
    - (ii) the property of the foundation does not revert to the founder or the founder's successor in entitlement (the Court may apply *cypres* to vary or terminate the foundation by directing that the property of the foundation be applied or distributed, in whole or in part, in a manner consistent with the founder's intention);
  - (d) a provision in the constitution that would result in the distribution of the property of that foundation to a non-charitable beneficiary overrides the power of the Court under paragraph (c)(ii) to apply *cypres* to vary or terminate the foundation only if, when the provision takes effect, the relevant property of the foundation is to revert to the founder and the founder is still living; and

- (e) the charitable purposes of a foundation may be enforced by the founder, if still living, maintaining a proceeding to enforce those purposes or by the Court.
- (5) (*Combination of a foundation with a limited partnership*): If the property of a Samoan foundation is the beneficial entitlement to the interest of a limited partner in a limited partnership, whether governed by the law of Samoa or another country:
  - (a) the founder, the council, any participant or any official has no duty -
    - (i) to diversify the interest; or
    - (ii) to consider the investments or business of the limited partnership;
  - (b) the powers and duties of the council, of the supervisory person, of the guardian and of the officials are subservient to the powers of the general partner of the limited partnership; and
  - (c) the founder, the council, any participant or any official is not liable for any loss directly or indirectly caused to the property of the foundation by reason of the management and control of the limited partnership by the general partner of that limited partnership.

**9. Councils:**

- (1) A foundation must have a council to administer the foundation's property and to see that the foundation's purpose is carried out.
- (2) Subject to the constitution, the council must have at least two (2) members.
- (3) The founder or a body corporate is eligible to be a member.

- (4) A person is not eligible to be appointed as a member if the person:
  - (a) is incapable;
  - (b) is a minor;
  - (c) is a bankrupt or, being a corporation, is subject to any proceedings which may result in that corporation being wound-up or liquidated or in respect of which a liquidator or receiver, has been appointed;
  - (d) has been convicted, in Samoa or another country, of an offence involving fraud or dishonesty;
  - (e) is prevented or disqualified by this Act or any other law of Samoa or another country, from being a member or from being a director of a company; or
  - (f) is an officer, supervisory person or guardian.
- (5) A member:
  - (a) must have that member's name and address recorded in the Register under clause 3(1)(a)(ii) of Schedule 4;
  - (b) must ensure that the council keeps accurate accounting records; and
  - (c) is an official and must comply with Part 4.
- (6) A person must not be appointed as a member, or be so referred to in the Register, unless the person has consented in writing to being a member.
- (7) The appointment of a person as a member is void if the person is a guardian.

**10. Supervisory persons:**

- (1) A foundation may have a supervisory person and, if so, the charter must provide for the appointment of the first supervisory person.

- (2) A person, except an official (other than the supervisory person) of the foundation or the guardian of the foundation, may be appointed a supervisory person, including any of the participants (other than the guardian).
- (3) Unless otherwise provided in the charter and the rules, the supervisory person:
  - (a) is to be appointed or removed under sections 28 and 29; and
  - (b) has the powers under section 34.

#### **11. Guardians:**

- (1) A foundation:
  - (a) must have a guardian if -
    - (i) the purpose includes any purpose, for which there is no beneficiary where the role of the guardian is to protect and ensure that purpose;
    - (ii) there are any non-notifiable beneficiaries where the role of the guardian is to protect and look after the interest of the non-notifiable beneficiaries;
    - (iii) the constitution does not provide for the appointment of a supervisory person; or
    - (iv) the constitution makes no provision for the addition, removal or exclusion of beneficiaries under section 17(1); and, the person may hold that role in a foundation by its constitution and under this Act to be the recipient of all or any of the founder's rights and powers under section 15(8), because such rights and power were not assigned; and
  - (b) may otherwise have a guardian.

- (2) A guardian:
  - (a) has the duties under section 35; and
  - (b) has the powers under section 36.
- (3) A person (except a member of the council or a supervisory person or an officer of the foundation) may be appointed as a guardian of the foundation, including any of the participants.
- (4) Unless otherwise provided in the charter, a guardian is to be appointed or removed under sections 26 and 27.
- (5) A guardian:
  - (a) must be so named in the Register under clause 3(1)(a)(iv) of Schedule 4;
  - (b) must keep and retain accurate accounts and records of the guardianship for so long as the guardianship subsists and for six (6) years after appointment; and
  - (c) is an official and must comply with Part 4.
- (6) A person must not be appointed as a guardian, or be so referred to in the Register, unless that person has consented in writing to being the guardian of the foundation.

**12. Resident agents:**

- (1) A foundation must have a resident agent.
- (2) A resident agent may request copies of:
  - (a) the records of the foundation;
  - (b) any other documents or information necessary for the resident agent to comply with its fiduciary duties; and
  - (c) if a resident agent can properly demonstrate to the Registrar that the resident agent -
    - (i) has taken all proper steps to endeavour to obtain the records, documents or information; but

- (ii) has been unable to do so by reason of circumstances beyond the control of the resident agent,

the resident agent is not liable for the default (if the resident agent has given written notice to the Registrar of the evidence and of the default) and the Registrar may strike off the foundation from the Register.

**13. Fraudulent disposition:**

- (1) If it is proved beyond reasonable doubt, by a claiming creditor, that a Samoan foundation, or property disposed of to a Samoan foundation:

- (a) was created or disposed of by or on behalf of the founder with principal intent to defraud that creditor of the founder; and
- (b) did, at the time the creation or disposition took place, render the founder, insolvent or without property by which that creditor's claim, if successful, could have been satisfied,

the creation or disposition is not void or voidable but the property of the foundation is to be available to satisfy that creditor's claim to the extent which, but for that creation or disposition, it would have been available to satisfy that creditor's claim immediately prior to the creation or disposition.

- (2) In determining under subsection (1) whether the creation of a Samoan foundation or a disposition to a Samoan foundation has rendered the founder insolvent or without property by which a creditor's claim, if successful, may be satisfied:

- (a) the fair market value of the founder's property (not being the property of that foundation) is taken into account, at the time immediately after the creation or disposition; and

- (b) if the fair market value of the property exceeded the value of the creditor's claim, at that time, then the Samoan foundation so created or the disposition to it, is, for the purposes of this Act, taken not to have been so created, or made, with principal intent to defraud the creditor.
- (3) The creation of a Samoan foundation and a disposition of property to the Samoan foundation are not fraudulent as against a creditor of a founder:
  - (a) if its creation or the disposition takes place after the expiration of two (2) years from the date that creditor's cause of action accrued; or
  - (b) if its creation or the disposition takes place before the expiration of two (2) years from the date that creditor's cause of action accrued and that creditor fails to commence that action before the expiration of one year from the date of the creation or disposition.
- (4) The creation of a Samoan foundation and a disposition of property to the Samoan foundation is not fraudulent as against a creditor of a founder if the creation or the disposition of property took place before that creditor's cause of action against the founder accrued or had arisen.
- (5) A founder must not be imputed with intent to defraud a creditor if the founder:
  - (a) has created a Samoan foundation or has disposed of property to the Samoan foundation within two (2) years from the date of the creditor's cause of action accruing; or
  - (b) is a beneficiary.
- (6) If the property of a Samoan foundation is liable to satisfy a creditor's claim in the manner provided for in

subsection (1) but cannot be so used because the property has been disposed of, other than to a *bona fide* purchaser for value, the disposition is void.

(7) In this section:

“**creditor**” includes a person who alleges a cause of action;

“**date when the cause of a creditor’s action accrued**” means:

- (a) the date of that act or omission which is to be relied upon by either party to wholly establish the cause of action and, if there is more than one act or the omission is a continuing one, the date of the first act or the date on which the omission first occurred; and
- (b) for a judgment, the date of that act or omission giving rise to the judgment, or if there is more than one act or the omission is a continuing one, the date of the first act or the date on which the omission first occurred which gave rise to the judgment.

**14. Registration, establishment and ancillary matters:**

Schedule 4 sets out the registration, establishment and any other matters (including disqualification) relating to a foundation.

### **PART 3 PARTICIPANTS**

**15. Founders:**

- (1) A founder has the rights and powers (if any) in respect of the foundation and its property as provided for in its charter and rules.

- (2) The rights and powers (which a founder may have in respect of the foundation and its property) may be assigned to another person unless the charter or the rules provide otherwise.
- (3) A person (other than the founder):
  - (a) may have the rights and powers in respect of the foundation and its property as may be provided for in its charter and rules; and
  - (b) may assign any of those rights and powers to any other person (including the founder) unless the charter or the rules of the foundation provide otherwise.
- (4) Unless the charter or the rules provide otherwise, the rights and powers may be assigned by:
  - (a) an assignee of the founder;
  - (b) an assignee of the person under subsection (3);  
or
  - (c) by an assignee of an assignee under paragraph (a) or (b).
- (5) An assignment is irrevocable unless it is expressed to be revocable or the charter or the rules provide otherwise.
- (6) A revocable assignment is revoked on the death of its assignee, unless the assignment expressly provides otherwise.
- (7) An assignment is valid from the date a notice and a copy of the assignment have been given to both the council and the resident agent (if given on 2 different dates, then the latter date).
- (8) If:
  - (a) a founder or any other person has rights and powers in respect of the foundation and its property; or

- (b) a person has been assigned (whether by the founder, or by that other person, or by an assignee of either of them or by any subsequent assignee of an assignee) any rights or powers of a founder or of any other person in respect of a foundation and its property,

and the founder or the person or any person under paragraph (b):

- (aa) dies; or
- (bb) for the founder or that other person or any person under paragraph (b) that is not an individual, ceases to exist,

those rights and powers (subject to subsection (9)) vest in the guardian of the foundation unless its charter or rules provide otherwise and, if the foundation does not have a guardian and its charter or rules do not provide otherwise, those rights and powers vest in the council of the foundation.

- (9) The default power to appoint and remove a guardian under sections 26 and 27 must not vest in the guardian but rather in the council under subsection (8).

**16. Further endowment:**

Unless the rules provide otherwise, the endowment of a foundation by a person other than the founder who provides the initial capital does not:

- (a) except for the purposes of sections 8(4)(e), 13 and 48, make the person a founder; or
- (b) vest in the person a right vested in a founder of the foundation.

**17. Beneficiaries:**

- (1) The powers of addition or removal of a person as a beneficiary or for the exclusion from benefit of a beneficiary either revocably or irrevocably:

- (a) may be provided in the constitution; or
  - (b) if they are not provided in the constitution, are taken to be vested in the guardian.
- (2) The constitution may:
- (a) impose an objection on a beneficiary as a condition of benefit; or
  - (b) provide whether and, if so, in what manner a non-notifiable beneficiary may become a notifiable beneficiary or vice versa.
- (3) A founder or an official may also be a beneficiary of the foundation.
- (4) If it is unclear from the constitution whether a beneficiary is a notifiable beneficiary or a non-notifiable beneficiary, then that beneficiary is to be treated as a notifiable beneficiary.
- (5) If, for a beneficiary, the constitution is silent or unclear as to the matter in subsection (2)(b), the status of the beneficiary may only be altered by order of the Court.

**18. Notifiable beneficiaries:**

- (1) A notifiable beneficiary is entitled to:
- (a) copies of the constitution;
  - (b) disclosure of records and accounts of the foundation, on written request to the council; or
  - (c) make an application to the Court to request an order to prohibit -
    - (i) a change to the purpose under section 7;
    - or
    - (ii) the winding-up of the foundation.
- (2) Unless the constitution provides otherwise, subsection (1) does not entitle a notifiable beneficiary to the information under section 44.

**19. Non-notifiable beneficiaries:**

Subject to the constitution, a non-notifiable beneficiary is not entitled to any information about the foundation.

**20. Rights of beneficiaries:**

- (1) A beneficiary under a foundation:
  - (a) has no interest in the foundation's property; and
  - (b) is not owed by the foundation or by either the participants or the officials of the foundation a duty that is or is analogous to a fiduciary duty.
- (2) However, if:
  - (a) a beneficiary of a foundation becomes entitled to a benefit under the foundation pursuant to the charter or the rules; and
  - (b) the benefit is not provided,the beneficiary may seek an order of the Court for the foundation to provide the benefit.
- (3) Except as provided by subsection (4), the beneficiary must seek the order within three (3) years from the time when the beneficiary became aware of his or her entitlement to the benefit.
- (4) If the beneficiary has not attained the age of 18 years when he or she became aware of his or her entitlement to the benefit, the period referred to in subsection (3) begins to run on the day on which the beneficiary attains that age.

**21. Disclaimer of beneficial entitlements:**

- (1) Unless the constitution provides otherwise, a beneficiary may disclaim any entitlement which the beneficiary may receive in the foundation or any part of the entitlement, whether or not the beneficiary has received any benefit from the entitlement.

- (2) A disclaimer:
  - (a) must be in writing; and
  - (b) may, subject to the constitution -
    - (i) be temporary; and
    - (ii) if the disclaimer so provides, be revoked in the manner and circumstances specified in the disclaimer.
- (3) A disclaimer is effective from the date it is delivered to the council.

**22. Class entitlements:**

Unless the constitution provides otherwise, if a foundation is made in favour of a class of persons:

- (a) the class closes when it is no longer possible for any other person to become a member of the class; and
- (b) if the entitlement of the class relates to income, and no member of the class exists, the income is to be accumulated and retained until a member of the class exists or the class closes.

## **PART 4 OFFICIALS**

**23. Additional officials if less than required number:**

- (1) Subject to the constitution, if:
  - (a) the number of members of the council falls below the number required under section 9(2);  
or
  - (b) there is no guardian, and a guardian is required by this Act or the constitution,

the necessary additional officials must be appointed as soon as practicable under the constitution or, if the constitution is silent, under this Act.

- (2) Until the necessary appointments are made under subsection (1), and subject to the constitution, the existing officials must act only to preserve the property of the foundation.

**24. New or additional members if no express provision:**

- (1) This section applies if:
  - (a) despite Schedule 2, the constitution contains no provision for the appointment of a new or additional member of the council; or
  - (b) that provision has lapsed or failed; or
  - (c) the person authorised to make the appointment is incapable.
- (2) If subsection (1) applies, a new or additional member of the council may be appointed by the following persons in the following order of priority:
  - (a) the council (including the last remaining member if not incapable);
  - (b) the founder;
  - (c) any supervisory person;
  - (d) any guardian;
  - (e) the personal representative or liquidator of the last remaining member;
  - (f) the Registrar; or
  - (g) the Court, on the application of any person under section 52(2).
- (3) A member appointed under subsection (2) has the same functions, and may act in all respects, as if the member had been originally appointed as a member.
- (4) A member with power to appoint a new or additional member who fails to exercise the power may be removed from office by the Court, on the application of any person under section 52(2).

**25. Resignation or removal of members:**

- (1) Unless the constitution provides otherwise, a member may resign by delivering a written notice of resignation to the council.
- (2) A member may be removed from or ceases to hold office pursuant to the constitution.
- (3) Subject to subsection (4) and unless the constitution provides otherwise, a resignation takes effect:
  - (a) on delivery of the notice; or
  - (b) on a later date or on the happening of a later event as may be specified in the notice.
- (4) A resignation is void if it:
  - (a) is given to facilitate a breach of duty; or
  - (b) would result in there being fewer members than the number required under section 9(2).
- (5) This subsection applies if the council has reason to believe that a member:
  - (a) is unwilling or is refusing to act; or
  - (b) could no longer qualify to be a member under section 9(4)(a) and (c) to (f).
- (6) If subsection (5) applies, the council must seek to remove that member and to appoint a replacement by the following persons in the following order of priority:
  - (a) the founder;
  - (b) any supervisory person;
  - (c) any guardian; or
  - (d) the Court on the application of the council or the last remaining member, if the founder, the supervisory person or the guardian does not act within a reasonable time or is unwilling to act.
- (7) The resignation or removal of a member is effective from:
  - (a) the date of the notice of resignation is signed by the member;

- (b) the date of the notice of removal is signed by the founder, the supervisory person, or the guardian; or
- (c) the date specified by the order of the Court.

**26. Appointment of new guardians if no express provision:**

- (1) This subsection applies if the foundation requires a guardian in order to comply with this Act or the charter, and:
  - (a) despite section 11(1) and clause 2 of Schedule 2, the constitution contains no provision for the appointment of a new guardian;
  - (b) the provision has lapsed or failed; or
  - (c) the person with power to make any such appointment is incapable.
- (2) If subsection (1) applies, a new guardian may be appointed by the following persons in the following order of priority:
  - (a) the founder;
  - (b) any assignee or successor to the power of the founder to appoint a new guardian;
  - (c) the personal representative of the founder, if the founder is deceased;
  - (d) the Court, on the application of a person under section 52(2).
- (3) A guardian appointed under this section has the same functions, and may act in all respects, as if the guardian had been originally appointed as a guardian.

**27. Resignation or removal of guardians:**

- (1) Unless the constitution provides otherwise, a guardian may resign from office by delivering a written notice of resignation to the council.

- (2) A guardian may be removed from or ceases to hold office pursuant to the constitution.
- (3) Subject to subsection (4) and the constitution, a resignation is effective from:
  - (a) the date of delivery of the notice to the council;  
or
  - (b) on a later date, or on the happening of a later event, as may be specified in the notice.
- (4) A resignation given to facilitate a breach of the guardian's duties is void.
- (5) This subsection applies if the council has reason to believe that the guardian:
  - (a) is unwilling or is refusing to act; or
  - (b) is bankrupt or incapable or otherwise unfit to act.
- (6) If subsection (5) applies, the council must seek to remove the guardian and to appoint a replacement by the following persons in the following order of priority:
  - (a) the founder;
  - (b) any assignee or successor to the power of the founder to remove the guardian;
  - (c) the Court on the application of the council or the last remaining member.
- (7) The removal of the guardian under subsection (6) is effective from:
  - (a) the date of the notice of removal signed by the founder or by the founder's assignee or successor under subsection (6)(b) and addressed to the guardian; or
  - (b) the date specified by the order of the Court.

**28. Appointment of new supervisory persons if no express provisions:**

- (1) This subsection applies if the foundation has a supervisory person, and:
  - (a) the constitution contains no provision for the appointment of a new supervisory person;
  - (b) the provision has lapsed or failed; or
  - (c) the person with power to make the appointment is incapable.
- (2) If subsection (1) applies, a new supervisory person may be appointed by the following persons in the following order of priority:
  - (a) the founder;
  - (b) any assignee or successor to the power of the founder to appoint a new supervisory person;
  - (c) the personal representative of the founder if the founder is deceased;
  - (d) the Court, on the application of any person under section 52(2).
- (3) A supervisory person appointed under this section has the same functions, and may act in all respects, as if he or she had originally been appointed as a supervisory person.

**29. Resignation or removal of supervisory persons:**

- (1) Unless the constitution provides otherwise, a supervisory person may resign from office by delivering a written notice of resignation to the council.
- (2) A supervisory person is removed from or ceases to hold office pursuant to the constitution.
- (3) Subject to subsection (4) and the constitution, a resignation is effective:
  - (a) from the date of delivery of the written notice to the council; or

- (b) from a later date or on the happening of a later event, as may be specified in the notice.
- (4) A resignation given to facilitate a breach of the supervisory person's duties is void.
- (5) This subsection applies if the founder, or any assignee of or successor to this power, or otherwise the Court upon application by any person under section 52(2) has reason to believe that the supervisory person:
  - (a) is unwilling or is refusing to act; or
  - (b) is bankrupt or incapable or otherwise unfit to act.
- (6) If subsection (5) applies, any one of the following may remove the supervisory person and appoint a replacement:
  - (a) the founder, while the founder is living and not incapable;
  - (b) any assignee or successor to the power of the founder to remove the supervisory person and appoint a replacement;
  - (c) the Court.
- (7) The removal under subsection (6) is effective:
  - (a) from the date the notice of removal is signed by the founder, or his or her assignee or successor under subsection (6)(a) or (b), and addressed to the supervisory person; or
  - (b) from the date specified by order of the Court.

**30. General duties of officials:**

An official has the following duties:

- (a) to act pursuant to the charter and rules and only for the advancement and achievement of the purpose;
- (b) to act honestly and in good faith with a view of the best interests of the foundation;

- (c) to exercise any care, diligence and skill as a reasonably prudent person would exercise in comparable circumstances;
- (d) subject to the constitution, not to profit from the official's office under section 37;
- (e) any other duty conferred on the official by the constitution or this Act.

**31. Specific duties of councils:**

A council has the following specific duties:

- (a) subject to the constitution, to provide information, subject to sections 18, 30 and 44;
- (b) to keep and maintain records of the foundation, subject to section 39;
- (c) to act together as the council, subject to section 40;
- (d) to act impartially, subject to section 41;
- (e) any other duty conferred on it by the constitution or this Act.

**32. Specific powers of councils:**

Subject to section 30, a council has the following powers:

- (a) subject to section 42, to delegate any of its functions to any person, including a member of the council;
- (b) if provided by the constitution, to pay remuneration to any supervisory person, guardian or officer;
- (c) to reimburse expenses properly and reasonably incurred by an official or officer acting on behalf of the foundation;
- (d) to appoint new or additional members of the council under section 24(1) and (2)(a);
- (e) to seek the removal of a member of the council under section 25(5) and (6);
- (f) any other powers conferred on it by the constitution or this Act.

**33. Specific duties of supervisory persons:**

In addition to section 30, a supervisory person has the following specific duties:

- (a) to take all steps as are reasonable in all the circumstances to ensure that the council carries out its functions;
- (b) any other duties as the supervisory person may have by reason of the constitution and this Act.

**34. Specific powers of supervisory persons:**

Subject to sections 30 and 33, a supervisory person has the following specific powers:

- (a) to require the council to account to the supervisory person as to the way in which the council has -
  - (i) administered the foundation and managed its property;
  - (ii) acted in furtherance of the purpose;
- (b) unless the constitution provides otherwise, to approve or disapprove any specified actions of the council;
- (c) unless the constitution provides otherwise, to sanction or authorise any action taken, or to be taken, by the council that would not otherwise be permitted by the constitution and, in that event, the action so sanctioned or authorised is treated to have been taken under the constitution;
- (d) to appoint a new or additional member under section 24(2)(c);
- (e) to appoint a replacement of a member under section 25(6)(b);
- (f) any other powers which the supervisory person may have by reason of the constitution and this Act.

**35. Specific duties of guardians:**

A guardian has the following specific duties:

- (a) if the purpose includes any other purpose, for which there are no beneficiaries, to protect and ensure that other purpose;
- (b) if there are non-notifiable beneficiaries, to protect and look after any interests of non-notifiable beneficiaries;
- (c) if the foundation has no supervisory person, to exercise the duty of the supervisory person to ensure that the council carries out its functions to the extent that the duties of guardians under paragraphs (a) and (b) are properly carried out;
- (d) any other duty conferred on the guardian by the constitution or this Act.

**36. Specific powers of guardians:**

Subject to sections 30 and 35, a guardian has the following specific powers:

- (a) all the powers necessary to achieve the specific duties of the guardian under section 35;
- (b) if the constitution provides no provision for the addition, removal or exclusion of beneficiaries, to exercise the powers of addition, removal or exclusion under section 17(1);
- (c) to appoint a new or additional member under section 24(2)(d);
- (d) to appoint a replacement of a member under section 25(6)(c);
- (e) any other powers conferred on the guardian by the constitution or this Act.

**37. Duty not to profit from office:**

Subject to section 32(b) and (c), an official must not:

- (a) derive, directly or indirectly, any profit from his or her appointment;

- (b) cause or permit any other person to so derive any profit; or
- (c) on his or her own account, enter into any transaction with the foundation, or relating to the property of the foundation, which may result in any profit, except -
  - (i) as expressly authorised by the constitution;
  - (ii) as authorised by this Act; or
  - (iii) with the approval of the Court.

**38. Duty to give information:**

- (1) The council must, at all reasonable times, at the written request of:
  - (a) the guardian;
  - (b) any notifiable beneficiary; or
  - (c) subject to the constitution, the founder,provide full and accurate information as to the state and amount of the foundation's property within three (3) months from the date of the written request.
- (2) If, because of subsection (1)(c), the constitution prohibits or restricts the providing of information required under subsection (1), the founder:
  - (a) may apply to the Court for an order to authorise the information to be provided; and
  - (b) must show the Court that the information is necessary or expedient -
    - (i) to properly dispose of any matter before the Court;
    - (ii) to protect the entitlement of any beneficiary or to protect and for the furtherance of the purpose; or
    - (iii) to properly administer or enforce the foundation.

**39. Duty to keep and maintain records:**

- (1) A council must ensure that the foundation keeps, at its registered office, any accounting and other information concerning the foundation as required under this Act.
- (2) If no member is resident in Samoa, the resident agent must comply with subsection (1).
- (3) The accounting records must:
  - (a) sufficiently show and explain the foundation's transactions;
  - (b) disclose with reasonable accuracy, at any time, the foundations' financial position at that time;
  - (c) enable the officials to ensure that the foundation's accounts are prepared properly pursuant to any enactment relating to standards of accounting;
  - (d) in particular, contain day to day entries of all sums of money received and expended by the foundation, the matters in respect of which the receipt and expenditure takes place and a record of the property and liabilities of the foundation; and
  - (e) be kept and retained for seven (7) years after the end of the financial year or accounting period to which they relate.
- (4) The guardian and resident agent may inspect any accounting records or information under subsection (3) upon two (2) working days' notice in writing to the council.
- (5) A person commits an offence if the person fails to comply with subsection (1) or (2).

**40. Duty of members to act together:**

- (1) Subject to the constitution:

- (a) all members must, act together as the council, to perform all matters relating to the foundation; and
  - (b) subject to subsection (2), a function of the council must not be performed unless all the members agree to perform it.
- (2) If the constitution empowers the council to act by majority of its members, a member who dissents from a majority decision may require the dissent to be recorded in writing.

**41. Impartiality of members:**

- (1) Subject to the constitution and to subsection (2), if a foundation has more than one (1) beneficiary or purpose, the council:
- (a) must be impartial; and
  - (b) must not manage the foundation for the advantage of one at the expense of another.
- (2) Subsection (1) does not apply when the council exercises any of its powers under the constitution.

**42. Delegation by council:**

- (1) Subject to subsection (2), the council must not delegate its functions unless permitted to do so by this Act.
- (2) If the constitution permits delegation, the council may:
- (a) delegate the management of the foundation's property to, and appoint, persons whom the council reasonably considers to be competent and qualified to act as managers to manage the property of the foundation or the investment of the property;
  - (b) appoint professional persons to act on the affairs of the foundation or to hold any property of the foundation; and

- (c) authorise a manager or person to retain any commission or other payment usually payable for services of the description rendered.
- (3) A member who, without any breach of duty, makes or permits the continuation of a delegation or appointment under subsection (2), is not liable for any loss to the foundation arising from the delegation or appointment.

**43. Corporate members:**

- (1) A corporate member may:
  - (a) act in connection with a foundation by resolution of the corporate member or of its board of directors or other governing body; or
  - (b) by resolution, appoint an officer or employee, or a committee of officers or employees, or both, to act on its behalf for the foundation.
- (2) The rights in action of a corporate member against its officers and employees are not property of the foundation.

**44. Non-disclosure of deliberations:**

- (1) As an exception to sections 18, 34(a) and 38, a member is not, subject to the constitution and to any order of the Court made pursuant to an application under this section by a participant, obliged to disclose documents which reveal:
  - (a) the council's deliberations as to how it should exercise its functions;
  - (b) the reasons for any decision made in the exercise of the council's functions; or
  - (c) any material upon which the decision was or might have been based.

- (2) A participant applying to the Court for an order under this section for the disclosure of any document must show that the disclosure is necessary or expedient:
  - (a) to properly dispose of any matter before the Court;
  - (b) to protect the entitlement of any beneficiary or the purpose; or
  - (c) to properly administer or enforce the foundation.

**45. Liability for breach of duty:**

- (1) Subject to this Act and the constitution, an official who commits or connives in a breach of the official's duty is liable for any loss or depreciation in value of the property of the foundation resulting from the breach.
- (2) An official is not liable for a breach of duty committed by another official unless the official:
  - (a) becomes or ought to have become aware of the breach or of the intention to commit the breach; and
  - (b) actively conceals the breach or intention, or fails within a reasonable time to take proper steps to protect or restore the property of the foundation or to prevent the breach.
- (3) A constitution may not:
  - (a) relieve an official of liability for a breach of duty arising from that official's own fraud, wilful misconduct or gross negligence; or
  - (b) grant the official any indemnity against the property of the foundation for that liability.
- (4) As an exception to this Act, a provision of the constitution dealing with the matters in subsection (3) is void.

**46. Power to relieve officials from personal liability:**

The Court may relieve an official wholly or partly of liability for a breach of duty, if it appears to the Court that the official:

- (a) has acted honestly and reasonably; and
- (b) ought fairly to be excused -
  - (i) for breach of duty; or
  - (ii) for omitting to obtain the directions of the Court in the matter in which the breach arose.

**PART 5****JURISDICTION AND POWERS OF THE COURT****47. Jurisdiction:**

The Supreme Court has jurisdiction in respect of all matters relating to a Samoan foundation.

**48. Application of Samoan law to questions of validity:**

- (1) Unless the constitution provides otherwise, the laws of Samoa (except Samoan rules of private international law) apply to determine any question on a Samoan foundation or disposition of property to or upon that foundation, including (without limitation) any of the following questions:
  - (a) the capacity of the founder;
  - (b) the validity, interpretation or effect of the constitution or any variation or revocation of the constitution;
  - (c) the validity of any endowment to the foundation;
  - (d) the management of the foundation, whether it is conducted in Samoa or another country, including (without limitation) any question on

- the function, appointment or removal of officials;
- (e) the existence and extent of any functions of the Samoan foundation, including (without limitation) powers of variation, revocation and appointment, and the validity of the exercise of any of those functions;
  - (f) the distribution of the Samoan foundation's property.
- (2) Subsection (1):
- (a) does not validate any endowment of property to the Samoan foundation by the founder, which is neither owned by the founder nor the subject of a power of disposition vested in the founder;
  - (b) does not affect the recognition of the law of any other jurisdiction in determining whether the foundation is the owner of any property;
  - (c) is subject to any express provision to the contrary in the constitution;
  - (d) does not, in determining the capacity of a legal person, affect the recognition of the law of its place of establishment;
  - (e) does not affect the recognition of the law of any other country prescribing the formalities for the disposition of property; and
  - (f) subject to subsection (3), does not validate -
    - (i) any disposition of real property situated in another country which is invalid under the law of that country; or
    - (ii) any testamentary disposition which is invalid under the law of the testator's domicile at the time of his or her death.

- (3) No Samoan foundation, and no endowment of property upon the Samoan foundation, is void, voidable, liable to be set aside, invalid or subject to any implied condition, nor is the capacity of any official or participant to be questioned, nor is any official, participant or third party to be subjected to any obligation or liability or deprived of any right, claim or interest, by reason that:
- (a) the laws of another country prohibit or do not recognise a Samoan foundation; or
  - (b) the foundation or endowment upon the foundation -
    - (i) avoids or defeats or potentially avoids or defeats rights, claims, interests, obligations or liabilities conferred or imposed by the law of any other jurisdiction on any person:
      - (A) by reason of a personal relationship to a founder or any beneficiary; or
      - (B) by way of foreign heirship rights; or
    - (ii) contravenes or potentially contravenes any law, judgment, order or action of another country intended to recognise, protect, enforce or give effect to any of those rights, claims, an interest, obligations or liabilities.
- (4) Despite any enactment on the recognition or enforcement of judgments, a judgment or order of a court of another country must not be recognised or enforced or give rise to any right, obligation or liability or raise any estoppel if and to the extent that:

- (a) it is inconsistent with this Act;
  - (b) it concerns any of the following -
    - (i) the personal and proprietary consequences of marriage or the termination of marriage;
    - (ii) succession rights, whether testate or intestate, including the fixed shares or interests of spouses or relatives;
    - (iii) any claims or orders made by the court of another country on a matter under subparagraph (i) or (ii) concerning the law of another country relating to the founder or any beneficiary;
    - (iv) the claims of creditors in an insolvency, subject to section 13;
    - (v) any claims about the validity of any transfer or disposition of property into the Samoan foundation;
    - (vi) any claims about the capacity of the founder; or
    - (vii) any claims by reason that a law of another country prohibits or does not recognise the concept of a foundation, and the law governing the foundation prevails over any law of another country on the founder or any beneficiary for any inconsistency between them; or
  - (c) order by the Court, for the purposes of safeguarding the purpose of the foundation or the interests of the beneficiaries, or in the interests of the proper management of the foundation.
- (5) This section applies whenever the foundation or endowment to it was created or made, despite any other law.

- (6) For a Samoan foundation comprising personal property or any endowment of personal property upon that foundation, the law relating to the rights of a surviving spouse applies only if the founder is domiciled in Samoa at the time of the founder's death.

**49. Approval of particular transactions:**

- (1) This section applies if:
  - (a) in the management of a foundation, a transaction is (in the opinion of the court) expedient but cannot be affected because the necessary power is not vested in the council by the constitution or this Act; and
  - (b) either there is no supervisory person or there is a supervisory person who is unwilling or incapable of exercising the power under section 34(1)(c).
- (2) If this section applies, the Court, on an application under section 52:
  - (a) may confer on the council, generally or in any particular circumstances, the necessary power, on terms and conditions as the Court thinks fit; and
  - (b) may direct the manner in which, and the property from which, any monies authorised to be expended, and the costs of any transaction, are to be paid or borne.

**50. Judgment against officials:**

- (1) An order, judgment or finding of law or fact of the Court in an action against an official founded on breach of duty is binding on:
  - (a) the foundation; and

- (b) all participants and non-notifiable beneficiaries (whether or not yet ascertained or in existence, and whether or not minors or persons under legal disability).
- (2) Subsection (1) applies to a participant or non-notifiable beneficiary only if:
  - (a) he or she was represented in the proceedings (whether personally, or by the guardian, or as the member of a class, or otherwise); or
  - (b) if not so represented, he or she had notice of the proceedings and a reasonable opportunity of being heard.
- (3) This section does not affect the Court's powers on representative proceedings or class actions.
- (4) In this section, "notice" means 14 days' notice or any other period ordered by the Court.

**51. Applications for directions:**

An official may apply to the Court for directions as to how the official must or may act in any of the affairs of the foundation, and the Court may make directions as it thinks fit.

**52. General powers of the Court:**

- (1) On the application of any person mentioned in subsection (2), the Court may:
  - (a) make any of the following orders about -
    - (i) the execution, management or enforcement of a foundation;
    - (ii) an official, including an order as to the exercise of his or her functions, their appointment and removal, the remuneration or conduct of an official, the keeping and submission of accounts, the making of payments, whether into

- Court or otherwise, and the repayment to the foundation of any loss caused by an official's breach of duty;
- (iii) a participant, or any person connected with a foundation;
  - (iv) any property of a foundation, including an order as to the vesting, preservation, application, distribution, surrender or recovery of such property;
- (b) make a declaration as to the validity or enforceability of the constitution;
  - (c) rescind or vary an order or declaration under this Act or make a new or further order or declaration.
- (2) An application under subsection (1) may be made by:
- (a) the Attorney General;
  - (b) an official;
  - (c) a participant;
  - (d) the Registrar; or
  - (e) any other person with leave of the Court.
- (3) The Court that appoints or removes an official under this section may impose any requirements and conditions as it thinks fit.
- (4) Subject to an order of the Court, an official appointed by the Court has the same functions, and may act in all respects, as an official appointed under the constitution.

**53. Powers of the Court for default:**

- (1) This section applies if a person does not comply with an order of the Court under this act requiring him or her to do anything.
- (2) If this section applies, the Court may, on any terms and conditions as it thinks fit, order that the thing be done by another person, nominated for the purpose by the

Court, at the expense of the person in default (or otherwise as the Court directs).

- (3) Anything done pursuant to this section has effect in all respects as if done by the person in default.

**54. Payment of costs:**

Without affecting the Court's powers arising otherwise than under this Act, the Court may order the costs and expenses of and incidental to an application to the Court under this Act to be paid by the foundation or by any persons, and in any manner and on any basis, as the Court thinks fit.

## **PART 6 OFFENCES**

**55. False or misleading information:**

- (1) A person who:
- (a) in connection with any application to, or otherwise in providing any information or document to, the Registrar about a foundation under this Act;
  - (b) in purported compliance with a requirement imposed by or under this Act; or
  - (c) otherwise than as mentioned in paragraph (a) or (b) but in circumstances in which the person intends, or could reasonably be expected to know, that the statement, information or document provided by the person would or might be used by the Registrar for the purpose of exercising the Registrar's functions under this Act,

commits an offence if the person:

- (aa) makes a statement which the person knows or has reasonable cause to believe to be false, deceptive or misleading in a material particular;
  - (bb) dishonestly or otherwise, recklessly makes a statement which is false, deceptive or misleading in a material particular;
  - (cc) produces or provides or causes or permits to be produced or provided any information or document which the person knows or has reasonable cause to believe to be false, deceptive or misleading in a material particular;  
or
  - (dd) dishonestly or otherwise, recklessly produces or provides or recklessly causes or permits to be produced or provided any information or document which is false, deceptive or misleading in a material particular.
- (2) An official commits an offence who fails to provide the Registrar with any information in the official's possession knowing or having reasonable cause to believe:
- (a) that the information is relevant to the exercise by the Registrar of the Registrar's functions under this Act; and
  - (b) that the withholding of the information is likely to result in the Registrar being misled as to any matter which is relevant to and of material significance to the exercise of those functions in relation to the foundation or an official.

**56. Other offences and penalties:**

- (1) If an offence under this Act is committed by a person and is proved to have been committed with the consent

or connivance of, or to be attributable to any neglect on the part of:

- (a) for a foundation, any member, official or officer;
- (b) for a body corporate, any director, manager, secretary or other similar officer, or any official, of the body corporate; or
- (c) for both a foundation and a body corporate, any person purporting to act in any capacity under paragraph (a) or (b),

the foundation or the body corporate commits the same offence.

(2) If the affairs of a body corporate are managed by its members, subsection (1) applies to a member in connection with his or her functions of management as if he or she were a director.

(3) If an offence under this Act is committed by an unincorporated body and is proved to have been committed with the consent or connivance, of, or to be attributable to any neglect on the part of:

- (a) a partner of a partnership;
- (b) an officer of any other unincorporated body, who is bound to fulfil any duty in respect of which the offence is a breach or, if there is no such officer, a member of the committee or other similar governing body; or
- (c) a person purporting to act in any capacity described in paragraph (a) or (b),

he or she as well as the unincorporated body commits an offence.

(4) If an offence under this Act is alleged to have been committed by an unincorporated body, proceedings for the offence must be brought in the name of that body and not in the name of any of its members.

- (5) A fine imposed on an unincorporated body on its conviction of an offence under this Act is to be paid from the funds of that body.

## PART 7 MIGRATION

### 57. Overseas foundations as Samoan foundations:

- (1) An overseas foundation may apply to the Registrar to be registered as a Samoan foundation under this Part.

- (2) In this Part:

**“country”** includes a state or territory of the country;

**“migration details”** means the documentation and information (listed in Schedule 5) required to register the overseas foundation in Samoa;

**“overseas foundation”** means a foundation with legal personality currently established under the laws of another country;

**“registered as a Samoan foundation”** means:

- (a) ceasing to be registered as a foundation in the country in which the foundation was established or where the foundation is now registered; and
- (b) becoming registered as a foundation in the Register.

**“registration”** as a Samoan foundation has a corresponding meaning.

### 58. Registration must be authorised by law of another country:

An overseas foundation cannot be registered as a Samoan foundation unless:

- (a) the foundation is able under the law of the country in which the foundation is currently established to be registered as a Samoan foundation; and
- (b) the overseas foundation has complied with the requirements of that law for its registration as a Samoan foundation.

**59. Prohibition from registration:**

An overseas foundation must not be registered as a Samoa foundation if:

- (a) the overseas foundation is bankrupt or is otherwise being wound-up;
- (b) a liquidator, receiver or administrator has been appointed, in relation to any property of the overseas foundation; or
- (c) an application has been made to the Court or a court of another country -
  - (i) to put the overseas foundation into bankruptcy or to have it declared bankrupt;
  - (ii) to have the overseas foundation wound-up;
  - (iii) for the approval of a composition, compromise or arrangement with creditors has been entered into so that its creditors will receive less than full repayment; or
  - (iv) for the appointment of a liquidator, receiver or administrator for any property of the overseas foundation,

and (in each case) the application has not been finally disposed of.

**60. Application:**

- (1) An application for registration as a Samoan foundation must be made to the Registrar.

- (2) The application must be in a form approved by the Registrar and must include or be accompanied by:
  - (a) the migration details;
  - (b) any other information and documents, verified in such manner, as the Registrar may require;
  - (c) a declaration of compliance; and
  - (d) any prescribed fee.
- (3) The application may propose the date on which registration as a Samoan foundation must take effect, provided that that date is no later than three (3) months after the date of the application.
- (4) An application for registration as a Samoan foundation may only be made by the resident agent of the new foundation.

**61. Effect of registration:**

- (1) Upon receipt of the application for registration as a Samoan foundation under section 60:
  - (a) the Registrar must register the foundation in the Register by -
    - (i) inscribing its name in the Register; and
    - (ii) allocating a registration number to the foundation;
  - (b) subject to this Part, the foundation is to be treated in all respects as a foundation established under this Act; and
  - (c) the Registrar must issue a certificate of registration of the foundation -
    - (i) containing the matters in clause 7(2) of Schedule 4;
    - (ii) stating the date on which the foundation was first established (in addition to the date on which it was established in Samoa);

- (iii) detailing any country in which the foundation was previously registered;
  - (iv) detailing any name with which the foundation was previously registered; and
  - (v) which is to be conclusive evidence that the foundation is registered under this Act.
- (2) If the application proposed a date pursuant to clause 10(1) of Schedule 5, which date postdates the date of issue of the certificate of registration, then the foundation must be registered and established as a Samoan foundation on the proposed date (which must be the date stated on the certificate).
- (3) When the certificate of registration is issued under subsection (1)(c) the situation must be as set out in section 73.

**62. Cancellation of registration:**

- (1) Upon registration as a Samoan foundation, the foundation must, as soon as possible, file with the Registrar any certificate or other document issued under the law of the country in which the foundation has ceased to be established and registered evidencing the fact that the foundation has ceased to be established and registered under that law.
- (2) The Court may, on application, order that the Foundation's name be removed from the Register if the Court is satisfied that:
- (a) an overseas foundation has been registered as a Samoan foundation; and
  - (b) the foundation continues to be established or registered under the law of another country.

- (3) The application under subsection (2) may be made by:
  - (a) the foundation or any of its participants or its creditors; or
  - (b) the Registrar.
- (4) An order made under subsection (2):
  - (a) may be made subject to such terms and conditions; and
  - (b) renders void the foundation's registration in Samoa unless the Court orders otherwise.

**63. Removal of registration:**

- (1) A foundation may apply to the Registrar to be removed from the Register under this Part.
- (2) In this Part, "removed from the Register" means removed from the Register for the purposes of becoming established as an overseas foundation with legal personality under the law of another country.

**64. Removal from Register if constitution provides:**

A foundation is not to be removed from the Register unless the constitution provides for the removal.

**65. Other grounds for non-removal from Register:**

A foundation is not to be removed from the Register if:

- (a) the foundation is bankrupt or wound-up;
- (b) a liquidator, receiver or administrator has been appointed, for any property of the foundation; or
- (c) an application has been made to the Court or a court in another country -
  - (i) to put the foundation into bankruptcy or to have it declared bankrupt;
  - (ii) to wound-up the foundation;

- (iii) to approve a composition, compromise or arrangement with creditors entered into for the foundation so that its creditors will receive less than full repayment; or
  - (iv) to appoint a liquidator, receiver or administrator for any property of the foundation,
- and (in each case) the application has not been finally disposed of.

**66. Notice to creditors and participants before removal:**

A foundation is not to be removed from the Register unless, before the foundation applies for removal under section 63(1), the foundation gives written notice to all its creditors and participants stating that it intends to so apply.

**67. Application for removal from the Register:**

- (1) An application for removal from the Register is to be made in an approved form by a resident agent to the Registrar.
- (2) The application is to be accompanied by:
  - (a) a written confirmation from the Attorney General that he or she has no objection to the removal of the foundation from the Register;
  - (b) any evidence acceptable to the Registrar that -
    - (i) the removal of the foundation from the Register complies with the requirements of this section and sections 68 and 69;
    - (ii) on the date of the removal of the foundation's name from the Register, the foundation will be established under the law of another country; and

- (iii) the foundation will continue to have legal personality under the law of that country;
  - (c) any other information or documents, verified in a manner required by Registrar;
  - (d) a declaration of compliance pursuant to section 71; and
  - (e) any prescribed fee.
- (3) When the application is received, the Registrar must give notice of the proposed removal in a manner and for a period determined by the Registrar.

**68. Effect of removal:**

Not less than 28 days after the day on which the Registrar gave notice under section 67(3):

- (a) any statement in the constitution that the registered office of the foundation is situated in Samoa is to be deleted;
- (b) the foundation's name must be removed from the Register;
- (c) the foundation must thereupon cease to be a Samoan foundation;
- (d) the Registrar must file in the Register a notice stating that the foundation's name has, pursuant to this section, been removed from the Register for the purpose of the foundation becoming established under the law of the country specified in the notice; and
- (e) the Registrar must publish the fact that the foundation has been removed from the Register in a manner and for a period as he or she thinks fit.

**69. Cancellation of removal:**

- (1) A foundation that is removed from the Register under this Part must, as soon as possible, file with the

Registrar any certificate or other document issued under the law of the country in which the foundation has become established evidencing the fact that the foundation has become established under the law of that country.

- (2) The Court may, (on application) order the restoration of the foundation's name to the Register if the Court is satisfied that:
  - (a) a foundation's name has been removed from the Register pursuant to this Part; and
  - (b) the foundation has not become established under the law of another country.
- (3) The application under subsection (2) is to be made by the foundation or any of its participants or creditors or the Registrar.
- (4) An order made under subsection (2):
  - (a) may be made subject to any terms and conditions as the Court thinks fit; and
  - (b) renders void the removal of the foundation's name from the Register.

**70. Power of the Court to remove from the Register:**

- (1) This subsection applies if the Court is satisfied that the removal of a foundation under section 67 would unfairly prejudice:
  - (a) a participant;
  - (b) creditor of the foundation; or
  - (c) any other person to whom the foundation is under any obligation or liability.
- (2) If subsection (1) applies, the Court may make any of the following orders:
  - (a) an order relating to the removal;

- (b) an order directing that the removal of the foundation is not to take place, or only to take place, subject to the terms and conditions as the Court thinks fit;
  - (c) an order modifying the proposal for the removal of the foundation in a manner specified in the order;
  - (d) an order directing the foundation or its members to reconsider the proposal for the removal of the foundation or any part of the proposal.
- (3) The application is to be made by a person under subsection (1)(a) to (c):
- (a) at any time before the date on which the removal of the foundation takes place; or
  - (b) within any further time, as the Court may in any particular case allow.
- (4) An order under subsection (2) may be made subject to such terms and conditions as the Court thinks fit.

**71. Declaration of compliance:**

- (1) A declaration of compliance is a declaration, signed by the resident agent, that all the requirements of this Part have been fulfilled in respect of:
- (a) registration as a Samoan foundation; or
  - (b) the removal of a foundation from the Register.
- (2) The Registrar, when performing his or her functions under this Part, may rely upon a declaration of compliance (and accordingly is not bound to enquire further) as to whether this Part has been complied with in relation to an application:
- (a) for registration as a Samoan foundation; or
  - (b) for the removal of a foundation from the Register.

**72. Documents in a language other than English:**

- (1) If a document provided to the Registrar under this Part is not in English, an English translation of it is to be provided to the Registrar unless waived by the Registrar.
- (2) The translation is to be certified by an independent person competent to provide the translation.
- (3) The resident agent must retain a copy of the English translation unless it has been waived by the Registrar.

**73. Registration or transfer does not affect continuity of foundation's existence:**

- (1) Registration as a Samoan foundation under this Part or removal of a foundation from the Register under this Part does not affect the identity or continuity of the foundation's legal personality which must be uninterrupted by the process of transfer.
- (2) Upon registration as a Samoan foundation or removal from the Register:
  - (a) all property and rights to which the foundation was entitled immediately before registration or removal remain its property and rights;
  - (b) the foundation remains subject to all criminal and civil liabilities, and all contracts, debts and other obligations, to which it was subject immediately before registration or removal;
  - (c) all actions and other legal proceedings which immediately before registration or removal could have been instituted or continued by or against the foundation may be instituted or continued by or against it after registration or removal; and

- (d) a conviction, ruling, order or judgment in favour of or against the foundation before registration or removal may be enforced by or against it after registration or removal.

**74. Terminology used in another country:**

References in this Part to foundations, officials, participants, certificates of establishment, liquidation or any other matters concerning a foundation include references to their equivalents in the law of the country from which or to which a foundation is migrating.

## **PART 8 AMENDMENT OF CONSTITUTION**

**75. Amendment of powers:**

- (1) Subject to section 11, the constitution may provide that any power or exercise of a power under the constitution may be amended.
- (2) An amendment does not affect anything lawfully done by an official in relation to the foundation before the official receives notice of the amendment.

**76. Amendment by Court:**

- (1) The Court, on the application of the officials, may, by order, approve any arrangement to amend the constitution or the powers of management of the council, if it is satisfied that the arrangement:
  - (a) is now suitable or expedient; and
  - (b) is consistent with the original intention of the founder and the spirit in which the foundation was established.

- (2) The Court may dispense with the consideration set out in subsection (1)(b) if satisfied that the original intention of the founder cannot be ascertained.
- (3) An application under subsection (1):
  - (a) is to be made by the officials; and
  - (b) must only be made upon notice to the participants.

## **PART 9 WINDING-UP**

### **77. Winding-up and termination:**

- (1) A foundation is terminated, and accordingly ceases to exist or to have legal personality, only if:
  - (a) a council's winding-up event or the Court winding-up event has occurred;
  - (b) after which, the winding-up has been completed and the property distributed under section 86;
  - (c) after which, an application has been submitted to the Registrar for removal of the foundation from the Register under section 87; and
  - (d) as a result of which, the Registrar has removed the foundation from the Register.
- (2) A foundation is only terminated on the date of its removal from the Register under this Part.

### **78. Official liquidators:**

- (1) The Registrar or the Court may, by notice in the Savali, appoint a person to be registered as an official liquidator for the purpose of winding-up under this Part, subject to payment of prescribed annual fee registration.

- (2) The power under subsection (1) includes the power to revoke the appointment.
- (3) A person must not be appointed or act as liquidator:
  - (a) if -
    - (i) the person is not an official liquidator;  
or
    - (ii) the person or any other person related to the person or in which the person has any beneficial interest is indebted to the foundation in liquidation in an amount exceeding \$1000 or an equivalent amount in any other currency; and
  - (b) unless the person consents.
- (4) The Registrar must keep a Register of official liquidators.
- (5) If an official liquidator is appointed to be a liquidator of a foundation, the liquidator must forthwith notify the Registrar in writing of any interest, which the liquidator or any person with whom the liquidator has a personal relationship or any person in which the liquidator has a beneficial interest, has as a participant or official of the foundation in liquidation.

**79. Winding-up on council's winding-up events:**

- (1) If any of the council's winding-up events occurs, a foundation must be wound-up:
  - (a) by the council; or
  - (b) by a liquidator, appointed by the Registrar on a written request of the council made at any time.
- (2) If a foundation is to be wound-up by the council, a copy of the resolution for the winding-up must be filed with the Registrar.

- (3) Subject to the order of the Court and to this Act, following the occurrence of any of the council's winding-up events, the property of the foundation must be distributed by the council or by a liquidator appointed under subsection (1)(b) within a reasonable time under section 85.

**80. Winding-up on Court winding-up events:**

- (1) If the Court is of the opinion that any of the Court winding-up events has occurred, the Court may, on application, order the winding-up of a foundation, including any of the following orders:
  - (a) an order appointing an official liquidator to wind-up the foundation's affairs and distribute its property;
  - (b) an order to apply to the Registrar for removal of the foundation from the Register;
  - (c) any other order in relation to the winding-up, as the Court thinks fit.
- (2) A person under section 52(2) or any creditor of the foundation:
  - (a) has the right to apply under subsection (1); and
  - (b) when a winding-up order is made must (as an applicant) -
    - (i) forthwith file a copy of the order with the Registrar; and
    - (ii) serve a copy of the order on the liquidator appointed under subsection (1)(a).
- (3) An appeal filed against the winding-up order acts as a stay of the winding-up order, as if the foundation had not been wound-up pending the final determination or withdrawal of the appeal.

- (4) However, the Court, before which the appeal is instituted, may, on the application of a person concerned, order the reversal of stay under subsection (1), subject to the terms and conditions as the Court may direct.
- (5) If an application is made under subsection (1), the Court may order that the foundation be struck off the Register instead of being wound-up, if it thinks just and equitable to do so in all the circumstances.

**81. General provisions on winding-up:**

- (1) When a foundation is required to be wound-up, its affairs must, unless a liquidator has been appointed by the Court under section 80(1)(a) or under subsection (4), be wound-up by the council, or by a liquidator appointed by the Registrar under section 79(1)(b).
- (2) Within two (2) weeks after the date of the council's winding-up event, the council, liquidator or resident agent, must:
  - (a) give notice to the participants of the winding-up; and
  - (b) publish a notice, in the Savali, that the foundation is being wound-up, or in any other manner and for a period as the Registrar thinks fit.
- (3) From the commencement of winding-up, an official may not, except under section 85, claim as a creditor of the foundation.
- (4) Upon the commencement of winding-up or at any time after that, the Court may, on the application of any official, participant, assignee or creditor of the foundation, make:

- (a) an order to appoint one (1) or more liquidators to wind-up the Foundation's affairs and distribute its property; or
  - (b) any other order relating to the winding-up as the Court thinks fit.
- (5) On the appointment of a liquidator (whether under subsection (4)(a) or under section 80) all powers of the officials cease.
- (6) From the commencement of winding-up, the foundation must cease to carry out any activities except to the extent necessary for its beneficial winding-up.
- (7) All expenses properly incurred in the winding-up of a foundation, including the liquidator's remuneration, are payable from the foundation's property in priority to all other debts.
- (8) From the commencement of winding-up, the persons winding-up the foundation's affairs, in the name of and for and on behalf of the foundation:
  - (a) may, to the extent necessary for the beneficial winding-up of the foundation, prosecute, defend or settle any civil or criminal action;
  - (b) must dispose of the foundation's property and realise its property; and
  - (c) must, under section 84 -
    - (i) discharge the foundation's debts; and
    - (ii) distribute any remaining property of the foundation under its constitution.
- (9) As soon as a foundation's affairs are fully wound-up:
  - (a) any person who conducts the winding-up must -
    - (i) prepare an account of the winding-up, giving details of the conduct thereof and the disposal of the foundation's property, and stating whether or not

- any state of affairs described in this section has come to that person's attention;
- (ii) provide all officials with a copy of the account; and
  - (iii) within a period of seven (7) days beginning on the date of completion of the winding-up:
    - (A) file with the Registrar, and publish in the Savali or in a manner and for a period as may be specified by the Registrar, a notice of completion of the winding-up; and
    - (B) file with the Registrar a copy of the account (however, upon a council's winding-up, if no liquidator has been appointed, it is sufficient for the council to file with the Registrar a certificate as to the solvency of the foundation and as to the completion of the winding-up, instead of filing a copy of the account);
  - (iv) upon filing of an auditor's certificate under subparagraph (iii)(B), permit the Registrar to obtain information as the Registrar may wish from the auditor and to inspect the account referred to in subparagraph (i) at the registered office of the foundation;

- (b) the Registrar must, as soon as is reasonably practicable after the filing under paragraph (a)(iii), delete any information about the foundation from the Register; and
  - (c) the foundation's certificate of registration becomes invalid and the foundation is dissolved.
- (10) A person conducting the winding-up may apply to the Court for any directions as to any matter relating to the winding-up, and the Court may make any order as it thinks fit.
- (11) It is an offence:
  - (a) for a person to exercise any power of an official ceased pursuant to subsection (5);
  - (b) for the foundation to contravene subsection (6), and the foundation and each member of the council are liable; or
  - (c) to contravene subsection (9)(a), and any person who conducted the winding-up is liable.

**82. Statement of affairs and reports of the liquidator and the council:**

- (1) This section applies if:
  - (a) a liquidator is appointed by the Registrar on the written request of the council under section 79; or
  - (b) a winding-up order is made under section 80.
- (2) If subsection (1) applies:
  - (a) a statement ("statement of affairs") is to be made (in the form approved by the Registrar and verified by affidavit) as to the affairs of the foundation as at the date of the happening of the relevant event showing -

- (i) the particulars of its property, debts and liabilities;
  - (ii) the names and addresses of its creditors;
  - (iii) the securities held by them respectively;
  - (iv) the dates when the securities were respectively given; and
  - (v) any further information as is prescribed or as the Registrar or the liquidator may require; and
- (b) the statement of affairs is to be submitted by a member of the council, within 25 working days after the happening of the relevant event, or within an extended time allowed for good reason by -
- (i) the Registrar for paragraph (a)(i);
  - (ii) a liquidator for paragraph (a)(ii); or
  - (iii) the Court,

and the liquidator must, within 5 working days of receiving statement of affairs, file a copy of it with the Registrar.

- (3) Subject to any regulations, a person who makes or concurs in making a statement of affairs is entitled to be paid by the council or the liquidator out of the property of the foundation such costs and expenses associated with preparing and making the statement of affairs as the council or the liquidator consider reasonable.
- (4) A person who, without reasonable cause, fails to comply with a requirement of this section commits an offence.
- (5) The liquidator must (as soon as practicable after receiving the statement of affairs) submit a preliminary report to the Court:
- (a) as to the estimated property and liabilities of the foundation;

- (b) if the foundation has failed, as to the cause of failure; and
  - (c) whether in the liquidator's opinion further enquiry is desirable as to any matter relating to the formation or failure of the foundation or the attainment of the purpose of the foundation.
- (6) The liquidator may make further reports stating:
  - (a) the manner in which the foundation was formed;
  - (b) whether, in his or her opinion -
    - (i) any fraud has been committed; or
    - (ii) any material fact has been concealed by any person in the formation of the foundation or by any official relating to the foundation since its formation; and
  - (c) any other matter which, in his or her opinion, is desirable to bring to the notice of the Court.
- (7) Before a statement of affairs is submitted under subsection (2) or a preliminary report is submitted under subsection (5) and the account is prepared and provided under section 81(9), the Court or the Registrar may require the liquidator or the council:
  - (a) to provide any information about the liquidation; or
  - (b) to provide the Court or the Registrar with a further statement or report as the Court or the Registrar may require.

**83. Liquidators:**

- (1) (*Vacancy in the office of liquidator*): If, in the course of winding-up, a vacancy occurs by death, resignation or otherwise in the office of liquidator:
  - (a) for a liquidator appointed by the Court, the Court -

- (i) must appoint another official liquidator to fill the vacancy; or
    - (ii) may remove the liquidator and appoint replacement official liquidator; and
  - (b) for a liquidator appointed by the Registrar, the Registrar -
    - (i) must appoint another liquidator to fill the vacancy; or
    - (ii) may remove the liquidator and appoint another replacement liquidator or apply to the Court for an order to remove the liquidator and to appoint another replacement liquidator.
- (2) (*Validity of a liquidator's acts*): The following applies for the acts of a liquidator:
- (a) the acts are valid even if there is any defect in the appointment or qualification of the liquidator;
  - (b) any conveyance, assignment, transfer, mortgage, charge or other disposition of a foundation's property made by a liquidator, despite any defect or irregularity affecting the validity of the winding-up or appointment of the liquidator, is valid in favour of a *bona fide purchaser for value without notice* of the defect or irregularity;
  - (c) a person making or permitting any disposition of property to any liquidator is to be protected and indemnified in so doing, despite any defect or irregularity affecting the validity of the winding-up or the appointment of the liquidator not then known to that person;
  - (d) for the purpose of this section, a disposition of property includes a payment of money.

- (3) (*Other provisions*): The following sets out other provisions for liquidators:
- (a) a liquidator may resign;
  - (b) if a participant or official seeks to remove a liquidator (whether appointed by the Court or Registrar) which is opposed by the liquidator, the question must be referred to the Court and, upon cause being shown, the Court may order that the liquidator be removed and then the liquidator must cease to be the liquidator;
  - (c) upon discovery of any defect in the appointment of a liquidator, the Registrar, upon an order of the Court to do so if the Court appointed the liquidator, may by public notice validate the appointment, and the liquidator is then taken to, for all purposes, to have been validly appointed on and from the date as may be specified in the notice and otherwise upon the date of the notice.
- (4) (*Powers of the liquidator*): A liquidator has the following powers:
- (a) a liquidator (including the council acting following the occurrence of a Council's winding-up event) may, subject to regulations and, where the liquidation is upon the Court winding-up event, subject to any order or rule of the Court -
    - (i) carry on the purpose so far as is necessary for the beneficial winding-up of the foundation;
    - (ii) subject to this Act, pay any class of creditors;

- (iii) make any compromise or arrangement with creditors or persons claiming to be creditors or having, or alleging themselves to have, any claim present or future, certain or contingent, ascertained or sounding only in damage, against the foundation or whereby the foundation may be liable;
- (iv) compromise:
  - (A) any debts and liabilities capable of resulting in debts;
  - (B) any claims present or future, certain or contingent, ascertained or sounding only in damages, subsisting or supposed to subsist between the foundation and a debtor or person apprehending liability to the foundation;
  - (C) any questions in any way relating to or affecting the property or the winding-up of the foundation, on such terms as are agreed; and
  - (D) taking of any security for the discharge of the debt, liability or claim, and give a complete discharge of those matters;
- (v) to the extent necessary for the beneficial winding-up of the foundation bring, defend or settle any civil or criminal action or other legal proceeding in the name of or on behalf of the Foundation;

- (vi) appoint a barrister, solicitor, a trustee company, and an accountant or other expert to assist them in their duties;
- (vii) sell the real and personal property and things in action of the foundation by public auction, public tender or private contract with power to transfer the whole to any person, foundation or company, or in parcels;
- (viii) do all acts and execute in the name and on behalf of the foundation all deeds, receipts and other documents and for that purpose use when necessary the foundation's seal, if it has one;
- (ix) prove rank and claim in the insolvency, sequestration bankruptcy or liquidation of any debtor for any balance against his or her estate and receive dividends in the insolvency, sequestration bankruptcy or liquidation in respect of that balance as a separate debt due from the insolvency, bankruptcy or liquidation and rateably with other separate creditors;
- (x) draw, accept, make and endorse any bill of exchange or promissory note in the name and on behalf of the foundation with the same effect with respect to the liability of the foundation as if the bill or note had been drawn, accepted or made or endorsed by or on behalf of the foundation in the course of the fulfilment of the purpose;

- (xi) raise on the security of the property of the foundation any money required;
  - (xii) take out or cause to be taken out, probate or letters of administration of the estate of any deceased debtor, and do any other act necessary for obtaining payment of any money due from a debtor or from his or her estate which cannot be conveniently done in the name of the foundation, and in all such cases the money due is for the purposes of enabling the liquidator to take out or cause to be taken out the probate or letters of administration or recover the money, due to the liquidator himself or herself;
  - (xiii) appoint any agent or expert to do any business or carry out any work or give any recommendation or advice which the liquidator is unable or unqualified to do himself or herself and to pay the proper charges of the agents and experts for the doing of the work and to pay the proper expenses incurred in and incidental to the doing of the work; and
  - (xiv) do any other things as are necessary or convenient and reasonable for winding-up the affairs of the foundation and distributing its property;
- (b) if any creditor of a foundation -
- (i) contends that the liquidator should exercise or refrain from exercising any of the powers set out in section 82(6)(a);  
or

- (ii) is aggrieved by any act or omission of the liquidator arising for such exercise or failure to exercise such powers,

person may submit the contention to the Registrar, setting out the ground for it and, if the Registrar is of the opinion that the contention is one which might be reasonably sustained (whether the Registrar would sustain it himself or herself or not) the Registrar must inform that liquidator and the contention must then be referred to the Court by the Registrar on behalf of the applicant and the liquidator must comply with the order of the Court;

- (c) unless the Court orders otherwise concerning a contention referred to it under paragraph (b) -

- (i) the liquidator is entitled to the costs and expenses of the proceedings out of the property of the foundation; and

- (ii) if prior to the contention being referred to the Court, the liquidator certifies to the Court that there is a doubt whether the property of the Court will be sufficient to satisfy the costs after providing for all other then known expenses and outgoings, the Court:

- (A) must not then proceed with the hearing until full security for the costs and expenses has been provided by the applicant (including security to the extent of the liquidators doubts as expressed); and

- (B) may order the applicant to pay to the liquidator the whole of the liquidator's costs and expenses

or a part of them as the Court thinks fit;

- (d) all proper costs charges and expenses of and incidental to the winding-up, including the remuneration of the liquidator, are payable out of the property of the foundation in priority to all other claims of whatsoever nature and, if the property is insufficient to satisfy the costs, charges and expenses the Court may make an order as to the order of priority of payment.
- (5) (*Exercise and control of liquidator's or council's powers*): The following sets out the exercise and control of the powers of the liquidator or the council:
- (a) subject to this Act and in the administration of the property of a foundation and the distribution of them amongst its creditors, the liquidator or the council must have regard to any directions given by creditors at any meeting or otherwise under this Act;
  - (b) the liquidator -
    - (i) may summon a meeting of the creditors for the purpose of ascertaining their wishes; and
    - (ii) must summon meetings if:
      - (A) directed by a resolution of the creditors; or
      - (B) requested by not less than one-tenth in value of the creditors,
- and all those meetings are to be summoned and held pursuant to any regulations;
- (c) subject to this Act, the liquidator and the council must use their respective discretions when managing the affairs of the foundation and distributing its property.

- (6) (*Payment by the liquidator or by the council*): The liquidator and the council must pay the monies received by them respectively into any bank account opened by them for the purposes of their activities as liquidator, and regulations may be issued prescribing the bank account approved for this purpose and the manner and terms under which the bank account is to be conducted. In this subsection “bank account” means an account in the name of the liquidator or in the name of the foundation in liquidation or in such other name as the Registrar directs, at such bank carrying on business in Samoa as is approved by the Registrar for the purpose of this section.
- (7) (*Liquidator’s or the council’s books*): The liquidator or the Council must keep proper books in which they must cause to be made entries:
- (a) of minutes of proceedings at meetings and of resolutions by creditors; and
  - (b) of any other prescribed matters,
- and any creditor entitled to prove in the liquidation may, with the approval of the Registrar, personally or by his or her agent inspect the books.
- (8) (*Liquidator’s or the Council’s returns*): Regulations may be made under section 89 to prescribe:
- (a) returns, accounts, reports and information to be lodged with the Registrar by a liquidator or the council, carrying out the liquidation; and
  - (b) costs and fees for the purposes of paragraph (a).
- (9) (*Invoices*): If a foundation is being wound-up, any invoice, order for goods or business letter issued by or on behalf of the foundation or a liquidator of that foundation, being a document on or in which the name of the foundation appears, must have the words “in

liquidation" added after the name of the foundation, where it first appears in that document.

- (9A) If a foundation contravenes subsection (9), the foundation and any of its official and its liquidator, who, knowingly and willfully, authorises or permits the contravention commits an offence.
- (10) (*Books of liquidator and foundation*): The following apply to the books of the liquidator or foundation:
- (a) if a foundation is being wound-up or has been wound-up, all books and papers of the foundation that are relevant to the affairs of the foundation at or subsequent to the commencement of the winding-up of the foundation as between the participants and the officials are *prima facie* evidence of the truth of all matters purporting to be recorded in those books and papers;
  - (b) if a foundation has been wound-up, the liquidator or the council must deliver the books and papers referred to in paragraph (a) to the resident agent who must retain the books and papers for six (6) years from the commencement of the winding-up;
  - (c) no responsibility rests on the liquidator or council, participants, officials or the Registrar by reason of any book or paper of the foundation being mislaid or not being forthcoming to a person claiming to be interested in the book or paper.
- (11) (*Investment by the liquidator or the council*): If the cash balance standing to the credit of a foundation in liquidation is in excess of the amount which in the opinion of the liquidator is required to answer the demands relating to the foundation, the liquidator or

the council may invest the excess or any part of the excess in any investment approved in writing by the Registrar.

- (12) (*Liquidator's or council's expenses*): The following apply to expenses of the liquidator or council:
- (a) unless expressly directed by the Court to do so, the liquidator or the council must not incur any expense on the winding-up of the foundation unless there are sufficient available property to meet the expense;
  - (b) on the application of a creditor, the Court may direct a liquidator or the council to incur a particular expense on condition that the creditor -
    - (i) indemnifies the liquidator or the council for the recovery of the amount expended; and
    - (ii) gives security for the amount of the indemnity in a form acceptable to the liquidator, council or Court.

**84 Further general matters about winding-up:**

- (1) (*Custody and vesting of foundation's property*): On the commencement of any winding-up, the liquidator must take into his or her custody or under their control:
- (a) all the property and things in action to which the foundation is or appears to be entitled; and
  - (b) on an application by the liquidator to the Court, all or any part of any property of the foundation, of whatsoever description belonging to the foundation, or held by trustees on its behalf, may be vested in the liquidator in his or her official name.

- (2) (*Delivery of property*): The Court may require any trustee, banker, agent, participant or official of a foundation to pay, deliver, convey, surrender or transfer to the council or to the liquidator forthwith or within a time as the Court directs, any money, property, books and papers in his or her hands to which the foundation is *prima facie* entitled.
- (3) (*Avoidance of certain transactions*): Any attachment, sequestration, distress or execution put in force against the property or effects of a foundation after the commencement of its winding-up is void, unless the Court otherwise orders.
- (4) (*Pending proceedings*): After the commencement of the winding-up, any action or proceeding is not to be proceeded with or commenced and any judgment is not to be executed against a foundation, except with leave of the Court, subject to terms and conditions as the Court may impose.
- (5) (*Power to stay winding-up*): A person:
  - (a) may, at any time after the commencement of a winding-up, apply to the Court for an order that the winding-up be stayed (either altogether or for a limited time and subject to section 80(3)), subject to terms and conditions as the Court may impose; and
  - (b) must forthwith lodge a copy of the order with the Registrar.

**85. Personal liability for certain defaults after bankruptcy:**

- (1) If:
  - (a) a foundation has been wound-up and is unable to pay its debts; and
  - (b) there has been, for the foundation, a contravention of a provision which -

- (i) has contributed to the inability of the foundation to pay its debts;
  - (ii) has materially misled or deceived any official, participant or creditor as to, or has resulted in substantial uncertainty as to, the property, liabilities or investment instruments of the foundation; or
  - (iii) has substantially impeded the orderly winding-up of the foundation's affairs,
- any official who is responsible for the contravention (without prejudice to any civil liability or order under subsection (3)) commits an offence.
- (2) It is a defence for an offence under subsection (1) to show that the official:
- (a) took all reasonable steps to secure compliance by the foundation with the relevant provisions; or
  - (b) had reasonable grounds for believing and did believe that a competent and reliable person, acting under the supervision or control of or appointed by the officials -
    - (i) was charged with the duty of ensuring that those provisions were complied with; and
    - (ii) was in a position to discharge that duty.
- (3) If any circumstances set out in subsection (2)(a) and (b) exist, the Court may, on the application of any creditor, official, participant or person conducting the winding-up of the foundation, order that the official who contravenes subsection (2)(b) be personally liable, without limitation of liability, for the debts of the foundation or any part of the liability as may be specified by the Court.

- (4) For a declaration under subsection (3) relating to any person, the Court may:
  - (a) give any other directions to give effect to the declaration;
  - (b) direct that the liability of that person under the declaration be a charge on -
    - (i) any debt due from the foundation to that person, to any other person on that person's behalf, to any person claiming as assignee from or through the assignee or to any person acting on behalf of an assignee; or
    - (ii) any charge on any foundation property or any interest in any the charge held by or vested in that person or any other person; and
  - (c) make any further orders as it thinks fit for the purpose of giving effect to any charge imposed under paragraph (b).
- (5) In subsection (4), "assignee":
  - (a) includes any person to whom or in whose favour, by the directions of the person liable, the debt, charge or interest was created, issued or transferred; but
  - (b) does not include an assignee for valuable consideration given in good faith and without notice of any of the grounds upon which the declaration might have been made.
- (6) The Court must not make a declaration under subsection (3) on a person if it considers that the person:
  - (a) took all reasonable steps to secure compliance by the foundation with the relevant provisions; or

- (b) had reasonable grounds for believing and did believe that a competent and reliable person, acting under the supervision or control of or appointed by the members of the council -
  - (i) was charged with the duty of ensuring that those provisions were complied with; and
  - (ii) was in a position to discharge that duty.
- (7) Subsections (3) to (6) is without prejudice to any other penalty, remedy or proceedings, whether civil or criminal, in respect of the contravention.
- (8) In this section:
  - (a) “relevant provision” means any provision of this section and any other prescribed provision; and
  - (b) a person is considered to be responsible for a contravention of a relevant provision if the contravention -
    - (i) was committed with the person’s consent or connivance; or
    - (ii) was attributable to or facilitated by any neglect on the person’s part.

**86. Distribution of property upon winding-up:**

- (1) Subject to subsections (2) to (7), upon the winding-up of a foundation, the property are to be distributed in the following order:
  - (a) firstly, to creditors other than officials, participants or non-notifiable beneficiaries, to the extent otherwise permitted by law, in satisfaction of the foundation’s debts;
  - (b) secondly, to officials, participants or non-notifiable beneficiaries who are creditors, to the

- extent otherwise permitted by law, in satisfaction of the foundation's debts;
- (c) finally, subject to the constitution, to the default recipient.
- (2) Subject to any preferential payments under this section, the property of a foundation must, on its winding-up be applied in satisfaction of its liabilities equally, unless the constitution provides otherwise.
- (3) A claim is not to be admitted to proof in a winding-up unless:
- (a) a judgment of a court of another country on the claim could be registered and enforce in Samoa under the laws of Samoa; or
- (b) the claim would be enforceable by proceedings of the Court.
- (4) In the winding-up of a foundation which is bankrupt, the same rules prevail and be observed with regard to:
- (a) the respective rights of secured and unsecured creditors;
- (b) debts provable; and
- (c) the valuation of annuities and future and contingent liabilities,
- as are in force or provided for the winding-up of a private company under the laws of Samoa.
- (5) Regulations under section 89 may provide for the proof of claims in a winding-up of a foundation and if there are no regulations the procedure to be followed are those provided for proof of claims in the winding-up of a private company under the laws of Samoa.
- (6) Subject to subsection (7):
- (a) the Court; or
- (b) the Registrar, for a winding-up upon a council's winding-up event if the council is affecting the liquidation,

may fix a date:

- (aa) on or before which creditors are to prove their debts or claims; or
  - (bb) after which the claims will be excluded from the benefit of any distribution made before those debts are proved.
- (7) The date in subsection (6) may be extended by:
- (a) the liquidator; or
  - (b) the Registrar, for a winding-up upon a council's winding-up event.

**87. Removal from Register:**

- (1) Following the winding-up of a foundation and distribution of the property under this Part, an application for removal from the Register must be submitted to the Registrar.
- (2) An application for removal from the Register must:
  - (a) state the winding-up event that led to the winding-up of the foundation;
  - (b) confirm that the winding-up process had been completed under this Part;
  - (c) be provided by the council, liquidator or resident agent, or any other person as the Registrar may allow; and
  - (d) contain any further information that the Registrar may require.
- (3) If the conditions of subsection (2) are satisfied:
  - (a) the foundation's name is to be removed from the Register;
  - (b) the foundation ceases to exist and to have legal personality;

- (c) the Registrar must file in the Register a notice stating that the foundation's name has, pursuant to this paragraph, been removed from the Register by virtue of its termination; and
- (d) the Registrar must publish the fact that the foundation has been terminated and removed from the Register in a manner and for a period as the Registrar thinks fit.

**88. Reinstatement following winding-up order:**

- (1) If a foundation has been removed from the Register under section 87 as a result of an administrative error, the Registrar may reinstate it to the Register, on the application of an official, participant or creditor if:
  - (a) the application is made within six (6) months of the date of removal; or
  - (b) within a greater time as the Registrar may allow, if the Registrar is satisfied that it was not possible for the application to be brought within time.
- (2) If the Registrar refuses, or is unable, to reinstate a foundation to the Register, the Court may, on such terms and conditions as it thinks fit, on an application by or on behalf of any person under section 52(2), by order authorise the reinstatement of a foundation to the Register, if:
  - (a) the application is made within six (6) months of the removal; or
  - (b) within a greater time as the Court may allow, if it is satisfied that it was not possible for the application to be brought within time; and
  - (c) if the Court thinks it just and equitable to do so in all the circumstances.

- (3) An order under subsection (2) may:
  - (a) contain any directions;
  - (b) make such provision as the Court thinks fit for placing the foundation and all other persons in the same position as nearly as may be as if the foundation had not been terminated; and
  - (c) without affecting paragraph (a) or (b), include provision for the return of the property of the foundation, which may include any property (or its value) which vested in the State upon termination.
- (4) The reinstatement of a foundation's name pursuant to an order under subsection (2) must, unless the Court otherwise directs, and without prejudice to any other term of the order, be conditional upon the payment by the applicant to the Registrar of:
  - (a) all sums which would have been payable by the foundation if it had not been dissolved; and
  - (b) any cost incurred by Registrar, if appropriate.
- (5) Upon the restoration of a foundation's name under this section, the foundation is taken to have continued in existence.

## **PART 10**

### **MISCELLANEOUS**

#### **89. Regulations and forms:**

- (1) The Head of State, acting on the advice of Cabinet, may make regulation to give effect to or for the purposes of this Act, and in particular to make regulations:
  - (a) to regulate striking off from the Register;

- (b) to prescribe fees for the purpose of the Act, subject to the approval of the National Revenue Board;
  - (c) to amend any Schedule except Schedule 8; and
  - (d) for matters required to be prescribed under this Act.
- (2) The Registrar may approve forms for the purpose of this Act.

**90. Penalties:**

The penalties for any offence under this Act are set out in Schedule 8.

**91. Income Tax Act amended:**

For Part A of Schedule 2 of the Income Tax Act 2012:

- (a) in subsection (1), replace the full stop with the semi colon at the end of paragraph (zc), and after paragraph (zc) insert:
  - “(zd) the income and capital gains (other than prescribed exempt income and capital gains) of a foreign benefitting foundation”;
- (b) in subsection (2) insert the following definition -
  - ““foreign benefitting foundation” means a Samoan foundation:
    - (a) of which the founder or other person who has endowed the foundation directly or indirectly is not a resident person or resident trust; and
    - (b) where its purpose cannot benefit a resident person or resident trust;”.

## SCHEDULES

### SCHEDULE 1

#### (Section 4)

##### The information required in charters

1. A charter must:
  - (a) state the name of the foundation;
  - (b) state the purpose of the foundation;
  - (c) contain a description of the initial capital;
  - (d) state the duration of the foundation (if it is to subsist for a limited period only); and
  - (e) contain a declaration from the founder, or the resident agent, that the founder wishes the members of the council to comply the charter.
  
2. The name of a foundation must:
  - (a) end with the word "Foundation";
  - (b) not be the same as a name already appearing in the Register;
  - (c) not be such as to create a criminal offence or, in the opinion of the Registrar, be offensive, misleading or inappropriate;
  - (d) not be such as to induce the public to confuse the foundation with some other person or body previously established in Samoa or another country;
  - (e) not without the consent of the Registrar, contain a restricted word or phrase which must have been published by the Registrar under clause 1(2) of Schedule 4; and
  - (f) not be changed if the constitution so provides unless the Registrar requires that the name of the foundation to be changed.

**SCHEDULE 2****(Section 5)****Matters to be provided by rules**

Rules must provide for the following matters:

- (a) the functions of the council and, if any functions are be delegated or exercised in conjunction with any other person, the extent to which the delegation may be done;
- (b) the appointment, resignation and removal of members of the council and the guardian;
- (c) the remuneration of the members of the council and the guardian, if they are to be remunerated;
- (d) the manner in which the decisions of the council are to be made and, if any of the decisions of the council requires the approval of a person other than a member of the council, specify which of the decisions and that other person.

**SCHEDULE 3**  
**(Sections 4 and 5)**

**Provisions which will apply as part of the charter or the rules unless expressly excluded in either of them**

**1. Amendment of the charter and rules:**

- (1) The charter or the rules may be amended by deed approved by resolution of the council with the prior written consent (which may be contained in the deed if the consent or is party to the deed) of the following persons in the following order of priority:
  - (a) the founder;
  - (b) the supervisory person;
  - (c) if there is no supervisory person, the guardian.
- (2) Without the need for any consent under subclause (1), if there are no such persons who are living and capable of acting, provided that the charter or the rules may not be amended or varied:
  - (a) to change the need for a guardian;
  - (b) to amend, vary or add to the founder's rights and powers; or
  - (c) to change the person in whom the rights or powers will vest, if the rights and powers are not appropriately assigned.
- (3) The deed does not take effect until it has been registered and copies of it have been delivered to the council and the resident agent.

**2. Successor supervisory person and successor guardian:**

- (1) A successor supervisory person (or persons in order of priority) and a successor guardian (or persons in order

of priority) may be appointed by deed in order of priority by:

- (a) the founder;
  - (b) a person having power of the appointment under the constitution;
  - (c) an assignee; or
  - (d) an assignee of any the assignee.
- (2) The deed does not take effect until it has been registered and copies of it have been delivered to the resident agent.

**3. Amendment of the purpose:**

- (1) Clause 1 applies to the amendment of the purpose.
- (2) Subclause (1) is to be exercisable in priority to the requirement to obtain an order of the Court under section 7(2)(b) of this Act.
- (3) The priority person has the power by notice in writing to require the council to pay remuneration to either or both of the supervisory person and the guardian and to amend the remuneration.

**4. Meetings of council:**

The following apply to a meeting of the council:

- (a) subject to paragraph (b), a meeting may (by 7 days' notice to the members of the council (other than the member of the council giving the notice)) be called by -
  - (i) any member of the council;
  - (ii) the supervisory person;
  - (iii) the guardian, if acting as the supervisory person; or
  - (iv) the resident agent;
- (b) a meeting may be called at short notice, if a consent to the short notice is signed by all members entitled to attend and vote at that meeting;

- (c) at the commencement of a meeting, the members must elect a chairperson of that meeting;
- (d) the council may meet in person or by telephone or by Skype or video link or any other method approved by the council or any combination of these methods;
- (e) despite paragraph (d), a resolution of the council signed by all members entitled to attend and vote at a meeting is as valid as a resolution of the council duly passed at a meeting if so signed (whether in one document or in a document in more than one part);  
and
- (f) at a meeting a member has one vote and, if the votes are tied, the chairperson has a casting vote.

**5. Officers:**

The council may appoint and remove officers of the council on such terms as to remuneration and otherwise generally as the council must decide.

**6. Notice:**

A notice to be given under the Act is to be given in writing and delivered by hand to the recipient or by post addressed to the recipient at his or her last known address or by email or by any other electronic means.

**SCHEDULE 4****Registration, establishment and ancillary matters (including disqualification)**

- 1. Name of the foundation (“name”):**
  - (1) The name must comply with clause 2 of Schedule 1.
  - (2) For the purposes of clause 2(5) of Schedule 1, the Registrar may publish restricted words or phrases.
  - (3) The Court may, if satisfied that subclause (1) has not been complied with, order that, within a time and subject to the terms and conditions as the Court thinks fit, the name must be changed.
  - (4) If an order of the Court under subclause (3) is not complied with in any respect, the foundation may be wound-up under section 80.
  - (5) The resident agent upon the direction of the council at any time may apply to the Registrar to change the name and the proposed change of the name must comply in all respects with clause 2 of Schedule 1 and clause 1 of Schedule 4.
  - (6) If the proposed change of name complies in all respects with clause 1 of Schedule 4, the application is to be treated as a notice under clause 9(1) of Schedule 4 to the Registrar to rectify the Register accordingly.
  
- 2. Registered office:**
  - (1) A foundation must at all times have a registered office in Samoa, which must be the office of the registered agent and at which all records of the foundation (or copies of them) must be kept.

- (2) The Registrar must be notified of any change in registered agent and in the registered office under clause 9(1) of Schedule 4.
- (3) The name and address of the registered office must be included in all correspondence sent by officials on behalf of the foundation, together with the registration number of the foundation, as referred to in clause 3(1)(a)(i).

### **3 Register of foundation:**

- (1) The Registrar must establish and maintain a Register of Foundations comprising the following Parts:
  - (a) Part A setting out -
    - (i) the name and registration number of the foundation;
    - (ii) the name and address of the members;
    - (iii) the name and address of any supervisory person;
    - (iv) the name and address of any guardian; and
    - (v) the name of the resident agent and the address of the registered office; and
  - (b) Part B setting out a statement of the purpose of the foundation, and all declarations and other documents filed with the Registrar under or for the purposes of this Act.
- (2) Part A of the Register provides public records pursuant to the Public Records Act 2011.

### **4. Use of Part B of the Register:**

- (1) Subject to subclause (2), a person who under or for the purposes of this Act receives information comprised or intended to be comprised within Part B of the Register, must not disclose the information without the consent

of the person to whom it relates and (if different) the person from whom it was so obtained.

- (2) Subclause (1) does not prevent:
- (a) the disclosure of -
    - (i) information which, at the time of disclosure, is or has already been made available to the public from other sources; or
    - (ii) information in the form of a summary or collection of information so framed so as not to enable information relating to any particular person to be ascertained from it;
  - (b) the disclosure of information for the purpose of enabling or assisting the Registrar to discharge his or her functions;
  - (c) if, in order to enable or assist him or her to discharge his or her functions conferred by or under this Act, the Registrar considers it necessary to seek advice from a qualified person on any matter of law, accountancy or valuation or any other matter requiring the exercise of professional skill, the disclosure by the Registrar to that person of any information as appears to the Registrar to be necessary to ensure that that person is properly informed as to the matter on which his or her advice is sought;
  - (d) the disclosure of information for the purpose of enabling or assisting an authority exercising, in another country, functions equivalent to those of the Registrar under this Act to exercise its functions;

- (e) the disclosure of information for the purposes of the investigation, prevention or detection of crime or with a view to the instigation of, or otherwise for the purposes of, any criminal proceedings in Samoa or another country;
  - (f) the disclosure of information for the purposes of enabling or assisting the Attorney General to discharge his or her functions;
  - (g) the disclosure of information for the purposes of enabling or assisting the Samoa Financial Services Authority to discharge its functions;
  - (h) the disclosure of information in connection with any proceedings arising out of this Act;
  - (i) the disclosure of information to comply with an order of a court; or
  - (j) the disclosure of information which is authorised or required under this Act or any other enactment.
- (3) A person who contravenes subclause (1) commits an offence.

**5. Establishment of foundation:**

- (1) A foundation must only be established if the requirements of this Act are satisfied.
- (2) A foundation is established:
  - (a) by the Registrar registering it on the Register and allocating to it a registration number; and
  - (b) with effect from the date of registration as stated in the certificate of registration.
- (3) Upon establishment under the name set out in the Register and for the purpose set out in the Register:
  - (a) a foundation has legal personality, separate from its founder, officials and beneficiaries with

- a continuous existence until its removal from the Register;
- (b) the persons named in the application as officials are taken to have been appointed to their respective offices;
  - (c) the doctrine of *ultra vires* does not apply to a foundation and accordingly, the capacity of a foundation is not limited by anything in its charter or rules or by any act of its officials or officers.
- (4) When established, a foundation:
- (a) may sue and be sued in its name and may exercise all the functions of a legal person, including the power to hold land; and
  - (b) may have a common seal as provided for in clause 13.

**6. Registration of foundation:**

- (1) A foundation must be registered and must continue to be registered under this clause.
- (2) Only the resident agent may apply to register a foundation under section 3(2) of this Act.
- (3) The application is to be made by filing with the Registrar the following documents and information:
  - (a) the charter as referred to in section 4 of this Act;
  - (b) the declaration under section 3(3) of this Act;
  - (c) the names and addresses of the proposed members, together with their written consents so to act;
  - (d) the name and address of any supervisory person, together with the supervisory person's written consent to act;

- (e) the name and address of the proposed guardian (if this Act so requires or if otherwise appointed), together with the guardian's written consent so to act;
  - (f) the name of the resident agent and the address of the registered office of the foundation;
  - (g) any applicable prescribed fee; and
  - (h) any other documents or information as the Registrar may require.
- (4) When the fees, documents and information specified in subclause (3) are received, the Registrar must, if is satisfied that the requirements of this Act are satisfied:
- (a) register the foundation by inscribing its name in the Register; and
  - (b) allocate a registration number to the foundation,

and then the foundation is established for the purposes of this Act.

- (5) The Registrar may:
- (a) when registering a foundation in the Register under this clause; and
  - (b) when issuing a certificate of registration under clause 7 or 9,

rely upon the documents filed with him or her in all respects and must not be bound to enquire further as to whether, in relation to the foundation, the formalities under this Act have been complied with.

- (6) The Registrar may determine that all registrations be subject to an annual renewal procedure; and if he or she does so, the Registrar must specify:
- (a) what information and any prescribed fee are to be provided and in what form;

- (b) what procedure is to be followed (including an appeals procedure if the Registrar thinks fit); and
- (c) as an exception to any other provision of this Act, what, if any, financial penalties shall be payable by those persons, as may be prescribed by the regulations for failure to comply with the renewal procedure.

**7. Issue of certificate of registration:**

- (1) The Registrar must, on registration of a foundation, issue a certificate of registration to the foundation.
- (2) The certificate must:
  - (a) state -
    - (i) the name and registered number of the foundation;
    - (ii) the registered office of the foundation;
    - (iii) the date of its establishment;
    - (iv) the duration of the foundation (if applicable); and
  - (b) be signed by the Registrar.
- (3) The certificate is, unless it has ceased to be valid, conclusive evidence of compliance with the requirements of this Act as to registration and of all matters stated in it.
- (4) A certificate of registration ceases to be valid in the circumstances under section 87 of this Act.
- (5) A certificate of registration, or a copy thereof issued and sealed by the Registrar, must be received in evidence in any legal proceedings.

**8. Pre-establishment contracts and obligations:**

A contract or obligation that purports to be made by or on behalf of a foundation at a time when the foundation has not

been established has effect, subject to any agreement to the contrary, as one made with the person purporting to act for the foundation or as agent for it, and the person is personally liable on the contract accordingly until the time that the contract is ratified by the council on behalf of the foundation.

**9. Change in and rectification of registered particulars:**

- (1) If during the continuance of a foundation:
  - (a) there is a change in any particular of the foundation referred to in clause 7(2); or
  - (b) a person becomes or ceases to be an official,notice of the change signed by the resident agent must, within a period of 21 days from the date of the change, be filed with the Registrar, and, if the change is to the foundation's name or resident agent (and therefore to the registered office), the change is not effective until the Registrar has issued a new certificate of registration, upon the issue of which the existing certificate must cease to be valid.
- (2) In default of compliance with subclause (1):
  - (a) the foundation and official each commit an offence;
  - (b) the Registrar may impose a prescribed financial penalty to be paid by those persons; and
  - (c) the change may not be relied on by the foundation or by any official or former official of the foundation so as to affect adversely the rights of any third person.
- (3) When the notice under subclause (1) is received or as soon as is reasonably practicable after that, the Registrar must make the appropriate entry in the Register.
- (4) The Registrar may on the terms and conditions as he or she thinks fit, on an application by or on behalf of the founder or an official, by order authorise the

rectification of any typographical error or formal defect or formal omission:

- (a) in the entries relating to the foundation in the Register; or
  - (b) in any declaration or other document of the foundation filed with the Registrar under this Act.
- (5) The Court may, on any terms and conditions as it thinks fit, on an application by or on behalf of the founder or an official, by order authorise the rectification of any error, defect or omission:
- (a) in the entries relating to the foundation in the Register; or
  - (b) in any declaration or other document of the foundation filed with the Registrar under this Act.

**10. Power of members to bind the foundation:**

- (1) In favour of a person dealing with a foundation in good faith, the power of the members to bind the foundation, or authorise others to do so, is taken to be free of any limitation under the constitution.
- (2) For this purpose:
  - (a) a person “deals with” a foundation if the person is a party to any transaction or other act to which the foundation is a party;
  - (b) a person dealing with a foundation -
    - (i) is not bound to enquire as to any limitation on the powers of the members of the council to bind the foundation or to authorise others to do so; and
    - (ii) is presumed to have acted in good faith, unless the contrary is proved; and

- (c) a person is not to be regarded as acting in bad faith by reason only of his or her knowing that an act is beyond the powers of the members under the constitution.
- (3) This clause:
  - (a) does not affect any right of any participant of the foundation to bring proceedings to restrain the doing of an action that is beyond the powers of the members;
  - (b) does not affect any liability incurred by the members or any other person by reason of the members or that other person exceeding their powers; and
  - (c) has effect, subject to clause 11.

**11. Constitutional limitations: transactions involving members:**

- (1) This clause applies to a transaction if or to the extent that its validity depends on clause 10.
- (2) Nothing in this clause excludes the operation of any other enactment or law by virtue of which the transaction may be called in question or any liability to the foundation may arise.
- (3) If:
  - (a) a foundation enters into a transaction; and
  - (b) the parties to the transaction include -
    - (i) a member; or
    - (ii) a person connected with the member,the transaction is voidable at the instance of the foundation.
- (4) Whether or not it is avoided, a party to the transaction under subclause (3)(b), and a member who authorised the transaction, is liable:

- (a) to account to the foundation for any gain he or she has made directly or indirectly by the transaction; and
  - (b) to indemnify the foundation for any loss or damage resulting from the transaction.
- (5) The transaction ceases to be voidable if:
  - (a) restitution of any money or other asset which was the subject matter of the transaction is no longer possible;
  - (b) the foundation is properly indemnified for any loss or damage resulting from the transaction;
  - (c) rights acquired *bona fide* for value and without actual notice of the members of the council exceeding their powers by a person, who is not party to the transaction, would be affected by the avoidance;
  - (d) the transaction is affirmed by the foundation; or
  - (e) it is disclosed by the member mentioned in subclause (3)(b) to the other officials and not avoided by the foundation within a period of three (3) months after the date of disclosure.
- (6) A person (other than a member) is not liable under subparagraph (3) if the person shows that, at the time the transaction was entered into, the person did not know that the council was exceeding its powers.
- (7) Nothing in subclauses (1) to (6) affects the rights of any party to the transaction not within subclause (3)(b), but the Court may, on the application of the foundation or the party, make an order affirming, severing or setting aside the transaction on the terms as appear to the Court to be just.
- (8) In this clause, “transaction” includes any act.

**12. Formal execution of documents:**

- (1) A document is formally executed by a foundation:
  - (a) by affixing under writing of its common seal;
  - (b) if it is signed on behalf of the foundation -
    - (i) by two (2) authorised signatories; or
    - (ii) by a member of the council in the presence of a witness who attests the signature;
  - (c) if it is signed by a person authorised by power of attorney under subclause (3); or
  - (d) by any other means specifically authorised by the constitution.
- (2) References in this clause to a document being signed by a member are to be read (if that office is held by a corporate member) as references to the document being signed by an individual authorised by the corporate member to sign on its behalf.
- (3) A foundation may, by power of attorney executed by the council, authorise a person, either generally or in respect of specified matters, as its attorney to execute documents on its behalf.
- (4) A document signed under subclause (1)(c), whether in Samoa or another country, has effect as if executed by the foundation.

**13. Common seal:**

- (1) A foundation may but need not have a common seal.
- (2) A foundation's name must be engraved in legible characters on the seal.
- (3) The foundation commits an offence if it fails to comply with subclause (2).
- (4) An official, or a person acting on behalf of a foundation, who uses, or authorizes the use of, a seal purporting to be a seal of the foundation on which its name is not

engraved as required by subclause (2) commits an offence.

**14. Disqualification orders:**

- (1) This subclause applies if the Court considers that, by reason of a person's conduct in relation to any foundation or otherwise, that person is unfit to be concerned in the management of a foundation.
- (2) If subclause (1) applies the Court may, if satisfied that it is desirable in the public interest to do so, make and subsequently renew (on one or more occasions) an order against him or her (a "disqualification order") prohibiting him or her, without the leave of the Court:
  - (a) from being an official of any foundation or any specified foundation;
  - (b) from participating in, or being in any way concerned in, directly or indirectly, the management, formation or promotion of any foundation or any specified foundation.
- (3) A disqualification order (and any renewal of it):
  - (a) may, with the agreement of the parties, and in the Court's discretion, be granted by consent;
  - (b) must have effect for a period, not exceeding 15 years, as specified in the order; and
  - (c) may contain any incidental and ancillary terms and conditions as the Court thinks fit;
  - (d) must be provided (a copy of it) by the Court to the Registrar.
- (4) An application for a disqualification order, or for a renewal of it, may be made by:
  - (a) the Registrar;
  - (b) the Attorney General;

- (c) a foundation of which the person in question is, or has been, an official, by any liquidator, participant or official; or
  - (d) with the leave of the Court, by any other interested party.
- (5) A person who contravenes a disqualification order, or a renewal of it:
  - (a) commits an offence; and
  - (b) on conviction, is liable to penalty units for up to the amount of any debts and liabilities of the foundation for which the contravention was committed which were incurred at any time when he or she was acting in contravention of the disqualification order or the renewal of it.
- (6) A person's liability under subclause (5) is joint and several with that of the foundation and of any other person so liable in relation to the foundation.
- (7) In determining whether or not a person is unfit to be concerned in the management of a foundation, the Court must have regard to clause 16.
- (8) A disqualification order may be renewed at any time before, or within a period of 1 month immediately succeeding, the date of the expiration of the order.

**15. Revocation of disqualification order:**

- (1) A person subject to a disqualification order, or renewal of it, may apply to the Court for a revocation of the order, or renewal of it ("application"), on the ground that the person is no longer unfit to be concerned in the management of a foundation.
- (2) The Court may grant the application if satisfied that:
  - (a) it would not be contrary to the public interest to do so; and

- (b) the applicant is no longer unfit to be concerned in the management of a foundation.
- (3) The application must not be heard, unless the person upon whose application the disqualification order, or the renewal of it, was made, has been served with notice of the application to revoke not less than 28 days (or such other period as the Court may direct) before the date of the hearing.
- (4) Despite subclauses (1) to (3), the Court may:
  - (a) direct that notice of the application to revoke must also be served on any other persons as the Court thinks fit; and
  - (b) for that purpose, adjourn the hearing of the application.
- (5) An application under this clause may, with the agreement of the parties, and in the Court's discretion, be granted by consent.

**16. Fit and proper person:**

- (1) A person who is, or is to be, an official must be a fit and proper person to hold that position.
- (2) In determining whether a person is a fit and proper person to be an official, regard must be had to:
  - (a) the person's probity, competence, solvency and soundness of judgment for fulfilling the responsibilities of that position;
  - (b) the diligence with which the person is fulfilling or likely to fulfil those responsibilities;
  - (c) whether the interests of participants or non-notifiable beneficiaries are, or are likely to be, in any way threatened by the person holding that position;

- (d) the rules, standards and guidelines of any relevant professional, governing, regulatory or supervisory authority;
  - (e) the person's record of compliance with this Act as an official or resident agent; and
  - (f) the person's record of compliance with this Act.
- (3) Despite subclauses (1) and (2), regard may be had to the previous conduct and activities in business or financial matters of the person.

**17. Registrar to keep register of disqualification orders:**

- (1) The Registrar must keep a register of all disqualification orders, and all renewals and revocations of them, made by the Court under clauses 14 and 15.
- (2) The register is public record under the Public Records Act 2011.

**18. Service of documents:**

- (1) Any document to be served on a foundation may be served:
  - (a) by being left at, or sent by post or transmitted to, its registered office; or
  - (b) by being delivered to a member of its council or by being left at, or sent by post or transmitted to, the member's address shown in the Register.
- (2) A document required to be served under this Act may be served on:
  - (a) an individual, by being delivered to him or her by hand, or by being left at, or sent by post or transmitted to, his or her usual or last known place of residence;

- (b) a body corporate with a registered office in Samoa, by being left at, or sent by post or transmitted to, that office,
  - (c) a body corporate without a registered office in Samoa, by being left at, or sent by post or transmitted to, its principal or last known principal place of business in Samoa or, if there is no place of business in Samoa, its registered office or principal or last known principal place of business in another country;
  - (d) an unincorporated body -
    - (i) by being served pursuant to paragraph (a) on any of its partners, members of the committee or other similar governing body, managers, directors or other similar officers; or
    - (ii) by being left at, or sent by post or transmitted to, the body's principal or last known principal place of business in Samoa or, if there is no place of business in Samoa, its principal or last known principal place of business in another country;
  - (e) the Attorney General, by being left at, or sent by post or transmitted to, the principal office of the Attorney General; and
  - (f) on the Registrar, by being left at, or sent by post or transmitted to, the principal office of the Registrar.
- (3) If a person notifies the Registrar of an address for service within Samoa for the purposes of this Act, any document to be served on that person under those provisions may be served by being left at, or sent by post to or transmitted to, that address.

- (4) If this Act authorises or requires a document to be served on a person who is:
- (a) a minor; or
  - (b) a person under legal disability,
- the document may be served on that person's guardian and, if that person has no guardian, the party wishing to effect service may apply to the Court for the appointment of a person to act as guardian for the purposes of those provisions.
- (5) If service of a document cannot, after reasonable enquiry, be effected under this clause, the document may be served by being published on 2 occasions in a newspaper in Samoa.
- (6) Subclauses (2) to (5) are without prejudice to subclause (1); and subclauses (1) to (5) are without prejudice to any other lawful method of service or clause 19.
- (7) If a document is sent by post it, unless the contrary is shown, is taken, for the purposes of this Act, to have been received:
- (a) for a document sent to an address in the Samoa, on the 3<sup>rd</sup> after the day of posting; or
  - (b) for a document sent to another country, on the 7<sup>th</sup> day after the day of posting,
- excluding in each case a non-business day.
- (8) For the purposes of this Act, service of any document sent by post is to be proved by showing the date of posting, the address thereon and the fact of prepayment.
- (9) As an exception to this clause and any other law on service of documents, no document to be served on the Registrar under this Act or any other law is taken to have been served until it is received.
- (10) In this clause and clause 19:  
"by post" means by registered post, recorded delivery service or ordinary letter post;

“document” does not include a summons;

“non-business day” means:

- (a) a Saturday, a Sunday, Christmas Day and Good Friday; and
- (b) any day declare as a public holiday under the Public Holidays Act 2008.

“served” includes given and submitted;

“summons” includes any document compelling a person’s attendance before a court;

“transmitted” means transmitted by electronic communication, facsimile transmission or other similar means which produce or enable the production of a document containing the text of the communication (in which event the document must be regarded as served when it is received).

**19. Documents to be submitted, etc., in electronic form:**

- (1) Any document required to be served on the Registrar under this Act must or, as the case may be, may be in such electronic form and served by any electronic means as the Registrar may require or, as the case may be, permit, whether in any particular case or class of cases or generally; and, without limitation, this clause applies to any, and to anything accompanying any, application, statement, consent, declaration or signature.
- (2) Accordingly, if, under this Act, any information or document is required to be in any form or to be served by any means, or anything is required to be done in the manner, as (in whatever words) the Registrar may require, the Registrar may, without limitation, require the information or document to be in or to be served, or the thing to be done, by electronic means.

- (3) This clause is without prejudice to:
  - (a) clause 18(9); and
  - (b) any prescribed practice and procedure of the office of Registrar.

**20. Recovery of fees:**

A fee to be paid under this Act is recoverable as a civil debt from the person liable to pay them.

**21. Resident agent requests:**

- (1) A resident agent may apply to Registrar to be removed as resident agent if:
  - (a) the resident agent requests information under section 12 of this Act; and
  - (b) on receipt of the request, the council refuses to provide the resident agent with the information requested.
- (2) When the Registrar receives the application, the Registrar must, if satisfied that it is properly made:
  - (a) grant the application, on 1 month's notice to the council; and
  - (b) if no other resident agent is appointed -
    - (i) the Registrar may impose a financial penalty prescribed by regulations under section 89;
    - (ii) an application may be made to the Court under clause 6 of Schedule 6 by any person under section 52(2) of this Act; and
    - (iii) if regulations are made for the purposes of this clause, the foundation may be struck off the Register.

**SCHEDULE 5****(Part 7)****Migration information****1. Certificate of registration:**

A copy of the overseas foundation's registration certificate or similar document (if any) in the country in which it is currently registered or established.

**2. Constitution, charter and rules:**

A copy of the constitution which is to be binding on the overseas foundation immediately after its registration in Samoa, which must comply with the requirements of this Act, together with, if different, a copy of the overseas foundation's current charter and rules or equivalent documents forming its current constitution.

**3. Officials:**

A statement of the overseas foundation's current officials which must comprise the full name of any official and his or her address (being, for a body corporate or a partnership, the address of its registered office, or, if none, its principal office).

**4. Registered office:**

A statement of the address of the overseas foundation's registered office in the country in which it is currently registered or established.

**5. Resident agent:**

A statement of the full name and business address of the resident agent (such address being the new registered office in Samoa).

**6. Guardian:**

A statement of the full names and address of the guardian (if required by this Act or if otherwise appointed).

**7. Supervisory person:**

A statement of the full names and address of the supervisory person (if any).

**8. Proposed registered name in Samoa:**

The proposed name under which the overseas foundation is to be registered in Samoa, which name must comply with Schedule 1.

**9. Other information:**

All other information and documents:

- (a) that would be required to be filed under Schedule 3 to effect the registration of a foundation in Samoa; and
- (b) as the Registrar may require.

**10. Other evidence:**

Evidence acceptable to the Registrar that:

- (a) the overseas foundation complies with sections 58 and 59 of this Act;
- (b) on the date of registration or, if later the date proposed under section 61(2) of this Act as the date on which registration must take effect in Samoa, the overseas foundation will cease to be established and registered under the law of another country; and
- (c) the overseas foundation will cease to have legal personality in the country in which it is registered or established and will have legal personality in Samoa from the date referred to in paragraph (b).

**SCHEDULE 6****(Part 9)****Council's winding-up events**

1. The expiry of duration of the foundation (if it is limited in duration).
2. The happening of any event or the exercise of any power specified in that behalf in the constitution, including a power exercised under section 11 of this Act.
3. The foundation no longer has any property.
4. The bankruptcy of the foundation.
5. The completion, failure or lapse of the purpose:
  - (a) by order of the Court, on the application of the members or participants; or
  - (b) with the consent of the participants.
6. The making of a winding-up order under section 80 of this Act.

**SCHEDULE 7****Court's winding-up events**

1. It is not reasonably practicable to carry on the foundation in conformity with the constitution.
2. The foundation was established by duress, fraud, mistake, undue influence or misrepresentation or in breach of fiduciary duty.
3. The foundation is, or is being conducted, in a way that is, immoral or contrary to public policy.
4. The purpose is so uncertain that the performance of the purpose is impossible.
5. The foundation is bankrupt.
6. Without prejudice to clause 5 of Schedule 6, the following conditions are satisfied:
  - (a) the foundation is indebted to a creditor in a sum exceeding an amount prescribed by regulations;
  - (b) the creditor has taken action against the foundation demanding payment of the debt; and
  - (c) the foundation does not, within a period of 21 days immediately following the date of service of any proceedings, pay the debt or give security for it to the creditor's satisfaction.
7. For the foundation, there has been a failure to comply with an order of the Court having regard to the requirements set out in Schedule 1.
8. The supervisory person or the guardian or registered agent has been denied access to the documents to which he or she is entitled.
9. The resident agent has been refused information requested under clause 22 or Schedule 1, or there is no resident agent where one is required.

10. The affairs of the foundation are being conducted in such a way as to defraud creditors (whether of the foundation or of any other person) or in an unlawful manner.
11. There has been persistent default by the foundation in complying with the requirements or conditions imposed by or under this Act.
12. The founder or members of the council have, in connection with the formation or management of the foundation, been guilty of fraud, misfeasance, breach of duty or other misconduct in relation to the foundation.
13. The Court considers that it is just and equitable to do so.

**SCHEDULE 8**  
**(Section 90)**

**Penalties**

Sections	Penalties
39	100 penalty units
55	100 penalty units or 3 months imprisonment
56	first offence 50 penalty units, second or subsequent offence 100 penalty units
81	100 penalty units or 3 months imprisonment
82	first offence 500 penalty units or 2 years imprisonment, second or subsequent offence 1000 penalty units or 5 years imprisonment
83	first offence 500 penalty units or 2 years imprisonment, second or subsequent offence 1000 penalty units or 5 years imprisonment
85	100 penalty units or 3 months imprisonment
Schedule 4	first offence 500 penalty units or 2 years imprisonment, second or subsequent offence 1000 penalty units or 5 years imprisonment

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