



**SAMOA**

## **TRUSTS ACT 2014**

### Arrangement of Provisions

#### **PART 1 PRELIMINARY**

1. Short title and commencement
2. Interpretation
3. Application of the Act

#### **PART 2 CREATION AND NATURE OF TRUSTS**

4. The nature and existence of a trust
5. The requirements for the creation of a trust
6. The form which a trust may take
7. Property which may be held in trust
8. The proper law and the power to change the proper law
9. Matters determined by the Law
10. Validity and enforceability of a trust
11. Jurisdiction of the Court
12. Fraudulent trust or disposition
13. Unenforceable foreign claim or judgment

#### **PART 3 DURATION AND ACCUMULATION**

14. Duration of a trust
15. Power of accumulation of income and of advancement

#### **PART 4 PARTIES TO A TRUST**

16. Who may be beneficiaries and their identifications
17. Powers to add to and remove from the beneficiaries and to create excluded persons
18. Disclaimer
19. Class interest
20. Interest of a beneficiary and dealing with such interest
21. Protector
22. Enforcer

#### **PART 5 TRUSTEES**

23. Number of trustees
24. Appointment of trustees
25. Acceptance of trusteeship

- 26. Vacancy in trusteeship
- 27. Resignation or removal of trustees
- 28. The position of the outgoing trustee
- 29. Duties of trustees
- 30. Duty to exercise care and skill
- 31. Power of investment
- 32. Agents
- 33. Nominees and custodians
- 34. Terms of appointment of nominees and custodians
- 35. Review of agents, nominees and custodians and liability for the appointment of them
- 36. Effect of trustees exceeding their powers
- 37. Sole trustees
- 38. Restriction or exclusion of the powers conferred by sections 32 to 36 and by sections 40 to 42
- 39. Existing trusts
- 40. Trustees' remuneration and expenses
- 41. Remuneration and expenses of agents, nominees and custodians
- 42. Insurance
- 43. Letters or memorandum of wishes
- 44. Corporate trustee may act by resolution

**PART 6  
RESERVED POWERS**

- 45. Reserved powers to a settlor
- 46. Reserved powers to a protector
- 47. Prescribed directions
- 48. Samoan International Special Trust Arrangement
- 49. Interpretation
- 50. Primary purpose of section 51

- 51. Designated shares
- 52. Trustee's duties in relation to designated shares
- 53. Restrictions on trustee's powers
- 54. Provisions relating to directors
- 55. Intervention by trustee in management in prescribed circumstances
- 56. Power to dispose of designated shares
- 57. Enforcement
- 58. Power of Court to order disposal
- 59. Beneficiaries not entitled
- 60. Disqualification of trustee as a director
- 61. Ascertaining wishes of settlor
- 62. Limitation of trustee's duties
- 63. Combination of a trust with a limited partnership

**PART 7  
SPECIAL TYPES OF TRUST**

- 64. Protective trust
- 65. Charitable trust
- 66. Purpose trust

**PART 8  
LIABILITIES AND REMEDIES**

- 67. Trustees
- 68. Limitation on trustee's liability - exculpation
- 69. Beneficiary's consent, release or ratification
- 70. Prevention of breach of trust
- 71. Remedies for breach of trust
- 72. Damages in absence of breach of trust
- 73. Protector
- 74. Enforcer

**PART 9  
VARIATION, REVOCATION,  
FAILURE, TERMINATION,  
MIGRATION**

- 75. Variation and revocation
- 76. Failure or lapse of interest
- 77. Termination
- 78. Migration

**PART 10  
FOREIGN TRUSTS**

- 79. Foreign trusts
- 79A Accounts to be kept

**PART 11  
TRUST INFORMATION**

- 80. Confidentiality and providing information

**PART 12  
POWERS OF THE COURT**

- 81. Application to and powers of the Court
- 82. Payment of cost
- 83. Nature of a trustee’s interest
- 84. Following trust property
- 85. Bankruptcy of trustees
- 86. Protection for persons dealing with trustee
- 87. Limitation and prescription
- 88. Constructive trusts

**PART 13  
MISCELLANEOUS**

- 89. Regulations
- 90. Consequential amendments
- 91. Repeal, transitional and saving

Schedule

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**2014, No. 8**

**AN ACT to regulate trusts, trustees, trust property and beneficiaries and for related purposes.**

*[Assent and commencement date: 7 April 2014]*

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

**PART 1  
PRELIMINARY**

- 1. Short title and commencement** - (1) This Act may be cited as the Trusts Act 2014.
- (2) This Act commences on the date of assent.

**2. Interpretation** - In this Act, unless the context otherwise requires:

“asset management functions of trustees”, for section 32(12) to (14), means:

- (a) the investment of assets being or forming part of the trust property; and
- (b) the acquisition of property being or forming part of the trust property; and
- (c) managing and disposing of trust property and creating or disposing of any interest in trust property;

“charitable trust” means a trust complying with section 65;

“class interest” means a trust or interest under a trust, which is in favour of a class of persons;

“country” does not include Samoa;

“Court” means the Supreme Court of Samoa;

“custodian” for trust property, means a person who:

- (a) is appointed in writing to undertake the safe custody of all or part of the trust property or of any documents or records concerning trust property; and
- (b) satisfies the conditions set out in section 33(6);

“domicile” means the permanent home of a natural person initially determined by reference to the permanent home of his or her father (or if his or her father is unknown or unidentifiable by reference to the permanent home of his or her mother) at the date of birth of that natural person which may be changed thereafter when that natural person has attained the age of 21 by the intention of that natural person determined by evidence beyond reasonable doubt relating to the lifestyle of that natural person;

“duty of care” means the duty of a trustee under section 30;

“estoppel” means the equitable right of the Court to prevent an action of any person;

“excluded person” means a person who can never benefit directly or indirectly from a Samoan trust;

“foreign benefitting trust” means a trust of which the proper law is the Law and of which a trust corporation is trustee and which is neither created by a citizen of or a tax resident of Samoa and which has no Samoan citizens or Samoan tax residents as beneficiaries;

“foreign court” means the court of another country than Samoa;

- “foreign law” means the law of another country than Samoa or of another jurisdiction than Samoa, whether within that other country or not;
- “foreign trust” means a trust of which the proper law is foreign law;
- “general power of investment” means the trustee’s power of investment under section 31;
- “instrument in writing”:
- (a) means an executed document; and
  - (b) includes -
    - (i) a document executed under hand and not under seal;
    - (ii) a deed; and
    - (iii) a will and a codicil;
- “interested person” for a trust, means a settlor, trustee, beneficiary, protector, enforcer or any other person given leave by the Court;
- “Law” means the law of Samoa;
- “policy statement”, for section 32(13), means a memorandum in writing prepared by the trustees of a Samoan trust, or prepared for them and approved by them, giving guidance to an agent to be appointed by them with regard to the exercise of their asset management functions;
- “proper advice”, for section 31, means the advice of a person who is reasonably believed by the trustee to be qualified to give the trustee investment advice because of the person’s ability in and practical experience of financial and other matters relating to a proposed investment for the trust of which the trustee is trustee;
- “proper law” means the law of a jurisdiction which is the governing law of a trust;
- “property” means any moveable or immovable property wherever situated and includes rights and interests, whether present or future and whether vested or contingent;
- “purpose trust” means a trust for a non-charitable purpose or for non-charitable purposes whether together with a charitable purpose or charitable purposes and a person or persons or not;
- “real property” means land and buildings and other immoveable property built upon or permanently secured to land;

- “reasonable remuneration”, for services provided by a trustee, means any remuneration as is reasonable in the circumstances for providing the services to or on behalf of that trust by that trustee;
- “rules of a company” means the rules of a company set out in the Companies Act 2001, and includes an article of association or memorandum of association of a company;
- “Samoan company” means a company incorporated under the Law;
- “Samoan trust” means a trust the proper law of which is or becomes the Law;
- “settlor” means a person who provides trust property or makes a testamentary disposition upon trust or to a trust;
- “standard investment criteria”, for a Samoan trust, means:
- (a) the suitability to the trust of investments of the same kind as any particular investment proposed to be made or retained and of that particular investment as an investment of that kind; and
  - (b) the need for diversification of investments of the trust in so far as is appropriate to the circumstances of the trust;
- “trust corporation” means a company registered or licensed to carry on business as a trustee company under the Law;
- “trust property” means property for the time being held by a trustee subject to a trust.

**3. Application of the Act** - Except as provided in this Act, the Act applies to trusts created before or after the commencement of this Act.

## PART 2 CREATION AND NATURE OF TRUSTS

**4. The nature and existence of a trust** - A trust exists if a person (“trustee”) holds or has vested in the trustee, or is deemed to have vested in the trustee, property, of which the trustee is not the owner in the trustee’s own right:

- (a) for the benefit of any other person than the trustee (“beneficiary”) whether or not yet ascertained or in existence; or

- (b) for any purpose which is not for the benefit only of the trustee; or
- (c) both for the benefit mentioned in paragraphs (a) and (b).

**5. The requirements for the creation of a trust** - A trust is properly created if all the following requirements are met:

- (a) the settlor has the capacity to create the trust;
- (b) the settlor indicates an intention not made under duress to create the trust;
- (c) the trust either -
  - (i) has a beneficiary ascertainable now or in the future; or
  - (ii) is a charitable trust; or
  - (iii) is a purpose trust; or
  - (iv) is for the benefit of such a beneficiary and also for a purpose, whether charitable or not;
- (d) the trustee has ascertainable property accepted by the trustee at the absolute discretion of the trustee and vested in the trustee for the benefit of a beneficiary or for a charitable or a non-charitable purpose or for all or any of them.

**6. The form which a trust may take** - (1) Subject to subsections (2) to (4), a trust may be created by any of the following methods:

- (a) oral declaration;
- (b) instrument in writing;
- (c) conduct;
- (d) in any other manner whatsoever.

(2) A unit trust may only be created by an instrument in writing.

(3) Technical expressions or words are not needed for the creation of a trust.

(4) A trust may be created and be valid in law if created in any language but, if that language is not English, an English translation of the original document constituting the trust must:

- (a) be made and certified by a notary public; and
- (b) retained by the trustee.

**7. Property which may be held in trust** - Subject to section 10:

- (a) property may be held by or vested in a trustee upon trust; and
- (b) a trustee may, at the absolute discretion of the trustee, accept any property from any person to be added to the trust property.

**8. The proper law and the power to change the proper law-**

(1) The proper law is to be selected in the following order of priority:

- (a) subject to paragraph (d), the law of the jurisdiction selected by the settlor and expressed by the provisions of the trust to be the proper law; or
- (b) subject to paragraph (d), the law of the jurisdiction to be implied from the provisions of the trust; or
- (c) the law of the jurisdiction with which the trust had the closest connection at the time of its creation; and
- (d) if the law of a jurisdiction is expressed to be or is implied to be the proper law but that law does not provide for trusts or for the category of trust concerned, paragraph (c) applies.

(2) If it is necessary to determine the law of the jurisdiction with which a trust had the closest connection at the time of its creation, reference is to be had in particular to the following factors:

- (a) the place of administration of the trust designated by the settlor;
- (b) the location of the assets of the trust;
- (c) the place of residence or business of the trustee; and
- (d) the objects of the trust and the places where they are to be fulfilled.

(3) The following provisions apply to a change of proper law:

- (a) if a trust so provides, the proper law may be changed to or from the Law, under the trust, if -
  - (i) for a change to the Law, the change is recognised by the proper law previously in effect; or
  - (ii) for a change from the Law, the new proper law would recognise the validity of the trust and the trusts, powers and provisions of the

trust remain enforceable and capable of being exercised;

- (b) a change in the proper law does not affect the legality or validity of, or render any person liable for, anything done before the change.

**9. Matters determined by the Law-**(1) Subject to the provisions of the trust, all questions arising in relation to a Samoan trust or any disposition of property to or upon such a trust, including (without limitation) questions as to:

- (a) the capacity of the settler;
- (b) the validity, interpretation or effect of the trust or disposition or any variation or termination of the trust;
- (c) the administration of the trust, whether it is conducted in Samoa or elsewhere, including (without limitation) questions as to the functions, appointment and removal of trustees, protectors and enforcers;
- (d) the existence and extent of any functions in respect of the trust, including (without limitation) powers of variation, revocation and appointment, and the validity of the exercise of any such function; and
- (e) the distribution of the trust property,

are to be determined according to the Law, without reference to any foreign law.

(2) Subsection (1):

- (a) does not validate any disposition of property which is neither owned by the settlor nor is the subject of a power of disposition vested in the settlor;
- (b) does not affect the recognition of any foreign law in determining whether the settlor is the owner of any property or the holder of any such power;
- (c) is subject to any express provision to the contrary in the trust or disposition;
- (d) does not, in determining the capacity of a corporation, affect the recognition of the law of its place of incorporation;
- (e) does not affect the recognition of any foreign law prescribing the formalities for the disposition of property;

- (f) subject to subsection (3), does not validate any trust or disposition of real property situated in a jurisdiction other than Samoa, which is invalid under the law of that jurisdiction; and
- (g) subject to subsection (3), does not validate any testamentary disposition which is invalid under the law of the testator's domicile at the time of his death.

(3) No Samoan trust, and no disposition of property to or upon such a trust, is void, voidable, liable to be set aside, invalid or subject to any implied condition, nor is the capacity of any settlor, trustee, protector, enforcer or beneficiary to be questioned, nor is any settlor, trustee, protector, enforcer, beneficiary or any other person to be subjected to any obligation or liability or deprived of any right, claim or interest, by reason that:

- (a) any foreign law prohibits or does not recognise the concept of a trust; or
- (b) the trust or disposition avoids or defeats or potentially avoids or defeats rights, claims, interests, obligations or liabilities conferred or imposed by a foreign law on any person -
  - (i) by reason of a personal relationship to a settlor or any beneficiary; or
  - (ii) by way of foreign heirship rights; or
- (c) contravenes or potentially contravenes foreign law, judgment, order or action under any foreign law intended to recognise, protect, enforce or give effect to any such rights, claims, interests, obligations or liabilities.

(4) Despite any current foreign law on the recognition or enforcement of judgments, a judgment or order made under the foreign law must not be recognised or enforced or give rise to any right, obligation or liability or raise any estoppel if:

- (a) it is inconsistent with this Act; or
- (b) ordered by the Court, for the purposes of protecting the interests of the beneficiaries or in the interests of the proper administration of the trust.

(5) Despite any other provision of this Act, this section applies whenever the trust or disposition arose or was made.

**10. Validity and enforceability of a trust** - (1) Subject to subsections (2) and (3), a trust is valid and enforceable under its provisions.

(2) A trust is invalid and unenforceable if:

- (a) it purports to do anything contrary to the Law; or
- (b) it confers or imposes any right or function the exercise or discharge of which would be contrary to the law; or
- (c) it has no beneficiary identifiable or ascertainable under section 16, unless -
  - (i) it is for a charitable purpose; or
  - (ii) it is for a non-charitable purpose in relation to which it is valid and enforceable by virtue of section 66; or
- (d) the Court declares that -
  - (i) it was established by duress, fraud, mistake, undue influence or misrepresentation or in breach of fiduciary duty;
  - (ii) it is immoral or contrary to public policy;
  - (iii) its provisions are so uncertain that its performance is rendered impossible; or
  - (iv) the settlor was, at the time of its creation, incapable of creating such a trust.

(3) If some of the provisions of a trust are invalid but others are not:

- (a) if the provisions cannot be separated, the trust is invalid; and
- (b) if the provisions can be separated, the Court may declare that the trust is valid as to the provisions which are valid.

(4) If a trust is partially invalid, the Court may declare what property is and what property is not to be held subject to the trust.

(5) Property as to which a trust is invalid must, subject to any order of the Court, be held by the trustees on trust for the settlor absolutely or, if the settlor is dead, for the settlor's personal representative.

(6) An application to the Court under this section may be made by any interested person.

**11. Jurisdiction of the Court** - (1) The Court has jurisdiction if:

- (a) the trust is a Samoan trust; or
- (b) a trustee of a foreign trust is resident in Samoa; or
- (c) any trust property of a foreign trust is situated in Samoa;  
or
- (d) the administration of any trust property of a foreign trust is carried on in Samoa.

(2) The Court may intervene in the administration of a trust if its jurisdiction is invoked by an interested person or as provided by the law.

(3) A trust is not subject to continuing judicial supervision by the Court unless so ordered by the Court.

(4) A judicial proceeding before the Court concerning or involving a trust may relate to any matter regarding the administration of that trust, including a request for instructions, an application for an order for directions and an action to declare rights.

(5) A trustee may apply to the Court for direction, opinion or advice concerning the manner in which the trustee may or should act in connection with any matter concerning the trust and the Court may make any order it thinks fit.

(6) The Court may:

- (a) make an order concerning -
  - (i) the execution or the administration of any trust;
  - (ii) the trustee of any trust, including an order relating to the exercise of any power, discretion or duty of the trustee, the appointment or removal of a trustee, the remuneration of a trustee, the submission of accounts, the conduct of the trustee and payments, whether payments into the Court or otherwise;
  - (iii) the vesting of trust property;
  - (iv) a beneficiary or any person having a connection with the trust as the Court may determine;
  - (v) the appointment or removal of an enforcer; or
- (b) make a declaration as to the validity or the enforceability of a trust; or

(c) rescind or vary any order or declaration made under the Law, or make any new or further order or declaration.

(7) The costs and expenses of and incidental to an application to the Court under this Act are to be paid out of the trust property or be borne and paid in any other manner and by any other person as the Court may order.

**12. Fraudulent trust or disposition** -(1) If it is proved beyond reasonable doubt, by a claiming creditor, that a Samoan trust, or property disposed of to a Samoan trust:

(a) was created or disposed of by or on behalf of the settlor with principal intent to defraud that creditor of the settlor; and

(b) did, at the time such creation or disposition took place, render the settlor, 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 trust property is to be available to satisfy that creditor's claim to the extent which, but for such 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 trust or a disposition to a Samoan trust has rendered the settlor insolvent or without property by which a creditor's claim, if successful, may be satisfied:

(a) the fair market value of the settlor's property (not being trust property of that trust) must be 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 trust 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 trust and a disposition of property to the Samoan trust are not fraudulent as against a creditor of a settlor:

- (a) if its creation or the disposition takes place after the expiration of 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 2 years from the date that creditor's cause of action accrued and that creditor fails to commence that action before the expiration of 1 year from the date of the creation or disposition.

(4) The creation of a Samoan trust and a disposition of property to that Samoan trust is not fraudulent as against a creditor of a settlor if the creation or the disposition of property took place before that creditor's cause of action against the settlor accrued or had arisen.

(5) A settlor must not be imputed with intent to defraud a creditor if the settlor:

- (a) has created a Samoan trust or has disposed of property to that Samoan trust within 2 years from the date of that creditor's cause of action accruing; or
- (b) is a beneficiary.

(6) If the trust property of a Samoan trust 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 partly to wholly establish the cause of action and, if there is more than 1 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 1 act or the omission is a continuing one, the date of the first act or the date on which the omission first occurred, as the case may be, which gave rise to the judgment.

**13. Unenforceable foreign claim or judgment-**(1) If a Samoan trust is validly created under this Act, the Court must not vary it or set it aside or recognise the validity of any claim against

the trust property pursuant to any foreign law or the order of any foreign court for:

- (a) the personal and proprietary consequences of marriage or the termination of marriage;
- (b) the succession rights, whether testate or intestate including the fixed shares or interests of spouses or relatives;
- (c) any claims or orders made by a foreign court with regard to matters referred to in paragraph (a) or (b) concerning foreign law relating to the settlor or any beneficiary;
- (d) the claims of creditors in an insolvency subject to section 12;
- (e) any claims with regard to the validity of any transfer or disposition of property into the Samoan trust;
- (f) any claims with regard to the capacity of the settlor; or
- (g) any claims by reason that any foreign law prohibits or does not recognise the concept of a trust.

(2) For the avoidance of doubt, it is hereby declared that in the event of any inconsistency between the proper law of a trust and any foreign law relating to the settlor or any beneficiary, the former shall prevail.

### **PART 3 DURATION AND ACCUMULATION**

**14. Duration of a trust-**(1) A Samoan trust may be expressed to continue for a fixed period or until the happening of a specified event.

(2) If a Samoan trust is not expressed to continue for a fixed period or until the happening of a specified event, then, subject to other provisions of this section and this Act, the trust continues indefinitely.

(3) Despite subsections (1) and (2) and the trust and subject to subsection (4), the trustee may by deed:

- (a) declare that a trust which continues indefinitely terminates at the end of a fixed period or upon the happening of a specified event; and
- (b) declare that a trust which terminates at the end of a fixed period or upon the happening of a specified event continues indefinitely; and

(c) alter the provisions of a trust by limiting or extending a fixed period during which it continues or changing or declaring the specified event upon the happening of which it will terminate.

(4) The trust may contain any of the provisions under subsection (3) and, unless the trust provides otherwise, the trustee may by deed alter or vary the trust to permit any of the matters under subsection (3); and in that case the trust takes precedence over subsection (3).

**15. Power of accumulation of income and of advancement-**

(1) A trust may direct or permit, at the trustee's discretion, accumulation of all or any part of the income of the trust for any period or until the happening of any specified event.

(2) If a trust does not contain provisions similar to those in subsection (1), the income of the trust may be accumulated in whole or part at the discretion of the trustee throughout the continuation of the trust.

(3) Subject to subsection (4), income of the trust which is not accumulated under subsections (1) and (2) must be distributed.

(4) Subject to the trust and to any prior interests or charges affecting the trust property, if a beneficiary is a minor and whether or not the beneficiary's interest:

(a) is a vested interest; or

(b) is an interest which will become vested -

(i) on attaining the age of majority;

(ii) at any later age; or

(iii) upon the happening of any event, the

trustee may -

(A) accumulate the income attributable to the interest of such beneficiary pending the attainment of the date of majority or the later age or the happening of the event; or

(B) apply the income or part of it to or for the maintenance, education or other benefit of the beneficiary; or

(C) advance or appropriate to or for the benefit of the beneficiary the interest or part of the interest.

(5) The receipt of a parent or the lawful guardian of a beneficiary who is a minor is sufficient discharge to the trustee for a payment made under subsection (4).

(6) Subject to subsection (8), the trust and any prior interests or charges affecting the trust property, the trustee may advance or apply the trust property for the benefit of the beneficiary.

(7) The trust property advanced or applied under subsection (6) is to be brought into account when determining the share of the beneficiary in the trust property.

(8) Any part of the trust property advanced or applied under subsection (6) must not exceed the presumptive, contingent or vested share of the beneficiary in the trust property.

#### **PART 4 PARTIES TO A TRUST**

**16. Who may be beneficiaries and their identifications-**(1) A beneficiary must be:

- (a) identifiable by name; or
- (b) ascertainable 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 trust or at the time by reference to which, under the provisions of the trust, members of a class are to be determined.

(2) A settlor or trustee or protector or enforcer of a trust may also be a beneficiary of the trust.

**17. Powers to add to and remove from the beneficiaries and to create excluded persons-**(1) A Samoan trust may provide for powers exercisable by the settlor or the protector or the trustee or any other person or persons whether alone or jointly or in succession and in order of priority by deed revocable or irrevocable:

- (a) to add to the beneficiaries;
- (b) to remove from the beneficiaries; and
- (c) to create excluded persons.

(2) If an existing beneficiary of a Samoan trust is created as an excluded person, the action does not invalidate any prior

distribution made to or benefit given to that beneficiary from the trust.

**18. Disclaimer-**(1) Despite the provisions of a Samoan trust, a beneficiary of a Samoan trust may disclaim, either permanently or for any period specified by the beneficiary, the whole or any part of that beneficiary's interest under that Samoan trust whether or not that beneficiary has received any benefit from the interest.

(2) A disclaimer made under subsection (1):

- (a) must be made in writing;
- (b) may, subject to the Samoan trust, be revocable and it is exercisable in the manner and under the circumstances so expressed; and
- (c) does not affect the rights and interests of the beneficiary prior to the disclaimer.

**19. Class interest** - Subject to the provisions of a Samoan trust, the following apply if a trust, or an interest under a trust, is in favour of a class of persons:

- (a) a class closes when it is no longer possible for any other person to become a member of the class;
- (b) a woman who is over 50 years is taken to be no longer capable of bearing a child;
- (c) if a class interest relates to income and for any period there is no member of the class in existence, the income is to be -
  - (i) accumulated; and
  - (ii) subject to section 15, retained until there is a member of the class in existence or the class closes.

**20. Interest of a beneficiary and dealing with such interest** - The interest of a beneficiary:

- (a) is personal property; and
- (b) subject to the provisions of the trust, may be transferred, assigned, charged or otherwise dealt with.

**21. Protector-**(1) A Samoan trust may provide for the appointment of a protector revocably or irrevocably by deed.

(2) Subject to the trust, a natural person of full age and of sound mind or body corporate or any firm or partnership or group

or body of persons, whether incorporated or unincorporated, other than the trustee or enforcer of the trust, may be appointed protector, including the settlor and any beneficiary.

(3) The trust or a separate deed, to which the settlor (if named in the deed constituting the trust), the trustee and the protector are to be parties, may provide for matters concerning the office and role of protector, including but not limited to:

- (a) the acceptance by the protector of the office of protector and confirming, if appropriate, that person is willing and capable of being appointed and has been independently advised on the role and powers of the protector, or does not require that independent advice, and accepts the appointment;
- (b) the appointment of joint protectors revocably or irrevocably;
- (c) the appointment of successor protectors revocably or irrevocably, which may be in succession to one another;
- (d) the appointment of a protector if there is no protector;
- (e) the information to be given to a protector; and
- (f) any other matters subsequently referred to in this section.

(4) A protector must be reimbursed all proper and reasonable expenses for the performance of the office of protector and, subject to the trust, a protector may charge reasonable remuneration for the performance of services as protector of the trust.

(5) A protector may, by the trust or a separate deed, be granted any proactive power or that the exercise of any power by the trustee requires the prior written consent of the protector.

(6) Subject to the trust, a protector has the following proactive powers:

- (a) to remove and to appoint new or additional trustees;
- (b) to add any person as a beneficiary of the trust;
- (c) to remove any person as beneficiary of the trust;
- (d) to create any excluded person;
- (e) to change the proper law of the trust; and
- (f) to change the forum of administration of the trust.

(7) If there are joint protectors of the trust, subject to contrary provisions in the trust, any functions or powers conferred on the protectors may be exercised by them by majority of protectors.

(8) A protector who dissents from a decision of the majority of the protectors may require his or her dissent to be recorded in writing.

(9) A protector exercising any 1 or more of the powers conferred by the trust or by a separate deed is taken not, by virtue of that exercise of powers, to be a trustee.

(10) If:

(a) the consent of the protector is required to the exercise of a power by the trustee, the consent is properly given and the trustee acts in good faith; or

(b) the trustee acts under a direction of the settlor or the protector properly given under the trust or any separate deed and the trustee acts in good faith,

the trustee is not liable for any loss directly or indirectly arising from any resulting act or omission.

(11) A protector may by deed release or extinguish all or any of the powers given to the protector.

**22. Enforcer** - (1) A purpose trust created under section 66 must provide for the appointment of:

(a) an enforcer; and

(b) a new enforcer at any time when there is no enforcer, and it is not invalid to that extent.

(2) Except as provided in subsection (3), a trustee of a purpose trust or a person who has a conflict of interest in acting as enforcer of the purpose trust must not be appointed or remain as enforcer of the purpose trust.

(3) The settlor, the personal representatives of the settlor, a corporation or any other person, may be appointed enforcer of a purpose trust.

(4) The duty of the enforcer is to enforce the non-charitable purposes of a purpose trust.

(5) Except as permitted by this Act or expressly provided by the trust, or with the approval of the Court, an enforcer must not:

(a) directly or indirectly profit from his or her appointment;

(b) cause or permit any other person to profit directly or indirectly from such appointment; or

(c) on his own account enter into any transaction with the trustees or relating to the trust property which may result in profit to him or the trustee.

(6) Subject to subsection (7):

- (a) an enforcer may resign from office by written notice delivered to the trustee, effective upon delivery of notice; and
- (b) the resignation does not release the enforcer from any liability concerning the purpose trust of which he or she was enforcer arising before the resignation took effect.

(7) A resignation given in order to facilitate a breach of trust has no effect.

(8) An enforcer ceases to be an enforcer of the trust in relation to its non-charitable purposes immediately upon:

- (a) the enforcer's removal from office by the Court;
- (b) the enforcer's resignation becoming effective;
- (c) the coming into effect of a provision in a trust under which the enforcer is removed from office or otherwise ceases to hold office; or
- (d) the enforcer's appointment as a trustee of the trust.

(9) When there is no enforcer of a purpose trust, the trustee of the purpose trust must take necessary steps to secure the appointment of a new enforcer.

(10) If the trustee of a purpose trust has reason to believe that the enforcer is unwilling or refuses to act, or is unfit to act or incapable of acting, the trustee must apply to the Court for removal of the enforcer and the appointment of a replacement.

(11) An enforcer must be provided with:

- (a) the accounts, including the annual accounts of the purpose trust;
- (b) copies of the trust instrument setting up the purpose trust and any deed or documents referred to in the instrument or ancillary to it;
- (c) any legal opinions and advice received by the trustees; and
- (d) any other documents or information to which he may be entitled under the provisions of the purpose trust.

(12) An enforcer has:

- (a) the same rights as a person with a beneficial interest under an ordinary trust to take administrative actions and other actions, including making an application to the Court for its direction, for the good of the trust;

- (b) the rights of a trustee of an ordinary trust to protection, indemnity and payment of expenses out of trust property, and to make applications to the Court under section 81; and
- (c) on behalf of the trust, the same personal and proprietary remedies for breach of trust against a trustee and against third parties as a beneficiary of an ordinary trust.

## **PART 5 TRUSTEES**

**23. Number of trustees-**(1) The number of trustees of a trust must be at least 2, unless:

- (a) only 1 trustee was originally appointed;
- (b) a trust corporation is appointed;
- (c) the Public Trustee is acting; or
- (d) the trust provides otherwise.

(2) A trust does not fail on the ground that there is no trustee or less than the number required by subsection (1).

(3) If the number of trustees falls below the minimum number required by subsection (1) or, if greater by the trust, the required number of new trustees must be appointed as soon as practicable.

(4) While there are fewer trustees than are required by the trust, the existing trustees may only act for the purpose of preserving the trust property.

**24. Appointment of trustees-**(1) If the following occur a new or additional trustee may be appointed under subsection (2):

- (a) a Samoan trust contains no provision for the appointment of a new or additional trustee;
- (b) the provision has lapsed or failed; or
- (c) the person with power to make the appointment is not capable of exercising the power.

(2) A new or additional trustee may be appointed by the following persons in the following order of priority:

- (a) the existing trustee;
- (b) the last remaining trustee;
- (c) the personal representative or liquidator of the last remaining trustee; or
- (d) the Court.

(3) Subject to the trust, a trustee appointed under this section has the same functions, and may act in all respects, as if the trustee had been originally appointed a trustee.

(4) The Court may remove a trustee with power to appoint a new or additional trustee who fails to exercise that power.

(5) On the appointment of a new or additional trustee, anything necessary to vest the trust property in the trustee jointly with any of his or her co-trustees must be done.

**25. Acceptance of trusteeship-**(1) Subject to subsection (3), a person appointed as trustee need not accept the appointment but the person is taken to have done so if the person knowingly takes part in or interferes with the trust or its affairs.

(2) A person appointed as trustee may, before acceptance (actual or deemed):

- (a) disclaim the appointment by notice in writing to the settlor or to the other trustees; or
- (b) if the settlor is dead or cannot be found, and there are no other trustees, apply to the Court for relief from the appointment, whereupon the Court may make any order as it thinks fit.

(3) If the person appointed as a trustee does not act under subsection (2) within a reasonable time of becoming aware of the appointment, the person is taken to have accepted it.

(4) A person designated as trustee, without accepting the trusteeship, may without liability for loss:

- (a) act to preserve the trust property if, within a reasonable time after acting, the person sends a written rejection of the trusteeship to the settlor or, if the settlor is dead or lacks capacity, to a named beneficiary;
- (b) inspect or investigate trust property to determine potential liability under the proper law or any foreign law or for any other purposes; or
- (c) apply to the Court for directions or advice.

**26. Vacancy in trusteeship-**(1) A vacancy in a trusteeship occurs if:

- (a) a person designated as trustee rejects the trusteeship;

- (b) a person designated as trustee cannot be identified or does not exist;
- (c) a trustee resigns;
- (d) a trustee is removed;
- (e) a trustee dies; or
- (f) a guardian is appointed for an individual serving as trustee.

(2) Section 24(1) and (2) applies, if a trust does not provide for the appointment of a new trustee.

(3) Subject to the trust, a trustee appointed under this section has the same powers, discretions and duties and may act as if the trustee had been originally appointed a trustee.

(4) The Court may:

(a) remove a trustee empowered to appoint a new trustee who fails to exercise that power; and

(b) appoint a new trustee.

(5) If 1 or more co-trustees remain in office, a vacancy in a trusteeship need not be filled.

(6) A vacancy in trusteeship must be filled if the trust has no remaining trustee.

(7) A trust does not fail if there is no trustee.

**27. Resignation or removal of trustees-**(1) A trustee, other than a sole trustee, may resign from office by delivering a written notice of resignation to his or her co-trustees.

(2) Subject to subsection (3) and the trust, a resignation takes effect:

(a) on delivery of the notice; or

(b) on any later date or on the happening of any later event specified in the notice.

(3) A resignation has no effect if:

(a) it is given to facilitate a breach of trust; or

(b) it would result in there being no trustee or less than the number required by section 23.

(4) The Court may, on its own initiative or on application of a settlor, a protector, an enforcer, a co-trustee, or a beneficiary, remove a trustee if:

(a) the trustee has committed a breach of trust;

(b) lack of cooperation among co-trustees substantially impairs the administration of the trust;

- (c) because of unfitness, unwillingness, or persistent failure of the trustee to administer the trust, the Court determines that removal of the trustee best serves the interests of the beneficiaries; or
- (d) there has been a substantial change of circumstances or removal is requested by all of the beneficiaries, and the Court finds that removal of the trustee best serves the interests of all the beneficiaries and is not inconsistent with a material purpose of the trust, and a suitable co-trustee or successor trustee is available.

(5) Pending a final decision on a request to remove a trustee, or in lieu of or in addition to removing a trustee, the Court may order an appropriate relief under section 81.

**28. The position of the outgoing trustee-**(1) Subject to subsection (3), a trustee who resigns or is removed must proceed expeditiously to deliver the trust property within the trustee's possession to the co-trustee, successor trustee or other person entitled to it.

(2) Unless a co-trustee remains in office or the Court otherwise orders, and until the trust property is delivered to a successor trustee or other person entitled to it, a trustee who has resigned or been removed has the duties of a trustee and the powers necessary to protect the property.

(3) A trustee who resigns or is removed may require to be provided with reasonable security for liabilities, whether existing future contingent or otherwise, before transferring or surrendering trust property.

(4) A trustee who resigns or is removed and has complied with subsection (1) is released from liability to any beneficiary, trustee or person interested under the trust for any act or omission in relation to the trust property or the trustee's duty as a trustee except liability:

- (a) arising from any breach of trust to which the trustee was a party or to which the trustee was privy; or
- (b) for actions to recover from the trustee trust property or the proceeds of trust property in the possession of the trustee.

**29. Duties of trustees-**(1) The duties of the trustees are:

- (a) matters referred to in subsections (2) and (3), which override the provisions of a Samoan trust; and
  - (b) matters referred to in subsections (4) to (9), which are subject to the provisions of a Samoan trust.
- (2) A trustee:
- (a) may make an application to the Court for direction, opinion or advice concerning the manner in which he may or should act in connection with any matter concerning the trust and the Court may make such order, if any, as it thinks fit; and
  - (b) subject to this Act, must carry out and administer the trust in accordance with its provisions.
- (3) The compulsory duties of a trustee include the following:
- (a) a trustee must keep accurate accounts and records of the trustee's trusteeship;
  - (b) a trustee must keep trust property separate from his or her personal property and separately identifiable from any other property of which he or she is a trustee;
  - (c) a trustee of a purpose trust must comply with section 22(9) and (10).
- (4) Subject to the trust, a trustee must:
- (a) so far as is reasonable, preserve the value of the trust property; and
  - (b) so far as is reasonable, enhance the value of the trust property.
- (5) Except with the approval of the Court, or as permitted by this Act or expressly provided by the provisions of the trust, a trustee must not:
- (a) directly or indirectly profit from the trustee's trusteeship;
  - (b) cause or permit any other person to profit directly or indirectly from the trustee's trusteeship; or
  - (c) on the trustee's own account enter into any transaction with the trustees or relating to the trust property which may result in a profit.
- (6) Subject to the trust, if there is more than 1 trustee, all the trustees must join in performing the trust.
- (7) Subject to subsection (8), if there is more than 1 trustee, a power or discretion given to the trustees must not be exercised unless all the trustees agree on its exercise.

(8) A trust may empower trustees to act by a majority but a trustee who dissents from a decision of the majority of the trustees may require the trustee's dissent to be recorded in writing.

(9) Subject to the trust, if there is more than 1 beneficiary, or more than 1 purpose, or at least 1 beneficiary and at least 1 purpose, a trustee must be impartial and must not execute the trust for the advantage of one at the expense of another.

**30. Duty to exercise care and skill-**(1) Subject to subsection (2), when a duty under this section and sections 31 to 42 applies to a trustee, the trustee must exercise such care and skill as is reasonable in the circumstances, having regard in particular:

- (a) to any special knowledge or experience that the trustee has or holds himself or herself out as having; and
- (b) if the trustee acts as trustee in the course of a business or profession, to any special knowledge or experience that it is reasonable to expect of a person acting in the course of that kind of business or profession.

(2) The duty referred to in subsection (1) applies to the extent specified in the Schedule and particularly to paragraph 4 of the Schedule.

**31. Power of investment-**(1) Subject to subsection (5), a trustee may make any kind of investment that the trustee could make if the trustee were absolutely entitled to the trust property.

(2) Subsection (1) does not permit a trustee to make investments in land other than in loans secured on land.

(3) A person invests in a loan secured on land if the person has rights under any contract under which:

- (a) one person provides another with credit; and
- (b) the obligation of the borrower to repay is secured on land.

(4) In this section:

“credit” includes any cash loan or other financial accommodation;

“cash” includes money in any form.

(5) In exercising any power of investment, whether arising under this section or otherwise, a trustee must have regard to the standard investment criteria.

(6) A trustee must, from time to time, review the investments of the trust and consider whether, having regard to the standard investment criteria, the investments should be varied.

(7) Subject to subsection (9), before exercising any power of investment, whether arising under this section or otherwise, a trustee must obtain and consider proper advice about the way in which, having regard to the standard investment criteria, the power should be exercised.

(8) Subject to subsection (9), when reviewing the investments of the trust, a trustee must obtain and consider proper advice about whether, having regard to the standard investment criteria, the investments should be varied.

(9) A trustee is not required to obtain advice under subsection (7) or (8) if the trustee reasonably concludes that in all the circumstances it is unnecessary or inappropriate to do so.

(10) The general power of investment is:

- (a) in addition to powers conferred on trustees otherwise than by this Act; but
- (b) subject to any restriction or exclusion imposed by the trust instrument.

(11) Subsection (1) applies in relation to trusts whether created before or after the commencement of this Act.

**32. Agents-**(1) Subject to other provisions of this section, the trustees of a trust may authorise a person to exercise any or all of their delegable functions as their agent.

(2) For a trust, other than a charitable trust, the trustees' delegable functions consist of any function other than:

- (a) a function relating to whether or in what way any assets of the trust should be distributed; or
- (b) a power to decide whether any fees or other payment due to be made out of the trust funds should be made out of income or capital; or
- (c) a power to appoint a person to be a trustee of the trust; or
- (d) a power conferred by any other enactment or the trust instrument which permits the trustees to delegate any of their functions or to appoint a person to act as a nominee or custodian.

(3) For a charitable trust, the trustees' delegable functions are:

- (a) any function consisting of carrying out a decision that the trustees have taken;
- (b) any function relating to the investment of assets subject to the trust (including, in the case of land held as an investment, managing the land and creating or disposing of an interest in the land);
- (c) any function relating to the raising of funds for the trust otherwise than by means of profits of a trade which is an integral part of carrying out the trust's charitable purpose;
- (d) any other prescribed function.

(4) In subsection (3)(c), a trade is an integral part of carrying out the charitable purpose of a charitable trust if, whether carried on in Samoa or elsewhere, the profits are applied solely to the purposes of the trust and either:

- (a) the trade is exercised in the course of the actual carrying out of a primary purpose of the trust; or
- (b) the work in connection with the trade is mainly carried out by beneficiaries of the trust.

(5) Subject to subsections (6) and (7), the persons whom the trustees may under this section authorise to exercise functions as their agent include one or more of their number.

(6) The trustees:

- (a) may not authorise 2 or more persons to exercise the same function unless they are to exercise the function jointly; and
- (b) may not, under this section, authorise a beneficiary to exercise any function as their agent (even if the beneficiary is also a trustee); and
- (c) may, under this section, authorise a person to exercise functions as their agent even though the person is also appointed to act as their nominee or custodian (whether under section 33 or any other power).

(7) Subject to subsection (8), a person who is authorised under this section to exercise a function is (whatever the provisions of the agency) subject to any specific duties or restrictions attached to the function.

(8) A person who is authorised under this section to exercise a power which is subject to a requirement to obtain advice is not subject to the requirement if the person is the kind of person from

whom it would have been proper for the trustees, in compliance with the requirement, to obtain advice.

(9) Subject to other provisions of this section, the trustees may authorise a person to exercise functions as their agent on such provisions as to remuneration and other matters as they may determine.

(10) The trustees may not authorise a person to exercise functions as their agent on any of the provisions mentioned in subsection (11) unless it is reasonably necessary for them to do so.

(11) Other provisions referred to in subsection (9) are:

- (a) a provision permitting the agent to appoint a substitute;
- (b) a provision restricting the liability of the agent or his substitute to the trustees or any beneficiary;
- (c) a provision permitting the agent to act in circumstances capable of giving rise to a conflict of interest.

(12) The trustees may not authorise a person to exercise any of their asset management functions as their agent except by an agreement which is in or evidenced in writing.

(13) The trustees may not authorise a person to exercise any of their asset management functions as their agent unless:

- (a) they have prepared a policy statement; and
- (b) the agreement under which the agent is to act includes a term to the effect that he or she will secure compliance with the policy statement, or, if the policy statement is revised or replaced under section 35, the revised or replacement policy statement.

(14) The trustees must formulate any guidance given in the policy statement with a view to ensuring that their asset management functions will be exercised in the best interests of the trust.

**33. Nominees and custodians-**(1) Subject to sections 32 to 39, the trustees of a Samoan trust may:

- (a) in writing, appoint a person to act as their nominee for all or part of the trust property as they determine; and
- (b) take any necessary steps to secure that those assets are vested in a person so appointed.

(2) This section does not apply to any trust having a custodian trustee or in relation to any assets vested in the Public Trustee.

(3) Subject to sections 30 and 31, the trustees of a trust may appoint a person to act as custodian in relation to all or part of the trust property as they may determine.

(4) The appointment of a custodian under this section does not apply to any trust having a custodian trustee or in relation to any assets vested in the Public Trustee.

(5) Subject to the trust, if the trustees retain or invest in securities payable to bearer they must appoint a person to act as a custodian of the securities.

(6) A person must not be appointed as a nominee or a custodian under this section unless the person satisfies one of the following conditions:

- (a) the person carries on a business which consists of or includes acting as a nominee or custodian; or
- (b) the person is a body corporate which is controlled by the trustees.

(7) Subject to subsection (6), the person whom the trustees may appoint as a nominee or custodian includes:

- (a) one of their number, if that 1 is a trust corporation; or
- (b) two (or more) of their number, if they are to act as joint nominees or joint custodians.

(8) The trustees may under this section appoint a person to act as their:

- (a) nominee even though the person is also -
  - (i) appointed to act as their custodian; or
  - (ii) authorised to exercise functions as their agent; or
- (b) custodian even though the person is also -
  - (i) appointed to act as their nominee; or
  - (ii) authorised to exercise functions as their agent.

#### **34. Terms of appointment of nominees and custodians-**

(1) Subject to subsection (2) and section 40, the trustees may under section 33 appoint a person to act as a nominee or custodian on terms, including remuneration and other matters as the trustees may determine.

(2) The trustees may not, under section 33(1), (2), (3) and (8), appoint a person to act as a nominee or custodian on any of the following terms unless it is reasonably necessary for them to do so:

- (a) to permit the nominee or custodian to appoint a substitute;
- (b) to restrict the liability of the nominee or custodian or his or her substitute to the trustees or to any beneficiary;
- (c) to permit the nominee or custodian to act in circumstances capable of giving rise to a conflict of interest.

**35. Review of agents, nominees and custodians and liability for the appointment of them-**(1) Subsections (4) to (9) apply if the trustees have, under section 32 or 33:

- (a) authorised a person to exercise functions as their agent;  
or
- (b) appointed a person to act as a nominee or custodian.

(2) Subject to subsection (3), subsections (4) to (9) also apply if the trustees have, under any power conferred on them by the trust instrument or by any enactment:

- (a) authorised a person to exercise functions as their agent;  
or
- (b) appointed a person to act as a nominee or custodian.

(3) Subsections (4) to (9) do not apply if they are inconsistent with the trust instrument or any other enactment.

(4) While the agent, nominee or custodian continues to act for the trust, the trustees:

- (a) must keep under review the arrangements under which the agent, nominee or custodian acts and how those arrangements are being put into effect; and
- (b) if circumstances make it appropriate to do so, must consider whether there is a need to exercise any power of intervention that they have; and
- (c) if they consider that there is a need to exercise such a power, must do so.

(5) If the agent has been authorised to exercise asset management functions, the duty under subsection (4) includes, in particular:

- (a) a duty to consider whether there is any need to revise or replace the policy statement made for the purposes of section 32(13); and
- (b) if they consider that there is a need to revise or replace the policy statement, a duty to do so; and

(c) a duty to assess whether the policy statement (as it has effect for the time being) is being complied with.

(6) Section 32(13) applies to the revision or replacement of a policy statement under this section as it applies to the making of a policy statement under that section.

(7) In this section, “power of intervention” includes:

(a) a power to give directions to the agent, nominee or custodian; and

(b) a power to revoke the authorisation or appointment.

(8) A trustee is not liable for any act or default of the agent, nominee or custodian unless the trustee has failed to comply with the duty of care applicable to the trustee:

(a) when entering into the arrangements under which the person acts as agent, nominee or custodian; or

(b) when carrying out the trustee’s duties under subsections (4) to (7).

(9) If a trustee has agreed to a term under which the agent, nominee or custodian is permitted to appoint a substitute, the trustee is not liable for any act or default of the substitute unless the trustee has failed to comply with the duty of care applicable to him or her, under paragraph 2 of the Schedule:

(a) when agreeing to that term; or

(b) when carrying out the trustee’s duties under subsections (4) to (7) in so far as those duties relate to the use of a substitute.

**36. Effect of trustees exceeding their powers** - A failure by the trustees to act within the limits of the powers conferred by sections 32 to 39:

(a) in authorising a person to exercise a trustee’s function as an agent; or

(b) in appointing a person to act as a nominee or custodian, does not invalidate the authorisation or appointment.

**37. Sole trustees**-(1) Subject to subsection (2), sections 32 to 39 apply to a trust having a sole trustee as they apply to other trusts (and references in sections 32 to 39 to trustees (except in sections 32(5), 32(6)(b) and 33(7)) are to be read accordingly).

(2) Section 33(5) does not impose a duty on a sole trustee if that trustee is a trust corporation.

**38. Restriction or exclusion of the powers conferred by sections 32 to 36 and by sections 40 to 42** - The powers conferred by sections 32 to 36 and by sections 40 to 42 are:

- (a) in addition to powers conferred on trustees otherwise than by this Act; but
- (b) subject to any restriction or exclusion imposed by the trust instrument or any other enactment.

**39. Existing trusts** - Sections 32 to 42 apply to trusts whether created before or after its commencement.

**40. Trustees' remuneration and expenses**-(1) Except to the extent (if any) to which the trust instrument makes inconsistent provision, subsections (2) to (4) apply to a trustee if:

- (a) there is a provision in the trust instrument entitling the trustee to receive payment out of trust funds in respect of services provided by him or her to or on behalf of the trust; and
- (b) the trustee is a trust corporation or is acting in a professional capacity.

(2) The trustee is to be treated as entitled under the trust instrument to receive payment for services even if they are services which are capable of being provided by a lay trustee.

(3) Subsection (1)(b) applies to a trustee of a charitable trust who is not a trust corporation only:

- (a) if the trustee is not a sole trustee; and
- (b) to the extent that a majority of the other trustees have agreed that it should apply to that trustee.

(4) For this section, a trustee acts in a professional capacity if the trustee acts in the course of a profession or business which consists of or includes the provision of services in connection with:

- (a) the management or administration of trusts generally or a particular kind of trust; or
- (b) any particular aspect of the management or administration of trusts generally or a particular kind of trust,

and the services the trustee provides to or on behalf of the trust fall within that description.

(5) For this section, a person acts as a lay trustee if the trustee:

- (a) is not a trust corporation; and
- (b) does not act in a professional capacity.

(6) Subject to subsection (9), a trustee of a trust corporation, other than a trustee of a charitable trust, is entitled to reasonable remuneration out of the trust funds for any services that the trust corporation provides to or on behalf of the trust.

(7) A trustee, other than a trust corporation, a trustee of a charitable trust or a sole trustee, who acts in a professional capacity is entitled to receive reasonable remuneration out of the trust funds for any services that the trustee provides to or on behalf of the trust if each of the other trustees has agreed in writing that the trustee be remunerated for the services.

(8) A trustee is entitled to remuneration under this section even if the services in question are capable of being provided by a lay trustee.

(9) A trustee is not entitled to remuneration under this section if any provision about the trustee's entitlement to remuneration has been made under the trust instrument or any other enactment.

(10) This section applies to a trustee authorised under sections 32 to 39 or the trust instrument:

- (a) to exercise functions as an agent of the trustees; or
- (b) to act as a nominee or custodian,

as it applies to any other trustee.

(11) A trustee:

- (a) is entitled to be reimbursed from the trust funds; or
- (b) may pay out of the trust funds,

expenses properly incurred by the trustee when acting on behalf of the trust.

**41. Remuneration and expenses of agents, nominees and custodians-**(1) This section applies, if under sections 32 to 39, any other enactment or the trust instrument, a person, other than a trustee has been:

- (a) authorised to exercise functions as an agent of the trustees; or
- (b) appointed to act as a nominee or custodian.

(2) The trustees may remunerate the agent, nominee or custodian out of the trust funds for services if:

- (a) he or she is engaged on provisions entitling him or her to be remunerated for those services; and
- (b) the amount does not exceed any remuneration as is reasonable in the circumstances for the services provided to or on behalf of that trust.

(3) The trustees may reimburse the agent, nominee or custodian out of the trust funds for any expenses properly incurred by him or her in exercising functions as an agent, nominee or custodian.

(4) Remuneration and expenses of agents, nominees and custodians applies to services provided to or on behalf of trusts whenever created and to expenses incurred on or after the commencement of trusts whenever created.

**42. Insurance-**(1) A trustee may:

(a) insure any property which is subject to the trust against risks of loss or damage due to any event; and

(b) pay the premiums out of the trust funds.

(2) For property held on a bare trust, the power to insure is subject to any direction given by the beneficiary or each of the beneficiaries:

(a) that any property specified in the direction is not to be insured; or

(b) that any property specified in the direction is not to be insured except on any specified conditions.

(3) Property is held on a bare trust if it is held on trust for:

(a) a beneficiary who is of full age and capacity and absolutely entitled to the property subject to the trust; or

(b) beneficiaries each of whom is of full age and capacity and who (taken together) are absolutely entitled to the property subject to the trust.

(4) If a direction under subsection (2) is given, the power to insure, so far as it is subject to the direction, ceases to be a delegable function for the purposes of section 32(1) to (4).

(5) In this section, “trust funds” means any income or capital funds of the trust.

**43. Letters or memorandum of wishes-**(1) The settlor, a beneficiary, whether for himself or herself or acting for a class of persons of which he or she is a member, and a protector, for all or any one or more of the beneficiaries, may alone or separately give to the trustee a letter of his or her wishes or the trustee may prepare a memorandum of the wishes of any of them with regard to the exercise of any functions or powers conferred on the trustee by the trust.

(2) If:

- (a) a letter of wishes is given to the trustee of a trust; or
- (b) a memorandum of wishes is given to or prepared by the trustee of a trust,

the trustee may have regard to that letter or memorandum in exercising any functions or powers conferred on the trustee by the trust, but is not be accountable in any way for his or her failure or refusal to have regard to that letter or memorandum.

(3) A fiduciary duty or obligation is not imposed on a trustee merely by the giving to the trustee of a letter or memorandum of wishes or the preparation by the trustee of a memorandum of wishes.

**44. Corporate trustee may act by resolution** - A corporate trustee may:

- (a) act in connection with a trust by a resolution of the corporate trustee or of its board of directors or other governing body; or
- (b) by such a resolution appoint an officer or employee, or a committee of officers or employees or both, to act on its behalf in connection with the trust.

## **PART 6 RESERVED POWERS**

**45. Reserved powers to a settlor**-(1) The validity of a trust is not affected by the matters set out in this section provided that:

- (a) the trust is not a sham; or
- (b) there is such an excessive reserve of powers to the settlor that the role of the trustee and the nature of the trust is compromised.

(2) The settlor may reserve to himself or herself at the time of the creation of the trust any beneficial interest in or rights over the property which is to become trust property.

(3) Subject to subsection (1), the settlor may reserve to himself or herself all or any of the following powers:

- (a) to revoke, vary or amend the trust or powers arising wholly or partly under it;
- (b) to advance, appoint, pay or apply income or capital of the trust property or to give directions for the making of any advancement, appointment, payment or application;

- (c) to act as, or give binding directions as to the appointment or removal of, a director or officer of any corporation wholly or partly owned by the trust;
- (d) to give binding directions to the trustee in connection with the purchase, retention, sale, management, lending, pledging or charging of the trust property or the exercise of any powers or rights arising from such property;
- (e) to appoint or remove any trustee, enforcer, protector or beneficiary;
- (f) to appoint or remove an investment manager or investment adviser;
- (g) to change the proper law of the trust;
- (h) to restrict the exercise of any powers or discretions of a trustee by requiring that the powers or discretions be exercisable only with the consent of the settlor or any other person specified in the trust.

(4) Subject to subsection (1), if a power mentioned in subsection (3) has been reserved or granted by the settlor, a trustee who exercises the power is not acting in breach of trust and is not liable for the consequences of so acting.

**46. Reserved powers to a protector** - A protector has the powers of the protector under section 21.

**47. Prescribed directions**-(1) The power to give prescribed directions may be reserved in a trust:

- (a) to the settlor under section 45(3); or
- (b) to the protector; or
- (c) to any person or persons (including the settlor and the protector) whether exercisable alone, personally, jointly by majority of persons or by reference to a casting vote or to persons in order of priority.

(2) If a trust provides for the giving of prescribed directions, the trustee is not:

- (a) under any duty to preserve or enhance the value of the trust property; or
- (b) under any duty to diversify the investments of the trust if prescribed directions provide otherwise; or

- (c) liable to any loss in value to the trust property arising directly or indirectly as a result of the giving of prescribed directions.

**48. Samoan International Special Trust Arrangement** - Sections 49 to 62 apply only if the trust expressly provides and declares the trust as a Samoan International Special Trust Arrangement (SISTA).

**49. Interpretation**-(1) In this Part, unless the context otherwise requires:

“appointed enquirer”, for a trust, means a person who is appointed by the trust to make intervention calls;

“business”, for a company, includes the holding of shares or other assets and non-commercial activities;

“business risk”, for a company, includes:

- (a) any risk attached to any business of the company, or any connected company, when conducted in the manner in which it has in fact been conducted; or
- (b) any risk which can be expected to be attached to any projected business of the company.

“company”, for designated shares, means a Samoan company that has issued the designated shares;

“designated shares” means shares in a Samoan company for which a valid direction has been given under section 51(1) and is in effect;

“designated trustee” means:

- (a) a trust corporation;
- (b) a private trust company exempt from requiring a licence to carry on business as a trustee company under the Law.

“disposal”, for designated shares, includes:

- (a) the exercise of voting powers leading, or capable of leading, to the liquidation of the company or the cancellation of the shares or of any rights attached to the shares; and
- (b) the creation of any legal or equitable interest in the shares.

“interested person”, for a trust, means:

- (a) a beneficiary of the trust;

- (b) an object of a discretionary trust over any of the capital or income of the trust;
- (c) a parent or legal guardian of any minor falling within paragraph (a) or (b);
- (d) an enforcer;
- (e) a protector, unless the trust provides otherwise;
- (f) an appointed enquirer;
- (g) where any of the purposes of the trust are exclusively charitable, the Attorney General; and
- (h) any beneficiary or other person so designated under the provisions of the trust.

“intervention call” means a call by an interested person under section 55(1);

“legal guardian”, for a minor, means a person legally recognised as the guardian in any jurisdiction with which the minor has a substantial connection;

“rules of the office of director” means the current rules referred to in section 54;

“trust”, for designated shares, means the trust on which the designated shares are held;

“trust fund”, for a trust, means property for the time being subject to the trust.

(2) In this section:

- (a) a reference to voting powers for shares includes a reference to powers to direct the voting of shares held by a nominee;
- (b) for a trust, a reference to a protector includes a person or a committee whose consent is required for the exercise of any powers;
- (c) a company is taken to be connected with another corporation if -
  - (i) that other corporation holds, directly or through a nominee, shares in that other corporation; or
  - (ii) it is controlled directly or indirectly by that other corporation; or
  - (iii) it is connected with a corporation which is itself connected with that other corporation;
- (d) a ground for complaint concerning the conduct of a company’s affairs is permitted if it is specified as such in the trust instrument, and the expression

“permitted ground for complaint” is to be construed accordingly.

**50. Primary purpose of section 51** - The primary purpose of section 51 is to enable a trust of company shares to be established under which:

- (a) the shares may be retained indefinitely; and
- (b) the management of the company may be carried out by its directors without any power of intervention being exercised by the trustee.

**51. Designated shares**-(1) If a trust fulfils the conditions in subsection (7), the trust may direct that this section applies:

- (a) to all shares comprised in the trust fund; or
- (b) to any shares comprised in the trust fund as may be specified in the direction.

(2) In subsection (1), “shares comprised in the trust fund”, includes shares:

- (a) becoming so comprised at any time after the creation of the trust, whether added to the trust fund by way of additional settlement by the original settlor or any other person;
- (b) acquired on a new issue by the company or in the course of management or administration of the trust fund; or
- (c) acquired in any other manner.

(3) A direction under subsection (1):

- (a) must not be made for shares added to the trust fund by a trustee of another trust in the exercise of a power in that other trust unless the power expressly permits this or the other trust is a Samoan trust and the trustee of the other trust, or 1 of the trustees of the other trust, is a designated trustee; and

(b) may -

- (i) identify the shares to which the direction relates either specifically or by any general description;
- (ii) specify a date or event upon the occurrence of, or circumstances in, which the direction will take, or will cease to have effect.

(4) The event referred to in subsection (3)(b)(ii) may include the service on the trustee of the trust, or on any of the trustees of the trust, if more than 1, of a written direction (“a trigger direction”) made by such person or committee as is specified in the trust to the effect that the direction under subsection (1) is immediately to take effect or is immediately to cease to have effect, as the case may be.

(5) The person or committee referred to in subsection (4) may not be or include the trustee of the trust, or any trustee of the trust if more than 1.

(6) The provisions of the trust shall determine whether or not the decision to make, or refrain from making, the trigger direction is fiduciary and, in a case where the terms of the trust do not expressly state otherwise, there shall be a presumption that the decision is fiduciary.

(7) The conditions referred to in subsection (1) are as follows:

- (a) the trust is created by or on a written testamentary or *inter vivos* instrument;
- (b) at least 1 trustee of the trust is a designated trustee at the time at which the direction under subsection (1) takes effect;
- (c) the provisions of the trust require that, for so long as the direction under subsection (1) has effect, at least 1 trustee of the trust is a designated trustee; and
- (d) the trust is not created in the exercise of a power conferred by another trust unless the power expressly permits this or at the time the power is exercised, the other trust is a Samoan trust and the trustee of the other trust, or 1 of the trustees of the other trust is a designated trustee.

(8) Subject to subsection (9), if a person is a settlor of a trust of designated shares and additional property is settled on the trust by another person, the former person must be considered for the purposes of this section as the settlor for the trust of the additional property.

(9) If the trust instrument provides that subsection (8) does not apply, then, for a trust comprising property which has been provided by more than 1 person, this Act applies as if each person had created a separate trust for the property which he or she has provided.

**52. Trustee's duties in relation to designated shares-(1)**

Subject to section 56, designated shares must be held by the trustee on trust to retain the designated shares.

(2) The trustee's duty to retain designated shares has precedence over any duty to preserve or enhance the value of the trust fund.

(3) Without affecting subsection (2), the trustee is not accountable for losses arising directly or indirectly from holding designated shares, including losses arising from any of the following circumstances:

- (a) the absence or inadequacy of financial return from any designated shares;
- (b) a decrease in value of any designated shares;
- (c) any act or omission of the directors of the company, regardless of whether it is made or carried out in good faith;
- (d) liquidation or receivership of the company;
- (e) share market fluctuation;
- (f) the loss of opportunity to make gains from reinvestment of the proceeds of designated shares; or
- (g) the liabilities and expenses of the company, including directors' remuneration and expenses.

(4) In subsection (3), "company" includes a corporation connected to it.

**53. Restrictions on trustee's powers-(1)**

Subject to the trust and sections 54 and 55, subsections (2) and (3) apply to a trustee of designated shares.

(2) The power of voting or other powers for designated shares must not be exercised by the trustee so as to interfere in the management or conduct of any business of the company, and in particular, the trustee:

- (a) must leave the conduct of the business, and all decisions as to the payment or non-payment of dividends, to the directors of the company; and
- (b) must not require the declaration or payment of any dividend by the company or exercise any power the trustee may have of compelling any declaration or payment.

(3) A trustee of designated shares must not:

- (a) instigate or support any action by the company against any of its directors for breach of duty to the company;
  - (b) procure the appointment or removal of any of the directors;
  - (c) subject to section 56, wind-up the company; and
  - (d) subject to subsections (1) and (2), apply to the Court for any form of relief or remedy for the company.
- (4) This section shall not apply to limit or restrict the exercise by a trustee of that trustee's rights, powers or entitlements under:
- (a) the Law; or
  - (b) any of the provisions of the articles of association of a company which enables shareholders of that company to inspect, make copies of or take extracts from accounts and records of the company or any connected company.

**54. Provisions relating to directors-**(1) The trust instrument may:

- (a) contain rules for determining the manner in which the power of voting and other powers attributable to designated shares may be exercised concerning the company by the trustee in relation to -
    - (i) the appointment of directors;
    - (ii) the removal of directors;
    - (iii) the remuneration of directors; or
    - (iv) any of the matters referred to in subsection (2); and
  - (b) provide provisions to amend the rules.
- (2) The rules for the office of director may:
- (a) require the trustee to ensure that a particular person holds or retains office as a director;
  - (b) require any person to be appointed to the office of director at a future date or upon the happening of a future event;
  - (c) require the removal of a director in specified circumstances;
  - (d) subject to the requirements of the rules the company and any written law applicable to the company, prescribe the minimum and maximum number of directors to hold office at any time;

- (e) require the trustee, for the appointment and removal of directors, to act generally or in any specified circumstances on the decision of a third person or a committee;
- (f) provide for the conferral of fiduciary duties on a person or a committee referred to in paragraph (e);
- (g) provide for the establishment, continuance, and procedures of a committee referred to in paragraph (e); or
- (h) provide for the remuneration of the person or committee referred to in paragraph (e) to be paid from the trust fund of the trust.

(3) Subject to subsection (9) and section 55, the trustee must, at all times, use its power of voting and other powers, so far as those powers allow, to ensure:

- (a) that the company has at least the minimum number of directors to meet the requirements of its rules and of the Companies Act 2001; and
- (b) that, except in an exempted case, the identity of the directors of the company conforms with the office of director rules, if any, for the time being applicable.

(4) A person becoming or remaining a director of the company, whether in consequence of the rules of the office of director or otherwise, does not, in the capacity of director:

- (a) owe fiduciary or other obligations under the trust; or
  - (b) have any fiduciary or other obligations to the trustee,
- but nothing in this section affects any duty which that person owes, as director, to the company.

(5) A person for whose appointment the rules of the office of director may provide includes:

- (a) a settlor or protector of the trust; and
- (b) both ascertained and ascertainable persons.

(6) A trustee is not liable for securing, sanctioning or not opposing the appointment of a director if that appointment complies with the rules of the office of director.

(7) If there are no rules of the office of director, and in an exempted case, a trustee is not liable for securing, sanctioning, or not opposing, the appointment of a director of the trustee's own selection, if:

- (a) the trustee concludes in good faith that the appointment in question is consistent with the wishes of the settlor; and
  - (b) the selection is not motivated by a desire on the part of the trustee to reduce business risk, except to the extent, if at all, that the trustee in good faith concludes that a reduction would be consistent with the wishes of the settlor.
- (8) In subsection (7), an exempted case is a case in which either:
- (a) the rules of the office of director make no provision in that case; or
  - (b) the rules make provision but the trustee concludes in good faith that it would be impossible, unlawful, impracticable, or plainly inconsistent with the wishes of the settlor, to ensure compliance with the rules in that case.
- (9) Subject to any express provision to the contrary in the provisions of the trust, a trustee has no duty to:
- (a) act under subsection (3) unless it receives actual notice that circumstances requiring the action have arisen; or
  - (b) enquire as to whether circumstances requiring action under subsection (3) exist.
- (10) If, on any question concerning the appointment or removal of a director, a trustee makes an application to the Court under section 81, the Court, in giving its directions, must not seek to reduce business risk, except to the extent, if at all, that the Court concludes that a reduction would be consistent with the wishes of the settlor.

**55. Intervention by trustee in management in prescribed circumstances-**(1) For a trust of designated shares, if an interested person has a complaint concerning the conduct of the company's affairs, and the ground for that complaint is permitted, the person may, in writing, call upon the trustee to intervene in the affairs of the company to deal with the complaint.

(2) A trust instrument may specify 1 or more permitted grounds for complaint.

(3) When an intervention call is received, the trustee must, if satisfied that the complaint is substantiated, take such action, if

any, as the trustee considers appropriate to deal with the complaint in the interests of the trust and such actions may include the following:

- (a) making or procuring changes in the directorship of the company under its rules and the Companies Act 2001, but otherwise on any provisions as the trustee thinks fit, but in making, procuring or maintaining any change, the trustee may disregard section 54(3)(b) if and in so far as, in the opinion of the trustee, it is expedient to do so for the purposes of dealing with the complaint; or
- (b) procuring action by the company to recover any losses caused by the conduct giving rise to the complaint; or
- (c) seeking such advice on the complaint and the manner of addressing it as the trustee considers appropriate.

(4) In considering and taking action under subsection (3), the trustee must:

- (a) have regard to -
  - (i) any wishes of the settlor; and
  - (ii) the efficient functioning of the company;and
- (b) disregard business risk, if -
  - (i) the ground for complaint consists of or arises from any disagreement among the directors as to business risk; or
  - (ii) any wishes of the settlor require business risk to be considered.

(5) After acting under subsection (3), or after deciding not to act, the trustee's obligation to intervene ends unless another intervention call is made.

(6) It is a ground for declining to act on an intervention call if, apart from any other reason for declining:

- (a) the call is made on substantially similar ground that has been made previously; and
- (b) there appears to the trustee to be no reason to alter, or act further on, the decision previously taken by it.

(7) If a trust instrument specifies 1 or more permitted grounds for complaint, the following provisions apply:

- (a) an interested person may require the trustee to provide any information concerning the affairs of the

company and any connected company as is reasonably required for that person to consider whether an intervention call is necessary, and the trustee must use all reasonable endeavours to provide the information and may, if considered necessary for this purpose, procure the replacement of any of the directors with the trustee's own representative;

(b) if there is an appointed enquirer, the enquirer has a duty to -

(i) make reasonable enquiries as to whether there is a permitted ground for complaint as often as appears appropriate in the circumstances and not less than once in 12 months; and

(ii) make an intervention call under this section, and provide the trustee with evidence of the relevant ground for complaint, whenever it appears to the enquirer to be appropriate;

(c) if there is no appointed enquirer, the trustee must use all reasonable endeavours to ensure that at all times at least 1 interested person of full capacity is given the following documents and information concerning the trust, but without affecting any right of the interested person to documents and information apart from this paragraph -

(i) a copy of the trust instrument and other trust documents;

(ii) the name and address of the trustee;

(iii) the name, registered office and principal place of business of the company;

(iv) the names and addresses of all directors of the company; and

(v) the nature of the current activities of the company.

(8) Where there is an appointed enquirer, the trustee shall use all reasonable endeavours to ensure that at all times the appointed enquirer is given the documents and information concerning the trust which are referred to in subsection (7)(c)(i) to (v).

(9) If practicable, a person to whom information is given under subsection (7)(c) must be a person who, in the reasonable opinion

of the trustee, has acquired, or is likely to acquire, by appointment or otherwise, a substantial equitable interest in some or all of the designated shares or their proceeds or is the parent or legal guardian of such a person or who is, in the case of a purpose trust, the enforcer.

(10) All expenses incurred in dealing with an intervention call or considering the complaint on which it is based, including trustee remuneration if applicable and the cost of any advice:

- (a) are payable out of the trust fund and its income in such proportions as the trustee decides; and
- (b) if there is any deficiency in liquid funds, the trustee may -
  - (i) take such steps as are available to the trustee under the rules of the company and the Companies Act 2001, to make up the shortfall out of dividends from the company; and
  - (ii) if considered necessary for this purpose, procure the replacement of any of the directors with the trustee's own representative.

(11) The trustee must, if practicable, procure the removal from office of a director:

- (a) appointed for the purpose under subsection (7)(a) or (10)(b)(ii) when the purpose for which the director was appointed is achieved; or
- (b) if removal is appropriate for the purpose of any action decided upon by the trustee pursuant to subsection (3), or subject to that action, for the purpose of complying with the rules of the office of director.

(12) The provisions of the trust may provide for the remuneration of the appointed enquirer to be paid from the trust fund of the trust.

**56. Power to dispose of designated shares-**(1) Subject to subsection (2) and to the trust instrument, the trustee may, in the management or administration of the trust fund, sell or otherwise dispose of designated shares, but the existence of this power:

- (a) does not carry an implied duty to exercise the power for the purpose of preserving or enhancing the value of the property of the trust or to consider its exercise for that purpose; and

(b) does not render the trustee liable, for losses arising in consequence of not exercising the power in section 55(3).

(2) Subject to section 58, the trustee must not, unless the trust instrument otherwise provides, sell or dispose of the designated shares in the management or administration of the trust fund without:

(a) the consent of the directors of the company or of a majority of them if more than 1; and

(b) such consents, if any, are made requisite by the trust instrument.

(3) The power to sell or dispose of the designated shares under subsection (1) must be made in any manner, and upon any terms and conditions, as the trustee, acting in its fiduciary capacity, thinks fit.

(4) Section 81 does not apply to the trust to the extent that the section permits the Court to confer upon the trustee any power of sale or other disposal.

**57. Enforcement-**(1) If, for a trust of designated shares, there is a breach of duty or obligation by a trustee, a person may, subject to the trust, apply to the Court for relief.

(2) If the Court is satisfied that the application under subsection (1) is well founded, it may grant relief by:

(a) making any order it considers appropriate to attain, as nearly as may be, the outcome that the Court considers would have been, or would most likely have been, attained for the trust, the company, its directors and generally if the breach had not occurred; and

(b) making such, if any, supplementary or incidental order as the Court considers, in the circumstances of the case, reasonably required having regard to the primary purpose of section 51 set out in section 50, but no order is to be made under this section to affect any interest in property, which was acquired from the trustee in good faith, for value and without actual or constructive notice of the trust, or from the company in good faith and for full consideration, or to affect any interest deriving from that interest.

(3) In subsection (1), “person” means:

(a) an interested person;

- (b) a director of the company; or
- (c) a person who, under the applicable office of director rules, would be a director if the trustee had complied with its obligations under section 54.

(4) Without limiting subsections (1) to (3), but subject to subsection (5), if, for a trust, there is a breach of a duty or obligation imposed by this Act on its trustee, the breach is, actionable in civil proceedings as, a breach of the trust, which includes references to a prospective breach.

(5) If civil proceedings are instituted for a breach of a duty or obligation, the Court must, in granting any remedy, take into account any relief granted or available for the breach on an application under subsection (1).

(6) Subject to the trust and sections 54 and 55, if designated shares are held on trust, the act or omission of a director of the company is not a ground for a person to seek intervention by the Court in the affairs of the trust.

**58. Power of Court to order disposal-**(1) If it appears to the Court that the retention of the designated shares is no longer compatible with the wishes of the settlor, the Court may, on the application of any interested person, order or authorise a sale or other disposal of the designated shares, and a sale or other disposal so ordered or authorised does not require any consent referred to in section 56(2).

(2) In making an order or authorisation under subsection (1), the Court may impose such, if any, terms and conditions for the sale or other disposal as it thinks fit.

**59. Beneficiaries not entitled-**(1) Despite any rule of equity or practice of the Court and except as provided in subsection (2):

- (a) neither a beneficiary who is solely interested in any designated shares; nor
- (b) all the beneficiaries who together are the persons interested in any designated shares,

shall be entitled, although in existence and ascertained and of full capacity, to call for or direct a transfer of those shares or to terminate or modify the trust relating to the shares, if and so far as that entitlement is, without offending any rule of perpetuity or remoteness, excluded by the trust instrument.

(2) The exclusion of entitlement in subsection (1) has no effect, or does not continue to have effect, after the expiration of 20 years, or such shorter period as may be specified in the trust, from the creation of the trust.

(3) If a person who receives designated shares, or an interest in the designated shares, is a person who, by virtue of the exclusion of entitlement, has no present right to receive the shares or that interest, that person, without affecting section 58(1), holds those shares or that interest on trust to transfer the shares or that interest to the trustee, and the Court must order that person to do so on the application by the trustee or any person defined in section 57(3).

(4) During the exclusion of entitlement, section 45 does not apply to the trust.

**60. Disqualification of trustee as a director** - A trustee of designated shares is disqualified from being, or becoming, a director of the company.

**61. Ascertaining wishes of settlor**-(1) This section applies if it is necessary under this Act for the Court or a trustee to ascertain the wishes of the settlor.

(2) If the settlor is alive, or in existence, the settlor must, if possible and practicable, be consulted as to the settlor's wishes.

(3) If the settlor is dead, or no longer in existence, or it is not possible or practicable to consult the settlor, the settlor's wishes should be taken to be:

- (a) the wishes which the settlor has most recently communicated to the trustee; or
- (b) if no wishes have been communicated, the wishes as the Court, or the trustee in good faith, believes most likely to have been the settlor's wishes from the evidence available for the wishes.

**62. Limitation of trustee's duties**-(1) A trustee of designated shares has no fiduciary responsibility or duty of care for the property of, or the conduct of the affairs of, the company, except when acting, or required to act, on an intervention call.

(2) Without prejudice to the generality of subsection (1), a trustee of designated shares:

- (a) is not required to make any enquiry as to whether any facts exist which would, or may, whether with or

without any other information, form the basis of an intervention call;

- (b) is not obliged to inform any interested person of any fact of which it becomes aware, or which it suspects, concerning the property of the company or the conduct of its affairs; and
- (c) does not incur liability as accessory to a director's breach of duty by reason of any omission on the part of the trustee to take action if the trustee is aware, or suspects, that there has been or will be a breach, or by reason of any act or omission in complying with section 54.

(3) A trust of designated shares may, by the provisions of the trust, exclude or modify any of the provisions of subsections (1) and (2) in relation to those shares.

(4) An exclusion or a modification made under subsection (3) has effect only if it expressly indicates that it is made pursuant to this section.

**63. Combination of a trust with a limited partnership** - If trust property of a Samoan trust is the beneficial entitlement to the interest of a limited partner in a limited partnership, whether governed by the Law or by foreign law:

- (a) the trustee has no duty -
  - (i) to diversify the interest; or
  - (ii) to consider the investments or business of the limited partnership; and
- (b) the powers of the trustee are subservient to those of the general partner of the limited partnership; and
- (c) the trustee is not liable for any loss directly or indirectly caused to the trust property by reason of the management and control of the limited partnership by the general partner of that limited partnership.

## PART 7 SPECIAL TYPES OF TRUST

**64. Protective trust**-(1) A trust may make the interest of the beneficiary liable to termination.

(2) Without limiting subsection (1), a trust may make the interest of a beneficiary in the income or capital of the trust property subject to:

- (a) a restriction on alienation or disposal; or
- (b) a diminution or termination in the event of the beneficiary becoming bankrupt or any of his or her property becoming liable to sequestration for the benefit of his or her creditors.

(3) A trust under which the interest of a beneficiary is subject to restriction, diminution or termination under subsection (2) is a protective trust.

(4) A provision of a trust requiring the interest of a beneficiary in trust property to be held upon a protective trust is to be construed as a requirement that the interest of the beneficiary be subject to any restriction, diminution or termination under subsection (2).

**65. Charitable trust-**(1) A trust is regarded as a trust for charitable purposes under this Act if the trust is made for any one or more of the following purposes and where the fulfilment of any of the purposes is for the benefit of the community or a substantial section of the community having regard to the type and nature of the purpose or purposes:

- (a) the relief or eradication of poverty;
- (b) the advancement of education;
- (c) the promotion of art, science and religion;
- (d) the protection of the environment;
- (e) the advancement of human rights and fundamental freedom; or
- (f) any other purposes which are beneficial to the community.

(2) A purpose may be regarded as charitable whether it is to be carried out in Samoa or another country and whether it is beneficial to the community in Samoa or another country.

(3) If a charitable trust does not indicate a particular charitable purpose or beneficiary or a means by which a particular charitable purpose or beneficiary may be selected, the Court may select 1 or more charitable purposes or beneficiaries pursuant to the settlor's intention to the extent it can be ascertained.

(4) Subject to subsection (5), if a particular charitable purpose becomes unlawful, impracticable, impossible to achieve, contrary

to public policy in Samoa, or obsolete in that, by reason of changed circumstances, it fails to achieve the purpose of the trust:

- (a) the trust does not fail, in whole or in part;
- (b) the trust property does not revert to the settlor or the settlor's successors in interest; and
- (c) the Court may apply *cy-pres* to vary or terminate the trust by directing that the trust property be applied or distributed, in whole or in part, in a manner consistent with the settlor's intentions.

(5) A provision in a charitable trust that would result in distribution of the trust property to a non-charitable beneficiary prevails over the power of the Court under subsection (4) to apply *cy-pres* to vary or terminate the trust only if, when the provision takes effect, the trust property is to revert to the settlor and the settlor is still living.

(6) A charitable trust may be enforced by the settlor of the trust, if still living, maintaining a proceeding to enforce such trust or by the Court.

**66. Purpose trust-**(1) Subject to the provisions of section 22 and despite any law to the contrary, a trust may be created or established by deed under this Act for any particular purpose, whether charitable or not provided that:

- (a) the purpose is possible and sufficiently certain to allow the trust to be carried out; and
- (b) the purpose is not contrary to public policy in Samoa or contrary to the Law.

(2) Without limiting other provisions of this section and provided that the purposes are lawful and not contrary to public policy, the objects of a purpose trust may be:

- (a) persons of any number;
- (b) purposes of any number or kind; or
- (c) both a person or persons and a purpose or purposes.

(3) Despite subsection (6), if the objects of a purpose trust include a person, that person is entitled to enforce the purpose trust, as regard that person and not a purpose.

- (4) Any instrument creating or evidencing a purpose trust may:
  - (a) specify an event or date upon the occurrence of which the trust ceases to be a purpose trust;
  - (b) provide for the disposition of the property of the trust when the trust ceases to be a purpose trust; and

(c) provide that, for so long as the trust is a purpose trust, the trustees do not owe any duty -

(i) to a person entitled to the property when the trust ceases to be a purpose trust; or

(ii) for any purpose for which the property is then to be applied.

(5) The terms of a trust for non-charitable purposes may provide for the addition, variation or removal of a non-charitable purpose of the purpose trust or for the exclusion of a non-charitable purpose from the objects of the purpose trust.

(6) A purpose trust must have an enforcer and section 22 applies to all purpose trusts.

## **PART 8 LIABILITIES AND REMEDIES**

**67. Trustees-**(1) Subject to this Act and the trust, a trustee is liable for a breach of trust committed by the trustee or in which the trustee has concurred.

(2) A trustee who is liable for a breach of a trust is liable for:

(a) the loss or depreciation in value of the trust property resulting from the breach; and

(b) the profit, if any, which would have accrued to the trust property if there had been no breach.

(3) If there are 2 or more breaches of a trust, a trustee must not set-off a gain from 1 breach of trust against the loss resulting from another breach of trust.

(4) A trustee is not liable for a breach of trust committed:

(a) prior to the trustee's appointment, if the breach of trust was committed by another person;

(b) by a co-trustee unless -

(i) the trustee becomes aware or ought to have become aware of the commission of the breach or of the intention of his or her co-trustee to commit a breach of trust; and

(ii) the trustee actively conceals the breach or intention or fails within a reasonable time to take proper steps to protect or restore the trust property or prevent the breach.

(5) If 2 or more trustees are liable for a breach of trust, the trustees are jointly and severally liable.

(6) A trustee who becomes aware of a breach of trust under subsection (4)(b) must take all reasonable steps to have the breach remedied.

**68. Limitation on trustee's liability - exculpation-(1)**

Nothing in a Samoan trust relieves, releases, or exonerates a trustee from liability for breach of trust arising from the trustee's own fraud, wilful misconduct or gross negligence.

(2) A term of a trust relieving a trustee of liability for breach of trust is unenforceable to the extent that it:

- (a) relieves the trustee of liability for breach of trust committed in bad faith or with reckless indifference to the purposes of the trust or the interests of the beneficiaries; or
- (b) was inserted as the result of an abuse by the trustee of a fiduciary or confidential relationship to the settlor.

(3) The Court may relieve a trustee wholly or partly of liability for a breach of trust, whether committed before or after the commencement of this Act, if it appears to the Court that the trustee:

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

(4) If a trustee commits a breach of trust at the instigation or request or with the concurrence of a beneficiary, the Court may, whether or not the beneficiary is a minor or a person under legal disability, impound all or part of the trustee's interest by way of indemnity to the trustee or a person claiming through the trustee.

**69. Beneficiary's consent, release or ratification-(1)**

A beneficiary may, for a liability to him or her for a breach of trust already committed, relieve a trustee of, or indemnify the trustee against, the liability, if the beneficiary:

- (a) has legal capacity;
- (b) has full knowledge of all material facts; and
- (c) has not been improperly induced by the trustee to give the relief or indemnity.

(2) Subject to section 68(1), a trustee is not liable to a beneficiary for breach of trust if the beneficiary:

- (a) consented to the conduct constituting the breach;
- (b) relieved the trustee from liability for the breach under subsection (1); or
- (c) ratified the transaction constituting the breach, unless -
  - (i) the consent, release or ratification by the beneficiary was induced by improper conduct of the trustee; or
  - (ii) at the time of the consent, release or ratification, the beneficiary does not know his or her rights or the material facts of the breach.

**70. Prevention of breach of trust** - In order to prevent a breach of trust, the Court may make any of the following orders:

- (a) to compel the trustee to perform the trustee's duties;
- (b) to restrain the trustee from committing a breach of trust;
- (c) to appoint a special fiduciary to take possession of the trust property and administer the trust;
- (d) to suspend the trustee; or
- (e) to remove the trustee.

**71. Remedies for breach of trust** - In order to remedy a breach of trust that has occurred, the Court may make any of the following orders:

- (a) to compel the trustee to perform the trustee's duties;
- (b) to compel the trustee to redress a breach of trust by paying money, restoring property or other means;
- (c) to order a trustee to account for the breach of trust;
- (d) to appoint a special fiduciary to take possession of the trust property and administer the trust;
- (e) to suspend the trustee;
- (f) to remove the trustee;
- (g) to reduce or deny compensation to the trustee;
- (h) subject to section 86, to invalidate an act of the trustee, impose a lien or constructive trust on trust property, or trace trust property wrongfully disposed of and recover the property or its proceeds;
- (i) to grant any other appropriate relief.

**72. Damages in absence of breach of trust** - Except as expressly provided in the trust:

- (a) a trustee is accountable to the trust for any profit made by the trustee arising from the administration of the trust, even if there is no breach of trust; and
- (b) if there is no breach of trust, a trustee is not liable for a loss or depreciation in the value of trust property or for not having made a profit.

**73. Protector** - Despite section 21(9), the following sections apply to the liability of a protector:

- (a) section 68(1) and (2) applies to a protector as it does to a trustee;
- (b) section 68(3) applies empowering the Court to relieve a protector as it may relieve a trustee;
- (c) section 68(4) applies if a protector commits a breach of any fiduciary duty which the protector may owe to any beneficiary as it does to a trustee who commits a breach of trust;
- (d) section 69(1) applies so that a beneficiary may relieve a protector from breach of any fiduciary duty as it applies to relieving a trustee from breach of trust;
- (e) section 69(2) applies to a protector who commits a breach of any fiduciary duty as it would to a trustee who commits a breach of trust.

**74. Enforcer** - Despite section 22(4), section 73 applies to an enforcer as if references in section 73 to a protector were references to an enforcer.

## **PART 9**

### **VARIATION, REVOCATION, FAILURE, TERMINATION, MIGRATION**

**75. Variation and revocation-**(1) A trust may expressly provide that:

- (a) its provisions are capable of variation; or
- (b) the trust itself or a power exercisable under the trust is revocable either in whole or in part.

(2) If a trust provides that it may be varied, the power to vary does not affect the power of the Court under this Act to vary the trust.

(3) The variation or revocation of a trust or of a power under the trust does not affect anything lawfully done by a trustee for the trust prior to the trustee receiving a notice of the variation or revocation.

(4) Subject to the trust, if a trust is revoked, either in whole or in part, the trustee holds the trust property affected by the revocation for the settlor absolutely or if the settlor is dead, for the settlor's personal representative or estate.

(5) The Court may vary a trust:

- (a) even if unambiguous, to conform with the settlor's intention if it is provided by clear and convincing evidence that both the settlor's intent and the trust were affected by a mistake of fact or law, whether in expression or inducement;
- (b) if, because of circumstances not anticipated by the settlor, modification will further the purpose of the trust; or
- (c) if continuation of the trust on its existing provisions would be impracticable or wasteful or impair the trust's administration.

(6) An application under subsection (5) may be made by the settlor, the trustee, a beneficiary or the guardian or representative of a beneficiary who is a minor, incapacitated, unascertained or unborn or by a protector on behalf of any 1 or more or all of the beneficiaries.

(7) In this section, "settlor" means the particular person who provided the property which is the subject of revocation.

**76. Failure or lapse of interest-**(1) Subject to a Samoan trust and to any order of the Court, the trust property or interest under the Samoan trust is held by the trustee in trust for the settlor absolutely or, if the settlor is dead, for the settlor's personal representative or estate if:

- (a) the interest in question lapses;
- (b) the trust property is vested in a person otherwise than for that person's sole benefit but the trusts upon which that person is to hold the property are not declared or communicated to him or her;

- (c) there is no beneficiary and there is no person who can become a beneficiary under the trust; or
- (d) the trust terminates otherwise than under section 77.

(2) An application to the Court under this section may be made by any of the persons stated in section 75(6).

(3) In this section, “settlor” means the particular person who provided the trust property or the interest under the trust referred to in subsection (1).

**77. Termination** - Without affecting the powers of the Court under this Act, a trust terminates:

- (a) if the trust is revoked or expires pursuant to its provisions;
- (b) if there is no beneficiary or person who can become a beneficiary under the trust or if no purpose of the trust remains to be achieved;
- (c) if the purposes of the trust have become unlawful, or impossible to achieve; or
- (d) subject to section 59, despite the trust, upon consent of all the beneficiaries in existence who have been ascertained and none of whom is a minor or a person under a legal disability.

**78. Migration**-(1) Subject to this Act, a trust established or created under foreign law, may, if it is so authorised by such foreign law, or the trust and its proper law, be enforceable and recognised in Samoa as if it had been created under this Act.

(2) Subject to this Act and the trust and its proper law, a Samoan trust validly created and recognised under this Act may be transferred to and become a trust under foreign law.

(3) A Samoan trust which has been previously transferred to Samoa under subsection (1) may be transferred to and under this section become a trust under foreign law.

## PART 10 FOREIGN TRUSTS

**79. Foreign trusts**-(1) Subject to subsection (2), a foreign trust is governed by, and to be interpreted under, its proper law.

(2) A foreign trust is unenforceable in Samoa if:

- (a) it purports to do anything contrary to the Law;

- (b) it confers or imposes any right or function the exercise or discharge of which would be contrary to the Law;
- (c) the Court declares that it is immoral or contrary to the public policy of Samoa.

**79A. Accounts to be kept** - (1) A Samoan trustee for a foreign trust must keep accounting records and such records should:

- (a) correctly explain all transactions;
- (b) enable the financial position of the foreign trust to be determined with reasonable accuracy at any time;
- (c) allow financial statements to be prepared;
- (d) include underlying documentation, such as invoices, contracts and so forth;
- (e) reflect the following details —
  - (i) all sums of money received and expended and the matters in respect of which the receipt and expenditure takes place;
  - (ii) all sales and purchases and other transactions; and
  - (iii) the assets and liabilities of the foreign trust.

(2) A Samoan trustee for a foreign trust must retain all the accounts and records referred to in subsection (1) for 7 years after the end of the financial year or accounting period to which they relate.

(3) A Samoan trustee for a foreign trust who contravenes or fails to comply with subsection (1) or (2) commits an offence and is liable upon conviction to a fine not exceeding 100 penalty units.

## PART 11 TRUST INFORMATION

**80. Confidentiality and providing information**-(1) Subject to other provisions of this section and section 10 of the Tax Information Exchange Act 2012, the trustee of a Samoan trust:

- (a) must treat all documents and information whatsoever concerning the trust as confidential; and

(b) must not, unless authorised by this section, be required to produce or disclose to any person any documents or information concerning such trust.

(2) A trustee must, on receipt of a request, provide accurate information as to the state and amount of the trust property and the administration of the trust:

(a) to the Court;

(b) to the settlor, the enforcer or the protector of the trust, unless the trustee has reason to believe that such person is making the request under duress; or

(c) if authorised under the trust -

(i) to any beneficiary having a vested interest in the trust; or

(ii) to any beneficiary specified under the trust to be a recipient of information for the beneficiaries; or

(iii) to a charity referred to by name in the trust instrument as a beneficiary under the trust.

(3) Subject to subsection (2), a trustee or other person is not required to disclose to another person not legally entitled to it under subsection (2) any document or information which discloses:

(a) his or her deliberations as to how he or she should exercise or has exercised his or her functions and powers as trustee;

(b) the reasons for any decision made in the exercise of those functions and powers;

(c) any material upon which the decision was or might have been based;

(d) any part of the accounts of the trust; or

(e) any letter of wishes given by the settlor, or any beneficiary, or any other person.

(4) Subject to subsection (5) and despite the trust, the Court may, on application by a person:

(a) declare that, in the particular circumstances of the trust, its provisions do not render the trustee sufficiently or appropriately accountable to the beneficiaries or any of them; and

(b) pursuant to the declaration, extend or restrict the rights of any or all of the beneficiaries to information relating to the trust; or

(c) make any other order as it thinks fit.

(5) A person, as defined under subsection (6), must show to the Court that the information applied for is necessary or expedient:

- (a) for the proper disposal of any matter before the Court;
- (b) for the protection of the interests of any beneficiary; or
- (c) for the proper administration or enforcement of the trust.

(6) In subsection (3), “person”, for an application, means a trustee, protector, enforcer or any beneficiary of the trust or person lawfully acting on his or her behalf and in his or her name.

## PART 12 POWERS OF THE COURT

**81. Application to and powers of the Court-**(1) A trustee may apply to the Court for any direction, opinion, advice or any other order as the Court may make, concerning the manner in which the trustee may or must act in connection with any matter concerning the trust.

(2) The Court may:

(a) make an order concerning—

(i) the execution or the administration of any trust;

(ii) the trustee of any trust, including an order relating to the exercise of any functions, power, discretion or duty of the trustee, the appointment or removal of a trustee for any reason, the remuneration of a trustee, the conduct of the trustee, the keeping and submission of proper accounts, and payments, whether payments into Court or otherwise;

(iii) any trust property, including the making of any order as to the vesting, preservation, application, distribution, surrender or recovery of the trust property;

(iv) a beneficiary or any person having a connection with the trust as the Court may determine; or

(v) an enforcer of a purpose trust, including an order as to the exercise of the enforcer’s functions and powers, the removal of an

- enforcer for any reason, and the appointment, remuneration or conduct of an enforcer;
- (b) make a declaration as to the validity or the enforceability of a trust; or
  - (c) rescind or vary any order or declaration made under this Act, or make any new or further order or declaration.

**82. Payment of cost** - The costs and expenses of and incidental to an application to the Court under this Act are to be paid out of the trust property or borne and paid in any other manner or by any other person as the Court may order.

**83. Nature of a trustee's interest** - Unless the trustee of a trust is also a beneficiary of the trust for the trustee's interest as a beneficiary:

- (a) the interest of a trustee in the trust property is limited to that which is necessary for the proper performance of the trust; and
- (b) the trust property does not form part of the trustee's estate.

**84. Following trust property** - Without prejudice to the personal liability of a trustee, trust property which has been charged or dealt with in breach of trust, or the property into which it has been converted, may be followed and recovered unless:

- (a) it is no longer identifiable; or
- (b) it is in the hands of—
  - (i) a *bona fide* purchaser for value without notice of the breach of trust; or
  - (ii) a person (other than the trustee) who derived title through the *bona fide* purchaser.

**85. Bankruptcy of trustees** - If a trustee becomes bankrupt, the trustee's creditors have no recourse against the trust property unless the trustee himself or herself has a claim against it or a beneficial interest in it.

**86. Protection for persons dealing with trustee**-(1) A *bona fide* purchaser for value without notice of a breach of trust:

- (a) may deal with a trustee of a trust property as if the trustee were the beneficial owner of the trust property; and
- (b) is not affected by the trusts on which the trust property is held.

(2) A person paying or advancing money to a trustee is not concerned to see that:

- (a) the money is wanted;
- (b) no more than is wanted is raised; or
- (c) the transaction or the application of the money is proper.

**87. Limitation and prescription-**(1) There is no period of limitation or prescription to an action brought against a trustee:

- (a) for any fraud to which the trustee was a party or was privy; or
- (b) to recover from the trustee trust property or the proceeds of trust property—
  - (i) held by or vested in the trustee or which is in the trustee's possession or control; or
  - (ii) previously received by the trustee and converted to the trustee's use.

(2) Subject to subsections (1) and (3), the period within which an action founded on breach of trust may be brought against a trustee is:

- (a) three years from the date on which the claimant first has knowledge of the breach; or
- (b) if the claimant was at the time of the breach of trust a minor or a person under legal disability—
  - (i) three years from the date on which his or her guardian first has knowledge of the breach; or
  - (ii) three years from the date on which the claimant ceased to be a minor or a person under legal disability,

whichever first occurs.

(3) Subject to subsection (1), an action founded on breach of trust must not be brought against a trustee after the expiration of six (6) years immediately following the date of the breach.

**88. Constructive trusts** - (1) A person who derived a profit from a breach of trust, or who obtains property in breach of trust, is taken to be a trustee of the profit or property unless the trustee derives or obtains it in good faith without notice of the breach of trust.

(2) A person who becomes a trustee by virtue of subsection (1) must deliver up the profit or property to the person properly entitled to it.

(3) This section does not exclude any other circumstances in which a constructive trust may arise.

### **PART 13 MISCELLANEOUS**

**89. Regulations** - (1) The Head of State, acting on the advice of Cabinet, may make regulations to give effect to or for the purposes of this Act, and in particular to make regulations for matters required to be prescribed under this Act.

(2) Regulations may be made under subsection (1) to regulate short form trusts.

**90. Consequential amendments** - (1) For the Income Tax Act 2012:

(a) in section 66(1) -

(i) at the end of paragraph (f), substitute “full stop” with the “semi colon”; and

(ii) after paragraph (f), insert the following paragraph:

“(g) capital gains exempted under subsection (1)(zb) of Part A of Schedule 2.”; and

(b) in subsection (1) of Part A of Schedule 2 -

(i) at the end of paragraph (za), substitute “full stop” with the “semi colon”; and

(ii) after paragraph (za) insert the following paragraph:

“(zb) the income and capital gains (other than non-exempt income or capital gains prescribed by

regulations made under section 106 of this Act) of the following under the Trusts Act 2014 -

- (i) a trustee of a foreign benefitting trust;
- (ii) subject to subparagraph (iv), a company, which is a foreign company in respect of which the trustee of a foreign benefitting trust is directly or indirectly and beneficially entitled to 95% or more of the issued shares; or
- (iii) a limited partnership, in respect of which the trustee of a foreign benefitting trust is directly or indirectly and beneficially entitled to the 95% or more interest of the limited partner in the limited partnership; or
- (iv) a Samoan incorporated company, 95% or more of the issued shares of which are beneficially owned by the trustee of a trust to which sections 48 to 62 of the Trusts Act 2014 apply.”;

(c) in subsection (2) of Part A of Schedule 2, insert the following definition in its correct alphabetical position:

““foreign benefitting trust” has the same meaning under section 2 of the Trusts Act 2014.”;

(2) In section 6(2) of the Special Purpose International Companies Act 2012, for “trusts registered under the International Trusts Act 1988” substitute “foreign trusts”.

**91. Repeal, transitional and saving-**(1) The following Acts are repealed, subject to subsections (2) and (3):

- (a) the International Trusts Act 1988; and
- (b) the Trustee Act 1975.

(2) At the commencement of this Act:

- (a) any international trust registered under the International Trusts Act 1988 continues for a period of 12 months as if it was a foreign trust under this Act despite being repealed; and
- (b) any existing trust created under the Trustee Act 1975, continues as if created under this Act.

(3) Any existing registered international trust must, within 12 months from the commencement of this Act, comply with the requirements of a trust under this Act.

## **SCHEDULE**

*(section 30)*

### **DUTY OF CARE**

**1. Investment** - The duty of care applies to a trustee:

- (a) when exercising the general power of investment or any other power of investment, however conferred; or
- (b) when carrying out a duty under section 31(6) to (10).

**2. Agents, nominees and custodians**-(1) The duty of care applies to a trustee:

- (a) when entering into arrangements under which a person is authorised under section 32 to exercise functions as an agent;
- (b) when entering into arrangements under which a person is appointed under section 33 to act as a nominee;
- (c) when entering into arrangements under which a person is appointed under section 33 to act as a custodian;
- (d) when entering into arrangements under which, with regard to any other power, however conferred, a person is authorised to exercise functions as an agent or is appointed to act as a nominee or custodian;
- (e) when carrying out his or her duties under section 35 (review of agent, nominee or custodian, etc.).

(2) For subclause (1)(b) or (c), entering into arrangements under which a person is authorised to exercise functions or is appointed to act as a nominee or custodian includes, in particular:

- (a) selecting the person who is to act;
- (b) determining any provisions on which he is to act; and
- (c) if the person is being authorised to exercise asset management functions, the preparation of a policy statement under section 32(13) and (14).

**3. Insurance** - The duty of care applies to a trustee when exercising any power under section 42.

**4. Exclusion of duty of care** - The duty of care does not apply if or in so far as it appears from the trust instrument that the duty is not meant to apply.

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**REVISION NOTES 2015**

This is the official version of this Act as at 31 December 2015.

This Act has been revised by the Legislative Drafting Division in 2014 and 2015 under the authority of the Attorney General given under the *Revision and Publication of Laws Act 2008*.

*By the Tax Information Exchange Amendment Act 2015:*

**Section 80** In subsection (1), after “section” insert “and section 10 of the Tax Information Exchange Act 2012”.



Aumua Ming Leung Wai  
Attorney General of Samoa

*This Act is administered by the  
Samoa International Finance Authority.*

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