

OBJECTS AND REASONS

This Bill seeks to amend the Trustee Ordinance (Cap. 303) (hereinafter referred to as “the principal Act”) for several reasons. By clause 1, the provisions of the proposed Act would come into force on such date or dates as the Governor may, by Proclamation, appoint and different dates may be appointed for the coming into force of different provisions of the proposed Act.

Clause 3 would amend section 16 of the principal Act to enable a sole personal representative or trustee to exercise the power to compromise claims, so that the costs and delays arising from the appointment of a second trustee would not arise. This amendment would only apply to trusts created on or after its coming into force.

Clause 4 would repeal and replace section 18 of the principal Act. The Territory’s laws are currently regarded as deficient in that, unless an express provision to the contrary is included in the trust instrument, those who exercise discretionary powers of appointment are obliged to ensure that substantial amounts of the appointed funds are paid over or transferred to each and every object of the power. In practice, this is seldom the intention of persons who create discretionary powers of appointment. The new section 18 would prevent the exercise of a power of appointment of trust property among two or more objects of the trust from being invalid on the ground that only an illusory share is appointed or left unappointed to devolve upon any one or more of the objects of the power, or on the ground that an object of the power has been excluded from the appointment.

Clause 5 would amend section 58 of the principal Act in order to enhance the jurisdiction of the High Court to vary trusts. This amendment would apply to trusts created before, on or after its coming into force.

Clause 6 would insert into the principal Act a new section 58A which would enable a trust instrument to provide for the appointment of persons to consent to variations to a trust on behalf of persons who are incapable of giving their consent. The new section 58A would apply to trusts created on or after its coming into force.

Clause 7 would amend section 81 of the principal Act to restrict the use of “flee clauses”, by virtue of which the proper law of a trust may be changed from that of one jurisdiction to another.

Clause 8 would amend section 82 of the principal Act to enable the High Court to have jurisdiction in relation to trusts where the Court is the natural forum for the litigation, where the parties submit to the jurisdiction of the Court or where the trust instrument contains a provision referring disputes to the jurisdiction to the Court.

Section 83 of the principal Act makes provision for the determination of the law that applies to a trust or disposition in situation where the law of more than one jurisdiction may apply. The provisions of section 83 are however now considered to be outdated and inadequate. Clause 9 would therefore limit the application of section 83 to trusts created before the coming into force of the new section 83A that would be inserted into the principal Act by clause 10. The new section 83A would introduce a modern set of conflict of laws rules which would apply to trusts and dispositions created on or after the coming into the force of that new section.

Clause 11 would amend section 84 of the principal Act by upgrading the current provisions that apply to purpose trusts. These amendments would, among other things, provide for the appointment of a designated person as a trustee of a purpose trust where no trustee of the trust is a designated person or no designated person is likely in the immediate future to be appointed as a trustee pursuant to the terms of the trust instrument. According to section 84(1), a designated person is a legal practitioner practising in the Territory, an accountant practising in the Territory who qualifies as an auditor for the purposes of the Banks and Trust Companies Act, 1990 (No. 9 of 1990), a licensee under the Banks and Trust Companies Act, 1990 or a person designated by the Minister of Finance. The amendments to section 84 would also enable the High Court to appoint a designate person as a trustee of a purpose trust where the trust does not have at least one trustee who is a designated person, and to vary any of the purposes of the trust or the powers of the trustees of the trust. The trustee of a purpose trust who is a designated person would be required to keep in the Territory a documentary record of the terms of the trust, the identity of the settlors, trustees and enforcer, the trust property and all distributions or applications thereof and the accounts of the trust. Section 84 as amended would only apply to purpose trusts created before the coming into force of the new section 84A that would be inserted by clause 12. The new section 84A would introduce a more comprehensive and robust regime for all purpose trusts which are created on or after the coming into force of that section.

Clause 13 would repeal and replace section 89 of the principal Act so as to provide that an express power to amend in a trust instrument shall be construed as a power to vary all or any of its terms, including terms implied by law.

Clause 14 would repeal and replace section 92 of the principal Act in order (a) to correct the errors in the current provision; (b) to increase trust duty from fifty dollars to one hundred dollars and the annual penalty for failure to pay trust duty from one hundred dollars to two hundred dollars; (c) to make it clear that trust duty must be paid within three months of the execution of the trust instrument; (d) to clarify which documents are subject to trust duty; (e) to exempt trusts that are exclusively charitable from trust duty; and (f) to permit the revenue stamp affixed to a trust instrument as payment of trust duty to be cancelled by a wide range of authorised persons.

Clause 16 would insert into the principal Act a new Part X and a new Part XI. The new Part X would make provision in respect of transactions between trustees and third parties. Trust property acquired by a third party by virtue of a transaction that was properly entered into by a trustee would be discharged from the trust. A transaction would be deemed to have been properly entered into by a trustee if the third party made reasonable enquiry that the trustee had the express power to enter into such transaction and complied with any express requirements contained in the trust instrument. The new Part X would also permit a trust instrument to contain by reference certain provisions concerning the liability of trustees, the power of trustees to vary the trust to protect the interests of creditors and the power of trustees to create charges over the trust property. Where the optional provisions concerning the liability of trustees do not apply to the trust, certain provisions limiting the trustee's personal contractual liability would apply. Only if a trustee is personally at fault would the trustee be personally liable for torts committed in the course of administering the trust, including liability for the violation of any law relating to the protection of the environment. Special provision would also be made in respect of the subrogation of a third party to a trustee's right of indemnity against the trust fund and against distributed property or its traceable product. The new Part X would only apply to trusts created on or after the coming into force of that Part.

The new Part XI would introduce certain reforms in relation to charities. These reforms follow the provisions of the English Charities Act 1993. Provision would be made to extend the cy-pres jurisdiction of the High Court. Thus, where the purposes of a charitable trust fail, the Court would have a fairly wide jurisdiction to make a scheme for the application of the trust property for other charitable purposes as near as possible to those intended by the donor. Where it appears to the Court that any action in the administration of a charity, such as a transaction, compromise or application of trust property, is expedient in the interests of the charity, the Court would be empowered to authorise that action whether or not the charity trustees otherwise have the power to do so. Provision would also be made to enable certain small charities to spend their capital. the new Part XI would apply to trusts created before, on or after the coming into force of that Part.

Chief Minister.