

TRUSTEE COMPANIES ACT 1981-82
with amendments up to 1995-96

Compiled By: Southpac Trust Limited (November 1996)
P. O. Box 11, Avarua, Rarotonga, Cook Islands.
Telephone: (682) 20-514, Fax: (682) 20-667

© Copyright: Southpac Trust Limited 1996.

ANALYSIS

Title	8. Revocation of registration
	9. Continuation of business where registration revoked
	10. Transfer or increase of shares
	10A. Share capital
<u>PART I</u> <u>PRELIMINARY AND</u> <u>REGISTRATION OF</u> <u>TRUSTEE COMPANIES</u>	
1. Short Title	
2. Interpretation	
3. Application of this Act	
4. Registration on acting as a trustee company	
4A. Acting through subsidiary company	
5. Application for provisional registration as a trustee company	
5A. [Repealed]	
5B. Applicant to satisfy criteria	
5C. Registration to be provisional	
5D. Commission may revoke provisional registration	
5E. Expiry of provisional registration	
6. Registration fee	
7. Publication in the gazette	
	<u>PART II</u> <u>POWERS OF</u> <u>TRUSTEE COMPANIES</u>
	11. Trustee company's power under the International Companies Act, 1982
	12. Trustee company's power to act as executor and obtain probate
	13. Trustee company's power to act as administrator
	14. Trustee company's power to act as trustee, receiver etc.
	15. Additional powers of a trustee company
	16. Trustee company's power to act as sole trustee

- | | | | |
|------|--|-----|--|
| 17. | Trustee company's power to act as joint | | trustee with another |
| 17A. | Trustee company's indemnity | 35. | Assets may be applied in discharge of expenses in administration |
| 18. | Delegation to a trustee company | 36. | Charge for remuneration |
| 19. | Delegation of functions by a trustee company | 37. | Common trust funds |
| 20. | Removal from office | 38. | Valuation |
| 21. | Restrictions on a trustee company's activities | 39. | Land trusts |
| 21A. | Protection of trustee company | 40. | Statutory purpose trust |
| 21B. | Liability of officers of corporate trustees | 41. | Bond not required of a trustee company |
| 21C. | Rights of third parties | 42. | Shares and stock |
| 22. | Taxation | 43. | Insurance |
| 23. | Right to decline | 44. | Application of other Acts to trustee companies |
| 24. | Affidavit of officer | 45. | Secrecy |
| 25. | A trustee company may act under power of attorney by managing director | 46. | Regulations |
| 26. | Power to declare trusts | 47. | Dealings by a trustee company with itself or a related company |
| 27. | Audit | | Schedule |
| 28. | Returns | | |
| 29. | Examination of books and accounts of a trustee company | | |
| 30. | Money paid to a trustee company to be held in trust | | |
| 31. | A trust company may obtain advice | | |
| 32. | Commission fees, charges and expenses levied by a trustee company | | |
| 33. | Management fees | | |
| 34. | Director's fees | | |

TRUSTEE COMPANIES ACT 1981-82
(A Consolidation up to November 1996)

An Act to provide for the registration of companies as trustee companies
in the Cook Islands and to prescribe their powers and duties
and for purposes consequent thereon and incidental thereto.

BE IT ENACTED by the Parliament of the Cook Islands in Session assembled, and by the authority of the same, as follows:

PART I

**PRELIMINARY AND REGISTRATION
OF TRUSTEE COMPANIES**

1. **Short Title** - This Act may be cited as the Trustee Companies Act 1981-82.
2. **Interpretation** - In this Act, unless the context otherwise requires -
"carrying on business" means carrying on any economic activity pursuant to the objects of the company and without limiting the generality of the foregoing includes -
 - (a) establishing or using a share transfer office or share registration office;
 - (b) administering, managing or otherwise dealing with property as an agent, legal personal representative or trustee, whether by servant or agent or otherwise;
 - (c) maintaining an agent for the purpose of soliciting or procuring business whether or not the agent is continuously resident in the Cook Islands;
 - (d) maintaining an office, agency or branch whether or not that office, agency or branch is also used for any purpose by another company;
 - (e) the provision of -
 - (i) management and accounting services to; and
 - (ii) directors, secretaries and registered office for,

international companies incorporated under the International Companies Act 1982 and to foreign companies registered under that Act;

- (f) incorporating or registering companies under the International Companies Act 1982 and generally acting as a lodging agent for any document required to be lodged by a company or person under that Act; and
- (g) doing all things capable of being done by a trustee company under the International Companies Act 1982;

"Commission" means the Financial Supervisory Commission established by the Financial Supervisory Commission Act 2003;

"company" means a company limited by its shares and -

- (a) incorporated under the Companies Act 1970-71 or registered as an overseas company under that Act;
- (b) incorporated under the International Companies Act 1981-82 or registered as a foreign company under that Act;

"Court" means the High Court of the Cook Islands;

"estate" means any property, whether real or personal, which is committed to the administration or management of a trustee company as executor, administrator, trustee, receiver, committee, guardian or agent;

"judge" means any Judge of the High Court;

"Minister" means the Minister of Finance;

"provisionally registered" means provisionally registered as a trustee company pursuant to section 5C and **"provisional registration"** shall have a corresponding meaning;

"registered" means registered as a trustee company pursuant to section 5E and **"registration"** shall have a corresponding meaning;

"trustee company" means a trustee company registered as a trustee company under this Act and, for the purposes of sections 11 to 26 (both inclusive), 29 to 42 (both inclusive), 44, 45 and 47, includes a wholly owned subsidiary of a trustee company nominated pursuant to section 4A of this Act.

“**trust instrument**” or “**instrument**” means the deed, will, codicil, settlement or instrument establishing or creating the trust together with any variation or amendment of such deed settlement or instrument;

(2) Whenever in this Act any person holding or occupying a particular office or position is mentioned or referred to, such mention or reference shall, unless the contrary intention appears, include all persons who shall at any time thereafter occupy for the time being the said office or position.

3. Application of this Act - The provisional registration of a company as a trustee company under section 5C or the registration of a company under section 5E as a trustee company shall not relieve that company from compliance with the provisions of the Companies Act 1970-71.

4. Restriction on acting as a trustee company - No company shall carry on business in the Cook Islands as a trustee company unless that company is either provisionally registered under section 5C or registered under section 5E to do so under this Act.

4A. Acting through subsidiary company - (1) Notwithstanding section 4 any company duly registered under this Act may for the purpose of or in connection with the undertaking of its own business as a trustee company nominate any wholly owned subsidiary company of that company to act as a trustee or nominee.

(2) Any wholly owned subsidiary company nominated in accordance with subsection (1) shall not be required to be registered under this Act to act as a trustee or nominee so long as it remains wholly managed, controlled and owned by a company duly registered under this Act.

(3) When pursuant to subsection (1) any wholly owned subsidiary company acts as a trustee or nominee, the parent company and the subsidiary company shall be jointly and severally liable and responsible for the performance, compliance and observance by the subsidiary company of all the subsidiary's duties and obligations, which duties and obligations shall be deemed to include such statutory duties and obligations as are imposed upon trustee companies registered under this Act.

5. Application for provisional registration as a trustee company - (1) A company that is incorporated pursuant to the provisions of the Companies Act 1970-71 may make application to the Commission for provisional registration to carry on business as a trustee company and upon application shall pay to the Commission such fee and in such manner as may be prescribed by regulation.

(2) There may be prescribed from time to time such forms and declarations

as may be required for the purposes of this section and the Commission may, in addition to the information in such forms and declarations require the applicant to provide such further or other information as the Commission in its discretion may require.

(3) There shall be provided to the Commission all agreements affecting the management, shareholding, profit sharing or control of the applicant, and notwithstanding that such agreements may not be in existence at the date of application to the Commission, all such agreements shall be provided to the Commission upon their coming into existence during the period for which the applicant may be provisionally registered.

5B. Applicant to satisfy criteria - (1) No application shall be granted by the Commission unless the Commission, is satisfied that the applicant complies with those matters set out in the following subsections.

(2) Where 75 per cent or more of the legal and beneficial ownership of the share capital of the applicant is vested in Cook Islanders or permanent residents, those persons in whom the total share capital is vested, and the officers of the applicant, shall possess the required professional qualifications, expertise, competence, and integrity to enable the applicant to carry on business in the Cook Islands as a trustee company.

(3) Where more than 25 per cent of the legal or beneficial ownership of the share capital of the applicant is vested in persons other than Cook Islanders or permanent residents, those persons in whom the total share capital is vested, the officers of the applicant, and the applicant (as the case may be), shall satisfy the following -

- (a) each person in whom share capital is vested (whether legal or equitable) and every officer shall have had substantial previous experience in the nature of carrying on business as defined in section 2;
- (b) each shareholder and officer shall be of good character and standing;
- (c) the applicant shall be able to commence carrying on business as a trustee company within 3 months of provisional registration under section 5C;
- (d) the applicant shall disclose particulars to the Commission of the nature of the business to be transacted by the applicant, the volume of such business, and the applicant's proposal to expand such business to markets in geographical areas other than those adequately served by existing trustee companies;

- (e) the administration and management of the applicant's business shall occur within the Cook Islands;
 - (f) the persons to be employed by the applicant shall be of such number and have such professional qualifications, competence, and experience as are necessary for the applicant to carry on business as a trustee company;
 - (g) the business of the applicant shall not be detrimental to the interests of the Cook Islands;
 - (h) the applicant shall have sufficient financial means as will enable the applicant to carry on business as a trustee company;
- (4) For the purposes of this section -
- (a) “**Cook Islander**”, means a person belonging to that part of the Polynesian race indigenous to the Cook Islands and includes a person descended from a Cook Islander.
 - (b) “**permanent resident**”, means a person who has been granted a certificate conferring on him the status of a permanent resident pursuant to the Entry Residence and Departure Act 1971-72.

5C. Registration to be provisional - (1) Every application pursuant to section 5 for provisional registration of a company as a trustee company shall, if granted, be granted provisionally for a period of 2 years from the date of provisional registration.

(2) The Commission may grant provisional registration upon such reasonable terms and conditions (other than the payment of share capital) as it thinks fit.

(3) No company shall be entitled as of right to be provisionally registered and the Commission may grant or reject any application.

5D. Commission may revoke provisional registration - (1) The Commission may at any time upon the receipt of any complaint or on its own motion revoke the provisional registration of a trustee company where the Commission is of the opinion that the company -

- (a) has contravened or failed to comply with any condition or term of its provisional registration; or
- (b) is in breach of any of the provisions of this Act; or

- (c) has contravened any other Act which imposes duties or obligations upon it; or
- (d) has, or any of its officers have in the course of their duties, committed a criminal offence;
- (e) has failed to satisfy or continue to satisfy any of the matters set out in subsection (3) of section 5B; or
- (f) has failed to carry on business as a trustee company in accordance with information supplied by the company or its officers to the Commission; or
- (g) has failed to disclose such information as may be required under this Act.

(2) The Commission shall not revoke the provisional registration of a trustee company except on the grounds referred to in paragraphs (a) to (g) of subsection (1), and shall where provisional registration is revoked notify the trustee company of the reasons therefor.

(3) Where a company that is provisionally registered is dissatisfied with the decision of the Commission that company may make application to the High Court to vary or annul that decision, and upon such application the High Court may confirm vary or annul the decision of the Commission.

(4) Where pursuant to subsection (1) the Commission revokes the provisional registration of a trustee company the company shall, subject to section 9, cease to carry on business as a trustee company.

5E. Expiry of provisional registration - (1) If the Commission has not already revoked the provisional registration of a trustee company pursuant to section 5D, that company may upon the expiry of 2 years from the date of its provisional registration, make application to the Commission, to be registered as a trustee company.

(2) The Commission shall, upon receipt of an application pursuant to subsection (1), register that company as a trustee company.

6. Registration fee - Every company that is provisionally registered or registered by the Commission shall pay to the Commission such fee in respect of each year of provisional registration or registration as may be prescribed by regulation.

7. Publication in the Gazette - The Registrar shall cause to be published

in the Cook Islands Gazette the name of any company provisionally registered or registered as a trustee company pursuant to this Act.

8. Revocation of registration - (1) If the Commission is of the opinion that a trustee company registered pursuant to section 5E -

- (a) is in breach of any of the provisions of this Act or any regulations made pursuant to this Act; or
- (b) has contravened any other Act or regulations which imposes duties or obligations upon it; or
- (c) has committed a criminal offence,
- (d) has failed to conduct itself in a manner consistent with standards of conduct agreed or maintained from time to time by trustee companies in the Cook Islands in relation to the exercise of any powers, duties or discretions bestowed upon it by this Act or any other Act, or by regulations made pursuant to this Act or any other Act.

and the Commission considers that, having regard to the nature of the contravention, failure, or offence it is undesirable that the company should continue to be registered, it shall notify the company of its opinion and of the reasons therefor and shall require the company to make representations within a specified period being not less than 28 days, as to why the company should continue to be so registered.

(2) On receipt of any representations made under subsection (1) and after due consideration of those representations or, on expiry of the prescribed period if no such representations are made, the Commission shall decide whether -

- (a) to revoke the registration of the trustee company; or
- (b) to take no further action; or
- (c) to issue a rebuke to the trustee company.

(3) Where the Commission decides to revoke the registration of a trustee company under subsection (2)(a) then -

- (a) the Commission shall inform the trustee company of its decision and of the reasons therefor; and
- (b) the trustee company, not later than 31 days after being informed of the Commission's decision, may appeal to the Court which may confirm, vary or reverse the decision of the Commission.

(4) Where the Court has confirmed a decision to revoke the registration of a trustee company under subsection (3)(b) or where a trustee company has been informed of the Commission's decision to revoke its registration and has not appealed within the time prescribed in that subsection, the Commission shall notify that cancellation in the Cook Islands Gazette, and the revocation, subject to section 9, shall take effect from the date specified in that notice.

9. Continuation of business where registration revoked - (1) The Commission in its discretion may fix a date, being a date not less than 3 months from the date of its decision to revoke the provisional registration or registration of a company as a trustee company, for the purpose of enabling the company upon the revocation of such provisional registration or registration to wind up its affairs, and any such date shall be notified to the company and be published in the Gazette.

(2) Upon receipt of any notice of revocation, a company shall not carry on business as a trustee company except insofar as is necessary for the company to wind up its affairs within the period so specified in the notice.

10. Transfer or increase of shares - (1) Any -

- (a) transfer of shares, (whether legal or equitable) in a trustee company, whether provisionally registered or registered;
- (b) increase in share capital of a trustee company, whether provisionally registered or registered, subscribed to -
 - (i) by a person other than an existing shareholder (whether in law or equity) either in whole or in part; or
 - (ii) by existing shareholders other than in proportion to and upon the same terms, conditions and rights as their existing shareholding,

shall not be valid or of any effect unless upon application to the Commission the Commission's approval is first obtained.

(2) Every application made pursuant to subsection (1) shall be referred by the Commission to the Advisory Committee for its recommendation.

(3) The Commission in considering whether its approval should be granted and the Advisory Committee in making recommendations to the Commission, -

- (a) in the case of a legal and beneficial transferee or a legal and beneficial subscriber who is a Cook Islander or permanent resident, shall ensure

that the provisions of section 5B(2) are satisfied;

- (b) in the case of a legal or beneficial transferee or a legal or beneficial subscriber who is not a Cook Islander or permanent resident, shall ensure that the provisions of section 5B(3) insofar as they may be applicable are satisfied.

(4) The Commission may approve or reject any application and if approved, may impose such terms and conditions upon the transferee or subscriber (as the case may be) as to the performance of the transferee or subscriber in the carrying on of business as the Commission may in its discretion determine; provided that approval by the Commission pursuant to this subsection shall not be unreasonably withheld in the case of a transferee or subscriber who satisfies the relevant provisions of section 5B(2) or section 5B(3) as the case may be.

(5) For the purposes of subsection (1), any -

- (a) issue of shares or other securities; or
- (b) sale transfer or other disposition of shares; or
- (c) change in the Articles of Association or governing rules; or
- (d) matter or thing,

having the effect of altering the effective ownership or control of any company which has any direct or indirect legal or beneficial interest in a trustee company whether provisionally registered or registered) shall be deemed to be a transfer of shares in that trustee company.

(6) For the purpose of this section -

- (a) “**Cook Islander**” means a person belonging to that part of the Polynesian race indigenous to the Cook Islands and includes a person descended from a Cook Islander;
- (b) “**permanent resident**” means a person who has been granted a certificate conferring on him the status of a permanent resident pursuant to the Entry Resident and Departure Act 1971-72.

10A. Share capital - Every company making application pursuant to section 5 to be provisionally registered as a trustee company shall have a share capital of not less than \$250,000.

PART II

POWERS OF TRUSTEE COMPANIES

11. Trustee Company's power under the International Companies Act, 1981-82 - A trustee company shall have the power to do all things capable of being done by a trustee company under the International Companies Act 1981-82.

12. Trustee Company's power to act as executor and obtain probate - Where any trustee company is appointed either alone or jointly with any other person as executor in the last will or in a codicil thereto of any testator (whether the will or any codicil thereto was made before or after the commencement of this Act) the trustee company may act as executor and may apply in the Cook Islands or elsewhere for probate of such will and any codicil thereto, and may perform and discharge all the acts and duties of an executor as fully and effectively as any other executor.

13. Trustee company's power to act as administrator - (1) In any case in the Cook Islands or elsewhere in which a person may apply for a grant of letters of administration of the estate of a deceased person (whether with or without the will annexed), that person may -

- (a) join with a trustee company in an application for a grant of letters of administration of the estate to himself and the trustee company jointly; or
- (b) instead of himself applying, authorise a trustee company to apply for a grant of letters of administration of the estate.

(2) Where administration of any estate, with or without the will annexed, is granted to a trustee company either alone or jointly with any other person the company may do and perform all acts and duties which belong to the office of administrator or joint administrator, as the case may be, notwithstanding its incorporation.

14. Trustee company's power to act as trustee, receiver, etc - Where the Court or any judge or other person has power to appoint any person as -

- (a) trustee; or
- (b) receiver; or
- (c) committee of the estate of a mentally ill person or manager of the estate of an incapable person; or

- (d) guardian of the estate of a minor,

a trustee company may be so appointed.

15. Additional powers of a trustee company - A trustee company may be appointed as an agent or as trustee under any settlement or other instrument creating a trust, or to perform any trust or duty which it is authorised by this Act or by its charter to undertake, and may be so appointed whether the settlement or instrument creating the trust or imposing the duty was made or came into operation before or after the commencement of this Act and either as an original or a new trustee or as an additional trustee and may perform and discharge all the acts and duties of a trustee as fully and effectively as any other trustee.

16. Trustee company's power to act as sole trustee - (1) Subject to subsection (3) of this section, a trustee company may be appointed or continue to act as sole trustee notwithstanding that it is provided by the terms of the instrument creating the trust or of any power or otherwise that there shall be more than one trustee to perform the trust.

(2) For the purposes of subsection (1) of this section, where a trustee company is appointed or continues to act as sole trustee in the circumstances referred to in that subsection, the trustee company shall be deemed to be equivalent to 2 trustees.

(3) A trustee company shall not be appointed or be entitled to act as sole trustee in any case in which the instrument creating the trust or power expressly -

- (a) forbids the appointment of a trustee company; or
- (b) provides that there shall be another trustee in addition to a trustee company; or
- (c) provides that a trustee company shall not be appointed to act as sole trustee.

17. Trustee company's power to act as trustee with another - (1) A trustee company may act as trustee, executor or agent with another trustee company or person if the instrument under which it acts so provides or if authorised or required to do so by law or if the Court so orders.

(2) A trustee company shall not be liable for breach of trust or loss resulting from any act or omission of a prior or co-trustee, executor or agent with whom it is acting, unless the company has itself actively participated in, or assented to, such breach of trust knowing it to be a breach of trust.

(3) Where a trustee company has power to exercise its discretion subject to a prior veto or consent power held by another person, then the trust instrument may provide that the trustee company shall not be liable for any breach of trust or consequence arising from the exercise of the trustee company's discretion in accordance with that power of consent or veto.

(4) Subject to the terms of the trust instrument and to subsection (2), a trustee company which dissents or does not participate in a decision made by the majority of trustees shall not be liable for the acts of the majority of the trustees pursuant to such decision.

17A. Trustee company's indemnity - (1) A beneficiary may relieve a trustee company from liability to him for a breach of trust or indemnify a trustee company against any liability it may incur for a breach of trust.

(2) Sub-section (1) shall not apply if the beneficiary -

- (a) subject to Section 21 of the International Trusts Act 1984, is a minor or a person under legal disability; or
- (b) does not have full knowledge of all material facts; or
- (c) is improperly induced by the trustee company to act under sub-section (1).

18. Delegation of a trustee company - It shall be lawful for any executor or administrator, trustee or agent to delegate by deed or writing to a trustee company either alone or jointly with any other corporation or person, as his attorney all such trusts and powers as may be lawfully delegated by him. All acts done by the trustee company as such delegate shall, as against any person dealing with the trustee company without notice of the revocation of such authority by such executor, administrator, trustee or agent, be valid and effectual notwithstanding such revocation.

19. Delegation of functions by a trustee company - (1) A trustee company may from time to time by resolution of its Commission of directors delegate to any director or to a secretary of the company either generally or in any particular case or class of cases such of the powers, authorities, duties and functions of the company as are specified in the resolution.

(2) A director or secretary of the company, when acting within the scope of any such delegation to him, shall be deemed to be the company.

(3) The Commission of directors may by resolution revoke or vary any such delegation.

(4) In relation to any particular matters or class of matters, a trustee company may by writing delegate any of its powers or functions, except this power of delegation, to any officer or employee of the company, so that the delegated powers or functions may be exercised by the delegate with respect to the powers or functions or class of matters specified in the instrument of delegation.

(5) Every such delegation shall be revocable in writing at will, and no delegation shall prevent the exercise of any power or function by the trustee company.

PART III

MISCELLANEOUS

20. Removal from office - Where a trustee company has been appointed executor, administrator, trustee, agent or attorney, whether before or after the commencement of this Act, it shall be subject in all respects to the same control and to removal or restraint from acting and generally to the jurisdiction of the Court, in the same manner as any other executor, administrator, trustee, agent or attorney.

21. Restrictions on a trustee company's activities - A trustee company shall not carry on any business other than is permitted by its Articles or Memorandum of Association, nor do any act contrary to its Articles or Memorandum of Association.

21A. Protection of trustee company - (1) Where an international trust has been deregistered under the International Trusts Act then -

- (a) notwithstanding the terms of the trust instrument, or that there would be no remaining trustee, a trustee company may resign immediately by giving notice to the Registrar of International Trusts and any one of the remaining trustees (if any), the settlor or any beneficiary, and upon resignation that trustee company shall have no further liability in respect of that trust for any acts or omissions relating to that trust from the date notice of resignation is delivered, posted or sent by facsimile or other electronic communication to the last known address of the recipient; and
- (b) the provisions of the International Trusts Act 1984 shall continue to apply in respect of that trust insofar as is required to retain the benefit of any rights or protections afforded to a trustee company, or its officers or employees, by that Act.

(2). Where an application has been made in respect of any entity containing

statutory information which, in the reasonable opinion of the trustee company to which the information was given, was known to the informant at the time of the application to be materially inaccurate or untrue, the trustee company shall, notwithstanding any enactment or rule of law to the contrary, resign from all offices held in connection with that entity, including as trustee, donor, holder, or power of appointment, protector, address for service, registered agent, director or secretary as the case may be, by giving 42 days written notice to the applicant, setting out the reasons for the resignation, and, unless otherwise ordered by the court on application by the applicant, upon expiry of that notice period, or such further period as the court may allow, that resignation shall be effective and the trustee company shall notify the Registrar of its resignation, and in these circumstances, subject to any order of the Court, no other trustee company, international company or registered foreign company may be appointed to hold any of the aforesaid offices.

(3) For the purposes of this section -

“**applicant**” means the person whom the trustee company considers to be the person primarily interested in the entity, or whom the trustee company has customarily been instructed by in relation to that entity, or in the case of an international trust, a protector, beneficiary or settlor (or any one of them) of that trust, or in the case of an international company any one of the directors of that international company;

“**entity**” means an international company registered under the International Companies Act, an international partnership registered under the International Partnership Act, a foreign company registered under the International Companies Act, an offshore bank licenced under the Offshore Banking Act, or an offshore insurance company licenced under the Offshore Insurance Act.

“**application**” means an application, including any documentation or correspondence supporting such application, by any person relating to the incorporation, establishment or registration of an entity;

“**statutory information**” means information relating to an application which is required by any statute or regulation to be provided as part of or incidental to that application.

(4) Notwithstanding any other rule of law or enactment of the contrary, any rights or indemnity, security, lien or contribution that a trustee company had in respect of an entity shall be unaffected by any resignation of that trustee company pursuant to subsection (2).

21B. Liability of officers of corporate trustees - Except where the trust

instrument expressly provides otherwise, an officer or employee of a trustee company shall not, in the performance of any obligation, duty, service or other activity for and on behalf of that trust, incur any tortious or any contractual liability or liability for any breach of trust or other equitable obligation in respect of that trust other than where the officer or employee of the trustee company acted dishonestly.

21C. Rights of third parties - (1) Except where expressly excluded by written agreement between a trustee company and a third party, this section shall apply to any action or proceeding commenced in the Cook Islands or which is determined in accordance with the law of the Cook Islands, including any action or proceeding to recognise or enforce a foreign judgement, in which a third party seeks any relief or remedy against a trustee company.

(2) In any action or proceeding where the cause of action is based in contract, the liability of a trustee company shall be limited to that trustee company's indemnity if -

- (a) the trustee company is described as a trustee in the contract the subject of the action or proceeding; or
- (b) the trustee company informs the third party that it is acting as trustee prior to the third party entering into that contract; or
- (c) that third party knew or ought reasonably to have known that he was dealing with a trustee; or
- (d) that contract was entered into by co-trustees of the trustee company, or in the name of the relevant trust, and the trustee company was not itself a party to that contract,

unless that trustee has acted in breach of trust in entering into that contract, and such action wholly or partly invalidates, or renders unenforceable the trustee company's indemnity, but in such a case the liability of the trustee company shall be limited to the loss caused to that third party by the invalidity or unenforceability of that indemnity.

(3) In any action or proceeding where the cause of action is based other than in contract, for acts or omissions arising in the course of or for the purpose of the management or administration of the relevant trust (whether authorised or empowered by the trust instrument or not), or by virtue of the ownership or control of property of the trust, the liability of that trustee company shall be limited to that trustee company's indemnity.

- (4) For all purposes, where any action or proceeding is commenced by a bona

vide third party against a trustee company in respect of an act, omission, contract or other matter consented to by the protector or the beneficiaries of that trust, or as a result of which a benefit was conferred on the property of the trust (but only to the extent of such benefit), that trustee company's indemnity shall not be wholly or partly lost, invalidated or rendered unenforceable in any way by any breach of trust or other act or omission of the trustee, or any other matter which would, except for this section, wholly or partly render unenforceable or invalidate the trustee company's indemnity.

(5) The resignation or removal of a trustee company as trustee of the relevant trust shall not affect the application of this section to that trustee company.

(6) For the purposes of this section -

(a) "**third party**" means a person other than a person in their capacity as-

- (i) a settlor, trustee, protector or beneficiary of the trust ; or
- (ii) a creditor of, or other person claiming through, a settlor, protector or beneficiary of the trust,

but shall include a co-trustee seeking to enforce a right of contribution or indemnity from a trustee company in respect of any obligations of that co-trustee to a third party;

(b) the term "**trustee company's indemnity**" shall mean that trustee company's right of indemnity against the property of the relevant trust in respect of the relief or remedy claimed by a third party.

(7) Nothing in this section shall affect or limit the liability of a trustee company to beneficiaries for a breach of trust.

22. Taxation - Subject to Section 44 of this Act, a trustee company shall be subject to the general laws of the Cook Islands imposing income tax, turnover tax, stamp duty or other tax, or impost or deductions of any kind whatsoever.

23. Right to decline - A trustee company may decline, either absolutely or conditionally, to accept any trust or to act in any of the capacities specified in its Memorandum or Articles of Association.

24. Affidavit of officer - In all cases in which, if it were a natural person, a trustee company would be obliged or authorised to make any affidavit, declaration or statement, it may do so by any of its officers appointed for the purpose.

25. A trustee company may act under power of attorney by

managing director - It shall be lawful for a trustee company to act, either alone or jointly with any other person, under any power of attorney by which the company is appointed attorney and all the powers conferred, and the duties imposed, upon the company by such power of attorney may be exercised and carried into execution by the managing director, manager or secretary or by such other officer of the company as may from time to time be appointed by the Commission of directors for the purpose or by any two directors of the company; but in all cases the capital, both paid and unpaid, and all other assets of the company shall be liable for the due execution of the powers so conferred upon the company.

26. Powers to declare trusts - A trustee company shall have the power to declare or create trusts of property by an instrument in writing, including trusts of property to be held upon the statutory purpose trusts or upon such trusts as varied in accordance with the provisions of section 40(2) of this Act.

27. Audit - (1) Every trustee company shall, at least once in every year, have its accounts audited by a person registered as an accountant with a professional body of accountants and approved by the Registrar.

(2) Within 6 months of the end of the trustee company's financial year the auditor so appointed shall report in writing to the trustee company as to the result of the audit and shall forthwith supply a copy of that report to the Registrar.

(3) The Registrar shall certify to the Commission that he has received the auditor's report and whether or not that report is satisfactory.

28. Returns - (1) The managing director, manager or secretary of a trustee company, in every year during which the trustee company carries on business, shall make a statutory declaration as to the affairs of the trustee company and in a form prescribed by regulation.

(2) That declaration shall within 7 days after the making thereof be filed with the Registrar.

29. Examination of books and accounts of a trustee company - (1) Any person who -

- (a) can demonstrate to the satisfaction of the Court an interest under any trust which is for the time being under the control or management of a trustee company; and
- (b) objects to an act or decision of the trustee company on the basis that there was some irregularity or impropriety by the trustee company in doing that act or making that decision;

may make application to the Court to have examined such entries in the books and

accounts of the trustee company as relate to that act or decision.

(2) Where the Court receives an application under subsection (1) of this section, which it believes to be bona fide and not frivolous or vexatious, the Court may appoint a person trained in accounting to examine such entries in the books and accounts of the trustee company as related to the act or decisions to which objection is made.

(3) Where it is established by such an examination of the books and accounts of a trustee company that there has been an irregularity or impropriety by the trustee company or by an officer or servant of the trustee company, the Court may make such order as it thinks fit.

30. Money paid to a trustee company to be held in trust - Subject to this Act, any money or other valuable consideration paid or given to a trustee company pursuant to any instrument creating a trust, shall be held by the trustee company, separate from its own moneys and other valuable consideration, in trust for the purposes for which it was paid or given and the trustee company shall account for them separately.

31. A trustee company may obtain advice - (1) A trustee company shall be entitled to obtain and act upon advice from any person permitted to practise as a lawyer in any country the law of which may have to be applied or taken into account in respect of any trust, or from any barrister or solicitor or attorney-at-law and the trustee company shall not be liable for any breach of trust or loss resulting from acting in accordance with such advice.

(2) Notwithstanding that a trustee company is not liable for any breach of trust or loss, it shall hold any money or property recovered, whether by action or otherwise, in respect of any loss upon the same trusts as the trusts upon which the property was held in respect of which that loss was suffered: provided that the company shall be entitled to retain or pay out of moneys recovered, or to raise and retain or pay out of any property recovered, the costs, charges and expenses of and incidental to the recovery.

(3) If a trustee company has available sufficient funds the subject of trusts for beneficiaries who have suffered loss as a result of the company acting on advice of the type referred to in subsection (1) of this section or if sufficient funds for the purpose of bringing or containing a claim or action against the person responsible for giving such advice are made available to the trustee company, the trustee company shall, subject to the following subsections of this section, take all reasonable steps to recover the loss.

(4) For the purposes of the preceding subsection "sufficient funds" means that amount of money which will be sufficient to provide for the payment of the

costs and expenses of the company likely to be expended in attempting to obtain recovery of the loss and all costs and expenses which the company may be ordered to pay in attempting to obtain recover of the loss.

(5) A trustee company is hereby empowered to expend trust moneys in payment for legal costs and expenses on behalf of the beneficiaries who have suffered loss notwithstanding that such trusts do not permit such expenditure.

32. Commission fees, charges and expenses levied by a trustee company - (1) A trustee company shall be entitled -

- (a) where it holds an estate on behalf of any person, to receive out of the estate, in addition to all moneys properly expended by the company and fees payable to it, and chargeable against the estate, a commission to be fixed from time to time by the directors of the trustee company;
- (b) in all other cases to levy fees, charges and expenses in respect of any work performed by the trustee company for or on behalf of any person, but where the fee, charge or expense is prescribed by regulation the trustee company shall charge the prescribed amount. Where no fee, charge or expense is prescribed the directors of the trustee company shall determine the appropriate fee, charge or expense according to the circumstances of each case.

(2) Where the Court is of the opinion that any commission, fee, charge or expense levied in respect to any estate or in respect of any work performed by the company is excessive, the Court may, on the application of any person on whose behalf the work was performed, review that commission, fee, charge or expense, and may, reduce it as it thinks fit.

(3) The commission, fee, charge or expense, which a trustee company is entitled to receive under this section, shall not in any way be affected or diminished by the fact that any other person may be entitled to a commission, fee, charge or expenses in respect of the work performed.

(4) A trustee company shall have the right to share the commission, fee, charge or expense to which it is entitled under this section with any other person.

33. Management fees - (1) A trustee company shall be entitled to receive out of any estate in respect of any service provided by the company in its administration or management of that estate such management fee as is reasonable having regard to the work involved in providing that service.

(2) The company shall be entitled to receive out of any estate in respect of any service of an unusual nature provided by the company in its administration or

management of that estate such management fee as is reasonable having regard to the work involved in providing that service or such fee as has been agreed to by a majority of the persons interested in the estate.

34. Director's Fees - Where an estate has an interest in a company and an officer of the trustee company, in his capacity as such an officer, acts as a director of that company for the purposes connected with the administration or management of the estate -

- (a) the trustee company shall be entitled to receive from the company and to regain any director's fees which would be payable to the officer had he so acted otherwise than in this capacity as such an officer; and
- (b) neither the officer nor the estate shall be entitled to receive the fees which the trustee company is entitled to receive under paragraph (a) of this section.

35. Assets may be applied in discharge of expenses of administration notwithstanding notice - Notwithstanding the receipt of actual notice, a trustee company shall be entitled to apply assets of any estate in discharge of the expenses of administration thereof and in payment of any debts incurred by it in the administration of the estate and in payment or appropriation of any commission due to it and shall not be under liability except to the extent of assets of the estate remaining in its hands from time to time after making such applications, payments or appropriations.

36. Charge for remuneration - A trustee company shall have a first charge upon the assets of any estate administered by it for any commission, fees or remuneration due to it and any disbursements made by it in the administration of the estate.

37. Common trust funds - (1) A trustee company may, if authorised by the Commission to do so, establish and keep in its books one or more funds to be known as common trust funds.

(2) The manner in which common trust funds are to be established, the classes of investment which may be made in respect of such funds and the computation of the interests in such funds, may be prescribed by regulation.

38. Valuation - (1) Where for any purpose a trustee company has to value any shares in companies whether incorporated in the Cook Islands or elsewhere, it may adopt as the value of a share such sum as in the opinion of the trustee company the holder of that share would receive in respect of that share in the event of the company being voluntarily wound up on the date in respect of which the value of the share is to be ascertained and shall record the manner in which the value has been

calculated and that record shall be available for inspection by any settlor, co-executor, co-administrator, co-trustee, beneficiary or such other person as the Court may order.

(2) Any person aggrieved by a valuation made under subsection (1) of this section may apply to the Court within 3 months of the valuation for the Court to review the valuation; and the Court may thereupon, after giving an opportunity to the person aggrieved and the trustee company to be heard, confirm or vary the valuation as it thinks fit and make such order as to costs of the application as it thinks fit and every order of the Court made upon such review shall be final.

39. Land trusts - A trustee company shall not accept any trust of land in the Cook Islands or of any interest in land in the Cook Islands without the prior consent of the Commission.

40. Statutory purpose trust - (1) Where the instrument under which property is held by a trustee company requires such property to be held upon the statutory purpose trust, such property shall, subject to the provisions of subsection (2) of this section, be held upon the trusts set out in the Schedule to this Act and the trustee company shall have the powers in respect thereof which are set out in the Schedule.

(2) The trusts set out in the Schedule of this Act may be varied at the time of creation of the trusts.

41. Bond not required of a trustee company - No bond, recognizance or other security for the proper discharge of duties of a trustee company shall be required to be given by or on behalf of the trustee company.

42. Shares and stock - Where a trust fund administered by a trustee company consists wholly or partly of shares, stock or property in any body or corporation, then, notwithstanding any law or contract to the contrary, the company shall be entitled to be registered as the proprietor of such shares, stock or property and the liability of the company in respect of such shares, stock or property shall not exceed the value of the other assets held by the company upon the same trusts as the shares, stock or property are held at the time when actual notice in writing of the amount of the liability is received by the company.

43. Insurance - (1) A trustee company shall take out such insurance against its liabilities for any breach of trust, for such amount of indemnity as is prescribed by regulation.

(2) Notwithstanding subsection (1) of this section, a trustee company shall not be obliged to insure its liability as required thereby if it transfers to, and maintains in, a Liability Reserve Fund established by it under subsection (3) of this

section such sum of money as is prescribed by regulation. If a lesser amount than the sum prescribed is maintained in the Fund, the amount of the indemnity for which insurance is required by those regulations shall be reduced by the same proportion as the amount maintained in the Fund bears to the sum prescribed.

(3) A trustee company may establish a Liability Reserve Fund, which shall be the property of the company. The assets of the Fund shall be kept apart and accounted for separately from the other assets of the company and shall not form part of the general assets of the company. Subject to the provisions of subsections (5) and (6) of this section, the fund shall not be used by the company for any purpose other than the discharge of any liability to a beneficiary of a trust administered by the company for any breach of trust, and such assets shall not be available to the general creditors of the company or the members of the company, nor shall any judgement be executed against the assets of the fund, except as provided in this section.

(4) The assets of the Liability Reserve Fund shall be available to any beneficiary of a trust in respect of any liability of a trustee company to him for any breach of such trust and a judgement obtained, or a foreign judgement registered in the Cook Islands in respect of any such liability may be executed against those assets.

(5) Where at any time the assets of the Liability Reserve Fund exceed the sum required by regulation to be maintained in the Fund, those assets which are surplus to such requirement may be transferred out of the Fund so as to become part of the general assets of a trustee company and may thereafter be used by the company for any lawful purpose and be available to creditors and members of the company. The Commission may direct the company to transfer out of the Liability Reserve Fund any such surplus assets but such direction shall require a transfer out of the Fund only to the extent that such surplus exceeds the aggregate of amounts which were transferred to the Fund in accordance with the regulations.

(6) A trustee company shall maintain a bank account at a bank approved by the Commission in writing into which the amount standing to the credit of the Liability Reserve Fund shall be paid: provided that the Commission may authorise the investment of the whole or any part of the amount standing to the credit of the Fund in such manner as it may approve and the value of such investments shall, for the purpose of determining whether the provisions of this section are being complied with by the trustee company, by their market value from time to time.

(7) Any income earned from investment of the Liability Reserve Fund shall not accrue to the Fund but shall form part of the general income of the trustee company.

(8) For the purpose of ascertaining the nett profits of a trustee company in

any accounting period the transfers to the credit of the Liability Reserve Fund shall be deemed to be expenditure and transfers of amounts from the Fund to the general assets of the company shall be deemed to be income.

(9) The Commission, by notice in writing may require every trustee company to satisfy the Commission that the company has complied with the regulations made under this section and, if any company fails so to satisfy it, the Commission shall direct that company to comply forthwith. If within 60 days after any such direction has been given the company has failed to comply with the regulations the Commission may apply to the Court for an order appointing a receiver and manager of the company.

(10) A receiver and manager appointed under subsection (9) of this section shall cause the company to comply with the regulations made under this section and shall retire upon having done so.

(11) If a trustee company is persistently in breach of regulations made under this section or the receiver and manager appointed under subsection (9) of this section reports that there is no reasonable prospect that the company will be able to comply with the regulations, the Court may order that the company be wound up.

44. Application of other Acts to trustee companies - (1) The provisions of subsection (2) of section 249 of the International Companies Act 1981-82 shall apply, mutatis mutandis, to a trustee company, as if the trustee company were an international company, where that trustee company is acting for or on behalf of an international company or a foreign company or a foreign company, to the extent of the trustee company's dealings on the international company or foreign company's behalf provided that nothing in this sub-section shall affect the liability for income tax and other taxes in respect of any of the income of a trustee company.

(2) The provisions of subsection (3) of section 249 of the International Companies Act 1981-82 shall apply, mutatis mutandis, to a trustee company, as if the trustee company were an international company or a foreign company and, for the purposes of interpreting that subsection, the trustee company shall be deemed not to be a domestic company.

45. Secrecy - A trustee company and the officers, servants and agents thereof, and every person appointed under section 29(2) of this Act to examine the books and accounts of a trustee company shall not, without leave of the Commission, make any disclosure as to the existence of any particular trust or estate nor the identity of any executor, settlor, appointor, guardian, trustee or beneficiary of any particular trust or estate except as is necessary for the purposes of administering such trust or estate or investing or recovering or getting in the assets thereof or as authorised by this Act.

46. Regulations - The Queen's Representative may from time to time by Order in Executive Council make such regulations as may be deemed necessary or expedient for the purpose of giving full effect to the provisions of this Act and for the due administration thereof.

47. Dealings by a trustee company with itself or a related company -

(1) For the purposes of this section a company shall be deemed to be related to another company if it would be deemed to be related to that other company under section 4 of the International Companies Act 1981-82.

(2) A trustee company shall not, by reason of its fiduciary position, whether pursuant to this Act or otherwise, be in any way precluded from -

- (a) making contracts;
- (b) entering into transactions in the ordinary course of business; or
- (c) undertaking any insurance, financial or agency services, including investing and borrowing funds,

with itself or a related company.

(3) Subject to subsection (4), a trustee company shall not be accountable to any estate or trust for any profit arising from contracts or transactions with or services provided by, itself or a related company.

(4) This section shall not be deemed to empower the trustee company to do anything in addition to what it could otherwise do if the contract, transaction or service had been with any person or company other than itself or a related company.

SCHEDULE

STATUTORY PURPOSE TRUSTS

For the purposes of this Schedule:

"the transferor" means the person transferring the property to the trustee or making the disposition thereof in favour of the trustee;

"the nominee" means such other person as may be nominated, from time to time, by the transferor.

Where property is held upon the statutory purpose trust -

(1) that property and any income or accretions thereto shall be held upon trust to be applied for such purposes as the transferor or nominee, from time to time, may direct;

(2) the trustee may invest the trust property by lending the same to any government statutory body of the Cook Islands upon such terms as to interest and to date of repayment as it sees fit or by investing the same in any other investment for the time being declared by any Act or regulations made thereunder to be trustee investment or by investing the same in accordance with the directions of the transferor or the nominee;

(3) the trust of the property, unless the transferor otherwise directs, shall cease and determine upon, and the property then comprising the same shall be paid in accordance with, the direction of the transferor or the nominee named by the transferor for the purpose; and

(4) any directions given by the transferor or the nominee may be given to take effect immediately or, at a future date or upon a future event and may be made by or under a deed delivered to the trustee or by or under a will admitted to probate in the Cook Islands or in respect of which letters of administration have been granted in the Cook Islands.

This Act is Administered by the Financial Supervisory Commission

**SOUTHPAC
TRUST
LIMITED**

**TRUSTEE
COMPANIES
ACT**

1981-82

**with
Amendments**

**1987, 1989
and 1995/96**