



## ANALYSIS

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1999, No. 3

An Act to amend the International Trusts Act 1984 and to modify the law relating to international trusts

(3 March 1999)

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

1. Short Title – This Act may be cited as the International Trusts Amendment Act 1999 and shall be read together with and deemed part of the International Trusts Act 1984 (hereinafter referred to as "the principal Act").

2. Interpretation – (1) Section 2(1) of the principal Act is amended by,  
 (a) inserting immediately before the definition of "Court", the following new definition -

"Commissioner" means the Commissioner for Offshore Financial Services appointed pursuant to the Offshore Financial Services Act 1998;"

(b) deleting from the definition of "international trust" the word "subsequently";

- (c) inserting after the definition of “protector” the following new definition -

“publish” means to produce and issue, by whatever means, and whether for sale or not and includes to report as part of any law report or reports;”.

3. Abolition of the rule against accumulations – Subsection (2) of section 9 of the principal Act is amended by deleting after the word “that” the word “if”, and substituting the word “is”.

4. Application of the rule in Saunders v Vautier – Section 10 of the principal Act is amended by –

- (a) repealing subsection (1) and substituting the following–

“(1) Notwithstanding any rule of law or equity to the contrary, where a trust instrument empowers a trustee to accumulate income, or to refrain from making any distribution of capital or income until a specified date or event, or where any provision of the trust instrument otherwise prevents the making of any distribution of capital or income, notwithstanding that a beneficiary may, but for this section, otherwise be entitled to that accumulation or distribution, the trustee may, in his absolute discretion, subject to any other express terms of the instrument, give effect to that direction as he thinks fit notwithstanding that a beneficiary shall request the trustee to immediately distribute the accumulation or distribution and will give a valid discharge to the trustee for such distribution.”;

- (b) amending subsection (2) by inserting after the words “accumulate income” wherever they appear, the words “or distribute capital”.

5. Fraud - Section 13B of the principal Act is amended by adding after subsection (13), the following new subsections -

“(14) For the purposes of assessing the liability of an international trust to a creditor under this section, where the amount of that creditor’s claim against the settlor is, wholly or partly, in any way related to or evidenced by a foreign judgement, the Court in making any award in favour of that creditor shall disregard and exclude any amount awarded in that foreign judgement to that creditor which comprise any form of exemplary, vindictive, retributory or punitive damages (by whatever name), or is an amount of damages arrived at by doubling, trebling or otherwise multiplying a sum assessed as compensation for the loss or damage (which types of damage are in this section together called “punitive damages”).

(15) The burden of proof shall be on a creditor to establish that an amount awarded in a foreign judgement does not wholly or partly comprise punitive damages.

(16) Subsection (14) shall not apply if, at the time of settlement, establishment, or disposition, as the case may be, an award of punitive damages has already been made in a foreign judgement against a settlor.”

6. Commencement of proceedings – Section 13K of the principal Act is amended by repealing subsection (5) and substituting the following -

“(5) Notwithstanding any other provision of this Act, the provisions of this section and sections 13A to 13J inclusive of those sections, shall apply to every international trust governed, or expressed to be wholly or partly governed, by the law of the Cook Islands, including a trust that formerly was not wholly or partly governed by the law of the Cook Islands but in respect of which the governing law of the trust has been changed (whether before or after registration) so that the trust, or any aspects of it, are governed, or expressed to be governed, by the law of the Cook Islands, and, without limiting the generality of the foregoing and notwithstanding any other law to the contrary, after the date of registration -

- (a) the settlement or establishment of such trust;
- (b) every disposition to such trust, including any disposition occurring before the date of registration or the change of law;
- (c) every proceeding commenced after the date of registration concerning such settlement, establishment or disposition -

shall be subject to the provisions of this section and of sections 13A to 13J inclusive of those sections as if upon the date that such settlement, establishment or disposition occurred, the trust was an international trust governed wholly and exclusively by the law of the Cook Islands.”

7. Certificate of Registration – Section 16 of the principal Act is amended by –

- (a) deleting from subsection (3) the words “subject to section 26”; and
- (b) adding at the end of subsection (3) the words -

“...provided the Registrar may, in his sole discretion, if he is satisfied on application by a trustee of a trust that the failure to make the application for renewal and payment of the prescribed fee was as a consequence of inadvertence on the part of any interested party to the trust, extend the time for registration accordingly.”

8. Custodian trustees – Section 19F of the principal Act is amended by repealing subsection (5) and substituting the following –

“(5) Without limiting any provision of this section, and except as varied by the trust instrument, the provisions of this Act and the Trustee Companies Act 1981-82 relating to a trustee’s powers, liabilities, functions, duties and discretions, shall apply equally to a custodian trustee, and in particular, without limiting the generality of the above, the custodian trustee –

- (a) shall have the full powers of delegation conferred on trustees by section 19B;
- (b) may permit assets to be held by or in the name of the managing trustee to facilitate the managing trustee’s management and administration of the Trust assets, or as otherwise directed by the managing trustee.”

9. Protector of a trust – Section 20 of the principal Act is repealed and the following section substituted –

“20. Protector of a trust - (1) The terms of a trust instrument may provide for the office of protector of that trust.

(2) A protector shall have the powers, delegations or functions as are conferred on the protector by the trust instrument or by this Act, or as may be prescribed.

(3) A protector of a trust may also be a settlor, a trustee or a beneficiary of that trust.

(4) Subject to the trust instrument, a protector of a trust shall not be liable or accountable as a trustee or other person having a fiduciary duty to any person in relation to any act or omission in performing the function of a protector under the trust instrument.

(5) Where there is more than one protector of a trust then, subject to the trust instrument, any power or function conferred on the protectors may be exercised if the majority of the protectors for the time being agree upon its exercise.

(6) A protector who dissents from a decision of the majority of protectors may require his dissent to be recorded in writing and filed at the registered office of the trust, and subject to the trust instrument, shall not be liable for the acts of the majority of protectors pursuant to such decision.

(7) Any powers or functions conferred by this Act on a protector shall have effect subject to the terms of the trust instrument.”

10. Secrecy - Section 23 of the principal Act is hereby repealed and the following section substituted -

“23 Privacy - (1) Except where the provisions of this Act require, and subject to this section, it shall be an offence under this Act for a person to divulge or communicate to any other person information relating to the establishment, constitution, business undertaking or affairs of an international trust.

(2) All judicial proceedings, other than criminal proceedings relating to an international trust shall, unless ordered otherwise be heard in camera and no details of the proceedings shall be published by any person except in accordance with subsection (3).

(3) Every decision of the Court in respect of any proceedings concerning the application or interpretation of this Act shall be published or reported for the purposes of affording a record of those proceedings, provided that in every case -

- (a) the written decision of the Court shall be edited to such extent as shall be necessary to preserve secrecy in respect of the identity of the trust, of every interested party and of the subject matter of the proceedings; and
- (b) no such decision shall be reported or published unless or until a judge of the Court shall have ascertained the views of the parties to the proceedings as to the adequacy of any editing undertaken, and certified in writing to the Registrar of the Court that the decision as edited may be released for publication or reporting.

(4) Unless excluded by the terms of a trust instrument, a trustee or an officer or employee of a trustee or trustee company may divulge or make available information relating to the establishment, constitution, business undertakings or affairs of an international trust -

- (a) to any person or class of persons as that trustee, officer or employee considers necessary from time to time, in its complete discretion, for carrying out the management and administration of the trust assets in the ordinary course of business; or
- (b) to a legal practitioner -
  - (i) for the purpose of obtaining legal advice relating to establishment, constitution, business undertakings or affairs of an international trust; or
  - (ii) for the purpose of prosecuting or defending any litigation relating to the establishment, constitution, business undertakings or affairs of an international trust.”

11. Power of exemption – Section 26 is amended by deleting from subsection (1), the words “the Registrar” and substituting the words “the Commissioner”.

12. Form of trust records – The principal Act is amended by adding after section 27B, the following new section –

“27C. Trust records – (1) Any records, accounts or documents relating to a trust and held by either the Registrar or a trustee, including but not by way of limitation, the trust instrument, may be established, kept or recorded in written, magnetic, electronic or any other data storage form, provided that the records can be readily produced in written form.

(2) When an international trust has been terminated, or the Cook Islands trustee is removed or has resigned, each trustee shall ensure that the records in the possession of that trustee are retained by that trustee for a period of three years from the said date of termination, removal or resignation as the case may be, but thereafter the said records may be destroyed.

(3) The Registrar may cause any records or registers in his possession to be destroyed after the expiration of three years from the date of de-registration, or from the date of expiry of the last certificate of registration of that trust under this Act.”

13. Application - (1) Except where expressly provided to the contrary in this Act the provisions of this Act shall apply to every international trust, whether registered before or after the commencement of this Act, and to all matters relating to or concerning every such international trust, or the interested parties to every such international trust.

(2) Nothing in this Act shall apply to or affect any proceedings commenced in the Court before the coming into force of this Act.

(3) Section 50 of the Trustee Act 1956 (NZ) shall have no further application to an international trust, and any reference in a trust instrument to section 50 of the Trustee Act 1956 (NZ) shall be deemed a reference to section 19F of the principal Act.

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This Act is administered by the Office of the Commissioner for Offshore Financial Services