

TRUSTS AND TRUSTEES BILL 2022

Explanatory Memorandum

1. This Bill is promoted by Hon. Dr. Allinson, M.H.K. on behalf of the Treasury.
2. *Clauses 1 and 2* constitute Part 1 (Introductory) of the Bill and contain, respectively, the short title of, and the commencement provisions for, the resulting Act.
3. *Clause 3* is the first clause of the Bill's Part 2 (amendment of the Trustee Act 2001), which comprises clauses 3 to 9. *Clause 3* merely declares that the *Trustee Act 2001* is amended in accordance with the succeeding provisions of Part 2.
4. *Clause 4* inserts a new Part, i.e. Part 1A (duty to disclose trust information), in the *Trustee Act 2001*. Part 1A consists of a single section, i.e. section 2A (disclosure of trust information). Section 2A defines "trust information" and proceeds to authorise the inclusion in the terms of a trust of provision doing any or all of a list of things pertaining to disclosure of trust information. Among the permitted uses of the terms of a trust are to confer on any person a right to request disclosure of trust information and to determine the extent of the right of any person to trust information. Further, section 2A specifies who may request that a trustee disclose trust information, specifies the circumstances in which a trustee may refuse a request for disclosure of trust information, specifies when a trustee will not be obliged to disclose specified types of trust information, and specifies when a trustee must disclose trust information. Section 2A expressly subjects all of its provisions to any order of the court and, in respect of two of the matters for which it provides, also to the terms of the trust. Additionally, it expressly empowers the court to, on the application of any of a group of specified persons, make an order pertaining to the extent of permitted disclosure of trust information or imposing a limitation on such disclosure, or both. Section 2A closes by expressly providing that it applies to trusts whether created before or after its commencement.
5. *Clause 5* inserts another new Part in the *Trustee Act 2001*; on this occasion, Part 3A (contracts). Part 3A consists of sections 10A (power of trustee to contract with himself) and 10B (restriction, exclusion and application of this Part). Section 10A asserts that it applies only a person ("T") who is a trustee of more than one trust and then expressly authorises T, in his or her capacity as a trustee for one trust ("trust No. 1") to enter into a contract with himself/herself in the capacity as a trustee for another trust ("trust No. 2"). T's two capacities are to be kept separate from each other, such that information T receives in one capacity is not to affect T in the other capacity. Further, it is provided that T need not disclose to his or her co-trustees of one trust T's interest in the other trust, specifically where the two trusts are to enter into a transaction with each other.

Section 10B provides that, in essence, the powers conferred by section 10A supplement powers otherwise conferred on a trustee but are subject to any restriction or exclusion imposed on the trust either statutorily or by the trust instrument. Section 10B closes as did section 2A, i.e. by expressly stating that its provisions and those of section 10A apply to trusts regardless of whether the trusts were created before or after the commencement of the Part which both sections constitute, i.e. Part 3A.

6. *Clause 6* inserts in the *Trustee Act 2001* yet another new Part, on this occasion Part 4A (third parties). Part 4A comprises a single section, i.e. section 27A (liability of trustees to third parties). Section 27A insulates a trustee from personal liability to any third party to a transaction or matter in respect of that transaction or matter, provided the third party is aware that the trustee is acting in the capacity of trustee in respect thereof. Accordingly, any claim by the third party can be against only the property of the trust. Importantly, such a claim against trust property is limited to the extent of the trustee's claim against the trust or the trustee's beneficial interest in the trust. However, the insulation of the trustee does not apply where, in respect of the transaction or matter, the trustee is acting or has acted in breach of trust. The section further provides that the trustee is liable personally if the trustee has failed to in writing notify the third party of the fact that he or she is acting as a trustee and the third party is not otherwise aware of that fact. Nevertheless, the trustee will in such a circumstance have a right of indemnity against the trust property in the event of a claim by the third party against the trustee, unless the trustee acted in breach of trust or the right of indemnity has otherwise been excluded. This section does not affect the trustee's liability for breach of either trust or warranty of authority. The section sets out definitions of key terms it uses and, in familiar vein, closes by stating that its provisions apply to trusts regardless of whether they were created before or after the section commences. On this occasion, however, the application of the section is limited to transactions or matters that take place after the commencement of the section.
7. *Clause 7* inserts in the *Trustee Act 2001* a new section, i.e. section 37A (validation of appointments where objects are excluded or take illusory shares). Section 37A sets out grounds on which it is impermissible to regard as invalid an appointment made in exercise of any power to appoint property among two or more objects of that power. The section also specifies a circumstance in which such an appointment *is* valid despite the happening of a specified event. However, the section stipulates that it does not affect any provision in the instrument creating a power which makes a declaration of a specified type. The section closes by asserting that it applies to appointments made before, on, or after it comes into operation.
8. *Clause 8* amends section 39(1) (interpretation) of the *Trustee Act 2001* by inserting a definition of "protector".
9. *Clause 9* amends Schedule 1 to the *Trustee Act 2001* by inserting two new paragraphs, i.e. paragraphs 2A and 2B, which make provision in respect of contracts and third parties, respectively.

10. *Clause 10* is the first clause of the Bill's Part 3 (amendment of the *Trustee Act 1961*), which comprises clauses 10 to 13. *Clause 10* merely declares that the *Trustee Act 1961* is amended in accordance with the succeeding provisions of Part 3.
11. *Clause 11* amends section 55(1) of the *Trustee Act 1961* by substituting a phrase.
12. *Clause 12* inserts in the *Trustee Act 1961* a new section, i.e. section 55A (power to declare exercise of power voidable). The section applies to the exercise of power by a trustee over or in respect of a trust or any transaction affecting trust property and empowers the court to declare a transfer void or voidable (in either case, in specified circumstances). Crucially, nothing the section provides for affects the court's power to set aside a transaction on the grounds of mistake. The section closes by specifying the scope of its application.
13. *Clause 13* amends section 61 of the *Trustee Act 1961* by omitting reference to a "direction" each time it appears alongside "advice".
14. *Clause 14* is the first clause of the Bill's final Part, i.e. Part 4 (other amendments), which comprises clauses 14 and 15. *Clause 14* amends the *Limitation Act 1984* by omitting "and (2)" from its section 18(1) and substituting section 21. The new section 21 (time limit for actions in respect of trust property) specifies types of action brought against a trustee to which no limitation period prescribed by the *Limitation Act 1984* shall apply. Where the exclusion of such a limitation period does not apply, a limitation period of 3 years is imposed in specified circumstances and the manner in which that period is to be calculated is specified. Provision is made for delaying the commencement of the running of time in respect of the limitation period where the beneficiary in question is a minor. Additional detailed provision is made in respect of limitation periods in other specified scenarios. *Clause 14* closes by omitting "and (2)" from section 22 of the *Limitation Act 1984*.
15. *Clause 15* amends the *Apportionment Act 1982* by inserting a new section, i.e. section 2A (new trusts). Section 2A specifies the circumstances in which a "new trust" is created and also specifies a particular type of trust that it includes. Further, it limits entitlement to income under a "new trust" to income as it arises and, consequently, proclaims that section 1 of the *Apportionment Act 1982* does not apply in relation to a "new trust". Crucially, section 2A declares inapplicable to a "new trust" three established rules of trust law each of which is named after the court case in which it was established. However, the trustees of a "new trust" are given the power to sell property which they would have otherwise been under a duty to sell. That duty to sell would have been imposed because the first part of one of the rules declared inapplicable, i.e. the rule in *Howe v Earl of Dartmouth 1802*, would (had it applied) have excused the trustees from the duty to sell the property. Due to the disapplication of the rule, the trustees would not have been so excused and *would* therefore have been under the duty to sell were it not for section 2A(4) (the effect of which is that what would otherwise have been a duty, i.e. **an obligation**, to sell is now a mere power to sell, i.e. **a choice** whether to sell or not).

16. The resulting Act is not expected to have any financial or human resource implications.
17. In the opinion of the member moving the Bill, the Bill's provisions are compatible with the Convention rights within the meaning of the *Human Rights Act 2001*.



Ellan Vannin

TRUSTS AND TRUSTEES BILL 2022

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Ellan Vannin

TRUSTS AND TRUSTEES BILL 2022

- 1 **A BILL** to amend the Trustee Act 2001 in respect of trustees' duties, powers and
2 liabilities, to amend the Trustee Act 1961 in respect of trustees' powers and the
3 powers of the court, to amend the Limitation Act 1984 in respect of actions
4 against trust property and to amend the Apportionment Act 1982 in respect of
5 entitlement to income arising under a trust; and for connected purposes.
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BE IT ENACTED by the Queen's Most Excellent Majesty, by and with the advice and consent of the Council and Keys in Tynwald assembled, and by the authority of the same, as follows:—

6 **PART 1 – INTRODUCTORY**

7 **1 Short title**

8 The short title of this Act is the Trusts and Trustees Act 2022.

9 **2 Commencement**

10 (1) This Act comes into operation on such day or days as the Treasury may
11 by order appoint and different days may be appointed for different
12 provisions and for different purposes.

13 Tynwald procedure – laying only.

14 (2) An order under subsection (1) may include such consequential,
15 incidental, supplemental, transitional, transitory or saving provisions as
16 the Treasury considers necessary or expedient in connection with the
17 coming into operation of any provision of this Act.

18 **PART 2 – AMENDMENT OF THE TRUSTEE ACT 2001**

19 **3 General**

20 The Trustee Act 2001 is amended in accordance with this Part.

4 Insertion of new Part 1A

After Part 1 (the duty of care), insert—

“PART 1A – DUTY TO DISCLOSE TRUST INFORMATION

2A Disclosure of trust information

(1) “Trust information” is information or a document relating to a trust including that relating to the accounts of the trust.

(2) The terms of a trust may —

- (a) confer on any person a right to request the disclosure of trust information;
- (b) restrict the right of any person to request the disclosure of trust information;
- (c) determine the extent of the right of any person to trust information;
- (d) impose a duty upon a trustee to disclose trust information to any person.

This is subject to any order of the court.

(3) The following may request disclosure of trust information by a trustee —

- (a) a beneficiary of the trust which is not a charitable trust;
- (b) a charity which is referred to by name as a beneficiary of the trust;
- (c) a protector.

This is subject to the terms of the trust and any order of the court.

(4) A trustee may refuse a request referred to in subsection (3) where he is satisfied that it is in the interests of one or more specific beneficiaries, or the beneficiaries as a whole, to do so.

This is subject to any order of the court.

(5) A trustee shall not be required to disclose trust information in respect of —

- (a) his deliberations in respect of any power, discretion or duty he has;
- (b) the reasons for any decision of his in respect of the exercise or non-exercise of any such power, discretion or duty;
- (c) some other beneficiary or potential beneficiary of the trust where requested to do so by another beneficiary of that trust.

- 1 | This is subject to the terms of the trust and any order of the court.
- 2 | (6) Despite the terms of a trust, the court may upon the application of
- 3 | P make such order as it sees fit determining —
- 4 | (a) generally or in a particular circumstance, the extent to
- 5 | which any person may request and receive trust
- 6 | information;
- 7 | (b) whether any limitation on disclosure imposed by the terms
- 8 | of the trust is reasonable in all the circumstances.
- 9 | (7) Despite the above, a trustee must disclose trust information to a
- 10 | person having a supervisory, regulatory or enforcement function
- 11 | for the purposes of that function.
- 12 | This is subject to any order of the court.
- 13 | (8) P means —
- 14 | (a) a trustee of the trust,
- 15 | (b) a beneficiary of the trust,
- 16 | (c) a protector, and
- 17 | (d) with leave of the court, any other person.
- 18 | (9) This section applies to trusts whether created before or after its
- 19 | commencement.”

20 | **5 Insertion of new Part 3A**

21 | After Part 3 (acquisition of land), insert —

22 | **“PART 3A – CONTRACTS**

23 | **10A Power of trustee to contract with himself**

- 24 | (1) This Part applies where a person (T) is a trustee of more than one
- 25 | trust.
- 26 | (2) Despite any enactment or rule of law to the contrary, T may in the
- 27 | capacity of trustee of one trust enter into a contract with himself
- 28 | in his capacity as trustee of another trust.
- 29 | (3) T, as trustee of a trust (“trust No.1”) shall not be affected by notice
- 30 | of any instrument, matter, fact or thing in relation to another trust
- 31 | (trust No.2) where he has obtained notice of it in his capacity as
- 32 | trustee of trust No.2.
- 33 | (4) Despite any enactment or rule of law to the contrary, where —
- 34 | (a) T is a trustee of trust No.1 and has an interest as trustee in
- 35 | trust No.2, and

- (b) a transaction in relation to trust No.1 is to be entered into with a trustee of trust No.2,
- T need not, but may disclose to his co-trustee of trust No.1 any interest which T has as trustee of trust No.2.

10B Restriction, exclusion and application of this Part

- (1) The powers conferred by this Part are —
- (a) in addition to powers conferred on a trustee otherwise than by this Part, but
- (b) subject to any restriction or exclusion imposed by the trust instrument or by any statutory provision.
- (2) This Part applies to trusts whether created before or after its commencement.”

6 Insertion of new Part 4A

After Part 4 (agents, nominees and custodians), insert —

“PART 4A – THIRD PARTIES

27A Liability of trustees to third parties

- (1) This section applies where a trustee is a party to a transaction or other matter affecting the trust which involves a third party.
- (2) If the trustee informs a third party to the transaction or matter, or the third party is otherwise aware, that the trustee is acting as a trustee —
- (a) the trustee is not personally liable in respect of the transaction or matter, and
- (b) any claim by the third party in respect of the transaction or matter must be made against the trustee as trustee of the trust and extends only to the property of the trust.
- (3) Nothing in subsection (2) entitles a third party to have a claim against trust property other than to the extent that the trustee has a claim against the trust or has a beneficial interest in the trust.
- (4) Subsection (2) does not apply in respect of any transaction or matter in which the trustee acts in breach of trust.
- (5) If the trustee does not inform a third party to the transaction or matter in writing, and the third party is otherwise unaware, that the trustee is acting as a trustee —
- (a) the trustee is personally liable to the third party in respect of the transaction or matter, and

- 1 (b) the trustee has a right of indemnity against the property of
 2 the trust in any claim by the third party against the trustee
 3 personally in respect of the transaction or matter, unless —
 4 (i) the trustee has acted in breach of trust, or
 5 (ii) the right of indemnity has been otherwise excluded.
- 6 (6) Nothing in this section affects —
 7 (a) a trustee’s liability for breach of trust or any claim for
 8 breach of warranty of authority, or
 9 (b) a trustee’s duty under any statutory provision to disclose
 10 that the trustee acts as a trustee.
- 11 (7) In this section, “matter affecting the trust” includes court
 12 proceedings properly brought or defended by a trustee when
 13 acting on behalf of the trust and references to a claim or liability in
 14 relation to such a matter include liability for any costs connected
 15 with those proceedings.
- 16 (8) “Third party” includes a settlor, beneficiary, enforcer (within the
 17 meaning given in section 1(1)(d) of the *Purpose Trusts Act 1996*) or
 18 protector where such a person does not contract with the trustee
 19 in such a capacity.
- 20 (9) This section applies to trusts whether created before or after its
 21 commencement but only in respect of transactions or matters
 22 referred to in subsection (1) taking place on or after its
 23 commencement.”

24 **7 Insertion of new section 37A**

25 After section 37 (authorised unit trusts), insert —

26 **“37A Validation of appointments where objects are excluded or take**
 27 **illusory shares**

- 28 (1) No appointment made in exercise of any power to appoint any
 29 property among two or more objects of that power shall be
 30 invalid on the ground that —
 31 (a) an unsubstantial, illusory or nominal share only is
 32 appointed to any one or more of the objects of the power,
 33 (b) an unsubstantial, illusory or nominal share only is left
 34 unappointed to devolve upon any one or more of those
 35 objects, or
 36 (c) any object of the power is excluded under the exercise of
 37 the appointment.
- 38 (2) An appointment referred to in subsection (1) shall be valid even
 39 though one or more of the objects of the power does not take a

share in the property under that appointment or in default of any appointment.

(3) This section does not affect any provision in the instrument creating the power which declares the amount of any share from which any object of the power is not to be excluded.

(4) This section applies to appointments made before or on or after this section comes into operation.”

8 Amendment of section 39

In section 39(1) (interpretation), at the appropriate place in the order insert —

““protector” has the meaning given in section 6 of the *Trusts Act 1995*.”

9 Amendment of Schedule 1

In Schedule 1 (application of duty of care), after paragraph 2 (acquisition of land) insert —

“Contracts

2A. The duty of care applies to a trustee —

- (a) when exercising the power under section 10A to enter into a contract with himself in his capacity of trustee of more than one trust;
- (b) when exercising any other power to enter into a contract with himself in his capacity of trustee of more than one trust, however conferred;
- (c) when exercising any power in relation to a contract entered into under a power mentioned in sub-paragraph (a) or (b).

Third Parties

2B. The duty of care applies to a trustee when entering into a transaction or other matter affecting the trust which involves a third party.”

PART 3 – AMENDMENT OF THE TRUSTEE ACT 1961

10 General

The Trustee Act 1961 is amended in accordance with this Part.

1 **11 Amendment of section 55**

2 In section 55(1) (power of court to authorise dealings with trust property), for
3 “Where in the management or administration of” substitute “Where any
4 transaction affecting or concerning”.

5 **12 Insertion of new section 55A**

6 After section 55, insert —

7 **“55A Power to declare exercise of a power voidable**

- 8 (1) This section applies to the exercise of a power by a trustee over or
9 in respect of a trust or any transaction affecting or concerning
10 trust property.
- 11 (2) The court may, in the circumstances set out in subsection (3) and
12 on the application of A, declare that such a transfer or other
13 disposition is —
- 14 (a) voidable and has such effect as the court may determine; or
15 (b) void from the time of its exercise.
- 16 (3) Those circumstances are where the trustee —
- 17 (a) failed to take into account any relevant considerations and,
18 but for that failure, would not have exercised the power, or
19 would not have exercised the power in the way or at the
20 time it was exercised; or
- 21 (b) took into account irrelevant considerations and, but for
22 doing so, would not have exercised the power, or would
23 not have exercised the power in the way or at the time it
24 was exercised.
- 25 (4) It does not matter whether or not the circumstances set out in
26 subsection (3) occurred as a result of a lack of care or other
27 fault —
- 28 (a) on the part of the trustee; or
29 (b) any other person giving advice in relation to the exercise of
30 the power.
- 31 (5) Nothing in this section affects a court’s power to set aside a
32 transaction on the grounds of mistake.
- 33 (6) “A” means —
- 34 (a) a trustee of the trust,
35 (b) a beneficiary of the trust,
36 (c) a protector, and
37 (d) with leave of the court, any other person.

- 1 (7) This section applies to the transfer or other disposition of property
 2 to a trust, any transaction affecting or concerning trust property,
 3 or the exercise of any power over or in relation to a trust or trust
 4 property that occurs before or after the commencement of this
 5 section.”

6 **13 Amendment of section 61**

7 In section 61 (trustee, executor, etc, may apply by petition, etc, to judge of Civil
 8 Division of High Court for opinion, advice, etc, in management, etc, of trust
 9 property) for “, advice, or direction” (3 times) substitute “or advice”.

10 **PART 4 – OTHER AMENDMENTS**

11 **14 Amendment of the Limitation Act 1984**

- 12 (1) The Limitation Act 1984 is amended as follows.
 13 (2) In section 18(1) (land held on trust), omit “and (2)”.
 14 (3) For section 21 (time limit for actions in respect of trust property)
 15 substitute –

16 **“21 Time limit for actions in respect of trust property**

- 17 (1) No period of limitation prescribed by this Act shall apply to an
 18 action brought against a trustee –
 19 (a) in respect of any fraud to which the trustee was a party or
 20 privy; or
 21 (b) to recover from the trustee trust property –
 22 (i) in his possession;
 23 (ii) under his control; or
 24 (iii) previously received by him and converted to his
 25 use.
- 26 (2) Where subsection (1) does not apply, an action by a beneficiary to
 27 recover trust property or in respect of any breach of trust, shall
 28 not be brought after the expiry of 3 years from whichever is the
 29 earlier of –
 30 (a) the date of delivery of the final accounts to the beneficiary;
 31 or
 32 (b) the date on which the beneficiary first has knowledge of
 33 the breach of trust.
- 34 (3) Where, at the time of the breach, the beneficiary referred to in
 35 subsection (2) is a minor or is under any other legal disability the

- 1 | period referred to in that subsection shall not begin to run before
2 | the first of the following occur—
- 3 | (a) the beneficiary ceases to be a minor or under that other
4 | legal disability (as the case may be);
- 5 | (b) the beneficiary’s guardian first has knowledge of the
6 | breach;
- 7 | (b) the beneficiary dies.
- 8 | (4) Where subsection (1) does not apply, an action by an enforcer
9 | against a trustee in respect of a breach of trust shall not be
10 | brought after the expiry of 3 years from the earlier of—
- 11 | (a) the date of delivery of the final accounts to the enforcer; or
12 | (b) the date on which the enforcer first has knowledge of the
13 | breach of trust.
- 14 | (5) Where subsection (1) does not apply, an action by a trustee
15 | against a former trustee in respect of a breach of trust shall not be
16 | brought after the expiry of 3 years from the date on which the
17 | former trustee ceased to be a trustee.
- 18 | (6) Where subsection (1) does not apply, an action in respect of a
19 | breach of trust shall not be brought against a trustee by any
20 | person after the expiry of the period of 21 years following the
21 | occurrence of the breach.
- 22 | (7) “Enforcer” means a person—
- 23 | (a) who is appointed in the trust instrument to enforce the
24 | trust; and
25 | (b) who is independent of the trustees.”
- 26 | (4) In section 22 (time limit for actions claiming personal estate of deceased
27 | person), omit “and (2)”.

28 | **15 Amendment of the Apportionment Act 1982**

- 29 | (1) The Apportionment Act 1982 is amended as follows.
30 | (2) After section 2 (recovery of apportioned income), insert —

31 | **“2A New trusts**

- 32 | | (1) A “new trust” is —
- 33 | | (a) a trust created or arising on or after the day on which this
34 | | section comes into operation; and
35 | | (b) includes a trust created or arising on or after that day
36 | | under a power conferred before that day.

- 1 (2) Any entitlement to income under a new trust is to income as it
2 arises (and accordingly section 1 of this Act does not apply in
3 relation to such a trust).
- 4 (3) The following do not apply in relation to a new trust —
- 5 (a) the rule commonly known as the rule in *Howe v Earl of*
6 *Dartmouth 1802* (the first part of which requires certain
7 residuary personal estate to be sold and the second part of
8 which withholds from a life tenant income arising from
9 certain investments and compensates the life tenant with
10 payments of interest);
- 11 (b) the rule commonly known as the rule in *Re Earl of*
12 *Chesterfield's Trusts 1883* (which requires the proceeds of
13 the conversion of certain investments to be apportioned
14 between capital and income);
- 15 (c) the rule commonly known as the rule in *Allhusen v Whittell*
16 *1867* (which requires a contribution to be made from
17 income for the purpose of paying a deceased person's
18 debts, legacies and annuities).
- 19 (4) Trustees have the power to sell any property which, but for the
20 first part of the rule in *Howe v Earl of Dartmouth 1802*, they would
21 have been under a duty to sell.
- 22 (5) Subsections (2) to (4) are subject to any contrary intention in —
- 23 (a) any trust instrument of the trust; and
24 (b) any power under which the trust is created or arises.”
- 25

IN THE KEYS

TRUSTS AND TRUSTEES BILL 2022

A **BILL** to amend the Trustee Act 2001 in respect of trustees' duties, powers and liabilities, to amend the Trustee Act 1961 in respect of trustees' powers and the powers of the court, to amend the Limitation Act 1984 in respect of actions against trust property and to amend the Apportionment Act 1982 in respect of entitlement to income arising under a trust; and for connected purposes.

Approved by the Council of Ministers
on 16 June 2022 for introduction in the
House of Keys.

DR. ALLISON MHK

28 JUNE 2022