



HON. MARK BROWN
FOUNDATIONS

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A BILL INTITULED

An Act to provide for the establishment of foundations.

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

PART 1 **OPENING PROVISIONS**

1. Short title - This Act is the Foundations Act 2012.
2. Commencement - This Act comes into force on the day after the date on which it receives the Royal assent.

3. Interpretation - In this Act, unless the context otherwise requires —

“Act” means this Act;

“Approved newspaper” means in relation to any notice required to be published by any provision of this Act any newspaper approved by the Registrar;

“Assets” in respect of a foundation, means —

- (a) any assets (including money, investments and other property) dedicated to the foundation;
- (b) any capitalised income added to the assets so dedicated; and
- (c) the money, investments and property from time to time representing those assets and capitalised income;

“Assigned” in respect of a right a person has in respect of a foundation or its assets, means assigned by that person or by a person to whom the right has been assigned;

“Beneficiary” in respect of a foundation that has the provision of a benefit to a person or to a class of persons as one of its objects, means a person (whether or not yet born or otherwise in existence) who is or who becomes a member of a class of persons that is —

- (a) specified in the foundation instrument; or
- (b) determined in accordance with —
 - (i) the foundation rules; or
 - (ii) a direction of the High Court under section 76(2), for the purpose of that object or those objects;

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“Business address” means —

- (a) in respect of a foundation, the business address of a trustee company in the Cook Islands acting as its registered agent;
- (b) in respect of a trustee company, the business address of the trustee company in the Cook Islands as it appears in the register;

“Court” means the High Court of the Cook Islands;

“Day” means Monday through to Friday, excluding bank holidays in the Cook Islands;

“Declaration of compliance” has the meaning specified in section 66;

“Dedicate” means to pass, or covenant to pass, the title in property absolutely, with or without consideration, to a foundation so that the property is an asset of the foundation (and “to pass”, for the purposes of this definition, includes whatever act may be necessary in relation to that property to transfer title effectively); and

“Dedication” is to be construed accordingly;

“Dedicator” means a person, other than the founder, who dedicates assets to the foundation;

“Default beneficiary” means a beneficiary to whom all the foundation assets shall pass on the revocation, dissolution or termination of the foundation pursuant to this Act.

“Dispose” or “disposition” in relation to property includes:

- (a) every form of conveyance, transfer, assignment, sale, gift, lease, licence, easement, profit, mortgage, charge, pledge, encumbrance or other transaction absolute or limited by which any legal or equitable interest in property is created, transferred or extinguished;
- (b) the disposal of an interest in or right over property by the exercise of a power of appointment, power of maintenance, power of advancement or other authority; and also includes the conferring or variation or surrender of such powers or authority;
- (c) a contract to make any such disposition referred to in paragraph (a) or (b).

“Dollar” or “\$” means a dollar unit of the currency of New Zealand.

“Endowment” means the dedicating of property to a foundation.

“Enforcer” means the person who is the enforcer of the foundation by virtue of section 13;

“Financial statements” means written statements of the foundation which comply with section 43(2);

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“Forced heirship right” means any right, claim or interest arising under the law of a jurisdiction other than the Cook Islands in, against or to the property of any person arising, accruing or existing in consequence of, or in anticipation of, that person’s death, other than a right, claim or interest created by will or expressed in any other voluntary disposition by that person or resulting from an express limitation in the disposition of the property to that person;

“Foundation” means a foundation established under this Act;

“Foundation instrument” includes any document, by whatever name called, which complies with the requirements of this Act relating to the foundation instrument of a foundation;

“Foundation rules” includes any document, by whatever name called, which complies with the requirements of this Act relating to the foundation rules of a foundation;

“Founder” means the person who instructed the trustee company to apply for the establishment of the foundation;

“Functions” includes powers and duties;

“Overseas foundation” means a foundation with legal personality registered or established under the law of any jurisdiction outside the Cook Islands;

“Person appointed under the foundation rules” means —

- (a) a member of the council of the foundation;
- (b) the foundation’s registered agent;
- (c) an enforcer of the foundation; and
- (d) any other person appointed under the foundation rules to carry out a function in respect of the foundation;

“Person with sufficient interest”, in respect of a foundation, means —

- (a) the foundation;
- (b) a founder of the foundation;
- (c) a dedicator to the foundation;
- (d) if any rights a founder of a foundation had in respect of the foundation and its assets have been assigned to some other person, that other person;
- (e) a member of the council of the foundation;
- (f) a person appointed under the foundation rules;
- (g) a beneficiary of the foundation; and
- (h) a person who the High Court determines to be a person with sufficient interest under section 75(3);

“Property” includes an estate or interest in real or personal property and includes anything in action;

“Published” means published in a manner likely to bring it to the attention of those affected;

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“Register”, as a noun, means the register kept by the Registrar for the purposes of this Act under section 48(1);

“Registered agent” means a trustee company residing in the Cook Islands who provides a registered office for a Cook Islands foundation, and who performs such other functions as are specified in this Act or any other enactment in force in the Cook Islands, or pursuant to the foundation instrument or foundation rules of a Cook Islands foundation.

“Registered office” means the principal office of the foundation in the Cook Islands.

“Registrar” means the Registrar of Foundations and includes a Deputy Registrar;

“Trustee company” means a company incorporated for the purpose of undertaking or offering to undertake, as a whole or a part of its business, all or any of the duties of a trustee, which is registered under the Trustee Companies Act 1981-82;

“The Queen's Representative” means the Queen's Representative of the Cook Islands appointed under the Cook Islands Constitution.

PART 2

ESTABLISHMENT OF FOUNDATIONS

Application for Establishment

4. Application for the establishment of a foundation – (1) Subject to subsection (2), an application may be made to the Registrar for the establishment of a foundation.

(2) The application shall be made by the trustee company that has made the declaration referred to in subsection (5) and the Registrar shall not accept an application made by any other person.

(3) The application shall be made in a form and manner published by the Registrar and shall contain the information required by the Registrar.

(4) It shall be accompanied by —

- (a) a copy of the foundation instrument;
- (b) the fee set out in the Schedule.

(5) The application shall also be accompanied by a declaration signed by the trustee company making the application stating —

- (a) that the trustee company shall provide the registered office of the foundation on its establishment;
- (b) that the trustee company is in possession of the foundation rules for the proposed foundation that have been approved by both the founder of the foundation and by the trustee company; and
- (c) that the address of the foundation, specified in the declaration, is the business address in the Cook Islands of the trustee company.

(6) The application and any document accompanying it shall be authenticated in any manner determined by the Registrar.

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(7) The Registrar may determine the procedure for the annual renewal of the registration of the foundation, and the Schedule shall set out the annual renewal fee.

The Foundation Instrument

5. Foundation shall have a foundation instrument - (1) A foundation shall have a foundation instrument that complies with the requirements of this Act.

(2) The foundation instrument may be in a language other than English.

(3) Where the foundation instrument is not in English, the foundation shall provide a copy of an accurate English translation of the instrument, certified by an independent person with the necessary competence to provide the translation, to its registered agent.

(4) The registered agent shall retain the translation.

(5) In the event of any inconsistency between the original version and the English translation of a foundation instrument satisfying the requirement in subsection (3), the English translation shall prevail.

6. The foundation instrument - name of foundation - (1) The foundation instrument shall specify the name of the foundation.

(2) The name -

(a) shall not be identical to the name under which another foundation is or has been established under this Act;

(b) shall not be so similar to the name of another foundation established under this Act that the use of the name would, in the opinion of the Registrar, be likely to confuse or mislead;

(c) shall not, without the consent of the Registrar, contain a restricted word or phrase;

(d) shall not, in the opinion of the Registrar, be offensive, misleading or otherwise undesirable; and

(e) shall end with the word "Foundation".

(3) For the purposes of subsection (2)(c), the Registrar may publish restricted words and phrases.

(4) The foundation instrument may prohibit the foundation from changing its name.

(5) If the foundation is not so prohibited, it shall notify the Registrar of any change of name in accordance with section 45 (as the change of name entails an amendment to the foundation instrument).

(6) The new name shall not contravene subsection (2).

(7) The Registrar may direct a foundation to change its name if it considers that the name does not comply with this section.

(8) The Registrar may assign a new name to a foundation which fails to comply with a direction under subsection (7) within 6 weeks from the date of the direction.

(9) Subsection (8) applies even where the foundation instrument does not allow the foundation to change its name.

(10) Where a foundation changes its name or a new name is assigned, the Registrar shall enter in the register the new name of the foundation and date the entry.

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7. The foundation instrument - objects - (1) The foundation instrument shall specify the objects for which the foundation is established.

(2) The objects -

(a) shall be certain, reasonable and possible; and

(b) shall not be unlawful, contrary to public policy or immoral.

(3) The objects may be charitable, non-charitable or both.

(4) The objects may be -

(a) to benefit a person or a class of persons; or

(b) to carry out a specified purpose, or to do both.

(5) It is sufficient, for the purpose of subsection (4)(a), for the foundation instrument to provide that the person or class of persons may be determined in accordance with the foundation rules.

(6) It is sufficient for the purpose of subsection (4)(b), for the foundation instrument to provide that the foundation is to hold assets selected in accordance with the foundation rules.

8. The foundation instrument - registered agent - (1) The foundation instrument shall specify the name and address of the foundation's registered agent.

(2) The foundation shall notify the Registrar of any change to its registered agent or to any change to the registered agent's name or addresses in accordance with section 45 (as the change of these details entails an amendment to the foundation instrument).

The Foundation Rules

9. Foundation shall have foundation rules - (1) A foundation shall have foundation rules that comply with this Act.

(2) The foundation rules may be in a language other than English.

(3) Where the foundation rules are not in English, the foundation shall provide a copy of an accurate English translation, certified by an independent person who has the necessary competence to provide the translation, of the rules to its registered agent.

(4) The registered agent shall retain the translation.

(5) In the event of any inconsistency between the original version and the English translation of the foundation rules satisfying the requirement in subsection (3), the English translation shall prevail.

(6) A foundation which fails to comply with subsection (3) commits an offence.

(7) A registered agent who fails to comply with subsection (4) commits an offence.

10. The foundation rules - objects - If a foundation has the provision of benefits to a person or to a class of persons as one of its objects, the foundation rules may provide for the manner in which that object may be amended -

(a) to exclude a person or a class of persons;

(b) to apply to a different person or to a different class of person; or

(c) to include an additional person or an additional class of persons, as the case may be.

11. The foundation rules - council - The foundation rules shall -

(a) establish a council to administer the foundation's assets and to carry out its objects;

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- (b) provide for the appointment, retirement, removal and remuneration (if any) of the council's members;
- (c) state that the foundation does not come into operation until it is endowed with its initial capital;
- (d) set out how the decisions of the council are to be made and, if any decision requires the approval of any other person, specify the decisions and that person; and
- (e) set out the functions of the council, and, if they shall or may be delegated or exercised in conjunction with any other person, the extent to which this shall or may be done.

12. The foundation rules - registered agent - (1) The foundation rules shall provide for the appointment, retirement, removal and remuneration (if any) of a trustee company residing in the Cook Islands (the "registered agent").

(2) In particular, the foundation rules shall set out a procedure that ensures that a trustee company is appointed to provide the registered office of the foundation as soon as reasonably practicable if, subject to subsection (3), its existing registered agent -

- (a) retires; or
- (b) otherwise ceases to act or to be able to act.

(3)(a) A trustee company wishing to resign as the registered agent of a foundation shall give not less than 30 days written notice of its intention to resign as registered agent of the foundation on the date specified in the notice to a person specified in subsection (4);

- (b) together with the written notice, provide a list of all approved registered agents in the Cook Islands with their names and addresses; and
- (c) file with the Registrar a copy of the notice and the list of registered agents provided under paragraph (b).

(3) A notice under subsection (2) and a list of approved registered agents shall be sent to a council member of the foundation at the council member's last known address or, if the registered agent is not aware of the address of a council member of the foundation, to the person from whom the registered agent last received instructions concerning the foundation.

(4) If a foundation does not change its registered agent on or before the date specified in the notice given under subsection (3), the registered agent may file a notice of resignation as the foundation's registered agent.

(5) The resignation of a registered agent is effective the day after the notice of resignation is registered by the Registrar.

13. The foundation rules - enforcer - (1) Subject to subsection (2), a foundation may have an enforcer.

- (2) If it is to have one, the enforcer -
 - (a) shall be appointed in accordance with this Act; and
 - (b) has, in respect of the foundation, the functions specified in this Act and in the foundation rules.

(3) If the foundation has an enforcer, the foundation rules shall provide for the enforcer's appointment.

- (4) Accordingly, the foundation rules shall —
 - (a) provide how an enforcer may retire;
 - (b) provide how a new enforcer is to be appointed; and

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- (c) provide for the enforcer's remuneration (if any).
- (5) Apart from —
 - (a) a founder of a foundation; and
 - (b) a trustee company who is a member of its council, a person may not be both a member of its council and its enforcer.
- (6) The enforcer shall take reasonable steps to ensure that the council of the foundation carries out its functions.
- (7) Accordingly, the enforcer may require the council to account to the enforcer for the way in which it has —
 - (a) administered the foundation's assets; and
 - (b) acted to further the foundation's objects.
- (8) The foundation rules may give its enforcer the power to approve or disapprove any specified actions of its council.
- (9) Except to the extent that the foundation rules provide otherwise, the enforcer may sanction or authorise any action taken or to be taken by the council of the foundation that would not otherwise be permitted by the foundation rules if the enforcer considers that it is appropriate to do so.
- (10) However, the enforcer shall not do so unless satisfied —
 - (a) that it is in the best interests of the foundation to do so; and
 - (b) that the council, in taking the action, acted or will be acting in good faith.
- (11) If the enforcer, acting under subsection (9), sanctions or authorises any action of the council of the foundation, the council, in taking that action, is to be taken for the purposes of third parties to have acted in good faith.
- (12) Nothing in subsection (9) is to be construed as permitting the enforcer to sanction or to authorise any action taken or to be taken by the council of the foundation that would be inconsistent with this Act or any other enactment.

14. The foundation rules - endowment and dedication of assets - (1) A foundation does not come into effect pursuant to this Act until it is endowed with its initial capital.

- (2) The initial capital of a foundation may comprise any property wheresoever located.
- (3) Further assets may be dedicated to the foundation after its establishment, unless the foundation rules provide otherwise.
- (4) The dedication of assets to a foundation by a person does not —
 - (a) make the person a founder; or
 - (b) vest in the person a right vested in a founder of the foundation.

15. The foundation rules - revocation - (1) The foundation rules may provide that a foundation and any power or exercise of a power under the foundation rules may be expressed to be capable of revocation, in whole or in part.

- (2) No revocation prejudices anything lawfully done by a council member in relation to the foundation before he or she receives notice of the revocation.
- (3) Subject to the foundation rules, if the foundation is revoked in whole or in part, the council members shall hold the foundation property or that part of the foundation property which is the subject of the revocation, as the case may be, as trustees in trust for the default beneficiary absolutely.
- (4) A foundation may only be revoked upon —

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- (a) an application to the Registrar, who shall be satisfied that the foundation rules permits the foundation to be so revoked, and
 - (b) 28 days' notice to the founder, the default beneficiary, the council members, any enforcer and any creditors of the foundation.
- (5) If the conditions of subsection (4) are satisfied then -
- (a) the foundation's name shall be removed from the Register;
 - (b) the foundation shall cease to be a legal person;
 - (c) the Registrar shall file in the Register a notice stating that the foundation's name has, pursuant to the provisions of this section, been removed from the Register by the revocation of the foundation, and
 - (d) the Registrar shall publish the fact that the foundation has been removed from the Register in such manner and for such period as he thinks fit.

16. The foundation rules - default beneficiary and winding up - (1) The foundation rules shall identify a default beneficiary for the distribution of assets of the foundation that remain should the foundation be wound up and dissolved.

(2) If the remaining assets of the foundation are not disposed of for any reason (including where no default beneficiary is identified in the foundation rules), a person with sufficient interest may apply to the High Court under section 75 for a direction as to the disposal of those assets.

(3) Where the foundation is dissolved, and no direction has been made by the High Court under section 75 for the disposal of the foundation's assets, all property and rights vested in or held on trust for the foundation immediately before its dissolution are to be treated as *bona vacantia* and consequently vest in the Registrar in trust for the Crown and maybe dealt with in the same manner as *bona vacantia* accruing to the Registrar under the International Companies Act 1981-2.

17. The foundation rules - term - (1) If a foundation is to be wound up and dissolved upon -

- (a) the happening of some event; or
- (b) the expiration of a fixed period of time, details of the event or period shall be specified in the foundation rules.

(2) If a person is to have the right to have a foundation wound up and dissolved, details of the right shall be specified in the foundation rules.

(3) Subsection (2) is subject to any right arising under an enactment or rule of law.

18. The foundation rules - general - (1) The foundation rules may, in addition to the matters required to be set out in them by this Act, provide for any other matter in respect of the foundation.

- (2) They may, in particular —
- (a) provide for the manner in which the foundation instrument or foundation rules may be amended;
 - (b) restrict the provisions of the foundation instrument or foundation rules which may be amended; and

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- (c) provide for the appointment, retirement, removal and remuneration (if any) of persons (other than the members of the council of the foundation, the trustee company and any enforcer of the foundation) to carry out functions in respect of the foundation.

(3) But where a foundation instrument specifies an exclusively charitable object, the foundation rules shall not provide for the amendment of the foundation instrument so as to specify anon-charitable object in place of the charitable object.

19. The foundation rules - fees and expenses - Unless the foundation rules provide otherwise, a person appointed under the foundation rules is entitled —

- (a) to receive payment from the foundation which has been agreed by the person and the foundation in respect of services provided by the person to the foundation;
- (b) to be reimbursed by the foundation for any reasonable fees or expenses incurred by the person in carrying out functions in respect of the foundation.

20. Power to prescribe model foundation rules - Regulations made by the Queen's Representative under section 85(1) may prescribe model foundation rules for foundations.

21. The foundation rules - supply of copies - (1) Unless the foundation rules provide otherwise, a foundation need not supply a copy of the foundation rules to a person other than—

- (a) a member of its council;
- (b) its registered agent;
- (c) its enforcer (if one is appointed); and
- (d) its founder.

(2) Subsection (1) does not affect any obligation of a foundation to supply a copy of the foundation rules imposed by an enactment or by an order of a court.

The Council of a Foundation

22. Foundation shall have a council - A foundation shall have a council —

- (a) to administer the assets of the foundation; and
- (b) to carry out its objects.

23. The council of a foundation - membership - (1) The council of a foundation shall have at least one member.

- (2) A member who is an individual shall be at least 18 years old.
- (3) A member shall not be —
 - (a) a person who is of unsound mind or whose person or estate is liable to be dealt with in any way under the law of the Cook Islands relating to mentally disturbed persons, or a corresponding provision of the law of a jurisdiction outside of the Cook Islands;
 - (b) a person who is disqualified from being a member of the council of a foundation or a director of a company under this or any other enactment; or

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- (c) a person who has been disqualified from managing companies under the Companies Act 1970-1 or the International Companies Act 1981-2.
- (4) The foundation's registered agent is not precluded from also being a member of its council.

24. The council of a foundation - acts of members - (1) The members of the council of a foundation shall conduct the foundation's affairs in accordance with its foundation instrument, foundation rules, this Act and any other enactment.

- (2) The members of the council of a foundation shall —
 - (a) act honestly and in good faith with a view to the best interests of the foundation; and
 - (b) exercise the care, diligence and skill that reasonably prudent persons would exercise in comparable circumstances.
- (3) For the avoidance of doubt, the duties of the members of the council of a foundation are owed to the council itself and not to its beneficiaries.
- (4) An act of a member of the council of a foundation is valid despite any defect that may afterwards be found in —
 - (a) the appointment of the member; or
 - (b) the member's qualifications.

25. Decisions of the council - (1) The exercise by the council of a power under this Act, the foundation instrument or foundation rules is to be sanctioned by —

- (a) a resolution at a meeting of the council; or
- (b) a written resolution under subsection (3).
- (2) A resolution of the members of the council is passed at a meeting of the council if it is approved by a majority of the members of the council who are present at such meeting and (being entitled to do so) vote on the matter (or such specified majority as the foundation rules provide).
- (3) An action that may be taken by the council at a meeting may also be taken by a resolution of the council consented to in writing or electronic communication by all the members of the council (or such specified majority as the foundation rules provide).
- (4) A resolution under subsection (3) may consist of several documents, including electronic communications, in like form each signed or assented to by one or more members of the council.

26. The members of the council and others - liability - (1) This section applies to a person appointed under the foundation rules when acting or purporting to be acting in the course of that appointment.

- (2) Nothing —
 - (a) in the foundation instrument or foundation rules; or
 - (b) in a contract between the foundation and a person to whom this section applies, relieves, releases or excuses the member from any liability for the person's wilful misconduct, wilful default or wilful negligence.
- (3) Any insurance purchased and maintained by the foundation in respect of a person to whom this section applies shall not include insurance in respect of —
 - (a) any liability the person may incur —
 - (i) to the foundation; or
 - (ii) to pay a fine in respect of an offence; or

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- (b) any costs the person may incur —
 - (i) in defending criminal proceedings in which the person is convicted; or
 - (ii) in defending civil proceedings brought by the foundation in which judgment is given against the person.

The Registered Agent

27. Foundation shall have a registered agent - (1) A foundation shall appoint a trustee company residing in the Cook Islands, who shall be the foundation's registered agent.

- (2) The registered agent—
 - (a) shall be appointed in accordance with this Act; and
 - (b) has, in respect of the foundation, the functions specified in this Act and in the foundation rules.

(3) On the establishment of a foundation the trustee company named under section 4(5)(a) becomes the registered agent for the foundation in the Cook Islands for the purposes of this Act.

(4) Although the council of a foundation may include more than one trustee company, the foundation shall not have more than one registered agent in the Cook Islands at any one time.

The Rights of Persons under a Foundation

28. Rights of the founder and others under the foundation rules - (1) A founder of a foundation has such rights (if any) in respect of the foundation and its assets as are provided for in the foundation rules.

(2) A person specified in the foundation rules (other than the founder, a member of the council, the registered agent and any enforcer) has such rights (if any) in respect of the foundation and its assets as are provided for in the foundation rules.

(3) Any rights a person may have in respect of the foundation and its assets may be assigned to some other person if the foundation rules so provide.

- (4) Subsection (5) applies where —
 - (a) a founder or other person has rights in respect of the foundation and its assets; or
 - (b) a person has in writing been assigned any rights of a founder or other person in respect of a foundation and its assets, and the founder or person dies or, in the case of a founder or a person that is not an individual, ceases to exist.

(5) Those rights vest in the council of the foundation unless the foundation rules provide otherwise.

29. Rights of beneficiaries - (1) A beneficiary under a foundation has no interest in the foundation's assets.

- (2) However, if —
 - (a) a beneficiary becomes entitled to a benefit under the foundation in accordance with the foundation instrument or the foundation rules; and

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(b) the benefit is not provided, the beneficiary, or a person acting on behalf of the beneficiary, may seek an order of the High Court ordering the foundation to provide the benefit.

(3) Except as provided by subsection (4), the beneficiary shall seek the order within the period of three (3) years from the time when the beneficiary became aware of the entitlement to the benefit.

(4) If the beneficiary has not attained the age of eighteen (18) years when he or she became aware of his or her entitlement to the benefit, the period referred to in subsection (3) begins to run on the day on which the beneficiary attains that age.

30. Provision of information by foundations - (1) Subsection (2) applies where a written request is made by a person with sufficient interest in the foundation.

(2) To the extent requested, the foundation shall provide the person making the request with full and accurate information about any of the following —

- (a) the financial statements of the foundation;
- (b) the assets of the foundation;
- (c) the manner in which its assets are being administered; and
- (d) the way in which it is carrying out its objects.

(3) The information shall be provided as soon as practicable after the foundation receives the request.

(4) Subsection (1) is subject to subsection (5).

(5) Subject to subsection (8), a foundation is not required to provide any person with information about the foundation where the provision of that information is prohibited under the foundation rules.

(6) If subsection (5) applies, the person making the request may apply to the High Court under section 75 for an order authorising or requiring the provision of the information.

(7) The person applying to the High Court shall show that the provision of the information is necessary or expedient to enable the determination as to whether or not —

- (a) the foundation is carrying out its objects;
- (b) the council of the foundation is carrying out its functions;
- (c) the assets of the foundation are being properly administered; and
- (d) the foundation is being properly administered.

(8) Subsection (5) does not affect any other obligation of a foundation to supply information about the foundation imposed by an enactment or an order of a court.

The Establishment of a Foundation

31. The Registrar may refuse application for establishment - (1) The Registrar may refuse to accept an application for the establishment of a foundation if —

- (a) the Registrar considers that its proposed name contravenes section 6(2); or
- (b) a matter comes to the attention of the Registrar which leads the Registrar to consider that its proposed objects contravene section 7(2).

(2) If the Registrar does so refuse, the Registrar shall inform the applicant of the refusal and the reason for the refusal.

(3) Following the Registrar's refusal, the applicant may either reapply to the Registrar or, within 21 days of being informed of the refusal, appeal to the High Court.

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- (4) The High Court may order the Registrar to accept the application if it considers —
- (a) that the proposed name of the foundation does not contravene section 6(2); or
 - (b) that the proposed objects of the foundation do not contravene section 7(2), as the case may be, but shall otherwise confirm the Registrar's decision to refuse to accept the application.
- (5) This section also applies, with necessary amendments, to any application to register an amendment to the foundation instrument of a foundation that involves a change of its name or objects.

32. Establishment - The Registrar may establish a foundation if —
- (a) the Registrar accepts an application from a trustee company for the establishment of the foundation on behalf of a person; and
 - (b) the Registrar is satisfied that the requirements of this Act in respect of the establishment of the foundation have been complied with.

33. Means of establishment - (1) To establish a foundation the Registrar shall enter in the register —
- (a) the name and business address of the foundation;
 - (b) its objects; and
 - (c) the name and business address in the Cook Islands of the foundation's registered agent as shown in the declaration mentioned in section 4(5), and date the entries.
- (2) The Registrar shall also issue the foundation with a registration number and a certificate of establishment.
- (3) An entry in the register of the name of a foundation is conclusive evidence —
- (a) that, on the date mentioned in subsection (1), the foundation was established under this Act; and
 - (b) that the requirements of this Act were complied with in respect of all matters precedent or incidental to the establishment of the foundation.

The Effect of Establishment

34. Nature of a foundation - A foundation —
- (a) is a legal person with the name specified in respect of it in the register;
 - (b) is capable of suing and being sued and prosecuted in its own name; and
 - (c) holds its assets for its objects.

35. Capacity of a foundation - (1) Except as provided by subsections (3) to (5), a foundation, acting through its council, is capable of exercising all the rights, powers and privileges of an individual.
- (2) Accordingly, the capacity of a foundation is not limited by —
- (a) anything in the foundation rules; or
 - (b) any act by a person appointed under the foundation rules.
- (3) A foundation may not directly engage in commercial trading that is not incidental to the attainment of its objects.

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(4) Regulations made by the Queen's Representative under section 85(1) may further restrict the activities of foundations.

(5) Subsection (1) is subject to any restriction arising under an enactment or rule of law.

The Application of Laws and Judgments to a Foundation

36. Cook Islands law to prevail in respect of foundations - (1) A question that arises in respect of —

- (a) a foundation; or
 - (b) the dedication of assets to a foundation, shall be determined in accordance with the law of the Cook Islands without reference to the law of a jurisdiction outside the Cook Islands.
- (2) Without limiting subsection (1), the question may be a question as to

- (a) the capacity of the founder of a foundation to seek the establishment of the foundation or the capacity of a dedicator to dedicate assets to it;
- (b) the validity, interpretation or effect of the foundation instrument or foundation rules or of an amendment of them;
- (c) the administration of the foundation, whether it is conducted in the Cook Islands or elsewhere, including questions as to the functions, appointment and removal of a person appointed under the foundation rules; or
- (d) the existence and extent of functions in respect of a foundation, including (but not limited to) powers of amendment, revocation and appointment, and the validity of the exercise of such a function.

(3) However, subsection (1) —

- (a) does not validate the dedication of assets to a foundation with property that is not —
 - (i) owned by a founder or dedicator; or
 - (ii) the subject of a power of disposition vested in a founder or dedicator;
- (b) does not affect the recognition of the law of a jurisdiction outside the Cook Islands in determining whether a founder or a dedicator is or was the owner of property or the holder of such a power;
- (c) is subject to an express provision to the contrary in the foundation instrument or foundation rules;
- (d) does not, as regards the capacity of a body corporate, affect the recognition of the law of its place of incorporation;
- (e) does not affect the recognition of the law of a jurisdiction outside the Cook Islands prescribing (without reference to the existence of the foundation or the terms of its foundation instrument and foundation rules) the formalities for the disposition of property;
- (f) does not validate a trust or disposition of immoveable property situate in a jurisdiction outside the Cook Islands that is invalid under the law of that jurisdiction; and

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- (g) does not validate a testamentary disposition that is invalid under the law of the testator's last domicile.

37. Exclusion of foreign law - (1) Subject to section 39, neither of the following is void, voidable, liable to be set aside, invalid or subject to an implied condition because of a reason specified in subsection (3), (4) or (6) —

- (a) the establishment of a foundation; or
- (b) the dedication of assets to a foundation.

(2) Subject to section 39, none of the following is subject to an obligation or liability or deprived of a right, claim or interest arising from or under the foundation because of a reason specified in subsection (3), (4) or (6) —

- (a) a foundation;
- (b) a founder of a foundation;
- (c) an assignee of a right a founder of a foundation may have had in respect of the foundation or its assets;
- (d) a dedicator to the foundation;
- (e) a person appointed under the foundation rules;
- (f) a beneficiary under a foundation;
- (g) a third party.

(3) The first reason is that the law of a jurisdiction outside the Cook Islands —

- (a) prohibits or does not recognise foundations; or
- (b) prohibits the dedication of assets to foundations.

(4) The second reason is that —

- (a) the establishment of a foundation; or
- (b) the dedication of assets to a foundation, avoids or defeats or potentially avoids or defeats a right, claim, interest, obligation or liability conferred or imposed by the law of a jurisdiction outside the Cook Islands on a person as the result of a factor mentioned in subsection (5).

(5) The factors are —

- (a) the existence of a personal relationship between a person referred to in subsection (4) and
 - (i) a founder;
 - (ii) a dedicator;
 - (iii) an assignee of a right a founder of a foundation may have had in respect of the foundation or its assets; or
 - (iv) a beneficiary under the foundation; or
- (b) the existence of foreign heirship rights.

(6) The third reason is that —

- (a) the establishment of a foundation; or
- (b) the dedication of assets to a foundation, contravenes or potentially contravenes a rule of law or a judicial or administrative judgment, order or action of a jurisdiction outside the Cook Islands intended to recognise, protect, enforce or give effect to a right, claim, interest, obligation or liability mentioned in subsection (4).

(7) Despite any other enactment or rule of law, a judgment or order of a court of a jurisdiction outside the Cook Islands that concerns a question mentioned in section 36(1) is not —

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- (a) to be recognised, enforced or otherwise given effect to; or
- (b) to give rise to a right, obligation or liability or raise any estoppel, if the court in giving the judgment or making the order failed to take the operation of section 36 and this section into account.

38. Bankruptcy - Notwithstanding any provision of the law of the founder's domicile or place of ordinary residence or the founder's current place of incorporation, a foundation and a disposition to a foundation shall not be void or voidable in the event of the foundation's bankruptcy, insolvency or liquidation (other than in the case of an international company registered pursuant to the International Companies Act 1981-82 that is in liquidation) or in any action or proceedings at the suit of creditors of the founder but shall remain valid and subsisting and take effect according to its tenor subject to the provisions of section 39.

39. Fraud - (1) Where it is proven beyond reasonable doubt by a creditor that a foundation established or property disposed to a foundation -

- (a) was so established or disposed by or on behalf of the founder with principal intent to defraud that creditor of the founder; and
- (b) did at the time such establishment or disposition took place render the founder insolvent or without property by which that creditor's claim (if successful) could have been satisfied, then such establishment or disposition shall not be void or voidable and the foundation shall be liable to satisfy the creditor's claim out of the property which, but for the establishment or disposition, would have been available to satisfy the creditor's claim and such liability shall only be to the extent of the interest that the founder had in the property prior to establishment or disposition and any accumulation to the property (if any) subsequent thereto.

(2) In determining whether a foundation established, or a disposition, has rendered the founder insolvent or without property by which a creditor's claim (if successful) may be satisfied, regard shall be had to the fair market value of the founder's property, (not being property of or relating to the foundation) at the time immediately after the establishment or the disposition referred to in subsection (1)(b) and in the event that the fair market value of such property exceeded the value of the creditor's claim, at that time, after the establishment or disposition, the foundation so established or the disposition shall for all purposes be deemed not to have been so established or the property disposed of with intent to defraud the creditor.

(3) A foundation established and a disposition to such foundation shall for all purposes be deemed not to have been so established, or the property disposed of with intent to defraud a creditor -

- (a) if established or the disposition takes place after the expiration of 2 years from the date that creditor's cause of action accrued; or

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- (b) where established or the disposition takes place before the expiration of 2 years from the date that the creditor's cause of action accrued, that creditor fails to commence in a court of competent jurisdiction proceedings in respect of that creditor's cause of action before the expiration of 1 year from the date such establishment or disposition took place, provided that this subsection shall not have effect if at the time of establishment, or disposition, as the case may be, proceedings in respect of that creditor's cause of action against that founder have already been commenced in a court of competent jurisdiction.
- (4) A foundation established and a disposition of property to such foundation shall for all purposes be deemed not to have been so established, or the property disposed of with intent to defraud a creditor if the establishment or disposition of property took place before that creditor's cause of action accrued.
- (5) A founder shall not have imputed to him an intent to defraud a creditor, solely by reason that the founder
 - (a) has established a foundation or has disposed of property to such foundation within two years from the date of that creditor's cause of action accruing;
 - (b) is a beneficiary, enforcer, or council member of the foundation; or
 - (c) has established a foundation, or has disposed of property to such foundation, at a time when proceedings in respect of that creditor's cause of action against that founder have already been commenced in a court of competent jurisdiction.
- (6) Where a foundation is liable to satisfy a creditor's claim in the manner provided for in subsection (1) -
 - (a) the creditor's rights to recovery shall be limited to that property referred to in subsection (1), or to the proceeds of that property, to the exclusion of any other property of the foundation;
 - (b) where the foundation is unable to satisfy the creditor's claim by reason of the fact that the property referred to in subsection (1) has been disposed of, other than to a bona fide purchaser for value, then any such disposition shall be void.
- (7) For the purpose of this section the onus of proof of the founder's intent to defraud the creditor lies on the creditor.
- (8) For the purposes of this section and section 40:
 - (a) the date of the cause of action accruing shall be the date of that act or omission which shall be relied upon to either partly or wholly establish the cause of action, and if there is more than one act or the omission shall be a continuing one, the date of the first act or the date that the omission shall have first occurred, as the case may be, shall be the date that the cause of action shall have accrued;
 - (b) the term "cause of action" means the earliest cause of action capable of assertion by a creditor against the founder of a foundation by which that creditor has established (or may establish) an enforceable claim against that founder;

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- (c) where a creditor has, or asserts, or could have asserted, multiple or successive causes of action against a founder (whether by virtue of the nature of the relevant circumstances of the case, or by reason of having attained the status of a judgement creditor in respect of one or more of such causes of action, or by reason of asserting or being able to assert an allegedly fraudulent settlement of or disposition to a foundation, or otherwise), the entitlement of such a creditor to relief under this section shall be determined, and the periods referred to in this section shall be calculated, with reference to one only of the creditor's causes of action, being that cause of action which accrued first in time in accordance with paragraph (b);
- (d) nothing in paragraphs (b) or (c) shall apply so as to affect the right or requirement of a creditor to commence separate proceedings under this section in relation to a cause of action which is separate from and independent of another cause of action where the Court is satisfied, having regard to paragraph (c), that both the circumstances out of which the cause of action arose and the subject matter of that cause of action are wholly unrelated to those of the other cause of action.

(9) The provisions of this section shall apply to all civil actions and proceedings brought in the Court in which fraud, deceit, unconscionable conduct or any other inequitable conduct however described or any species of unjust enrichment is alleged, against any person (whether a party to the proceedings or not) with regard to the establishment of a foundation or the disposition of property to such a foundation, or receipt of property by or for such a foundation (or subsequent disposition of property from such a foundation with the intention of prejudicing creditors of the founder of such foundation), and the remedy conferred by subsection (1) shall be the sole remedy available in such an action or proceedings, to the exclusion of any other relief or remedy against any party to the relevant action or proceeding.

(10) The provisions of this section shall operate to the exclusion of any other remedy, principle or rule of law, whether provided for by statute, or founded in equity or in common law including, for the avoidance of doubt, the imposition of a constructive trust upon any interested party or the recognition and enforcement of any constructive trust imposed or recognised by the laws of any other jurisdiction.

(11) The provisions of this section shall apply to every foundation, and to every foundation which having been registered as a foundation, is no longer so registered, and in respect of all dispositions to such a foundation.

(12) For the purposes of this section the term "creditor" means a creditor of the founder and includes any person who alleges a cause of action against a founder.

(13) A creditor seeking to enforce a claim under this section in reliance on a foreign judgement may not enforce such claim until such time as it can demonstrate to the reasonable satisfaction of the Court that,

- (a) it has exhausted all remedies available to it against the founder's remaining property, and
- (b) all rights of appeal against that foreign judgement have been exhausted.

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(14) For the purposes of assessing the liability of a foundation to a creditor under this section, where the amount of that creditor's claim against the founder 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 founder.

40. Commencement of Proceedings – (1) No action or proceedings, whether pursuant to this Act or at common law or in equity, to -

- (a) set aside the establishment of any foundation, or
- (b) set aside any disposition to any foundation, or
- (c) seek relief or remedy under section 39, shall be commenced, unless such action or proceedings is commenced
- (d) in the High Court of the Cook Islands; and
- (e) before the expiration of 2 years from the date of -
 - (i) the establishment of the foundation, or
 - (ii) the disposition to the foundation, as the case may be.

(2) No action or proceedings whether pursuant to this Act or at common law or in equity shall be commenced by any person -

- (a) claiming to have had an interest in property before that property was disposed to a foundation; and
- (b) seeking to derive a legal or equitable interest in that property, unless such action or proceedings is commenced;
- (c) in the High Court of the Cook Islands; and
- (d) before the expiration of 2 years from the date that the property referred to in paragraphs (a) and (b) disposed to a foundation.

(3) No action or proceeding (whether substantive or interlocutory in nature) to which either this section or section 39 applies shall be heard, and no order shall be made or granted by the Court in respect of or relating to such action or proceeding (including any injunction or order that shall have the effect of preventing the exercise of, or the granting or restoring of, any right, duty, obligation or power, or of preserving, granting custody of, or detaining or inspecting any property, including for the avoidance of doubt any Anton Pillar order or any Mareva injunction) unless the Court having regard to the affidavit filed pursuant to subsection(4) shall first be satisfied, beyond reasonable doubt that:

- (a) commencement of the action or proceedings is not precluded by the provisions of subsections (1) or (2);
- and in any action or proceedings to which section 39 applies that;
- (b) the remedy or relief sought is not precluded by the provisions of section 39; and
 - (c) the evidence as disclosed by the affidavit demonstrates the ability of the plaintiff to prove those matters necessary to establish a right to relief under section 39.

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(4) In every action or proceeding to which this section applies, or to which section 39 applies, the person or persons bringing the same (in this subsection referred to as the “plaintiff”) shall, upon the commencement of such proceedings, file an affidavit which shall be made by the plaintiff or by any one of them (or in the case of a corporate plaintiff, by an officer thereof) who shall depose as to:

- (a) the facts and circumstances giving rise to the action or proceedings;
- (b) whether an action or proceedings have been commenced in any other jurisdiction between any of the parties to the action or proceedings;
- (c) such of the circumstances of the plaintiff as are or may be relevant to determine the quantum of security to be paid by the plaintiff or if there is more than one plaintiff, any one or more of them, either as non-residents, or in connection with the making of any interim order; and
- (d) the date upon which the foundation or property, in respect of which the action or proceedings is brought, was established or disposed of to the relevant foundation, as the case may be;

and in any case to which section 39 applies, the following further matters:

- (e) the facts and circumstances of the creditor’s cause of action, and if the creditor shall have multiple or successive causes of action, the facts and circumstances of the creditor’s cause of action which accrued first in time (as defined by and determined in accordance with section 39);
- (f) the date upon which that creditor’s cause of action accrued; and
- (g) whether an action or proceedings have been commenced in any jurisdiction in respect of that creditor’s cause of action and if so, the date upon which that action or those proceedings were commenced.

(5) In any action or proceedings commenced, whether pursuant to this Act or at common law or inequity wherein the usual or appropriate remedy (whether sought or not) would be either:

- (a) the setting aside of the establishment of, or disposition to, a foundation; or
- (b) the award of a legal or equitable interest in property established upon or disposed of to a foundation;

but the grant of such a remedy is or would be precluded either by subsections (1) or (2), or by section 39, then neither damages nor any other relief or remedy which has the effect of providing relief or remedy alternative to or consequential upon that precluded by the said provisions, shall be awarded in such action or proceedings.

PART 3 **ADMINISTRATION OF FOUNDATIONS**

41. Service of documents - A document required to be served on a foundation shall be served on the foundation by leaving it at, or by sending it by post to, its business address.

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42. Documents to be kept at registered office of foundation - (1) A foundation shall keep the documents and records specified in subsection (2) at its registered office.

- (2) The documents and records referred to in subsection (1) are —
- (a) a copy of its foundation instrument and foundation rules as they are for the time being in force;
 - (b) a register showing the names and addresses of the members of its council;
 - (c) records sufficient to show and explain its transactions, including minutes of meetings of the council and resolutions of the council;
 - (d) a record of the appointment of any enforcer of the foundation showing the date of his or her appointment and his or her name and address;
 - (e) records that disclose, with reasonable accuracy, its financial position; and
 - (f) a register of the names and addresses of all dedicators to the foundation.

43. Foundation to keep financial records - (1) A foundation shall keep reliable records which —

- (a) enable the financial position of the foundation to be determined with reasonable accuracy at any time; and
 - (b) allow financial statements to be prepared.
- (2) When financial statements are prepared, they shall be approved by the council of the foundation.
- (3) The records, or a copy thereof, shall be kept at the registered office of the foundation or at such other place as the council of the foundation thinks fit.
- (4) The records, or a copy thereof, must be kept at the registered office of the foundation for a minimum period of six years.
- (5) Where the records are kept at a place other than at its registered office, the foundation shall provide its registered agent with a written record of the physical address of the place at which they are kept.
- (6) Where the place at which they are kept is changed, the foundation shall provide its registered agent with the physical address of the new location of the records within 14 days of the change of location.

44. Right to require financial statements to be prepared - (1) Subsection (2) applies if a foundation has not prepared financial statements for a continuous period of eighteen (18) months or more.

- (2) A person with sufficient interest may demand that financial statements be prepared for the period —
- (a) commencing at —
 - (i) the end of the accounting period to which the preceding financial statements relate; or
 - (ii) if there are no preceding financial statements, the date of establishment of the foundation; and
 - (b) ending at the date specified in the demand, which shall not be later than the date of demand.
- (3) A demand under subsection (2) shall be in writing and deposited at the business address of the foundation.

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(4) The financial statements shall be prepared by the foundation within 6 months of the date of deposit of the demand.

(5) A foundation which fails to comply with subsection (4) commits an offence.

45. Amendment of the foundation instrument - (1) A foundation shall notify the Registrar of any amendment made to its foundation instrument within one month of the amendment taking effect.

(2) The notice under subsection (1) shall be accompanied by —

(a) a copy of the foundation instrument as amended; and

(b) the fee set out in the Schedule.

(3) If the Registrar is satisfied that the requirements of this Act in respect of the amendment of the foundation instrument have been complied with, the Registrar shall enter the foundation instrument as amended in the register and date the entry.

(4) An attempt to amend the foundation instrument of a foundation otherwise than —

(a) in accordance with its foundation instrument and foundation rules; or

(b) by an order of the High Court, is of no effect.

(5) The foundation shall provide a copy of any notification under subsection (1) to its registered agent.

(6) The registered agent shall retain the copy.

(7) A foundation which fails to comply with subsection (1) or (5) commits an offence.

(8) A registered agent who fails to comply with subsection (6) commits an offence.

PART 4 **THE REGISTRAR**

46. The Registrar - (1) The Registrar of International and Foreign Companies appointed pursuant to section 8 of the International Companies Act 1981-82 shall be the Registrar of Foundations.

(2) A Deputy Registrar of International and Foreign Companies and any officer appointed pursuant to section 8 of the International Companies Act 1981-82 shall be a Deputy Registrar of Foundations for the purposes of this Act.

(3) Anything authorised or required to be done by the Registrar under this Act may be authorised or done by a Deputy Registrar.

(4) All courts, judges and persons acting judicially shall take judicial notice of the seal and also the signature of the Registrar and any Deputy Registrar.

47. Exercise of functions of the Registrar - A function of the Registrar under this Act may, to the extent authorised by the Registrar, be exercised by an officer on the staff of the Financial Supervisory Commission of the Cook Islands.

48. Register to be kept and made available for public inspection - (1) The Registrar shall keep a register for the purposes of this Act.

(2) The Registrar shall include in the register the foundation instrument of each foundation.

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(3) The Registrar shall on payment of any fee set out in the Schedule, make the register available for public inspection at any reasonable time.

(4) On payment of the fee set out in the Schedule, the Registrar shall supply a person with a certificate stating whether or not a named body is a foundation and, if it is, the following details as they appear in the register —

- (a) the date of its establishment;
- (b) its registration number;
- (c) its business address;
- (d) whether it has paid all fees and penalties due and payable; and
- (e) the name and business address of its registered agent or, if there is no such registered agent, its last registered agent.

(5) On payment of the fee set out in the Schedule, the Registrar shall supply a person with a certified copy of the foundation instrument of a foundation as included in the register.

(6) There is admissible in evidence in legal proceedings —

- (a) a certificate supplied under subsection (4); or
- (b) a certified copy of the foundation instrument supplied under subsection (5).

49. Keeping of records by the Registrar - (1) A record delivered to the Registrar under this Act may be kept by the Registrar in any form —

- (a) that is approved by the Registrar; and
- (b) that is capable of being reproduced in a legible form.

(2) The Registrar is to be taken to have complied with an obligation to keep a record if the Registrar has complied with subsection (1) in respect of the record.

(3) The Registrar may destroy a record kept by the Registrar if —

- (a) it is an original record and the Registrar has recorded and kept the information in it in accordance with subsection (1); or
- (b) it relates to a foundation which has been dissolved more than 10 years previously.

50. Power of the Registrar to refuse documents - (1) The Registrar may refuse to accept any document delivered under this Act if —

- (a) it does not comply with this Act;
- (b) it has not been duly completed;
- (c) it contains any material error;
- (d) it is not legible; or
- (e) it is not accompanied by the prescribed fee.

(2) If the Registrar refuses to accept a document, the Registrar shall return it to the person who submitted it together with a notice specifying the grounds upon which the document was refused.

(3) Subject to subsection (5), a document refused by the Registrar is deemed not to have been delivered.

(4) A person who is aggrieved by the refusal of a document by the Registrar may appeal to the High Court within one month after the date of refusal or such further time as the High Court may allow.

(5) On hearing an appeal under subsection (4), the High Court may confirm the refusal or make such determination in the matter as it sees fit.

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PART 5 MIGRATION, DISSOLUTION AND TERMINATION

Registration of Overseas Foundation as Cook Islands Foundation

51. Overseas foundation may be registered as Cook Islands foundation - An overseas foundation may apply to the Registrar to be registered as a Cook Islands foundation in accordance with the provisions of this Part.

52. Registration shall be authorised by foreign law - An overseas foundation cannot be registered as a Cook Islands foundation unless -

- (a) the equivalent of the Registrar in the jurisdiction which the foundation is established provides confirmation in writing that the foundation is able under the law of that jurisdiction to be registered as a Cook Islands foundation, and
- (b) the foundation has complied with the requirements of that law in relation to its registration as a Cook Islands foundation.

53. Overseas foundation cannot be bankrupt etc. - An overseas foundation cannot be registered as a Cook Islands foundation if-

- (a) the foundation is bankrupt,
- (b) a receiver or administrator has been appointed, in relation to any property of the foundation,
- (c) an application has been made to a court, whether in the Cook Islands or elsewhere -
 - (i) to put the foundation into liquidation, to wind it up or to have it declared insolvent,
 - (ii) for the approval of a compromise or arrangement between the foundation and a creditor, or
 - (iii) for the appointment of a receiver or administrator in relation to any property of the foundation, and (in each case) the application has not been finally disposed of.

54. Application for registration as a Cook Islands foundation - (1) An application by an overseas foundation for registration as a Cook Islands foundation shall be made to the Registrar.

- (2) The application shall include or be accompanied by -
 - (a) the migration details, as specified in section 55 below;
 - (b) such other information and documents, verified in such manner, as the Registrar may require;
 - (c) a declaration of compliance; and
 - (d) the fee set out in the Schedule.
- (3) The application may propose the date on which registration as a Cook Islands foundation shall take effect, provided that that date is not later than three (3) months after the date of the application.
- (4) An application for registration as a Cook Islands foundation may only be made by a trustee company residing in the Cook Islands.

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55. Migration details - (1) In this Part, "migration details" means –
- (a) a copy of the foundation's certificate of establishment in the jurisdiction in which it is established or registered;
 - (b) a copy of the foundation's instrument and rules which are to be binding on the foundation immediately after its registration in the Cook Islands, together with a copy of the foundation's current instrument or rules or equivalent documents;
 - (c) a statement of the foundation's current foundation council members or equivalent individuals;
 - (d) a statement of the foundation's business address or registered office in the jurisdiction in which it is established or registered;
 - (e) the proposed name under which the foundation is to be registered;
 - (f) evidence acceptable to the Registrar that –
 - (i) the foundation is not prohibited from being registered in the Cook Islands pursuant to section 53 of this Act;
 - (ii) on the date of registration, the foundation will cease to be established and registered under the law of any jurisdiction outside the Cook Islands, and
 - (iii) the foundation has legal personality in the jurisdiction in which it is established or registered.

(2) The statement of the foundation's current foundation council members or equivalent individuals shall comprise the full name of every such member and his or her address.

(3) The foundation instrument and foundation rules which are to be binding on the foundation immediately after its registration in the Cook Islands may be different from its current instrument or rules or equivalent documents if the amendments are valid and have been validly made under the law (including the rules of private international law) of the jurisdiction outside the Cook Islands from which the foundation is migrating.

56. Effect of registration - (1) Upon receipt of the application for registration as a Cook Islands foundation -

- (a) the Registrar shall register the foundation in the Register by -
 - (i) recording its name therein, and
 - (ii) allocating a registration number to the foundation,
- (b) subject to the provisions of this Part, the foundation shall be treated in all respects as a foundation established under this Act,
- (c) the Registrar shall issue a certificate of registration in respect of the foundation which shall –
 - (i) contain the matters detailed in section 49(4),
 - (ii) state the date on which the foundation was first established (in addition to the date on which it was registered in the Cook Islands),
 - (iii) detail the jurisdiction(s) in which the foundation was previously registered,
 - (iv) detail the name(s) with which the foundation was previously registered, and
 - (v) be conclusive evidence that the foundation is duly registered.

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(2) If the application proposed a date on which registration as a Cook Islands foundation was to have effect which date postdates the issue of the certificate of registration, then the foundation shall be established and registered as a Cook Islands foundation on (and the date stated on the certificate shall be) the proposed date.

57. Cancellation of registration - (1) Where an overseas foundation is registered as a Cook Islands foundation under this Part, the foundation shall, as soon as possible, file with the Registrar any certificate or other document issued under the law of the jurisdiction in which the foundation has ceased to be established and registered evidencing the fact that the foundation has ceased to be established and registered under that law.

(2) If the High Court is satisfied that -

- (a) an overseas foundation has been registered as a Cook Islands foundation pursuant to the provisions of this Part, and
- (b) the foundation continues to be established or registered under the law of any jurisdiction outside the Cook Islands, the High Court may, in its absolute discretion on the application of -
 - (i) the foundation or any of its council members, beneficiaries, enforcer, founder, or creditors, or
 - (ii) the Registrar, make an order for the removal of the foundation's name from the Register.

(3) An order under subsection (2) may be made subject to such terms and conditions and such penalty as the High Court thinks fit.

(4) On the making of an order under subsection (2) the foundation's registration in Cook Islands shall (unless the High Court orders otherwise) be void *ab initio*.

Transfer of Registration of Foundations to Overseas

58. Foundations may transfer registration - A foundation may apply to the Registrar to be removed from the Register in accordance with the provisions of this Part.

59. Foundations cannot transfer registration without power to do so - A foundation cannot be removed from the Register unless the foundation's council members satisfy the Registrar that the foundation's instrument and rules do not prohibit such removal.

60. Foundations cannot transfer registration if in bankruptcy, etc - A foundation cannot be removed from the Register if -

- (a) the foundation is bankrupt;
- (b) a receiver or administrator has been appointed, in relation to any property of the foundation;
- (c) an application has been made to a court, whether in the Cook Islands or elsewhere -
 - (i) to put the foundation into liquidation, to wind it up or to have it declared insolvent,
 - (ii) for the approval of a compromise or arrangement between the foundation and a creditor, or
 - (iii) for the appointment of a receiver or administrator in relation to any property of the foundation, and (in each case) the application has not been finally disposed of; or
- (d) possession or control has been taken of any of the foundation's property or affairs by or on behalf of creditors issued by it.

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61. Foundations cannot transfer registration without giving notice to creditors - A foundation cannot be removed from the Register unless, before it applies to the Registrar for removal under section 62, it gives written notice to all its creditors stating that it intends to so apply.

62. Application for transfer of registration - (1) An application for removal from the Register shall be made to the Registrar.

- (2) The application shall include or be accompanied by -
- (a) confirmation from the Ministry of Finance and Economic Development in the Cook Islands that they have no objection to the removal of the foundation from the Register;
 - (b) evidence acceptable to the Registrar that -
 - (i) the removal of the foundation from the Register by this Act;
 - (ii) on the date of the removal of the foundation's name from the Register the foundation will be established under the law of the jurisdiction in question;
 - (iii) the foundation will continue to have legal personality in accordance with the law of the jurisdiction in question;
 - (c) a declaration of compliance;
 - (d) such other information and documents, verified in such manner, as the Registrar may require; and
 - (e) the fee set out in the Schedule.

(3) Upon receipt of the documents specified in subsection (2), the Registrar shall give notice of the proposed transfer in such manner and for such period as he thinks fit.

(4) An application for removal from the Register may only be made by a trustee company residing in the Cook Islands.

63. Effect of transfer of registration - Not less than 28 days after the day on which the Registrar gave notice under section 62(3) -

- (a) any statement in the foundation's instrument or rules that its registered office is situated in the Cook Islands shall be deleted,
- (b) the foundation's name shall be removed from the Register,
- (c) the foundation shall cease to be a Cook Islands foundation with effect from the date on which its name was removed from the Register,
- (d) the Registrar shall file in the Register a notice stating that the foundation's name has, pursuant to the provisions of this section, been removed from the Register for the purpose of the foundation becoming established under the law of the jurisdiction specified in the notice, and
- (e) the Registrar shall publish the fact that the foundation has been removed from the Register in such manner and for such period as he thinks fit.

64. Cancellation of transfer - (1) Where a foundation is removed from the Register under this Part, the foundation shall, as soon as possible, file with the Registrar any certificate or other document issued under the law of the jurisdiction in which the foundation has become established evidencing the fact that the foundation has become established under the law thereof.

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- (2) If the High Court is satisfied that -
- (a) a foundation's name has been removed from the Register pursuant to the provisions of this Part, and
 - (b) the foundation has not become established under the law of any jurisdiction outside the Cook Islands, the High Court may, in its absolute discretion on the application of -
 - (i) the foundation or any of its council members, beneficiaries, enforcer, founder or creditors, or
 - (ii) the Registrar, make an order for the restoration of the foundation's name to the Register.
- (3) An order under subsection (2) may be made subject to such terms and conditions and such penalty as the High Court thinks fit.
- (4) On the making of an order under subsection (2) the removal of the foundation's name from the Register shall (unless the Court otherwise orders) be void *ab initio*.

65. Power of Court to make orders as to transfer of registration - (1) If the High Court is satisfied that the removal of a foundation from the Register under section 63 would unfairly prejudice a founder, beneficiary, creditor or any enforcer of the foundation or any other person to whom the foundation is under any obligation or liability, the Court may, on the application of that person made at any time before the date on which the removal of the foundation takes place, or within such further time as the Court may in any particular case allow, make such order as it thinks fit in relation to the removal, including, without prejudice to the generality of the foregoing, an order -

- (a) directing that the removal of the foundation shall not take place, or shall only take place subject to such terms and conditions as the Court thinks fit,
 - (b) modifying the proposal for the removal of the foundation in such manner as may be specified in the order,
 - (c) directing the foundation or its council members to reconsider the proposal for the removal of the foundation or any part of the proposal.
- (2) An order under subsection (1) may be made subject to such terms and conditions and subject to such penalty as the Court thinks fit.

Migration Generally

66. Declaration of compliance - (1) A declaration of compliance is a declaration, signed by a trustee company, that all the requirements of this Part in respect of registration as a Cook Islands foundation, or the removal of a foundation from the Register (as the case may be), have been fulfilled.

(2) The Registrar, when performing his functions under this Part, may rely upon a declaration of compliance in all respects and accordingly is not bound to enquire further as to whether, in relation to an application for registration as a Cook Islands foundation, or an application for the removal of a foundation from the Register (as the case may be), the provisions of this Part have been complied with.

(3) A person who without reasonable excuse makes a declaration of compliance under this Part which is false, deceptive or misleading in a material particular is guilty of an offence.

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67. Documents in a language other than English - (1) Where a document provided to the Registrar under this Part is not in English, a translation in English certified by a person with the necessary competence to provide the translation, shall also be provided.

(2) In the event of any inconsistency between the original version and the English translation, the English translation shall prevail.

68. Registration or transfer not to prejudice continuity of foundation's existence - (1) Registration of an overseas foundation as a Cook Islands foundation or removal of a Cook Islands foundation from the Register for the purpose of transferring the registration does not prejudice or affect the identity or continuity of the foundation's legal personality which shall be uninterrupted by the process of transfer.

(2) For the avoidance of doubt, upon registration as a Cook Islands foundation or removal from the Register –

- (a) all property and rights to which the foundation was entitled immediately before registration or removal remain its property and rights,
- (b) the foundation remains subject to all criminal and civil liabilities, and all contracts, debts and other obligations, to which it was subject immediately before registration or removal,
- (c) all actions and other legal proceedings which immediately before registration or removal could have been instituted or continued by or against the foundation may be instituted or continued by or against it after registration or removal, and
- (d) a conviction, ruling, order or judgment in favour of or against the foundation before registration or removal may be enforced by or against it after registration or removal.

69. Terminology used in other jurisdictions - References in this Part to foundations, founders, council members, enforcers, certificates of establishment, liquidations or any other matter concerning a foundation include references to their equivalents in the law of the jurisdiction outside the Cook Islands from which or to which a foundation is migrating.

Termination and Dissolution

70. Termination and dissolution - (1) Subject to the provisions of this Act, a foundation shall terminate and be dissolved, by being wound up by the council members, upon –

- (a) the expiry of its duration (if it is limited in duration);
- (b) the happening of any event specified in that behalf in the foundation instrument or foundation rules;
- (c) the foundation no longer having any property or assets;
- (d) the bankruptcy of the foundation;
- (e) the completion, failure or lapse of its purpose, by order of the High Court, on the application of the council members or any beneficiary, enforcer or founder;
- (f) the making by the High Court of an order -

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- (i) under section 57(2) (cancellation of registration) directing the winding up of the foundation, or
- (ii) under section 71(1) (winding up by High Court) for the winding up of the foundation.

(2) Subject to the order of the High Court, immediately prior to termination the foundation property shall, subject to subsection (2), be distributed by the council members within a reasonable time in accordance with the provisions of section 73.

71. Winding up of foundation by High Court - (1) The High Court may order the winding up of a foundation on the application of any of the foundation's council members, founder, beneficiaries, enforcer or creditors thereof or on the application of the Registrar if in its opinion -

- (a) it is not reasonably practicable to carry on the foundation in conformity with its foundation instrument and foundation rules;
- (b) it was established by duress, fraud, mistake, undue influence or misrepresentation or in breach of fiduciary duty;
- (c) it is, or is being conducted in a way that is, immoral or contrary to public policy;
- (d) its terms are so uncertain that its performance is rendered impossible;
- (e) the foundation is bankrupt;
- (f) without prejudice to the generality of subsection (e), the following conditions are satisfied -
 - (i) the foundation is indebted to a creditor in a sum exceeding \$1,000 or such other sum as may be prescribed by the Financial Supervisory Commission of the Cook Islands;
 - (ii) the creditor has served a signification on the foundation demanding payment of the debt, and
 - (iii) the foundation does not, within a period of 21 days immediately following the date of service of that demand, pay the debt or give security for it to the creditor's satisfaction;
- (g) the affairs of the foundation are being conducted in such a way as to defraud creditors (whether of the foundation or of any other person) or in an unlawful manner;
- (h) there has been persistent default by the foundation in complying with the requirements or conditions imposed by or under this Act, or any regulation made under it;
- (i) the founder or council members have in connection with the formation of the foundation, been guilty of fraud, misfeasance, breach of fiduciary duty or other misconduct in relation to the foundation; or
- (j) it is just and equitable to do so.

(2) Upon the making of an order under subsection (1) for the winding up of a foundation or at any time thereafter, the High Court may make such other orders in relation to the winding up as it thinks fit, including one for the appointment of one or more liquidators to wind up the foundation's affairs and distribute its assets, and to apply to the Registrar for removal of the foundation from the Register.

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72. General provisions as to winding up of foundations - (1) When a foundation is required to be wound up its affairs shall, unless a liquidator has been appointed by the High Court under subsection 71(2) or under subsection (5), be wound up by the council members.

(2) From the commencement of the winding up of a foundation no foundation council member may, except in accordance with the provisions of section 73(distribution of assets), claim as a creditor of the foundation.

(3) For the purposes of this Act, the winding up of a foundation is deemed to commence on the earlier of the following -

- (a) the date of the occurrence of the event upon which, under the provisions of this Act, the foundation is required to be wound up, or
- (b) the date of the order of the High Court under subsection 71(1) for its winding up.

(4) Where there is a contravention of subsection (2) in relation to a foundation, the foundation council members shall be guilty of an offence.

(5) Upon the commencement of the winding up of a foundation or at any time thereafter, the High Court may, on the application of any foundation council member, beneficiary, enforcer the founder, or any creditor, make such orders in relation to the winding up as it thinks fit, including one for the appointment of one or more liquidators to wind up the foundation's affairs and distribute its assets.

(6) On the appointment of a liquidator (whether under this section or under section 71) all powers of the foundation council members cease, and a person who purports to exercise any power of a foundation council member at a time when, pursuant to this subsection, those powers have ceased shall be guilty of an offence.

(7) From the commencement of the winding up of a foundation the foundation shall cease to carry any activities except to the extent necessary for its beneficial winding up, and where in relation to a foundation there is a contravention of this subsection, the foundation and each council member thereof shall be guilty of an offence.

(8) All expenses properly incurred in the winding up of a foundation, including the liquidator's remuneration, are payable from the foundation's assets in priority to all other debts.

(9) From the commencement of the winding up of a foundation, the persons winding up the foundation's affairs, in the name of and for and on behalf of the foundation -

- (a) may, to the extent necessary for the beneficial winding up of the foundation, prosecute, defend or settle any civil or criminal action,
- (b) shall dispose of the foundation's property and realise its assets, and
- (c) shall, in accordance with the provisions of section 73, and subject to section 16—
 - (i) discharge the foundation's debts, and
 - (ii) distribute any remaining assets of the foundation in accordance with the terms of the foundation rules.

(10) As soon as a foundation's affairs are fully wound up -

- (a) the persons who conducted the winding up shall -
 - (i) prepare an account of the winding up, giving details of the conduct thereof and the disposal of the foundation's property;

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- (ii) provide all of the foundation's council members with a copy of the said account, and
- (iii) within a period of 7days beginning on the date of completion of the winding up, file with the Registrar, and publish in the Cook Islands Gazette and in an approved newspaper, notice of completion of the winding up;
- (b) the Registrar shall, as soon as is reasonably practicable after such filing, delete the name of the foundation from the Register, and
- (c) the foundation's certificate of establishment shall thereupon cease to be valid and the foundation shall thereupon be dissolved.

(11) Where there is a contravention of any provision of subsection (9)(a) in relation to a foundation, the persons who conducted the winding up shall each be guilty of an offence.

(12) The persons conducting the winding up of a foundation may seek the Court's directions as to any matter arising in relation to the winding up, and upon such an application the Court may make such order as it thinks fit.

73. Distribution of assets upon winding up - Upon the winding up of a foundation, the assets shall be distributed in the following order -

- (a) first, to creditors other than foundation's council members, beneficiaries, founder or any enforcer, to the extent otherwise permitted by law, in satisfaction of the foundation's debts;
- (b) secondly, to the foundation's council members, beneficiaries, founder or any enforcer who are creditors, to the extent otherwise permitted by law, in satisfaction of the foundation debts;
- (c) finally, subject to the provisions of the foundation instrument and foundation rules, to the default beneficiary.

74. Personal liability for certain defaults - (1) In any case where -

- (a) a foundation has been wound up and is unable to pay its debts, and
- (b) there has been in relation to the foundation a contravention of any relevant provision which -
 - (i) has contributed to the inability of the foundation to pay its debts,
 - (ii) has materially misled or deceived any foundation council member, beneficiary, enforcer, creditor or the founder as to, or has resulted in substantial uncertainty as to, the assets, liabilities, client money or investment instruments of the foundation, or
 - (iii) has substantially impeded the orderly winding up of the foundation's affairs, any foundation council member who is responsible for the contravention shall (without prejudice to any civil liability or order under subsection (3)) be guilty of an offence.

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(2) In a prosecution for an offence under this section, it shall be a defence for the person charged to show that -

- (a) he or she took all reasonable steps to secure compliance by the foundation with the relevant provisions, or
- (b) he or she had reasonable grounds for believing and did believe that a competent and reliable person, acting under the supervision or control of or appointed by the foundation council members -
 - (i) was charged with the duty of ensuring that those provisions were complied with, and
 - (ii) was in a position to discharge that duty.

(3) Where circumstances exist such that a foundation's council member may be guilty of an offence under subsection (1), the High Court may, on the application of any creditor, foundation council member, beneficiary, enforcer, founder or of any person conducting the winding up of the foundation, declare that the foundation council member who is responsible for the contravention of any matters detailed in subsection (1)(b) shall be personally liable, without limitation of liability, for the debts of the foundation or such part thereof as may be specified by the Court.

(4) Where the High Court makes a declaration under subsection (3) in relation to any person, it may -

- (a) give such directions as it thinks fit for the purpose of giving effect to the declaration, and
- (b) direct that the liability of that person under the declaration shall be a charge on -
 - (i) any debt due from the foundation to him or her, to any person on his or her behalf, to any person claiming as assignee from or through him or her or to any person acting on behalf of such an assignee, or
 - (ii) any charge on any foundation assets or any interest in any such charge held by or vested in him or any such person, and the Court may also from time to time make such further orders as it thinks fit for the purpose of giving effect to any charge imposed under this subsection.

(5) In subsection (4) the expression "assignee" includes any person to whom or in whose favour, by the directions of the person liable, the debt, charge or interest was created, issued or transferred but does not include an assignee for valuable consideration given in good faith and without notice of any of the grounds upon which the declaration might have been made.

(6) The High Court shall not make a declaration under subsection (3) in respect of a person if it considers that -

- (a) he or she took all reasonable steps to secure compliance by the foundation with the relevant provisions, or
- (b) he or she had reasonable grounds for believing and did believe that a competent and reliable person, acting under the supervision or control of or appointed by the foundation's council members -
 - (i) was charged with the duty of ensuring that those provisions were complied with, and
 - (ii) was in a position to discharge that duty.

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(7) Subsections (3), (4), (5) and (6) are without prejudice to any other penalty, remedy or proceedings, whether civil or criminal, in respect of the contravention.

(8) For the purposes of this paragraph -

- (a) the expression "relevant provision" means any provision of section 70 and any other provision for the time being prescribed by regulations of the Queen's Representative pursuant to this Act, and
- (b) a person shall be considered to be responsible for a contravention of a relevant provision if the contravention -
 - (i) was committed with his or her consent or connivance, or
 - (ii) was attributable to or facilitated by any neglect on his or her part.

PART 6 POWERS OF THE HIGH COURT

75. Applications to the High Court - (1) A person with sufficient interest in respect of a foundation may apply to the High Court for the Court to take, in respect of the foundation, any of the actions specified in this Part.

(2) Where the question or one of the questions to be determined by the High Court is whether a person is a person with sufficient interest in respect of a foundation, the reference in subsection (1) to a person with sufficient interest is to be taken, for the purpose of determining that question, to include such a person.

(3) Where the High Court considers that a person's interest in a foundation is sufficiently close that the person ought to be treated as a person with sufficient interest, the High Court may determine that the person is to be a person of sufficient interest for the purposes of this Act.

76. Power of the High Court to order compliance - (1) If the High Court is satisfied that, in respect of a foundation, a person has failed to comply with —

- (a) a requirement of this Act or of the foundation instrument or foundation rules; or
- (b) an obligation imposed on the person by this Act or the foundation instrument or foundation rules, the Court may, by order, require the person to comply with the requirement or obligation.

(2) If the High Court is satisfied that a foundation, acting through its council, has failed to carry out its objects or any of them, the Court may, by order, require the foundation to do so.

(3) An order under this section may specify the action the person or foundation is required to take.

77. Power of the High Court to order amendment of foundation instrument or foundation rules - (1) The High Court may order the amendment of the foundation instrument or the foundation rules if the Court is satisfied —

- (a) that the change will assist the foundation to administer its assets or to attain its objects; or

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- (b) that those objects are no longer attainable and that the change will assist the foundation to attain objects as near as reasonably possible to those objects.
- (2) If the order is to amend the foundation instrument, section 45 has effect.
- (3) Without limiting subsection (1), the High Court may make an order under subsection (1) in the event that a foundation does not have foundation rules or that the terms of those rules cannot be readily ascertained or are otherwise incomplete.

78. Power of the High Court to give directions - (1) This section applies if the High Court is satisfied —

- (a) that if it gives a direction it will assist a foundation to administer its assets or to carry out its objects; or
- (b) that it is otherwise desirable for the Court to give a direction.
- (2) The Court may give a direction as to —
 - (a) the meaning and effect of a provision or term in the foundation instrument or foundation rules;
 - (b) the manner in which the council of the foundation is required to carry out the administration of the foundation's assets or the carrying out of its objects;
 - (c) the functions of the council of the foundation or of any of its members;
 - (d) the functions of any other person appointed under the foundation rules;
 - (e) whether a person is a beneficiary;
 - (f) the rights of beneficiaries under the foundation as between themselves or as between themselves and the foundation; or
 - (g) such other matters as the High Court considers relevant to the foundation, its foundation instrument, its foundation rules, the administration of its assets or the carrying out of its objects.
- (3) The High Court may, in addition to giving a direction under subsection (2), make such an order as it thinks fit to give effect to the direction.

79. Power of High Court to protect interests in a foundation - The High Court may by order appoint a person to protect the interests of a person who the Court is satisfied is or may come to be a beneficiary under a foundation, where —

- (a) the person is unborn; or
- (b) the Court is satisfied that the person is unable to act on his, her or its own behalf.

80. Power of the High Court to dismiss or appoint a registered agent - (1) If the High Court is satisfied that it is in the interest of a foundation to do so, it may order —

- (a) the removal of a registered agent of the foundation; or
- (b) the appointment of a registered agent in the Cook Islands for the foundation, or do both.
- (2) As a change of a foundation's registered agent entails an amendment to the foundation instrument, section 45 has effect.

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81. Power of the High Court to take action on behalf of others - (1) This section applies where the High Court is satisfied, in respect of a foundation, that a person has failed to comply with —

- (a) a requirement of this Act or of the foundation instrument or foundation rules; or
 - (b) an obligation imposed on the person by this Act or by the foundation instrument or foundation rules.
- (2) The High Court may, by order, comply with the requirement or obligation on behalf of the person who has failed to do so.
- (3) The Court shall not do so unless it is satisfied —
- (a) that to do so will assist the foundation in the administration of its assets or the attainment of its objects; or
 - (b) that it is otherwise desirable that it should do so.
- (4) Where the Court does so, its order has the same effect as if it were an action taken by the person required to comply with the requirement or obligation.

82. General power of the High Court in respect of orders - (1) An order made by the High Court under this Part in respect of a foundation may, in particular, provide for the appointment or removal of a person appointed under the foundation rules.

- (2) Any order made by the High Court under this Part —
 - (a) may be made on such terms; and
 - (b) may impose such conditions, as the Court thinks fit.

PART 7 **CLOSING PROVISIONS**

83. False or misleading statements - A person commits an offence if, when giving information to the Registrar, the person —

- (a) makes a statement which the person knows is false in a material particular; or
- (b) recklessly makes a statement which is false in a material particular.

84. Offences - (1) A person guilty of an offence under this Act is liable on summary conviction to a fine not exceeding \$10,000.

(2) Subsection (3) applies if an offence under this Act is committed by a foundation and it is proved that a member of the council of the foundation or its registered agent (or a person purporting to act in either such capacity) authorised, permitted, participated in or failed to take all reasonable steps to prevent the commission of the offence.

(3) The member of the council or registered agent (or person purporting to act in either such capacity), as well as the foundation, commits the offence and is liable to the penalty provided for the offence.

(4) Subsection (5) applies if an offence under this Act is committed by a body corporate and it is proved that a director or other officer of the body corporate, or its registered agent (or a person purporting to act in any such capacity) authorised, permitted, participated in or failed to take all reasonable steps to prevent the commission of the offence.

(5) The director, officer or the body corporate's registered agent (or person purporting to act in any such capacity), as well as the foundation, commits the offence and is liable to the penalty provided for the offence.

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85. Regulations - (1) The Queen's Representative may make regulations in respect of any of the following —

- (a) restricting the business that foundations may carry on;
- (b) the conduct of business of foundations;
- (c) the taxation of foundations;
- (d) the form and content of model foundation rules;
- (e) the form and content of the accounting records and financial statements of foundations;
- (f) requiring compliance with specified accounting standards;
- (g) requiring the audit of the financial statements of foundations;
- (h) the qualifications of auditors of such statements;
- (i) requiring auditors to comply with systems of public oversight specified in the regulations;
- (j) the winding up and dissolution of foundations;
- (k) the removal of foundations from the register (by striking them off or otherwise);
- (l) the merger of foundations;
- (m) any other matter where the Queen's Representative considers that regulations are necessary or expedient to give effect to this Act.

(2) Regulations under subsections (1) and (2) may —

- (a) provide for their contravention to be an offence and prescribe a penalty for commission of the offence of a fine not exceeding \$10,000 on summary conviction;
- (b) exempt a person from a provision of this Act to which the regulations relate;
- (c) permit a person to exercise a discretion in respect of any matters specified in the regulations;
- (d) require compliance with standards or the adoption of practices recommended or specified from time to time (whether before or after the making of the regulations) by a person or body specified in the regulations;
- (e) permit a person to publish fees that may be imposed by the regulations;
- (f) permit a person to publish forms and other material in respect of any matter specified in the regulations; and
- (g) contain consequential, incidental, supplementary and transitional provisions which the maker of the regulation considers to be necessary or expedient.

(3) The power conferred by subsection (3)(g) includes the power to modify, adapt or amend any provision of this Act or any other enactment.

86. Fees, penalties and forms - (1) The Registrar may —

- (a) set the level of any fees payable under this Act;
- (b) impose a penalty for non-payment of a prescribed fee and set the level of that penalty;
- (c) specify the form of any statement, document or form required under this Act; and
- (d) publish such fees, penalties and forms.

Foundations

(2) A prescribed fee or penalty is a debt due to the Registrar from the foundation and may be sued for accordingly.

(3) Fees and penalties payable under this Act form part of the consolidated revenue of the Cook Islands.

87. Application of other enactments - (1) No Act of the Cook Islands, or any regulation, by-law or rule thereunder, shall -

- (a) impose -
 - (i) any liability, duty, responsibility, obligation or restrictions;
 - (ii) any fee, impost, tax, levy, dues, duty or excise; or
 - (iii) any fine or penalty, on a foundation; or
- (b) require -
 - (i) the deposit of any moneys in any public account by;
 - (ii) the filing of any accounts, returns, reports or records by;
 - or
 - (iii) the licensing or registration of, a foundation, other than this Act, the Crimes Act 1969, the Criminal Procedure Act 1980-81, the Proceeds of Crime Act 2003, the Financial Supervisory Commission Act 2003, the Banking Act 2003, the Mutual Assistance in Criminal Matters Act 2003, the Extradition Act 2003, the Financial Transactions Reporting Act 2004, the Trustee Companies Act 1981-82 the Terrorism Suppression Act 2004 and the Shipping Act 1998.

(2) Every foundation may sue and be sued in the High Court and accordingly shall be subject to the Judicature Act 1980-81 and to every regulation, by-law or rule made under that Act and to all other rules of procedure of the High Court whether provided for under or by virtue of statute or made by the High Court in its inherent jurisdiction.

This Act is administered by the Financial Services Development Authority

Foundations

SCHEDULE

FEEES

Column 1 <u>Section</u>	Column 2 <u>Nature of Fee</u>	Column 3 <u>Amount</u> <u>(in United States Dollars)</u>
4(4)(b)	On application to register a Foundation	300.00
4(7)	On application to renew registration of a foundation	300.00
4(7)	On every late renewal of re-registration of a Foundation	50.00
15(4)(d)	On application for notice of confirmation of deregistration of a Foundation	25.00
45	For the amendment of a Foundation instrument.	25.00
48(3)	For each inspection of the file of documents kept by the Registrar for any Foundation	15.00
48(4)	On application for a Certificate of Current Status of a Foundation	25.00
48(5)	For a certified copy of a foundation instrument of a foundation as included in the Register.	25.00

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54(2)(a)	Fee for application by overseas foundations to register as a Cook Islands foundation	300.00
62(2)(e)	Application for transfer of registration of a Cook Islands foundation overseas.	300.00
86(1)(a)	Providing a certificate of change of name of a Foundation	50.00
86(1)(a)	On providing notice of a change of registered office of a Foundation	25.00
86(1)(a)	On providing notice of resignation as the registered office of a Foundation	25.00
86(1)(a)	Providing a certified copy or extract of any document kept by the Registrar	25.00
86(1)(a)	Providing an uncertified copy or extract of any document kept by the Registrar	25.00
86(1)(a)	Manual Lodgment Service Fee	10.00
86(1)(a)		25.00
