

REPUBLIC OF NAURU
TRUSTS BILL 2018
EXPLANATORY MEMORANDUM

The Trusts Bill is a Bill for the Trusts Act 2018.

This memorandum provides an explanation of the Bill and is only intended to indicate the general effect.

EXPLANATION OF CLAUSES

PART 1—PRELIMINARY

Clause 1 provides that, once enacted, the short title of the Bill will be the *Trusts Act 2018*.

Clause 2 is the commencement clause and provides that the Act commences upon certification by the Speaker.

Clause 3 provides for the objective of the Bill which are to:

- (a) create, establish and registration of registrable trusts;
- (b) registration of charitable trusts having charitable purpose and for public benefit;
and
- (c) register trusts for the benefit of minors interest in a trust.

Clause 4 is the interpretation provision and sets out definitions for key terms used in the Bill. The cornerstone of the Bill is the concept of a registrable trust, that is, a trust that must be registered, and what is a registrable trust is set out in clause 5.

PART 2—REGISTRABLE TRUSTS

Clause 5 provides the type of trust that is registrable under the Bill which is:

- (a) an express trust under clause 9;
- (b) it is a charitable purpose trust under clause 10;
- (c) the trust is located in the Republic; and
- (d) not excluded under Clause 7.

Clause 6 determines the criteria for a trust located in Nauru. The reference to citizen is because every Nauruan who even resides outside Nauru is entitled to come and reside in Nauru. This clause would require the settlor to be residing in Nauru and it may be by a

person who is not a citizen of the Republic. In addition, at least one of the trustees shall be residing in the Republic. The trust is subject to the laws of the Republic and is administered by the authorities in the Republic.

Clause 7 excludes several categories of trust from the scope of registrable trusts. Constructive and resulting trusts are not registrable by virtue of their existence that is, based on the factual circumstance under which a trust property may be construed to be in the custody or control of the trustee. The family trust for Nauruans is not registrable as a number of family owned businesses may become subject to registration. However, the Bill does not prohibit voluntary registration of a family trust.

Nauruan land ownership is not covered by a trust for two reasons:

- (a) land owning structure is based on a trust from one generation to another; and
- (b) if land is to be registered as a trust, all the land in Nauru will be covered. However, the actual distribution of land is covered more than adequately in the Gazette notices by the Nauru Lands Committee.

Sub clause (2) describes what constitutes a family trust.

Sub clause (3) deals with royalties payable under Article 63 of the Constitution. This is covered by other legislation as such it is not appropriate to re-legislate it here. The other important issue is that any amendment to this Article would require a public referendum under Article 85.

Clause 8 provides that a registrable trust must be registered. The procedure for registration of registrable trust is contained in Part 5 of the Bill. Where a trustee does not register a registrable trust, the trustee commits an offence under Part 7 of the Bill.

PART 3 - EXPRESS TRUSTS

Clause 9 gives the meaning of an express trust for the purposes of the Bill. An express trust is a trust created in express terms usually in writing and is distinguishable from one inferred by law from the conduct of the parties. The ingredients of an express trust in the Bill gives a guide as to when a trust must be registered.

The trust creates a legal relationship between the trustees and the beneficiaries as well as a legal relationship amongst the beneficiaries. The trustee:

- (a) holds the trust property for the purpose of the trust;
- (b) has the power and obligation to deal with the trust property according to the terms of the trust and the duties imposed on the trustee by law;

(c) the settlor who created the trust states the terms and conditions of the trust orally, in writing or in any other manner the settlor deem necessary for the trustee to deal with the trust property.

PART 4 – CHARITABLE TRUSTS

Charitable trusts are separately dealt with in the Bill to allow Nauruans to register trusts for charitable purposes. There is a demand for charitable trusts in the Republic as currently, Nauruans are unable to register charitable trusts under any other specific legislation. Registration of charitable trusts specifically would enable those interested to use the registered instruments legitimately for acquiring funds from people or other donor agencies.

Clause 10 gives the meaning of a charitable trust which includes every charitable purpose if it relates to the relief of poverty, advancement of education, advancement of religion or any other matter that would benefit the community and the general public. An essential criterion for a charitable trust is that it must be for the public benefit.

In the Bill, charitable trusts are now registrable trusts and as such, all organisations relying on charity will be required to register the trust.

This clause empowers the Cabinet to prescribe any additional requirements for a charitable trust or purpose.

PART 5 – PROCEDURE FOR REGISTRATION

Clause 11 provides the effect of registration of a trust in that the trust has the same characteristics as a corporate body in that it becomes a legal entity on registration which can sue and be sued, enter into contracts and other obligations and acquire, hold, manage and dispose of real or personal properties.

Under this Part, a trust is recognised as a legal entity of its own. The trustees in exercising their powers under the trust instrument, must ensure that the powers given to them by the settlor be complied with. If there is more than one trustee of a trust, such trustees are able to delegate their duties, powers and functions to one or more of the other trustees unless such power of delegation was specifically excluded by the settlor.

In order to enable the trustees to carry out the duties, functions and powers under the trust as a separate legal entity, subclause (4) empowers them with powers similar to those of directors of corporations under the Corporations Act 1972 together with any other statutory powers and obligations.

Conclusive evidence that the trust is a legal entity is its certificate of registration.

Clause 12 requires the trustee of a registrable trust to lodge an application for registration of a trust with the Registrar of Trusts. The period for filing is 30 days after the Act commences (in the case of existing trusts), 30 days after creation (in the case of new trusts).

Clause 13 sets out the requirements for an application to register a trust. These requirements relate to the application form, the contents and documents to be appended, signature by the person filing it and payment of a filing fee.

Clause 14 provides for registration. On receiving an application to register a trust, the Registrar shall register the trust in the register of trusts and issue a certificate of registration of trust in the prescribed form.

Clause 15 requires the trustee of a registered trust to file annual returns of the registrable trust on the anniversary of the date of the registration of the trust. The requirements for the annual return shall be in the prescribed form, the contents and documents to be appended, signed by the trustee or an authorised person and payment of the prescribed filing fee.

PART 6 — TRUSTS REGISTER

Clause 16 establishes that the Secretary of Justice and Border Control shall be the Registrar of Trusts.

Clause 17 sets out the Registrar's power to delegate to another person his or her functions, duties and powers except for the power of delegation.

Clause 18 sets out the Registrar's power to inspect the information of a trust.

Clause 19 requires the Registrar to establish and maintain a register of trusts under Part 3 and a register of charitable trusts under Part 4 which shall be kept in the form the Registrar deems expedient and may include in electronic form.

Clause 20 provides that a trustee of a registered trust or a person authorised by a trustee, has access to entries in the register relating to the trust. But the register is not a public record to which members of the public have access.

Clause 21 provides for the Register to record the changes or variation to a trust. This is necessary, first, to update entries in the light of changes notified via a registered trust's annual return and, second, to eliminate inaccurate information.

Clause 22 empowers a trustee to distribute the trust property and wind up a trust:

- (a) at the request of all the beneficiaries who together hold all the beneficial interest in the trust property;
- (b) where the court has made an order distributing the trust property and approving the winding up of the trust on behalf of the beneficiaries who lack capacity or who may acquire beneficial interest at a future date or is a future person who may acquire a beneficial interest;
- (c) by winding up the trust under a Court order in a case where there is a dispute or disagreement amongst the trustees or beneficiaries or both.;
- (d) the beneficiaries with the approval of the trustees may take all the interest in the trust in which he or she ceases to be a beneficiary.

Clause 23 provides for removal of a registered trust that has ceased to be a registrable trust or is otherwise defunct from the register.

The Registrar shall give notice of removal of a trust to the person who filed the most recent annual return and if the person fails to respond then the Registrar may remove the trust from the register.

PART 7 - OFFENCES

Clause 24 provides that filing an application form or annual return that is false or misleading in a material respect with culpable knowledge is an offence. The offence is not confined to the person who actually files but extends to a person who causes the application or return to be filed.

Clause 25 requires a trustee of a registered trust to keep and maintain the records including the underlying documentation such as proper accounts and records that relate to the affairs, particularly the financial affairs, of the trust. Breach of this obligation is an offence and each trustee is liable to prosecution.

Clause 26 provides that failure to register a trust or to file an annual return is an offence. The offence is committed by each trustee. This casts a responsibility on each trustee to ensure that one of the trustees files as required by clauses 12 and 13.

Clause 27 provides that a proceeding in court or imposition of any penalty shall not prohibit the beneficiary or contributor from seeking any relief or remedy in civil claim against the trustees.

PART 8 — BENEFICIARIES WHO ARE MINORS IN AN EXPRESS TRUST

Clause 28 provides that a minor is a beneficiary of an express trust whether or not the beneficiary interest is a contingent interest once a minor reaches the age of majority, at any later age or upon the happening of an event.

Clause 29 provides that the trust may direct or permit the accumulation of income for the benefit of the minor pending the minor reaching a certain age, later age or happening of certain event. This clause ensures that any income accumulated under the trust is for the benefit of the minor.

Clause 30 provides that the Court can vary or revoke a trust on behalf of a minor on the application made by a trustee or the legal guardian or representative of a beneficiary who is a minor.

Sub clause (4) provides the discretionary power of the Court to appoint the Curator as the trustee where the Court considers it necessary for the benefit of the minor.

Clause 31 provides for the specific recording of the interest of minors in a registrable trust. Minors are specifically covered to ensure that transparency of a trust is maintained by the trustee. The trustee will have restrictions in dealing with a minor's trust, as such, the requirement of reporting will become extremely important. Where necessary, court orders will be required to deal with the interest of the minors.

Cabinet may prescribe particulars of the registration of minors' interest.

PART 9 — MISCELLANEOUS

Clause 32 provides that the Secretary for Justice and Border Control may by notice in the Gazette authorise an officer of the Department of Justice and Border Control to be an authorised officer.

Clause 33 is an information-sharing clause. Since the register of trusts is a closed register, this clause allows the Registrar to share information or documents with a law enforcement or regulatory agency, whether in Nauru or overseas, and with the competent authority of a foreign government with which Nauru has entered into an information exchange agreement.

Clause 34 sets out the categories of regulations that may be made by the Cabinet to supplement the provisions of the Bill.