

A BILL

*i n t i t u l e d*

An Act to amend the Labuan Offshore Trusts Act 1996.

[ ]

**ENACTED** by the Parliament of Malaysia as follows:

**Short title and commencement**

**1.** (1) This Act may be cited as the Labuan Offshore Trusts (Amendment) Act 2009.

(2) This Act comes into operation on a date to be appointed by the Minister by notification in the *Gazette*.

**Amendment of long title**

**2.** The Labuan Offshore Trusts Act 1996 [*Act 554*], which is referred to as the “principal Act” in this Act, is amended in the long title by substituting for the word “offshore” the word “Labuan”.

**Amendment of section 1**

**3.** Section 1 of the principal Act is amended by deleting the word “Offshore”.

**Amendment of section 2****4. Section 2 of the principal Act is amended—**

(a) in subsection (1)—

(i) by substituting for the definition of “Authority” the following definition:

‘ “Authority” means the Labuan Financial Services Authority established under section 3 of the Labuan Financial Services Authority Act 1996 [*Act 545*];’;

(ii) by inserting after the definition of “Authority” the following definition:

‘ “authorized officer” means an officer duly authorized by the Authority under section 6B;’;

(iii) by inserting after the definition of “breach of trust” the following definition:

‘ “charitable trust” means a trust referred to in section 11B;’;

(iv) by substituting for the definition of “corporation” the following definition:

‘ “corporation” means a body corporate formed or incorporated or existing within Malaysia or outside Malaysia and includes a foreign Labuan company but does not include—

(a) a corporation sole;

(b) a trade union registered under written law as a trade union; or

(c) a society registered under any written law relating to co-operative societies;’;

(v) by inserting after the definition of “Court” the following definition:

‘ “enforcer” means a person referred to in section 11C;’;

(vi) by deleting the definition of “immovable property situated in Malaysia”;

(vii) by inserting after the definition of “Labuan” the following definitions:

‘ “Labuan company” has the meaning assigned to it in the Labuan Companies Act 1990 [Act 441];

“Labuan trust” has the meaning assigned to it under subsection 8(1);

“Labuan trust company” means a corporation registered as a Labuan trust company under Part V of the Labuan Financial Services and Securities Act 2009 [Act       ];’;

(viii) in the definition of “Minister”, by substituting for the words “offshore companies” the word “finance”;

(ix) by deleting the definition of “offshore trust”;

(x) by substituting for the definition of “person” the following definition:

‘ “person” includes a corporation, a partnership, a body of persons, corporate or unincorporated, and a corporation sole;’;

(xi) by substituting for the definition of “prescribed” the following definition:

‘ “prescribed”, where no mode is mentioned, means prescribed from time to time by order published in the *Gazette*, and a power to prescribe includes the power to make different provisions in the order for different persons or different classes, categories or descriptions of persons;’;

(xii) by substituting for the definition of “property” the following definition:

‘ “property” includes—

(a) property of every kind, whether corporeal or incorporeal, movable or immovable, tangible or intangible, however acquired; or

(b) legal documents or instruments in any form, including electronic or digital, evidencing title to or interest in, such property, including bank cheques, money orders, shares, securities, bonds, bank drafts and letters of credit;’;

(xiii) by inserting after the definition of “property” the following definitions:

‘ “protector” means a person appointed in accordance with section 35;

“purpose trust” means a trust referred to in section 11A, and includes a charitable trust;’;

(xiv) by substituting for the definition of “registered offshore trust” the following definition:

‘ “registered Labuan trust” means a Labuan trust registered under subsection 12(4);’;

(xv) in the definition of “resident”, by substituting for paragraph (b) the following paragraph:

“(b) who has established a place of business and is operating in Malaysia, other than—

(i) a Labuan company or a foreign Labuan company incorporated or registered under the Labuan Companies Act 1990;

(ii) a Labuan foundation established under the Labuan Foundations Act 2009 [Act       ]; and

(iii) a partnership registered under the Labuan Limited Partnerships and Limited Liability Partnerships Act 2009 [Act       ],”;

(xvi) by inserting after the definition of “resident” the following definition:

‘ “ringgit” means a ringgit in the currency of Malaysia;’;

(xvii) by inserting after the definition of “settlor” the following definition:

‘ “specified”, where no mode is mentioned in this Act, means specified from time to time in writing, and a power to specify includes the power to specify differently for different persons or different classes, categories or description of persons;’; and

(xviii) by deleting the definition of “trust company”; and

(b) by deleting subsection (2).

### **Deletion of sections 4 and 5**

5. Sections 4 and 5 of the principal Act are deleted.

### **Amendment of section 6**

6. Section 6 of the principal Act is amended—

(a) by inserting after subsection (1) the following subsections:

“(1A) Subject to subsection (1B), the proper law of a trust shall be—

(a) the law chosen by the settlor to be applicable to a trust, the choice being expressed or implied in the terms of the trust; or

(b) where no law is chosen, the law with which a trust is most closely connected at the time of its creation.

(1B) In ascertaining the law with which a trust is most closely connected, reference shall be made, in particular, to—

(a) the place of administration of the trust designated by the settlor;

(b) the *situs* of the property of the trust;

- (c) the place of residence or business of the trustee;  
and
- (d) the objects of the trust and the places where  
they are to be fulfilled.

(1c) Without precluding other means for ascertaining the designated jurisdiction with which a trust is most closely connected, the terms of a trust designating the place of administration are valid and conclusive if—

- (a) a trustee’s principal place of business is located in or a trustee is resident of the designated jurisdiction; or
- (b) all or any part of the administration occurs in the designated jurisdiction.”.

## **New Part IA**

7. The principal Act is amended by inserting after section 6 of Part I the following Part:

### “PART IA

#### ADMINISTRATION OF THE ACT

### **Administration of the Act**

**6A.** The Authority is responsible for the administration of this Act, subject to the general directions and control of the Minister.

### **Authorized officer**

**6B.** (1) The Authority may authorize any of its members or officers to perform any of its functions, exercise any of its powers or discharge any of its duties under this Act.

(2) Subject to such limitations, if any, as may be prescribed, an authorized officer shall perform all the functions, exercise all the powers and discharge all the duties of the Authority

and every function so performed, power so exercised and duty so discharged shall be deemed to have been duly performed, exercised and discharged for the purpose of this Act.”.

## **Amendment of Part II**

8. The heading of Part II of the principal Act is amended by substituting for the word “OFFSHORE” the word “LABUAN”.

## **Amendment of section 7**

9. The principal Act is amended by substituting for section 7 the following section:

### **“Existence of Labuan trust**

7. (1) The settlor of a Labuan trust may be a qualified person or a resident.

(2) The trust property shall not include any Malaysian property unless prior approval of the Authority is obtained or the trust is a trust for charitable purposes.

(3) The beneficiaries of a Labuan trust may be a qualified person or a resident.

(4) A Labuan trust company shall be one of the trustees of a Labuan trust.

(5) Where the trust property includes Malaysian property, any income derives from the trust property shall be subject to the Income Tax Act 1967 [*Act 53*].

(6) Where the trust property does not include Malaysian property, any income derives from the trust property shall be subject to the Labuan Business Activity Tax Act 1990 [*Act 445*].

(7) For the purposes of this section, “Malaysian property” means any property which is situated in Malaysia.”.

**Amendment of section 8****10.** Section 8 of the principal Act is amended—

- (a) in the shoulder note, by substituting for the word “offshore” the word “Labuan”;
- (b) in subsection (1)—
  - (i) in the English language text, by substituting for the words “An offshore” the words “A Labuan”;
  - (ii) in the national language text, by substituting for the words “luar pesisir” the word “Labuan”;and
- (c) in paragraph (2)(a)—
  - (i) in the English language text, by substituting for the words “an offshore” the words “a Labuan”;
  - and
  - (ii) in the national language text, by substituting for the words “luar pesisir” the word “Labuan”.

**New section 8A****11.** The principal Act is amended by inserting after section 8 the following sections:**“Secrecy**

**8A.** (1) Subject to subsection (3), no person who has by any means access to any record, book, register, correspondence, document, material or information, relating to the business and affairs of a Labuan trust shall give, divulge, reveal, publish or otherwise disclose to any person such record, book, register, correspondence, document, material or information.

(2) All proceedings (other than criminal proceedings) relating to a Labuan trust commenced in any court under the provisions of this Act and any appeal therefrom, shall, unless the court otherwise orders, be heard *in camera* and no details of the proceedings shall be published by any person without leave of the court.

(3) Subsection (1) shall not apply where disclosure is required—

- (a) pursuant to an order by any court of competent jurisdiction in any proceedings;
- (b) for the purpose of the performance of the Authority's supervisory functions as may be provided for under the Labuan Financial Services Authority Act 1996;
- (c) pursuant to section 22 of the Labuan Business Activity Tax Act 1990; or
- (d) with the consent of the Labuan trust.

(4) Where an order referred to in paragraph (3)(a) has been obtained by an *ex-parte* application, the trustee may notify the person affected by the order and upon receipt of such notification, the affected person may file in the necessary application to the court to contest the order or otherwise comply with the order accordingly;

(5) A person who contravenes subsection (1) commits an offence.

Penalty: Imprisonment for three years or one million ringgit or both.

(6) Nothing in this section shall prevent any court from exercising its discretion to require any person to produce any document or to give any evidence in any proceedings before the court which is relevant to those proceedings.

### **Retention of certain rights by settlor**

**8B.** (1) The reservation or grant by a settlor of a trust of any beneficial interest in the trust property or any of the powers mentioned in subsection (2), shall not affect the validity of the trust or the trust instrument.

(2) The powers referred to in subsection (1) are as follows:

- (a) to revoke, vary or amend the terms of a trust or powers arising wholly or partly under the trust;

- (b) to advance, determine, pay or apply income or capital of the trust property or to give directions for the making of such advancement, determination, payment or application;
- (c) to act as, or to give binding directions as to the appointment or removal of, a director or officer of any corporation wholly or partly owned by the trust;
- (d) to give binding directions to the trustee in connection with the purchase, retention, sale, management, lending, pledging or charging of the trust property or the exercise of any powers or rights arising from such property;
- (e) to appoint or remove any trustee, enforcer, protector or beneficiary;
- (f) to appoint or remove an investment manager or investment adviser;
- (g) to change the proper law of the trust; and
- (h) to restrict the exercise of any powers or discretions of a trustee by requiring that the powers shall only be exercisable with the consent of the settlor or any other person specified in the terms of the trust.”.

### **Amendment of section 9**

#### **12.** Section 9 of the principal Act is amended—

- (a) in the English language text, by substituting for the words “offshore”, “An offshore” and “an offshore”, wherever they appear, the words “Labuan”, “A Labuan” and “a Labuan” respectively; and
- (b) in the national language text, by substituting for the words “luar pesisir”, wherever they appear, the word “Labuan”.

**Amendment of section 10**

**13.** Section 10 of the principal Act is amended—

(a) in subsection (1)—

- (i) in the English language text, by substituting for the words “an offshore” the words “a Labuan”;
- (ii) in the national language text, by substituting for the words “luar pesisir” the word “Labuan”;
- (iii) in paragraph (c), by deleting the word “or” appearing at the end of the paragraph;
- (iv) by substituting for the full stop at the end of paragraph (d) a semi-colon; and
- (v) by inserting after paragraph (d) the following paragraphs:
  - “(e) any claims with regard to the validity of any transfer or disposition of property into the Labuan trust;
  - (f) any claims with regard to the capacity of the settlor; or
  - (g) any claims by reason that the laws of any foreign jurisdiction prohibit or do not recognise the concept of a trust.”; and

(b) by inserting after subsection (2) the following subsection:

“(3) Where the settlor of a Labuan trust is a resident, this section shall only apply in so far as it is consistent with any written law in Malaysia.”.

**Amendment of section 11**

**14.** Section 11 of the principal Act is amended—

- (a) in the English language text, by substituting for the words “offshore”, “an offshore” and “An offshore” wherever they appear, the words “Labuan”, “a Labuan” and “A Labuan” respectively;

- (b) in the national language text, by substituting for the words “luar pesisir”, wherever they appear, the word “Labuan”; and
- (c) by inserting after subsection (6) the following subsection:

“(6A) Where the settlor of a Labuan trust is a resident, this section shall apply only in so far as it is consistent with any written law for the time being in force in Malaysia.”.

### **New sections 11A, 11B, 11C, 11D and 11E**

**15.** The principal Act is amended by inserting after section 11 the following sections:

#### **“Purpose trusts**

**11A.** (1) Notwithstanding any law to the contrary, a trust may be created or established under this Act for a particular purpose or purposes, whether charitable or not.

(2) Without prejudice to subsection (1), the objects of a trust may be—

- (a) persons of any number;
- (b) purposes of any number or kind; or
- (c) both the person or persons and purpose or purposes,

provided that the purposes are lawful and not contrary to public policy.

(3) A purpose trust shall be enforceable by the enforcer appointed in accordance with section 11c.

(4) Notwithstanding subsection (3), where the objects of a purpose trust include a person, such person shall be entitled to enforce the purpose trust as regard the person and not a purpose.

(5) Any instrument creating or evidencing a purpose trust may—

- (a) specify an event or date upon the occurrence of which the trust ceases to be a purpose trust;
- (b) provide for the disposition of the property of the trust when the trust ceases to be a purpose trust; and
- (c) provide that, for so long as the trust is a purpose trust, the trustees owe no duty—
  - (i) to any person entitled to such property when the trust ceases to be a purpose trust; or
  - (ii) in relation to any purposes for which such property are then to be applied.

### **Charitable trusts**

**11B.** (1) A trust shall be regarded as a trust for charitable purposes under this Act where the trust is made for any one or more of the following purposes and where the fulfillment of such purpose or purposes is for the benefit of the community or a substantial section of the community having regard to the type and nature of the purpose or purposes:

- (a) the relief or eradication of poverty;
- (b) the advancement of education;
- (c) the promotion of art, science and religion;
- (d) the protection of the environment;
- (e) the advancement of human rights and fundamental freedom; or
- (f) any other purposes which are beneficial to the community.

(2) A purpose may be regarded as charitable whether it is to be carried out in Malaysia or elsewhere and whether it is beneficial to the community in Malaysia or elsewhere.

**Enforcers**

**11c.** (1) The terms of a purpose trust shall provide for the appointment of an enforcer or such number of enforcers whose duty shall be to enforce the trust in accordance with its terms and purposes.

(2) Without prejudice to subsection (1), the Court may, on the application of a trustee, the settlor or any other person whom the Court considers has sufficient interest in the enforcement of the trust, appoint an enforcer or such number of enforcers if it deems fit.

(3) No person shall at any time act as both trustee and enforcer of the same trust.

(4) The settlor or his personal representatives may also be appointed as an enforcer of the purpose trust.

(5) An enforcer shall not—

- (a) place himself in a position which may conflict with his duties to enforce the purposes of the trust;
- (b) derive directly or indirectly any profit by reason of his appointment other than any reasonable fee for his service and for any reasonable expenses which he may have incurred in the discharge of his duties; or
- (c) enter on his own account into any dealing with the trustee of the purpose trust or in relation to the trust property of the purpose trust of which he is an enforcer.

(6) An enforcer shall be provided with—

- (a) the accounts, including the annual accounts of the purpose trust;
- (b) copies of the trust instrument setting up the purpose trust and any deed or documents referred to in the instrument;
- (c) any legal opinions and advice received by the trustees; and

(d) any other documents or information to which he may be entitled to under the terms of the purpose trust.

(7) An enforcer has the same rights as a person with a beneficial interest under an ordinary trust to take administrative actions and other actions, including making an application to the Court for its direction, for the good of the trust.

(8) An enforcer has the rights of a trustee of an ordinary trust to protection, indemnity and payment of expenses out of trust property, and to make applications to the Court under section 49.

(9) An enforcer has, on behalf of the trust, the same personal and proprietary remedies for breach of trust against a trustee and against third parties as a beneficiary of an ordinary trust.

(10) An enforcer may resign his office by notice in writing and his resignation shall take effect on the delivery of the notice to the trustee of the purpose trust.

(11) The resignation of an enforcer shall not release the enforcer from any liability in relation to the trust arising before his resignation.

### **Purpose trust not rendered void merely by uncertainty**

**11D.** (1) A purpose trust shall not be rendered void merely by any uncertainty as to its objects or mode of execution.

(2) The terms of a purpose trust may give the trustee or any other person power to resolve any uncertainty as to its objects or mode of execution.

(3) If a purpose trust has more than one object and the trust instrument does not allocate the trust property among them, then if and so far as a contrary intention is not expressed in the trust instrument, and subject to the terms of that instrument, the trustees of the trust have power in their absolute discretion to allocate capital and income among the different purposes of the trust.

(4) If any uncertainty as to objects or mode of execution of a purpose trust or as to the allocation of trust property among its objects cannot be resolved, or has not been resolved pursuant to the terms of the trust, the Court—

(a) may resolve the uncertainty—

(i) by reforming the trust;

(ii) by settling a plan for its administration; or

(iii) in any other way which the Court considers appropriate; or

(b) in so far as the objects of the trust are uncertain and the general intent of the trust cannot be found from the admissible evidence as a matter of probability, may declare the trust void.

### **Spendthrift or protective trust**

**11E.** (1) The terms of a trust may make the interest of a beneficiary in the trust property or in any income or capital of such property—

(a) liable to termination;

(b) subject to a restriction on alienation or disposal;  
or

(c) subject to diminution or termination in the event of the beneficiary becoming insolvent or any of his property becoming liable to seizure or to sequestration for the benefit of his creditors.

(2) A trust under which the interest of a beneficiary is subject to termination, restriction or diminution under subsection (1) is a spendthrift or protective trust.

(3) A provision in the terms of a trust requiring the interest of a beneficiary in the trust property or in any income or capital of such property to be held upon a spendthrift or protective trust shall be construed as a requirement that the interest of the beneficiary be subjected to termination, restriction or diminution as mentioned in subsection (1).”.

**Amendment of section 12**

**16.** Section 12 of the principal Act is amended—

- (a) in the English language text, by substituting for the words “offshore” and “an offshore”, wherever they appear, the words “Labuan” and “a Labuan” respectively;
- (b) in the national language text, by substituting for the words “luar pesisir”, wherever they appear, the word “Labuan”; and
- (c) by inserting after subsection (4) the following subsection:

“(4A) A Labuan trust shall not be registered where the name of the Labuan trust to be registered is, in the opinion of the Authority, in any way misleading or otherwise undesirable.” .

**Amendment of section 13**

**17.** Section 13 of the principal Act is amended by substituting for the word “offshore” the word “Labuan”.

**Amendment of section 14**

**18.** Section 14 of the principal Act is amended—

- (a) in the English language text, by substituting for the words “offshore” and “an offshore”, wherever they appear, the words “Labuan” and “a Labuan” respectively; and
- (b) in the national language text, by substituting for the words “luar pesisir” the word “Labuan”.

**Amendment of section 15**

**19.** Section 15 of the principal Act is amended by substituting for the word “offshore” wherever it appears the word “Labuan”.

**Amendment of section 16**

**20.** The principal Act is amended by substituting for section 16 the following section:

**“Duration of Labuan trust**

**16.** (1) The terms of a Labuan trust may expressly provide that the Labuan trust shall exist for a fixed duration.

(2) A Labuan trust shall, unless otherwise stated in the terms of a trust, continue to exist for an unlimited period or be terminated in accordance with the provisions of this Act.

(3) Notwithstanding subsections (1) and (2), the terms of a Labuan trust may authorize the trustee to—

- (a) appoint a fixed duration to a Labuan trust;
- (b) convert a Labuan trust with fixed duration to a Labuan trust for unlimited period; or
- (c) alter, by limiting or extending, the duration of a Labuan trust.”.

**Amendment of section 17**

**21.** Section 17 of the principal Act is amended—

- (a) in the English language text, by substituting for the words “offshore”, “An offshore” and “an offshore”, wherever they appear, the words “Labuan”, “A Labuan” and “a Labuan” respectively; and
- (b) in the national language text, by substituting for the words “luar pesisir” the word “Labuan”.

**Amendment of section 18**

**22.** Subsection 18(1) of the principal Act is amended by substituting for the words “an offshore” the words “a Labuan”.

**Amendment of section 19**

**23.** Section 19 of the principal Act is amended—

(a) in the shoulder note, by substituting for the word “offshore” the word “Labuan”;

(b) by substituting for subsection (1) the following subsection:

“(1) Without prejudice to the powers of the Court under subsection (4) and notwithstanding anything to the contrary in the terms of the trust, where all the beneficiaries of a Labuan trust are in existence and have been ascertained and none of them is a minor or a person under any legal disability, the Court may, on the application of any beneficiary or the trustee, order the trustee to terminate the trust and distribute the trust property among the beneficiaries if the Court is satisfied that such termination is not contrary to any material purpose or object of the trust.”; and

(c) in subsection (2), by inserting the words “pursuant to subsection (1)” after the words “ the termination of the trust”.

**Amendment of section 21**

**24.** Section 21 of the principal Act is amended—

(a) in the shoulder note, by substituting for the word “offshore” the word “Labuan”;

(b) in subsection (1), by substituting for the words “an offshore trust” the words “a Labuan trust”; and

(c) in subsection (2), by substituting for the words “An offshore trust” the words “A Labuan trust”.

**Amendment of Part III**

**25.** The heading of Part III of the principal Act is amended by substituting for the word “OFFSHORE” the word “LABUAN”.

**Amendment of section 22**

**26.** Section 22 of the principal Act is amended—

- (a) in subsection (1), by substituting for the words “subsection 4(3)” the words “sections 11A and 11B”;
- (b) in subsection (3), by substituting for the words “an offshore trust” the words “a Labuan trust”; and
- (c) by substituting for subsection (4) the following subsection:

“(4) The terms of a Labuan trust may include—

- (a) the addition of a person as a beneficiary;
- (b) the exclusion of a beneficiary from a benefit;
- (c) the imposition on a beneficiary of an obligation as a condition for a benefit; or
- (d) the power to declare that any person shall cease to be a beneficiary.”.

**Amendment of section 23**

**27.** The principal Act is amended by substituting for section 23 the following section:

**“Disclaimer**

**23.** (1) Notwithstanding the terms of the trust, a beneficiary may disclaim, either permanently or for such period as he may specify, the whole or any part of his interest under a Labuan trust whether or not the beneficiary has received any benefit from the interest.

(2) A disclaimer made under subsection (1) shall be in writing.

(3) A disclaimer made under subsection (1) may, subject to the terms of the trust, be revocable and it shall be exercisable in the manner and under the circumstances so expressed.

(4) A disclaimer made under subsection (1) shall not prejudice the rights and interests of the beneficiary prior to the disclaimer.”.

**Amendment of section 24**

**28.** Section 24 of the principal Act is amended by deleting subsection (1).

**Amendment of section 26**

**29.** Subsection 26(2) of the principal Act is amended—

(a) in paragraph (a)—

(i) in the English language text, by inserting after the words “shall be a” the word “Labuan”; and

(ii) in the national language text, by inserting after the words “syarikat amanah” the word “Labuan”; and

(b) in paragraph (b)—

(i) in the English language text, by inserting after the words “shall be a” the word “Labuan”; and

(ii) in the national language text, by inserting after the words “syarikat amanah” the word “Labuan”.

**Amendment of Part IV**

**30.** The heading of Part IV of the principal Act is amended by substituting for the word “OFFSHORE” the word “LABUAN”.

**Amendment of section 30**

**31.** Section 30 of the principal Act is amended—

(a) by inserting after subsection (1) the following subsections:

“(1A) In addition to subsection (1), unless otherwise provided in the terms of the trust, a trustee shall, in the execution of his duties and the exercise of his powers and discretion, exercise such reasonable care and skill, having regard in particular—

(a) to any special knowledge or experience that he has or holds himself out as having such special knowledge or experience; and

(b) if he acts as trustee in the course of a business or profession, to any special knowledge or experience that may reasonably be expected of a person acting in the course of that kind of business or profession.”; and

(b) by inserting after subsection (6) the following subsection:

“(7) Where a power mentioned in subsection 8B(2) has been reserved or granted by the settlor, a trustee who acts in accordance with the exercise of the power is not acting in breach of trust.”.

### **Amendment of section 31**

**32.** Section 31 of the principal Act is amended by substituting for subsection (2) the following subsection:

“(2) Where the terms of the trust empower the trustees to act by a majority, a trustee who dissents from a decision of the majority of the trustees shall cause his dissent to be recorded in writing.”.

### **Amendment of section 33**

**33.** Section 33 of the principal Act is amended—

(a) in subsection (2), by inserting after the words “with the terms of the trust” the words “and the provisions of this Act”; and

(b) by inserting after subsection (2) the following subsection:

“(3) A trustee may, unless otherwise provided in the terms of the trust—

(a) insure any property which is subject to the trust against risks of loss or damage due to any event; and

(b) pay the premiums out of any income or capital funds of the trust.”.

**New sections 33A and 33B**

**34.** The principal Act is amended by inserting after section 33 the following sections:

**“Trustee’s power of investment**

**33A.** (1) In exercising any power of investment, a trustee shall observe the standard investment criteria under subsection (3).

(2) A trustee shall, from time to time, review the investments of the trust and consider whether, having regard to the standard investment criteria, the investments should be varied.

(3) The standard investment criteria, in relation to a trust are as follows:

(a) the suitability to the trust of investments of the same kind as any particular investment proposed to be made or retained and of that particular investment as an investment of that kind; and

(b) the need for diversification of investments of the trust, in so far as is appropriate to the circumstances of the trust.

(4) The application of this section shall apply in so far as it is consistent with the terms of the Labuan trust.

**Advice in relation to investment**

**33B.** (1) Except as otherwise provided by subsection (2), a trustee shall, before exercising any power of investment, obtain and consider proper advice relating to the way in which the power should be exercised, having regard to the standard investment criteria.

(2) Except as otherwise provided by subsection (3), a trustee shall, when reviewing the investments of the trust, obtain and consider proper advice on whether the investments should be varied, having regard to the standard investment criteria.

(3) A trustee need not obtain the proper advice required under subsection (1) or (2), if he reasonably concludes that in all the circumstances it is unnecessary or inappropriate to obtain the proper advice.

(4) In this section, “proper advice” means the advice of a person who is reasonably believed by the trustee to be qualified to give such advice by his ability in, and practical experience of, financial and other matters relating to the proposed investment.

(5) This section shall apply in so far as it is consistent with the terms of the Labuan trust.”.

### **Amendment of section 35**

**35.** Section 35 of the principal Act is amended—

(a) by inserting after subsection (1) the following subsection:

“(1A) Any person of full age and of sound mind or any body corporate, any firm, partnership or group of persons, whether incorporated or unincorporated, may be appointed as a protector.”.

(b) in subsection (2), by inserting after the words “be deemed to be a trustee” the words “and unless otherwise provided under the terms of the trust, shall not be liable to the beneficiaries or the trustees for the *bona fide* exercise of the power”;

(c) by substituting for subsection (3) the following subsection:

“(3) The terms of a trust may confer on the protector the power—

(a) to remove a trustee and to appoint a new or additional trustee, but if the protector removes a trust company as a trustee, the protector shall appoint another trust company as a new trustee in its place;

(b) to determine the law of which jurisdiction shall be the proper law of the trust, in the event it is not provided in the trust deed or by the settlor;

(c) to change the place of administration of the trust; and

(d) to withhold consent from specified actions of the trustees either conditionally or unconditionally.”; and

(d) by inserting after subsection (3) the following subsections:

“(4) The protector of a trust may also be a settlor or a beneficiary of the trust.

(5) Where there is more than one protector of a trust, any functions conferred on the protectors may be exercised, subject to the terms of the trust, by a majority of the protectors.

(6) A protector who dissents from a decision of the majority of protectors may require his dissent to be recorded in writing.

(7) A protector exercising any one or more of the powers conferred by the terms of the trust shall not by virtue only of such exercise be deemed to be a trustee.

(8) A person may charge reasonable remuneration for his services as a protector unless otherwise provided by the trust instrument.”.

### **Amendment of section 36**

**36.** The principal Act is amended by substituting for section 36 the following section:

#### **“Delegation of powers by trustee**

**36.** (1) Subject to the provisions of this Act, a trustee may delegate any or all of his delegable powers and functions to any person as their agent on such terms as to remuneration and other matters as he may determine.

(2) In the case of a trust other than a charitable trust, the trustee may delegate any of the powers or functions under this Act and the trust except—

- (a) any function relating to the manner in which any property of the Labuan trust should be distributed;
- (b) any power to decide whether any fees or other payment due to be made out of the trust funds should be made out of income or capital;
- (c) any power to appoint a person to be a trustee of the trust; or
- (d) any power conferred by the trust instrument which permits the trustee to delegate any of their functions or to appoint a person to act as a nominee or custodian.

(3) In the case of a charitable trust, the trustee may delegate the following functions:

- (a) any function relating to carrying out a decision that the trustee has taken;
- (b) any function relating to the investment of property subject to the trust (including, in the case of land held as an investment, managing the land and creating or disposing of an interest in the land); and
- (c) any function relating to the raising of funds for the trust otherwise than by means of profits of a trade which is an integral part of carrying out the trust's charitable purpose.

(4) For the purposes of paragraph (3)(c), a trade shall mean an integral part of carrying out a trust's charitable purpose if the profits are applied solely to the purposes of the trust and either—

- (a) the trade is exercised in the course of the actual carrying out of a primary purpose of the trust; or
- (b) the work in connection with the trade is mainly carried out by beneficiaries of the trust.

(5) A trustee shall not delegate his functions to any person as his agent on any of the following terms unless it is reasonably necessary to do so:

- (a) a term permitting the agent to appoint a substitute;
- (b) a term restricting the liability of the agent or his substitute to the trustee or any beneficiary; or
- (c) a term permitting the agent to act in circumstances capable of giving rise to a conflict of interest.

(6) A trustee who in good faith and without neglect makes an appointment or a delegation in accordance with the provisions of this Act shall not be liable for any loss arising to the trust in consequence thereof or from the default of any appointee or delegate if the trustee has exercised due skill and care in the selection of the appointee or delegate.”.

#### **New sections 36A and 36B**

**37.** The principal Act is amended by inserting after section 36 the following sections:

#### **“Delegation of powers in relation to property management functions**

**36A.** (1) This section shall apply to every trust unless otherwise expressly excluded by the terms of the trust.

(2) A trustee may not delegate his property management functions to any person as his agent except by an agreement which is in writing or evidenced in writing and unless—

- (a) the trustee has provided that person with a statement that gives guidance in writing as to how the functions should be exercised (hereinafter referred to as “policy statement”); and
- (b) the agreement under which the agent is to act includes a term to the effect that he will secure compliance with—
  - (i) the policy statement; and
  - (ii) if the policy statement is revised or replaced, the revised or replacement policy statement.

(3) The trustees shall formulate any guidance given in the policy statement with a view to ensuring that the functions will be exercised in the best interests of the trust.

(4) For the purposes of this section, the property management functions of trustees are their functions relating to—

- (a) the investment of assets subject to the trust;
- (b) the acquisition of property which is to be subject to the trust; and
- (c) the management of property which is subject to the trust and the disposal of, or the creation or disposal of an interest in, such property.

### **Review of agents**

**36B.** (1) This section shall apply to every trust unless otherwise expressly excluded by the terms of the trust.

(2) Where an agent is appointed to exercise any delegable functions of the trustee, it shall be the duty of the trustee—

- (a) to keep under review the arrangements under which the agent acts and the manner in which such arrangements are being put into effect; and
- (b) to exercise any power of intervention that he has, if the circumstances make it appropriate to do so.

(3) If the agent has been authorized to exercise property management functions, the duty under subsection 36A(2) shall include—

- (a) a duty to consider whether there is any need to revise or replace the policy statement made for the purposes of section 36A;
- (b) if the trustees consider that there is a need to revise or replace the policy statement, a duty to do so; and
- (c) a duty to assess whether the policy statement is being complied with.

(4) In this section, “power of intervention” includes—

- (a) a power to give directions to the agent; and
- (b) a power to revoke the delegation of powers and functions to the agent or appointment of the agent.”.

### **Amendment of section 41**

**38.** The principal Act is amended by substituting for section 41 the following section:

#### **“Right to information**

**41.** (1) A trustee shall, on receipt of a request, provide accurate information as to the state and amount of the trust property and the administration of the trust—

- (a) to the Court;
- (b) to the settlor, the enforcer or the protector of the trust, unless the trustee has reason to believe that such person is making the request under duress; or
- (c) where the terms of the trust so authorize—
  - (i) to any beneficiary having a vested interest in the trust; or
  - (ii) to the charity referred to by name in the trust instrument as a beneficiary under the trust.

(2) Subject to the terms of the trust and to any order of the Court given on special and exceptional grounds, a trustee or other person shall not be required to disclose to any person not legally entitled to it under subsection (1) any document or information which discloses—

- (a) his deliberations as to how he should exercise or has exercised his functions as trustee;
- (b) the reasons for any decision made in the exercise of those functions;
- (c) any material upon which such a decision was or might have been based;

- (d) any part of the accounts of the trust; or
- (e) any letter of wishes given by the settlor or beneficiary.

(3) Notwithstanding the terms of the trust—

- (a) the Court may, on application made to it, declare that in particular circumstances of the trust its terms do not render the trustee sufficiently or appropriately accountable to the beneficiaries or any of them; and
- (b) the Court may, pursuant to such declaration, extend or restrict the rights of all or any beneficiaries to information relating to the trust or may make such other order as it thinks fit.

(4) Except as is required, permitted or otherwise provided by this Act, or by the terms of the trust or as may be necessary for the purposes of the trust, and notwithstanding the provisions of any other law—

- (a) every trustee and every other person shall at all times regard and deal with all documents and information relating to a trust as secret and confidential;
- (b) no trustee or other person shall at any time be required to produce to or before any court, tribunal, board, committee of inquiry or any other authority or to divulge to any such authority any matter or thing coming to his notice or being in his possession for any reason, where such matter or thing relates to a trust.

(5) Any trustee or other person who, except as is required, permitted or otherwise provided by this Act, or by the terms of the trust or by the Court, at any time communicates or attempts to communicate any matter or thing relating to a trust to any person commits an offence.

Penalty: Imprisonment for five years or one million ringgit or both.”.

**Amendment of section 42**

**39.** Section 42 of the principal Act is amended—

- (a) by deleting subsections (2) and (3);
- (b) by inserting after subsection (9) the following subsections:

“(9A) A term of a trust relieving a trustee from liability for breach of trust is unenforceable to the extent that it—

- (a) relieves the trustee from liability for breach of trust committed in bad faith or with reckless indifference to the purposes of the trust or the interests of the beneficiaries; or
- (b) was inserted as the result of an abuse by the trustee of a fiduciary or confidential relationship to the settlor.

(9B) Subject to subsection (9C), a trustee is not liable to a beneficiary for breach of trust if the beneficiary—

- (a) consented to the conduct constituting the breach;
- (b) relieved the trustee from liability for the breach as provided in subsection (9); or
- (c) ratified the transaction constituting the breach, unless—
  - (A) the consent, release or ratification by the beneficiary was induced by improper conduct of the trustee; or
  - (B) at the time of the consent, release or ratification, the beneficiary has no knowledge of the beneficiary’s rights or of the material facts relating to the breach.

(9C) Nothing in the terms of a trust shall relieve, release or exonerate a trustee from liability for breach of trust arising from his own fraud, willful misconduct or gross negligence.”; and

- (c) by deleting subsection (11).

**New sections 42A and 42B**

**40.** The principal Act is amended by inserting after section 42 the following sections:

**“Prevention of breach of trust**

**42A.** The Court may, in preventing a breach of trust from occurring, make an order to—

- (a) compel the trustee to perform the trustee’s duties;
- (b) restrain the trustee from committing a breach of trust;
- (c) appoint a special fiduciary to take possession of the trust property and administer the trust;
- (d) suspend the trustee; or
- (e) remove the trustee.

**Remedies for breach of trust**

**42B.** The Court may, to remedy a breach of trust that has occurred, make an order to—

- (a) compel the trustee to perform the trustee’s duties;
- (b) compel the trustee to redress a breach of trust by paying money, restoring property or other means;
- (c) order a trustee to account to such breach of trust;
- (d) appoint a special fiduciary to take possession of the trust property and administer the trust;
- (e) suspend the trustee;
- (f) remove the trustee;
- (g) reduce or deny compensation to the trustee;
- (h) subject to section 44, invalidate an act of the trustee, impose a *lien* or a constructive trust on trust property, or trace trust property wrongfully disposed of and recover the property or its proceeds; or
- (i) grant any other appropriate relief.”.

**Amendment of section 46**

**41.** Section 46 of the principal Act is amended by inserting after subsection (1) the following subsection:

“(1A) Unless a co-trustee remains in office or the Court otherwise orders, and until the trust property is delivered to a successor trustee or other person entitled to it, a trustee who has resigned or has been removed shall continue to have the duties of a trustee and the powers necessary to protect the property.”.

**New Part IVA**

**42.** The principal Act is amended by inserting after section 46 of Part IV the following Part:

“PART IVA

LABUAN SPECIAL TRUST

**Application of this Part**

**46A.** This Part shall apply only if the terms of the trust expressly provide and declare the trust as a Labuan Special Trust.

**Interpretation**

**46B.** (1) In this Part, unless the context otherwise requires—

“appointed enquirer”, in relation to a trust, means any person who by the terms of the trust is appointed to make intervention calls;

“business”, in relation to a company, includes the holding of shares or other assets and non-commercial activities;

“business risk” , in relation to a company, includes—

- (a) any risk attached to any business of the company, or any connected company, when conducted in the manner in which it has in fact been conducted;
- or

- (b) any risk which can be expected to be attached to any projected business of the company;

“company”, in relation to designated shares, means a Labuan company or a Labuan limited liability partnership established under the Labuan Limited Partnerships and Limited Liability Partnerships Act 2009 that has issued the designated shares;

“designated shares” means shares in a Labuan company or partnership interests in a Labuan limited liability partnership established under the Labuan Limited Partnerships and Limited Liability Partnerships Act 2009 comprised in a trust fund and in respect of which a valid direction under subsection 46D(1) has been made;

“designated trustee” means a company registered as a Labuan trust company under Part V of the Labuan Financial Services and Securities Act 2009 to carry on business as a trust company in Labuan;

“disposal”, in relation to designated shares, includes—

- (a) the exercise of voting powers leading, or capable of leading, to the liquidation of the company or the cancellation of the shares or of any rights attached to them; and
- (b) the creation of any legal or equitable interest in the shares;

“interested person”, in relation to a trust, means—

- (a) a beneficiary of the trust;
- (b) an object of a discretionary power over any of the capital or income of the trust;
- (c) a parent or legal guardian of any minor falling within paragraphs (a) or (b);
- (d) an enforcer;
- (e) a protector; or
- (f) an appointed enquirer;

“intervention call” means a call by an interested person under subsection 46H(1) for a trustee to intervene in the affairs of a company;

“legal guardian”, in relation to a minor, means a person legally recognised as his guardian in any jurisdiction with which the minor has a substantial connection;

“office of director rules” means rules referred to in subsection 46G(1) and any amendments made to the rules for the time being in force;

“trust”, in relation to designated shares, means the trust on which the designated shares are held;

“trust fund”, in relation to a trust, means property for the time being subject to the trust.

(2) In this Part—

- (a) a reference to voting powers in respect of shares shall be taken to include a reference to powers to direct the voting of shares held by a nominee;
- (b) a reference, in relation to a trust, to a protector includes a person or a committee whose consent is requisite for the exercise of any powers;
- (c) a reference to the memorandum and articles of a company is a reference to the memorandum of association and articles of association of the company;
- (d) a company shall be taken to be connected with another corporation if—
  - (i) that other corporation holds, directly or through a nominee, shares in that other corporation;
  - (ii) it is controlled directly or indirectly by that other corporation; or
  - (iii) it is connected with a corporation which is itself connected with that other corporation;
- (e) a ground for complaint concerning the conduct of a company’s affairs is permitted if it is specified

as such in the trust instrument, and the expression “permitted ground for complaint” shall be construed accordingly;

- (f) a reference to “shares”, “director”, “dividends” and “memorandum and articles of association” in relation to designated shares shall, where the designated shares are with respect to a Labuan limited liability partnership, be a reference to “partnership units”, “designated partner”, “distributions” and “partnership agreement” respectively and the provisions in this Part shall then be construed accordingly.

### **Primary purpose of this Part**

**46c.** The primary purpose of this Part is to enable a trust of company shares to be established under which—

- (a) the shares may be retained indefinitely; and
- (b) the management of the company may be carried out by its directors without any power of intervention being exercised by the trustee.

### **Designated shares**

**46d.** (1) Subject to subsection (3), where a trust fulfils the conditions specified in subsection (4), the terms of the trust may direct this Part shall apply—

- (a) to all shares comprised in the trust fund; or
- (b) to such shares comprised in the trust fund as may be specified in the direction.

(2) For the purposes of subsection (1), shares comprised in the trust fund shall be taken to include shares becoming so comprised at any time after the creation of the trust, whether added to the trust fund by way of additional settlement by the original settlor or any other person, acquired on a new issue by the company or in the course of management or administration of the trust fund, or acquired in any other manner.

(3) A direction under subsection (1) shall not be made in respect of shares added to the trust fund by a trustee of another trust in the exercise of a power in that other trust.

(4) The conditions referred to in subsection (1) are as follows:

- (a) the trust is created by or on the terms of a written testamentary or *inter vivos* instrument;
- (b) a designated trustee is the sole trustee of the trust;
- (c) the terms of the trust require that any successor trustee (mediate or immediate) is a designated trustee acting as the sole trustee; and
- (d) the trust is not created in the exercise of a power conferred by another trust.

(5) A direction under subsection (1) may identify the shares to which it relates either specifically or by any general description.

(6) Subject to subsection (7), where a person is a settlor in relation to a trust of designated shares and additional property is settled on the terms of the trust by another person, the former person shall be considered for the purposes of this Part as the settlor in relation to the trust of the additional property.

(7) If the trust instrument provides that subsection (6) shall not apply, then, in the case of a trust comprising property which has been provided by more than one person, this Act shall apply as if each person had created a separate trust in relation to the property which he has provided.

### **Trustee's duties in relation to designated shares**

**46E.** (1) Subject to section 46I, designated shares shall be held by the trustee on trust to retain the designated shares.

(2) The trustee's duty to retain designated shares shall have precedence over any duty to preserve or enhance the value of the trust fund.

(3) Without prejudice to subsection (2), the trustee shall not be accountable for losses arising directly or indirectly from holding designated shares, including losses arising from any of the following circumstances:

- (a) the absence or inadequacy of financial return from any designated shares;
- (b) a decrease in value of any designated shares;
- (c) any act or omission of the directors of the company, regardless of whether it is made or carried out in good faith;
- (d) liquidation or receivership of the company;
- (e) share market fluctuation;
- (f) the loss of opportunity to make gains from reinvestment of the proceeds of designated shares; or
- (g) the liabilities and expenses of the company, including directors' remuneration and expenses.

(4) Every reference in subsection (3) to the company shall include a reference to any corporation connected to it.

### **Restrictions on trustee's powers**

**46F.** (1) Subject to the terms of the trust and to sections 46G and 46H, the obligations specified in subsections (2) and (3) shall apply to a trustee of designated shares.

(2) The power of voting or other powers in respect of designated shares shall not be exercised by the trustee so as to interfere in the management or conduct of any business of the company, and in particular, the trustee—

- (a) shall leave the conduct of every such business, and all decisions as to the payment or non-payment of dividends, to the directors of the company; and
- (b) shall not require the declaration or payment of any dividend by the company or exercise any power the trustee may have of compelling any such declaration or payment.

- (3) A trustee of designated shares shall not—
- (a) instigate or support any action by the company against any of its directors for breach of duty to the company;
  - (b) procure the appointment or removal of any of the directors;
  - (c) subject to section 46i, wind up the company; and
  - (d) subject to the provisions of this Part, apply to the Court for any form of relief or remedy in relation to the company.

### **Provisions relating to directors**

**46G.** (1) The trust instrument may contain rules for determining the manner in which the power of voting and other powers attributable to designated shares should be exercised by the trustee in relation to—

- (a) the appointment of directors of the company;
- (b) the removal of directors;
- (c) the remuneration of directors; or
- (d) any of the matters referred to in subsection (2),

and may make provision for those rules to be amended.

(2) The office of director rules may, in particular—

- (a) require the trustee to ensure that a particular person holds or retains office as a director;
- (b) require any person to be appointed to the office of director at a future date or upon a future event;
- (c) require the removal of a director in specified circumstances;
- (d) prescribe, subject to the requirements of the memorandum and articles of the company and any written law applicable to the company, the minimum and maximum number of directors to hold office at any time;

- (e) require the trustee, in relation to the appointment and removal of directors, to act generally or in any specified circumstances on the decision of a third person or a committee;
- (f) provide for the conferral of fiduciary duties on a person or a committee referred to in paragraph (e); or
- (g) provide for the establishment, continuance, and procedures of a committee referred to in paragraph (e).

(3) Subject to subsection (9) and section 46H, the trustee shall at all times use its power of voting and other powers, so far as those powers allow, to ensure—

- (a) that the company has at least the minimum number of directors to meet the requirements of its memorandum and articles and any written law applicable to the company; and
- (b) that, except in an exempted case, the identity of the directors of the company conforms with the office of director rules, if any, for the time being applicable.

(4) No person becoming or remaining a director of the company, whether in consequence of the office of director rules or otherwise, shall, in the capacity of director, owe fiduciary or other obligations under the trust, or have any fiduciary or other obligations to the trustee, but nothing in this subsection shall affect any duty which that person owes, as director, to the company.

(5) A person for whose appointment the office of director rules may provide include—

- (a) a settlor or protector of the trust; and
- (b) both ascertained and ascertainable persons.

(6) A trustee shall incur no liability for securing, sanctioning or not opposing the appointment of a director where that appointment is in conformity with the office of director rules.

(7) Where there is no office of director rules, and in an exempted case, a trustee shall incur no liability for securing, sanctioning, or not opposing, the appointment of a director of the trustee's own selection, if—

- (a) the trustee concludes in good faith that the appointment in question is consistent with the wishes of the settlor; and
- (b) the selection is not motivated by a desire on the part of the trustee to reduce business risk, except to the extent, if at all, that the trustee in good faith concludes that a reduction would be consistent with the wishes of the settlor.

(8) For the purposes of this section, an exempted case is any case in which either—

- (a) the office of director rules make no provision in that case; or
- (b) the rules make provision but the trustee concludes in good faith that it would be impossible, unlawful, impracticable, or plainly inconsistent with the wishes of the settlor, to ensure compliance with the rules in that case.

(9) A trustee shall have no duty—

- (a) to act pursuant to subsection (3) unless and until it receives actual notice that circumstances requiring such action have arisen; or
- (b) to enquire as to whether circumstances requiring action pursuant to subsection (3) exist.

(10) Where, on any question concerning the appointment of a director, a trustee makes an application to the Court under section 49, the Court, in giving its directions, shall not seek to reduce business risk, except to the extent, if at all, that the Court concludes that a reduction would be consistent with the wishes of the settlor.

**Intervention by trustee in management in prescribed circumstances**

**46H.** (1) Where, in relation to a trust of designated shares, an interested person has a complaint concerning the conduct of the company's affairs, and the ground for that complaint is permitted, he may, in writing, call upon the trustee to intervene in the affairs of the company to deal with the complaint.

(2) A trust instrument may specify one or more permitted grounds for complaint.

(3) Upon receiving an intervention call, the trustee shall, if satisfied that the complaint is substantiated, take such, if any, action as the trustee considers appropriate to deal with the complaint in the interests of the trust and may include the following:

- (a) making or procuring changes in the directorship of the company in accordance with the provisions of its memorandum and articles and any written law applicable to the company, but otherwise on such terms as the trustee thinks fit, provided that in making, procuring or maintaining any such change, the trustee may disregard paragraph 46G(3)(b) if and in so far as, in the opinion of the trustee, it is expedient to do so for the purposes of dealing with the complaint;
- (b) procuring action by the company to recover any losses caused by the conduct that giving rise to the complaint; or
- (c) seeking such advice on the complaint and the manner of addressing it as the trustee considers appropriate.

(4) In considering and taking action under subsection (3), the trustee shall—

- (a) have regard to—
  - (i) any wishes of the settlor; and
  - (ii) the efficient functioning of the company; and

(b) disregard business risk, except to the extent that—

- (i) the ground for complaint consists of or arises from any disagreement among the directors as to business risk; or
- (ii) any wishes of the settlor require business risk to be considered.

(5) After acting pursuant to subsection (3), or after deciding not to act, the trustee's obligation to intervene shall be at an end unless and until another intervention call is made.

(6) It shall be a ground for declining to act on an intervention call if, apart from any other reason for declining, the call is made on substantially similar ground that has been made previously, and there appears to the trustee to be no reason to alter, or act further on, the decision previously taken by it.

(7) Where a trust instrument specifies one or more permitted grounds for complaint, the following provisions shall apply:

- (a) an interested person may request the trustee to provide such information concerning the affairs of the company and any connected company as is reasonably required for that person to consider whether an intervention call is necessary, and the trustee shall use all reasonable endeavours to provide that information and may, if considered necessary for this purpose, procure the replacement of any of the directors with the trustee's own representative;
- (b) where there is an appointed enquirer he shall be under the following duties:
  - (i) a duty to make reasonable enquiries as to whether there is a permitted ground for complaint as often as appears appropriate in the circumstances, and not less than once in a period of twelve months; and
  - (ii) a duty to make an intervention call under this section, and provide the trustee with evidence of the relevant ground for complaint, whenever it appears to him to be appropriate;

- (c) where there is no appointed enquirer, the trustee shall use all reasonable endeavours to ensure that at all times at least one interested person of full capacity is given the following documents and information concerning the trust, but without prejudice to any right of that person to documents and information apart from this paragraph:
- (i) a copy of the trust instrument and other trust documents;
  - (ii) the name and address of the trustee;
  - (iii) the name, registered office and principal place of business of the company;
  - (iv) the names and addresses of all directors of the company; and
  - (v) the nature of the current activities of the company,

provided that, where practicable, any person to whom information is given under this paragraph shall be a person who, in the reasonable opinion of the trustee, has acquired, or is likely to acquire, by appointment or otherwise, a substantial equitable interest in some or all of the designated shares or their proceeds or is the parent or legal guardian of such a person.

(8) All expenses incurred in dealing with an intervention call or considering the complaint on which it is based, including trustee remuneration where applicable, and the cost of any advice, shall be payable out of the trust fund and its income in such proportions as the trustee decides, and if there is any deficiency in liquid funds the trustee may take such steps as are available to the trustee under the memorandum and articles of the company and any written law applicable to the company, to make up the shortfall out of dividends from the company and may, if considered necessary for this purpose, procure the replacement of any of the directors with the trustee's own representative.

(9) The trustee shall, where practicable, procure the removal from office of a director appointed for the purpose specified in paragraph (7)(a) or subsection (8) when the purpose for which the director was appointed is achieved, if removal is appropriate for the purpose of any action decided upon by the trustee pursuant to subsection (3) or, subject to such action, for the purpose of compliance with the office of director rules.

### **Power to dispose designated shares**

**46i.** (1) Subject to subsection (2) and to the terms of the trust instrument, the trustee shall have power, in the management or administration of the trust fund, to sell or otherwise dispose of designated shares, but the existence of this power—

(a) shall not carry an implied duty to exercise the power for the purpose of preserving or enhancing the value of the property of the trust or to consider its exercise for that purpose; and

(b) shall not render the trustee liable, in consequence of not exercising such power, for losses of the kind referred to in subsection 46E(3).

(2) Subject to section 46K, the trustee shall not, unless the trust instrument otherwise provides, sell or dispose of the designated shares in the management or administration of the trust fund without—

(a) the consent of the directors of the company or of a majority of them if more than one; and

(b) such consents, if any, are made requisite by the trust instrument.

(3) The power to sell or dispose of the designated shares under subsection (1) shall be made in such manner, and upon such terms and conditions, as the trustee, acting in its fiduciary capacity, thinks fit.

(4) Section 48 shall not apply to the trust to the extent that the section permits the Court to confer upon the trustee any power of sale or other disposal.

## Enforcement

**46j.** (1) Where in the case of a trust of designated shares there is a breach of a duty or obligation imposed by this Part on its trustee, any of the persons specified in subsection (3) may, subject to the terms of the trust, apply to the Court for relief.

(2) The Court shall, if satisfied that the application under subsection (1) is well founded, grant relief by—

- (a) making such order as it considers appropriate to attain, as nearly as may be, the outcome that the Court considers would have been, or would most likely have been, attained in respect of the trust, the company, its directors and generally if the breach had not occurred; and
- (b) making such, if any, supplementary or incidental order as the Court deems, in the circumstances of the case, reasonably required having regard to the primary purpose of this Part,

provided that no order shall be made under this subsection to prejudice any interest in property which was acquired from the trustee in good faith, for value and without actual or constructive notice of the trust, or from the company in good faith and for full consideration, or to prejudice any interest deriving from such an interest.

(3) The persons referred to in subsection (1) are as follows:

- (a) an interested person;
- (b) a director of the company; and
- (c) a person who, under the applicable office of director rules, would be a director if the trustee had complied with its obligations under section 46G.

(4) Without prejudice to subsections (1) to (3), but subject to subsection (5), where in the case of a trust there is a breach of a duty or obligation imposed by this Act on its trustee, the breach shall be, and be actionable in civil proceedings as, a breach of the trust which shall be taken to include references to a prospective breach.

(5) Where civil proceedings are instituted in relation to a breach of a duty or obligation, the Court shall, in granting any remedy, take into account of any relief granted or available in respect of the breach on an application under subsection (1).

(6) Subject to the terms of the trust and to sections 46G and 46H, where designated shares are held on trust, no act or omission of a director of the company shall be a ground for any person to seek intervention by the Court in the affairs of the trust.

### **Power of Court to order disposal**

**46K.** (1) Where it appears to the Court that the retention of the designated shares is no longer compatible with the wishes of the settlor, the Court shall have power, on the application of any interested person, to order or authorize a sale or other disposal of the designated shares, and a sale or other disposal so ordered or authorized shall not require any consent referred to in subsection 46I(3).

(2) In making an order or authorization under subsection (1), the Court may impose such, if any, terms and conditions in relation to the sale or other disposal as it thinks fit.

### **Beneficiaries not entitled**

**46L.** (1) Notwithstanding any rule of equity or practice of the Court to the contrary, but subject to subsection (2), neither a beneficiary who is solely interested in any designated shares, nor all the beneficiaries who together are the persons interested in any designated shares, shall be entitled, although in existence and ascertained and of full capacity, to call for or direct a transfer of those shares or to terminate or modify the trust relating to the shares, if and so far as that entitlement is, without offending any rule of perpetuity or remoteness, excluded by the trust instrument.

(2) No such exclusion of entitlement shall have effect, or continue to have effect, after the expiration of twenty years from the creation of the trust.

(3) Where a person who receives designated shares, or an interest in the designated shares, is a person who, by virtue of such an exclusion of entitlement, has no present right to receive the shares or that interest, he shall, without prejudice to the generality of subsection (1), hold those shares or that interest on trust to transfer the shares or that interest to the trustee, and the Court shall order him to do so on the application by the trustee or any person specified in subsection 46j(3).

(4) During any such exclusion of entitlement, section 47 shall not apply to the trust.

### **Disqualification of trustee as a director**

**46m.** A trustee of designated shares shall not be, or become, a director of the company.

### **Ascertaining wishes of settlor**

**46n.** (1) Where it is necessary under this Act for the Court or a trustee to ascertain the wishes of the settlor, the provisions of this section shall apply.

(2) Where the settlor is alive, the settlor shall, where possible and practicable, be consulted as to his wishes.

(3) Where the settlor is dead, or it is not possible or practicable to consult him, his wishes shall be taken to be—

- (a) such wishes as he has most recently communicated to the trustee, or
- (b) where no wishes have been communicated, such as the Court, or the trustee in good faith, believes most likely to have been his wishes from the evidence available in respect of the wishes.

### **Limitation of trustee's duties**

**46o.** (1) A trustee of designated shares shall have no fiduciary responsibility or duty of care in respect of the property of, or the conduct of the affairs of, the company, except when acting, or required to act, on an intervention call.

(2) Without prejudice to the generality of subsection (1), a trustee of designated shares—

- (a) shall not be required to make any enquiry as to whether any facts exist which would, or may, whether with or without any other information, form the basis of an intervention call;
- (b) shall not be obliged to inform any interested person of any fact of which it becomes aware, or which it suspects, concerning the property of the company or the conduct of its affairs; and
- (c) shall not incur liability as accessory to a director's breach of duty by reason of any omission on the part of the trustee to take action where the trustee is aware, or suspects, that there has been or will be such a breach, or by reason of any act or omission in compliance with the provisions of section 46G.

### **Restrictions on Labuan trust to apply**

**46p.** The restrictions in section 7 shall apply to a Labuan Special Trust constituted under this Part.”.

### **Amendment of section 49**

**43.** Subsection 49(4) of the principal Act is amended by substituting for the word “offshore” the word “Labuan”.

### **Amendment of section 52**

**44.** Subsection 52(2) of the principal Act is amended, by substituting for the word “six” the word “three”.

### **Amendment of section 53**

**45.** Section 53 of the principal Act is amended—

- (a) in subsection (1), by substituting for the words “an offshore trust” the words “a Labuan trust”; and

(b) by substituting for subsection (3) the following subsection:

“(3) Any person who without reasonable excuse fails to comply with the requirements of subsection (1) or (2) shall be guilty of an offence.

Penalty: Imprisonment for five years or three million ringgit or both.”.

### **Amendment of section 56**

**46.** The principal Act is amended by substituting for section 56 the following section:

#### **“Power to compound**

**56.** (1) The Authority may, with the consent in writing of the Public Prosecutor, compound any offence committed by any person under this Act by making a written offer to the person suspected to have committed the offence to compound the offence upon payment to the Authority of an amount of money not exceeding fifty per centum of the amount of maximum fine for that offence within such time as may be specified in the written offer.

(2) An offer under subsection (1) may be made at any time after the offence has been committed but before any prosecution for it has been instituted, and if the amount specified in the offer is not paid within the time specified in the offer or such extended time as the Authority may grant, prosecution for the offence may be instituted at any time after that against the person to whom the offer was made.

(3) Where an offence has been compounded under subsection (1), no prosecution shall be instituted in respect of the offence against the person to whom the offer to compound was made.

(4) Any document or thing seized in connection with the compounded offence may be released or forfeited by the Authority, subject to such terms and conditions as the Authority deems fit to impose in accordance with the conditions of the compound.

(5) All sums of money received by the Authority under this section shall be paid into the Fund established under section 29 of the Labuan Financial Services Authority Act 1996.”.

**Amendment of section 57**

**47.** The principal Act is amended by substituting for section 57 the following section:

**“Power of the Minister to make regulations**

**57.** (1) The Minister may, on the recommendation of the Authority, make regulations as may be necessary or expedient for the better carrying out of the provisions of this Act.

(2) The regulations made under this Act may provide for any act or omission in contravention of the regulations to be an offence and may provide for penalties of a fine not exceeding twenty-five thousand ringgit.”.

**Amendment of section 58**

**48.** The principal Act is amended by substituting for section 58 the following section:

**“Power of the Minister to grant exemptions**

**58.** The Minister may, on the recommendation of the Authority, exempt any Labuan trust or Labuan Special Trust from any of the provisions of this Act and may, in granting such exemption, impose such terms and conditions as the Minister thinks fit.”.

**Amendment of section 59**

**49.** Paragraph 59(1)(b) of the principal Act is amended by substituting for the word “offshore” the word “Labuan”.

**Amendment of section 62**

**50.** Section 62 of the principal Act is amended by substituting for the words “an offshore trust” the words “a Labuan trust”.

**New section 63**

**51.** The principal Act is amended by inserting after section 62 the following section:

**“Application of the Labuan Financial Services Authority Act 1996**

**63.** In the event of any conflict or inconsistency between the provisions of this Act and the Labuan Financial Services Authority Act 1996, the provisions of the Labuan Financial Services Authority Act 1996 shall prevail.”.

**Savings**

**52.** All references to the Labuan Offshore Trusts Act 1996 in any written law or document shall, on the coming into operation of this Act, be construed as references to the Labuan Trusts Act 1996.

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**EXPLANATORY STATEMENT**

This Bill seeks to amend the Labuan Offshore Trusts Act 1996 (“Act 554”).

2. *Clause 1* contains the short title of the Act and provision on the commencement of the proposed Act.

3. *Clauses 2* and *3* seek to amend the long title and the short title of Act 554 respectively by deleting the word “Offshore”. The deletion is due to the Labuan branding exercise as a new Labuan International Financial Centre and to ensure consistency in respect of Labuan Offshore Financial Services Authority’s (hereinafter referred to as “LOFSA”) designation with the other Labuan legislations.

4. *Clause 4* seeks to amend section 2 of Act 554 to introduce new definitions and to amend existing definitions used in Act 554.

5. *Clause 5* seeks to delete sections 4 and 5 of Act 554 which will now be covered under new sections 11A until 11E, inserted by *clause 15* into the proposed Act. The intention of the amendments is to place the subject matter of the deleted sections, i.e. purpose trust and charitable trust, under Part II of Act 554 which relates to the creation and recognition of offshore trusts.

6. *Clause 6* seeks to amend section 6 of Act 554 to provide for a comprehensive meaning of “proper law”, in particular, how it is determined and also sets out matters to be governed by the proper law. This *clause* further provide for the place of administration of trust.
7. *Clause 7* seeks to introduce a new Part, i.e. Part IA, which contains two new sections 6A and 6B into Act 554. Section 6A sets out that LOFSA is responsible for the administration of the Act subject to the general directions of the Minister whilst section 6B empowers LOFSA to appoint authorized officers.
8. *Clause 9* seeks to amend section 7 of Act 554 to allow Malaysian immovable properties to be included as part of the trust property. This *clause* also seeks to allow a Malaysian resident to be a beneficiary of a Labuan trust provided that the trust properties are foreign properties, and to allow a Malaysian resident to be a settlor of a Labuan trust provided that the trust properties are foreign properties. This *clause* further requires that at least one of the trustees of the Labuan trust shall be a Labuan trust company.
9. *Clause 11* seeks to introduce two new sections, namely sections 8A and 8B into Act 554. Section 8A provides that all proceedings (other than criminal proceedings) in respect of a Labuan trust must be held *in camera* and seeks to prohibit the disclosure of any information relating to the affairs of a Labuan trust while section 8B relates to the retention of certain rights by the settlor.
10. *Clause 13* seeks to amend section 10 of Act 554 to provide for a more comprehensive protection for trust property and to include protection from foreign claims or the application of foreign laws in regard to any disposition of property to the trust and the capacity of the settlor.
11. *Clause 14* seeks to introduce a new subsection (6A) into section 11 of Act 554. This amendment seeks to restrict the application of section 11 in the circumstances where the settlor is a resident.
12. *Clause 15* seeks to introduce the new sections 11A, 11B, 11C, 11D and 11E into Act 554. As mentioned earlier, in paragraph 5, the new sections set out provisions on purpose trusts and charitable trusts which were previously contained in the deleted sections 4 and 5. New section 11C seeks to introduce provisions relating to “enforcers” while section 11D provides that a purpose trust is not to be rendered void merely by uncertainty. New section 11E provides for spendthrift or protective trust.
13. *Clause 16* seeks to amend section 12 of Act 554 to address the issue of Labuan trusts using misleading or undesirable names. With this amendment, LOFSA is empowered to refuse registering a trust if the name of the trust is misleading or undesirable.
14. *Clause 20* seeks to amend section 16 of Act 554 to clarify that Labuan trusts are not subject to the perpetuity rule, and also to empower the trustee to change a perpetual trust to a trust of fixed duration and to appoint a fixed duration or to alter the duration of trust.

15. *Clause 23* seeks to amend section 19 of Act 554 to ensure that the statutory provision does not defeat the settlor's intention of creating the trust. The amendment seeks to strike a balance between the wishes of the beneficiaries and that of the settlor. This *clause* also provides that if the terms of the trust disallow termination of the trust by the beneficiaries, the beneficiaries may apply to the Court for the termination of the trust and the Court may approve such termination if it is satisfied that termination is consistent with the material purpose of the trust.

16. *Clause 26* seeks to amend section 22 of Act 554 to enable the terms of a trust to provide for the addition of a person to be a beneficiary, to exclude a person from being a beneficiary and to impose upon a beneficiary any obligation as a condition for a benefit under the trust.

17. *Clause 27* seeks to amend the existing section 23 of Act 554 to enable a beneficiary to disclaim the whole or any part of his interest despite the terms of the trust.

18. *Clause 31* seeks to introduce a new subsection (1A) into section 30 of Act 554. This amendment seeks to adopt a more modern approach in regard to a trustee's duty of care based on the UK Trustees Act 2000 and the Singapore Trustees Act. Any special knowledge or experience that the trustee has or that he holds himself out as having, and any special knowledge or experience that is reasonably expected of a professional trustee is taken into account in the execution of his duties as a trustee.

19. *Clause 32* seeks to amend section 31 of Act 554 to require a trustee, who dissent from a decision of the majority of the trustees, to cause his dissent to be recorded in writing.

20. *Clause 33* seeks to amend section 33 of Act 554 to require a trustee to insure the trust property against any loss or damage and to pay the premium out of the income or capital funds of the trust.

21. *Clause 34* seeks to introduce two new sections, namely sections 33A and 33B into Act 554. Section 33A seeks to provide for the power of investment of the trustee. Section 33A impose certain safeguards on the trustee's power of investment, in particular, to require the trustee to have regard to standard investment criteria and considerations, including the suitability of proposed investments and the need for diversification of investments of the trust. Section 33B requires the trustee to obtain proper advice relating to any proposed investment from qualified persons.

22. *Clause 35* seeks to amend section 35 of Act 554 to set out the role and powers of a protector in more detail.

23. *Clause 36* seeks to amend section 36 of Act 554 to introduce certain safeguards in relation to the trustee's power of delegation, in particular to specify certain non-delegable functions and in this regard, delegable functions in respect of charitable trusts should vary from that of non-charitable trusts and

to impose strict requirements in respect of delegation of property management functions and to require trustees to keep under review the terms of the delegation and how the person appointed is performing.

24. *Clause 37* seeks to introduce two new sections, namely sections 36A and 36B into Act 554. Section 36A deals with the delegation of powers in relation to property management functions while section 36B deals with the review of agents.

25. *Clause 38* seeks to amend section 41 of Act 554 to provide the necessary exceptions to confidentiality of trust information and further, to restrict the obligation to disclose such information to any beneficiary having a vested or contingent interest in a trust.

26. *Clause 39* seeks to amend section 42 of Act 554. This amendment seeks to delete subsections 42(2) and (3) as the provisions create unjustified discrimination against directors of fiduciary business compared to other professionals and the continued existence of the discrimination may deter international service providers from setting up business in Labuan. In addition, the amendment seeks to provide that exculpation clauses in trust instrument are not enforceable under certain specified circumstances. A trustee should not be liable to a beneficiary for breach of trust if the beneficiary consented to the conduct constituting the breach, had released the trustee from liability for the breach or had ratified the transaction constituting the breach.

27. *Clause 40* seeks to introduce new sections 42A and 42B into Act 554. Section 42A empowers the Court to make an order to prevent a breach of trust from occurring while section 42B empowers the Court to make an order to remedy a breach of trust that has occurred.

28. *Clause 41* seeks to amend section 46 of Act 554 to introduce appropriate measures to avoid a gap in the trusteeship when a trustee retires.

29. *Clause 42* seeks to introduce a new Part, namely Part IVA which consists of new sections 46A, 46B, 46C, 46D, 46E, 46F, 46G, 46H, 46I, 46J, 46K, 46L, 46M, 46N, 46O and 46P, into Act 554. This new Part provides for the creation of Labuan Special Trust.

30. *Clause 44* seeks to amend section 52 of Act 554 to shorten the limitation period under subsection 52(2) from the current six years to three years. The present limitation period of six years under subsection 52(2) is too long compared to other jurisdictions.

31. *Clause 45* seeks to amend section 53 of Act 554 to increase the penalty for an offence of receiving money or other property from illegal activities from thirty thousand ringgit to three million ringgit.

32. *Clause 47* seeks to amend section 57 of Act 554 to empower the Minister to set out the penalties that may be prescribed in regulations made under the Act.

33. *Clause 48* seeks to amend section 58 of Act 554 to empower the Minister, on the recommendation of LOFSA, to exempt any person from any of the provisions of this Act.

34. *Clause 51* seeks to introduce a new section, namely section 63, into Act 554 to provide that in the event of any inconsistencies between the provisions of Act 554 and the Labuan Financial Services Authority Act 1996 [*Act 545*], the provisions of the Labuan Financial Services Authority Act 1996 shall prevail.

35. *Clause 52* of this proposed Act contains the savings provision.

36. Other amendments not specifically dealt with in this Statement are minor or consequential in nature.

#### *FINANCIAL IMPLICATIONS*

The Bill will not involve the Government in any extra financial expenditure.

[PN(U<sup>2</sup>)2667]