
Trust Law (Amendment) Bill 2013

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A BILL

To

Amend the Trustee Ordinance and the Perpetuities and Accumulations Ordinance to extend trustees' powers in certain aspects; to impose a statutory duty of care on trustees; to provide for the validity of certain trusts; to abolish the rule against perpetuities; to change the rule against excessive accumulations of income; and to provide for related and consequential amendments.

Enacted by the Legislative Council.

Part 1

Preliminary

1. Short title and commencement

- (1) This Ordinance may be cited as the Trust Law (Amendment) Ordinance 2013.
 - (2) This Ordinance comes into operation on a day to be appointed by the Secretary for Financial Services and the Treasury by notice published in the Gazette.
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Part 2

Amendments to Trustee Ordinance

2. Trustee Ordinance amended

The Trustee Ordinance (Cap. 29) is amended as set out in this Part.

3. Section 2 amended (interpretation)

(1) Section 2, English text, definition of *trust for sale*—

Repeal the full stop

Substitute a semicolon.

(2) Section 2—

Add in alphabetical order

“2013 amending Ordinance (《2013年修訂條例》) means the Trust Law (Amendment) Ordinance 2013 (of 2013);

body corporate (法人團體) means a body corporate incorporated or established in Hong Kong or elsewhere;

statutory duty of care (法定謹慎責任), in relation to a trustee, means the duty of care required to be exercised by the trustee under section 3A as read with the Third Schedule;

trust funds (信託基金) means any income or capital funds of a trust.”.

4. Section 3 amended (application)

Section 3—

Repeal subsections (1) and (2)

Substitute

- “(1) This Ordinance applies to trusts (whenever created) including, so far as this Ordinance applies, executorships and administratorships whenever constituted.
- (2) Subject to subsection (2A), the powers conferred by this Ordinance on trustees are in addition to the powers conferred by the instrument creating the trust or an enactment.
- (2A) The powers conferred by this Ordinance on trustees—
- (a) apply if, and so far only as, a contrary intention is not expressed in the instrument creating the trust or an enactment; and
 - (b) have effect subject to the terms of that instrument or enactment.
- (2B) Subsections (1) and (2) have effect except as otherwise stated in this Ordinance.”.

5. Part IA added

After section 3—

Add

“Part IA

Statutory Duty of Care

3A. Statutory duty of care

- (1) If the statutory duty of care applies to a trustee as provided in the Third Schedule, the trustee must exercise the care and skill that is reasonable in the circumstances, having regard to—
- (a) any special knowledge or experience that the trustee has or holds out as having; and

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- (b) if the trustee is acting in that capacity in the course of a business or profession, any special knowledge or experience that is reasonably expected of a person acting in the course of that kind of business or profession.
- (2) If the statutory duty of care applies to a trustee when exercising a power or doing an act, that duty has effect in place of any common law rules and equitable principles regarding the duty and standard of care owed by the trustee to the beneficiaries of the trust when exercising the power or doing the act.
- (3) The statutory duty of care does not apply to a trustee if, or in so far as, it appears from the instrument creating the trust or an enactment that the duty is not meant to apply.
- (4) The statutory duty of care does not apply in relation to a trust created before the commencement date of this section in so far as provision to the effect that subsection (1) does not apply is made by a deed executed—
- (a) if the trust was created by a person who is of full capacity, by that person;
- (b) if the trust was created by more than one person, by all the persons who are of full capacity; or
- (c) if none of the persons creating the trust is of full capacity, by—
- (i) the sole beneficiary under the trust who is absolutely entitled to the property subject to the trust and—
- (A) is an individual of full age and capacity; or
- (B) is a body corporate whose constitution does not prohibit it from exercising the power under this section; or

- (ii) all the beneficiaries under the trust who (taken together) are absolutely entitled to the property subject to the trust and each of whom is either—
 - (A) an individual of full age and capacity; or
 - (B) a body corporate whose constitution does not prohibit it from exercising the power under this section.”.

6. Section 4 amended (authorized investments)

Section 4(1)(a)—

Repeal the semicolon

Substitute

“subject to the compliance with any condition specified in relation to the investment in that Schedule;”.

7. Section 7 substituted

Section 7—

Repeal the section

Substitute

“7. Retention of unauthorized investment

A trustee is not liable for a breach of trust only because of the trustee’s continuing to hold an investment which has ceased to be an investment authorized by the instrument creating the trust or the general law if the trustee has discharged the statutory duty of care in doing so.”.

8. Section 8 repealed (investment in bearer securities)

Section 8—

Repeal the section.

9. Section 11 amended (powers supplementary to powers of investment)

(1) Section 11(3)—

Repeal

“and shall not be”

Substitute

“and if the trustees have discharged the statutory duty of care, the trustees are not”.

(2) Section 11(4)—

Repeal

everything after “first-mentioned”

Substitute

“securities.”.

(3) After section 11(4)—

Add

“(4A) The trustees are not responsible for any loss occasioned by an act or thing done under subsection (4) if they have discharged the statutory duty of care in doing so.

(4B) The trustees may retain any securities accepted under subsection (4) for a period for which they could have properly retained the original securities.”.

(4) Section 11—

Repeal subsection (5)

Substitute

- “(5) If a conditional or preferential right to subscribe for securities in a company is offered to trustees for any holding in the company, the trustees may, for all or any of the securities—
- (a) exercise the right and apply the trust funds in payment of the consideration;
 - (b) renounce the right;
 - (c) assign for the best consideration that can be reasonably obtained the benefit of the right, or the title to the right, to any person, including a beneficiary under the trust.
- (5A) The trustees are not responsible for any loss occasioned by an act or thing done under subsection (5) if they have discharged the statutory duty of care in doing so.”.

10. Section 12 amended (power to deposit at bank and to pay calls)

Section 12—

Repeal subsection (2)

Substitute

- “(2) Trustees may apply the trust funds of the trust in payment of a call on any shares subject to the trust.”.

11. Cross-heading before section 13 repealed

Cross-heading before section 13—

Repeal the cross-heading.

12. Part III, Division 1 heading added

Before section 13—

Add

“Division 1—General Powers”.

13. Section 16 amended (power to do other acts)

Section 16—

Repeal

everything after “other things as to”

Substitute

“the personal representative, trustees or sole acting trustee seem expedient, without being responsible for any loss occasioned by an act or thing done under this section if the personal representative, trustees or sole acting trustee has or have discharged the statutory duty of care in doing so.”.

14. Section 21 substituted

Section 21—

Repeal the section

Substitute

“21. Power to insure

(1) The trustee of a trust may—

- (a) insure any property that is subject to the trust against loss or damage due to any event; and
- (b) pay the premiums out of the trust funds.

(2) If a property is held on a bare trust, the power to insure the property is subject to any direction given by the sole beneficiary or (if more than one beneficiary) each of the beneficiaries that—

- (a) the property is not to be insured; or
- (b) the property is not to be insured except on the conditions specified in the direction.

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- (3) For the purpose of subsection (2), a property is held on a bare trust if it is held on trust for—
- (a) the sole beneficiary under the trust who is absolutely entitled to the property subject to the trust and—
 - (i) is an individual of full age and capacity; or
 - (ii) is a body corporate whose constitution does not prohibit it from exercising the power under this section; or
 - (b) all the beneficiaries under the trust who (taken together) are absolutely entitled to the property subject to the trust and each of whom is either—
 - (i) an individual of full age and capacity; or
 - (ii) a body corporate whose constitution does not prohibit it from exercising the power under this section.
- (4) If a direction under subsection (2) is given, the power to insure, so far as it is subject to the direction, ceases to be a delegable function for the purpose of section 41B (power to appoint agents).”.

15. Section 22 amended (application of insurance money where policy kept up under any trust, power or obligation)

Section 22(1)—

Repeal

“whether by fire or otherwise,”.

16. Section 23 repealed (deposit of documents for safe custody)

Section 23—

Repeal the section.

17. Section 24 amended (reversionary interests, valuations, and audit)

(1) Section 24(1)—

Repeal

“so done by them in good faith”

Substitute

“done by them under this section if the trustees have discharged the statutory duty of care in doing so”.

(2) Section 24(2)(a)—

Repeal

“as aforesaid”

Substitute

“as referred to in subsection (1)”.

(3) Section 24(2)—

Repeal

“to be taken:”

Substitute

“to be taken.”.

(4) Section 24(2)—

Repeal the proviso.

(5) After section 24(2)—

Add

“(2A) Subsection (2) does not relieve the trustees of the obligation to get in and obtain payment or transfer of such share or interest or other thing in action on its falling into possession.”.

(6) Section 24(3)—

Repeal

“so made in good faith shall be binding upon all persons interested under the trust”

Substitute

“made by them under this section is binding on all persons interested under the trust if the trustees have discharged the statutory duty of care in making the valuation”.

(7) Section 24(4)—

Repeal

everything after “give such information to”

Substitute

“the accountant as the accountant may require.”.

(8) After section 24(4)—

Add

“(5) The costs of the examination or audit referred to in subsection (4), including the fee of an auditor, are to be paid out of the trust funds.”.

18. Section 25 repealed (power to employ agents)

Section 25—

Repeal the section.

19. Section 27 amended (power to delegate trusts)

(1) Section 27, heading—

Repeal

“Power to delegate trusts”

Substitute

“Individual trustee’s delegation by power of attorney”.

- (2) Section 27(1)—

Repeal

“for a period not exceeding 12 months”.

- (3) After section 27(1)—

Add

“(1A) A delegation under this section—

- (a) commences as provided by the instrument creating the power of attorney or, if the instrument makes no provision as to commencement of the delegation, on the date of the execution of the instrument by the donor of the power; and
- (b) continues for a period of 12 months or, if a shorter period is provided by the instrument creating the power of attorney, the shorter period.”.

- (4) Section 27(2)—

Repeal

“but not (unless a trust corporation) the only other co-trustee of the donor of the power”.

- (5) After section 27(2)—

Add

“(2A) If a trust has more than one trustee, the exercise of the power of delegation must not result in the trust having only 1 donee under a power of attorney or 1 trustee administering the trust, unless the donee or trustee is a trust corporation.”.

(6) Section 27(4), English text—

Repeal

“some only”

Substitute

“only some trusts, powers and discretions”.

(7) After section 27(8)—

Add

“(9) This section as in force immediately before the commencement date of the 2013 amending Ordinance continues to apply to a power of attorney created before the commencement date, as if this section had not been amended.”.

20. Cross-heading before section 28 repealed

Cross-heading before section 28—

Repeal the cross-heading.

21. Part III, Division 2 heading added

Before section 28—

Add

“Division 2—Indemnities”.

22. Section 32 repealed (implied indemnity of trustees)

Section 32—

Repeal the section.

23. Cross-heading before section 33 repealed

Cross-heading before section 33—

Repeal the cross-heading.

24. Part III, Division 3 heading added

Before section 33—

Add

“Division 3—Maintenance, Advancement and Protective Trusts”.

25. Sections 40A to 40D added

After section 40—

Add

“40A. Appointment and retirement of trustees on beneficiaries’ directions

(1) This section applies in relation to a trust if—

(a) no person is nominated for the purpose of appointing new trustees by the instrument creating the trust or an enactment; and

(b) either—

(i) the sole beneficiary under the trust is absolutely entitled to the property subject to the trust and—

(A) is an individual of full age and capacity;
or

(B) is a body corporate whose constitution does not prohibit it from exercising the power under this section; or

(ii) all the beneficiaries under the trust (taken together) are absolutely entitled to the property subject to the trust and each of whom is either—

(A) an individual of full age and capacity; or

- (B) a body corporate whose constitution does not prohibit it from exercising the power under this section.
- (2) The sole beneficiary or all the beneficiaries may give either or both of the following directions—
- (a) a written direction to a trustee directing the trustee to retire from the trust;
 - (b) a written direction to a sole trustee or all the trustees for the time being or, if there is none, to the personal representative of the last person who was a trustee, directing the sole trustee, trustees or the personal representative to appoint by writing a person specified in the direction as a trustee.
- (3) A trustee to whom a direction under subsection (2)(a) has been given must make a deed declaring the trustee's retirement if—
- (a) reasonable arrangements have been made for the protection of any rights of the trustee in connection with the trust;
 - (b) after the trustee has retired, there will be either a trust corporation or at least 2 persons to act as trustees of the trust; and
 - (c) either—
 - (i) another person is to be appointed as a new trustee on the trustee's retirement (whether in compliance with a direction given under subsection (2)(b) or otherwise); or
 - (ii) the continuing trustees by deed consent to the retirement.
- (4) When the deed declaring the trustee's retirement is made—
- (a) the retirement takes effect and the trustee is discharged from the trust; and

- (b) the trustee and the continuing trustees (together with any new trustee) must (subject to any arrangement for the protection of the rights of the retiring trustee) do anything necessary to vest the property subject to the trust in—
 - (i) the continuing trustees; or
 - (ii) the continuing trustees and new trustees.
- (5) This section has effect subject to the restrictions imposed by section 36 on the number of trustees.

40B. Appointment of substitute for incapacitated trustee

- (1) This section applies in relation to a trust if—
 - (a) a trustee, because of mental incapacity as defined by section 2(1) of the Mental Health Ordinance (Cap. 136), is incapable of exercising the trustee's functions (*the incapacitated trustee*);
 - (b) no person is entitled, willing and able to appoint, under section 37(1), a new trustee in place of the incapacitated trustee; and
 - (c) either—
 - (i) the sole beneficiary under the trust is absolutely entitled to the property subject to the trust and—
 - (A) is an individual of full age and capacity; or
 - (B) is a body corporate whose constitution does not prohibit it from exercising the power under this section; or
 - (ii) all the beneficiaries under the trust (taken together) are absolutely entitled to the property subject to the trust and each of whom is either—

- (A) an individual of full age and capacity; or
 - (B) a body corporate whose constitution does not prohibit it from exercising the power under this section.
- (2) Either the sole beneficiary or all the beneficiaries may give a written direction to the specified attorney or committee to appoint a person specified in the direction to be a new trustee in place of the incapacitated trustee.
- (3) In subsection (2)—
- (a) the specified attorney is an attorney acting for the incapacitated trustee under an enduring power of attorney; and
 - (b) the specified committee is a committee of the estate or other person acting for the incapacitated trustee appointed or authorized by the court under Part II of the Mental Health Ordinance (Cap. 136).

40C. Provisions supplementary to sections 40A and 40B

- (1) For the purposes of sections 40A and 40B, a direction is given by all the beneficiaries if—
- (a) a single direction is jointly given by all of them; or
 - (b) in compliance with subsection (2), a direction is given by each of them (whether solely or jointly with one or more, but not all, of the others),
- and none of them by writing withdraws the direction given before it has been complied with.
- (2) If more than one direction is given, each beneficiary must specify for the appointment or retirement the same person or persons.

- (3) Section 37(7) (providing for the powers, authorities and discretions of new trustees) applies to a trustee appointed under section 40A or 40B as if the trustee were appointed under section 37.

40D. Application of sections 40A and 40B

- (1) Sections 40A and 40B do not apply in relation to a trust if a contrary intention is expressed in the instrument creating the trust or an enactment.
- (2) Sections 40A and 40B do not apply in relation to a trust created before the commencement date of those sections in so far as provision to the effect that those sections do not apply is made by a deed executed—
- (a) if the trust was created by a person who is of full capacity, by that person; or
- (b) if the trust was created by more than one person, by all the persons who are of full capacity.
- (3) A deed executed for the purpose of subsection (2) is irrevocable.
- (4) If a deed is executed for the purpose of subsection (2)—
- (a) the deed does not affect anything done before its execution to comply with a direction given under section 40A or 40B; but
- (b) a direction given under section 40A or 40B that has not been complied with before the execution of the deed ceases to have effect.
- (5) Sections 40A and 40B do not apply to the appointment and retirement of a personal representative.”.

26. Section 41 amended (vesting of trust property in new or continuing trustees)

Section 41(2)—

Repeal

“the statutory power”

Substitute

“section 40 or 40A”.

27. Parts IVA to IVD added

After section 41—

Add

“Part IVA

Appointment of Agents, Nominees and Custodians

Division 1—Application

41A. Application of Part IVA

- (1) Except as otherwise provided in section 41I(6)—
 - (a) this Part applies in relation to a trust having a sole trustee in the same way as it applies to a trust that has more than one trustee; and
 - (b) references to trustees in this Part (except in sections 41C(1) and 41J(6)) include the sole trustee of a trust.
- (2) The powers conferred by this Part are only exercisable by trustees jointly if there is more than one trustee.

Division 2—Agents

41B. Power to appoint agents

- (1) Subject to the provisions of this Division, the trustees of a trust may authorize a person to exercise one or more of their delegable functions as their agent.

-
- (2) For a trust that is not a charitable trust, the trustees' delegable functions are any functions of the trustees other than—
- (a) a function relating to whether, or in what way, any assets of the trust are to be distributed;
 - (b) a power to decide whether any fees or other payment due to be made out of the trust funds is to be made out of income or capital of the trust;
 - (c) a power to appoint a person to be a trustee of the trust; or
 - (d) a power conferred by the instrument creating the trust or an enactment that permits the trustees to delegate any of their functions or to appoint a person to act as a nominee or custodian.
- (3) For a charitable trust, the trustees' delegable functions are—
- (a) a function relating to carrying out a decision that the trustees have taken;
 - (b) a function relating to the investment of assets 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) a 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 subsection (3)(c), a trade, whether carried on in Hong Kong or elsewhere, is an integral part of carrying out a trust's charitable purpose if the profits of the trade are applied solely for the purposes of the trust and either—

- (a) the trade is carried on 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 the beneficiaries of the trust.

41C. Persons who may act as agents

- (1) Subject to subsection (2), a person whom the trustees may under section 41B authorize to exercise functions as the trustees' agent includes one or more of the trustees.
- (2) The trustees may not authorize 2 or more persons to exercise the same function unless the persons are to exercise the function jointly.
- (3) The trustees may under section 41B authorize a person to exercise a function as their agent even though the person is also appointed to act as the trustees' nominee or custodian (whether under section 41G, 41H or 41I or any other power).

41D. Linked functions, etc.

- (1) Subject to subsection (2), a person who is authorized under section 41B to exercise a function as the trustees' agent is (whatever the terms of agency) subject to any specific duties or restrictions attached to the function.
- (2) A person who is authorized under section 41B to exercise a power which is subject to a requirement to obtain advice is not subject to the requirement if the person is the kind of person from whom it would have been proper for the trustees, in compliance with the requirement, to obtain advice.

41E. Terms of agency

- (1) Subject to subsection (2), section 41F(2) and Part IVB (remuneration and expenses), the trustees may under section 41B authorize a person to exercise functions as their agent on the terms as to remuneration and other matters that the trustees may determine.
- (2) The trustees may not under section 41B authorize a person to exercise functions as their agent on any of the terms mentioned in subsection (3) unless it is reasonably necessary for them to do so.
- (3) The terms are—
 - (a) a term permitting the agent to sub-delegate the trustees' powers or functions to a delegate of the agent;
 - (b) a term restricting the liability of the agent, or a delegate of the agent, to the trustees or to any beneficiary; and
 - (c) a term permitting the agent to act in circumstances capable of giving rise to a conflict of interest.

41F. Special restrictions relating to asset management

- (1) The trustees may not under section 41B authorize a person to exercise any of their asset management functions as their agent except by an agreement made, or evidenced, in writing.
- (2) In addition, the trustees may not under section 41B authorize a person to exercise any of their asset management functions as their agent unless—
 - (a) the trustees have provided that person with a statement that gives guidance as to how the functions are to be exercised (*policy statement*); and

- (b) the agreement under which the agent is to act includes a term to the effect that the agent will secure compliance with—
 - (i) the policy statement; or
 - (ii) if the policy statement is revised or replaced under section 41M (review of agents), the revised or replaced policy statement.
- (3) The trustees must formulate any guidance given in the policy statement with a view to ensuring that the functions will be exercised in the best interest of the trust.
- (4) A policy statement must be made, or evidenced, in writing.
- (5) The asset 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 creation or disposal of an interest in, the property.

Division 3—Nominees and Custodians

41G. Power to appoint nominees

- (1) Subject to the provisions of this Division, the trustees of a trust may—
 - (a) appoint a person to act as the trustees' nominee in relation to any of the assets of the trust as they determine; and
 - (b) take the steps that are necessary to ensure that those assets are vested in a person so appointed.

- (2) An appointment under subsection (1)(a) must be made, or evidenced, in writing.
- (3) This section does not apply to any trust having a custodian trustee.

41H. Power to appoint custodians

- (1) Subject to the provisions of this Division, the trustees of a trust may appoint a person to act as a custodian in relation to any of the assets of the trust as they determine.
- (2) For the purposes of this Ordinance, a person is a custodian in relation to any assets if the person undertakes the safe custody of the assets or of any documents or records concerning the assets.
- (3) An appointment under subsection (1) must be made, or evidenced, in writing.
- (4) This section does not apply to any trust having a custodian trustee.

41I. Investment in bearer securities

- (1) Trustees may, unless expressly prohibited by the instrument creating the trust or an enactment, retain or invest in securities payable to bearer which, if not so payable, would have been authorized investments.
- (2) A direction that investments must be retained or made in the name of a trustee is not an express prohibition referred to in subsection (1).
- (3) If trustees retain or invest in securities payable to bearer, the trustees must appoint a person to act as a custodian of the securities.

- (4) Subsection (3) does not apply if the instrument creating the trust or an enactment contains a provision that (however expressed) permits the trustees to retain or invest in securities payable to bearer without appointing a person as a custodian.
- (5) An appointment under subsection (3) must be made, or evidenced, in writing.
- (6) Subsections (3), (4) and (5) do not impose a duty on a sole trustee if that trustee is a trust corporation.
- (7) Subsections (3), (4) and (5) do not apply to any trust having a custodian trustee.

41J. Persons who may be appointed as nominees or custodians

- (1) A person may not be appointed under section 41G as a nominee unless one of the conditions mentioned in subsection (2) is satisfied.
- (2) The conditions are—
 - (a) the person carries on a business that consists of, or includes, acting as a nominee;
 - (b) the person is a body corporate that is controlled by the trustees.
- (3) A person may not be appointed under section 41H or 41I as a custodian to undertake the safe custody of the assets or of any documents of title concerning the assets unless one of the conditions mentioned in subsection (4) is satisfied.
- (4) The conditions are—
 - (a) the person carries on a business that consists of, or includes, acting as a custodian;
 - (b) the person is a body corporate that is controlled by the trustees.

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- (5) For the purpose of subsections (2)(b) and (4)(b), a body corporate is controlled by the trustees if the trustees have the power to ensure that the affairs of the body corporate are conducted in accordance with the wishes of the trustees—
- (a) by means of holding shares or possessing voting power in, or in relation to, that body corporate or any other body corporate; or
 - (b) because of any powers conferred by the articles of association or other document regulating that body corporate or any other body corporate.
- (6) Subject to subsections (1) and (3), the persons whom the trustees may under section 41G, 41H or 41I (as the case requires) appoint as a nominee or custodian—
- (a) include one of the trustees, if that one is a trust corporation; or
 - (b) include 2 or more of the trustees, if they are to act as joint nominees or joint custodians.
- (7) The trustees may under section 41G appoint a person to act as their nominee even though the person is also—
- (a) authorized to exercise functions as the trustees' agent (whether under section 41B or any other power); or
 - (b) appointed to act as the trustees' custodian (whether under section 41H or 41I or any other power).
- (8) The trustees may under section 41H or 41I appoint a person to act as their custodian even though the person is also—
- (a) authorized to exercise functions as the trustees' agent (whether under section 41B or any other power); or

- (b) appointed to act as the trustees' nominee (whether under section 41G or any other power).

41K. Terms of appointment of nominees and custodians

- (1) Subject to subsection (2) and Part IVB (remuneration and expenses), the trustees may under section 41G, 41H or 41I appoint a person to act as a nominee or custodian on the terms as to remuneration and other matters that the trustees may determine.
- (2) The trustees may not under section 41G, 41H or 41I appoint a person to act as a nominee or custodian on any of the terms mentioned in subsection (3) unless it is reasonably necessary for them to do so.
- (3) The terms are—
 - (a) a term permitting the nominee or custodian to sub-delegate the trustees' powers or functions to a delegate of the nominee or custodian;
 - (b) a term restricting the liability of the nominee or custodian, or a delegate of the nominee or custodian, to the trustees or to any beneficiary; and
 - (c) a term permitting the nominee or custodian to act in circumstances capable of giving rise to a conflict of interest.

Division 4—Review of and Liability for Agents, Nominees and Custodians

41L. Application of sections 41M, 41N and 41O

- (1) Sections 41M, 41N and 41O apply in a case where trustees have, under section 41B, 41G, 41H or 41I—

- (a) authorized a person to exercise functions as their agent; or
 - (b) appointed a person to act as a nominee or custodian.
- (2) Subject to subsection (3), sections 41M, 41N and 41O also apply in a case where trustees have, under a power conferred on them by the instrument creating the trust or an enactment—
- (a) authorized a person to exercise functions as their agent; or
 - (b) appointed a person to act as a nominee or custodian.
- (3) If the application of section 41M, 41N or 41O in a case is inconsistent with the terms of the instrument creating the trust or an enactment, that section does not apply to that case.

41M. Review of agents

- (1) While an agent continues to act for a trust, the trustees of the trust must—
- (a) keep under review the arrangements under which the agent acts and the way in which those arrangements are being put into effect;
 - (b) if circumstances make it appropriate to do so, consider whether there is a need to exercise any power of intervention that the trustees have; and
 - (c) if the trustees consider that there is a need to do so, exercise the power of intervention.
- (2) If an agent has been authorized to exercise asset management functions, the duty to review under subsection (1) includes—

- (a) a duty to consider whether there is a need to revise or replace the policy statement made for the purposes of section 41F;
 - (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.
- (3) The trustees must carry out the review as frequently as the circumstances of the trust may require having regard to the nature of the functions required to be exercised by the agent.
- (4) Section 41F(3) and (4) applies to the revision or replacement of a policy statement under this section as it applies to the making of a policy statement under that section.
- (5) For the purposes of subsection (1)—
- power of intervention*** (干預權力) includes—
- (a) a power to give directions to the agent; and
 - (b) a power to revoke the authorization or appointment of the agent.

41N. Review of nominees and custodians

- (1) While a nominee or custodian continues to act for a trust, the trustees of the trust must—
- (a) keep under review the arrangements under which the nominee or custodian acts and the way in which those arrangements are being put into effect;
 - (b) if circumstances make it appropriate to do so, consider whether there is a need to exercise any power of intervention that the trustees have; and

- (c) if the trustees consider that there is a need to do so, exercise the power of intervention.
- (2) The trustees must carry out the review as frequently as the circumstances of the trust may require having regard to the nature of the functions required to be exercised by the nominee or custodian.
- (3) For the purposes of subsection (1)—
power of intervention (干預權力) includes—
 - (a) a power to give directions to the nominee or custodian; and
 - (b) a power to revoke the appointment of the nominee or custodian.

41O. Liability for agents, nominees and custodians

- (1) A trustee of a trust is not liable for any act or omission of an agent, nominee or custodian acting for the trust (each is a ***representative***) if the trustee has discharged the statutory duty of care applicable to the trustee under Division 2 of the Third Schedule when—
 - (a) entering into the arrangements under which a person acts as the representative; and
 - (b) carrying out the duties to review under section 41M or 41N.
- (2) If a trustee has agreed to a term under which a representative is permitted to sub-delegate the trustee's powers or functions to a delegate of the representative, the trustee is not liable for any act or omission of the delegate if the trustee has discharged the statutory duty of care applicable to the trustee under Division 2 of the Third Schedule when—
 - (a) agreeing to that term; and

- (b) carrying out the duties to review under section 41M or 41N as far as the duties relate to the use of the delegate.

41P. Effect of trustees exceeding their powers

A failure by the trustees to act within the limits of the powers conferred by this Part does not invalidate—

- (a) the authorization of a person to exercise a function of the trustees as an agent; or
- (b) the appointment of a person to act as a nominee or custodian.

Part IVB

Remuneration and Expenses

41Q. Application of Part IVB

This Part applies in respect of—

- (a) services provided to, or on behalf of, a trust (whenever created) on or after the commencement date of this Part; or
- (b) expenses incurred on behalf of a trust (whenever created) on or after the commencement date of this Part.

41R. Interpretation of Part IVB

- (1) For the purposes of this Part, a trustee acts in a professional capacity if—
 - (a) the trustee acts in the course of a profession or business that consists of, or includes, the provision of services in connection with—
 - (i) the management or administration of trusts generally or a particular kind of trust; or
 - (ii) any particular aspect of the management or administration of trusts generally or a particular kind of trust; and
 - (b) the services that the trustee provides to, or on behalf of, the trusts fall within the description of paragraph (a).
- (2) For the purposes of this Part, a person acts as a lay trustee if the person—
 - (a) is not a trust corporation; and
 - (b) does not act in a professional capacity.

41S. Remuneration of trustees under instrument creating trust

- (1) Subject to subsection (2)—
 - (a) subsections (3) and (4) apply to a trustee who—
 - (i) is a trust corporation; or
 - (ii) is not a trust corporation, but is acting in a professional capacity as a trustee of a non-charitable trust; and
 - (b) subsections (3) and (4) apply to a trustee—
 - (i) if the trustee is not a trust corporation, but is acting in a professional capacity as a trustee, other than the sole trustee, of a charitable trust; but

- (ii) only to the extent to which a majority of the other trustees of the charitable trust have agreed that those subsections apply to the trustee, subject to any inconsistent provision in the instrument creating the trust or an enactment.
- (2) Subsections (3) and (4) apply to a trustee—
- (a) only if there is a provision in the instrument creating the trust or an enactment entitling the trustee to receive payment out of trust funds for services provided by the trustee to, or on behalf of, the trust; and
 - (b) except to the extent to which any inconsistent provision is made in the instrument creating the trust or an enactment.
- (3) A trustee is to be treated as being entitled under the instrument creating the trust to receive payment for services provided even if the services are capable of being provided by a lay trustee.
- (4) Any payment to which a trustee is entitled for services provided is to be treated as remuneration for services (but not as a disposition of property) for the purposes of section 10 of the Wills Ordinance (Cap. 30) (avoidance of gifts to attesting witnesses and their spouses).

41T. Remuneration of trustees other than under instrument creating trust

- (1) Subject to subsection (2)—
- (a) subsections (3) and (4) apply to a trustee who is a trust corporation; and

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- (b) subsections (3) and (4) apply to a trustee who is not a trust corporation, but is acting in a professional capacity as a trustee, other than the sole trustee, of a trust if each of the other trustees of the trust has agreed in writing that the trustee may be remunerated for services provided by the trustee to, or on behalf of, the trust.
- (2) Subsections (3) and (4) apply to a trustee of a charitable or non-charitable trust only if the trustee's entitlement to remuneration—
- (a) is not provided by the instrument creating the trust or an enactment; and
- (b) is not expressly prohibited by a term in the instrument or enactment.
- (3) A trustee is entitled to receive reasonable remuneration out of trust funds for services provided by the trustee to, or on behalf of, the trust.
- (4) A trustee is to be treated as being entitled under this section to receive remuneration for services provided even if the services are capable of being provided by a lay trustee.
- (5) This section applies to a trustee authorized to act in another capacity as it applies to any other trustee.
- (6) For the purpose of subsection (5), a trustee authorized to act in another capacity is a trustee who has been authorized, under a power conferred by Part IVA (appointment of agents, nominees and custodians), the instrument creating the trust or an enactment—
- (a) to exercise functions as a trustee's agent; or
- (b) to act as a nominee or custodian.
- (7) For the purposes of this section—
- reasonable remuneration*** (合理酬金)—

- (a) means, in relation to the provision of services by a trustee of a trust, the remuneration that is reasonable in the circumstances for the provision of those services by the trustee to, or on behalf of, the trust; and
- (b) includes, in relation to the provision of services by a trustee who is an authorized institution under the Banking Ordinance (Cap. 155) and provides those services in the course of, or incidental to, the exercise of its function as a trustee, the institution's reasonable charges for the provision of those services.

41U. Trustee's expenses

- (1) A trustee of a trust who has properly incurred expenses when acting on behalf of the trust—
 - (a) is entitled to be reimbursed from the trust funds for those expenses; or
 - (b) may pay for those expenses out of the trust funds.
- (2) This section applies to a trustee authorized to act in another capacity as it applies to any other trustee.
- (3) For the purpose of subsection (2), a trustee authorized to act in another capacity is a trustee who has been authorized, under a power conferred by Part IVA (appointment of agents, nominees and custodians), the instrument creating the trust or an enactment—
 - (a) to exercise functions as a trustee's agent; or
 - (b) to act as a nominee or custodian.

41V. Remuneration and expenses of agents, nominees and custodians

- (1) This section applies, if, under a power conferred by Part IVA (appointment of agents, nominees and custodians), the instrument creating the trust or an enactment, a person other than a trustee has been—
 - (a) authorized to exercise functions as a trustee's agent; or
 - (b) appointed to act as a nominee or custodian.
- (2) The trustees of the trust may remunerate the agent, nominee or custodian (each is a *representative*) out of trust funds for services if—
 - (a) the representative is engaged on terms entitling the representative to be remunerated for those services; and
 - (b) the amount does not exceed the remuneration that is reasonable in the circumstances for the provision of those services by the representative to, or on behalf of, the trust.
- (3) The trustees may reimburse the representative out of trust funds for any expenses properly incurred in exercising the representative's functions.

Part IVC

Exemption from Liability

41W. Trustee is not exempted from liability for breach of trust

- (1) Subject to subsection (2), this section applies to a trustee who—

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- (a) acts in a professional capacity; and
 - (b) receives remuneration for the trustee's services provided to, or on behalf of, the trust.
- (2) This section does not apply to an approved trustee of a registered scheme under the Mandatory Provident Fund Schemes Ordinance (Cap. 485).
- (3) The terms of a trust must not—
- (a) relieve, release or exonerate a trustee from liability for a breach of trust arising from the trustee's own fraud, wilful misconduct or gross negligence; or
 - (b) grant the trustee any indemnity against the trust property for the liability.
- (4) A term of a trust is invalid to the extent to which it purports to—
- (a) relieve, release or exonerate a trustee from liability for a breach of trust arising from the trustee's own fraud, wilful misconduct or gross negligence; or
 - (b) grant the trustee any indemnity against the trust property for the liability.
- (5) This section has effect in respect of a trust created on or after the commencement date of the 2013 amending Ordinance.
- (6) For a trust created before the commencement date of the 2013 amending Ordinance, this section—
- (a) has effect in respect of the trust on the expiry of 1 year after that date; and
 - (b) does not affect the liability for anything done by a trustee of the trust within that 1-year period.

- (7) In this section, a reference to a trustee who acts in a professional capacity is to be construed in accordance with section 41R(1).
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Part IVD

Reserve Power and Transfer of Movable Property

41X. Reserve power of settlor

- (1) A trust is not invalid only because of the person creating the trust (*the settlor*) reserving to the settlor any or all powers of investment or asset management functions under the trust.
- (2) If a power or function referred to in subsection (1) has been reserved by the settlor, a trustee who acts in accordance with the exercise of the power or function is not in breach of the trust.
- (3) If a trust was declared invalid by the court before the commencement date of the 2013 amending Ordinance, subsection (1) does not operate to revive the invalid trust on or after that date.
- (4) Subject to subsection (3), if the validity of a trust (whenever created) is being questioned, the court may take into account subsection (1) in determining the validity.

41Y. Transfer of movable property not affected by foreign law of inheritance

- (1) This section applies in relation to a trust (whenever created) only if—
 - (a) the trust is expressed to be governed by Hong Kong law; and

- (b) at all times when the trust is in force, each trustee of the trust is either—
- (i) an individual who ordinarily resides in Hong Kong; or
 - (ii) a body corporate the central management and control of which is in Hong Kong.
- (2) A person who during his or her lifetime transfers any movable property to be held on trust (whenever created) is regarded as having the capacity to transfer the property if the person has capacity to do so under any of the following laws—
- (a) the law applicable in Hong Kong;
 - (b) the law of the person's domicile or nationality; or
 - (c) the proper law of the transfer.
- (3) A law relating to inheritance or succession of a foreign jurisdiction does not affect the validity of the transfer of any movable property to be held on trust if the person transferring the movable property had the capacity to do so under subsection (2).
- (4) The reference to law in paragraph (a), (b) or (c) of subsection (2) does not include any choice of law rules that form part of the law in any of those paragraphs.”.

28. Cross-heading before section 42 repealed

Cross-heading before section 42—

Repeal the cross-heading.

29. Part V, Division 1 heading added

Before section 42—

Add

“Division 1—Appointment of New Trustees”.

30. Cross-heading before section 45 repealed

Cross-heading before section 45—

Repeal the cross-heading.

31. Part V, Division 2 heading added

Before section 45—

Add

“Division 2—Vesting Orders”.

32. Cross-heading before section 56 repealed

Cross-heading before section 56—

Repeal the cross-heading.

33. Part V, Division 3 heading added

Before section 56—

Add

“Division 3—Jurisdiction to Make Other Order”.

34. Cross-heading before section 62 repealed

Cross-heading before section 62—

Repeal the cross-heading.

35. Part V, Division 4 heading added

Before section 62—

Add

“Division 4—Payment into Court”.

36. Section 77 amended (application by company to be registered as a trust company)

Section 77(2)(e)—

Repeal subparagraph (i)

Substitute

“(i) deposited in the name of the Director of Accounting Services with an authorized institution within the meaning of section 2 of the Banking Ordinance (Cap. 155) a sum not less than \$1,500,000 and lodged a receipt issued by the authorized institution for that amount with the Director of Accounting Services;”.

37. Section 81 amended (objects)

Section 81(1)(o), English text—

Repeal

“conductive”

Substitute

“conducive”.

38. Section 110 added

After section 109—

Add

“110. Transitional and savings for the purpose of 2013 amending Ordinance

The transitional and saving provisions as set out in the Fourth Schedule have effect.”.

39. Second Schedule amended (authorized investments)

- (1) Second Schedule—

Repeal

“[s. 4]”

Substitute

“[s. 4 & 3rd Sch.]”.

- (2) Second Schedule, paragraph 1—

Repeal

“Any shares”

Substitute

“Subject to paragraph 7A, any shares”.

- (3) Second Schedule, paragraph 1(a)(ii)—

Repeal

“\$10 billion (\$10,000,000,000)”

Substitute

“\$5 billion (\$5,000,000,000)”.

- (4) Second Schedule, paragraph 1(a)(iii)—

Repeal

“in each of the 5 years immediately preceding the calendar year in which the investment is made, a dividend wholly in cash (except to the extent that any shareholder may have opted to accept it other than wholly in cash)”

Substitute

“in any 3 years out of the 5 years immediately preceding the calendar year in which the investment is made, a dividend, either wholly in cash or in kind or partly in cash and partly in kind”.

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- (5) Second Schedule, paragraph 2—
Repeal
“Any debt”
Substitute
“Subject to paragraph 7A, any debt”.
- (6) Second Schedule, paragraph 4—
Repeal
“Any deposit”
Substitute
“Subject to paragraph 7A, any deposit”.
- (7) Second Schedule, paragraph 5—
Repeal
“Certificates”
Substitute
“Subject to paragraph 7A, certificates”.
- (8) Second Schedule, paragraph 6—
Repeal
“First”
Substitute
“Subject to paragraph 7A, first”.
- (9) Second Schedule, paragraph 7—
Repeal
“Any derivatives”
Substitute
“Subject to paragraph 7A, any derivatives”.
- (10) Second Schedule, after paragraph 7—
Add

“7A. Paragraphs 1, 2, 4, 5, 6 and 7 do not include any structured product as defined by section 1A of Part 1 of Schedule 1 to the Securities and Futures Ordinance (Cap. 571).”.

40. Third and Fourth Schedules added

After Second Schedule—

Add

“Third Schedule [ss. 2, 3A & 41O]

Application of Statutory Duty of Care

Division 1—Investment

1. The statutory duty of care applies to a trustee when—
 - (a) exercising the power of investment under section 4(1) or any other power of investment, however conferred;
 - (b) exercising the power under section 5, 6, 11(1), (2), (3), (4) or (5), 12 or 41I; or
 - (c) continuing to hold an investment that has ceased to be an investment authorized by the instrument creating the trust or the general law as mentioned in section 7.
2. For the purpose of section 1(a) of this Schedule, when investing any trust funds in any investment specified in the Second Schedule, the trustee must discharge the statutory duty of care in addition to complying with that Schedule.

Division 2—Agents, Nominees and Custodians

3. The statutory duty of care applies to a trustee when—

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- (a) entering into arrangements under which a person is authorized, under section 41B or any other power (however conferred), to exercise functions as an agent;
 - (b) entering into arrangements under which a person is appointed, under section 41G or any other power (however conferred), to act as a nominee;
 - (c) entering into arrangements under which a person is appointed, under section 41H or any other power (however conferred), to act as a custodian; or
 - (d) carrying out a trustee's duty under section 41M (review of agents) or 41N (review of nominees and custodians).
 4. For the purpose of section 3 of this Schedule, entering into arrangements under which a person is authorized to exercise functions as an agent or is appointed to act as a nominee or custodian includes—
 - (a) selecting the person who is to act;
 - (b) determining the terms on which the person is to act; and
 - (c) if the person is being authorized to exercise asset management functions, the preparation of a policy statement under section 41F.

Division 3—Power to Do Other Things

5. The statutory duty of care applies to a trustee when—
 - (a) exercising powers relating to trust properties conferred by section 16; or
 - (b) exercising any corresponding power, however conferred.

Division 4—Insurance

6. The statutory duty of care applies to a trustee when—
 - (a) exercising the power under section 21 to insure property; or
 - (b) exercising any corresponding power, however conferred.

Division 5—Reversionary Interests, Valuations and Audit

7. The statutory duty of care applies to a trustee when—
 - (a) exercising the power under section 24(1) or (3); or
 - (b) exercising any corresponding power, however conferred.

Fourth Schedule

[s. 110]

Transitional and Saving Provisions

1. **Savings for repeal of section 8 (investment in bearer securities)**

If, immediately before the commencement date of section 8 of the 2013 amending Ordinance, a banker or banking company holds any securities payable to bearer deposited with it under the repealed section 8, then on and after that date, the banker or banking company is to be treated as having been appointed as a custodian of the securities under section 411.

2. Savings for repeal of section 23 (deposit of documents for safe custody)

If, immediately before the commencement date of section 16 of the 2013 amending Ordinance, a banker, banking company or any other company holds any documents deposited with it under the repealed section 23, then on and after that date, the banker, banking company or other company is to be treated as having been appointed as a custodian of the documents under section 41H.

3. Savings for repeal of section 25 (power to employ agents)

- (1) Subsection (2) applies if, before the commencement date of section 18 of the 2013 amending Ordinance, a person has been employed or appointed to act as an agent under the repealed section 25(1) or (3).
- (2) For any period for which the employment or appointment has left to run on or after the commencement date, the person is to be treated as having been authorized to exercise functions as an agent under section 41B (and, if appropriate, as also having been appointed under section 41G or 41H to act as a nominee or custodian).
- (3) Subsection (4) applies if, before the commencement date of section 18 of the 2013 amending Ordinance, a person has been appointed to act as an agent or attorney under the repealed section 25(2) (power to employ agents or attorney in respect of property outside Hong Kong).
- (4) For any period for which the appointment has left to run on or after the commencement date, the person is to be treated as having been authorized to exercise functions as an agent under section 41B (and, if appropriate, as also having been appointed under section 41G or 41H to act as a nominee or custodian).

4. Transitional and savings provisions concerning Part 2 of 2013 amending Ordinance

Without affecting section 3 of this Ordinance, Part 2 of the 2013 amending Ordinance does not affect the legality and validity of anything done or omission made before the commencement date of that Part, except as otherwise expressly provided in the 2013 amending Ordinance.”

Part 3

Amendments to Perpetuities and Accumulations Ordinance

41. Perpetuities and Accumulations Ordinance amended

The Perpetuities and Accumulations Ordinance (Cap. 257) is amended as set out in this Part.

42. Cross-heading before section 1 repealed

Cross-heading before section 1—

Repeal the cross-heading.

43. Part 1 heading added

Before section 1—

Add

“Part 1

Preliminary and General”.

44. Section 2 amended (interpretation)

Section 2(1), before definition of *disposition*—

Add

“**2013 amending Ordinance** (《2013年修訂條例》) means the Trust Law (Amendment) Ordinance 2013 (of 2013);”.

45. Section 3 amended (application)

(1) Before section 3(1)—

Add

- “(1A) Part 2 applies in relation to an instrument taking effect on or after the commencement date of the 2013 amending Ordinance, except that—
- (a) Part 2 does not apply in relation to a will executed before that date; and
 - (b) Part 2 applies in relation to an instrument made in the exercise of a special power of appointment only if the instrument creating the power takes effect on or after that date.”.

(2) Section 3(1)—

Repeal
“Nothing in this Ordinance shall”

Substitute
“Part 3 does not”.

(3) Section 3(2)—

Repeal
“This Ordinance shall apply”

Substitute
“Subject to subsection (2A), Part 3 applies”.

(4) Section 3(2)—

Repeal
“after the commencement of this Ordinance”

Substitute
“on and after 13 March 1970”.

(5) Section 3(2), English text—

Repeal
“shall apply only”

Substitute

“applies only”.

- (6) Section 3(2)—

Repeal

“after that commencement”

Substitute

“on and after that date”.

- (7) Section 3(2), English text, proviso—

Repeal

“section 12 shall apply”

Substitute

“section 12 applies”.

- (8) After section 3(2)—

Add

“(2A) Part 3 does not apply in relation to an instrument taking effect on or after the commencement date of the 2013 amending Ordinance but Part 3 still applies in relation to an instrument so taking effect if—

- (a) it is a will executed before that date; or
- (b) it is an instrument made in the exercise of a special power of appointment, and the instrument creating the power took effect before that date.”.

- (9) Section 3(3), English text—

Repeal

“shall apply”

Substitute

“applies”.

46. Part 2 added

After section 3—

Add

“Part 2

**Provisions Applicable to Instruments Taking
Effect on or after Commencement Date of 2013
Amending Ordinance**

3A. Rule against perpetuities etc. have no effect

- (1) The rule against perpetuities (or remoteness of vesting) and the rule against excessive accumulations have no effect in relation to an instrument to which this Part applies (as provided in section 3(1A)).
- (2) A trust (whether created by an instrument or otherwise) may continue in existence for an unlimited period unless the terms of the trust provide to the contrary.

3B. Restriction on accumulations for charitable trusts

- (1) This section applies to an instrument to the extent to which its terms (other than a term of a court order) provide for property to be held on trust for charitable purposes.
- (2) If—
 - (a) the terms of the instrument impose or confer on the trustees a duty or power to accumulate income; and

- (b) apart from this section the duty or power would last beyond the end of a period of 21 years beginning on the first day when the income must or may be accumulated,
- then subject to subsection (3), the duty or power ceases to have effect at the end of that 21-year period.
- (3) Subsection (2) does not have effect in relation to the instrument if its terms provide for the duty or power to accumulate income to cease to have effect—
- (a) on the death of the settlor; or
- (b) on the death of one of the settlors, as determined by name or by the order of their deaths.
- (4) If a duty or power to accumulate income ceases to have effect under subsection (2), the income to which the duty or power would have applied apart from this section must—
- (a) go to the person who would have been entitled to it if there had been no duty or power to accumulate income; or
- (b) be applied for the purposes for which it would have had to be applied if there had been no such duty or power to accumulate income.
- (5) This section applies whether or not the duty or power to accumulate income extends to income produced by the investment of income previously accumulated.

3C. Rule as to duration of non-charitable purpose trust not affected

This Part does not affect any rule of law that limits the duration of non-charitable purpose trusts.”.

47. Cross-heading before section 4 repealed

Cross-heading before section 4—

Repeal the cross-heading.

48. Part 3 heading and Division 1 heading added

Before section 4—

Add

“Part 3

**Provisions Applicable to Instruments Taking
Effect before Commencement Date of 2013
Amending Ordinance**

Division 1—Perpetuities”.

49. Section 13 amended (administrative powers of trustees)

(1) Section 13(2)—

Repeal

“after the commencement of this Ordinance”

Substitute

“on or after 13 March 1970”.

(2) Section 13(2)—

Repeal

“before that commencement”

Substitute

“before that date”.

50. Section 16 amended (possibilities of resulting trust, conditions subsequent, exceptions and reservations)

Section 16(2)—

Repeal

“Ordinance”

Substitute

“Part”.

51. Cross-heading before section 17 repealed

Cross-heading before section 17—

Repeal the cross-heading.

52. Part 3, Division 2 heading added

Before section 17—

Add

“Division 2—Accumulations”.

53. Section 18 amended (qualification of restrictions on accumulation)

Section 18—

Repeal

“before or after the commencement of this Ordinance”

Substitute

“before, on or after 13 March 1970”.

Part 4

Related and Consequential Amendments

Division 1—Enactments Amended

54. Enactments amended

The enactments specified in Divisions 2 and 3 are amended as set out in those Divisions.

Division 2—Amendments to Enduring Powers of Attorney Ordinance (Cap. 501)

55. Section 8 amended (scope of authority, etc. of attorney under enduring power)

Section 8(3)—

Repeal paragraph (a).

56. Section 20 added

After section 19—

Add

“20. Transitional and savings for repeal of section 8(3)(a)

- (1) Subject to subsections (2) and (3), the repealed section 8(3)(a) continues to apply to an enduring power of attorney created before the commencement date (*pre-existing PA*) and is in force on that date for a period of one year from the commencement date as if that section had not been repealed.
- (2) If the instrument creating a pre-existing PA is registered as at the commencement date, the repealed section 8(3)(a) ceases to apply to the pre-existing PA when the registration of the instrument is cancelled.

- (3) If an application for the registration of an instrument creating a pre-existing PA is pending as at the commencement date, or is made during the period of one year from that date, then the repealed section 8(3)(a) ceases to apply to the pre-existing PA—
- (a) if the instrument is registered pursuant to the application, whether during or after that one-year period, when the registration of the instrument is cancelled; or
 - (b) if the application is finally refused by the Registrar of the High Court or withdrawn by the applicant or otherwise finally disposed of, whether during or after that one-year period, when the application is finally refused, withdrawn or otherwise finally disposed of.

- (4) In this section—

cancelled (被取消) means cancelled under section 11(4);

commencement date (生效日期) means the date on which section 56 of the Trust Law (Amendment) Ordinance 2013 (of 2013) comes into operation.”.

Division 3—Amendments to Enduring Powers of Attorney (Prescribed Form) Regulation (Cap. 501 sub. leg. A)

57. Section 5 amended (donor to specify decisions attorney may make)

- (1) Section 5(3)(e)—

Repeal

“income;”

Substitute

“income; or”.

- (2) Section 5(3)(f)—

Repeal

“; or”

Substitute a full stop.

- (3) Section 5(3)—

Repeal paragraph (g).

58. Schedule 1 amended (Form 1)

- (1) Schedule 1, under heading “**Information you must read**”—

Repeal item 2.

- (2) Schedule 1, Part A, paragraph 2(1)(f)—

Repeal

“; or”

Substitute a full stop.

- (3) Schedule 1, Part A, paragraph 2(1)—

Repeal sub-subparagraph (g).

59. Schedule 2 amended (Form 2)

- (1) Schedule 2, under heading “**Information you must read**”—

Repeal item 2.

- (2) Schedule 2, Part A, paragraph 3(1)(f)—

Repeal

“; or”

Substitute a full stop.

- (3) Schedule 2, Part A, paragraph 3(1)—

Repeal sub-subparagraph (g).

Explanatory Memorandum

The object of this Bill is to modernize trust law by amending the Trustee Ordinance (Cap. 29) (*TO*) and the Perpetuities and Accumulations Ordinance (Cap. 257) (*PAO*) to—

- (a) introduce a trustees' statutory duty of care when trustees are exercising certain prescribed functions;
- (b) give trustees wider powers to insure trust properties against loss or damage due to any event;
- (c) provide trustees with a general power to appoint agents, nominees and custodians;
- (d) allow trustees acting in a professional capacity to receive remuneration for their services rendered for trusts;
- (e) regulate the exemption clauses for trustees acting in a professional capacity who receive remuneration for their services;
- (f) provide for a court-free mechanism for beneficiaries to retire and appoint trustees;
- (g) clarify that neither a limited reservation of a settlor's power nor the transfer of movable property under certain situation affects the validity of a trust;
- (h) abolish the rule against perpetuities with respect to new instruments; and
- (i) abolish the rule against excessive accumulations of income with respect to new instruments (except that, for charitable trusts, the restriction is retained to the effect that they may accumulate income up to 21 years).

The proposed amendments will facilitate more effective trust administration, provide appropriate checks and balances so that trustees will exercise the new powers properly and modernize the trust law.

2. The Bill is preceded by the following papers published by the Financial Services and the Treasury Bureau (**FSTB**)—
 - (a) Consultation Paper on the Review of the Trustee Ordinance and Related Matters (June 2009) and the Consultation Conclusions (February 2010); and
 - (b) Consultation Paper on the Detailed Legislative Proposals on Trust Law Reform (March 2012) and the Consultation Conclusions (November 2012).

The papers are accessible at the FSTB's website at—

<http://www.fstb.gov.hk/fsb/ppr/consult/index.htm>

3. The Bill is divided into 4 Parts.

Part 1

4. Part 1 of the Bill contains preliminary provisions. Clause 1 sets out the short title and provides for commencement.

Part 2

5. Part 2 of the Bill contains amendments to the TO.
6. Clause 3 amends section 2 of the TO by adding the new definitions of **2013 amending Ordinance**, **body corporate**, **statutory duty of care** and **trust funds**.
7. Section 3 of the TO provides that the powers conferred by the TO on trustees apply only if no contrary intention is expressed in the instrument creating the trust and that the powers are subject to the terms of the instrument. Clause 4 amends section 3 to the effect that the terms of any enactment prevail over the application of the default powers conferred by the TO.

Statutory duty of care

8. Clause 5 adds a new section 3A to the TO providing for the new default statutory duty of care for trustees. The circumstances where the duty will apply are defined in the new Third Schedule (added by clause 40). Where the duty applies, it replaces the common law duty of care for trustees. To comply with the new duty a trustee must show a level of care and skill that is reasonable in the circumstances of the case having regard to the trustee's special knowledge, experience or professional status. The statutory duty of care does not apply if the instrument creating the trust or other enactment indicates that the duty of care is not meant to apply. In the case of an existing trust, the new section 3A provides a mechanism for settlors or beneficiaries to exclude the statutory duty of care by a subsequent deed.
9. The new Third Schedule specifies the circumstances in which a trustees' statutory duty of care applies, including when trustees invest trust property, appoint agents, nominees and custodians, insure trust property and deal with matters concerning reversionary interests, valuations and audit.
10. Under section 4 of the TO, the Financial Secretary may by order published in the Gazette amend the Second Schedule to the TO which sets out the investments in which a trustee may invest trust funds. Clause 6 amends section 4 to provide for the Second Schedule specifying conditions subject to which the investment may be made.
11. Clauses 7, 9, 13 and 17 amend sections 7, 11, 16 and 24 of the TO to make the protection of trustees under those sections conditional on the trustees discharging the statutory duty of care. The existing section 7 protects a trustee from liability for a breach of trust only because of continuing to hold an investment that has ceased to be authorized by the instrument creating the trust or by the general law. The existing sections 11, 16 and 24 further provide that the trustees are not responsible

for any loss occasioned by an act done in good faith in exercising—

- (a) powers regarding securities held by the trustees such as concurring in a scheme or an arrangement for reconstruction of the company concerned;
 - (b) powers in accepting property, severing blended trust property, paying any debt or accepting any composition; and
 - (c) powers regarding trust properties that are not vested in the trustees.
12. Clause 8 repeals section 8 of the TO and the provision is re-enacted as the new section 41I.
 13. Sections 12(2) and 24(4) of the TO provide for the circumstances in which payment may be made out of the capital or income of the trust property. To do away with the distinction between capital and income, clause 10 amends section 12(2), so that trustees may apply both capital money and income of the trust (i.e. trust funds), instead of capital money only, to pay the calls on any shares subject to the trust. Clause 17 amends section 24 by adding a new subsection (5) to stipulate that the costs of examining or auditing the accounts of trust property should be paid out of the trust funds.

Insurance

14. Clause 14 replaces section 21 of the TO with a new default provision that empowers a trustee to insure any trust property against loss or damage due to any event, without limit whether to its market value or full replacement value. Trustees will be able to pay the insurance premium out of the trust funds instead of the income of the trust only. But if a property is held on a bare trust, the sole beneficiary or all the beneficiaries may direct that a trust property is not to be insured or may only be insured on certain conditions. Trustees are subject to the statutory duty of care when exercising the power to insure under the new section 21.

15. Clause 15 makes a consequential amendment to section 22(1) of the TO to align with the power under the new section 21.
16. Section 27 of the TO concerns the delegation of powers of an individual trustee by a power of attorney. Clause 19 amends section 27 by clarifying that an instrument creating the power is valid for 12 months (or any shorter period as provided by the instrument creating the power) and commences on the date provided by the instrument or the date of execution of the instrument. To better protect the interests of beneficiaries from excessive delegation, the new section 27(2A) requires that the exercise of a trustee's power of delegation must not result in the trust having only 1 donee under a power of attorney or 1 trustee administering the trust if the trust has more than one trustee. The new section 27(9) provides for the savings of an existing power of attorney.
17. Clause 22 repeals section 32 (implied indemnity of trustees) of the TO because it is inconsistent with the proposed statutory duty of care when the trustees exercise specified functions.

Appointment and retirement of trustees

18. Under the common law, beneficiaries who wish to replace a trustee need an authority under the instrument creating the trust or they must resort to the court. Clause 25 adds new sections 40A to 40D to the TO enabling a sole beneficiary or all beneficiaries to appoint and retire trustees by way of a court-free procedure under specified circumstances. In essence—
 - (a) The new section 40A provides that all beneficiaries of full age and capacity who are absolutely entitled to the trust property may replace a trustee by a written direction that directs the trustee to retire and all trustees to appoint another person as a trustee.
 - (b) The new section 40B allows the appointment of a substitute for a trustee who is incapable by reason of mental incapacity. All beneficiaries of full age and

capacity who are absolutely entitled to the trust property may by a written direction direct the appointment of a new trustee in place of the incapacitated trustee.

- (c) The new section 40C adds supplementary provisions relating to beneficiaries' directions.
- (d) The new section 40D specifies the application of the new sections 40A and 40B. The application of those sections is subject to contrary intention in the instrument creating the trust, an enactment or a subsequent deed.

Appointment of agents, nominees and custodians

19. Clauses 16 and 18 repeal sections 23 and 25 (which concerns deposit of documents for safe custody and power to employ agents) of the TO. Appointment of agents, nominees and custodians is covered in the new Part IVA (containing the new sections 41A to 41P (added by clause 27)). In essence—

Agents

- (a) The new section 41A provides for the application of the new Part IVA. Under section 41A, the default powers of delegation conferred by the new Part are exercisable by the trustees jointly if there is more than one trustee. With a minor exception this Part applies equally to a trust with a sole trustee in the same way as it applies to a trust with more than one trustee.
- (b) The new section 41B empowers trustees to delegate one or more of their “delegable functions” to an agent. The nature of the functions that may be delegated will in part be governed by whether the trust is charitable or not. For non-charitable trusts, the trustees may delegate any functions except the more important functions specified in section 41B(2), including the function to distribute trust assets. The new section

41B(3) sets out the functions that trustees of a charitable trust may delegate, including carrying out trustees' decisions and investing assets.

- (c) The new section 41C defines the persons who may be appointed as agents for trustees under the new section 41B. Subject to the requirement that if 2 or more persons are appointed, they must exercise the functions jointly (new section 41C(2)), there are no restrictions on the persons whom the trustees may appoint as their agents. Thus, the trustees may delegate to one or more of their number or to their nominees or custodians (new section 41C(1) and (3)).
- (d) The new section 41D provides that an agent authorized under the new section 41B is subject to any specific duties or restrictions attached to the functions delegated.
- (e) The new section 41E sets out some restrictions on the terms of appointment of agents. Trustees may not appoint agents on terms that permit them to appoint a delegate, restrict the liability of agents or their delegates, or permit them to act even if a conflict of interest may arise. However, these restrictions will not apply if it is reasonably necessary to appoint on these terms.
- (f) The new section 41F places special requirements on trustees in relation to the delegation of asset management functions. These functions relate to the investment of trust assets and the acquisition, management and disposal of trust property (new section 41F(5)). The trustees must provide an agent with a policy statement on how the functions are to be exercised. The policy statement must be drawn up with a view to ensuring that the functions will be exercised in the best interest of the trust (new section 41F(3)).

Nominees and custodians

- (g) The new sections 41G and 41H provide trustees with default powers to appoint nominees and custodians in relation to any trust assets. The appointment must be made in writing.
- (h) The new section 41I (which replaces the repealed section 8 of the TO) provides for the appointment of a custodian for bearer securities unless the instrument creating the trust or an enactment permits the trustees to retain or invest bearer securities without the appointment.
- (i) The new section 41J describes the persons who may be appointed as nominees or custodians. To protect the beneficiaries, a person may be appointed as a nominee or custodian (for a custodian who undertakes the safe custody of the assets or of any documents of title concerning the assets) only if the person is either carrying on business as a nominee or custodian or is a body corporate controlled by the appointing trustees. The section also sets out the test for determining whether a body corporate is “controlled” by trustees. The new section 41J(7) provides that an agent or a custodian may also be appointed as a nominee by the trustees. The new section 41J(8) makes similar provision in relation to the appointment of a custodian.
- (j) The new section 41K sets out some restrictions on the terms of appointment of nominees and custodians. Trustees may not appoint nominees or custodians on terms that permit them to appoint a delegate, restrict the liability of nominees and custodians or their delegates, or permit them to act even if a conflict of interest may arise. However, these restrictions will not apply if it is reasonably necessary to appoint on these terms.

Duty to review and trustees' liability

- (k) The new section 41L provides for the application of the new sections 41M, 41N and 41O.
- (l) The new section 41M imposes duties on trustees to keep under review the terms of appointing agents and how the agents appointed are performing. If circumstances make it appropriate to do so, trustees must consider whether to exercise any power of intervention, for example, to give directions or to revoke the appointment.
- (m) The new section 41N imposes duties on trustees to keep under review the terms of appointing nominees and custodians and how the nominees and custodians appointed are performing. If circumstances make it appropriate to do so, trustees must consider whether to exercise any power of intervention, for example, to give directions or to revoke the appointment.
- (n) The new section 41O defines when a trustee is protected from liability for the acts or omissions of the agents, nominees or custodians or their permitted delegate. The section makes clear that a trustee who has discharged the statutory duty of care in relation to the appointment and review of the appointment of the agents, nominees or custodians is not liable for the acts and omissions of the appointees.
- (o) The new section 41P provides that the appointment of agents, nominees or custodians under the new Part IVA is not invalidated merely by any failure by the trustees to act within the limits of their powers.

Trustees' remuneration and expenses

20. Under the common law, trustees in general are not permitted to receive remuneration unless they are authorized to do so by the instrument creating the trust. Trustees acting in the course of business or profession are not permitted to receive remuneration in respect of services that are capable of being provided by lay trustees unless they are expressly allowed to do so. The new sections 41Q to 41T in the new Part IVB enable trustees acting in a business or profession to receive remuneration under specific circumstances. In essence—
- (a) The new section 41Q sets out the application of the new Part IVB.
 - (b) The new section 41R sets out the meaning of 2 expressions for use in this Part, namely, “a trustee acts in a professional capacity” and “a person acts as a lay trustee”.
 - (c) The new section 41S provides for the remuneration of trustees acting in a professional capacity if the instrument creating the trust (whether charitable or non-charitable) contains a charging clause entitling the trustees to receive payment. The remuneration may be paid even if the services provided could be provided by a lay trustee. However, for a charitable trust, a trustee acting in a professional capacity other than a trust corporation is entitled to remuneration only to the extent to which a majority of the other trustees of the charitable trust have agreed that the trustee should be paid.
 - (d) The new section 41T provides for the remuneration of trustees acting in a professional capacity if neither the instrument creating the trust (whether charitable or non-charitable) nor an enactment provides for the trustees' entitlement. However, a trustee, other than a trust corporation, is entitled to receive reasonable remuneration only if each of the other trustees of the trust agrees.

21. The new section 41U provides that a trustee is entitled to be reimbursed from trust funds the proper expenses incurred by the trustee when acting on behalf of the trust.
22. The new section 41V provides that trustees may pay remuneration to agents, nominees and custodians for their services, or reimburse them, out of trust funds for any proper expenses incurred in exercising their functions.

Statutory control on trustees' exemption clause

23. Under the common law, a trustees' exemption clause can validly exempt trustees from liability of all breaches of trust except fraud. To better protect beneficiaries in the event of a breach of trust, the new section 41W provides that a remunerated trustee acting in a professional capacity is not exempted from liability for a breach of trust arising from the trustee's own fraud, wilful misconduct or gross negligence. Other than a registered scheme under the Mandatory Provident Fund Schemes Ordinance (Cap. 485), the section applies to all trusts whenever created. However, it will commence in phases (new section 41W(5) and (6)).

Reservation of power, etc.

24. A valid trust requires certainty of intention by the settlor to create a trust. It is generally acceptable for a settlor to reserve some (but not excessive) powers to control over the trust property. The new section 41X provides that a limited reservation of a settlor's power relating to investment or asset management functions does not invalidate a trust. A trustee who has acted in accordance with the exercise of the reserved power is exempt from liability.

25. Forced heirship rules are mandatory rules found in some civil law jurisdictions to restrict the freedom of testators in determining how to pass their estate on death. The rules require a particular portion of the estate to be reserved for designated categories of heirs. If there is not enough left in the estate to satisfy the requirement, property held in trust set up by the testator during lifetime may be clawed back to make up for the shortfall. The new section 41Y addresses these rules and provides certainty on the validity of a lifetime transfer of movable properties to a trust expressed to be governed by Hong Kong law by a settlor. A settlor has the requisite capacity to transfer the properties if the settlor has the capacity to do so under Hong Kong law, the law of domicile or the proper law of transfer.
26. A company making an application to be registered as a trust company must meet specified condition under section 77(2) of the TO. Clause 36 amends section 77(2)(e)(i) of the TO by requiring the deposit of certain sum in the name of the Director of Accounting Services with an authorized institution, as a condition for registration as a trust company, instead of a deposit of investments.

Authorized investment

27. In the absence of express provision in the instrument creating the trust or an enactment, the Second Schedule to the TO sets out the default range of authorized investments in which a trustee may invest. Clause 39 amends the Second Schedule to relax the market capitalization and dividend requirements concerning investment in shares. It also adds a provision to expressly stipulate that structured products are not default authorized investments under the Second Schedule.

Transitional and savings

28. Clause 38 adds a new section 110 to the TO which provides that the transitional and saving provisions set out in the new Fourth Schedule have effect.
29. The new Fourth Schedule contains the transitional and saving provisions on the repeal or amendment of certain provisions of the TO. In essence—
 - (a) Section 1 of the new Fourth Schedule provides for the savings for a banker or banking company previously appointed under the repealed section 8 of the TO. The banker or banking company is to be treated as if it had been appointed under the new section 41I.
 - (b) Section 2 of the new Fourth Schedule provides for the savings of the appointment of custodians after the repeal of section 23 of the TO. A banker, banking company or other company appointed to hold any documents under the repealed section 23 of the TO is to be treated as if it had been appointed as a custodian under the new section 41H.
 - (c) Section 3 of the new Fourth Schedule provides for the savings on the repeal of the existing section 25 of the TO. An agent appointed under the repealed section 25(1), (2) or (3) is to be treated as if he or she had been authorized to exercise functions as an agent under the new section 41B.
 - (d) Section 4 of the new Fourth Schedule provides that Part 2 of the Trust Law (Amendment) Ordinance 2013 does not affect the legality and validity of anything done or omission made before the commencement date of that Part.

Part 3

30. Part 3 of the Bill contains amendments to the PAO. In gist, the amendments seek to abolish, with prospective effect, the rule against perpetuities (*RAP*) and the rule against excessive accumulations of income (*REA*). The RAP specifies a time limit within which trust properties must vest in the beneficiaries. The REA prohibits a person from accumulating any income of a trust for a period longer than one of the 6 statutory periods specified in section 17 of the PAO.
31. Clause 44 amends section 2 of the PAO by adding the definition of *2013 amending Ordinance*.
32. Clause 45 adds new subsections (1A) and (2A) to section 3 of the PAO to provide for the application, in gist—
 - (a) under subsection (1A), the new Part 2 of the PAO applies in relation to new instruments;
 - (b) under subsections (2) and (2A), Part 3 (containing existing provisions of the PAO) of the PAO applies in relation to existing instruments.
33. Clause 46 adds a new Part 2 (containing new sections 3A, 3B and 3C) to the PAO.
34. The new section 3A—
 - (a) provides that the RAP and REA do not apply in relation to new instruments (creating new trusts and special powers of appointment) if the instruments take effect on or after the commencement of the Trust Law (Amendment) Ordinance 2013; and
 - (b) allows a trust to continue in existence for an unlimited period of time (the exception is a trust formed for non-charitable purposes as described in the new section 3C) unless the terms of the trust provide to the contrary.

35. The new section 3B maintains certain restrictions on accumulations of income of charitable trusts. The maximum accumulation period is 21 years unless the trust specifies that the duty or power to accumulate income is to cease to have effect on the death of the settlor or, where there are multiple settlors, the death of one of them determined by name or by the order of their deaths. The 21-year period begins on the first day when the duty or power to accumulate income must or may be exercised. If the duty or power ceases to have effect, the income obtained after the permitted accumulation period is then applied as it would have been had there been no duty or power to accumulate in the terms of the trust.
36. Under the common law, trusts formed for non-charitable purpose without ascertainable beneficiaries are generally held to be void. There are only a few exceptions under case law, such as trusts for the caring of specific animals. The new section 3C clarifies that the rule of law against inalienability, as applied to trusts formed for non-charitable purpose will be retained. The rule restricts such trusts to the perpetuity period, that is life in being plus 21 years, or 21 years if there is no relevant life in being.

Part 4

37. Part 4 of the Bill contains related and consequential amendments to various enactments. Transitional and savings provisions are in place for the repeal of section 8(3)(a) of the Enduring Powers of Attorney Ordinance (Cap. 501) and its subsidiary legislation.