

FOUNDATIONS BILL 2016

SAMOA

Explanatory Memorandum

Objects and reasons:

The object of the Bill is to create foundation as a legal entity to manage properties.

The Bill seeks to cover the following:

- creation, registration and establishment of a foundation;
- appointments and removal of members of the Council, a Supervisory Person and Guardian;
- duties and powers of the Court regarding a foundation;
- registration of overseas foundation in Samoa and vice-versa;
- revocation or variation of any power regarding a foundation and the variation of terms of Constitution of a foundation;
- winding-up of a foundation by its Council or an official liquidator appointed by the Court or the Registrar upon written request of the Council.

Clauses:

PART 1 - PRELIMINARY

- Clause 1:** - states that, when enacted, the Bill will be called the Foundations Act 2016, and will commence on the date of assent by the Head of State.

Clause 2: - provides for the definitions of terms within the Bill.

PART 2 - CREATION AND CONSTITUTION

Clause 3: - deals with the creation and registration of a foundation and the requirements to be complied with.

Clause 4: - provides that a foundation must have a charter, which is the constitution of a foundation containing information set out in Schedule 1 and other matters including the manner in which the charter and rules may be amended. It further provides that the charter must have an English version even if it was created in another language.

Clause 5: - that a foundation must have rules and matters required to be in the rules such as matters set out in Schedule 2 and any other matter i.e manner in which the charter or the rules may be amended etc.

Clause 6: - provides for the Default Recipient and how they receive assets of foundation upon termination if they were named or identified in the constitution of the foundation and circumstances whereby a recipient was not named in the constitution.

Clause 7: - provides that the purpose of the foundation must be stated in the charter and how the purpose of the foundation may be amended.

- Clause 8:** - provides for three (3) special features of a foundation which is Protective foundation, Charitable purpose and Combination of a foundation with limited partnership.
- Clause 9:** - provides for the council of a foundation (to administer the foundation's property and see that the foundation's purpose is carried out) and how its members are appointed.
- Clause 10:** - provides for a supervisory person and how they are appointed and removed.
- Clause 11:** - provides for the circumstances in which there has to be a guardian including duties, appointment and removal.
- Clause 12:** - provides for the resident agent of a foundation.
- Clause 13:** - provides for the extent of asset protection in respect of property transferred to or disposed of fraudulently to a Samoan foundation.
- Clause 14:** - provides that Schedule 4 sets out the registration, establishment and any other matters relating to a foundation.

PART 3 - PARTICIPANTS

- Clause 15:** - provides for the founder's rights and powers or the powers regarding the foundation and its property.
- Clause 16:** - provides that any endowment by a person (other than the founder) does not make that person a founder or vest in that person the right of a founder.

- Clause 17:** - provides for beneficiaries and how they are to be dealt with regarding the kind of beneficiary.
- Clause 18:** - provides for notifiable beneficiaries and what they are entitled to.
- Clause 19:** - provides that a non-notifiable beneficiary is not entitled to any information about the foundation.
- Clause 20:** - provides for the rights of beneficiaries under a foundation such as their interest in the foundation's property.
- Clause 21:** - provides a beneficiary with the power to disclaim an entitlement which he or she may receive.
- Clause 22:** - provides for class entitlements if a foundation made in favour of a class of persons.

PART 4 - OFFICIALS

- Clause 23:** - provides for the appointment of additional officials if less than the required number.
- Clause 24:** - provides for appointment of new or additional members of the council in absence of an express provision.
- Clause 25:** - provides for the resignation or removal of a member of the council.
- Clause 26:** - provides for the appointment of a new guardian in the absence of express provision.
- Clause 27:** - provides for resignation or removal of a guardian.
- Clause 28:** - provides for the appointment of a new supervisory person in the absence of express provision.
- Clause 29:** - provides for the resignation or removal of a supervisory person.

- Clause 30:** - provides for the general duties of officials.
- Clause 31:** - provides for the specific duties of the council.
- Clause 32:** - provides for specific powers of the council which are to be exercised subject to the general duties under clause 30.
- Clause 33:** - provides for specific duties of a supervisory person additional to duties under clause 30.
- Clause 34:** - provides for specific powers of supervisory persons but subject to the general duties of officials in clause 30 and specific duties of supervisory persons in clause 33.
- Clause 35:** - provides for specific duties of a guardian.
- Clause 36:** - provides for specific powers of the guardian but subject to clauses 30 and 35.
- Clause 37:** - prohibits an official to profit from office under clause 32(b) and (c).
- Clause 38:** - provides for the duty of the Council to give information upon written request of the guardian, notifiable-beneficiary, founder or Court order.
- Clause 39:** - provides for the duty of the council to keep and maintain records of the foundation.
- Clause 40:** - provides for the duty of members of the council to act together.
- Clause 41:** - provides for impartiality of members of the council when dealing with more than one beneficiary, and the exception.
- Clause 42:** - provides that the council must not delegate its functions, unless permitted to do so by this Act or the Constitution.
- Clause 43:** - provides for corporate members of the foundation.

- Clause 44:** - provides for circumstances where a member is not obliged to disclose information and the exception to it.
- Clause 45:** - provides for liability of an official who commits or connive in a breach of any official's duty in certain circumstances.
- Clause 46:** - provides for the power of the Court to relieve an official of liability for a breach of a duty.

PART 5 - JURISDICTION AND POWERS OF THE COURT

- Clause 47:** - provides for the Supreme Court jurisdiction regarding matters relating to a Samoan foundation.
- Clause 48:** - provides for application of Samoan law to question of validity of a Samoan foundation, unless the constitution of a foundation provides otherwise.
- Clause 49:** - provides for approval of a particular transaction by a person who apply to Court to provide the authority needed.
- Clause 50:** - covers the extent to which judgments against an official for breach of duty are binding.
- Clause 51:** - provides any official with power to apply to Court for directions as to how he or she should or might act in affairs of the foundation.

- Clause 52:** - empowers the Court to make orders on matters relating to a foundation or validity or enforcement of the constitution.
- Clause 53:** - provides for what happens if someone does not comply with a Court order.
- Clause 54:** - provides for the Court to make an order for costs and expenses.

PART 6 - OFFENCES

- Clause 55:** - creates the offence of making false or misleading information.
- Clause 56:** - makes member, official, etc of a foundation or body corporate commits the same offence if committed with their consent or connivance.

PART 7 - MIGRATION

- Clause 57:** - provides that an overseas foundation may apply to the Registrar to be registered as a Samoan foundation.
- Clause 58:** - provides that an overseas foundation cannot be registered as a Samoan foundation unless it is authorised and has complied with the requirements of the law of the country of its registration.
- Clause 59:** - prohibits registration of an overseas foundation in certain circumstances.
- Clause 60:** - provides for application for registration of overseas foundation.

- Clause 61:** - provides for the effect of registration and the duties of the Registrar upon receipt of the application for registration as a Samoan foundation.
- Clause 62:** - provides for the duty of the overseas foundation to provide evidence of de-registration under the law of the country in which the foundation has ceased to be established and registered, once the overseas foundation is established and registered in Samoa.
- Clause 63:** - provides for removal of a registration of a Samoan foundation for its transfer out of Samoa to be registered and established as an overseas foundation.
- Clause 64:** - prohibits removal of a foundation from Register unless the constitution so provides.
- Clause 65:** - provides for other grounds for a foundation not to be removed from the Register.
- Clause 66:** - duty of a foundation to give notice to the foundation's creditors and participants before applying for its removal from the Register.
- Clause 67:** - provides that an application for removal from the Register of a foundation to be made in an approved form to the Registrar and duty of the Registrar to give notice of the proposed removal.
- Clause 68:** - provides for the effect of removal of a foundation from the register and what is required of the Registrar.
- Clause 69:** - requires the foundation migration overseas to inform the Registrar about its registration overseas and the circumstances where the Court may order the restoration of the foundation's name to the Register.

- Clause 70:** - provides for the power of the Court to make an order relating to the removal of a foundation under clause 67. The order may be made if there is an issue of prejudice or unfairness in removal of a foundation.
- Clause 71:** - provides for declaration of compliance to be signed by the resident agent declaring that all requirements under this Part have been fulfilled and how such declaration will be used by the Register when performing duties and functions under this Part.
- Clause 72:** - provides that any documents to be submitted to the Registrar under this Part that is not in English must be translated in English unless waived by the Registrar.
- Clause 73:** - provides that registration or transfer of a foundation under this Part does not affect the identity or continuity of the foundations legal personality having the period of transfer.
- Clause 74:** - provides that the terminology used in this Part concerning a foundation include references to their equivalents in the law of the country from or which a foundation is migrating.

PART 8 - AMENDMENT OF CONSTITUTION

- Clause 75:** - provides that any power or exercise of a power under the constitution may be amended, and that amendment does not affect any act done before the amendment.

- Clause 76:** - empowers the Court to approve the amendments of the constitution.

PART 9 - WINDING-UP

- Clause 77:** - provides for when a foundation is terminated and accordingly ceases to exist or to have legal personality.

- Clause 78:** - provides for official liquidators and how they are appointed and also the revocation of their appointments.

- Clause 79:** - provides for the winding-up of a foundation on council's winding-up events.

- Clause 80:** - provides for the winding-up of a foundation on Court winding-up events.

- Clause 81:** - provides that a winding-up of a foundation must be made by the council or a liquidator appointed by the Court or the Registrar.

- Clause 82:** - provides for matters to be included in the statement of affairs of the foundation to be submitted by the council to the liquidator and the duty of the liquidator to file a copy of it to the Registrar and the duty of the liquidator to submit a preliminary report to the Court after receiving the statement of affairs.

- Clause 83:** - specifically deals with appointments, duties, functions and matters regarding the liquidator.

- Clause 84:** - provides for general matters about winding-up of a foundation such as custody and vesting of a foundations property; delivery of property; avoidance of certain transactions; pending proceedings; and power to stay winding-up.
- Clause 85:** - makes an official responsible for any contravention liable of an offence and provides for matters whereby an official can be used as a defence.
- Clause 86:** - provides for the order of distributing assets in a winding-up of a foundation.
- Clause 87:** - makes provision for an application for removal of a foundation from Register after a winding-up and distribution of the property of a foundation.
- Clause 88:** - provides the ability in specified circumstances for an application to be made to the Registrar to reinstate a foundation which has been removed from the Register.

PART 10 - MISCELLANEOUS

- Clause 89:** - empowers the Head of State acting on the advice of the Cabinet to make regulations for the purposes of the act and other particular matters. It further empowers the Registrar to approve forms for the purpose of the Act.
- Clause 90:** - provides that penalties for any offence under this Act are set out in Schedule 8.

- Clause 91:** - provides for amendment to the Income Tax Act 2012 to exempt the income and capital gains of a foreign benefitting foundation.

SCHEDULES

- Schedule 1:** - provides for information required for charters.
- Schedule 2:** - provides for matters to be provided by rules.
- Schedule 3:** - provides for provisions which will apply as part of the charter or the rules unless expressly excluded in either of them.
- Schedule 4:** - provides for registration, establishment and ancillary matters including disqualification of foundations.
- Schedule 5:** - provides for migration information under Part 7.
- Schedule 6:** - provides for council's winding-up events.
- Schedule 7:** - provides for Court's winding-up events.
- Schedule 8:** - provides for penalties for offences under the Act.

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(Hon SILI Epa Tuioti)

MINISTER OF FINANCE