

ANGUILLA

**A BILL FOR
ANGUILLA SPECIAL TRUSTS (ASTrA) ACT, 2020**

DRAFT

Published by Authority

ANGUILLA SPECIAL TRUSTS (ASTrA) ACT, 2020

TABLE OF CONTENTS

SECTION

PART 1
PRELIMINARY

1. Interpretation

PART 2
SPECIAL TRUSTS

2. Application of Part 2
3. Objects
4. Enforcers
5. Duties of enforcers
6. Rights and remedies of enforcers
7. Maintenance of records

PART 3
TRUSTS OF COMPANY SHARES

8. Interpretation of certain terms in Part 3
9. Primary purpose of Part 3
10. Application of Part 3
11. Trustee's duties in relation to designated shares
12. Restrictions on trustee's powers
13. Provisions relating to directors
14. Intervention by trustee in management in prescribed circumstances
15. Power to dispose
16. Enforcement
17. Power of Court to order disposal
18. Modification of rule in *Saunders v. Vautier*
19. Disqualification of trustee as a director
20. Limitation of trustee's duties

PART 4
GENERAL PROVISIONS

21. Ordinary trusts and powers

22. Existing law
23. Uncertainty
24. Cy-près
25. Theft
26. Unlawful acceptance
27. Foreign element
28. Land in Anguilla
29. Ascertaining wishes of settlor
30. Optional provision concerning liability of trustee
31. Limitation of trustee's personal contractual liability
32. Provisions relating to the right of subrogation
33. Regulations
34. Citation

SCHEDULE - Connected Persons

DRAFT

I Assent

Governor_____
Date

ANGUILLA

No. /2020

A BILL FOR

ANGUILLA SPECIAL TRUSTS (ASTrA) ACT, 2020

An Act to enable the creation of ‘ASTrA trusts’ for the purpose of making special provision in respect of trusts for charitable and non-charitable purposes and in respect of trusts of shares in companies; to prohibit trustees from intervening in the management of the companies, except in certain circumstances; to enable the appointment of persons empowered to enforce ‘ASTrA trusts’; and for related matters.

[Gazette Dated: _____, 2020] [Commencement: Assent under section 57 of the Constitution]

ENACTED by the Legislature of Anguilla

PART 1

PRELIMINARY

Interpretation

1. (1) In this Act, unless the context otherwise requires -

“Anguillian shares” means shares in a company that is on the Register of Companies maintained under the Companies Act which is not -

- (a) a company which has a licence under the Trust and Corporate Services Providers Act, 2020;
- (b) a company which is licensed as an insurer under the Insurance Act or licensed to act as an insurance manager under that Act;
- (c) a company which is registered as a public fund, a private fund or a professional fund, under the Securities and Investment Funds Act, 2020;
- (d) a company which is licensed as a fund manager or fund administrator under the Securities and Investment Funds Act, 2020;
- (e) a company which has a licence under the Company Management Act; or
- (f) an entity which is regulated by the Commission;

“ASTrA trust” means a trust established under Part 2 or Part 3;

“beneficiary”, in Part 2, means a person who will or may derive a benefit or advantage, directly or indirectly, from the execution of a special trust;

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

“business risk” in relation to a company includes -

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

“Commission” means the Financial Services Commission established under section 2 of the Financial Services Commission Act;

“connected person” has the meaning assigned to that expression in subsection (2);

“connected trust business” means trust business in respect of trusts of which there is one or more than one contributor to the funds of which all are, in relation to each other, connected persons;

“contract” includes warranty, undertaking, covenant and any other legal commitment;

“designated shares” means Anguillian shares comprised in a trust fund and in respect of which a valid direction under section 10(1) has been made and is in effect;

“designated trustee” means –

- (a) a holder of a trust licence under the Trust and Corporate Services Providers Act, 2020; or
- (b) a private trust company;

“enforcer” means a person or foreign entity which has standing to enforce a special trust;

“foreign entity” means an entity which is regulated by a foreign regulatory authority;

“foreign regulatory authority” means an authority in a jurisdiction outside Anguilla which exercises a function corresponding or similar to a function exercised by the Commission;

“interested person” in relation to a trust means -

- (a) a beneficiary of the trust;
- (b) an object of a discretionary power over any of the capital or income of the trust;
- (c) a parent or legal guardian of any minor person falling within paragraph (a) or (b);
- (d) where any of the purposes of the trust are exclusively charitable, the Attorney General;
- (e) an enforcer;
- (f) a protector, unless the trust instrument provides otherwise;
- (g) an appointed enquirer; or
- (h) any other person so designated under the terms of the trust instrument;

“intervention call” means a call by an interested person under section 14(1) for a trustee to intervene in the affairs of a company;

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

“office of director rules” means rules referred to in section 13(1) and in force;

“ordinary”, in reference to a trust or power, signifies that it is a trust or power which is not subject to Part 2;

“power” includes an administrative power as well as a dispositive power;

“private trust company” means a trust company which -is incorporated in Anguilla and which conducts no trust business other than connected trust business;

“special”, in reference to a trust or power, signifies that it is a trust or power which is subject to Part 2;

“standing to enforce” means the right or duty to bring an action for the enforcement of a special trust;

“trust” includes -

- (a) a trust of a power;
- (b) a trust of property; and
- (c) for the purposes of Part 3, a trust on which designated shares are held;

and “trustee” has a correspondingly extended meaning;

“trust business” means carrying on the business of acting as trustee of property;

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

(2) For the purposes of this Act, a person is a connected person in relation to another person if -

- (a) they are in a relationship listed in the Schedule;
- (b) one is contributing to the funds of a trust as the trustee of a trust of which the other is a contributor;
- (c) each is in a group of companies; or
- (d) one is a company and the other is a beneficial owner of shares or other ownership interests of that company or of any other company in the same group of companies.

(3) In this Act, a power is said to be held in trust if granted or reserved subject to any duty, express or implied, qualified or unqualified, to exercise the power or to consider its exercise.

(4) Except as provided in this section, terms and expressions defined in section 1 of the Trusts Act have the same meanings in this Act.

PART 2

SPECIAL TRUSTS

Application of Part 2

2. (1) A trust or power is subject to this Part, and is described as special, if -
- (a) it is created by or on the terms of a written instrument, testamentary or *inter vivos*;
 - (b) the instrument contains a declaration to the effect that this Part is to apply;
 - (c) at least one trustee of the trust is a designated trustee at the time at which the declaration under paragraph (b) takes effect;

- (d) the terms of the trust require that, for so long as the declaration under paragraph (b) has effect, at least one trustee is a designated trustee; and
- (e) the trust is not created in the exercise of a power conferred by another trust, unless that other trust is an Anguillian trust and at least one trustee of that other trust is a designated trustee.

(2) If a trust or power is created by written instrument in exercise of a special power, and the instrument contains no declaration as to the application of this Part, this Part shall, subject to evidence of a contrary intention, be deemed to be intended to apply; and for the purpose of subsection (1) the instrument shall be deemed to contain a declaration to that effect.

(3) A trust or power which does not meet the requirements of subsection (1), and is not deemed to do so by virtue of subsection (2), is an ordinary trust or power and is not subject to this Part.

(4) A person who, in Anguilla or elsewhere, knowingly administers a special trust while there is a breach of subsection (1), apart from -

- (a) actions intended to bring the trust into compliance with subsection (1) as soon as possible; and
- (b) actions intended to preserve the trust property pending compliance with subsection (1),

commits an offence and is liable on summary conviction to a fine of \$50,000 or to imprisonment for a term of 2 years or to both.

Objects

3. (1) The objects of a special trust or power may be persons or purposes or both.

(2) The persons may be of any number.

(3) The purposes may be of any number or kind, charitable or non-charitable, provided that they are lawful and not contrary to public policy.

Enforcers

4. (1) A beneficiary of a special trust does not, as such, have standing to enforce the trust, or an enforceable right against a trustee or an enforcer, or an enforceable right to the trust property.

(2) The only persons who have standing to enforce a special trust are such persons, whether or not beneficiaries, as are appointed to be enforcers -

- (a) by or pursuant to the terms of the trust; or
- (b) by order of the Court.

(3) A right or duty to enforce a trust is presumed, subject to evidence of a contrary intention, to extend to every trust which is created by or on the terms of the same instrument, or pursuant to a power so created.

(4) The Court may, on the application of a trustee or an enforcer, appoint an enforcer -

- (a) if the terms of the trust require the appointment of an enforcer but -
 - (i) it is impossible to make the appointment without the Court's assistance; or
 - (ii) it is difficult or inexpedient to make the appointment without the Court's assistance;
- (b) if an enforcer with a duty to enforce is unable, unwilling or unfit to do so; or
- (c) if there is no enforcer who is of full capacity and who -
 - (i) is a beneficiary; or
 - (ii) has a duty to enforce and is fit and willing to do so.

(5) In the circumstances described in paragraph (c) of subsection (4), the trustee shall, within 30 days apply, to the Court for the appointment of an enforcer, or for the administration of the special trust under the direction of the Court, or for such other order as the Court shall think fit and, if a trustee knowingly fails to do so, that person commits an offence and is liable on summary conviction to a fine of \$10,000.

(6) Subsections (1) to (5) do not affect -

- (a) the enforcement, by a trustee, an enforcer or any other person involved in the administration of a trust, of a right to remuneration or indemnity; or
- (b) the enforcement of a trustee's duties by a co-trustee or a successor trustee.

Duties of enforcers

5. (1) Standing to enforce a special trust may be granted or reserved as a right or as a duty.

(2) Subject to evidence of a contrary intention, an enforcer is deemed to have a fiduciary duty to act responsibly with a view to the proper execution of the trust.

(3) A trustee or another enforcer, or any person expressly authorised by the terms of the special trust has standing to bring an action for the enforcement of the duty, if any, of an enforcer.

Rights and remedies of enforcers

6. Subject to the terms of that person's appointment -

- (a) an enforcer has the same rights as a beneficiary of an ordinary trust -
 - (i) to bring administrative and other actions, and make applications to the Court, concerning the trust; and
 - (ii) to be informed of the terms of the trust, to receive information concerning the trust and its administration from the trustee, and to inspect and take copies of trust documents;
- (b) in the performance of that person's duties, if any, an enforcer has the rights of a trustee of an ordinary trust to protection and indemnity and to make applications to the Court for an opinion, advice or direction or for relief from personal liability; and
- (c) in the event of a breach of trust an enforcer has, on behalf of the trust, the same personal and proprietary remedies against the trustee and against third parties as a beneficiary of an ordinary trust.

Maintenance of records

7. (1) Except as authorised by an order of the Court, or permitted by or pursuant to this section, a designated trustee shall keep in Anguilla at the office of the designated trustee, a documentary record of -

- (a) the terms of the special trust;
- (b) the identity of the trustee and the enforcers;
- (c) all settlements of the property upon the special trust and the identity of the settlors;
- (d) the property subject to the special trust at the end of each of its accounting years; and
- (e) all distributions or applications of the trust property.

(2) The Court may authorise non-compliance with subsection (1) on such terms as it thinks fit if it is satisfied that the execution of the trust will not be prejudiced.

(3) A designated trustee who knowingly fails to comply with subsection (1) commits an offence and is liable on summary conviction to a fine of \$50,000 or to imprisonment for a term of 2 years or to both.

(4) This section does not apply to the holder of a power which is granted or reserved by the terms of a special trust to a person other than the trustee of the special trust, even though the power is held in trust.

(5) This section does not apply (except as regards any antecedent offence) if the governing law of the trust has been changed from the law of Anguilla.

PART 3
TRUSTS OF COMPANY SHARES

Interpretation of certain terms in Part 3

8. (1) In this Part -

- (a) references to voting powers in respect of shares shall be taken to include references to powers to direct the voting of shares held by a nominee;
- (b) references in relation to a trust to a protector are to any person or committee whose consent is requisite for the exercise of any powers;
- (c) references in relation to a trust to an appointed enquirer are to any person who by, or under any power conferred by, the terms of the trust is appointed to make intervention calls;
- (d) references to the memorandum and articles of a company are to its memorandum of association and its articles of association;
- (e) a company shall be taken to be connected with another company if -
 - (i) that other company holds, directly or through a nominee, shares in it;
 - (ii) it is controlled directly or indirectly by that other company; or
 - (iii) it is connected with a company which is itself connected with that other company; and
- (f) a ground for complaint concerning the conduct of a company's affairs is permitted if it is specified as such in the trust instrument, and the expression "permitted ground for complaint" shall be construed accordingly.

(2) In this Part, the following definitions shall, where the context admits, apply in relation to, or in the context of a provision referring to, designated shares -

"company" means the company that has issued the designated shares;

"disposal" includes -

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

and "dispose" shall be construed accordingly;

"trust" means the trust on which the designated shares are held;

"trust instrument" means the instrument containing the terms of the trust.

Primary purpose of Part 3

9. The primary purpose of this Part is to enable a trust of company shares to be established under which -

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

Application of Part 3

10. (1) Where a trust fulfils the conditions specified in subsection (4), the terms of the trust may, subject to subsection (3), direct that the provisions of this Part shall apply -

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

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

(3) A direction under subsection (1) shall not be made in respect of shares added to the trust fund by a trustee of another trust in the exercise of a power in that other trust, unless that other trust is an Anguillian trust and one of the trustees of that other trust is a designated trustee.

(4) The conditions referred to in subsection (1) are -

- (a) the trust is created by or on the terms of a written testamentary or *inter vivos* instrument;
- (b) at least one trustee of the trust is a designated trustee at the time at which the direction under subsection (1) takes effect;
- (c) the terms of the trust require that, for so long as the direction under subsection (1) has effect, at least one trustee is a designated trustee; and
- (d) the trust is not created in the exercise of a power conferred by another trust, unless that other trust is an Anguillian trust and at least one trustee of that other trust is a designated trustee.

(5) A direction under subsection (1) may -

- (a) identify the shares to which the direction relates either specifically or by any general description;

- (b) specify a date or event upon the occurrence of, or circumstances in, which the direction will take or will cease to have effect.

(6) The event referred to in subsection (5)(b) may include the service on the trustee of the trust, or on any of the trustees if more than one, of a written direction (“a trigger direction”) made by such person or committee as is specified by the terms of the trust to the effect that the direction under subsection (1) is immediately to take effect or is immediately to cease to have effect, as the case may be.

(7) The person or committee referred to in subsection (6) may not be or include the trustee of the trust, or any trustee of the trust if more than one.

(8) The terms of the trust shall determine whether or not the decision to make or refrain from making the trigger direction is fiduciary and, in a case where the terms of the trust do not expressly state otherwise, there shall be a presumption that the decision is fiduciary.

(9) Subject to subsection (10), where a person (“the first person”) is a settlor in relation to a trust of designated shares and additional property is settled on the terms of the trust by another person, the first person shall be considered for the purposes of this Part as the settlor in relation to the trust of the additional property.

(10) If the trust instrument provides that subsection (9) shall not apply, then, in the case of a trust comprising property which has been provided by more than one person, this Part shall apply as if each person had created a separate trust in relation to the property which he or she has provided.

(11) In this section, “Anguillian trust” means a trust the essential validity of which is governed by the laws of Anguilla.

Trustee’s duties in relation to designated shares

11. (1) Subject to section 15, designated shares shall be held by the trustee on trust to retain them.

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

(3) Without prejudice to subsection (2), the trustee shall not be accountable for losses arising directly or indirectly from holding, rather than disposing of, designated shares, including, in particular, losses arising from any of the factors specified in subsection (4).

- (4) The factors referred to in subsection (3) are -
 - (a) the absence, or inadequacy, of financial return from any designated shares;
 - (b) a decrease in value of any designated shares;

- (c) speculative or imprudent activities of the company or depletion of the company's assets by disposition;
- (d) any act or omission of the directors of the company, regardless of whether it is made or carried out in good faith;
- (e) liquidation or receivership of the company;
- (f) share market fluctuation;
- (g) the loss of opportunity to make gains from reinvestment of the proceeds of designated shares;
- (h) the liabilities and expenses of the company, including directors' remuneration and expenses.

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

Restrictions on trustee's powers

12. (1) Subject to the terms of the trust and to sections 13 and 14, the obligations specified in subsections (2) and (3) shall apply to a trustee of designated shares.

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

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

(3) A trustee of designated shares -

- (a) shall take no steps to instigate or support any action by the company against any of its directors for breach of duty to the company;
- (b) shall take no steps to procure the appointment or removal of any of the directors;
- (c) subject to section 15, shall take no steps to wind up the company; and
- (d) subject to the provisions of this Part, shall not apply to the Court for any form of relief or remedy in relation to the company.

(4) This section shall not apply so as to limit or restrict the exercise by a trustee of its rights, powers or entitlements under -

- (a) section 159 of the Companies Act; or

- (b) any provision of the articles of association of a company which enables members to inspect, make copies or take extracts from accounts and records of the company or any connected company.

Provisions relating to directors

13. (1) The trust instrument may contain rules for determining the manner in which voting and other powers attributable to designated shares should be exercised by the trustee in relation to -

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

and may make provision for those rules to be amended.

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

- (a) require the trustee to ensure that a particular person holds or retains office as director;
- (b) require any person to be appointed to the office of director at some future date or upon some future event;
- (c) require the removal of a director in specified circumstances;
- (d) prescribe, subject to the requirements of the memorandum and articles of the company and the law of Anguilla, the minimum and maximum number of directors (whether one or more) to hold office at any time or times;
- (e) require the trustee, in relation to the appointment and removal of directors, to act, generally or in any specified circumstances, on the decision of a third person or committee;
- (f) provide for the conferral of fiduciary duties on a person or committee referred to in paragraph (e);
- (g) provide for the establishment, continuance, and procedures of a committee referred to in paragraph (e); or
- (h) provide for the remuneration of the person or committee referred to in paragraph (e) to be paid from the trust fund.

(3) Subject to subsection (9) and to section 14, the trustee shall at all times use its voting and other powers, so far as those powers allow, to ensure -

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

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

(5) Persons for whose appointment the office of director rules may provide include -

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

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

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

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

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

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

(9) Subject to any express provision to the contrary in the terms of the trust, a trustee shall have no duty -

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

Intervention by trustee in management in prescribed circumstances

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

(2) A trust instrument may specify one or more permitted grounds for complaint, but need not specify any.

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

(4) Action taken under subsection (3) may include -

- (a) making or procuring changes in the directorship of the company in accordance with the provisions of its memorandum and articles and the law of Anguilla, but otherwise on such terms as the trustee thinks fit, provided that in making, procuring or maintaining any such change, the trustee may disregard section 13(3)(b) if and for so long as, in the opinion of the trustee, it is expedient to do so for the purposes of dealing with the complaint;
- (b) procuring action by the company to recover any losses caused by the conduct giving rise to the complaint; or
- (c) seeking such advice on the complaint and the manner of addressing it as the trustee considers appropriate.

(5) In considering and taking action under subsection (3), the trustee shall -

- (a) have regard to -
 - (i) any wishes of the settlor; and
 - (ii) the efficient functioning of the company;
- (b) disregard business risk, except to the extent that -
 - (i) the ground for complaint consists of or arises from any disagreement among the directors as to business risk, or
 - (ii) any wishes of the settlor require business risk to be considered.

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

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

(8) Where a trust instrument specifies one or more permitted grounds for complaint, the following provisions of this subsection shall apply -

- (a) an interested person may request the trustee to provide such information concerning the affairs of the company and any connected company as is reasonably required for that person to judge whether an intervention call is necessary, and the trustee

shall use all reasonable endeavours to provide that information and may, if considered necessary for this purpose, procure the replacement of any of the directors with the trustee's own representative;

- (b) where there is an appointed enquirer he or she shall have the following duties -
- (i) a duty to make reasonable enquiries as to whether there is a permitted ground for complaint as often as appears appropriate in the circumstances, and not less than once in any period of 12 months;
 - (ii) a duty to make an intervention call under this section, and provide the trustee with evidence of the relevant ground for complaint, whenever it appears to him or her to be appropriate;
- (c) where there is no appointed enquirer, the trustee shall use all reasonable endeavours to ensure that at all times at least one interested person of full capacity is given the following documents and information concerning the trust, but without prejudice to any right of that person to documents and information apart from this paragraph -
- (i) a copy of the trust instrument and other trust documents,
 - (ii) the name and address of the trustee,
 - (iii) the name, registered office, and principal place of business, of the company,
 - (iv) the names and addresses of all directors of the company,
 - (v) the nature of the current activities of the company,

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

(9) Where there is an appointed enquirer, the trustee shall use all reasonable endeavours to ensure that at all times he or she is given the documents and information concerning the trust which are referred to in subsection (8)(c)(i) to (v).

(10) All expenses incurred in dealing with an intervention call or considering the complaint on which it is based, including trustee remuneration where applicable, and the cost of any advice, shall be borne by the trust fund and its income in such proportions as the trustee decides, and if there is any deficiency in liquid funds the trustee may take such steps as are available to the trustee under the memorandum and articles of the company and the law of Anguilla to make up the shortfall out of dividends from the company and may, if considered necessary for

this purpose, procure the replacement of any of the directors with the trustee's own representative.

(11) The trustee shall, where practicable, procure the removal from office of a director appointed for the purpose specified in subsection (8)(a) or (10) when the purpose for which the director was appointed is achieved, if removal is appropriate for the purpose of any action decided upon by the trustee pursuant to subsection (3) or, subject to such action, for the purpose of compliance with the office of director rules.

(12) The terms of the trust may provide for the remuneration of the appointed enquirer to be paid from the trust fund.

Power to dispose

15. (1) This section shall apply to a trust of designated shares.

(2) Subject to subsection (3) and to the terms of the trust instrument, the trustee shall have power, in the management or administration of the trust fund, to sell or otherwise dispose of designated shares, but the existence of this power -

- (a) shall not carry an implied duty to exercise it for the purpose of preserving or enhancing the value of the assets of the trust or to consider its exercise for that purpose; and
- (b) shall not render the trustee liable, in consequence of not exercising it, for losses of the kind referred to in section 11(3).

(3) Subject to section 17, the trustee shall not, unless the trust instrument otherwise provides, sell or dispose of designated shares in the management or administration of the trust fund without -

- (a) the consent of the directors of the company or of a majority of them if more than one; and
- (b) such, if any, consents as are made requisite by the trust instrument.

(4) A sale or other disposal in exercise of the power conferred by subsection (2) shall be made in such manner, and upon such terms and conditions, as the trustee, acting in its fiduciary capacity, thinks fit.

(5) Section 52(2) of the Trusts Act shall not apply to the trust to the extent that it permits the Court to confer upon the trustee any power of sale or other disposal.

Enforcement

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

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

- (a) making such order as it considers appropriate to attain, as nearly as may be, the outcome that the Court considers would have been, or would most likely have been, attained in respect of the trust, the company, its directors and generally if the breach had not occurred; and
- (b) making such, if any, supplementary or incidental order as the Court deems, in the circumstance of the case, reasonably required having regard to the primary purpose of this Part stated in section 9,

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

(3) The persons referred to in subsection (1) are -

- (a) any interested person;
- (b) any director of the company; and
- (c) any person who, under applicable office of director rules, would be a director if the trustee had complied with its obligations under section 13.

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

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

(6) References in subsection (4) to a breach shall be taken to include references to a prospective breach.

(7) Subject to the terms of the trust and to sections 13 and 14, where designated shares are held on trust, no act or omission of a director of the company shall be a ground for any person to seek intervention by the Court in the affairs of the trust.

Power of Court to order disposal

17. (1) Where it is shown to the Court that the retention of the shares is no longer compatible with the wishes of the settlor, the Court shall have power, on the application of any interested person, to order or authorise a sale or other disposal

of any designated shares, and a sale or other disposal so ordered or authorised shall not require any consent referred to in section 15(3).

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

Modification of rule in *Saunders v. Vautier*

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

(2) No such exclusion of entitlement shall have effect, or continue to have effect, after the expiration of 20 years, or such shorter period as may be specified in the trust instrument, from the creation of the trust.

(3) Where a person who receives designated shares, or an interest in them, is a person who, by virtue of such an exclusion of entitlement, has no present right to receive the shares or that interest, he or she shall, without prejudice to the generality of subsection (1), hold those shares or that interest on trust to transfer the same to the trustee, and the Court shall order him or her so to do on the application by the trustee or any person specified in section 16(3).

(4) During any such exclusion of entitlement, section 52(1) of the Trusts Act shall not apply to the trust.

Disqualification of trustee as a director

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

Limitation of trustee's duties

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

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

- (a) shall not be required to make any enquiry as to whether any facts exist which would, or may, whether with or without any other information, form the basis of an intervention call;

- (b) shall not be obliged to inform any interested person of any fact of which it becomes aware, or which it suspects, concerning the assets of the company or the conduct of its affairs;
- (c) shall not incur liability as accessory to a director's breach of duty by reason of any omission on the part of the trustee to take action where the trustee is aware, or suspects, that there has been or will be such a breach, or by reason of any act or omission in compliance with section 13.

(3) A trust of designated shares may, by the terms of the trust instrument, exclude or modify any of the provisions of subsections (1) and (2) in relation to those shares.

(4) An exclusion or a modification made under subsection (3) shall have effect only if it expressly indicates that it is made pursuant to this section.

PART 4

GENERAL PROVISIONS

Ordinary trusts and powers

21. Nothing in this Act affects an ordinary trust or power directly or by inference.

Existing law

22. The law relating to ASTRa trusts is the same in every respect as the law relating to ordinary trusts and powers, save as provided in this Act.

Uncertainty

23. (1) Subject to subsection (4), an ASTRa trust is not rendered void by uncertainty as to its objects or mode of execution.

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

(3) If an ASTRa trust has multiple objects and there is no allocation of the trust property between them, the trustee, subject to evidence of contrary intention, has discretion to allocate the trust property.

(4) If an uncertainty as to the objects or mode of execution of an ASTRa trust cannot be resolved, or has not been resolved pursuant to the terms of the ASTRa trust, the Court -

- (a) may resolve the uncertainty -
 - (i) by reforming the ASTRa trust;
 - (ii) by settling a plan for its administration; or
 - (iii) in any other way which the Court deems appropriate; or

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

(5) This section applies to powers as to ASTRa trusts.

Cy-près

24. (1) If the execution of an ASTRa trust in accordance with its terms is or becomes in whole or in part -

- (a) impossible or impracticable;
- (b) unlawful or contrary to public policy; or
- (c) obsolete in that, by reason of changed circumstances, it fails to achieve the general intent of the ASTRa trust,

the trustee shall, unless the ASTRa trust is reformed pursuant to its own terms, apply to the Court to reform the ASTRa trust *cy-près* or, if or insofar as the Court is of the opinion that it cannot be reformed consistently with the general intent of the ASTRa trust, the trustees shall dispose of the trust property as though the ASTRa trust or the relevant part of it has failed.

(2) Section 52 of the Trusts Act does not apply to ASTRa trusts.

Theft

25. (1) Section 255(2) of the Criminal Code does not apply to ASTRa trusts.

(2) For the purpose of the Criminal Code, property held upon an ASTRa trust shall be regarded, as against the trustee of the property or of any power in relation to the ASTRa trust, and against any enforcer of the ASTRa trust, as belonging to others (except to the extent of the beneficial interest, if any, of the trustee or enforcer under the terms of the ASTRa trust), and an intention on the part of any such trustee or enforcer to defeat the ASTRa trust shall be regarded accordingly as an intention to deprive others of their property.

Unlawful acceptance

26. A person who, as trustee, accepts a settlement of property upon an ASTRa trust without taking steps to ensure that the settlor, or the person making the settlement on that person's behalf, understands who will have standing to enforce the ASTRa trust commits an offence and is liable on summary conviction to a fine of \$25,000 or to imprisonment for a term of 2 years or to both.

Foreign element

27. (1) Part 9 of the Trusts Act applies to ASTRa trusts but as though paragraph (b) of section 63(4) were repealed and the following substituted -

“(b) in the case of a change from the law of Anguilla, the new governing law would recognise the validity of the trust (without any material effect on its objects) and the standing of the enforcers to enforce the trust.”.

(2) No -

- (a) judgment of a foreign court; or
- (b) decision of any other foreign tribunal (whether in an arbitration or otherwise),

with respect to an ASTRa trust shall be enforceable, or given effect, to the extent that it is inconsistent with this Act, irrespective of any applicable law relating to conflict of laws.

Land in Anguilla

28. No land nor any interest in land in Anguilla shall be subject, directly or indirectly, to an ASTRa trust, but an ASTRa trust may hold an interest in a company, partnership or other entity which holds land in Anguilla, or an interest in such land for the purposes of its business.

Ascertaining wishes of settlor

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

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

(3) Where the settlor is dead or no longer in existence, or it is not possible or practicable to consult him or her, his or her wishes shall be taken to be -

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

Optional provision concerning liability of trustee

30. (1) This section applies to an ASTRa trust where the terms of the trust expressly so provide.

(2) Where this section applies to an ASTRa trust, subsections (3) and (4) shall have effect.

(3) Except as otherwise provided in a contract, a trustee of the ASTRa trust shall not be personally liable under or by virtue of a contract with any party entered into by the trustee in the trustee's fiduciary capacity in the course of administering

the ASTRa trust if the trustee disclosed in the contract the fiduciary capacity, or if the party was otherwise aware of that capacity.

- (4) A claim based on -
 - (a) a contract entered into by a trustee of the ASTRa trust;
 - (b) an obligation arising from ownership or control of ASTRa trust property, or
 - (c) a tort committed in the course of administering the ASTRa trust,

may be asserted by a party in a judicial proceeding against the trustee in the trustee's fiduciary capacity, whether or not the trustee is personally liable for the claim, and so that the claimant shall be entitled to satisfaction out of the ASTRa trust fund directly rather than by way of subrogation to any right of indemnity of the trustee.

Limitation of trustee's personal contractual liability

31. (1) Where section 30 does not apply to an ASTRa trust, this section shall apply to it.

(2) Subject to subsection (3), where, in a contract entered into by a trustee, the trustee discloses his or her fiduciary capacity, or the other party was otherwise aware of that capacity, the trustee is personally liable for any sum payable under the contract only to the extent of the value of the ASTRa trust fund when the payment falls due.

(3) When computing the value of the ASTRa trust fund for the purposes of subsection (2), the fund shall be treated as still including any property which, since the contract was entered into, has been distributed.

(4) Subsections (2) and (3) shall have effect subject to any contrary provision in the contract.

(5) For the purposes of subsection (3), property shall be taken to have been distributed if it has ceased to be subject to the ASTRa trust otherwise than on a disposal in good faith for valuable consideration in the management or administration of ASTRa trust property.

Provisions relating to the right of subrogation

32. (1) Subject to the terms of the trust and without prejudice to section 30 where applicable -

- (a) where a trustee of an ASTRa trust has incurred a liability in favour of another party ("the third party") under or by virtue of a contract entered into by the trustee, the trustee shall have a right of indemnity in relation to that liability against the ASTRa trust fund

and against distributed property or its traceable product, to which right the third party shall be subrogated; and

- (b) in computing the amount of the indemnity any indebtedness of the trustee shall be disregarded.

(2) The disregarding of any indebtedness of the trustee under subsection (1)(b) shall be solely for the purpose of establishing the extent of the third party's right of subrogation, and shall not eliminate or otherwise affect that indebtedness.

(3) For the purposes of this section, indebtedness of a trustee includes all liability, quantified or not, of the trustee to make restitution or pay compensation to the ASTRa trust fund.

(4) Rights of indemnity conferred by this section -

- (a) shall not prejudice any rights of indemnity or reimbursement to which, apart from this section, a trustee would be entitled;
- (b) shall subsist notwithstanding any purported waiver or exclusion, in whole or in part, by the trustee.

(6) For the purposes of subsection (1), property shall be taken to have been distributed if, since the contract was entered into, it has ceased to be subject to the trust otherwise than on a disposal in good faith for valuable consideration in the management or administration of ASTRa trust property.

Regulations

33. The Governor in Council may make regulations for the purpose of carrying the provisions of this Act into effect.

Citation

34. This Act may be cited as the Anguilla Special Trusts (ASTrA) Act, 2020.

SCHEDULE

(Section 1)

CONNECTED PERSONS

1. For the purposes of this Act, the following persons constitute connected persons in relation to an individual -

- (a) spouse;
- (b) the descendants of the individual and their spouses;
- (c) parents, including step-parents;
- (d) grandparents;
- (e) parents-in-law, including step-parents-in-law;
- (f) brother, step-brother, sister, step-sister and their spouses;
- (g) spouse's grandparents;

- (h) spouse's brother, step-brother, sister, step-sister and their spouses and children;
 - (i) parent's brother, step-brother, sister, step-sister and their spouses;
 - (j) children of the brother, step-brother, sister or step-sister of the individual's parents, both present and future, including step-children, and their spouses; and
 - (k) children of the individual's brother, step-brother, sister or step-sister, both present and future, including step-children, and their spouses.
2. For any of the relationships listed in paragraph 1 that may be established by blood, that same relationship may also be established by adoption.
3. In paragraph 1(b), the term "descendants of the individual" means the individual's children, the children of that person's children, the children of those children, and so on.
4. For the purpose of paragraph 3, the term "children" includes step-children.

DRAFT

OBJECTS AND REASONS

(The objects and reasons do not form part of the Bill)

The Bill for consideration is the Anguilla Special Trusts (ASTrA) Bill.

A review of existing legislation has disclosed that the trust regime has not been updated in over two decades. Provisions are in place to enhance the regime for trustees (both regulated and unregulated); however, trust business could be further enhanced by the development of a special trust within Anguilla that would accelerate growth of the financial services industry and, specifically, the Fiduciary Services sector. Additionally, research shows that special trust provisions are attractive to markets where High Net Worth Individuals are desirous of establishing structures that allow for specific trust functionalities which are supported in legislation and by case law. Thus, various factors support the need for changes to existing trust legislation.

The Bill seeks to enable the creation of ‘ASTrA trusts’ for the purpose of making special provision in respect of trusts for charitable and non-charitable purposes and in respect of trusts of shares in companies. An ASTRa trust would only be able to hold assets via a company domiciled in Anguilla and, moreover, the trust could not be re-domiciled to another jurisdiction since it would be unique to Anguilla. These factors would therefore serve to embed business here.

Part 1 of the Bill, together with the Schedule, provides for the interpretation of key words and expressions used in the Bill. An “ASTrA trust”, for example, is defined as a trust established under Part 2 or Part 3; and a “designated trustee” is defined as either a holder of a trust licence under the Trust and Corporate Services Providers Act, 2020 or a private trust company. In addition, terms and expressions defined in section 1 of the Trusts Act may also be utilised.

Provision is made in Part 2 of the Bill (clauses 2 to 7) for the establishment of special trusts.

Clause 2 seeks to provide that a trust is special if certain conditions are met, namely -

- (a) it is created by or on the terms of a written instrument, testamentary or *inter vivos*;
- (b) the instrument contains a declaration to the effect that Part 2 is to apply;
- (c) at least one trustee of the trust is a designated trustee at the time at which the declaration under paragraph (b) takes effect;
- (d) the terms of the trust require that, for so long as the declaration under paragraph (b) has effect, at least one trustee is a designated trustee; and

- (e) the trust is not created in the exercise of a power conferred by another trust, unless that other trust is an Anguillian trust and at least one trustee of that other trust is a designated trustee.

Clause 3 provides that the objects of a special trust may be persons or purposes or both.

Clause 4 provides that a beneficiary of a special trust does not have standing to enforce the trust, or an enforceable right against a trustee, or an enforceable right to the trust property. The only persons who have standing to enforce a special trust are persons appointed to be enforcers by the terms of the trust or by Court Order; however, a trustee or another enforcer, or any person expressly authorised by the terms of the special trust, has standing to bring an action for the enforcement of the duty of an enforcer (**clause 5**).

Clause 6 seeks to prescribe the rights and remedies of enforcers, including the right to be informed of the terms of the trust, to receive information concerning the trust and its administration from the trustee, and to inspect and take copies of trust documents.

Clause 7 seeks to impose on a designated trustee a duty to maintain specified records at the trustee's office in Anguilla. Failure to comply would be an offence.

Special provision is made in Part 3 of the Bill (clauses 8 to 20) for trusts of company shares.

Clause 8) provides for the interpretation of key words and expressions used in Part 3.

Clause 9 seeks to prescribe the primary purpose of Part 3, namely, to enable a trust of company shares to be established under which the shares may be retained indefinitely and the management of the company may be carried out by its directors without any power of intervention being exercised by the trustee.

Clause 10 provides that, where a trust fulfils certain conditions, the terms of the trust may direct that Part 3 applies to all Anguillian shares comprised in the trust fund or to such Anguillian shares comprised in the trust fund as may be specified in the direction. The conditions to be fulfilled are similar to those mentioned above in relation to clause 2 (for example, at least one trustee of the trust must be a designated trustee).

Clause 11 seeks to prescribe a trustee's duties in relation to shares (for example, a trustee would not be accountable for losses arising directly or indirectly from holding, rather than disposing of, shares).

Clause 12 sets out the restrictions on a trustee's powers. A trustee would have no authority to interfere in the management or conduct of the business of the relevant company but would be required to leave the conduct of company business, and all

decisions as to the payment or non-payment of dividends, to the directors of the company. Moreover, a trustee would have no authority to take steps to procure the appointment or removal of any of the directors or to wind up a company.

Clause 13 seeks to provide that a trust instrument may contain rules for determining the manner in which voting should be exercised by a trustee in relation to the appointment and removal of directors of a company,

Clause 14 would prescribe the circumstances in which an interested person may call upon a trustee to intervene in the affairs of a company to deal with a complaint.

Clause 15 prevents a trustee from disposing of shares in the management or administration of a trust fund without the consent of the directors of the relevant company.

Clauses 16 and 17 seek to enable Court intervention where, in the case of a trust of shares, there is a breach of a duty imposed on a trustee or where the retention of the shares is no longer compatible with the wishes of the settlor.

By virtue of **clause 18**, neither a beneficiary who is solely interested in any shares, nor all the beneficiaries who together are interested in any shares, would be entitled, although in existence and ascertained and of full capacity, to call for or direct a transfer of those shares or to terminate or modify the trust relating to them, if that entitlement is excluded by the trust instrument; but this exclusion of entitlement would not continue to have effect after the expiration of 20 years from the creation of the trust.

Clause 19 would disqualify a trustee of shares from being a director while **clause 20** would provide that the trustee has no fiduciary responsibility or duty of care in respect of the assets of, or the conduct of the affairs of, the relevant company, except when acting pursuant to a request by an interested party.

Part 4 (**clauses 21 to 34**) contain general provisions.

Clause 21 provides that the Act would not affect trusts that are not ASTRa trusts while **clause 22** provides that the law relating to ASTRa trusts would be the same in every respect as the law relating to trusts that are not ASTRa trusts, save as provided in the Act.

Clauses 23 and 24 seek to enable Court intervention where uncertainty as to the objects or mode of execution of an ASTRa trust cannot be resolved or where the execution of an ASTRa trust in accordance with its terms is impossible or impracticable.

Clause 25 seeks to provide that, for the purpose of the Criminal Code, property held upon an ASTRa trust would be regarded, as against any trustee or enforcer of the trust, as belonging to others and an intention on the part of the trustee or

enforcer to defeat the trust would be regarded as an intention to deprive others of their property.

Clause 26 would make it an offence for a trustee to accept a settlement of property upon an ASTRa trust without taking steps to ensure that the settlor understands who would have standing to enforce the trust.

Clause 27 seeks to provide that a judgment of a foreign court with respect to an ASTRa trust would not be enforceable to the extent that it is inconsistent with the Act, irrespective of any applicable law relating to conflict of laws.

Clause 28 specifies that land in Anguilla cannot be subject to an ASTRa trust, but that an ASTRa trust may hold an interest in a company which holds land in Anguilla.

Clause 29 seeks to prescribe guidelines for determining the wishes of a settlor.

Clause 30 provides the circumstances in which a claim based on a contract entered into by a trustee of an ASTRa trust could be asserted by a party in a judicial proceeding against the trustee in the trustee's fiduciary capacity, so that the claimant would be entitled to satisfaction out of the ASTRa trust fund directly rather than by way of subrogation to any right of indemnity of the trustee. **Clause 31** would limit a trustee's personal contractual liability in cases where **clause 30** does not apply and **clause 32** contains provisions relating to the right of subrogation.

Clause 33 sets out the power of the Governor in Council to make regulations for the purpose of carrying the provisions of the Act into effect.

Clause 34 provides the short title of the Bill.

Speaker

Passed by the House of Assembly this day of , 2020

Clerk of the House of Assembly
