ANALYSIS

1982, No. 50

An Act to amend the Trustee Act 1956 relating to trustees' powers in respect of businesses forming the whole or part of the trust assets [*13 November 1982*

BE IT ENACTED by the General Assembly of New Zealand in Parliament assembled, and by the authority of the same, as follows:

1. Short Title and commencement—(1) This Act may be cited as the Trustee Amendment Act 1982, and shall be read together with and deemed part of the Trustee Act 1956 (hereinafter referred to as the principal Act).

(2) This Act shall come into force on the 28th day after the date on which it receives the Governor-General's assent.

2. New heading and sections (relating to trustees' powers) inserted—The principal Act is hereby amended by inserting in Part III, after section 42, the following heading and sections:

"Special Powers in Respect of Businesses

"42A. **Power to set aside reserves out of income or profits of business**—(1) Where any property settled by way of succession is employed in a business that the trustee is empowered or authorised to carry on, and the trustee considers that in the interests of the persons entitled to the income or capital of the property, and in accordance with good business practice, it is expedient to set aside and retain as a capital reserve part of the income or profits arising therefrom in any period, then, notwithstanding any rule of law to the contrary, and without in any way affecting any other power conferred on him by this Act or any other enactment (including, without limiting the generality of the foregoing, the power to set up a depreciation or replacement fund under section 15 (2) of this Act), or by the instrument creating the trust, it shall be lawful for but not obligatory upon the trustee to direct that such part of the income or profits arising from the property in that period as he determines shall cease to be income and shall become a capital reserve of the business.

"(2) Any income or profits reserved by the trustee under this section may be applied by him in his discretion either immediately or at any time or times thereafter in, for, or towards all or any of the following purposes:

"(a) The payment or discharge of any debts or liabilities of the business that are properly payable out of capital:

"(b) The improvement or development of any of the assets of the business, including the acquisition of trading stock or livestock:

"(c) The replacement, repair, maintenance, upkeep, or renovation of any of the assets of the trust used in the business, whether the cost of such replacement, repair, maintenance, upkeep, or renovation would otherwise have to be paid out of capital or out of income or partly out of capital and partly out of income:

"(d) The acquisition by purchase or otherwise of property or assets of like nature to any of the assets used in the business or that may advantageously be employed in conjunction therewith:

"(e) The provision of additional capital for the more efficient working of the business and a fund to enable the business to be developed:

"(f) Meeting any losses notwithstanding that under any rule of law or enactment or provision in the trust instrument to the contrary such losses should be borne or partly borne by income:

"(g) Any purpose or other purpose to which or for which in the exercise of any power, trust, or authority conferred upon him by this Act or any other enactment, or rule of law or by the trust instrument creating the trust, or Court order the trustee may pay or apply the income or capital of the property or of any other assets held by him upon the same trusts.

"(3) All income or profits reserved by the trustee under this section shall, subject to the provisions of this section, follow the destination of the capital of the property and shall be subject to all the trusts, powers, and provisions applicable thereto.

"42B. **Power to apply capital of business for maintenance**—(1) Where any property settled by way of succession is employed in a business that the trustee is empowered or authorised to carry on, and the trustee considers in any period that the income arising from the business and available for distribution to the person entitled to receive it (in this section referred to as the income beneficiary) is insufficient for the proper maintenance of the income beneficiary, having regard to any other income received or to be received during that period by the income beneficiary from whatever source and to all the other circumstances of the case, then, notwithstanding any rule of law to the contrary, and without in any way affecting any other power conferred on him by this Act or any other enactment (including, without limiting the generality of the foregoing, the power to make advances out of income and capital under sections 40 and 41 of this Act) or by the instrument creating the trust, it shall be lawful for but not obligatory upon the trustee to pay or apply any capital money or other capital asset subject to the trust and employed in the business (including any money for the time being standing to the credit of any fund established by the trustee under section 15 (2) or section 42A of this Act) for the maintenance or benefit, in such manner as he may in his absolute discretion think fit, of the income beneficiary.

"(2) If, in any such case, the trustee pays or applies any capital money or capital asset for the maintenance or benefit

of the income beneficiary in accordance with subsection (1) of this section, and, in any subsequent period, the trustee considers that the income available from the business for distribution to the income beneficiary is more than sufficient for the proper maintenance of the income beneficiary, having regard to any other income received or to be received during that subsequent period by the income beneficiary from whatever source and to all the other circumstances of the case, then the trustee may recoup the whole or such part as he thinks fit of the sum so paid (or of a sum equivalent to the value of the capital asset so applied) from the income arising from the business during that period and available for distribution to the income beneficiary.

"42C. **Matters to be taken into consideration when exercising powers**—In considering whether or not to exercise, or in what manner he should exercise, any power conferred on him by section 42A or section 42B of this Act, the trustee shall have regard to the desirability of ensuring both—

"(a) The proper maintenance and support of the beneficiary entitled to the income arising from the business; and

"(b) The preservation and improvement of the business enterprise in the interests of the beneficiaries entitled to the capital thereof.

"42D. **Apportionment of income**—Where any property settled by way of succession is employed in a business that the trustee is empowered or authorised to carry on, and the trustee considers that, in order better to determine the net income of the business that is available in any period for appropriation and distribution to the person or persons entitled under the trust to the income therefrom, it is expedient to do so, he may—

"(a) Instead of commencing the accounting period to determine such income with the date of the commencement of the trust, adopt the accounting period employed in respect of the business immediately before the commencement of the trust, continue the accounting period so employed and current immediately before the commencement of the trust, and apportion the income so determined on such basis as if it had accrued evenly during that accounting period:

"(b) Instead of preparing final accounts, in respect of any interest in the whole or any part of the income arising from the business, as at the date of the termination of that interest, prepare such accounts at the end of the accounting period employed in respect of the business immediately before the date of the termination of the interest and current at that date, and apportion the income so determined on such basis as if it had accrued evenly during that accounting period."

This Act is administered in the Department of Justice.