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Australian trust drafters often include third party officers, such as appointors and guardians in discretionary trust deeds, giving these third party officers a capacity to exercise certain discretionary powers in relation to a trust, including to terminate or change the role of the trustee. When trustee and third party officers fall out and attempt to remove each other from office, current Australian case law suggests that the party who exercises a valid deed first will succeed in removing the other. This article suggests that Australian courts need to draw on case law from other jurisdictions, including offshore jurisdictions, to allow them to consider whether discretionary powers have been exercised for a proper purpose and in light of proper considerations, allowing Australian courts to respond to the underlying question of whether such powers were exercised justly.

Over the course of the past 30 or so years, offshore jurisdictions have pushed the boundaries of trust law, often with the objective of attracting and competing for foreign investment. Some of these offshore innovations have reached onshore territories. This is not entirely surprising, for it is not uncommon for legislatures to draw on foreign models and, at times, to transplant foreign instruments into their own home jurisdiction. However, in the context of trust law, legal scholars have expressed concerns about such developments, especially because offshore jurisdictions have developed types of trusts that have taken the trust concept to its limits and that can be put to all manner of uses.

This article provides a comprehensive examination of an example of such onshoring of a foreign type of trust in Scotland: the introduction of private purpose trusts in the Trusts and Succession (Scotland) Act 2024. It shows that the drafters of this new Act (which for the most part is not yet in force) have heavily drawn on offshore models whilst also going a step further in providing a legal framework for private purpose trusts that is even more flexible and settlor-friendly than some of the offshore instruments that have inspired it. This framework raises several concerns related especially to (i) the lack of accountability of trustees and supervisors of Scottish private purpose trusts; (ii) the enforceability of such trusts more generally; (iii) the permissive and open textured nature of some of the legislative provisions; as well as (iv) their scope and impact on the rights of potential beneficiaries under such trusts. More fundamentally, there is a danger that these private purpose trusts will be used to create a vacuum in beneficial entitlement to property. While many of these concerns are not unique to Scotland, as the article shows, they are heightened by some of the choices that the Scottish drafters have made and certain specific features of Scottish trust law within which the new framework will operate. The article further illustrates that despite the ambitions of the drafters, the new