TO: MINISTRY OF JUSTICE

SUBMISSION ON EXPOSURE DRAFT OF TRUSTS BILL

24 JANUARY 2017
INTRODUCTION

1 The Ministry of Justice has sought feedback on a draft Trusts Bill, as part of the Government’s move to update the general law governing trusts in New Zealand. This submission is from Chapman Tripp.

2 The matters covered by the Exposure Draft of the Trusts Bill (Exposure Draft) are of direct interest to us as legal practitioners and to our clients.

3 Our submission follows the structure of the template for submissions and, where appropriate, includes some general comments.

4 We have also set out as Appendix 1 to our submission a proposed replacement definition of “wholesale investment trust” – which, for the reasons set out below, we propose renaming “excluded trust”.

5 We have no objection to our submission being published on the Ministry’s website.

6 We would be happy to discuss with the Ministry any of the comments we have made.

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Chapman Tripp is a leading law firm with a strong practice in commercial and corporate law and with offices in Auckland, Wellington and Christchurch.

We act for a range of family trusts, estates, corporate trusts, equity and debt issuers, investors, arrangers, trustees/supervisors, derivative market participants and other intermediaries on a broad range of domestic and international capital markets transactions, as well as on securitisations, covered bond arrangements, structured finance and security trust arrangements.

We also act for providers of retail managed funds, wholesale managed funds, KiwiSaver and superannuation schemes, employer-based workplace savings schemes, providers of master trust superannuation products and providers of other financial products such as custodians and wrap accounts.
We have a significant private client and trusts practice servicing individuals, families and charities. Our Māori Law practice, Te Waka Ture, advises iwi, hapū, Māori landowners, Māori businesses and those looking to work with them.

**KEY POINTS**

**Definition of wholesale investment trust needs to be broader**

11 Managed investment structures, public debt offerings, securitisations, covered bond arrangements and structured finance arrangements are commonly structured as or involve trust arrangements. In addition, security arrangements for large wholesale or syndicated loans often involve the use of a security trustee who holds certain rights in relation to secured assets on trust.

12 Many of the issues applying to securitisations, covered bond structures, structured finance arrangements and security trust arrangements apply equally to managed investment structures and public debt offerings. For this reason, we submit that any exceptions ultimately provided to wholesale excluded trusts should also apply to commercial trusts more broadly and these could be referred to as “excluded trusts” in the Exposure Draft – including those which are offered to the public. In our submission we refer to managed investment structures, public debt offerings, securitisations, covered bond arrangements, structured finance arrangements and security trust arrangements collectively as “excluded trusts”. Where we refer to other types of trust which we agree should be subject to the provisions of the Exposure Draft, we use the term “non-excluded trusts”.

13 We do not consider that the focus on “wholesale” trusts in this context is appropriate. We say this because when interests in “excluded trusts” are offered to the public, they are subject to a detailed conduct and disclosure regime contained in the Financial Markets Conduct Act 2013 (FMCA) and the trustees (i.e. the supervisors) of retail schemes are subject to a licensing regime set out in the Financial Markets Supervisors Act 2011 (FMSA). Many of the approaches taken in the Exposure Draft on matters also addressed in the FMCA are dealt with inconsistently. Those inconsistencies (such as delegation restrictions, indemnity and limitation exclusions) should be drafted consistently, particularly if the trusts which we recommend treating as excluded trusts are not ultimately excluded (as we submit
they should be).

Need for freedom to contract for excluded trusts

14 All parties to the establishment of excluded trusts are sophisticated and well advised. Accordingly, we submit that it is inappropriate for the new Trusts Act to override the freedom of these commercial counterparties to agree, in the documents establishing and governing their trusts, how their arrangements should operate.

15 While this is perhaps a lesser issue for structures established after the new Trusts Act comes into force\(^1\), parties will need to carefully examine their existing structures to ensure that they do not need to be modified to either take account of the new Trusts Act or specifically exclude the application of various parts of it. This will be a costly and time consuming exercise and in the case of some older structures a practical impossibility.\(^2\)

16 This in turn risks the new Trusts Act overturning the commercial arrangements negotiated between sophisticated parties, for no benefit.

17 For this reason we have submitted that a greater number of the provisions of the new Trusts Act should not apply to excluded trusts.

18 While we acknowledge that in many instances these provisions replicate the current position at common law, much of the case law establishing these principles of trust law was decided in the context of family trust arrangements or smaller trading trusts. For this reason the courts have not yet had the opportunity to determine whether these rules should be modified in the case of each type of excluded trust. If the current state of the law of trusts is preserved in statute then its application to types of trusts or commercial arrangements which were not contemplated when those principles were established will be unable to be

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\(^{1}\) As they will be able to express an intention that specific provisions of the Trusts Act should not apply to them.

\(^{2}\) Certain older structures are not able to be amended without the consent of all of the creditors of those trusts. Restrictions of this type were historically put in place to protect creditors or beneficiaries against the possibility that the trust deed governing the structure would be amended in a manner that might be prejudicial to the secured party or beneficiary. However, as a consequence of this it now may be very difficult (if not practically impossible) to amend the trust deeds governing these structures – as obtaining the consent of all creditors is not feasible, whether because creditors cannot now be located, refuse to engage or otherwise.
reconsidered by the courts. The alternative would be to consider whether these rules should be modified in the case of each type of excluded trust which would complicate the Exposure Draft and accordingly undermine its purpose of “enhancing access to the law of trusts”.

**Transitional relief**

19 The protections contained in the FMCA were recently the subject of detailed consultation and a long and complex transition exercise. This required managed investment schemes and issuers of debt securities to the public to revisit their trust arrangements at significant cost.

20 The transitional arrangements in the Exposure Draft do not adequately recognise the significant costs for managed investment schemes, the issuers of debt securities and the managers of other excluded trusts to determine:

- what (if any) changes are required to their trust deeds;
- whether those amendments are able to be made under:
  - the terms of the relevant trust deed; and
  - the FMCA.

The current transition period in the Exposure Draft will exacerbate these costs by requiring this exercise to be undertaken over a shorter period than providers had to give effect to the FMCA (which was two years).

21 The FMCA also provided a mechanism for the Financial Markets Authority to approve amendments to a trust deed to be made to comply with the FMCA, overriding any other requirement in the trust deed itself for any other person to consent to those amendments. We consider a similar mechanism would be useful in relation to amendments being made to trust deeds to reflect the new Trusts Act.

**Insolvency**

22 We consider that the Exposure Draft presents a valuable opportunity to establish a coherent regime applicable to insolvent trusts. This is an area of law that is currently uncertain. We strongly support the inclusion of additional provisions in the Trusts Act to deal with insolvency issues,
in particular the adoption of a liquidation regime.

**Māori Land Trusts**

23 There was a recommendation made in the Review of the Law of Trusts to ensure that Te Ture Whenua Māori Act 1993 and the jurisdiction of the Māori Land Court over trusts created under that Act was not prejudiced. This is not addressed expressly in the Exposure Draft. We have commented further on this in relation to Question 36 below.

**Interpretation and precedence of trust deed**

24 We suggest that the Exposure Draft would benefit from an interpretation provision stating that the (or certain of the) powers of trustees and beneficiaries under the Act are in addition to those expressed in the terms of the trust. This would be useful, for example, in relation to clause 108 which sets out the common law rule in *Saunders v Vautier*, but does not specify that a trust deed may provide alternative methods for winding up a trust. We acknowledge that any such interpretation provision would need to be tested for each power under the Act to ensure that it had no unintended consequences. We suggest that the clause also provide that any contrary intention in a trust deed will override a power in the Exposure Draft. We note that section 2(4) of the Trustee Act 1956 is commonly called upon in practice.
Do the preliminary provisions set out a useful starting point for interpreting the Bill?

We broadly agree with the preliminary provisions, although we note that the definition of "Trustee" is overly broad in some respects but lacking in others. Specifically, the definition currently captures any person who “holds or deals with” property under a trust. This wording extends to custodians, bankers and fund managers for ordinary discretionary trusts, which roles are contemplated in clause 64(5)(b). This wording captures a greater number of the different parties involved in the operation of commercial trusts and would (by bringing those parties into the ambit of the Trusts Act) impose obligations on all of these third parties where either:

- previously there were none; or
- those obligations are inconsistent with their current obligations (whether at law or under the terms of the relevant trust or commercial arrangement).

It is strongly arguable that the definition would, for example, capture:

- a bank holding funds on account for a trust;
- a manager, investment manager and custodian of a managed investment scheme and any agent, delegate or broker who is authorised to deal with trust property by a trustee; and
- the manager/servicer of a securitisation structure or a covered bond trust.

While we recognise that trust “managers” (whether of managed investment schemes or otherwise) have the potential, at law, to be co-trustees, capturing them within the ambit of the Trusts Act would, by overlaying co-extensive duties, create inconsistency in how these arrangements should operate.

This would be particularly acute in the context of the FMCA, under which managers and supervisors have separate and distinct duties and functions. In a managed investment scheme context, where a custodian is appointed (so the supervisor does not hold or deal with the trust property), the supervisor may not be a trustee under this definition (despite section 153(4) of the FMCA). We do not consider that this is intended.

We also note that some of the parties which would be caught by this definition have not previously regarded themselves as trustees, so would need to significantly amend the terms of the relevant trust to, for example, enable them to be paid for

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3 Barclays v Equity [2014] JRC102D
their services or, where applicable, exclude their liability to perform any such services.

2 **Do you have any comments about how the provisions could be improved?**

We recommend the word “person” as used in the definition of “adult” and “child” be replaced with “individual”.

In the context of non-excluded trusts a possible definition of trustee could be:

“trustee means, in relation to a trust to which this Act applies, a person subject to the terms of that trust who holds or deals with property subject to that trust;”

As an alternative, and acknowledging the circularity of this option:

“trustee means a person who has the powers of a trustee and is subject to the duties of a trustee on the terms of this Act;”

We consider that clause (b) of the “trustee” definition be removed as section 33 of the Interpretation Act has this effect already.

In the time available we have not been able to arrive at a satisfactory definition of “trustee” for use in the context of excluded trusts.

**Part 2 – Express Trusts**

3 **Do these provisions set out a clear approach for the creation and characteristics of express trusts?**

We have always had an issue with attempting to define the characteristics of a trust in legislation.

If a definition is used, we have strong objections to clause 9(1)(b) being included. This refers to the trustee “being required to hold or deal with the trust property in a way that it is identifiably separate” from his or her personal property. Trustees have a duty in common law not to co-mingle their property with trust property but to fail foul of that is at worst a breach of trust. It should not of itself call into question the existence of the trust.

Clause 9(1)(d) is too open-ended by not specifying who the trustee must be accountable to.

We welcome the addition of clause 9(2) which allows the court to determine that a trust meets the requirements of an express trust for the purposes of the proposed Trusts Act where the trust does not fall within clause 9(1) but has characteristics that are recognised as being sufficient to constitute an express trust.

However, we have some concern that the proposed clause 9 does not adequately address the scenario where a trust would be or become *invalid* at common law (e.g.
where the sole trustee and sole beneficiary are the same person) but would nonetheless meet the definition of an "express trust" in clause 8. Particularly, where the sole trustee and sole beneficiary are the same person, it would be necessary to assess the trust based on the three certainties – is this intended? The problem with that would be that the three certainties are only described as relevant for the creation of a trust and not for its continuance. Therefore perhaps there would still be a question mark over the validity of a trust that was validly created but fell short of the three certainties at a subsequent point in time.

The criteria for identification of beneficiaries in clause 10(1)(b) may be inconsistent with the common law. Under the common law there is a distinction between the required certainty of beneficiaries for a fixed trust and that for a discretionary trust. It is sufficient under common law to establish discretionary trusts where the class of beneficiaries allows for it to be determined whether any particular person is or is not a beneficiary. It does not require that each beneficiary be identified when the trust is created. We suggest that the current tests are reflected in clause 10(b)(ii).

Clause 12 requires some clarification, as set out below.

4 **Do you have any comments about how the provisions could be improved?**

Clause 9(1)(b) should be deleted.

Clause 9(1)(d) should be improved by including that the trustee is accountable to the beneficiaries of the trust or to the Attorney General in the case of a charitable trust.

We favour retaining the provision that was clause 4(2) of the indicative draft provisions set out in Appendix A of Review of the Law of Trusts: A Trusts Act for New Zealand (August 2013). That clause provided that an express trust must not have the sole trustee as the sole beneficiary of the trust. We favour retaining the provision because such a trust would be invalid at common law yet could meet the definition of an express trust under the draft provisions.

We consider that there should be a negative mirror image of clause 9(2) which provides that even if a trust has the characteristics in clause 9(1)(a), (c) and (d) (as we suggest (b) be removed) but also has characteristics which render it invalid in common law, the court may determine that the trust is invalid.

**Duration of trusts**

Regarding clause 11, we are content with the 125 year period (acknowledging the reduction from the initial 150 year suggestion). Our comments primarily relate to the detail of its application for existing express trusts:

- For example, if a trust has a specified perpetuity period of 80 years then clause 11(4) suggests that it cannot avail itself of the longer period, even if the trust deed contemplates variation. We imagine that this is not the intention.
We query whether an existing trust with a fixed perpetuity period of 80 years and no internal variation mechanism would be able to resettle its assets onto a new trust to which the 125 years duration applies? Is the intention that it should be able to do so following the passing of the Exposure Draft because the common rule against perpetuities, which currently prohibits that, will have been abolished under clause 11(7)? Therefore any restriction in the existing trust deed prohibiting a resettlement that contravened the rule against perpetuities would become obsolete?

For existing trusts that have an ability to extend their duration, it is quite likely that the class of final beneficiaries will need revisiting as the vesting date could be 45 years later than originally contemplated which could cover two generations. We are of the view that changing final beneficiaries of a trust could well be regarded as changing the core features of the trust, therefore triggering a resettlement of the assets onto a newly created trust. We suggest that this issue may well come up as a tax issue in the future.

In relation to trusts established under Te Ture Whenua Maori Act 1993 (TTWMA), the exception in clause 11(8) works together with section 235 of TTWMA which provides that "No trust constituted under this Part shall be subject to any enactment or rule of law restricting the period for which a trust may run". However, because the rule against perpetuities is being repealed, we suggest a consequential amendment to the title of section 235 of TTWMA to remove the reference to "perpetuities".

In relation to trusts established as Post Settlement Governance Entities, consequential amendments will be required to the various Settlement Acts which refer to the Perpetuities Act and the rule against perpetuities. To illustrate the need for this, we set out in Appendix 2 sections from the Ngāti Whātua Ōrākei Claims Settlement Act 2012 and the Ngāti Haua Claims Settlement Act 2014.

Trusts established as PSGEs are not necessarily "created by or under an enactment". Some are contemplated by an enactment but created separately by Trust Deed. So the exception in clause 11(8) of the Trusts Act is not broad enough to apply to these trusts. More often than not, trust deeds for PSGEs refer to the Perpetuities Act and the rule against perpetuities. By way of example, we set out in Appendix 2 clauses from the trust deed of the Ngāti Whātua Ōrākei Trust and the trust deed of the Ngāti Haua Iwi Trust relating to the vesting period for these trusts. An amendment to a PSGE trust deed normally needs to be approved by 75% of iwi members voting, which will result in a significant cost for iwi groups; though we note that the trust deed for Ngāti Haua Iwi Trust includes an exception to this rule where an amendment is required for consistency with the Settlement Act (see Appendix 3 for this example wording). Is the intention that such clauses in PSGE Trust Deeds will not need to be amended because the various Settlement Acts will be changed by consequential amendment to cover this?
Other comments on clause 11

Is it correct that, due to the repeal of the Perpetuities Act 1964, there is no longer a restriction on accumulations or is the rule still applicable to charitable trusts containing a direction to accumulate funds?

We also note that the rule against perpetuities does not apply to a number of excluded trusts (see section 19 of the Perpetuities Act 1964) but these trusts have not been excluded from the application of clause 11 of the Exposure Draft. We consider that this should be clarified so that these trusts are not subject to the new 125 year duration limitation. One area of concern here is KiwiSaver, superannuation and workplace savings schemes (all of which are ‘superannuation funds’ as defined in section 19 of the Perpetuities Act). For those schemes, the 125 year rule is not only at odds with their very long-term focus (including for example where schemes provide lifetime pensions to former members and their spouses) but might also force some terminations in the relatively near term – a few workplace savings schemes have already operated for well over a century.

Clause 11(5) should be subject to clause 11(6) and the 'However' at the beginning of (6) could then come out.

Clause 11(8)(a) should refer to a trust for a permitted purpose, being a charitable purpose given that “charitable trust” is not defined.

We suggest that, for the purposes of clause 11(6), a body corporate or trustees of a trust are regarded as a single beneficiary for the purposes of sharing the trust assets equally.

We suggest that “receive the trust property” in clause 11(6) becomes “receive the trust property or in whom the trust property is to be vested” to allow for vesting clauses to apply. The rule against perpetuities prevents contingencies continuing after the perpetuity period, but not the termination of a trust. Clause 11(1) changes this. Under the existing law, trusts could continue after the perpetuity period provided all entitlements were vested. This change may have an impact for some trusts.

Clause 12

Clause 12, which provides that the age of majority is 18, applies to express trusts. To ensure that the provision applies to wills (consistent with Recommendation 9 of the Review of the Law of Trusts) a consequential amendment is required to the Administration Act 1969 to provide that the age of majority for wills, including the age at which a person can be appointed as an executor and receive a distribution under a will, is 18. Currently a person must be 20 to act as an executor or to receive a distribution under a will, which is inconsistent with the proposed clause 12.
**Part 3 – Trustees’ Duties and Information Obligations**

**Subpart 1 – Duties of Trustee**

5 *Do the provisions on duties clearly set out the basic obligations of a trustee?*

Our preference has always been to have the following four core duties:

- to act honestly and in good faith (13(1)(c));
- to act for the benefit of the beneficiaries or for a permitted purpose (subject to their respective interests under, and the terms of, the trust);
- to perform the trust in accordance with its terms; and
- to be accountable for one’s performance to the beneficiaries (or the Attorney General, in the case of charitable trusts).

Acting for a proper purpose is covered by the duty to act honestly and in good faith. Performing the trust in accordance with its terms implies a requirement to know what those terms are.

6 *Do you have any comments about how they could be improved?*

We consider that there should only be four core duties, as they are set out in the above paragraph.

We strongly suggest that the duty to keep trust property identifiably separate from a trustee’s personal property should be a default duty.

The list of default duties should be specified as being non-exhaustive.

*Duty applies unless modified or excluded*

We consider that it should be clear that default duties may be modified or excluded either expressly or by inference. This would assist existing trusts that modify some or all of them by implication. Our suggestion is that the first phrase of clause 15(2) be amended to read that a trustee’s default duty may be modified or excluded by the terms of the trust expressly or impliedly by way of a contrary intention. See our responses to question 42 for further comment on this issue.

We consider that clause 15(3), while intended to be enabling, creates a negative inference that the modification of any default duty other than that contained in clauses 23, 30, 31 or 32 could be inconsistent with the mandatory duty in clause 20 (to act for the benefit of beneficiaries or to further the permitted purpose of the trust). This form of wording also creates an inference that the modification of any default duty contained in clauses 23, 30, 31 or 32 could be in breach of other mandatory duties (e.g. the duty to act honestly and in good faith). We suggest that
this could be alleviated by saying that the exclusion or modification of any one or more default duties will not of itself be inconsistent with any mandatory duty.

**Duty of advisers**

We do not have any in principle objection to the obligation to explain to settlors the impact of modifying or excluding a default duty. Our specific questions on this point are:

- How is it intended to apply to amendments made to the trust deed modifying default duties after the creation of the trust?

- If it is intended to apply to subsequent variations, do all persons who would be settlors, as defined in the Income Tax Act 2007, need to be informed? That would be impractical;

- How could this work for advisers to trustees who are declaring a trust (rather than there being a settlor).

However, we consider that in the context of the establishment of excluded trusts, the imposition of this obligation is of little practical value to the relevant parties. As a practical matter, the parties to the establishment of excluded trusts, including managed investment schemes, will be entering into the relevant documents in a professional capacity and will understand the impact of modifying the default duties.

Accordingly, we agree with the proposal that clause 15(4) not apply to excluded trusts.

**Duty to know the terms of the Trust**

As mentioned, this duty is not necessary if there is a duty to act in accordance with the terms of the trust as a required knowledge of the terms is implied.

**Duty to act in accordance with terms of trust**

Clause 18 should clarify that acting in accordance with the terms of the trust includes acting on the instructions of beneficiaries or such other persons to the extent provided for in the trust deed.

**Duty not to fetter future exercise of powers**

Arguably, every decision fetters the exercise of future powers. If an investment manager is appointed for a term or money is placed on term deposit (for example), future decision making is curtailed up to a point. We suggest this duty is refined or removed. Otherwise, as a practical matter, we can envisage that this duty will be invariably excluded or modified in trust deeds, especially in relation to excluded trusts.
7  Do you think there should be an additional mandatory duty for the trustee to act personally, in order to clarify how the trustee’s ability to give powers to other people operates (see cls 64 and 65)?

If such a duty is introduced, it should not be a mandatory duty but should be listed as a default duty so that it can be modified in accordance with clause 64. We believe it is often in the interests of the beneficiaries if trustees can delegate functions to whomever they think appropriate. We suggest that section 146 of the FMCA provides a suitable model for delegations in the excluded trust context.

8  Should there either be a different standard of care for powers of investment or is it appropriate for the general duty of care to apply in this case? Why?

We consider that the duty of care which applies to the exercise of any power of investment should be modified in the case of managed investment schemes to correspond to the standard of care imposed by the FMCA (section 143 and 144).

This can be achieved by excluding managers governed by the FMCA from the application of duties imposed in the Exposure Draft.

In terms of non-excluded trusts we are happy with the two standards of care, the higher standard applying to the exercise of investment powers by trustees. We note that both of them can be modified, as is the law currently. We expect that the suggestion of the higher standard for investment decisions will lead to the delegation of investment management decisions to external professionals. This may result in a greater cost to trust administration and a more conservative allocation of risk, which we think is appropriate in the context of a trust relationship.

Subpart 2 – Exemption and Indemnity Clauses

9  Do the exemption and indemnity provisions clearly set out the extent to which trustees can limit their liability?

No. The question of whether gross negligence differs from ordinary negligence and (if so) how to quantify the difference has not been reliably settled under New Zealand law – and the gross negligence standard is used very rarely in legislation.

Courts (and United Kingdom courts in particular) have not unanimously accepted the basic proposition that gross negligence has a different meaning to negligence.  

To our knowledge the only New Zealand case on point adopted the modern approach (being that the two terms are different and gross negligence requires more than

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4 For the view that there is no difference, see (for example) Hilston v Dibber (1842) 2 QB 646, Pentecost v London District Auditor [1951] 2 All ER 330 and Tradigrain SA v Internet [2007] EWCA Civ 154. For the view that the two terms are different, see (for example) Armitage v Nurse [1997] 2 All ER 705, The Hellespond Ardent [1997] 2 Llyod’s Rep. 547 and Camarata Property v Credit Suisse [2011] EWHC 479.
ordinary negligence) - albeit without any acknowledgement or consideration of the competing traditional view.⁵

The inclusion of this standard in the Exposure Draft has the potential to confuse the extent to which trustees are entitled to an indemnity from trust assets. Resolving this uncertainty will be costly to trustees and beneficiaries.

Subject to our comments below in relation to excluded trusts, we suggest that for the sake of certainty the Exposure Draft define gross negligence.

We also consider that the trustees of excluded trusts (excluding managed investment schemes) should continue to be free to set the terms on which the trustees of those trusts are indemnified. These trusts represent commercial arrangements to which the parties should be free to agree a different indemnity standard subject to the current limits imposed by the common law. Accordingly, the whole of subpart 2 should not apply to excluded trusts, not just clause 36. For managers of registered managed investment schemes, section 136 of the FMCA already addresses this point (albeit inconsistently with the Exposure Draft’s approach).

10 Do you have any comments about the language used, or otherwise about how the provisions could be improved?

It seems that the purpose of clause 36 has moved from being general settlor education/awareness of limitations of liability to a punitive tool for advisers who agree to act as trustees, draft their own indemnities and do not disclose their meaning fully. We thought that the broader purpose of requiring advisers generally to advise their settlor clients on limitations of liability was appropriate but would be happy if this were implemented at an industry body level, for example, a Practice Note such as the one drafted by STEP in the United Kingdom on the issue.

We note that, in the context of managed investment schemes, issues of debt securities to the public and other excluded trusts, a trustee’s right of indemnity should be respectively:

- replaced by the specific limits set out in the FMCA; and/or
- the subject of negotiations between experienced and well advised counterparties.

In these contexts, we consider that the commercial arrangements arrived at by the parties should be respected.

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11 *Should the liability of an advisor under cls 15(4) and 36 be specifically set out in the Bill or be left for development under ordinary tort principles?*

Our preference is that the liability should not be prescribed in the Exposure Draft, and it should be left for development under ordinary tort principles.

**Subpart 3 – Trustee’s obligations to keep and give trust information**

12 *Do these provisions clearly set out a trustee’s obligation to keep and give trust information?*

No – we do not consider that these provisions clearly set out a trustee’s obligations to keep and give trust information for the reasons set out at question 13 below.

13 *Do you have any suggestions about how the provisions could be improved?*

**List of assets to be kept by trustees**

We consider that the requirement in clause 37(c) to keep a list of all assets that comprise the trust property and of all liabilities of the trusts will in many instances be impractical. For example:

- trading trusts may acquire assets and incur liabilities on a daily basis in the ordinary course of running the business; and

- for some trusts the “assets” of the trust are limited to legal rights and there is no value to maintaining a list of such assets.

We note that a large number of excluded trusts (particularly managed investment schemes and securitisations) are externally administered and/or managed. That is, the manager/trustee has delegated to a professional manager or administration manager aspects of the administration and operation of the relevant trust. In recognition of this commercial reality, the obligation to retain records in the FMCA is able to be satisfied by “ensuring those records are kept” (see section 158 of the FMCA) and we submit that this should also be the case in the Exposure Draft. Certain excluded trusts are trusts over legal rights (e.g. security trust arrangements) and they do not have any assets as such. It is unclear to us how this requirement would be applied in such cases.

Finally, with regards to the obligation to retain accounting records and financial statements, we note that sub part 2 of part 7 of the FMCA imposes specific obligations on “FMC reporting entities” on the preparation of accounting records and financial statements. In the context of a non-restricted managed investment scheme, preparation and retention of accounting records and financial statements is expressly a function of the manager of the scheme (not the supervisor). We think it important that the Exposure Draft not impose duplicative obligations to those contained in the FMCA.
Who is required to keep records
Clause 38(b) requires that copies of all records must be held by at least one trustee. In the case of trading trusts and many trusts for a permitted purpose, including charitable trusts, the size of their operations may mean this is not practicable. We query whether, as an alternative to a trustee holding the records, those records could be held by that trust’s:

- secretary or Chief Executive (or an analogous officer of the trust), or
- in the case of charitable trusts (who are either incorporated under the Charitable Trusts Act 1957 or registered charities under the Charities Act 2005) at the publicly recorded registered office / address for service.

Period of time records are to be held
Excluded trusts and trading trusts more generally may continue for extended periods and may transact frequently. This has the potential to result in a large volume of records.

In this context, the current obligation in the Exposure Draft for a trustee to keep records indefinitely may prove administratively difficult as it could require the retention of a significant amount of information.

While clause 37 does posit that a trustee is only required to retain records so far as is reasonable, in practice it may be difficult for trustees to determine what is reasonable, particularly where reasonableness will be assessed after the fact when those records are required.

We submit that it would be more administratively workable for the Exposure Draft to set a minimum period for which records (other than the trust deed (or any other document that contains the terms of the trust) and any variations made to the trust deed or terms of the trust) must be retained. This would enable trustees to determine on a case by case basis whether any specific records should be retained for a longer period.

While the Law Commission has stated that either a 7 or 20 year record retention period is potentially too short, given the duration of trusts and the likely timeframe over which decisions are made, we disagree with this view. A 7 year period has been set by Parliament for both companies and managed investment schemes (see section 227 of the FMCA) and we are not aware of any systemic issues resulting from this.

We submit that any such period should be aligned with the seven year record retention period set out section 458 of the FMCA.

Historical records
A number of trusts have been in existence for a number of years. For example we are anecdotally aware of securitisation trusts which have been in operation since the early 2000’s (if not earlier) and a number of managed investment structures have
been in operation for considerably longer (since at least the 1980s and in a few cases since the early-to-mid 1900s).

These trusts have not previously had an express obligation to keep all of the records detailed in clause 37 and imposing a strict obligation, particularly one which would err on the side of requiring records to be retained, risks placing the trustees of such trusts at risk of breaching the Trusts Act for historically compliant behaviour. This issue should at a minimum be addressed through the transitional provisions.

**Obligation to provide records to beneficiaries**

We consider that clauses 41 to 47 are too heavily weighted in favour of beneficiaries. Insufficient discretion is given to the trustees and insufficient heed is paid to a settlor’s wishes and expectations and that these may change over time. We are concerned that there is an assumption that some information must be made available. This is at odds with the statements in both the *Schmidt v Rosewood* and *Erceg* decisions that no beneficiary has an absolute right to information.

We note that several of the clauses are ambiguous (for example reference to ‘as soon as practicable’ in clause 43 and ‘a reasonable period of time’ in clause 44) and some appear contradictory (for example clauses 42(2) and 44(2)).

It appears to us that the Exposure Draft is seeking to impose a standard of reasonableness on trustees with regard to the disclosure of information. We do not consider that this is appropriate; trustees must act in accordance with their duties as trustees, and this standard may not align with “reasonableness” in every instance.

We also query what is a ‘sufficient’ amount of trust information and a ‘sufficient’ number of beneficiaries under clause 42(1)? What does ‘enable the terms of the trust to be enforced’ in the definition of trust information and under clause 42(1) actually mean?

The definition of qualifying beneficiary in clause 41 is inadequate. There is no indication of who is to assess this and when. It would be more helpful if trustees were to be able to assess who is a qualifying beneficiary subjectively.

There is also no reference to providing information under clause 42 to a representative for a child.

It is also unclear to us, if the basic trust information is provided to a representative, whether that person can then request information on behalf of the beneficiary. If so, this could be problematic. For example, an ex-spouse might request information as a representative of a child who is a beneficiary for their own purposes.

The definition of trust information might include memoranda of guidance by settlors. These should not be required to be disclosed as they may include private reasons for the settlor’s preferences. The fact that they may come within the definition of trust information suggests the definition is too wide.
We also consider:

- that the factors to be considered in clause 45(2) should not be exhaustive and we recommend adding a general factor, namely ‘such other matters as the trustees consider relevant’ or similar (For example there may be privacy issues or commercial sensitivity);

- that the use to which the trustees reasonably expect the information to be put should be a factor able to be taken into consideration; and

- that the effect of disclosure on the beneficiary should also be added as an additional factor in clause 45(2).

Clause 47 does not follow the Law Commission’s recommendation on this point. The trustees should be able to apply to the court for an order as to whether they are required to provide information requested. In reviewing the matter, the court should apply usual principles applicable to any review of a trustee discretion, i.e. only intervene if the trustees have erred in law, not taken relevant considerations or matters into account, or taken irrelevant considerations into account.

We note that permitted purpose, and in particular charitable, trusts are accountable to the Attorney General rather than beneficiaries. In addition it is likely to be impracticable (and inappropriate) for individuals who have received a benefit from a charitable trust (for example a scholarship recipient) to be personally entitled to request information about that trust.

*Information provisions to not apply to excluded trusts or permitted purpose trusts which are registered charities*

We note that managed investment schemes are already subject to a detailed disclosure regime in the FMCA which includes specific rights for beneficiaries to obtain additional information. Investors invest in managed investment schemes on the basis of these rights and the Exposure Draft should not impose additional disclosure obligations on the trustees and managers of managed investment schemes.

Likewise, issuers of debt securities to the public are required to comply with detailed disclosure requirements under the FMCA, including having available copies of the relevant trust deed and the terms of the debt securities that have been issued. Moreover, in respect of a number of other forms of excluded trusts where there are residual beneficiaries only (with limited rights to receive trust property), the intention is that such residual beneficiaries have only very limited visibility of the ongoing operation and administration of the trust.

In addition, permitted purpose trusts which are registered under the Charities Act 2005 are subject to significant obligations in relation to the disclosure of information, including trustee details and financial information. This information is disclosed to the Department of Internal Affairs and some is also made publicly available. Given permitted purpose trusts are accountable to the Attorney General
and certain information is also publicly available, it is likely to be both impractical and inappropriate for individuals\(^6\) to be personally entitled to request information.

Given the above, we submit it is not appropriate that the information provisions apply to excluded trusts or permitted purpose trusts registered under the Charities Act.

**Part 4 – Trustee’s Powers and Indemnities**

**Subpart 1 – Powers of Trustee**

14 *Do you think subpart 1 of Part 4 clearly sets out the powers of a trustee?*

No – see our responses to question 15 below.

15 *Do you have any comments about how the provisions could be improved?*

We note, and agree with, the proposal to clarify the general powers of the trustee in clause 48 and make them more consistent with the approach taken by the Companies Act 1993 in relation to the capacity and powers of a company.

However, we disagree with the qualification to the ability to limit the powers of the trustee. If a settlor wishes to restrict the types of investment of the trust, the settlor should be able to do so.

We submit that the provisions in respect of the protection of persons dealing with a trustee in clause 50 should also be made more consistent with the corresponding provisions in section 18 of the Companies Act. In particular, the protection should extend to any person dealing with the trustee, and not be limited to transferees or assignees of trust property.

We consider that the current wording is unnecessarily limited, and potentially gives rise to issues trying to determine whether a particular third party falls within the category of a “transferee or assignee”. We see no reason to distinguish such persons from other third parties dealing with a trustee, such as a mortgagee.

In the context of clause 52, we suggest that clause 52(1)(e) takes account of the risk of loss generally (of income as well as capital loss). This would help to provide further clarity that the trustee may have regard to the need to enter into hedging and/or derivatives to protect both the capital and income of the trust against loss. Historically, there have been issues as to whether (and the extent to which) trustees of trusts have had the power to enter into derivatives and other hedging arrangements as part of the investment activities of a trust in order to protect the underlying trust property, particularly if there was no specific power given to the trustee under a trust deed to enter into such arrangements.

\(^6\) In our view, the definition of *beneficiary* is broad enough to allow identification of individual beneficiaries of permitted purpose trusts. For example, a person who has received a grant or scholarship from a charitable trust will be considered a *beneficiary* for the purposes of the Act.
In relation to clause 56, we assume the reference to ‘intermediate income’ should be to ‘immediate income’ or alternatively just to ‘income’?

We consider that clauses 64 to 68 should not apply to excluded trusts. We consider that such a prescribed regime for the delegation of powers and functions is not appropriate in the context of sophisticated arrangements, where the trustee and the various other parties involved (e.g. the trust manager and any custodian) should be free to contract how they see fit in relation to their roles under the trust deed (for example who are “eligible persons” under clause 64(4) and the extent to which the trustee needs to keep any such delegations under review pursuant to clause 65). While clause 64(5) provides some flexibility, this relies on the relevant provisions being excluded by the terms of the excluded trust arrangements. We submit that the default position should be that they do not apply to excluded trusts, and the relevant parties in relation to excluded trusts should be free to contract as they see fit in relation to who exercises a trustee’s powers. The FMCA also contains a regime for delegation by trustees and, to the extent that that Act applies, that regime should apply.

We also consider that the proposed two year time limit on delegation is too short. Parties may be absent from New Zealand for longer than two years.

In relation to non-excluded trusts we are generally happy with these provisions as they are a vast improvement on the current position. Our comments are as follows:

- Presumably clause 65(2) applies unless the general duty of care has been modified or removed or does clause 65(3) override any modification?

- We assume that clause 66(6) prevents a trust deed from granting a trustee a power to grant a power of attorney in broader circumstances than specified in clause 66(2).

- How do these restrictions apply to a power of attorney granted by a trustee in security for an obligation under a commercial arrangement? For example, a trustee selling shares might be asked to grant the purchaser a security power of attorney so that the purchaser could sign on behalf of the trustee if he or she defaults on an obligation or where a trustee grants security over a lease.

- If the trustee is a company that can avail itself of the power in the Companies Act and/or its constitution to appoint an attorney, does that trump the limitations in clause 66 as it is not in the terms of the trust deed?

**Notice to potential creditors**

We also have doubts as to the workability of clause 75 as a trustee may not be able to practically identify all potential creditors. Further, the tenor of the clause differs from that in the existing section 35 of the Trustee Act 1956 which it was intended to replicate. This provision appears to operate to require the identification exercise to be completed for all distributions made by a trust (including those in the ordinary course of business). We do not expect that the clause was intended to impact the
making of any distributions where the trustees are reasonably satisfied, having made due inquiries, that the trust will remain solvent immediately following the distribution. We suggest this is made clearer.

In situations where notice to potential creditors is required, we consider that public notice, similar to that required by section 3 of the Companies Act 1993, should be deemed to be notice to “potential creditors”.

16 **R14 (3) of the Commission’s report recommended clarifying a trustee can consider the objectives or purpose of a trust when deciding how to manage trust property. Is this achieved by including the objectives or permitted purpose of the trust as a matter to have regard to in exercise a power of investment?**

Yes, as one matter to be considered. However we consider that:

- wishes expressed by the settlor which pertain to the nature of investments;
- the status of the trust; and
- policies applicable to the trust’s overall investment strategy (e.g. an ethical investment policy),

should be added to the list in clause 52(1).

17 **If not, how could the Bill implement this recommendation?**

18 **Do you think the Bill needs to specifically provide that people engaged to act on behalf of a trustee can be paid, considering that the default duty is for a trustee not to be paid?**

No. The costs and expenses charged by a person engaged to act by a trustee, in their capacity as trustee, are properly characterised as expenses of the relevant trust and accordingly are (assuming the trustee is acting honestly and in good faith) able to be paid from the assets of the relevant trust.

Expressly stating for the avoidance of doubt that these expenses are able to be paid from trust assets brings into question the ability of a trustee to pay other trust expenses in the absence of an equivalent provision.

Subpart 2 – Trustees’ Indemnities

19 **Does subpart 2 of Part 4 appropriately set out the rules around a trustee’s liability or indemnity arrangements?**

Clause 76 correctly states the existing law (subject to our comments below in relation to managed investment schemes). That existing law is not well understood, so it is useful to have the clarity that the clause would bring.
The clause should go on to provide that a trustee may, in contracting with any creditor, agree to limit (but not exclude) the trustee’s liability, including to the assets of the trust. Our concern is that the clause could be read as prohibiting limitations of liability. It is quite orthodox for independent trustees’ personal liability to be limited to the assets of the trust. However, such a provision should not override clause 79.

The cross referencing in sub-sections (3) and (4) of clause 76 appears to us to be incorrect. In each case the subsection should read “Subsections (1) and (2) apply ...”. The indemnity in sub-clause (2) should apply regardless of the terms of the trust, and in relation to a former trustee. The purpose is to protect creditors as well as trustees. Our submission is consistent with the Law Commission’s recommendation R47(3) and (5) in Review of the Law of Trusts: A Trusts Act for New Zealand. It should also be made clear that clause 77 does not limit clause 76.

Clause 79 is a substantial and important improvement for creditors of trusts. We are very much in favour of its adoption. One enhancement we suggest is that clause 79(3) be clarified so that it is clear a creditor needs to have knowledge that the relevant circumstances had the effect of excluding or limiting the trustee’s indemnity, in order to be treated as not acting in good faith.

We have limited comments on the clause as drafted:

- For the avoidance of doubt, sub-clause (2) could usefully expressly state that it will operate notwithstanding clause 34. That is, the creditor can seek an indemnity even where the trustee would be precluded from an indemnity due to clause 34;

- Sub-clause (4)(c) could be clearer. The indemnity created by the clause as a whole could affect the ranking of creditors in some cases. Where one creditor can make use of the indemnity in clause 79, and another cannot, then clearly the first will be paid from the trust assets and the second will be limited to the assets of the trustee (subject to any limit of liability in the contract). In that sense, the clause definitely affects the creditors’ “ranking”. But the sub-clause is merely designed, we assume, to confirm that the mechanism in clause 79 does not affect the ranking of creditors who are entitled to be indemnified from the trust assets.

**Inconsistency with the FMCA in relation to managed investment schemes and debt securities**

In the context of managed investment schemes, clauses 76 and 79 are inconsistent with sections 105 and 136 of the FMCA.

Clause 76(1) permits a trustee who reasonably incurs an expense or a liability when acting on behalf of a trust to be reimbursed from the trust property for the expense or liability if the trustee has paid it from the trustee’s own funds. Clause 76(3) provides that clause 76(1) applies regardless of any contrary intention expressed in the terms of the trust.
In contrast, section 136(1) of the FMCA requires that if a manager/supervisor of a registered scheme has any rights to be indemnified for liabilities or expenses incurred in relation to the performance of the manager’s issuer obligations or the supervisor’s licensee obligations, those rights must be set out in the scheme’s governing document and must be available only in relation to the proper performance of the duties under the relevant sections of the FMCA. Section 105 of the FMCA is a similar provision in relation to the indemnity available to a supervisor (i.e. trustee) in respect of debt securities.

Similarly, clause 79 allows a creditor to have a limited claim to trust property through the trustee’s indemnity, and allows a creditor to claim to be indemnified out of the trust property as if the creditor were a trustee, even if the trustee for any reason is not entitled to be fully indemnified (for example, if the trustee incurred the liability in breach of trust).

However, section 136(2) of the FMCA requires that:

If an investment manager of a registered scheme has any rights to be indemnified for liabilities or expenses incurred in relation to the performance of the investment manager’s contracted functions, those rights—

(a) must be set out—

(i) in the scheme’s governing document; or

(ii) in the contract between the investment manager and the manager, provided that the scheme’s governing document contains a power that permits such an indemnity; and

(b) must be available only in relation to the proper performance of the duty under section 144.

In addition, clause 77 provides that a trustee may be indemnified from the trust property for a specific performance or exercise, or a non-performance or non-exercise, of a trustee duty, power or function if all of the adult beneficiaries agree. However, the beneficiaries cannot indemnify the trustee if the exercise or non-exercise of the trustee duty, power, or function involved the dishonesty, gross negligence, or wilful misconduct by the trustee. These carve-outs are similar, but not the same as the carve-outs for indemnification under the FMCA (see in particular section 154 of the FMCA, which requires the supervisor to comply with a professional standard of care).

Accordingly, if subpart 2 of Part 4 (Trustees’ Indemnities) is to apply to registered managed investment schemes (especially as they relate to the supervisor, manager and an investment manager) then the inconsistency with the FMCA will need to be resolved.
We also consider that clause 81 of the Exposure Draft should not apply where a trustee is assigning a lease as security for obligations.

20 Do you have any comments about how the provisions could be improved?

Extension of indemnification by beneficiaries
Clause 77 should not apply to certain excluded trusts, especially securitisations, covered bond trusts and structured finance arrangements. The trust deeds that are negotiated for such trusts are designed to have clearly specified limits to the right of indemnification that the trustee may have. Any extension of this may have a material adverse impact on the structure of the arrangements, especially given the priority in the payment waterfall that such rights of indemnity have (see below).

Moreover, it is not appropriate in the context of excluded trusts that have residual beneficiaries only (such as securitisations, covered bond trusts and structured finance arrangements), that such residual beneficiaries be given the power to restructure the way in which such rights of indemnity should operate.

In addition, we consider there should be express mention that clause 77 does not apply in the context of permitted purpose trusts that are charitable trusts.

Overturning agreed ranking of trust property
A number of the types of excluded trusts, such as securitisations, covered bond trusts and structured finance arrangements, include strict orders in which trust property is applied to meet expenses and liabilities (known as payment waterfalls). These payment waterfalls are required by rating agencies in order for the structures to receive the very high credit ratings that they need for notes issued by the structures in order for them to operate effectively.

Clause 78(2) allows courts to overturn the agreed payment waterfalls on the application of the trustee, any creditor or a beneficiary. Allowing a court to overturn the agreed position of the parties on the application by certain persons is likely to result in unnecessary uncertainty for such structures and impact on the credit rating that rating agencies may issue for them. As such, clause 78(2) should not apply to excluded trusts.

Rights of set off – Enforcement of mutuality on liquidation
Although clause 79 provides creditors (such as derivative counterparties) the right to “step in” to the position of the trustee and claim directly against the trust property if the trustee does not have (or has lost) the right to be indemnified from the trust property as a consequence of incurring a liability under a derivative arrangement, it needs to be made clear that the derivative counterparty can exercise rights of set off in such circumstances and that such rights are protected where a receiver or liquidator (see comments below on clause 125) is appointed to the trust when the trust has effectively become insolvent.

By way of background, we note that changes were recently proposed to the Companies Act through clauses 27 and 28 of the Regulatory Systems (Commercial
Matters) Amendment Bill to broaden the ability of derivative counterparties to net amounts under bilateral netting arrangements where the counterparty to the derivative transaction is a trustee.

However, we are aware that there are concerns that those clauses are of limited value in the context of providing robust enforceability opinions in relation to derivative arrangements with trustees. This is because clauses 27 and 28 of the Regulatory Systems (Commercial Matters) Amendment Bill address the position in relation to mutuality on the insolvency of a trustee only, and do not clarify that netting is enforceable on the insolvency of the underlying trust property. There are issues for creditors if there is a loss of access to the underlying trust property in the event of the insolvency of the trustee, for example if the trustee loses its right of indemnity from the trust property.

By allowing the creditor to “step in” to the position of the trustee and claim directly against the trust property as proposed by clause 79 takes the first step to create such enforceability. However, the legislation needs to go further to clarify that set off rights can be exercised (i.e. making it clear that there are mutual credits and mutual debts between the creditor and the trust fund in such circumstances), and that the right of set off will not be undermined in circumstances where the trust fund is insolvent through the appointment of a receiver, liquidator or other official having power to direct the application or distribution of the trust assets. We consider that provisions analogous to those set out in sections 310A to 310O of the Companies Act (especially in relation to bilateral netting agreements) would be appropriate.

We note that this issue was raised at paragraph 16.34 of the Law Commission’s Report, and we consider that the Exposure Draft is an appropriate place in which to address it. Given the growth in the use of derivatives by a broad range of trusts, trading trusts as well as wholesale investment trusts and other excluded trusts, we consider it is important that the opportunity is taken to clarify the position. We are mindful that New Zealand is out of step with other jurisdictions (Australia, for example, has a robust netting regime for trusts as part of its Payments Systems and Netting Act 1998), and with the increased use of international central clearing platforms for vanilla derivatives for which netting enforceability is critical, the lack of clarity on the issue is likely to leave New Zealand trusts in a more disadvantaged position going forward.

This is an area we would be happy to discuss in further detail with the Ministry.

**Part 5 – Appointment and Discharge of Trustees**

**21 Do the provisions create a clear and workable framework for appointing and removing trustees and transfer of trust property?**

*Application to review exercise of power to remove and appoint trustee*

Clause 91 should not apply in the respect of excluded trusts, particularly those such as securitisations, covered bond trusts and structured finance arrangements, in
respect of which the beneficiary’s interest is limited to any residue remaining after creditors are paid.

**Removal of trustee**

We do not consider the strictness of clause 95(1) (i.e. requiring a person with the power to remove a trustee to act to remove that trustee where their powers have not been delegated in a manner authorised by an enactment or by the terms of the trust) to be appropriate in the context of an excluded trust. We submit that, in the context of excluded trusts, persons with the power to remove and appoint trustees should be able to remove the trustee of an excluded trust but should not be required to do so.

In the context of a number of the types of excluded trust (particularly non-restricted managed investment schemes), the replacement of a trustee is an expensive and potentially fraught exercise - which can involve a manager having to obtain a court order removing the trustee.

This has the potential to impose significant costs on investors or creditors out of all proportion to the harm caused by a potentially technical defect in the manner in which a trustee has delegated the performance of certain of its functions.

For all other trusts, including permitted purpose trusts which are charitable trusts, we submit that there would be merit in aligning the trustee disqualification criteria (set out in clause 86(2)) with disqualification criteria for:

- directors (set out in section 151(2) of the Companies Act 1993);
- general partners of limited partnerships (set out in section 19A and 19B of the Limited Partnerships Act 2008); and
- officers of charities (set out in section 16(2) of the Charities Act 2005.

Disqualification criteria to be added to clause 86(2) include individuals who have been prohibited from being a director or promoter or concerned in the management of an incorporated or unincorporated body under the Companies Act, the Financial Markets Conduct Act, the Takeovers Act or Limited Partnerships Act.

Finally, we note an inconsistency between the age at which a person may be an officer of a charity under the Charities Act (age 16) and a trustee of a trust under this Act (age 18). We query whether there is a continued reason for a lower age in relation to charities registered under the Charities Act, or whether a consequential amendment to align with the terms of this Act is appropriate.

**Application to prevent removal (clause 96)**

In the circumstances where the trustee of an excluded trust is required to be removed, it is not appropriate for the parties to have to wait 21 days to give effect to that removal.
Practically, the trustee of an excluded trust is unlikely to be removed unless the trustee is facing significant financial stress or has materially failed in the performance of their duties. In those circumstances, investors’ funds or creditors’ rights are unduly jeopardised by not permitting the other parties involved with the excluded trust to remove the trustee immediately.

We believe that parts of Part 5 overlap with the FMCA requirements for managed investment schemes. Accordingly, we believe that Part 5 should be modified to remove any inconsistency with, or duplication of, the FMCA provisions.

**Vesting of trust property on appointment of new trustee or retirement of trustee (clause 102)**

Title to financial products is typically recorded solely in the register of the provider of those products (whether a shareholder, unit holder, debt holder or member register).

Participants in the financial markets rely on the validity of the information contained in their registers when dealing with clients/investors and in order to meet their own obligations (e.g. where they are required to send investors notices or to act on the instructions of the registered holders). For this reason the current Trustee Act 1956 recognises that automatic vesting does not apply “to any share, stock, annuity, or property which is transferable only in books kept by a company or other body”.

Changing the current position undermines the ability of financial markets participants to rely on their registers in operating their own businesses and meeting their own obligations.

While clause 103 provides some help on the issue by effectively making the application of clause 102 subject to the requirements of any other Act, we recommend that automatic vesting not apply generally if the relevant trust property is recorded in a register and is transferable only through a change in that register (irrespective of whether that requirement is a statutory or a contractual one).

22 **Do you have any comments about how the provisions could be improved?**

Clause 86(4) should include a person who has been certified by a health practitioner as being mentally incapable.

Clause 88(1)(c)(ii) should read “a person holding an enduring power of attorney over the property of a trustee who has been certified by a health practitioner as being mentally incapable:”

Otherwise, see our response to question 21 above.
Clause 88(1) sets out the people who may remove a trustee – should this include the receiver of a company in receivership?

Yes. We recommend that clause 88(1)(a) cover both the person nominated and any receiver, liquidator, administrator, voluntary administrator, statutory manager or similar person who may be appointed in respect of such person.

Part 6 – Revocation and Variation of Trusts

Do these provisions set out a clear process for the revocation or variation of trusts in limited circumstances?

These provisions are sufficiently clear in relation to non-excluded trusts, subject to our comments below in question 25.

Part 6 as a whole (i.e. clauses 108 to 113, and in particular clause 110) should not apply to excluded trusts, not just clauses 108 and 109. The trust deeds that are negotiated for such trusts are designed to have clearly specified circumstances in which they can be revoked or varied, or in which any distribution is made to beneficiaries. Any extension of these circumstances could have a material adverse effect on the structure of the arrangements, and adversely impact on their ability to operate effectively and in accordance with their intended terms. This would not only create issues for the various non-beneficiary parties to the arrangements, especially creditors and investors, but also cause issues for any credit rating agencies that provide ratings to the structures.

Clause 110 particularly would be contrary to withdrawal suspension rights in the governing document of a managed investment scheme. Withdrawal suspension rights are important provisions which allow for the orderly withdrawal of investments from a managed investment scheme in the event of a market failure or illiquidity of investments.

Moreover, it is inappropriate in the context of excluded trusts that have residual beneficiaries only (such as securitisations, covered bond trusts and structured finance arrangements) that such residual beneficiaries be given any control or influence over the way in which such structures should operate.

These provisions should not apply to permitted purpose trusts (including charitable trusts) either, recognising that those trusts are accountable to the Attorney General rather than beneficiaries.

Do you have any comments about how the provisions could be improved?

We suggest that the language in clause 77(3) could be replicated and inserted into clause 108 as follows:

"The trustees of a trust must terminate the trust and distribute the trust property on being required to do so by the beneficiaries who are together
absolutely entitled to the trust property if the conditions set out in sub-section (2) are satisfied.”

Subsection (2) should then refer to the conditions for the termination of a trust under subsection (1), to ensure that the conditions do not apply more broadly, acknowledging that trust deeds may have alternative wind up mechanisms.

This phrase should also be inserted into clause 109 as follows:

“The beneficiaries of a trust who are together absolutely entitled to the trust property acting unanimously may do any of the following things, if the conditions set out in subsection (2) are satisfied:”

A further sub-clause should be included at clause 109(1) which provides for the appointment of beneficiaries of the trust.

Clauses 111 and 112 should clarify who can make the applications to the court – perhaps in the style of clause 113(2).

Part 7 – Court Powers and Dispute Resolution

26 Does Part 7 clearly set out the appropriate powers of the court?

Clauses 114 and 115 provide that the court may set aside an act or decision, or direct the trustees to act, in respect of decisions made by the trustees where the decisions were not reasonably open to the trustees in the circumstances. In our view, the onus of proof is inappropriately allocated – please see our comments in question 27 below.

27 Do you have any comments about how the provisions could be improved?

Clause 115 sets out a two-stage process whereby a beneficiary must adduce evidence that raises a genuine and substantial dispute as to whether the act, omission, or decision in question was or is reasonably open to the trustee in the circumstances. At that point, the onus of proof shifts to the trustee, to establish that the act, omission, or decision was or is reasonably open to him or her in the circumstances.

We have previously submitted that we consider this to be a highly significant step and we disagree with the approach. We are of the view that the approach taken should be as under the Queensland provision, with the onus remaining with the complaining beneficiary or beneficiary representative.

We consider that a settlor should also be able to be an applicant in addition to a beneficiary and a beneficiary’s representative.

Clauses 114 and 115 to not apply to excluded trusts
We consider that clauses 114 and 115 should not apply to excluded trusts.
In the context of excluded trusts that are managed investment schemes or relate to issues of debt securities to the public, our view is that the FMCA and FMSA provide adequate procedures in the event of manager/supervisor/trustee non-performance, and so it is unnecessary to apply a further layer of beneficiary protection under the Exposure Draft.

In relation to the other types of excluded trust, especially those that have residual beneficiaries only (such as securitisations, covered bond trusts and structured finance arrangements), it is not appropriate that residual beneficiaries be given any control or influence over the way in which such structures operate, and, accordingly, those persons should not have the ability to challenge the way in which a trustee has (or has not) acted.

**Review of the payment of the fee to the trustee not to apply to excluded trusts (clause 126)**

A number of the types of excluded trusts, such as securitisations, covered bond trusts and structured finance arrangements, are special purpose vehicles which have limited funds available to pay the various parties to the arrangements (including trustees, managers, investors and creditors). They use detailed payment models which are determined at the time that the arrangements are put in place. Accordingly, it is important that, in order for these structures to operate effectively (including to receive their high credit ratings), the fee arrangements that are agreed with the administrators of the structures (including the trustee) cannot be changed other than as contemplated by the arrangements.

Clause 126 allows courts to change the trustee fee arrangements which could result in unnecessary uncertainty for such structures and impact (where relevant) on the credit rating that they receive. As such, clause 126 should not apply to excluded trusts.

We note in this context that the trustees for these types of arrangements will be sophisticated entities who are able to negotiate appropriate fees for the services they provide without needing the assistance of potential court intervention.

**Will the provisions facilitate the use of alternative dispute resolution when there are disputes in relation to trusts?**

In the context of excluded trusts, our expectation is that the various parties involved will not generally want to use alternative dispute resolution processes to deal with disputes.

While we note the alternative dispute resolution process is optional, we suggest that in the case of excluded trusts the default position should be that the alternative dispute mechanism does not apply, rather than the parties needing to disapply the provisions. Managers and supervisors of managed investment schemes are required to be a member of a dispute resolution scheme (section 48 of the Financial Services Providers (Registration and Dispute Resolution) Act 2008). It would seem
unnecessary if the alternative dispute mechanism under the Exposure Draft also applied to them.

29 **Do you have any other comments about how Part 7 could be improved?**

The mechanism for appointing receivers (clause 125) is useful confirmation. But it does not advance or change the law in our view. As the Law Commission noted in its Review of the Law of Trusts: A Trusts Act for New Zealand, at 16.30, the High Court already has an inherent jurisdiction to appoint a receiver. The office of receiver is fundamentally different to that of a liquidator. A receiver appointed by the court will be in office for the purposes identified by the Court. Typically, there will be some need to protect the trust assets, or to deal with some other governance concern. This provision, if passed, will not be a general remedy for creditors seeking repayment.

Rather, creditors seeking repayment would benefit from the further comprehensive review indicated in the Law Commission’s report (including the comments at paragraph 8.72 of the Law Commission’s "Review of the Law of Trusts: Preferred Approach" publication). In our view, the interests of creditors would be greatly protected by the following:

- An express ability for the Court to appoint a liquidator to the trust assets, whether or not the trustee is or includes a company. This is distinct from a liquidation of a corporate trustee. Assets held on trust are beyond the reach of a liquidator of a corporate trustee, subject to the ability of the liquidator of the trustee to seek the assets in satisfaction of the trustee’s indemnity rights.

- A more detailed regime for dealing with trust assets on the appointment of a liquidator. This should be analogous to the regime for companies under Part 16 of the Companies Act.

- The current proposal in clause 125 for receivers (especially clause 125(4)) is too vague and provides too much discretion to the courts for it to be any real value to creditors of a trust.

- A framework for ensuring that trustees do not make distributions to beneficiaries in a manner that renders the trust assets insufficient to meet liabilities to creditors, similar to that contained in the Companies Act, sitting alongside subpart 6 of part 6 of the Property Law Act 2007.

**Part 8 – Miscellaneous Provisions**

30 **Do you have any comments about Part 8?**

We note that the audit provisions in clauses 142 to 147 do not apply if the trustee is a trustee corporation. We note in the context of a number of excluded trusts that subsidiaries of trustee corporations often perform the trustee role rather than the trustee corporation itself. Such subsidiaries should not be treated differently to the trustee corporations themselves as they are under the management and control of
the trustee corporations. Accordingly, the exclusion wording at the end of clause 142(1) should be extended to subsidiaries of trustee corporations as well.

Managed investment schemes are subject to the supervision of a supervisor and the jurisdiction of the FMA. There are certain audit requirements imposed on their operations by the FMCA. Accordingly, we suggest that clauses 142 to 147 should not apply to managed investment schemes registered under the FMCA.

Trusts which are subject to audit obligations imposed by other enactments, for example trusts which are required to be audited under the Charities Act, should also be excluded from the audit provisions under this Act.

Schedule 1 – Transitional, Savings and Related Provisions

31 Do you have any comments on the transitional provisions in schedule 1?

Need for certainty
See our comments on question 42.

Application of clauses 53 and 54
We submit that the transitional rule in relation to clauses 53 and 54 is unclear about how it applies to existing trusts if there is already a contrary intention in the terms of the trust.

If the intention is that the rule in clause 7 of schedule 1 applies to existing trusts only where there is currently no contrary intention in the terms of the trust (and allows for the trust to provide for that contrary intention in the 6 months between enactment of the Trust Act and commencement of the Act), the wording of clause 7 should be clarified.

If the intention is that a trust must re-contract out of clauses 53 and 54 (as applicable) despite the terms of the trust already indicating the contrary intention, this is an inappropriate result and we submit that this result should be either removed entirely or excluded in the case of excluded trusts.

32 Are other specific transitional provisions required?

As noted above, we query whether the transitional period for existing trusts is long enough under the proposed Act. The Financial Markets Conduct Act had a transitional period of two years and the Incorporated Societies Bill has, in respect of amending the rules of existing societies, a transition period of four years.

Given the number of private family trusts in New Zealand, we submit that a longer transition period (more akin to the period provided in the Incorporated Societies Bill) is provided.
Schedule 2 – Wholesale Investment Trusts

Do you have comments about the treatment of wholesale investment trusts in schedule 2?

Meaning of wholesale investment trust in clause 1(1) of Schedule 2
The term “wholesale investment trust” should be changed to “excluded trust” and capture, amongst other things, managed investment schemes and trusts required for offers of debt securities to the public which are regulated by the FMCA (and, in relation to KiwiSaver schemes, the KiwiSaver Act 2006 (KSA)) as well as historical structures which were offered under, or in accordance with, earlier legislation, including restricted schemes under the FMCA and cash and term PIE products.

Investors in (and the beneficiaries of) managed investment schemes have the benefit of the protections in the FMCA and, in some cases, the KSA. Likewise, investors in offers of debt securities to the public have the benefit of the protections in the FMCA.

Our suggested replacement definition of wholesale investment trust is set out in appendix 1 to this submission.

Reasons for other changes to the meaning of wholesale investment trust

Removal of references to "other" wholesale investors
We suggest removing references to "other" wholesale investors where they currently appear in the definition, as the entities listed in the introduction to clause 1 of Schedule 2 are not the same as “wholesale investors” as defined. "Large” as defined in the definition of “wholesale investor” is quite a different test to the Financial Reporting Act 2013 definition of "large”.

In this context, we question why the draft definition uses the "large” test under the Financial Reporting Act 2013, when, in respect of other "wholesale” tests, the definition uses FMCA concepts. We suggest that there be a consistency of approach and (if the concept is retained) the "large” test under the FMCA is used instead.

The use of and/or
We suggest clarifying where tests should be "and” rather than "and/or” (for example, covered bond trusts borrow money from a registered bank, as well as guarantee the payment of covered bonds).

References to borrowing and lending money
We believe that the use of:

- “Investing in financial products” (incorporated through the definition of “investment business”); and
"offering financial products" / "offer ...of financial products" (e.g. in clauses 1(1)(a) and (2) of Schedule 2),
is confusing. This wording should be clarified or added to so that it is clear that making loans and borrowing (as applicable) is covered by the wording (so that security trust arrangements in relation to syndicated loans fall within the definition). We note that not all lenders are New Zealand registered banks or non-bank deposit takers. While technically the existing wording may be wide enough to capture borrowing and lending money, it is very artificial drafting.

Territorial limits to the wholesale investor aspect of the definition
The "wholesale investor" aspects of the definition should apply to the extent offers of financial products are made in New Zealand.

Disapplied provisions of the Trusts Act
The following provisions of the draft Trusts Act should also be disapplied or modified in respect of excluded trusts (in addition to those specified):

- Clauses 33 to 35 for the reasons discussed under questions 9 and 10;
- Clauses 41 to 47 for the reasons discussed under question 13;
- Clauses 64 to 68 for the reasons discussed under question 15;
- Clause 77 for the reasons discussed under question 20;
- Clause 78(2) for the reasons discussed under question 20;
- Clauses 91, 95(1) and 96 for the reasons discussed under question 21;
- Clauses 110 to 113 for the reasons discussed under question 24;
- Clauses 114 and 115 for the reasons discussed under question 27;
- Clause 126 for the reasons discussed under question 27;
- Clauses 132 to 138 for the reasons discussed under question 28; and
- Clause 142 to 147 for the reasons discussed under question 30.

Repealed Sections of the Trustee Act 1956

34 Do you agree that the proposed repealed sections aren’t needed in the Bill?
Yes.
If not, which sections do you think are still required in the Bill?

Concluding General Questions

36 The new Trusts Act is intended to work alongside other statutes that involve trusts. Do you see any issues with the way in which the new Act will interact with any such existing statutes?

Māori Land Trusts

Recommendation 1(6) of the Review of the Law of Trusts has not been carried through to the Trusts Bill. That recommendation was that the Trusts Act include a provision along the following lines:

"Nothing in this Act shall detract from or affect any provision of Te Ture Whenua Māori Act 1993 and the jurisdiction of the Māori Land Court over trusts created under that Act”.

We agree with this recommendation and submit that the Trusts Bill be amended to include this language.

It is widely recognised and understood that the current Trustee Act 1956 and general trust law are applicable to Māori land trusts where TTWMA is silent. TTWMA provides much of the law regarding the constitution and administration of Māori land trusts and powers of the Maori Land Court in relation to those trusts. While it is arguable that adding such a clause into the new Trusts Act is for the avoidance of doubt on the basis that it reflects how the current law would be applied in practice in any event, the purpose of this Act is to make trust law more simple to understand and apply. Adding such a clause is consistent with this overall purpose.

Excluded Trusts

A number of trusts which will be subject to the requirements of the replacement Trusts Act are governed by detailed regimes set out in earlier statutes such as the KSA and more recently the FMCA.

To the extent that legislation places express requirements on the governance and administration of those trusts the provisions of the Trusts Act should be read subject to that legislation.

Specifically, the Trusts Act should expressly acknowledge in clause 3 that it, the rights contained within it and the obligations it imposes are to be read subject to the provisions of the FMCA, KSA, FMSA, TTWMA, Charitable Trusts Act and Charities Act.
We acknowledge that, as a matter of ordinary statutory interpretation:

- to the extent of any inconsistency a newer statute overrides any later statute; but
- a statute of general application must be read subject to any statute dealing with specific subject matter.

However, determining which piece of legislation overrules the other in any specific situation can be a fraught process particularly where there are competing interests (see for example Trustees Executors Limited v The Official Assignee [2015] NZCA 118, which sought to determine the primacy as between the Insolvency Act 2006 and the KSA).

In addition, at the time which any inconsistency arises, trustees will need certainty as to which statute prevails. See for example our response to question 19 in relation to the inconsistency with the FMCA for managed investment schemes.

Accordingly, we think it appropriate that the Trusts Act expressly recognises that it is to be read subject to the provisions of the FMCA, KSA, FMSA, TTWMA, Charitable Trusts Act and Charities Act.

Given the breadth of the definition of excluded trust, we consider that trusts who meet the definition of excluded trusts should be able to opt out of the application of the excluded trusts regime. Careful thought will need to be given to any such opt-out to avoid parties utilising it to circumvent existing commercial arrangements.

Do you think the Bill sets out key rules relating to trusts in a way that can be easily understood and applied by everyday people who use trusts?

Do you have any suggestions about how the Bill could be improved for everyday people who use trusts?

Do you think the changes in the Bill will address problems related to the complexity and expense of administering trusts?

If not, how could the Bill further facilitate the administration of trusts?

The intention is that the Bill would not require existing trust deeds to be changed. Do you agree that this is the case?

No.
42 If not, what areas of the Bill would require existing trust deeds to be changed?

Most non-excluded trusts will want to take advantage of the greater permitted duration for trusts and this will require amendment.

Most non-excluded trust deeds will currently indemnify the trustees against liability arising from gross negligence. Although the effect of clause 34 should be to imply a further carve out from the indemnity, we have no doubt that amendments will be made for the sake of clarity.

Many trust deeds will not adequately modify or exclude the default duties as they are expressed in the Exposure Draft, and it will be desirable to amend the trust deed to do so. For example, a family trust deed may have provisions favouring primary beneficiaries which include the trustee, but not have provisions negating the duty to avoid a conflict of interest or to act impartially (or one but not the other). While our suggestion that clause 15(2) confirm that exclusion or modification may be implied by contrary intention as well as express, there will still be many questions raised which could only be clarified by amendment.

As an example, trustees may wish to amend their trust deeds to ensure the duty to invest prudently is modified in accordance with the new Act when the trust deed expresses a “contrary intention” for the purposes of section 13D of the Trustee Act 1956. Such expressions commonly state that:

- the parties agree that a particular provision is a contrary intention for the purposes of that section; and
- accordingly, the duty imposed by section 13C of Trustee Act 1956 does not apply.

This does not clearly alter the duty to invest prudently under the new Act, and greater alignment would be desirable. This will involve significant cost and will take time to complete given the number of excluded trust arrangements.

As mentioned above, the area of the Exposure Draft which is most likely to result in existing trust deeds needing to be changed is the default duties provisions.

For example, the default duties include a duty for a trustee not to make a profit from the trusteeship of a trust, to avoid a conflict between the interests of the trustee and the interests of the beneficiaries and to not take any reward for acting as a trustee.

For this reason, in order to achieve the Exposure Draft’s intention that existing trust deeds not need to be changed, we submit that - in the case of trusts already in existence at the time the Trusts Act is passed – the default duties not apply to the extent the trust deed indicates a contrary intention (without requiring the particular duty to be modified or excluded).
43 Could any of the terms in the Bill be clearer or more modern?

44 Do you have any suggestions about how to clarify or modernise the terms used in the Bill?

45 Do you have any other comments about how the Bill could be improved?

We consider that it would be useful for the Exposure Draft to include a territoriality provision, to give certainty as to which trusts it is intended to apply to.
APPENDIX 1

Replacement definition of wholesale investment trust (clause 1 of Schedule 2)

(1) An excluded trust is a trust (within the meaning of section 8) that:
   
   (a) is a registered scheme, or
   
   (b) is or was created pursuant to a trust deed established in connection with a regulated offer or exempt offer of debt securities or an offer of debt securities under or in accordance with the Securities Act 1978; or
   
   (c) has the following characteristics:
      
      (i) the trustee—
         
         (A) offers or will offer financial products to investors, and as a term of that offer only wholesale investors (as it relates to the offer of financial products in New Zealand) and/or non-New Zealand persons are able to accept that offer; or
         
         (B) borrows or will borrow money exclusively from wholesale investors7; or
         
         (C) guarantees or will guarantee out of the trust assets 1 or more obligations, or holds on trust 1 or more rights, relating to financial products, that are offered only to wholesale investors (as it relates to the offer of financial products in New Zealand) and/or non-New Zealand persons; or

      (ii) the trust is not a registered scheme but interests in the trust were offered under or in accordance with:
          
          (A) the Securities Act 1978; or
          
          (B) the Superannuation Schemes Act 1989; or
          
          (C) the Unit Trusts Act 1960; or
          
          (D) the Trustee Companies Act 1967;

7 We acknowledge the breadth of this limb of the test of excluded trust has the potential to inadvertently capture the ordinary course banking arrangements of all trusts. Further refinement of this provision will be required to limit the application of this provision to arrangements which are primarily wholesale in nature, for example, by limiting it to borrowing in connection with the intended issue of financial products.
(iii) it is a term of the trust, or will be a term on which interests in the trust are offered, that each beneficiary will be 1 or more of the following:

(A) a wholesale investor;

(B) the manager or an investment manager of the investment trust or the originator of any loans or mortgage securities of the trust (or an associated person of any of them);

(C) an entity that—

(I) is named in the terms of the trust as the sole beneficiary of any residual assets of the trust at the termination of the trust once all other claims on the trust have been satisfied; and

(II) has no right to any other prior entitlement during the term of the trust to income or assets of the trust; and

(III) at the time of the creation of the trust, carried on activities of a charitable, sporting, academic, philanthropic, community, social, or similar nature.

(2) A custodial trust\(^8\) that is established in connection with any one or more of the following is also taken to be an excluded trust:

(a) the offer, holding or guarantee of financial products; or

(b) the offer of a discretionary investment management service; or

(c) the offer of one or more managed investment schemes.

(3) A security trust that is established in connection with any one or more of the following is also taken to be an excluded trust:

(a) the offer or guarantee of financial products; or

(b) the lending of money.

(4) Whether a trust meets the criteria to be an excluded trust is to be determined at the time the trust is established, or later where the trust deed is amended to express an intention that the relevant trust should not be an excluded trust.

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\(^8\) This definition has been left deliberately broader than, for example, the definition of an FMCA custodial service in the Financial Advisers (Custodians of FMCA Financial Products) Regulations 2014 to account for the many different scenarios in which a custodial trust may arise.
(5) In this clause,—

**debt securities** has the meaning given to it in section 8(1) of the Financial Markets Conduct Act 2013, and has the meaning given to it in the Securities Act 1978 when that term is used in the context of that Act.

**discretionary investment management service** has the meaning given to it in section 392 of the Financial Markets Conduct Act 2013.

**exempt offer** means an offer of financial products in reliance upon one or more clauses of Schedule 1 of the Financial Markets Conduct Act 2013.

**financial products** has the meaning given to it in section 7 of the Financial Markets Conduct Act 2013.

**investment business** means an entity that is an investment business as defined in clause 37 of Schedule 1 of the Financial Markets Conduct Act 2013.

**managed investment scheme** has the meaning given to it in section 9 of the Financial Markets Conduct Act 2013.

**registered scheme** has the meaning given to it in section 6 of the Financial Markets Conduct Act 2013.

**securities** has the meaning given to it in the Securities Act 1978 when that term is used in the context of that Act.

**regulated offer** has the meaning given to it in section 41 of the Financial Markets Conduct Act 2013.

**wholesale investor** has the meaning given to it in clause 3 of Schedule 1 of the Financial Markets Conduct Act 2013 and includes (in the relevant capacity) an investor who holds securities which were allotted while the Securities Act 1978 was in force and were not offered to the public by virtue of section 3(2) of the Securities Act 1978.
APPENDIX 2

Ngāti Whātua Ōrākei Claims Settlement Act

20 Rule against perpetuities does not apply
(1) The rule against perpetuities and the provisions of the Perpetuities Act 1964 do not—
   (a) prescribe or restrict the period during which—
      (i) the Ngāti Whātua Ōrākei Trust may exist in law; or
      (ii) the trustees may hold or deal with property (including income derived from property); or
   (b) apply to a document entered into to give effect to the deed of settlement if the application of that rule or the
       provisions of that Act would otherwise make the document, or a right conferred by the document, invalid or
       ineffective.

(2) However, if the Ngāti Whātua Ōrākei Trust is, or becomes, a charitable trust, the application (if any) of the rule
    against perpetuities or any provision of the Perpetuities Act 1964 to that trust must be determined under the general
    law.

Trust Deed of the Ngāti Whātua Ōrākei Trust

17.1 Perpetuities

Unless stated otherwise in the Settlement Act, the perpetuity period for the Trust is the period that commences on the date of this Trust Deed and ends eighty (80) years less one (1) day after that date of this Trust Deed, that period being within the perpetuities period permitted by section 8 of the Perpetuities Act 1964 and the perpetuities period applicable to the Trust is hereby specified accordingly.

Ngāti Hauā Claims Settlement Act 2014

19 Rule against perpetuities does not apply
(1) The rule against perpetuities and the provisions of the Perpetuities Act 1964—
   (a) do not prescribe or restrict the period during which—
      (i) the Ngāti Hauā Iwi Trust may exist in law; or
      (ii) the trustees may hold or deal with property or income derived from property; and
   (b) do not apply to a document entered into to give effect to the deed of settlement if the application of that rule or the
       provisions of that Act would otherwise make the document, or a right conferred by the document, invalid or
       ineffective.

(2) However, if the Ngāti Hauā Iwi Trust is, or becomes, a charitable trust, the application (if any) of the rule against perpetuities
    or of any provision of the Perpetuities Act 1964 to that trust must be determined under the general law.

Trust Deed of the Ngāti Hauā Iwi Trust
28.3 Amendment to reflect Deed of Settlement and Settlement Legislation  
Notwithstanding any other provision in the Trust Deed to the contrary, this Trust Deed:

(a) must be amended by the Trustees if necessary to make the definition of Member of Ngāti Hauā or Ngāti Hauā Ancestor consistent with that set out in the final Deed of Settlement and the Settlement Act; and

(b) may be amended by the Trustees to reflect provisions (if any) in the Deed of Settlement and the Settlement Legislation in relation to rights and powers of the Trustees;

If the Trust Deed is amended due to operation of this sub-clause a Special Resolution passed in accordance with the Fourth Schedule is not required.

31 → PERPETUITIES AND VESTING DAY

31.1 The Vesting Day for the Trust is the day that is eighty (80) years less one (1) day after the date of this Deed, that date being within the perpetuities period permitted by section 6 of the Perpetuities Act 1964 and the perpetuities period applicable to the Trust is hereby specified accordingly. On the Vesting Day, the Trustees shall hold the remaining capital and income of the Trust’s assets on trust for the Members of Ngāti Hauā then living as tenants in common in equal shares.

31.2 If the Settlement Act provides that the rule against perpetuities, and the other rules of law regulated by the Perpetuities Act 1964, are not to apply to the Trust, clause 31.1 shall be void.