



# TO: JUSTICE SELECT COMMITTEE SUBMISSION ON TRUSTS BILL

5 MARCH 2018





## INTRODUCTION

- 1 The Committee Staff of the New Zealand Parliament (*Committee*) have sought feedback on the Trusts Bill (*Bill*) which will replace the Trustee Act 1956. This submission is from Chapman Tripp.
- 2 The matters covered by the Bill are of direct interest to us as legal practitioners and to our clients.
- 3 Chapman Tripp has made submissions on the New Zealand Law Commission's previous report on trust law and the various issue papers on specific trust law issues. More recently, Chapman Tripp made a detailed submission to the Ministry of Justice on the Exposure Draft of the Trusts Bill dated 24 January 2017 (*Previous Submission*). This submission addresses some of the key issues raised in our Previous Submission which we do not believe have been satisfactorily resolved by the Bill.
- 4 We have also set out in Appendix 1 our comments in relation to Schedule 3 of the Bill.
- 5 We have no objection to our submission being published.
- 6 We would be happy to discuss with the Committee Staff any of the comments we have made.

Our contacts are:

### ***Private client & trusts***



**ARTHUR YOUNG – SENIOR PARTNER**  
T: +64 9 357 9001  
M: +64 21 680 067  
E: arthur.young@chapmantripp.com



**PHILLIPPA WILKIE – SENIOR ASSOCIATE**  
T: +64 9 357 9275  
M: +64 21 322 137  
E: philippa.wilkie@chapmantripp.com

### ***Managed funds***



**TIM WILLIAMS – PARTNER**  
T: +64 9 358 9840  
M: +64 27 243 1629  
E: tim.williams@chapmantripp.com



### **Debt capital markets**



**EMMA SUTCLIFFE – PARTNER**

**T:** +64 4 498 6323

**M:** +64 27 294 9114

**E:** emma.sutcliffe@chapmantripp.com



**ALAN LESTER – SPECIAL COUNSEL**

**T:** +64 4 498 4959

**M:** +64 27 285 0160

**E:** alan.lester@chapmantripp.com

### **Te Waka Ture**



**NICK WELLS – CEP/HOA RANGAPU WHAKARAE**

**T:** +64 9 357 9004

**M:** +64 27 449 0041

**E:** nick.wells@chapmantripp.com



**TE AOPARE DEWES – SENIOR ASSOCIATE**

**T:** +64 9 358 9839

**M:** +64 27 209 0810

**E:** teaopare.dewes@chapmantripp.com

### **ABOUT CHAPMAN TRIPP**

- 7 Chapman Tripp is a leading law firm with a strong practice in commercial and corporate law and with offices in Auckland, Wellington and Christchurch.
- 8 We act for a range of family trusts, estates, charitable trusts, 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.
- 9 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.
- 10 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

In summary, the key issues we have identified include the following:

- We believe amendments are required to clauses 12 to 15 of the Bill to ensure that the meaning of an express trust is as clear, flexible and workable as possible.
- We suggest that for the sake of certainty the Bill define gross negligence. The inclusion of this standard in the Bill 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.
- While we are generally happy with the drafting of the definition of a Specified Commercial Trust in Schedule 3 of the Bill, there are several aspects of the definition which need further work, in particular the definition of wholesale trust and residual beneficiary, the Schedule's reconciliation with clauses 157 and 161 and the consistency of wholesale and retail trust treatment. We have set these out on page 10 and Appendix 1.
- The provisions relating to insurance moneys in clause 73(6) of the Bill are too narrow and should be subject to the terms of the relevant trust deed.
- The benefits that creditors receive in relation to being able to claim directly against trust property under clause 80 could be significantly undermined if creditors lose such benefits where they had no knowledge that particular circumstances would result in a limitation to the trustee's indemnity rights.
- The ability of trustees to appoint other persons to perform functions on their behalf/delegate their powers to other persons should be reconciled, including so that they are not unnecessarily limited and would work well in practice.
- The *Te Ture Whenua Maori Act 1993 (TTWMA)* provides much of the law regarding the constitution and administration of Māori land trusts and powers of the Māori Land Court in relation to those trusts. The Bill as currently drafted does not clearly preserve the structures and powers under TTWMA. Accordingly, our submissions consider express preservation of the provisions of TTWMA and of the powers of the Māori Land Court.
- PGSE's are in almost all circumstances an express trust formed to receive cultural and commercial redress from the Crown for breaches of the Treaty of Waitangi. The exception in clause 16(6) of the Trusts Bill in relation to the rule against perpetuities, as currently drafted, is not broad enough to apply to PGSE's that are a trust.

## KEY ISSUES

### *Preliminary provisions*

We suggest that the word "person" as used in the definition of "adult" and "child" be replaced with individual.



A recommendation was 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 was not addressed expressly in the Exposure Draft, nor in the Bill. We have commented further on this below.

### *Express Trusts*

We have always had an issue with attempting to define the characteristics of a trust in legislation. In particular, we note the following:

- clause 13(b) is too open ended by not specifying who the trustee must be accountable to. In particular, clause 13(b) 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 disagree with deleting the clause 9(2) of the Exposure Draft which allowed 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 13 of the Bill but has characteristics that are recognised as being sufficient to constitute an express trust;
- similarly, we recommend that there should be a clause which provides that even if a trust has the characteristics of a trust, but also has characteristics which render it invalid in common law, the court may determine that the trust is invalid.
- we welcome the addition of the new clause 14 which makes it clear that a sole trustee of a trust must not be the sole beneficiary of the trust;
- we suggest clause 15(1)(b)(ii) be replaced with “identifies the class of beneficiaries with sufficient specificity to be able to tell with certainty whether an individual is or is not a member of that class, or the permitted purpose of the trust” so that the Bill is aligned with the certainty of objects test from *Re Gulbenkian's Settlements Trusts* [1968] UKHL 5. Such a change would allow for discretionary trusts with a broad class of beneficiaries to be included under the express trust definition.

### *Duration of trusts*

Our comments primarily relate to the detail of the Bill’s application for existing express trusts:

- for example, if a trust has a specified perpetuity period of 80 years then clause 16(4) (even when read together with Schedule 1) still suggests that it cannot easily avail itself of the longer period, even if the trust deed contemplates variation.
- 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 Bill because the common rule against perpetuities, which currently prohibits that, will have been abolished under clause 16(5)? 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 again suggest that this issue may well come up as a tax issue in the future;
- we welcome clause 17 which makes it clear that due to the repeal of the Perpetuities Act 1964, there is no longer a restriction on accumulations;
- we welcome clause 18(1)(b) and the trustees' ability to distribute property on expiry of a trust in accordance with the objectives of the trust, if there are no express terms in this regard. In our view, a further improvement would be to allow in the transition provisions a window for settlors, or in their absence, trustees to amend trust deeds to include provisions providing for the manner in which property is to be distributed on the expiry of the trust, which is consistent with the objectives of the trust, where no such provisions are included in the terms of the trust. This would allow settlors or trustees to avoid the new presumption of equal shares for all surviving beneficiaries, if the trust's terms are silent and the trustees at the time are unwilling to develop a proposal consistent with the objectives of the trust.

In relation to trusts established under Te Ture Whenua Maori Act 1993 (TTWMA), the exception in clause 16(6) 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 Hauā 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 16(6) of the Bill 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 Hauā 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 Hauā 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?



### *Duties of trustees*

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

In relation to clause 21, 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).

The duty in clause 22 (duty to know the terms of the trust) 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.

The duty in clause 23 (duty to act in accordance with the terms of the trust) 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.

Clause 25 should ideally clarify that “otherwise act” means “otherwise act when acting in the trustee’s capacity as trustee” to avoid any suggestion that the duty has a broader application.

The duty in clause 31 “duty not to bind or commit trustees to future exercise of discretion” is stated only to apply in relation “to the distribution of trust property”. This is very narrow and does not reflect the position at common law.

### *Exemption and indemnity clauses*

We suggest that for the sake of certainty the Bill define gross negligence. As we have discussed in our Previous Submission:

- 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;
- the inclusion of this standard in the New Act 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.

It seems that the purpose of clause 40 of the Bill 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.



### *Who is required to keep records*

Clause 42 of the Bill still effectively requires that copies of all records must be held by at least one trustee. In the case of 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 must be held*

We believe that it would be more administratively workable for the Bill 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.

### *Obligations to provide records to beneficiaries*

These clauses still use ambiguous language. Clause 48, for example, talks about "a reasonable period of time".

We think it would be beneficial if something along the lines of "the use to which the trustees reasonably expect the information to be put" is expressly added to the list in clause 49 of the Bill.

### *Trustee's powers and indemnities*

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 55(1).

We suggest that clause 55(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.

We recommend that a subclause be added to clause 63 of the Bill which provides "to avoid any doubt, nothing in this section 63 will prevent the trustees appointing a proxy or other agent to cast a vote on shares". We believe that appointing a proxy to cast a vote on shares is an administrative function of a trust that needs to be covered by clause 63 of the Bill.



Presumably clause 64(2) applies unless the general duty of care has been modified or removed or does clause 64(3) override any modification?

Clause 64(4) should include a licensed discretionary investment manager, so it is clear that trustees can appoint a licensed discretionary investment manager to manage the investments of a trust assets generally.

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?

We suggest that the Bill clarifies the differences between a trustee's power of appointment under clause 63 and the trustee's power to delegate under clause 66. Both empower the trustee to appoint someone else to perform trustee functions. Sections 65 and 68 are of the same effect, so the trustee's liability in each case is the same. A number of questions arise from the distinction implied by the separate treatment of the power of appointment and the power to delegate. In the circumstances described in clause 66(2), is the trustee able to appoint someone else to perform its functions only under clause 66? Is it intended that trustees be able to "delegate" only under a power of attorney? If not, does clause 67 apply to other delegations (including the exercise of a delegation power in the trust deed)? Is a trustee able to appoint an attorney other than in the circumstances described in clause 66? Should the two powers be combined? Does section 66 impliedly limit the power to appoint others under clause 63 in some way?

We consider that clause 73(6) is overly narrow, in that if the trust deed includes provisions relating to insurance moneys, then those provisions should prevail. Clause 73 generally should simply be a fallback for if there is no such provision in the trust deed. We therefore submit that clause 73(6) should read:

*"This section does not affect:*

- (a) the application of any provision of a trust deed in relation to insurance moneys (so that compliance with any such provision shall not be a breach of this section);*
- (b) any right a person may have to require the insurance money (or part of it) to be applied in a particular manner; or*
- (c) the rights of a mortgagee, secured creditor, lessor or lessee."*

The rule in clause 76 should apply in relation to all dealings with trust property, not just disposals. A close analogy can be drawn with section 18 of the Companies Act, and it is appropriate for parties dealing with trusts/trustees to have equivalent protections.



### *Trustees' indemnities*

We think it would be beneficial if the Bill expressly stated and /or recognised that a trustee who contracts with a third party may limit their liability.

### *Creditors*

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".

In regard to clause 80(3), we do not believe that it is appropriate for a creditor to lose the benefit of clause 80 where it had no knowledge that particular circumstances would result in a limitation to the trustee's indemnity rights. The "good faith" test in this clause appropriately has an element of *mens rea*, so if the creditor did not know that the relevant circumstances would affect the trustee's indemnity rights then the creditor should not lose the ability to claim under this clause.

### *Removal of trustees*

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 90(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).

We also 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 Bill is appropriate.

We recommend that clause 86(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.

Clause 86(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:"

Clause 90(4) should include a person who has been certified by a health practitioner as being mentally incapable.

We also think it would be beneficial if, where appropriate, the disqualification criteria in clauses 90 and 97 of the Bill align. This would mean, for example, that someone cannot qualify for appointment as a trustee under clause 90 if they have been disqualified under clause 97 of the Bill.

In regard to clause 99(3), 21 *working* days seems an odd period, and we note that the exposure draft contemplated a period of 21 days.



#### *Revocation and variation of trusts*

A further sub-clause should be included at clause 114(1) which provides for the appointment of beneficiaries of the trust.

#### *Court powers and dispute resolution*

As discussed in more detail in our Previous Submission, in our view, the onus of proof is inappropriately allocated. 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.

In regard to clause 118, we consider it is inappropriate for a “residual beneficiary” (as defined in schedule 3) to have the right to challenge a trustee’s action, omission or decision. Such beneficiaries receive only what is left over when a trust is terminated and all other obligations of the trust are satisfied, and so should not have rights to challenge the trustee in this way.

#### *Court appointment of receiver*

As discussed in our Previous Submission, the mechanism (clause 130 of the Bill) does not advance or change the law in our view. The High Court already has an inherent jurisdiction to appoint a receiver. 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;
- 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 130 for receivers (especially clause 130(4)) is too vague and provides too much discretion to the courts for it to be any real value to creditors of a trust; and
- 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.

#### *Further submissions on Specified Commercial Trusts*

There is potential an overlap between clauses 157 and 161 on one hand and Schedule 3 on the other. Trusts under regulated debt security trust deeds and registered managed investment schemes could be specified commercial trusts and so covered by Schedule 3. But they are also specifically dealt with by clauses 157 and 161, respectively. Clauses 157 and 161 provide broader relief than Schedule 3. Any such overlap should be rectified for clarity.

We believe that wholesale (unregistered) managed investment schemes would not be subject to clause 161, but would be a specified commercial trust under the definition in Schedule 3. Consequently, if there is an unauthorised delegation, the trustee would be removed under clause 97 (as, unlike registered managed investment schemes, the trustee is not exempted from clause 66 and 97). We submit that wholesale and retail schemes



should be treated consistently in this, and other, respects, including under many of the prescriptive removal and replacement provisions.

We also note in regard to clauses 158-160, that many trust documents have been prepared on the basis of the existing duties and, in some cases, may have repeated those duties in full (although that is not our general approach) in the terms of the trust documents. As parties would wish those documents to be consistent with legislation, they would need to be amended to reflect the change in duties. To require existing trust documents to be amended in such a minor way, so soon after the FMCA framework was implemented, is disproportionate and would not achieve any real benefit. As an absolute minimum, there should be a transitional period for documents to be amended to reflect the new duties.

#### *Miscellaneous provisions*

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 clauses 146 to 151 of the Bill.

In regard to clause 146(1), trustee corporations commonly form subsidiaries to act as trustees. We consider these trustees should receive the same treatment as trustee corporations, and so the parenthetical in this clause should read "(unless the trustee is a trustee corporation or a subsidiary of a trustee corporation)".

#### *Interaction between the Bill and existing statutes*

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.



## APPENDIX 1

### Schedule 3 Specified commercial trusts

#### 1 Meaning of specified commercial trust

(1) A **specified commercial trust** means—

(a) an express trust (within the meaning of **section 12**)—

- (i) that is created for the purpose of facilitating 1 or more commercial transactions; and
- (ii) every beneficiary of which is a beneficiary as a result of entering into the commercial transaction that the trust is created to facilitate, or as a result of entering into a commercial transaction of the type that the trust is created to facilitate; or

(b) a wholesale trust; or

(c) a security trust.

(2) To avoid doubt, a trust—

(a) ceases to be a specified commercial trust under **clause 1(1)(a)** if any person becomes a beneficiary of the trust and **clause 1(1)(a)(ii)** does not apply to that beneficiary; and

(b) is not a specified commercial trust for as long as that person is a beneficiary of the trust.

(3) In this clause,—

**commercial transaction** is a transaction that all parties enter into in trade  
**goods**—

(a) means personal property of every kind (whether tangible or intangible); and

(b) includes—

- (i) ships, aircraft, and vehicles:
- (ii) animals, including fish:
- (iii) minerals, trees, and crops, whether on, under, or attached to land or not:



(iv) gas and electricity:

(v) to avoid doubt, water and computer software

**services—**

(a) includes any rights (including rights in relation to, and interests in, real or personal property), benefits, privileges, or facilities that are or are to be provided, granted, or conferred; and

(b) without limiting **paragraph (a)**, includes the rights, benefits, privileges, or facilities that are or are to be provided, granted, or conferred under any of the following classes of contract:

(i) a contract for, or in relation to,—

(A) the performance of work (including work of a professional nature), whether with or without the supply of goods:

(B) the provision of, or the use or enjoyment of facilities for, accommodation, amusement, the care of persons or animals or things, entertainment, instruction, parking, or recreation:

(C) the conferring of rights, benefits, or privileges for which remuneration is payable in the form of a royalty, tribute, levy, or similar exaction:

(D) to avoid doubt, the supply of electricity, gas, telecommunications, or water, or the removal of waste water:

(ii) a contract of insurance, including life assurance and life reinsurance:

(iii) a contract between a bank and a customer of the bank:

(iv) any contract for, or in relation to, the lending of money or granting of credit, or the making of arrangements for the lending of money or granting of credit, or the buying or discounting of a credit instrument, or the acceptance of deposits; but

(c) does not include rights or benefits in the form of the supply of goods or the performance of work under a contract of service

**trade** means any trade, business, industry, profession, activity of commerce, or undertaking relating to the supply or acquisition of goods or services or to the disposition or acquisition of any interest in land.



## 2 Meaning of wholesale trust

(1) A **wholesale trust** is an express trust (within the meaning of **section 12**) that has the following characteristics:

(a) the trust is established in connection with or as a consequence of 1 or both of the following:

- (i) an offer of financial products exclusively to 1 or more of the persons described in clause 2(1)(b)(i) to (v) (inclusive):
- (ii) the lending of money to, or the borrowing of money from, 1 or more of the persons described in clause 2(1)(b)(i) to (v) (inclusive); and

**[Chapman Tripp Drafting Note: These changes are for consistency with para (b) – if persons in (b)(i) to (v) can be beneficiaries, then they must also be able to be party to the underlying transaction. At a minimum (a) should extend to overseas investors substantially similar to wholesale investors (as per (b)(v))]**

(b) every beneficiary is 1 or more of the following:

- (i) a wholesale investor:
- (ii) a manager or an investment manager of the trust (or an associated person of that person):
- (iii) an originator of any property sold to the trust (or an associated person of that person):
- (iv) a seller of any property sold to the trust (or an associated person of that person):
- (v) a person who is controlled by, or who is otherwise an associated person of, an investment business, a large entity, or a government agency:
- (vi) an overseas person who is, or who undertakes a role that is, substantially similar to a person under any of **paragraphs (i) to (iv)**:
- (vii) the trustee of the trust:
- (viii) a residual beneficiary.

(2) In this clause,—



**associated person** has the meaning given to it in section 12 of the Financial Markets Conduct Act 2013

**government agency** has the meaning given to it in clause 40 of Schedule 1 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, and includes an equivalent overseas entity

**large** has the meaning given to it in clause 39 of Schedule 1 to the Financial Markets Conduct Act 2013

**[CT DN: All other concepts in 2(1)(b) flow from the FMCA, so we would also expect this one to. The FRA definition is a very different concept]**

**residual beneficiary** means a beneficiary that is an entity that receives trust property only after any other claims on the trust property at that time have been satisfied

**[CT DN: It is possible for residual amounts to be paid to the residual beneficiary throughout the life of the trust]**

**[CT DN: Although in many cases the residual beneficiary of wholesale trusts (e.g. for securitisations) is charitable, this is not universally the case. As a matter of principle, the status of the residual beneficiary as charitable or not charitable should not affect whether the trust qualifies as a "wholesale trust" for these purposes]**

**wholesale investor** has the meaning given to it in clause 3 of Schedule 1 of the Financial Markets Conduct Act 2013.

### 3 Meaning of security trust

(1) A security trust is an express trust (within the meaning of **section 12**) if the trustee holds security over the assets of a debtor (including any guarantor or other person) for the benefit of **one or more counterparties** to a financing arrangement.

**[CT DN: Generally there will only be a security trust arrangement if there is more than one counterparty entitled to the benefit of the security]**

(2) In this clause, **financing arrangement** means a loan facility agreement, an issue of a debt security or any other debt funding arrangement—

(a) in which each party to the financing arrangement (**other than the debtor, any guarantor and any associated person of the debtor or a guarantor**) is a beneficiary who falls within **clause 2(1)(b)(i) to (vi)**; or



**[CT DN: There will always be "borrower side" parties to the arrangement.]**

(b) that is a regulated offer of debt securities (within the meaning of section 6 the Financial Markets Conduct Act 2013) or an offer of debt securities made under clause 19 of Schedule 1 to the Financial Markets Conduct Act 2013.

**[CT DN: This limb should capture all offers that require a trustee/supervisor under the FMCA]**

#### **4 Certain provisions are or may be modified or excluded in relation to specified commercial trust**

(1) The following provisions do not apply to a specified commercial trust (whether created before or after the commencement of this clause):

(a) **section 21(2)** (requiring paid adviser to ensure settlor aware of meaning and effect of any modification or exclusion of default duties):

(b) **section 40** (requiring paid adviser to ensure settlor aware of meaning and effect of any liability exclusion or indemnity clause).

(2) The following provisions do not apply to a specified commercial trust that was created before the commencement of this clause:

(a) **sections 41 to 51:**

(b) **sections 63 to 72:**

(c) **sections 77 to 79:**

(d) **sections 113 to 115.**

(3) The following provisions apply to a specified commercial trust that was created after the commencement of this clause unless their application is modified or excluded by the terms of the trust:

(a) **sections 41 to 51:**

(b) **sections 63 to 72:**

(c) **sections 77 to 79:**

(d) **sections 113 to 115.**



(4) **Sections 37 to 39** apply to a specified commercial trust (whenever created) as if the references to gross negligence were omitted from those provisions.



## 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 trustee 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 6 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 this 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 ¶