

27 October 2015

Hon Amy Adams
Minister of Justice
Parliament Buildings
Wellington

Stuart.McGilvray@parliament.govt.nz

Dear Minister

Trust Law Reform

1. We are writing to you as Chair of the Trusts Reference Group (**TRG**) which we understand is currently considering the recommendations made in the Law Commission's Report, Review of the Law of Trusts: A New Trusts Act for New Zealand (NZLC R130,2013) (**Report**), including the indicative draft provisions at pages 244-256 of the Report (**Draft Provisions**).
2. The New Zealand Bankers' Association (**NZBA**) and its member banks appreciate the opportunity to provide comments to the TRG at this stage of the reform process.
3. NZBA wishes to express our members' concerns over the potential adverse impact that the Draft Provisions and codification of trust law could have on New Zealand's capital markets which commonly use 'commercial trusts'. Our members are concerned that the proposed codification and the Draft Provisions have been prepared without adequate consideration being given to the use of trusts in the capital markets. For example, our members use trusts for managed funds (such as KiwiSaver), securitisation and covered bond programmes (**Programmes**). As you will appreciate these are important investment options for the public of New Zealand or are crucial funding mechanisms for the banking industry.

4. To give the TRG an indication of the quantum of the Programmes which may be affected, information provided by our members indicate that the approximate range of sizes of these Programmes of our member banks is:
 - a. KiwiSaver: NZD 661,000,000 – NZD 7,000,000,000
 - b. Covered Bond Trusts: NZD 3,000,000,000 – NZD 8,000,000,000
 - c. PIE Fund/Trusts: NZD 800,000,000 – NZD 3,750,000,000
 - d. Residential Mortgage-Backed Security Trusts: NZD 600,000,000 – NZD 4,242,000,000
 - e. Other managed investment schemes: NZD 40,000,000 – NZD 12,000,000,000
 - f. Other commercial trust arrangements that member banks participate in: NZD 40,000,000 – NZD 6,570,000,000
5. The Programmes utilise the flexibility that the common law provides; in particular, the parties' ability to define the terms of the relevant trust. The flexibility inherent in the common law also allows for the development of innovative structures that benefit the development of New Zealand's capital markets. For example, the ability to use trusts (and trust like structures) has allowed a number of our members to develop covered bond programmes which has allowed banks to access funding in offshore markets by making investment more attractive to these investors through providing a better proposition to them. This ultimately benefits all New Zealanders.
6. NZBA and its members are concerned that codifying trust law will create significant risks to New Zealand's capital markets. In particular:
 - a. it has the potential to create uncertainty in the market for existing Programmes, which could impact credit ratings of such Programmes and reduce investor appetite for such products. This may ultimately translate into increased costs (including cost of capital) for New Zealand businesses and the retail public;
 - b. it would make New Zealand trust law off-market in comparison with other major common law jurisdictions (including the UK and Australia) and may result in capital markets activity moving to offshore jurisdictions which have more certain and flexible trust law frameworks; and
 - c. it may reduce innovation in the New Zealand market.
7. Our members are also concerned that the Draft Provisions may conflict with other statutory requirements such as the Financial Markets Conduct Act 2013.
8. We believe further consideration needs to be given to the impact that codification will have on New Zealand's capital markets prior to progressing the proposed reforms. We would welcome the opportunity to discuss the use of trusts in the capital markets and our concerns further with the TRG.

Yours faithfully

A handwritten signature in black ink, appearing to be 'Kirk Hope', written in a cursive style.

Kirk Hope
Chief Executive

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