

Submission

to the

Justice Committee

on the

Trusts Bill

5 March 2018

About NZBA

1. NZBA works on behalf of the New Zealand banking industry in conjunction with its member banks. NZBA develops and promotes policy outcomes that contribute to a strong and stable banking system that benefits New Zealanders and the New Zealand economy.
2. The following sixteen registered banks in New Zealand are members of NZBA:
 - ANZ Bank New Zealand Limited
 - ASB Bank Limited
 - Bank of China (New Zealand) Limited
 - Bank of New Zealand
 - Bank of Tokyo-Mitsubishi, UFJ
 - China Construction Bank (New Zealand) Limited
 - Citibank, N.A.
 - The Co-operative Bank Limited
 - Heartland Bank Limited
 - The Hongkong and Shanghai Banking Corporation Limited
 - Industrial and Commercial Bank of China (New Zealand) Limited
 - JPMorgan Chase Bank, N.A.
 - Kiwibank Limited
 - Rabobank New Zealand Limited
 - Southland Building Society
 - TSB Bank Limited
 - Westpac New Zealand Limited

Background

3. Thank you for the opportunity to provide the Justice Committee with comments regarding the Trusts Bill (**Bill**). We would also welcome the opportunity to present oral submissions in person to the Justice Committee.
4. If you would like to discuss any aspect of the submission further, please contact:

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Introduction

5. Trusts are used in numerous commercial transactions ranging from trusts used by banks for funding purposes (such as securitisation and covered bond programmes) to trust arrangements for managed investment schemes (both retail and wholesale). Trusts are also used when banks and other lenders lend money to borrowers. As noted in our previous correspondence with the then Minister of Justice, and by way

of example, information provided by our members as at October 2015 indicated 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.
6. NZBA and its members support the purpose of making trust law more accessible to everyday users. However, given the significance of trusts in commercial transactions in New Zealand, it is essential that the Bill provides adequate flexibility to allow such trusts to continue to operate in a manner that is not detrimental to New Zealand's financial markets.
7. As noted in NZBA's submissions in relation to the exposure draft of the Bill:
- (a) NZBA has concerns that the Bill does not fully recognise trust structures which are not family trusts, such as trust structures used to facilitate important commercial and financing transactions. NZBA wishes to ensure that such trust structures, which facilitate legitimate and important commercial transactions, are not compromised as a result of the proposed reform.
 - (b) NZBA submits that commercial trusts, which are self-governing under contract or subject to other legislative and regulative requirements, should be excluded from the ambit of the Bill.
8. In these submissions, the NZBA has sought to identify all the provisions of the Bill that should not apply to business trusts (as defined in paragraph 9). However, given the number of exclusions that would be required, our overarching submission is that such business trusts should not be captured by the Bill at all.
9. In light of this background, this submission primarily addresses the definitions and provisions relating to:
- (a) specified commercial trusts, as set out in Schedule 3 (**specified commercial trusts**);
 - (b) trusts constituted under a trust deed for a debt security pursuant to the Financial Markets Conduct Act 2013 (**FMC Act**), as described in clause 157 (**FMC debt trusts**);
 - (c) managed investment schemes constituted as a trust pursuant to the FMC Act, as described in clause 161 (**MIS trusts**); and

- (d) trusts constituted for the purposes of section 77P of the Financial Advisers Act 2008 (**FAA**), as described in clause 165 (**broking trusts**),

together referred to in this submission as **business trusts**.

10. As will be clear from the details of this submission, NZBA submits that the current provisions that disapply provisions of the Bill in respect of business trusts do not adequately address the unique requirements of these types of trusts.
11. The unique nature of these trusts has been partially recognised in the Bill, such that many of the provisions do not apply for one or two types of business trusts. However, there is no obvious rationale why those provisions should apply for the other types of business trusts, which require similar flexibility in order to operate as currently done in New Zealand's financial markets. Therefore, this submission begins by discussing sequentially the clauses of the Bill that are relevant for one or more types of business trusts.
12. Despite their similarities, each type of business trust ultimately operates in different contexts for different purposes. Accordingly this submission then sets out each type of business trust in turn, with a discussion of clauses that are relevant for that particular type of business trust.
13. We have also included comments of a more general nature on the Bill at the end of this submission.

Submissions in relation to more than one type of business trust

Clause 28

14. Under clause 28, a trustee must exercise "the care and skill that a prudent person of business would exercise in managing the affairs of others". Most (if not all) specified commercial trusts, FMC debt trusts, MIS trusts and broking trusts will have investment powers for the trustee or broker. The scope of that power will be clearly defined (for example, through mandates). The trustees of such trusts are professional trustees and would have agreed to take on the role based on their assessment of the role and appropriate remuneration. The clause requires the trustee to act with the skill and care of "a prudent person of business". This may not have been in the parties' contemplation at the time the trust was created. Often a trustee will invest as instructed by, for example, a manager of the trust. This seems to have been recognised for MIS trusts, which this clause does not apply to. The same rationale applies to FMC debt trusts, broking trusts and existing specified commercial trusts. Accordingly, we recommend the carve out should also apply to those trusts. Our suggested amendment to clause 4(2) of Schedule 3 addresses this for existing specified commercial trusts (see paragraph 34 and paragraphs 56 to 59). Similarly, see paragraphs 65 and 78 for FMC debt trusts and broking trusts respectively.

Clause 30

15. Clause 30 requires a trustee to actively and regularly consider whether it should be exercising its powers. However, most (if not all) specified commercial trusts and broking trusts will generally permit the trustee not to act unless required to. The trustee or broker is not required to actively investigate when it is required to act (eg. whether a breach has occurred), and can usually assume that there is no need to

act until told otherwise. This duty should therefore not apply to such trusts. See paragraphs 34 and 56 to 59 for existing specified commercial trusts and paragraph 78 for broking trusts.

Clause 34 and 35

16. Clauses 34 and 35 requires a trustee not to make a profit from the trusteeship and not to take any reward for acting as a trustee. Trustees of specified commercial trusts, FMC debt trusts, MIS trusts and broking trusts are professional trustees that will require remuneration to take on the role and so these clauses should not apply to those trusts. Our suggested amendment to clause 4(2) of Schedule 3 addresses this for existing specified commercial trusts (see paragraph 34 and paragraphs 56 to 59). Similarly, see paragraphs 65, 68 and 78 for FMC debt trusts, MIS trusts and broking trusts respectively.

Clause 36

17. If there is more than one trustee, clause 36 requires them to act unanimously. For a specified commercial trust, a FMC debt trust or a MIS trust, there would usually only be (or, in the case of a FMC debt trust, can only be) one trustee and so this clause is not likely to be applicable for such trusts. However, in the MIS trust context, the trustee could have delegated to a custodian trustee (who also has duties to the beneficiaries). Accordingly, it is possible to have multiple trustees. Furthermore, in the case of a broking trust, it is common for custodians to appoint sub-custodians, and section 77U of the FAA sets out who is responsible for the broker obligations in such circumstances. It is unclear whether clause 36 would have the effect of requiring a custodian and a sub-custodian to act unanimously, but ultimately they should not be required to do so. This clause does not apply to MIS trusts in the Bill but does apply to other types of trusts.
18. For the avoidance of doubt and for consistency with MIS trusts, this clause should not apply to existing specified commercial trusts (see paragraphs 34 and 56 to 59) and FMC debt trusts (see paragraph 65). In addition, for the reasons set out in paragraph 17, clause 36 should also not apply to broking trusts (see paragraph 78).

Clauses 37 to 40

19. These clauses restrict the scope of what may be included in the terms of trust in respect of the trustee's limitation of liability and indemnity for any breach of trust. As noted above, trustees of specified commercial trusts, FMC debt trusts, MIS trusts and broking trusts are professional trustees and take on the role of trustee based on their assessment of the role and appropriate remuneration. The terms of trust for such trusts will generally have specific limitation of liability and indemnity provisions, which the proposed clauses would undermine. The Bill carves out the application of clauses 37 to 40 for FMC debt trusts and MIS trusts. It also disapplies clause 40 for specified commercial trusts. However, given the terms of such limitation of liability and indemnity are agreed between commercial parties, we suggest they should also be carved out for existing specified commercial trusts (see paragraph 59). In addition, new specified commercial trusts should have the ability to modify or exclude the provisions if commercially agreed (see paragraph 61). Finally, similar to FMC debt trusts and MIS trusts, clauses 37 to 40 should be carved out for broking trusts (see paragraph 78).

Clauses 54 and 55

20. These clauses set out the trustee's power to invest and the matters which the trustee may consider when investing. However, the trustee's investment power and the scope of that power (for example, under any applicable mandates) would be prescribed in the terms of trust for existing specified commercial trusts. Similarly, FMC debt trusts would also address such powers where relevant. Accordingly, these clauses should not apply to such trusts. See paragraphs 59 (in respect of existing specified commercial trusts) and 65 (in respect of FMC debt trusts).

Clauses 56 and 57

21. The power to determine treatment of returns and accounts, which are covered in these clauses, are fundamental to the operation of specified commercial trusts. This means that such a power, and how it may be exercised by the trustee, will generally be extensively set out in the terms of trust.
22. In addition, these powers are not relevant to broking trusts, especially in the case of a broker that is a custodian, as the custodian generally holds property and assets as bare trustee, with minimal ability to exercise discretion. Accordingly, these clauses should not apply to existing specified commercial trusts (see paragraph 59) or broking trusts (see paragraph 78).

Clauses 58(1) to (5) and 59 to 62

23. These clauses relate to the trustee's power to apply trust property for a beneficiary's welfare. The trustees of existing specified commercial trusts, FMC debt trusts, MIS trusts or broking trusts should not have this discretion as their ability to apply trust property will already be set out in the terms of trust. For example, this clause would conflict with the terms of trust for KiwiSaver and other retirement schemes where funds are not paid out until retirement. Accordingly, these clauses should not apply to existing specified commercial trusts (see paragraph 59), FMC debt trusts (see paragraph 65), MIS trusts (see paragraph 68) or broking trusts (see paragraph 78).

Clause 73

24. Clause 73 sets out the application of insurance money for loss or damage of trust property. Subclause (2) requires a beneficiary to hand over net proceeds received under an insurance contract to the trustee. This does not seem appropriate where the beneficiary could have separately taken out insurance in respect of the trust property, and so should be entitled to such proceeds.
25. Subclause (3) is mandatory, and requires a trustee to hold the insurance money on the same terms and subject to the same powers and provisions as those to which the lost or damaged property is subject. This would not be appropriate where the insurance money that has been received is, pursuant to the terms of trust, to be utilised for a different purpose, for example to repay noteholders rather than be held by the trustee in a passive role (as was likely the case for the original trust property).
26. Accordingly, this clause should not apply to existing specified commercial trusts, FMC debt trusts, MIS trusts or broking trusts as the treatment of any insurance proceeds would generally be set out in the trust deed (if relevant). In this regard, see paragraphs 59, 65, 68 and 78 respectively. In addition, this clause should be able to be modified or excluded for new specified commercial trusts (see paragraph 61).

Clause 77

27. Subclause 77(1) restates the common law position that a trustee is personally liable for an expense or a liability incurred by the trustee when acting as a trustee. This subclause does not apply to broking trusts and specified commercial trusts, but does apply to FMC debt trusts and MIS trusts (to which the remainder of clause 77 does not apply). Where subclause 77(1) does not apply, then the rules of the common law would apply and reach the same position, subject to any contractual limitation of liability included with regard to third parties interacting with the trustee. We assume that subclause 77(1) does not apply for broking trusts and specified commercial trusts because these are between commercial parties (in particular, professional trustees). If so, subclause 77(1) should not apply to FMC debt trusts and MIS trusts for the same reason (see paragraphs 65 and 68 respectively).

Clause 131

28. The court's power to order payment to the trustee of commission out of trust property is not appropriate for trustees of specified commercial trusts, FMC debt trusts, MIS trusts and broking trusts. Such trustees are professional trustees and would have agreed to take on the role based on appropriate remuneration. There should not be scope for increasing that remuneration out of the trust property. This is particularly important for structured specified commercial trusts such as securitisations and covered bond programmes where the cashflows are carefully analysed to ensure there are sufficient funds to pay creditors. Accordingly, this clause should not apply to these trusts. In this regard, see paragraphs 59, 65, 68 and 78 respectively. A new specified commercial trust should also be able to exclude or modify this provision (see paragraph 61).

Clauses 146 to 151

29. These provisions set out how a trustee or beneficiary of a trust may apply to Public Trust to investigate the condition and accounts of the trust property. These provisions are not appropriate given that business trust arrangements are between sophisticated commercial parties and, for certain types of specified commercial trusts, the beneficiary will have very limited rights (if any). This has been recognised for FMC debt trusts and MIS trusts, to which these provisions do not apply. Clauses 146 to 151 should therefore also not apply to existing specified commercial trusts and should be able to be modified or excluded for new specified commercial trusts (see paragraphs 59 and 61).
30. Brokers are already subject to sections 77Q to 77T of the FAA, which require them to account for, keep records of, and report on the use of client money and client property. In addition, the Financial Advisers (Custodians of FMCA Financial Products) Regulations 2014 (**Custodian Regulations**) require brokers who provide FMCA custodial services to obtain an assurance engagement. Accordingly, clauses 146 to 151 should not apply to broking trusts (see paragraph 78).

Submissions in relation to specified commercial trusts

Clause 25

31. Clause 25 imposes a mandatory duty that requires the trustee to act for the benefit of the beneficiaries. While this may be true for some specified commercial trusts, it is not the case for all specified commercial trusts. For example:

- (a) in a securitisation or covered bond programme, while the beneficiary will receive some form of income, the trustee would usually act in a manner that ensures its secured creditors are repaid in full. Instructions on how to ensure this occurs would be provided by the manager of the trust and would also be clearly set out in the transaction documents; and
 - (b) in a security trust, the security trustee would not necessarily act in the best interests of all its beneficiaries (being, the secured creditors) as the terms of trust may have included specific requirements to act in the interests, or on the directions, of a specified group of beneficiaries.
32. This clause should therefore be included at clauses 4(2) and (3) of Schedule 3, such that it does not apply to existing specified commercial trusts and can be modified or excluded for new specified commercial trusts (see paragraphs 59 and 61).
33. For most trusts (including a FMC debt trust and MIS trust), in acting in the interests of the beneficiaries the trustee will need to do so in accordance with the terms of trust (in accordance with clause 23), which should take precedence. To clarify this, we recommend adding the words "in accordance with the terms of trust" after "for the benefit of the beneficiaries".

Clauses 27 to 36

34. Clauses 27 to 36 sets out default duties that may cut across trust deeds for existing specified commercial trusts. Accordingly these should be included at clause 4(2) of Schedule 3 as not being applicable for existing specified commercial trusts. The relevant parties can choose to opt back into the default duties if they so desire. This suggested approach is discussed further at paragraphs 56 and 57.

Clause 80

35. We understand that clause 80 applies to unsecured creditors of a trust. It applies to a creditor that the trustee owes a liability to and is a departure from the common law position with regard to unsecured creditors. The current clause provides that, subject to meeting certain criteria, the creditor has a claim against the trustee that can be satisfied by that creditor being indemnified "as if the creditor were a trustee". This right of the creditor can arise even where the trustee is not entitled to be indemnified from the trust property. In order for the claim to be made in such circumstances, the trust needs to have "received a benefit". We recommend this phrase be more specifically defined to clarify what is required to meet this criteria.
36. At subclause (2), the creditor's claim should still preserve the trustee's right to be indemnified (for the benefit of the creditor) as opposed to providing the creditor with a direct right to be indemnified out of the trust property. The wording "as if the creditor were a trustee" suggests that the creditor could be directly indemnified from the trust property, which may result in that creditor having a better claim as against other creditors. In the context of secured commercial transactions (including FMC debt trusts) it is essential that unsecured creditors are not preferred over secured creditors. Given that clause 80 is a departure from the common law position, we recommend that the clause is carefully examined to ensure that the narrow intention of this provision is made plain. It is important that such reform of trusts law does not override the existing and settled law on security arrangements, which would jeopardise the willingness of parties to enter into commercial transactions. Accordingly, it must be very clear that clause 80(4)(c) prevails so as not to give unsecured creditors greater priority over secured creditors.

Clause 82

37. Clause 82 sets out possible actions for the trustee if the trustee is liable in relation to a lease. In specified commercial trusts, the trustee's powers and role will be strictly prescribed in the terms of trust. Accordingly, these additional powers should not be available to trustees of existing specified commercial trusts (see paragraph 59).

Clause 86(1) and (2), 89, 95 and 97

38. These clauses set out who has the power to remove a trustee and appoint a replacement trustee, that a beneficiary may apply to court for the review of the exercise of such a power, and how a trustee can retire or be removed.
39. The terms of trust for a specified commercial trust will set out the persons with the power to appoint or remove the trustee (including who may appoint or remove a trustee if the nominated persons do not act) and how a trustee can retire or be removed. Accordingly, clauses 86(1) and (2) and 95 (being the provisions that can be modified or excluded under Schedule 2) and 97 (which sets out additional grounds of removal) should not apply to existing specified commercial trusts. Clause 97 should also be able to be modified or excluded for new specified commercial trusts.
40. For certain types of specified commercial trust (such as securitisation and covered bond programmes), the beneficiary will have very limited rights (if any) and should not be able to apply for a review in respect of the removal or appointment of a trustee. Clause 89 should therefore not apply to existing specified commercial trusts and should be able to be modified or excluded for new specified commercial trusts (see paragraphs 59 and 61).

Clause 93(2) and (3)

41. This clause confirms that a trustee's appointment must be accepted by the relevant trustee. However, subclauses (2) and (3) give rise to the possibility of implied acceptance and deemed rejection. In many instances (in particular, in a commercial context) it is desirable for the trustee to expressly accept its appointment. It is very common for specified commercial trusts to have detailed provisions addressing the appointment of, and related acceptance by, a new trustee. While subclause (2) contemplates the terms of the trust overriding it, the inability to modify or exclude subclause (3) may create confusion as to when the effective date of the appointment is. In particular, it imposes a 90 day deadline on acceptance or rejection which may not be appropriate for specified commercial trusts. Accordingly, these provisions should not apply for existing specified commercial trusts (see paragraph 59) and subclause (3) should generally be able to be modified or excluded (see paragraph 88).

Clause 122(2)(b)

42. Clause 122(2)(b) provides that a court may vary or extend the power of a trustee upon application by a beneficiary or the trustee. However, the beneficiary of certain types of specified commercial trusts (such as securitisations and covered bond programmes) will have limited input (if any) on the operations of that trust and should not be able to apply for such an order. This clause should not apply to existing specified commercial trusts (see paragraph 59) and should be able to be modified or excluded for new specified commercial trusts (see paragraph 61).

Clauses 137 to 142

43. These clauses set out a regime for alternative dispute resolution. The parties to specified commercial trusts are sophisticated commercial parties who are able to include such provisions in the relevant document at the time if it is appropriate. Accordingly, such a regime should not be imposed on existing specified commercial trusts (see paragraph 59).

Schedule 3

44. We have **attached** as an appendix to this submission our detailed submissions on Schedule 3 of the Bill.

45. We have also set out below a summary of our submissions on Schedule 3:

Clause 1(1)

46. In addition to the types of commercial trusts set out in subclause (1), a common type of trust is a turnover trust. An example of where this commonly arises is when a guarantor receives assets to which it is not entitled and must hold those assets on trust until it is passed back to the creditor or secured party. As this type of trust is not created for the purpose of facilitating one or more commercial transactions, and is not a wholesale trust or a security trust, we suggest including a specific item for turnover trusts within the definition of clause 1(1).

Clause 1(2)

47. Subclause (2) sets out the circumstances in which a trust ceases to be or is not a specified commercial trust. We are unsure what this clause is intended to address and suggest its intention should be clarified.

Clause 1(3)

48. At the definition of "services":

- (a) Limb (iii): this should also include a contract between a bank and a guarantor of, or security provider for, the customer of the bank.
- (b) Contracts of investment, being a common type of commercial transaction that may give rise to a trust, should also be included.
- (c) Limb (iv): this should be extended to include making other types of financial accommodation available to the relevant parties.
- (d) Paragraph (c): it is not clear what types of contracts this paragraph is referring to, and accordingly this should be clarified.

Clause 2

49. At subclause (1)(a):

- (a) the definition of "wholesale trust" should also encompass the offer of financial products to, and lending of money to or borrowing of money from, overseas investors who may not fall within the definition of "wholesale

investors" as defined in the FMC Act. This would capture borrowing and/or funding offshore which occurs regularly in commercial transactions; and

- (b) a new subsection (iii) should be inserted to include "the holding of client money or client property on trust for wholesale clients". This would address broking services provided to wholesale clients.
50. The words "originator of any debt securities" at subclause (1)(b)(iii) should be amended to an "originator any property sold to the trust". In addition, a new subclause (iiia) should be inserted to cover any person that sells property to a trust. The trustee is the issuer of the debt securities, and the originator may not necessarily be the entity that sells the property to the trustee.
51. The definition of "large" should refer to the FMCA instead of the Financial Reporting Act 2013, for consistency with the definitions of "wholesale investor", "investment business" and "government agency".
52. New definitions should be inserted for "client money", "client property" and "wholesale client", which should each have the meaning given to them in the FAA.
53. Residual beneficiaries can receive both surplus assets on a winding up and nominal income on an ongoing basis during the life of the trust. Given the possible variations in what may be received by such a beneficiary, we suggest limb (a)(i) of the definition of "residual beneficiary" should be deleted as the key requirement is that the beneficiary is paid after all other claims on the trust property. It is usual for periodic payments to be made to the residual beneficiary. However, such payment would be in accordance with the set order of distribution where the residual beneficiary would be paid after all other claims at that time had been satisfied. Accordingly, limb (a)(ii) should instead read "after any other claims on the trust property **at that time** have been satisfied". Finally, it would be practically difficult to determine if residual beneficiary operated "exclusively" for a charitable purpose. It should be sufficient that the residual beneficiary acts for a charitable purpose.

Clause 3

54. Subclause (1) sets out the definition of a "security trust". As security may be granted by entities other than the debtor, and the security trust may be for the benefit of any party to a financing arrangement, this definition should be revised to read "holds security over the assets of a debtor **or any other party** for the benefit of a party **or parties to** a financing arrangement".
55. The definition of "financing arrangement" should be amended to:
- (a) include "any other lending of money or provision of financial accommodation". As currently drafted, "financing arrangement" is limited to a loan facility agreement or an issue of a debt security, which are not the only means by which money can be lent or financial accommodation provided;
 - (b) encompass "all arrangements and transactions in connection with or contemplated by a loan facility agreement or an issue of a debt security". Such structures will often include various other secured parties such as an account bank and swap counterparty. Our suggested amendment will accommodate such counterparties who are also party to the financing arrangement;

- (c) delete paragraph (a), as the beneficiaries of a security trust may not fit within the parameters set out in clause 2(1)(b)(i) to (vi). It should be sufficient that the beneficiary is a party to the financing arrangement, which is addressed within the definition of "security interest"; and
- (d) delete paragraph (b) as security trust arrangements can apply to both retail and wholesale offers of a debt security.

Clause 4(2)

- 56. We agree with the approach taken in this clause; being that certain provisions of the Bill will not apply to existing specified commercial trusts. These provisions are not appropriate for such trusts and may directly conflict with the terms of the trust, which have been negotiated by commercial parties.
- 57. Unlike specified commercial trusts created after the commencement of the Bill, such parties will not have an opportunity to easily modify or exclude these provisions from the terms of trust. It is not uncommon for the terms of trust to have extensive amendment procedures that require involvement from multiple stakeholders. Accordingly, requiring the parties to modify or exclude the relevant provisions, as contemplated for new specified commercial trusts, is not practical for existing specified commercial trusts. However, if the relevant parties wish to re-apply any of the provisions listed at clause 4(2), they would be free to do so, subject to complying with the amendment procedures in the relevant documents.
- 58. Clause 4(2) refers to "a specified commercial trust that was created before the commencement of this clause". However, there are many existing trusts that provide for further new trusts to be created when the trustee holds or receives certain specified property. An example of such a subsequent trust is a "trust-back" trust under a securitisation or covered bond programme. While such trusts are "created" after the commencement of clause 4(2), they should have the same treatment as existing specified commercial trusts for the reasons set out above at paragraph 57. Accordingly, this clause should be amended to refer to "a specified commercial trust that was created ***pursuant to terms of trust that are in effect*** before the commencement of this clause".
- 59. As detailed earlier in this submission, the following provisions should also be included at subclause (2):
 - (a) Clause 25 (Duty to act for benefit of beneficiaries or permitted purpose);
 - (b) Clauses 27 to 36 (Default duties);
 - (c) Clauses 37 to 39 (Exemption from liability and indemnity);
 - (d) Clauses 54 and 55 (Investment powers);
 - (e) Clauses 56 and 57 (Power to determine treatment of returns and accounts);
 - (f) Clauses 58(1) to (5) and 59 to 62 (Powers to apply trust property for beneficiary's welfare);
 - (g) Clause 73 (Application of insurance money for loss or damage of trust property);

- (h) Clause 82 (Trustee indemnity for rent, covenant or agreement under lease);
- (i) Clauses 86(1) and (2) (Removal and appointment of trustee)
- (j) Clause 89 (Application to review power to remove or appoint);
- (k) Clauses 93(2) and (3) (How trustee accepts or rejects appointment);
- (l) Clause 95 (Retirement of trustee);
- (m) Clause 97 (How trustee is removed);
- (n) Clause 122(2)(b) (Power of court to vary or extend trustee's power);
- (o) Clause 131 (Payment of commission to trustee);
- (p) Clauses 137 to 142 (Alternative dispute resolution); and
- (q) Clauses 146 to 151 (Investigation of condition and accounts of certain trust property).

Clause 4(3)

60. Clause 4(3) of Schedule 3 sets out provisions of the Bill that a specified commercial trust may modify or exclude in its terms of trust. We recommend clarifying that these provisions are in addition to the provisions set out in Schedule 2 which may also be modified or excluded.
61. As detailed earlier in this submission, the following provisions should be included at subclause (3):
- (a) Clause 25 (Duty to act for benefit of beneficiaries or permitted purpose);
 - (b) Clauses 37 to 39 (Exemption from liability and indemnity);
 - (c) Clause 73 (Application of insurance money for loss or damage of trust property);
 - (d) Clause 89 (Application to review power to remove or appoint);
 - (e) Clause 97 (How trustee is removed);
 - (f) Clause 122(2)(b) (Power of court to vary or extend trustee's power);
 - (g) Clause 131 (Payment of commission to trustee); and
 - (h) Clauses 146 to 151 (Investigation of condition and accounts of certain trust property).
62. As discussed at paragraph 19, clauses 37 to 39 should be included at clauses 4(2) and 4(3) of Schedule 3 and subclause 4(4) of Schedule 3 should be deleted.

Submissions in relation to FMC debt trusts

Clause 33

63. Clause 33 imposes a duty on the trustee to act impartially in relation to beneficiaries. This clause is disapplied for MIS trusts, which we understand is likely because of section 153(1)(b) of the FMC Act. For similar reasons we believe this provision should also be disapplied for FMC debt trusts. See section 112(1)(b) of the FMC Act.

Clause 157

64. Subclause (1) defines the types of trusts this new section would apply to. However, subclause (1)(c)(ii) overlaps with the definition of "wholesale trust" at clause 2 of Schedule 3. It should be clarified that, where a trust falls within the definition of "wholesale trust" at clause 2(1) of Schedule 3, then the provisions of Schedule 3 (rather than clause 157) should apply to that trust.
65. As detailed earlier in this submission, the following provisions should be included at subclause (2):
- (a) Clauses 28 (Duty to invest prudently), 33 (Duty of impartiality), 34 (Duty not to profit), 35 (Duty to act for no reward) and 36 (Duty to act unanimously);
 - (b) Clauses 54 and 55 (Investment powers);
 - (c) Clauses 58(1) to (5) and 59 to 62 (Powers to apply trust property for beneficiary's welfare);
 - (d) Clause 73 (Application of insurance money for loss or damage of trust property);
 - (e) Clause 77(1) (Trustee's liability for expenses and liabilities incurred, and trustee's right to indemnity); and
 - (f) Clause 131 (Payment of commission to trustee).

Submissions in relation to MIS trusts

Clause 31

66. For MIS trusts, where a trustee commits to an approach with regards to withdrawals (for example, when investors may be permitted to make withdrawals from their KiwiSaver or superannuation scheme), this approach should be permitted to continue to apply to future trustees. Accordingly, this provision should be disapplied for MIS trusts.

Clause 161

67. Subclause (1) defines the types of trusts this new section would apply to. However, subclause (1)(c)(ii) overlaps with the definition of "wholesale trust" at clause 2 of Schedule 3. It should be clarified that, where a trust falls within the definition of

"wholesale trust" at clause 2(1) of Schedule 3, then the provisions of Schedule 3 (rather than clause 161) should apply to that trust.

68. As detailed earlier in this submission, the following provisions should be included at subclause (2):
- (a) Clause 31 (Duty not to bind future trustee);
 - (b) Clauses 34 (Duty not to profit) and 35 (Duty to act for no reward);
 - (c) Clauses 58(1) to (5) and 59 to 62 (Powers to apply trust property for beneficiary's welfare);
 - (d) Clause 73 (Application of insurance money for loss or damage of trust property);
 - (e) Clause 77(1) (Trustee's liability for expenses and liabilities incurred, and trustee's right to indemnity); and
 - (f) Clause 131 (Payment of commission to trustee).
69. Subclause (3) should be deleted, as this is already dealt with under clause 16(6)(b).

Submissions in relation to broking trusts

Clause 21(2)

70. This clause imposes an obligation on advisers (who advise or prepare the terms of trust) to ensure that the settlor is aware of the meaning and effect of any modification or exclusion of default duties that the adviser is recommending. The obligation is set out in subclause (2).
71. While broking trusts are created pursuant to section 77P of the FAA, the documentation setting up such trusts may modify or exclude such default duties. Accordingly, subclause (2) should not apply to broking trusts. This is consistent with the Bill's approach to FMC debt trusts, MIS trusts and specified commercial trusts.

Clauses 45 to 51

72. Clauses 45 to 51 sets out a regime for providing information to beneficiaries. Custodians, which are trustees of a broking trust, are already subject to obligations to provide information under the Custodian Regulations. The information provided under those regulations is more relevant to beneficiaries than the information required to be provided by the Bill. Accordingly, these clauses should not apply to a broking trust if the Custodian Regulations or any equivalent legislation under the Financial Services Legislation Amendment Bill (**FSLAB**) apply to that broking trust.

Clauses 86(1) and (2) and 92

73. These clauses set out who may remove or appoint trustees. However, brokers are required by section 77P of the FAA to hold client money or client property on trust or ensure that client money or client property is held on trust. If the broker itself holds the client money or client property on trust, then none of the removal or appointment methods or relevant persons in these clauses would apply. In such a case, a new

trustee would be appointed only by changing the broker. Accordingly, these clauses should not apply to broking trusts.

Clause 97

74. Clause 97 sets out how a trustee is removed, including additional grounds of removal at subclause (3). However, the terms governing the broking relationship will already set out the circumstances in which the broker can be removed, and so this clause should not apply to broking trusts.

Clauses 113 to 115

75. These provisions set out how a trust may be terminated or varied, which are usually set out in the terms of trust in a commercial context. This has already been recognised for specified commercial trusts, FMC debt trusts and MIS trusts, to which these clauses do not apply. Similarly, this clause should not apply for broking trusts. Broking trusts arise only by virtue of section 77P of the FAA, meaning that they would only be terminated if the broker ceases to act as a broker.

Clause 164

76. The FAA will be replaced by the FSLAB. Based on current timetables the FSLAB is likely to be in effect prior to the Trusts Act. We query whether it would be beneficial to include a comparable provision to clause 165 in relation to the FSLAB in anticipation of the changeover of the broking trust regime. The suggested changes to deal with broking arrangements with wholesale clients suggested at Schedule 3 should also be considered in light of the anticipated changes to be brought in by the FSLAB.

Clause 165

77. Subclause (1) defines the types of trusts this new section would apply to. Some broking trusts may only have wholesale clients. For such trusts, which should fall within the definition of "wholesale trust" at clause 2 of Schedule 3 (see paragraph 49), it should be clarified that the provisions of Schedule 3 (rather than clause 165) should apply.
78. As detailed earlier in this submission, the following provisions should be included at subclause (2):
- (a) Clause 21(2) (Adviser to alert settlor to modification or exclusion of default duty);
 - (b) Clauses 28 (Duty to invest prudently), 30 (Duty to consider exercise of power), 34 (Duty not to profit), 35 (Duty to act for no reward) and clause 36 (Duty to act unanimously);
 - (c) Clauses 37 to 40 (Exemption from liability and indemnity);
 - (d) Clauses 45 to 51 (Giving information to beneficiaries);
 - (e) Clauses 56 and 57 (Power to determine treatment of returns and accounts);
 - (f) Clauses 58(1) to (5) and 59 to 62 (Powers to apply trust property for beneficiary's welfare);

- (g) Clause 73 (Application of insurance money for loss or damage of trust property);
- (h) Clauses 86(1) and (2) (Removal and appointment of trustee);
- (i) Clause 92 (Appointment of trustee);
- (j) Clause 97 (Removal of trustee);
- (k) Clauses 113 to 115 (Termination and variation of trusts);
- (l) Clause 131 (Payment of commission to trustee); and
- (m) Clauses 146 to 151 (Investigation of condition and accounts of certain trust property).

General submissions

Clause 5(4)

79. This clause states that the terms of a trust may impose duties and restrictions on a trustee additional to those provided for in the Bill, which we agree with. However, the terms of a trust may, in addition to imposing such restrictions, also specifically empower the trustee. Accordingly, we recommend this is clarified by amending this subclause to "the terms of a trust may **give powers to and** impose duties...".

Clause 15(2)

80. Clause 15(2) states that a trust commences "when a trustee holds property of the trust". In commercial transactions, often the same entity can act as the trustee of different trusts, or may have received property prior to commencement of the appointment. We suggest adding the words "as trustee of that trust" at the end of clause 15(2).

Clause 16(6)(c) and (d)

81. Section DC 7 of the Income Tax Act refers to but does not "apply to" employees' superannuation schemes (as contemplated by subclause 16(6)(c)). Such schemes can instead be captured by adding "a superannuation scheme or" after the words "the trusts of" in subclause 16(6)(d), and subclause 16(6)(c) can therefore be deleted.

Clause 36

82. As noted earlier in this submission, if there is more than one trustee, clause 36 requires them to act unanimously. Section 81 of the Trustee Act 1956 provides that where there are multiple trustees, those trustees can write to the relevant bank confirming that the trust's bank account can be operated by any of them or any of them and a delegate. Without an equivalent to section 81, the duty to act unanimously could lead to a situation where all trustees are required to operate the trust's bank account on a day to day basis. This would be practically difficult and will have a significant impact on banking arrangements for trusts. Therefore we submit that an equivalent to section 81 of the Trustee Act 1956 should be included in the Bill.

Clause 52

83. Clause 52 sets out the general power of a trustee to manage the trust property. However, the exercise of the trustee's powers is always subject to them being consistent with a trustee's duties in any particular instance, including the terms of trust. Accordingly, we recommend the addition of a new subclause (2) to clarify this, as set out below:

The general powers in subsection (1):

- (a) can be modified by the terms of the trust; and
- (b) are to be exercised in accordance with the mandatory duties and the default duties (if any, and to extent of any such duties) of the trustee.

If this addition is not made, clause 52 should be added to clause 4(2) of Schedule 3 as it would be difficult for parties to existing specified commercial trusts to amend the terms of trust to modify or exclude clause 52.

Clause 67(4)

84. The reference to "section 49(2)" in subclause 67(4) should instead refer to "section 49".

Clause 90

85. Clause 90 sets out who may not be appointed as trustee, and at subclause (2)(d) excludes "a body corporate that is subject to an insolvency event". Most corporate trustees act as trustees of multiple trusts, and the insolvency event of one trust does not necessarily mean it should not be able to be appointed as a trustee of another trust. Accordingly, we recommend adding at the end of subclause (2)(d) the words "in its personal capacity or in respect of its personal assets (and not in its capacity as trustee of any trust or in respect of any assets it holds as trustee)".

Clauses 108 and 109(1)(b)

86. Clause 108 states that the execution of the document of appointment, removal, or discharge divests the trust property from the outgoing trustees, and vests the trust property in the incoming trustees. However, a change in trustee and the vesting of trust property in the incoming trustee may not be simultaneous with execution of the relevant document. To address this, we recommend that at subclause (2), the words "execution of" should be replaced by "appointment, removal or discharge in accordance with". The same change should be made at subclause 109(1)(b), which tracks clause 108.

Clause 133

87. This clause is based on the existing section 55 of the Trustee Act 1956. In the Trustee Act equivalent of subclause (3), limbs (a) and (b) are qualified by limb (c), such that subclause (3) should read:

The persons are—

- (a) a person who is entitled to, or who has any interest in, the land: or

(b) a person who has any contingent right in the land: and

a person who is a party to the proceeding to which the judgment or order relates or is otherwise bound by the judgment or order.

Schedule 2

88. As discussed at paragraph 41, subclause 93(3) should be included at Schedule 2.

Additional provisions

89. In addition to the submissions set out above, the NZBA submits that the following provisions would be useful to include in the Bill to ensure it operates as intended:

(a) **Amendments with court consent:** While this submission has sought to be comprehensive as to the potential application of the Bill, there may be unforeseen circumstances and changes to the way trusts are used in the commercial context. We suggest that the Bill should include a provision to explicitly allow:

(i) subject to paragraph (a)(ii), the trustee of any business trust to apply for an order from the High Court; and

(ii) the trustee of a FMC debt trust or a MIS trust to apply for the Financial Markets Authority's consent,

to amend the terms of trust, despite anything to the contrary in the terms of trust (including anything relating to the consent of any person). This could operate in a similar way to section 109 of the FMCA where the issuer may amend or replace a trust deed with the Financial Markets Authority's consent.

(b) **Regular reviews:** Given the wide effect of the Bill, it would be sensible to require a review to be conducted some time after the Bill's enactment to assess the operation of the Bill and whether any amendments may be desirable. This would give stakeholders an opportunity to provide feedback to Parliament on the Bill once it is passed into law.

90. We would be happy to discuss these submissions if required.

APPENDIX

DETAILED SUBMISSIONS ON SCHEDULE 3

Schedule 3 Specified commercial trusts

ss 5(3)(b), 9

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; or
- (d) *[Insert concept of a turnover 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) a bank; and
- (B) a customer of the bank, a guarantor of the customer of the bank or a security provider for the customer of the bank:
- (iiia) a contract of investment:
- (iv) any contract for, or in relation to, the lending of money, ~~or granting of credit,~~ or making of financial accommodation, or the making of arrangements for the lending of money, ~~or granting of credit~~ or making of financial accommodation, 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 wholesale investors and/or overseas investors;
 - (ii) the lending of money to, or the borrowing of money from, wholesale investors and/or overseas investors; ~~and~~;
 - (iii) the holding of client money or client property on trust for wholesale clients; and
- (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 ~~debt securities~~ property of sold to the trust (or an associated person of that ~~originator~~ beneficiary);
 - (iiia) a seller of any property sold to the trust (or an associated person of that seller);
 - (iv) a person who is controlled by, or who is otherwise an associated person of, an investment business, a large entity, or a government agency;
 - (v) an overseas person who is, or who undertakes a role that is, substantially similar to a person under any of **paragraphs (i) to (iv)**;
 - (vi) the trustee of the trust;
 - (vii) 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

client money has the meaning given to it in section 77B of the Financial Advisers Act 2008

client property has the meaning given to it in [section 77B of the Financial Advisers Act 2008](#)

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 ~~section 45~~ [clause 39 of Schedule 1](#) of the Financial ~~Reporting Act 2013~~ [Markets Conduct Act 2013](#)

residual beneficiary means a beneficiary that is an entity that—

- (a) receives trust property [\(including any income of the trust\)](#) only—
 - (i) ~~at the termination of the trust; and~~
 - (ii) ~~after any other claims on the trust property at that time have been satisfied; and~~
- (b) at the time when the trust was created, operated ~~exclusively~~ for a charitable purpose or was otherwise for the benefit of the community

wholesale client has the meaning given to it in [section 5C of the Financial Advisers Act 2008](#)

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 [or any other party](#) for the benefit of a party [or parties](#) ~~to of that debtor as a part of~~ a financing arrangement.
- (2) In this clause,—

financing arrangement means [all arrangements and transactions in connection with or contemplated by](#) a loan facility agreement, ~~or~~ an issue of a debt security [or any other lending of money or provision of financial accommodation](#).—

- (a) ~~in which each party to the financing arrangement is a beneficiary who falls within clause 2(1)(b)(i) to (vi); or~~
- (b) ~~that is a regulated offer of debt securities (within the meaning of section 6 of the Financial Markets Conduct Act 2013).~~

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 pursuant to terms of trust that are in effect before the commencement of this clause:
- (a1) section 25:
 - (a2) sections 27 to 36:
 - (a3) sections 37 to 39:
 - (a) **sections 41 to 51:**
 - (aa) sections 54 to 57:
 - (ab) sections 58(1) to (5) and 59 to 62:
 - (b) **sections 63 to ~~73~~2:**
 - (c) **sections 77 to 79:**
 - (ca) section 82:
 - (cb) section 86(1) and (2):
 - (cc) section 89:
 - (cd) section 93(2) and (3):
 - (ce) section 95:
 - (cf) section 97:
 - (d) **sections 113 to 115~~:-~~:**
 - (da) section 122(2)(b):
 - (e) section 131:
 - (f) sections 137 to 142:
 - (g) sections 146 to 151.
- (3) In addition to the provisions set out in Schedule 2, the application of the following provisions may be modified or excluded by the terms of the trust ~~apply to where a~~

specified commercial trust ~~that waives~~ created pursuant to terms of trust that take effect after the commencement of this clause ~~unless their application is modified or excluded by the terms of the trust:~~

(a1) section 25:

(a2) sections 37 to 39:

(a) sections 41 to 51:

(b) sections 63 to ~~732~~:

(c) sections 77 to 79:

(ca) section 89:

(cb) section 97:

(d) sections 113 to 115~~:-~~

(da) section 122(2)(b):

(e) section 131:

(f) sections 146 to 151.

~~(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.~~