

Supplemental Submission

to the

Justice Committee

on the

Trusts Bill

8 May 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 seventeen 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 further comments on the Trusts Bill (**Bill**). We note that NZBA has prepared this submission in response to the Justice Committee's request to ANZ Bank New Zealand Limited for further information.
4. This submission is in addition to our written submissions dated 5 March 2018 (**Primary Submission**) and oral submissions on 5 April 2018.
5. NZBA is happy to work further with the Justice Committee and officials in relation to the proposals set out in this submission.
6. If you would like to discuss any aspect of the submission further, please contact:

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Introduction

7. As detailed in our Primary Submission:
 - (a) 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).
 - (b) NZBA is concerned that the Bill as currently drafted does not fully recognise trust structures that are not family trusts, for example trust structures used to facilitate important commercial and financing transactions.
 - (c) NZBA's intention is to ensure that the Bill does not compromise the operation of those trusts which facilitate legitimate and important commercial transactions.
8. NZBA's overarching submission is that certain trusts should not be captured by the Bill at all, such trusts being **excluded trusts**. Rather, the existing rules of common law and equity relating to trusts would apply to excluded trusts, consistent with clause 5(5)(b) of the Bill. This submission follows from our Primary Submission; commercial trusts, which are self-governing under contract or subject to other legislative and regulatory requirements, should be excluded from the ambit of the Bill.
9. The definition of excluded trust would need to be carefully considered. In our view, as a starting point, excluded trusts should include specified commercial trusts, as set out in Schedule 3 of the Bill (**specified commercial trusts**). The Bill currently partially recognises the unique nature of specified commercial trusts; many of the substantive provisions of the Bill do not apply to these trusts. However, as explained in our Primary Submission, given the number of exclusions that would be required, excluded trusts should not be captured by the Bill at all.
10. We have **attached** as an appendix to this submission a proposed definition of excluded trust. This builds on our Primary Submission on the definition of specified commercial trusts (we have accepted the changes we suggested to Schedule 3 and marked-up new edits). NZBA's previous revisions and comments on Schedule 3 also continue to apply (please see paragraphs 44 to 55 (inclusive) of the Primary Submission).
11. We recognise that there are likely to be other trust structures that should also be categorised as excluded trusts (ie trust structures used outside the banking/financial services industry). Accordingly, the proposed definition of excluded trusts provides for these other trusts to be addressed in the Bill by:
 - (a) Identification and categorisation as an excluded trust in the Bill itself where these are known, such as trusts used by other industries that have submitted on the Bill. NZBA understands that an example of this is a trust where the trustee is the statutory supervisor for a retirement village.
 - (b) Designation by an appropriate regulatory authority in respect of trusts that may develop in the future. We have suggested the Ministry of Justice be the regulatory authority with the ability to designate future excluded trusts, similar to sections 562 to 564 of the Financial Markets Conduct Act 2013.

The Committee may consider an alternative authority or approach to be more appropriate. For example, the Committee may prefer the designation to be effected by way of Order in Council on the recommendation of the Minister of Justice.

12. Notwithstanding this submission, we note that we consider that the Bill should continue to apply to FMC debt trusts, MIS trusts and broking trusts in the manner contemplated by clauses 157, 161 and 165 of the Bill and our submissions in the Primary Submission continue to apply.

APPENDIX

PROPOSED DEFINITION OF "EXCLUDED TRUST"

Schedule 3
Specified commercial Excluded trusts

ss 5(3)(b), 9

1 Meaning of specified commercial excluded trust

(1) **An specified commercial excluded 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;
- (c) a security trust; or
- (d) *[Insert concept of a turnover trust];*
- (e) *[Insert any other trusts that should also be an excluded trust eg retirement village trust]; or*
- (f) a trust that is declared to be an excluded trust under clause 4.

(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, granting of credit or making of financial accommodation, or the making of arrangements for the lending of money, 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~~ more 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:
 - (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 property sold to the trust (or an associated person of that originator):
 - (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 clause 39 of Schedule 1 of the Financial 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— after any other claims on the trust property at that time have been satisfied; and
~~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 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 a financing arrangement.
- (2) In this clause,-

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

4 ~~Certain provisions are or may be modified or excluded in relation to specified commercial trust~~ Ministry of Justice's designation power

- (1) ~~The following provisions do not apply to a specified commercial trust (whether created before or after the commencement of this clause):~~ The Ministry of Justice may declare that a trust that would not otherwise be an excluded trust is an excluded trust.

- (2) A declaration may specify terms and conditions relating to—
- (a) the circumstances in which the declaration applies, including (without limitation) by reference to any person or class of persons or any transaction or class of transactions; and
 - (b) transitional matters.
- (3) The Ministry of Justice must not make a declaration under this clause unless:
- (a) it has had regard to the purpose for the establishment of the relevant trust;
 - (b) it is satisfied that the relevant trust is of a type that the declaration is necessary or desirable in order to allow the trust to operate as intended by the settlor and the proposed trustee;
 - (c) the relevant trust will facilitate a commercial or financing arrangement that would, but for certain characteristics of the relevant trust, otherwise meet the criteria specified in clause 1(1)(a) to [(e)];
 - (d) *[Insert any other conditions for such a declaration];* and
 - (e) it has consulted the persons or representatives of the persons that the Ministry of Justice considers will be substantially affected by the declaration.

A failure to comply with this clause 4(3)(e) does not affect the validity of the declaration.

- (4) A declaration under this clause applies subject to any terms and conditions of the declaration relating to transitional matters.

~~(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:~~
- ~~(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 where a specified commercial trust is created pursuant to terms of trust that take effect after the commencement of this clause :~~
 - ~~(a1) — section 25:~~
 - ~~(a2) — sections 37 to 39:~~
 - ~~(a) — sections 41 to 51:~~
 - ~~(b) — sections 63 to 73:~~
 - ~~(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.~~

