



FINANCIAL SERVICES FEDERATION

19 December 2016

Trusts Bill Consultation Team,
Ministry of Justice,
SX 10088
Wellington

By email: trustlaw@justice.govt.nz

Dear Team members,

Consultation on a New Trusts Act for New Zealand

The Financial Services Federation (“FSF”) wishes to comment on the above Consultation Paper (the “Consultation Paper”), and in particular on aspects of the exposure draft of a Trusts Bill which accompanied the Consultation Paper (the “draft Bill”).

By way of background, the FSF is the industry body representing responsible and ethical finance and leasing providers in New Zealand. The FSF has over fifty members and affiliates providing first-class financing, leasing, and credit-related insurance products and services to over 1 million New Zealand consumers and businesses. The FSF’s affiliate members include internationally recognised legal and consulting partners. A list of the current membership is attached to this submission as Appendix “A”.

Many, and perhaps “most”, of the FSF’s members frequently have dealings with trusts, including in either - or in some cases both - of the following ways:

- a) Dealings with Private Trusts: Many New Zealanders now have a family trust, sometimes as an asset owning vehicle, and sometimes as a vehicle for a trading enterprise. Reflecting that, those of the FSF’s members that are financiers are often involved in providing finance to such trusts or persons associated with them;
- b) Dealings with Trustee Corporations: Some FSF members are non-bank deposit takers regulated by the Non-bank Deposit Takers Act 2013 (“NBDTs” and the “NBDT Act”). They are required by the laws applicable to deposit takers to have a Trust Deed in favour of a Trustee Corporation which acts as a Supervisor for the benefit of their investors.

While FSF members may also have dealings with trusts in other ways, the above two categories are those of most relevance to FSF members, and are addressed separately below.

Private Trusts:

As noted above, it is common for the FSF’s financiers members to be involved in providing finance to such trusts, or to persons associated with them when the trust is involved in a capacity other than as borrower, for example as a guarantor. Many of the proposals addressed in the Consultation Paper or in the draft Bill are however not directly relevant to those activities, and as a result the FSF does not intend to address most of the questions in the Consultation Paper.

The FSF intends instead to focus on the provisions of the draft Bill that relate to the powers of Trusts, and in particular on the provisions most relevant to financing transactions involving Trusts.

A financing transaction involving an FSF member dealing with a trust is typically likely to involve a trust in one of three ways:

- a) Trust as Borrower: The trust may be borrowing from an FSF member, whether as a residential or other mortgage, as a vehicle financing transaction, or for other purposes;
- b) Trust as Guarantor: The trust may be guarantor of a loan made by an FSF member to another borrower;
- c) Trust as Security Provider: Whether as a borrower or as a guarantor, the Trust may be providing security for finance provided by an FSF member.

The FSF wishes to comment on the potential impact of the draft Bill in each of those three areas, as will be addressed separately next. As a preliminary comment applicable to each of those areas, the FSF would first note that whether a trust has power to enter into a particular transaction is, under present law, often not an easy matter to determine, and may be impacted by a range of differently drafted Trust Deeds, and resolution of that issue may on occasion require external advice, at a cost.

The FSF's impression is that the relevant provisions of the draft Bill will make it easier for FSF members to deal with Trusts, and may also have a beneficial effect in terms of reducing transaction costs, both of which the FSF welcomes.

Despite that comment, the FSF suggested the relevant provisions of the draft Bill might be further improved in each of the situations addressed next.

Trust as Borrower: The FSF welcomes the clear statement in clause 48 of the draft Bill that -

"A trustee has the following general powers:

- a) all the powers necessary to manage the trust property including, in relation to the trust property, all the powers of an absolute owner of the property;*
- b) all the powers necessary to carry out the trust, including powers incidental to those in paragraph (a)."*

That approach to the legislative expression of a Trust's powers is broadly consistent with the approach taken by, for example, the Companies Act 1993 in relation to companies, and should facilitate dealing with trusts in a manner that will help to minimise transaction costs.

In respect of borrowing by Trusts, the FSF expects that the above provision should typically result in trusts having power to borrow. However, the FSF suggests that the significant role that trusts play in contemporary New Zealand society and the frequency with which trusts borrow are such as to make it desirable for the Bill explicitly to state that a trust has the power to borrow.

The FSF notes that such an approach is presently taken in the Trustee Act 1956, section 21 of which specifically addresses secured borrowing. The FSF submits the same approach should be taken in the draft Bill.

Trust as Guarantor: Similar comments apply here, except that the FSF suggests that it is less clear that clause 48 of the draft Bill empowers the giving of guarantees by trusts. That too ought desirably to be made clear by an explicit statement that a trust has the power to guarantee.

Trust as Security Provider: The FSF also notes clause 50 of the draft Bill, which is intended to protect a "transferee or assignee" against arguments that a transaction to which they are a party is ineffective because-

"...the purported exercise of the power exceeds the powers of the trustee or is otherwise contrary to the terms of the trust."

The FSF also welcomes the policy apparent in clause 50, which again should help to minimise risk and costs in dealing with Trusts. However, the FSF submits that this provision could also usefully be improved.

Specifically, the scope of the words "transferee or assignee" lacks clarity. Is a lender who has taken a mortgage of land or other security interest in property an "assignee" of the trust for example? The FSF

submits that clause 50 of the draft Bill should also apply in favour of secured lenders, and notes that is already the case under the corresponding present legislation, namely section 22 of the Trustee Act 1956 which expressly protects a mortgage lender as well as a “purchaser” or a “transferee”.

That protection for secured lenders should be maintained by the draft Bill, except that in a post-PPSA environment it should be expressed in more contemporary terminology than “mortgagee”. The FSF suggests that perhaps this point could be addressed in the interpretation sections, by stating that a reference to a “transferee or assignee includes a mortgagee or the holder of a security interest as defined in the Personal Property Securities Act 1999.”

That is in fact the approach taken in taken to the definition of “purchase” in section 16 of the Personal Property Securities Act 1999, and the FSF suggests that consistency in policy approach and in drafting also makes that approach desirable in the draft Bill.

Trustee Corporations:

As noted above, the FSF’s NBDT members are parties to Trust Deeds under which a Trustee Corporation acts as Supervisor for the benefit of their investors. Despite the recent change of the name of that role to “Supervisor”, such Supervisors seem clearly intended to be “trustees” for the purposes of the draft Bill (as is implicit in the draft Bill’s concept of “wholesale investment trust”).

As well as being subject to the new Act which is envisaged by the draft Bill, those Supervisors are already regulated to a significant extent by complex existing legislation, some of which has only very recently come into full force (the Financial Markets Conduct Act 2013 [“FMC Act”] in particular).

While it is evident that the Ministry is aware of the need to address the relationship between the draft Bill and the FMC Act (as is again evidenced by the “wholesale investment trust” concept in the draft Bill), it is not yet clear to the FSF and its relevant members how some of the provisions of the draft Bill may impact on, and inter-relate with, such other legislation. That applies in particular to the relationship between the draft Bill and FMC Act, but may apply also to other legislation applicable to statutory supervisors (for example the Financial Markets Supervisors Act 2011 and the NBDT Act) and potentially also to other legislation that addresses the role of trusts in the financial sector.

While the FSF and its relevant members will need to undertake such an exercise, doing so will be a significant and time consuming task, requiring longer than the period of approximately one month allowed by the Consultation Paper for responses to the draft Bill, particularly at this time of year.

It may be that there could ultimately be relatively simple solutions to the relationship between the draft Bill and such existing legislation, for example by stating clearly in the draft Bill that such existing legislation prevails over the draft Bill, but the FSF considers that issues here first need further study by the FSF and other interested parties, in consultation with officials.

The FSF accordingly suggests that such matters are the subject of further consultation in the New Year, and would request the opportunity to be involved in such consultation.

The FSF trusts that its above comments are helpful, and as just indicated would welcome the opportunity to discuss some aspects further.



Lyn McMorran
EXECUTIVE DIRECTOR

**Appendix “A”
FSF Membership List as at 1 November 2016**

Debenture Issuers - (NBDT) Non-Bank Deposit Takers	Vehicle Lenders	Finance Company Diversified Lenders	Credit Reporting Other	Insurance	Affiliate Members
<u>Rated</u> Asset Finance (B) Fisher & Paykel Finance (BB+)	BMW Financial Services Branded Financial Services Community Financial Services Go Cars Finance Ltd European Financial Services Mercedes-Benz Financial Services Motor Trade Finance Nissan Financial Services NZ Ltd Onyx Finance Limited Toyota Finance NZ Yamaha Motor Finance	Advaro Limited Avanti Finance Caterpillar Financial Services NZ Ltd Centracorp Finance 2000 Finance Now Future Finance Geneva Finance Home Direct Instant Finance John Deere Financial Latitude Financial Personal Finance Ltd South Pacific Loans The Warehouse Financial Services Group Thorn Group Financial Services Ltd Turners Finance Limited	VEDA Advantage <u>Debt Collection Agencies</u> Baycorp (NZ) Consumer Credit Management Limited Dun & Bradstreet (NZ) Limited	Autosure Protecta Insurance Provident Insurance Corporation Ltd Southsure Assurance	American Express International (NZ) Ltd AML Solutions Buddle Findlay Chapman Tripp EY Finzsoft KPMG PWC SimpsonWestern (Total : 53 members)