



TRUSTEE CORPORATIONS ASSOCIATION of NEW ZEALAND INC

SUBMISSION

TO THE

FINANCE AND EXPENDITURE COMMITTEE

ON THE

NON-BANK DEPOSIT TAKERS BILL

6 OCTOBER 2011

INTRODUCTION

1. This Submission is from Trustee Corporations Association of New Zealand Inc ("TCA"). We are available to meet with the Committee to discuss our Submission. We can be contacted at:

Trustee Corporations Association of New Zealand Inc
Level 12
City Chambers
Cnr Johnston & Featherston Streets
PO Box 2382
WELLINGTON 6140

Ph: 04 499 6791
Attention: David Brown Douglas
Email: davidbd@tca.org.nz

2. TCA is a long established association to which all Trustee Corporations belong. The members of the TCA are Public Trust and each of the Trustee Corporations authorised under the Trustee Companies Act 1967 to act as Corporate Trustee for financial products – being Trustees Executors Limited, The New Zealand Guardian Trust Company Limited, New Zealand Permanent Trustees Limited (wholly owned by Public Trust) and Perpetual Trust Limited. The Māori Trustee joined TCA on 1 June 2011. Covenant Trustee Company Limited, although not authorised under the Trustee Companies Act 1967, is an associate member of TCA.
3. TCA maintains relationships with government ministries, regulatory bodies and financial sector groups. TCA sets minimum standards as practice guidelines for the performance of Corporate Trustees – standards for integrity, competence, financial capacity, internal controls, powers and duties, standards for conflict of interest management and for reports from scheme operators.
4. Trustee Corporations are most often associated with drawing up wills and trusts, putting in place enduring powers of attorney and handling estates, a service known as Personal Trusts. TCA contends that its members are uniquely qualified to fill this important role which requires independence, experience, professionalism and above all a focus on investor and beneficiary protection.
5. TCA members also provide prudential supervision of a wide range of investment products and financial arrangements in a number of ways and at various levels. In certain instances, fund managers must appoint a Corporate Trustee to meet regulatory requirements before they can offer a financial product to the market.
6. As at 30 June 2011, total Personal Trusts (excluding agencies and administrations) under supervision exceeded \$26,000 with a value in excess of \$6.3b. Corporate Trust funds under supervision exceeded \$173b.
7. TCA appreciates this opportunity to comment on the Non-bank Deposit Takers Bill.

General Comment

8. TCA is supportive of the Bill. Its submissions relate mainly to fine tuning or technical matters.

Detailed Comments

9. Clause 4: "governing body" includes, in relation to unit trusts in paragraph (c), the trustee. Given the dominant role of the manager in governance of a unit trust, this definition should be limited to the manager and the reference to the trustee deleted.
10. Clause 4: "guaranteeing subsidiary" is now limited to those subsidiaries that guarantee all debt securities issued by the NBDT. TCA agrees this is an appropriate alignment of the definition with the Securities Act.
11. Clause 5 - definition of "NBDT":
 - (a) The exclusion of credit unions and building societies that don't fund from the public by debt securities would appear correct.
 - (b) The exclusion of entities in receivership or liquidation should extend to entities in moratorium.
 - (c) Clause 13(2)(b): It's inconceivable an applicant for a licence could apply without having entered into the trust deed. We suggest adding "(including having entered into an appropriate trust deed for its debt securities)" after "the Securities Act 1978".
 - (d) While primarily an issuer point, we note the definition of NBDT as it relates to a funding subsidiary of an industrial/trading group that only on-lends within the group. That should not be caught; that isn't clearly the case. The intra group business of borrowing and lending should be excluded having regard to the primary objectives of the legislation.
12. Clause 18: Given the importance of the licence and compliance with any conditions, we suggest a requirement that either the Bank or the NBDT furnish a copy of the licence and any conditions to the Trustee. The Trustee has to know of the current conditions and terms in order to discharge its statutory obligations under clause 44.
13. Clause 21 - Procedure for cancelling licence: The Trustee should be directly notified in licence cancellation. Under both clauses 21(1) and 21(3)(a), please add "and the Trustee" after "to the licensed holder".
14. Clause 25: Again, mainly an issuer point, but is this intended to override section 131(2) of the Companies Act 1993 which allows directors to act in the best interests of the company's holding company if the constitution so allows it? If the NBDT is a subsidiary, such a provision (including existing ones) would be illegal. Clarify the relationship between the two provisions.
15. Clause 41: Is it realistic or conducive to getting the right people as directors to require directors to be aware of suitability concerns regarding their fellow directors and senior officers? This is the effect of the wording that directors "ought to be aware". While this comment is most obviously an

issuer point, trustees have an indirect interest through their obligation to report on non compliance with the Act and hence an interest in obligations that are appropriate and can be monitored sensibly. We are not convinced this is in that category; but undoubtedly issuer submissions will be received on this and we'll defer to those.

16. Clauses 43, 44 and 45: Basically TCA is comfortable with their bringing over from Part 5D. However, given the more extensive requirements of an NBDT under this Act, clause 44(1) should depend on the Trustee believing, and in addition having reasonable grounds to believe, that a licensed NBDT is not complying with the Act or the regulations. The trustee will only be able to do this on the basis of advice provided to it by the NBDT itself. Particularly in relation to suitability requirements of directors and changes in shareholding of an NBDT, there will inevitably be a delay in the trustee forming the belief. The wording could catch a situation where objectively the Trustee could be said to have reasonable grounds for a belief, but in fact through delays or inadequacy in NBDT reporting, not having formed that belief – and thus not having reported, itself being in breach. That takes Trustee accountability too far.
17. Clause 56: This is a new Bank direction power. TCA have no quarrel with it as such even though it seems primarily directed at NBDT failure and trustee assistance to the Reserve Bank. However, the protection of trustees provisions in clause 76 do not cover the trustee acting under a clause 56 direction. They should, unless it relates to a trustee default. Clause 76 should be amended accordingly.

Trustee Corporations Association of New Zealand Inc

6 October 2011