



LAW COMMISSION

TE AKA MATUA O TE TURE

MEDIA RELEASE

13 November 2012

Hon Sir Grant Hammond KNZM
President
Law Commission

REVIEW OF THE LAW OF TRUSTS – DETAILS OF PREFERRED APPROACH

LAW COMMISSION SEEKS FEEDBACK ON TRUST LAW PROPOSALS

The Law Commission is seeking feedback on a number of proposed reforms designed to clarify, modernise and improve the workability of trust law in New Zealand.

Law Commission President Grant Hammond said:

“Trust law has evolved over hundreds of years and is largely the result of the English judge-made law of equity. In New Zealand this has been overlaid with a fifty-year old statute, the Trustee Act 1956.

“Because of the importance of trusts to individuals, as a way of managing personal and family property, and to the business community, as a business and investment structure, it is vital that New Zealand has robust trust law.”

The Commission’s proposals are intended to ensure trusts legislation is fit for the modern context and overcomes the uncertainty that exists in some areas.

Many provisions of the Trustee Act are no longer relevant, while other important subject areas are not covered by the legislation at all. The Commission thinks trusts legislation can be made more useful by including general principles of trust law and default positions that reflect the modern use of trusts.

Where possible the Commission’s proposals will provide sufficient clarity and direction to preclude or limit the need for applications to the court. Sir Grant said “We want the court’s supervisory role to be limited to disputes or situations where the interests of beneficiaries or trustees are at risk. We want to avoid the court being used for non-contentious administrative tasks that prove unnecessarily expensive and time-consuming for those involved.”

This project has focused on core trust law, rather than other areas of law and policy that intersect with trust law, such as insolvency and social assistance. The Commission has generally taken the position

that resolving the problems that may arise in these areas due to the existence of trusts as a particular form of property holding falls beyond the scope of this review.

One area of interaction which the Commission has had to look further at is relationship property. This is because of significant concern about the potential for injustice due to the use of trusts. The Commission raises several options for comment involving the amendment of relationship property legislation in order to alleviate the impact of trusts.

Some specific reform proposals are discussed below.

Trustees' duties

The Commission's proposals would bring trustees' duties to the forefront of trusts legislation. "The duties owed by trustees to beneficiaries are central to what a trust is. We think that the duties need to be given greater prominence. Legislation should make clear the range and status of the duties owed by trustees," Sir Grant said.

The proposed approach would clarify which duties are a mandatory part of every trust and which may be excluded in a trust deed. The Commission also aims to make the law explicit regarding when liability for a breach of trust can be excluded.

The duty to provide beneficiaries with information about a trust has proven to be a cause of concern and confusion for some trustees. The Commission presents proposals which would assist trustees in determining what information must be provided to which beneficiaries.

Investment powers

Many of the investment provisions in the Trustee Act are unclear and outdated. The Commission is proposing to give trustees greater flexibility in the approach that may be taken to the investment of a trust fund.

The proposals would better support trustees adopting a total return investment policy and would move away from the current default obligation of selecting investments with regard to legal category rather than overall return.

The investment proposals also enable trustees to appoint an investment manager.

Corporate trustees

The Commission is suggesting innovative measures to address problems that arise where a corporate is acting as a trustee, rather than a natural person. Commonly these corporate trustees hold few or no assets in their own right. Sometimes creditors mistakenly believe they are contracting with a company rather than with a trustee.

The Commission's proposals include: requiring a corporate trustee to disclose its status as a trustee on all written communications and contracts; making directors of corporate trustees liable to discharge any debt incurred by the company acting as trustee; and making directors of corporate trustees owe obligations directly to the beneficiaries of the trust.

Court jurisdiction

The Commission's preferred approach would allow cases under the Trustee Act to be considered by the District Court as well as the High Court, so long as the amount at issue is within the District Court's monetary jurisdiction. This would be a change from the High Court's current exclusive jurisdiction.

Improved accountability of trustees

The Commission proposes to enhance the provision that allows the court to review a trustee's exercise of discretion. The proposal would require a clear threshold of evidence before the court would review a trustee's decision, but would be available in a wider range of circumstances to a wider range of applicants.

Feedback sought on *Preferred Approach* paper

The *Preferred Approach* paper is available on the Commission's website:

www.lawcom.govt.nz/project/review-law-trusts/publication/preferred-approach-paper.

The Commission is seeking comments from submitters as to whether they consider the proposals would be beneficial or whether there are any issues with how they would work in practice. The submission period closes on 22 February 2013. Submissions can be sent to trusts@lawcom.govt.nz.

The Commission will release a final report with recommendations in 2013.

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For further information and comment, contact: Sir Grant Hammond, President, Law Commission, tel (04) 914 4815 or 021 557 282, trusts@lawcom.govt.nz

This media release and a copy of the publication is available from our website at <http://www.lawcom.govt.nz/project/review-law-trusts>