EXECUTIVE SUMMARY

Auckland District Law Society Inc (ADLSI) would like to take this opportunity to thank the Law Commission, and in particular Sir Grant Hammond and Professor Geoff McLay for meeting with its members as part of their consultations on the Preferred Approach Paper.

Various submissions have been made by ADLSI over the past two years in response to the Issues Papers the Law Commission published in its Review of the Law of Trusts. Additionally ADLSI hosted two substantial consultation meetings between its members and Law Commission representatives. It is therefore not the intention of this paper to make an extensive submission on all of the Law Commission proposals but rather to provide a summary of the views so ably put forward by those present.

Proposals 1-4 generally met with the approval of practitioners.

Proposals 5-8, which reform the scope of trustees duties, were however a cause of serious concern to practitioners.

Some members were concerned that Proposal 5, in sections (3) and (4), goes further than the law currently requires in *Armitage v Nurse* [1997] 3 WLR and pointed to the lack of case law to support the decision to extend the irreducible core of the duties of a trustee to the extent proposed.

A number of concerns were raised regarding Proposal 6(a) as practitioners felt that, while it is obviously desirable for trustees to always understand and adhere to the terms of the trust deed, this could be extremely difficult for lay people dealing with trust deeds that were poorly drafted, used archaic terminology or were extremely complex. It was suggested that the duty should be reworded to require trustees to use ‘best endeavours’ to understand and adhere to the terms of the trust.

Proposal 6(b) caused a great deal of debate at both the meetings as to the precise meaning of the trustee’s duty to account to the beneficiaries for the trust property. Many practitioners queried whether this meant the compiling of detailed financial records to a certain financial standard or the lower standard of maintenance of proper accounts as noted by Butler in *Equity and Trusts in New Zealand*.

At Proposal 6(2) the effect upon new trust deeds that try to avoid such duties is clearly spelt out however it is of serious concern to ADLSI that there does not appear to have been sufficient thought given to the incorporation of existing trust deed provisions into a new Act and the interpretation of clauses in these deeds that may exempt them from the
new mandatory duties. This could lead to many trustees being required to apply to the courts for direction rather than risk failing to adhere to either the provisions of the trust deed or the new legislation.

In Proposal 7 the Law Commission provides a list of default content duties. Some practitioners felt that this distinction between default and mandatory duties would serve to muddy the waters of what was required of trustees. While it may have been intended to comprise a series of default standards for trustees it could end up causing significant problems due to the opportunity of it being used as an unfair method of pursuing trustees for breaches that were not envisaged by the drafters or settlors of the trust deed. This is mainly due to the fact that some of the proposals may be excluded completely while others may only be modified which is likely to cause significant confusion in the drafting of trust deeds and in the practical performance of the role of the trustee.

One primary example is that of the use of the term “evenhandedness” in P7(1)(a) which practitioners saw as being likely to leave the trustee’s open to criticism from beneficiaries. It should be remembered that many trusts are drafted leaving funds to be distributed to discretionary beneficiaries in a manner to be determined by the Trustees and therefore they could easily fall foul of this wording. This is particularly true where trustees may be abiding by a Memorandum of Wishes or other written formal instructions, where permitted, from the Settlor to prefer one beneficiary over another.

Practitioners noted that the status of documents such as Memorandums of Wishes did not appear to have been addressed by the Law Commission in their proposals and that legislative guidance for these could be helpful.

Proposal 7(1)(e) raised some concerns as it needs to be measured in the context of the nature and extent of trust activities. The holding of passive assets (for example a family home/bach) does not require active administration whereas the holding of investment portfolios may.

Proposal 7(1)(k) is also a matter of concern as the practitioners (and the ADLSI Property Law Committee in an earlier submission) took the view that the duty to keep proper accounts and give information as required should be split into separate parts and clearly defined as duties in their own right.

Proposal 8(5) met with the approval of the practitioners present however there was continued concern about the conflicting standards of duties expected from trustees.

Proposal 9 with its concept of “qualifying beneficiary” met with support from practitioners who were otherwise concerned as to the wide duty to provide information to beneficiaries that was proposed in P 6(1)(b).

The wording of Proposal 9(2) was considered helpful in that the decision in Schmidt and Rosewood was to be implemented while taking into account the factors that may temper such a duty. It should be explicit in any legislation the degree to which such factor, including confidentiality or the risk of embittered feelings, may modify this duty.
There was a great deal of discussion by practitioners with the Law Commission as to the status and identification of such beneficiaries during the consultations that ADLSI members had with the Law Commission. It was considered necessary that there be a means of identifying “qualifying beneficiaries” in existing trust deeds particularly as many older trust deeds may have an extremely wide number of potential beneficiaries and providing information to them may not be practicable or desirable. It was not felt that Proposal 9(4) was sufficiently clear and may serve to limit a new trust deed which attempts to specify a certain person(s) as a “qualifying beneficiary” with regards to the duty to inform but does not include other beneficiaries with a vested interest. This was complicated further by P 9(5) which appeared to provide this power.

Only where there is certainty as to, or a clear means of establishing, who a “qualifying beneficiary” is can the intention of Proposal 9 be effective.

Proposal 9(10) addresses the role of the Public Trust which features heavily in the Law Commission recommendations. Practitioners had serious concerns over the roles that were to be handed to the Public Trust which appeared to draw it into a number of conflicting spaces. First and foremost is the issue of independent legal advice. In light of the duties, some of which will be complex to put into practice due to poorly drafted trust deeds and a failure to adhere to them in the past, there will be a critical need for lawyers and trust specialists to assist. Proposal 6 is one initial area where such advice will almost become mandatory however at Proposal 9(10) a layperson would be forgiven for thinking that the role of independent advisor was to be played exclusively by the Public Trust. This element of the proposal seriously risks undermining the role of the legal profession in providing advice to trustees or beneficiaries while promoting a competing entity in the Public Trust which itself performs a partisan role for its clients and is ill suited to such an independent jurisdiction.

Practitioners at both meetings were concerned as to the role suggested for the Public Trust in the Law Commission's Preferred Approach Paper and felt that these require significant amendment. If the Public trust is to be fulfil the various roles the Law Commission has envisaged then significant restructuring of the Public Trust may be necessary to introduce an adjudication section that is very separate from the trust and will administration role that it currently performs.

Proposal 10 is effectively a good housekeeping provision that met with approval from practitioners who are already required to preserve such materials and who see the benefits of trustees being required clearly to do likewise.

Proposal 11 explicitly provides the trustees the same powers in relation to trust property as if the property were vested in the trustee absolutely and for their own use. Such explicit granting of the powers and competence of a natural person to the trustee is long overdue and provides a welcome legislative clarification by the Law Commission. The preface to the additional schedule of powers should be drafted as proposed and the wording of these sections should ensure that the cumbersome wording included in many trust deeds to comply with banks rules can be avoided in future.
Proposal 18 was briefly discussed by Sir Grant Hammond at our meeting and there were no objections to the change in the age of majority.

Proposals 17-20 were of significant interest to practitioners and one issue that arose was the liability of trustees for appointment of investment managers under P20 should the appointee turn out to have been corrupt or negligent. The current wording is unclear as to the extent of the supervisory role the trustees are required to play, and the extent to which they may be empowered to so supervise if the investment company does not permit them to do so. This is particularly the case in light of the close relationship that may exist between investment managers and finance advisors and the recent failures of finance companies. The liability of trustees in such cases should be limited to their proving they had taken reasonable care rather than depending on the court to exclude the trustees from liability under a reformatted section 73 clause. Otherwise there could be a substantial degree of uncertainty for trustees which would hamper investment and could lead to expensive and unnecessary litigation before the court decided to exercise the power to relieve the trustees as per P8(5).

Proposals 24 and 25 appear to assume that the Public Trust will play an automatic or mandatory role in the retirement process of trustees regardless of the circumstances of the trust. This highlights the concerns noted earlier in this summary that practitioners have with the multiple and conflicting roles the Public Trust is being expected to play under the proposed scheme.

The requirement that the removal or appointment of a trustee be conducted out “in good faith and honesty” is a little surprising and may constitute an unnecessary restriction upon the settlor if they retain this power. If it is considered to be a protection against another trustee with the power appointment wielding excessive power over the trust then any trustee, including the trustee being removed, may apply to the court for direction for a breach of such a fiduciary obligation.

At Proposal 33 the Law Commission suggests an amendment of section 25 of the Companies Act 1993 to require a company when acting as a trustee of a trust to clearly describe its status as such in all communications and contracts. This was considered an excellent proposal by the practitioners present at the meetings however it was felt that it should be extended significantly to apply to ownership of land.

Practitioners pointed to the difficulty of identifying where land was owned by a trust and the difficulties that this could lead to for both vendors and purchasers. It was proposed that the new Land Transfer Bill introduce a mandatory requirement to state on the land register when the land was held by trustees on behalf of a trust. This idea appeared to meet with the support of those present and it was felt that this would be a logical extension of P33.

It is therefore recommended that there be an automatic noting of where an interest is held by a trustee on behalf of a trust included on the companies office register and in the land transfer register. It was felt that that if the Companies Act and associated regime was being amended in this way then the new Land Transfer Bill should include a similar provision.
Proposals 34 – 36 were the subject of a great deal of discussion during the meetings and it was clear that there was significant concern among the practitioners as to the approach Law Commission had taken in its proposals.

In particular practitioners were very concerned about the extent and wording of P34 and the extent of the liability of the director of a corporation which is a trustee. This approach was regarded by some as inconsistent with the approach taken by the courts to date and in comparable jurisdictions. It was also felt that where this proposal was intended to address concerns as to the exposure of third parties to the actions of a trust then this could be effected by application (or if necessary extension) of P33 requiring the trust to disclose its status and any trustees acting as a corporation. This would ensure that there were appropriate levels of transparency to protect third parties without so dramatically shifting the exposure to liability.

The practitioners present were concerned that such exposure to liability coupled with the standards set out earlier in the proposals would seriously weaken trust administration in that it was possible fewer people would consent to acting as independent trustees.

Proposal 50 was briefly discussed with regards to the capacity of the District Court to determine any proceeding where the amount claimed was under $500,000 or where there were any proceedings or applications to be determined not involving claims for money or property. While these issues were not fully discussed due to lack of time there was significant concern as to the extension of District Courts jurisdiction with some practitioners feeling strongly that trust matters should be the exclusive preserve of the High Court and that this would remove the problem of conflicting approaches between the courts.

The extensive powers that are suggested for the Family Court in P51 were also not supported by the majority of those present, with some members supporting the approach that trust matters be sent to the High Court. There were also notable concerns that the Law Commission proposals did not properly address some of the shortcomings in the Property (Relationships) Act 1976.

While ADLSI appreciates that this summary is not an exhaustive response to the Law Commissions proposals it is hoped that it will be of assistance in reflecting some of the views of its members and practitioners generally to the important points that have been raised. If the Law Commission wishes clarification on any matter or requires any further assistance then please contact the Documents and Precedents Manager, Timothy Orr, by email timothy.orr@adls.org.nz. ADLSI would like to take this opportunity to thank the Law Commission for carrying out this extensive consultation and welcomes the opportunity to liaise with the Commission in the future.

Signed by

Frank Godinet
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