



## Trustee Companies Regulations 2014

His Excellency, Tom Marsters

Queen's Representative

### Order in Executive Council

At Avarua, Rarotonga this 20<sup>th</sup> day of November 2014

Present:

### His Excellency the Queen's Representative in Executive Council

Pursuant to section 119 of the Trustee Companies Act 2014, His Excellency the Queen's Representative, acting on the advice and with the consent of the Executive Council, makes the following regulations—

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## Regulations

- 1 Title**  
These regulations are the Trustee Companies Regulations 2014.
- 2 Commencement**  
These regulations are deemed to have come into force on 8 November 2014.
- 3 Interpretation**
- (1) In these regulations, unless the context otherwise requires,—
- Act** means the Trustee Companies Act 2013
- client**, in respect of a trustee company when it carries on trustee company business, means a person—
- (a) who has contracted with the trustee company for it to provide or arrange services:
- (b) who receives, or may receive, the benefit of a service provided or arranged by the trustee company.
- (2) Any term or expression that is defined in the Act and used, but not defined, in these regulations has the same meaning as in the Act.
- (3) In these regulations, if client money is the property of a trust then that trust and its beneficiaries are treated as 1 client.

## Part 1

### Client's assets

#### 4 Terms used in this Part

(1) In this Part—

**approved bank** means a bank that—

- (a) carries on banking business in a jurisdiction; and
- (b) is authorised to do so by the supervisory authority of that jurisdiction; and
- (c) is authorised to do so by the supervisory authority of the jurisdiction in which that bank is established

**client money**, in respect of a trustee company, means money in any form and currency in which a client has either a legal or equitable interest—

- (a) over which the trustee company has sole control;
- (b) that the trustee company has sole obligation to safeguard;
- (c) for which the trustee company has assumed sole responsibility

**client pooled bank account**, in respect of a trustee company, means a bank account that is—

- (a) opened by the trustee company in its name; and
- (b) holds or is intended to hold the client money of 2 or more of its clients; and
- (c) not a designated joint account; and
- (d) not an account held for a single client

**designated joint account**, in respect of a trustee company, means a bank account that is—

- (a) opened by the trustee company in its name; and
- (b) holds or is intended to hold the client money of 2 or more of its clients; and
- (c) those clients agree in writing at the time the account is opened that it should be a joint account; and
- (d) money in the account is to be used to finance a joint enterprise

**joint enterprise** means an enterprise for commercial purposes in which—

- (a) two or more persons participate; and
- (b) each participates for those commercial purposes.

#### 5 Records of client money to be kept

(1) A trustee company must keep adequate records of client money.

(2) The records must—

- (a) show each transaction in respect of the money; and
- (b) do that in a way that allows—
  - (i) the transaction to be identified and traced; and
  - (ii) the balance due to each client to be identified and traced; and
  - (iii) the records to be reconciled on a timely basis so that any error can be corrected promptly.

**6 Reconciliation of client money**

- (1) A trustee company must, at least once in each calendar month, carry out reconciliations between—
  - (a) the records of client money kept by the trustee company in a client pooled bank account; and
  - (b) the records of any third party that holds that client money.
- (2) In any other case, a trustee company must carry out reconciliations whenever statements are received from a third party that holds client money.
- (3) A trustee company must ensure those statements are supplied on a regular basis, consistent with the nature of the account or holding by that third party.
- (4) A trustee company must promptly identify any un-reconciled credit or debit and take prompt and prudent action to resolve a reconciliation issue.

**7 Interest on client money**

- (1) Unless a client directs otherwise, a trustee company must, so far as reasonable and practicable, act to ensure interest is received on client money.
- (2) A trustee company must credit interest received on a client's money to that client.

**8 Client money not to be mixed with other money**

- (1) A trustee company must so far as reasonable and practicable act to ensure, client money is not mixed with money that is not client money.
- (2) If a person is charged with breaching this regulation, it is a defence if that person can show that within 2 days of it becoming reasonable and practicable to do so, the money was separated.
- (3) In this regulation, money is mixed—
  - (a) if it is held in a single account; or
  - (b) is physically intermingled.

**9 Use of client money**

- (1) A trustee company must ensure a client's money is not used for another person without proper authority.
- (2) A trustee company must ensure that client money is not disbursed unless it is paid—
  - (a) to that client; or
  - (b) to another person with the authority of that client; or
  - (c) as money properly payable by or for that client; or
  - (d) as money otherwise properly disbursed.

**10 Client money in a client pooled bank account**

- (1) If client money is kept in a client pooled bank account, the trustee company must ensure—
  - (a) the account is with an approved bank; and
  - (b) the account name includes the words "trust account" or similar words that give clear notice the account holds client money and not money belonging beneficially to the trustee company; and
  - (c) the account is not knowingly overdrawn.

**11 Exemptions**

- (1) A trustee company may apply to the Commission to exempt that company from compliance with any requirement of this Part.
- (2) The Commission must not grant an exemption unless it has satisfied itself that no client of the trustee company is likely to be prejudiced by that exemption.
- (3) The Commission may—
  - (a) grant the exemption with or without conditions; or
  - (b) refuse to grant the exemption.
- (4) The Commission may vary or revoke an exemption at any time.
- (5) It may do so either—
  - (a) on its own initiative, by notice in writing to the trustee company; or
  - (b) on application by the trustee company.

**12 Offences**

A trustee company that fails to comply with a requirement of this Part commits an offence and is punishable on conviction by a fine not exceeding \$150,000.

## **Part 2 Accounts and Audit**

**13 Trustee company to appoint an approved auditor**

- (1) A trustee company must appoint an auditor of the financial accounts of its trustee company business.
- (2) However, a trustee company must not appoint an auditor of that business until the appointment has been approved by the Commission.
- (3) An appointment that has not been approved by the Commission is of no effect for the purposes of the Act and these regulations.
- (4) The Commission must not approve the appointment of an auditor unless it is satisfied—
  - (a) the auditor is independent of the trustee company; and
  - (b) having regard to the trustee company's actual or proposed trustee company business, the auditor is fit and proper to be an auditor of that business.

**14 Termination of appointment of an auditor**

- (1) This regulation applies if the appointment of an auditor is terminated by—
  - (a) the trustee company;
  - (b) the auditor.
- (2) The auditor must, within 7 days of the termination, provide a statement to the Commission giving full information—
  - (a) as to the reasons for the termination; and
  - (b) as to any matters (proven or suspected) that might be a breach of the Act or these regulations that had come to the attention of that auditor.
- (3) An auditor who fails to comply with subclause (1) is guilty of an offence punishable on conviction—

- (a) if the auditor is an individual, to a fine not exceeding \$50,000 or to imprisonment for a term not exceeding 2 years, or both; or
- (b) in any other case, to a fine not exceeding \$150,000.

## **15 Audited Financial Statements**

- (1) A trustee company must obtain an auditor's report on the financial statements of the trustee company and its subsidiaries for each financial period of the trustee company.
- (2) The auditor must state in the report whether—
  - (a) the auditor has obtained all information and explanations that, to the best of the auditor's knowledge, were necessary for the purposes of the audit; and
  - (b) if the auditor has requested an explanation or information from officers or agents of the licensee or its subsidiaries, in the auditor's opinion, the explanation or information is satisfactory; and
  - (c) in the auditor's opinion—
    - (i) proper books of account are being kept by the trustee company and its subsidiaries; and
    - (ii) the balance sheet and the profit and loss account of the licensee and its subsidiaries are in agreement with the books of account and the returns of the licensee and its subsidiaries; and
    - (iii) the balance sheet of the licensee and its subsidiaries gives a true and fair view of the state of affairs of the licensee and its subsidiaries for the period covered by the report; and
    - (iv) the profit and loss account of the trustee company and its subsidiaries gives a true and fair view of the profit or loss of the trustee company and its subsidiaries for the period covered by the report.
- (3) The following documents must be presented at the annual general meeting of the shareholders of a trustee company—
  - (a) its financial statements; and
  - (b) its auditor's report; and
  - (c) its directors' report.
- (4) A trustee company must provide copies of its financial statements together with both its auditor's report and its compliance declaration to the Commission within—
  - (a) 4 months after the close of its financial year; or
  - (b) a further time period approved by the Commission in writing.

## **16 Trustee company to make periodic compliance declarations**

- (1) A trustee company must make a compliance declaration in respect of each of its accounting periods.
- (2) The declaration must—
  - (a) be made by a person legally authorised to make a declaration on behalf of the company; and

- (b) must state whether or not, throughout the relevant accounting period, the trustee company has complied with each requirement imposed on the trustee company—
    - (i) by or under the Act; and
    - (ii) generally as to maintaining proper accounting records and adequate systems of a sort that would enable the trustee company to comply with each requirement imposed on the trustee company by or under the Act; and
    - (iii) by or under all laws relating to financial misconduct; and
  - (c) give full details of any breach or non-compliance; and
  - (d) specify measures (if any) taken or to be taken by the trustee company to ensure the breach or non-compliance—
    - (i) has been corrected; and
    - (ii) will not be repeated.
- (3) A trustee company that fails to comply with this regulation is guilty of an offence punishable on conviction by a fine not exceeding \$150,000.

#### **17 Exemptions**

- (1) A trustee company may apply to the Commission to exempt that company from compliance with any requirement of this Part.
- (2) The Commission must not grant an exemption unless it has satisfied itself that no client of the trustee company is likely to be prejudiced by that exemption.
- (3) The Commission may—
  - (a) grant the exemption with or without conditions; or
  - (b) refuse to grant the exemption.
- (4) The Commission may vary or revoke an exemption at any time.
- (5) It may do so either—
  - (a) on its own initiative, by notice in writing to the trustee company; or
  - (b) on application by the trustee company.

#### **18 Auditor to provide information to the Commission**

- (1) A past or present auditor of a trustee company must notify the Commission of any circumstance that gives that person reasonable cause to believe that—
  - (a) an intervention ground has occurred or may occur;
  - (b) a client of the trustee company has incurred, or is at significant risk of incurring, a material loss as a result of breach—
    - (i) of a requirement imposed on the trustee company by or under the Act;
    - (ii) of an internal control or procedure.
- (2) A person who fails to comply with subclause (1) is guilty of an offence punishable on conviction—
  - (a) if the person is an individual, to a fine not exceeding \$50,000 or to imprisonment for a term not exceeding 2 years, or both; or
  - (b) in any other case, to a fine not exceeding \$150,000.

### **Part 3**

## **Share capital and insurance**

- 19 Trustee companies to have adequate financial resources**  
If the Commission requires, a trustee company must demonstrate to the Commission's satisfaction that the company has financial resources and insurance cover that comply with the requirements of this Part.
- 20 Share capital**  
A trustee company must have paid up share capital of at least \$250,000.
- 21 Insurance**
- (1) A trustee company must maintain insurance cover of a sort and to a level that is appropriate to the nature and extent of its trustee company business.
  - (2) The cover must include professional indemnity insurance that includes—
    - (a) a fidelity guarantee; and
    - (b) cover for negligence, errors and omissions by the trustee company; and
    - (c) employee dishonesty.
- 22 Extent of insurance cover**
- (1) So far as is reasonable and practicable, the professional indemnity insurance cover required under this Part must—
    - (a) extend to each country or jurisdiction in which the company conducts trustee company business; and
    - (b) include—
      - (i) the loss and theft of documents (including liability for the loss, the costs of replacing or reinstating data and any increased working costs); and
      - (ii) indemnities for employees.
  - (2) The cover must be arranged on the basis of any 1 claim and in the aggregate including costs and expenses.
  - (3) The trustee company must give the Commission written notice of any limitation in the cover in respect of a country or jurisdiction in which the trustee company conducts or may conduct trustee company business.
- 23 Minimum cover**
- (1) The minimum professional indemnity insurance cover must be the greater of—
    - (a) three times the annual amount the trust company receives in fees and commissions in respect of trustee company business; or
    - (b) thirty times the annual amount the trust company receives in fees and commissions from its single largest customer for trustee company business.
  - (2) However, a trustee company is not required to have cover exceeding \$10,000,000.
  - (3) The Commission may consent to a reduction in the minimum insurance cover required under this regulation if—



- (a) a trustee company applies for a reduction; and
- (b) the Commission is satisfied—
  - (i) it is reasonable, in all the circumstances for it to allow a reduction; and
  - (ii) no client of the trustee company is likely to be prejudiced by that reduction.

#### **24 Excess**

- (1) Any excess per claim on the professional indemnity insurance cover must not exceed the greater of—
  - (a) \$250,000; or
  - (b) 3% of the trustee company's annual fees and commissions in respect of trustee company business.
- (2) The Commission may consent to an increase in the maximum excess per claim required under this regulation if—
  - (a) a trustee company applies for an increase; and
  - (b) the Commission is satisfied—
    - (i) there are exceptional circumstances for doing so; and
    - (ii) no client of the trustee company is likely to be prejudiced by that increase.

#### **25 Self-insurance**

- (1) A trustee company may, with the consent of the Commission, self-insure.
- (2) The Commission must not give its consent unless it is satisfied—
  - (a) that the trustee company is or is owned by, an institution with sufficient financial resources; and
  - (b) no client of the trustee company is likely to be prejudiced by its allowing self-insurance.

#### **26 Trustee company ceasing business**

- (1) If a trustee company intends to cease trustee company business, it must arrange for professional indemnity insurance cover in respect of claims arising from past acts or omissions.
- (2) The cover must be for a minimum period of 12 months after the trustee company ceases to carry on trustee company business.
- (3) The cover must be on terms approved by the Commission.

#### **27 Trustee company to maintain adequate procedures**

- (1) A trustee company must have adequate procedures in place to ensure compliance with the terms and conditions of its professional indemnity insurance policy.
- (2) In particular, it must have in place a procedure to make sure prompt notice is given of events that may lead to a claim on the policy.

#### **28 Offences**

A trustee company that fails to comply with a requirement placed on it by this Part is guilty of an offence punishable on conviction by a fine not exceeding \$150,000.

## **Part 4**

### **Intervention grounds**

#### **29 Examples of Intervention Grounds**

Without limiting the provisions of the Act, each of the cases set out in Schedule 1 may be treated by the Commission as giving rise to an intervention ground.

## **Part 5**

### **Fees**

#### **30 Application fee**

The application fee for a licence to carry on trustee company business is the sum specified in Schedule 2.

#### **31 Annual licence fee**

- (1) The annual licence fee a trustee company must pay is the amount specified in Schedule 2.
- (2) The annual licence fee is payable—
  - (a) on the grant of a licence; and
  - (b) on each subsequent anniversary of that grant.
- (3) If a trustee company does not pay the full annual licence fee on or before the date it becomes due it must pay an additional late payment fee. That fee is calculated on the basis set out in Schedule 2.
- (4) However, subclause (3) does not affect any other power of the Commission.

#### **32 Late delivery fee**

- (1) A trustee company must pay a late delivery fee if—
  - (a) a document must be delivered to the Commission; and
  - (b) a date (or time limit) is provided by or under this Act; and
  - (c) the trustee company does not deliver that document on or before that date (or within that time limit). That fee is calculated on the basis set out in Schedule 2.
- (2) However, the fee is not payable if—
  - (a) the trustee company has given the Commission prior written notice of the reasons for the late delivery; and
  - (b) the Commission has agreed in writing that the document may be delivered by a later date; and
  - (c) the document is delivered by that date.

## **Schedule 1**

### **Cases giving rise to intervention grounds**

#### **Case 1**

There has been inadequate management of the trustee company's trustee company business.

Note:

The inadequate management may be evidenced, in particular, by—

- (a) the dishonesty of a principal person of the trustee company;
- (b) a person committing a serious breach of a fiduciary duty in respect of the trustee company's trustee company business;
- (c) the trustee company having insufficient resources to continue to carry on the trustee company business effectively;
- (d) a serious failure by the trustee company to maintain proper records;
- (e) the existence of a conflict of interest that may prevent the interests of the trustee company's trustee company business or clients or potential clients being properly protected;
- (f) the trustee company committing serious and persistent breaches of an obligation imposed on the trustee company by or by virtue of the Act;
- (g) the death or incapacity or prolonged absence of a principal person of the trustee company to the detriment of the trustee company's trustee company business.

#### **Case 2**

The trustee company appears to have ceased to carry on trustee company business but has failed to wind up, liquidate, close or transfer the business in an orderly manner or at all.

#### **Case 3**

The trustee company has persistently failed to examine clients' claims or complaints.

#### **Case 4**

The trustee company is not licensed to carry on trustee company business of the type being carried on by the company.

#### **Case 5**

There is a need to appoint a manager to collect, protect or preserve the assets or records of the trustee company's trustee company business or the property of the clients of the company, or both.

#### **Case 6**

There is a need to appoint a manager to avoid circumstances arising that could provide grounds for a forced closure of the trustee company business of the trustee company.

#### **Case 7**

There is a need to appoint a manager to promote or implement a compensation scheme established specifically for clients of the trustee company's trustee company business.

**Case 8**

The trustee company has failed to comply with —

- (a) a condition of the trustee company's licence;
- (b) a notice of objection;
- (c) a direction,

and there is therefore a need to appoint a manager of the trustee company's business to ensure its independent management.

Regulations 30, 31 and 32

## Schedule 2 Fees

**1 Application fee**

The application is NZD5000.

**2 Annual licence fee**

The annual licence fee is NZD5000.

**3 Late payment fee/late delivery fee**

The late payment fee/ late delivery fee is fixed on the basis that time runs to the later of—

- (a) payment:
- (b) delivery.

The fee is calculated with reference to the date paid —

- |   |          |
|---|----------|
| (a) if paid in the period 1 to 5 business days after due date:  | NZD100   |
| (b) if paid in the period 6 to 20 business days after due date: | NZD500   |
| (c) if paid more than 20 business days after due date:          | NZD2,000 |

Aukino Taiera

**Clerk of the Executive Council**

These regulations are administered by the Financial Supervisory Commission.  
These regulations were made on the \_\_\_\_\_ day of \_\_\_\_\_ 2014.