

TOWER Trust Limited Bill

Private Bill

As reported from the Commerce Committee

Commentary

Recommendation

The Commerce Committee has examined the TOWER Trust Limited Bill and recommends that it be passed with the amendments shown.

Introduction

The Trustees, Executors, and Agency Company of New Zealand (Limited) operates under the Trustee, Executors, and Agency Company Act 1882 and its amendments. The bill repeals the principal Act and its amendments and replaces them with a new statute. The bill changes the name of the company to TOWER Trust Limited (TOWER) and sets out various rights, powers and obligations of the company consistent with those of other trustee companies under the Trustee Companies Act 1967.

The provisions in the principal Act are either updated and included in the bill or are repealed altogether. For example, sections 14, and 16 to 19, of the principal Act containing certain requirements as to winding up and retirement, replacement and domicile of directors, are to be repealed, as they are now obsolete. All other existing obligations are carried over into the bill. Several new provisions are included in the bill to accommodate the current, and any future, name change of the trustee company, and to authorise TOWER to transact business with its present parent companies and any subsidiaries of its present parent companies.

Summary

We recommend a number of changes to the bill, including:

- amending clause 13 to duplicate the effect of the same provision in the principal Act relating to unclaimed money
- clarification that an authorisation under clause 14 should be in respect of a 'subsidiary of a parent' rather than a 'related company', which may be broader
- minor drafting changes to improve consistency, efficacy, and to bring the bill into line with current drafting practice.

Preamble

Pursuant to Standing Orders we have considered the preamble and consider that the statements in the preamble have been proved to the satisfaction of the committee. We are recommending only certain minor consequential amendments to the preamble.

Unclaimed money

Clause 13 discharges the company from the trust affecting any moneys paid to the Commissioner of Inland Revenue under the Unclaimed Money Act 1971. We note that the language of the equivalent provision, section 13, in the Trustees, Executors, and Agency Company Act 1882 is outdated. Also, this clause should not rely on the Unclaimed Money Act definition of unclaimed money, as that definition appears not to apply to trust and estate monies. Therefore clause 13 should be amended, and the language modernised, to duplicate the effect of the earlier provision. We recommend the wording of clause 13 be amended accordingly.

Transacting business with parent company, subsidiaries and associated companies

Clause 14 authorises TOWER to transact business with its present parent companies and any subsidiaries of its present parent companies. In its submission the promoter raised the issue that use of 'related companies' in the clause could be viewed as authorising TOWER to transact business with a future (currently unknown) parent company and companies in its group, if a related company were construed as being related to TOWER rather than to its current parent company.

We consider that it should be clarified that the authorisation is in respect of a 'subsidiary of a parent' rather than a 'related company', which may be broader. This will limit the authorisation to present named parent companies and their subsidiaries and we recommend that the clause be amended accordingly.

Relationship between private and trust interests

One submitter argues that the effect of clause 14 would be to allow TOWER to place itself in a position where its private interests could be in conflict with those of the trust (i.e. beneficiaries). TOWER could be subject to pressures or directions from its parent company without regard to its fiduciary obligations. Specifically, it is submitted that the words in clause 14(4) mean that the general law of trusts and any particular terms of a trust may be overridden. It is also submitted that if 'business' in clause 14(1) includes the investment of funds, the prudent person regime may be disregarded. Finally, it is submitted that clause 14(1) provides a subjective test, as it is the company that decides whether to proceed with a business transaction.

Clause 14 allows TOWER to transact business with its parent companies and their subsidiaries. Normally a trustee would not be able to do this because of the potential conflict of interest. However, the interests of the trust or estate client are protected by the requirement that TOWER cannot do so unless satisfied on reasonable grounds that it is in the best interests of the estate or trust property to do so. The test is an objective one. The requirement for the transaction to be in the best interests of the estate/trust imposes a high standard on TOWER. The courts are also likely to strictly construe this relaxation of the conflict of interest rule. To the extent a transaction includes the investment of money, the prudent person test would still apply as that test concerns the exercise of the power of investment, not the issue of conflicts of interest with which this clause is concerned.

The clause also permits TOWER to benefit from income, including fees, premiums, and commissions, in respect of these related company business transactions. Normally a trustee cannot profit from the administration of his or her trust unless there is specific authorisation (i.e. in the trust instrument, by statute or all the beneficiaries agree). If TOWER receives income from related company transactions, safeguards lie in the fiduciary's general duty to account for such profit to its principal, as well as in the disclosure of payments

provision in subclause (3). Moreover, the clause requires that the fees and charges must be properly payable. The High Court also retains its supervisory jurisdiction over trusts, and beneficiaries retain their rights under the general law.

We consider that subclause (4) is needed to clarify in this limited situation that the usual rules applying to trustees are being varied. However, we note that TOWER is not being given the freedom to disregard its fiduciary duties and to act contrary to the interests of its trust clients, and we are advised that the fiduciary rights, obligations, and liabilities of TOWER will continue. These authorisations to transact business and receive fees are already included in the private Acts governing the other trustee companies. The imposition of a different approach would be singling out this trustee company for different treatment from its competitors. We do not therefore consider that this clause requires amendment.

Requirement to enter new name on the companies register

Clause 17 removes any obligation on persons responsible for books or registers, for example the Registrar-General of Land, to record the change of name of the company. This appears to conflict with the requirement in clause 6 for the Registrar of Companies to enter the new name of the company on the companies register. We recommend an amendment to preserve the effect of clause 6.

Miscellaneous issues

Consistency with other trustee company statutes

We considered whether the bill is consistent with other similar private Acts. Only those companies authorised by an Act of Parliament as a trustee company may undertake the administration of estates. Each of the trustee companies was incorporated under the appropriate legislation, granted the power to act as executor and trustee by private Act and is subject to the general provisions of the 'umbrella' statute, the Trustee Companies Act. Currently there are four trustee companies, which compete with Public Trust and, to a lesser degree, legal practitioners, for trust and administration work.

The statutory trustee companies are as follows:

- TOWER, the Trustees, Executors, and Agency Company of New Zealand (Limited), governed by the Trustees, Executors, and Agency Company Act 1882

- New Zealand Permanent Trustees Limited governed by the New Zealand Permanent Trustees Limited Act 1991
- Perpetual Trust Limited (including PGG Trust Limited) governed by the AMP Perpetual Trustee Company Limited Act 1988
- New Zealand Guardian Trust Company Limited governed by the New Zealand Guardian Trust Company Act 1982.

The trustee companies except for TOWER are permitted by their statutes to transact business with named parents and their parent company's subsidiaries. TOWER is seeking such authorisation under this bill. We were advised that the provisions of this bill are consistent with those of the other private Acts.

Review of the Trustee Companies Act

We note that the Minister of Justice and Associate Minister of Justice have agreed that the Ministry of Justice should lead a review of the Trustee Companies Act, commencing this year with a possible completion date of mid-2003. The terms of reference are currently being developed and will involve consideration of a number of specific issues. We look forward to being advised of progress.

Fiduciary obligations

We considered the issue of fiduciary obligations and were advised that it is not necessary to clarify TOWER's fiduciary obligations in the bill as these are already clearly set out in case law and statute. The fiduciary obligations imposed on trustees, whether trustee companies or individuals, are onerous and the courts enforce them vigorously. For example, a trustee must not put himself or herself in a position where his or her fiduciary duty and private interests may conflict. A trustee can only profit (i.e. take remuneration for trust services) from his or her fiduciary relationship if specifically authorised and must account to his or her trust client for such profit. A trustee must act with integrity, exclusively in the interest of the trust (i.e. the best interests of beneficiaries) and observe reasonable standards of business efficiency in the management of trust affairs. Otherwise a trustee would be held personally liable.

Appendix

Committee process

The TOWER Trust Limited Bill was introduced on 20 September 2001 and referred to the Commerce Committee on 17 October 2001 for consideration. The closing date for submissions was 15 January 2002. We received three submissions, from Mr Geoffrey Fuller, the Trustees, Executors, and Agency Company of New Zealand (Limited), and the Trustee Corporations Association of New Zealand. We heard evidence from all submitters. Hearing evidence on the bill took 35 minutes and consideration took 15 minutes. We received advice from the Ministry of Justice.

Committee membership

David Cunliffe (Chairperson)

Kevin Campbell (Deputy Chairperson)

Steve Chadwick

Hon Ruth Dyson

Owen Jennings

Warren Kyd

Hon Tony Ryall

Pansy Wong

Key to symbols used in reprinted bill

As reported from a select committee

Struck out (unanimous)

[Subject to this Act, **]**

Text struck out unanimously

New (unanimous)

[Subject to this Act, **]**

Text inserted unanimously

(Subject to this Act,)

Words struck out unanimously

Subject to this Act,

Words inserted unanimously

TOWER Trust Limited Bill

Private Bill

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Preamble

- (1) The Trustees, Executors, and Agency Company of New Zealand (Limited) (the **Company**) was incorporated under the Joint Stock Companies Act 1860 on 15 September 1882:
- (2) Since its incorporation the Company has carried on trustee company, trust, and agency business, including as a trustee company under the Trustee Companies Act 1967: 5
- (3) The Trustees, Executors, and Agency Company Act 1882 gave the Company various powers and imposed certain requirements, some of which are no longer appropriate:
- (4) The Company wishes to— 10
 - (a) change its name to TOWER Trust Limited and provide for future changes of name; and
 - (b) amend various of the powers and requirements given or imposed by the Trustees, Executors, and Agency Company Act 1882; and 15

- (c) be expressly authorised by legislation to transact with *(any present related company)* its present parent companies, and subsidiaries of its present parent companies, business in connection with any estate or trust property that the Company administers: 5
- (5) The objects of this Act cannot be achieved without the authority of Parliament:
- (6) Legislation is the only expedient means by which the name of the Company can be changed efficiently and economically without interference to the conduct and continuity of the Company, its clients, and other persons doing business with it, and the trusts under its administration: 10

The Parliament of New Zealand therefore enacts as follows:

1 Title

This Act is the TOWER Trust Limited Act **2001**. 15

New (unanimous)

**Part 1
Preliminary**

2 Commencement

This Act comes into force on the day after the date on which it receives the Royal assent. 20

3 Purpose

The purpose of this Act is to—

- (a) provide for a change of name, and for future changes of name, by the Trustees, Executors, and Agency Company of New Zealand (Limited); and 25
- (b) expressly authorise the Company to transact with *(any present related company)* its present parent companies, and subsidiaries of its present parent companies, business in connection with any estate or trust property that the Company administers; and 30
- (c) consolidate and amend the provisions of the Trustees, Executors, and Agency Company Act 1882 and its amendments.

4 Interpretation

In this Act, unless the context otherwise requires,—

Company means the company (*which, before the date this Act comes into force,*) that, before the commencement of this Act, is called the Trustees, Executors, and Agency Company of New Zealand (Limited) and, on and after (*that date*) the commencement of this Act (unless its name is changed under the Companies Act 1993), is called TOWER Trust Limited

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Court means the High Court, and includes a Judge of that Court

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document has the same meaning as in section 2(1) of the Companies Act 1993

fiduciary rights, obligations, and liabilities includes all rights, capacities, authorities, discretions, duties, obligations, and liabilities as executor, trustee, administrator, receiver, liquidator, committee, guardian, attorney, or agent, or as a fiduciary in any capacity

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liabilities means liabilities, debts, charges, and duties of every description (whether present or future, actual or contingent, and whether payable or to be observed or performed in New Zealand or elsewhere)

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parent company means TOWER Limited and any other holding company (within the meaning of section 5 of the Companies Act 1993) of the Company on the (*date on which this Act comes into force*) commencement of this Act

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property means property of every kind, whether tangible or intangible, real or personal, or corporeal or incorporeal; and, (*without limiting the generality of the foregoing*) without limitation, includes—

- (a) choses in action and money; and
- (b) goodwill; and
- (c) rights, interests, and claims of every kind in or to property, whether arising from, accruing under, created or evidenced by, or the subject of, an instrument or otherwise, and whether liquidated or unliquidated, actual, contingent, or prospective

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related company has the same meaning as in section 2(3) of the Companies Act 1993

rights means all rights, powers, privileges, and immunities, whether actual, contingent, or prospective

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subsidiary has the same meaning as in sections 5 to 8 of the Companies Act 1993

trust property means all property held as executor, trustee, administrator, receiver, liquidator, committee, guardian, attorney, or agent, or as a fiduciary in any capacity. 5

5 Act (to bind) binds the Crown and other persons

This Act binds the Crown and every person whose rights, obligations, or liabilities are affected by any provision of this Act.

New (unanimous)

**Part 2
Change of name** 10

6 Change of name

- (1) The name of the Company is changed to TOWER Trust Limited (*from the date this Act comes into force*) on and from the commencement of this Act (unless its name is changed under the Companies Act 1993). 15
- (2) As soon as practicable after the commencement of this Act, the Registrar of Companies must—
- (a) enter the new name of the Company on the register kept under section 360(1)(a) of the Companies Act 1993; and 20
- (b) issue to the Company a certificate of incorporation for the Company recording the change of name.
- (3) Neither this Act nor the Trustee Companies Act 1967 prevents the name of the Company being changed in accordance with the Companies Act 1993. 25

7 Company (to continue) continues under this Act

- (1) The company called TOWER Trust Limited is the same company as the company existing immediately before the commencement of this Act called the Trustees, Executors, and Agency Company of New Zealand (Limited). 30
- (2) Without limiting **subsection (1)**,—
- (a) except as this Act expressly provides otherwise, the rights, obligations, and liabilities (including fiduciary

- rights, obligations, and liabilities) of the Company are not affected by the *(enactment)* commencement of this Act; and
- (b) all property, and all trust property, belonging to or vested in the Company immediately before the commencement of this Act *(continue, on and after that date,)* continues to belong to or be vested in the Company on and after the commencement of this Act; and 5
- (c) all actions, arbitrations, and other proceedings that are pending immediately before the commencement of this Act by or against the Company may be continued in the same manner by the Company *(after that date)* on and after the commencement of this Act; and 10
- (d) every reference in any *(Act)* enactment, will, trust deed, instrument, register, record, notice, security, document, communication or other place to the Trustees, Executors, and Agency Company of New Zealand (Limited), whether before, on, or after the commencement of this Act, *(is to be read and construed)* must be read as a reference to the Company by whatever name called. 15 20

New (unanimous)

Part 3 Powers, obligations, and restrictions

- 8 Company may act as executor and obtain probate**
If the Company is appointed as executor (whether alone or jointly) of the will of any person, the Company is entitled— 25
- (a) to be and act as executor of the will, whether alone or jointly; and
- (b) to apply for and obtain probate of the will; and
- (c) to perform and discharge all the acts and duties of an executor in the same way and to the same extent as an individual appointed as an executor. 30
- 9 Company's liability to be same as individual**
In acting as executor, trustee, administrator, receiver, liquidator, committee, guardian, attorney, or agent, or *(in any other similar capacity)* as a fiduciary in any capacity, the Company is, in addition to the liabilities and restrictions imposed by this Act and by the Trustee Companies Act 1967, subject to the 35

same control and liability to removal as an individual appointed to act in the same capacity.

10 Court may order account

- (1) If a trustee, executor, legatee, administrator, beneficiary, next-of-kin, creditor, or other person entitled to or interested in an estate that is in the possession or under the control of the Company is unable, on applying to the Company, to obtain a sufficient account of the property and assets of the estate or of the disposal and expenditure of or out of the estate, that person may apply to the Court for an account. 5
- (2) The Company must be served with a notice of the application. 10
- (3) If the Court is satisfied that the Company has not provided a sufficient account to the applicant, the Court may order the Company to provide the applicant with an account in *(such form as)* any form that the Court thinks fit. 15
- (4) The Court may make *(such order)* any orders as to costs either against the Company or against the applicant, or as to payment of costs out of the estate, *(as)* that the Court thinks fit.

11 Court may order examination of documents

- (1) The Court may, on application under **section 10 (in)** (in addition to or in substitution for an order that an account be provided by the Company), make an order appointing a person named in the order to examine the documents of the Company that relate to the *(estate to which the order relates)* relevant estate. 20 25
- (2) If the Court makes an order under **subsection (1)**, the Company must—
- (a) deliver to the person named in the order a list of all documents held by the Company that relate to the estate to which the order relates; and 30
- (b) produce to that person, at all reasonable times when required by that person to do so, those documents; and
- (c) provide that person with all information and facilities necessary to enable that person to make the examination. 35
- (3) The Court may make *(such order)* any orders as to costs either against the Company or against the applicant, or as to payment of costs out of the estate, *(as)* that the Court thinks fit.

12 Company (*not to*) must not be put into liquidation without approval of Court

- (1) So long as any estate in respect of which the Company is executor, administrator, or trustee remains in whole or in part unadministered,— 5
- (a) the Company must not be put into liquidation under section 241(2)(a) or (b) of the Companies Act 1993 without the approval of the Court; and
- (b) a parent company must not dispose of any shares it holds in the Company that are not fully paid up without the approval of the Court. 10
- (2) A person interested in any estate of which the Company is executor, administrator, or trustee, or who may have a claim in respect of any such estate, may apply to the Court for an order— 15
- (a) prohibiting the Company from being put into liquidation under section 241(2)(a) or (b) of the Companies Act 1993; or
- (b) restraining a parent company from disposing of any shares in the Company that are not fully paid up. 20
- (3) On an application under this section, the Court may make (*such order as*) any order that the Court thinks fit.

Struck out (unanimous)

13 Unclaimed money

Payment of money by the Company to the Commissioner of Inland Revenue in accordance with the Unclaimed Money Act 1971, to the extent of the amount paid, discharges the Company from the trust to which the money is subject. 25

New (unanimous)

13 Unclaimed money

- (1) Money held by the Company as executor, trustee, administrator, receiver, liquidator, committee, guardian, attorney, or agent, or in any other capacity under this Act, that remains unclaimed, and of which no lawful owner is known, for a period of 6 years after its receipt by the Company, must, at the end of the Company's next financial year, be paid by the 30

New (unanimous)

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|-----|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|---|
| | Company to the Commissioner of Inland Revenue in accordance with the Unclaimed Money Act 1971. | |
| (2) | Payment of money under subsection (1) , to the extent of the amount paid, discharges the Company from the trust to which the money is subject. | 5 |
| (3) | Nothing in subsection (1) or subsection (2) limits or affects the provisions of an instrument creating a trust to which the money is subject or that confers on the Company a power, authority, discretion, or duty in relation to the money. | |
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- | | | |
|-----------|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|----------|
| 14 | Company authorised to transact business with parent company or (<i>related companies</i>) subsidiaries | 10 |
| (1) | The Company is authorised to transact with a parent company or (<i>any related company</i>) <u>a subsidiary of a parent company</u> any business (including insurance business) in connection with any estate or trust property that it administers if, after considering all the circumstances (including appropriate business arrangements offered by other companies), the Company is satisfied on reasonable grounds that it is in the best interests of the estate or trust property to do so. | 15 |
| (2) | A parent company or (<i>any related company of the Company</i>) <u>a subsidiary of a parent company</u> is entitled to receive and retain all fees, premiums, commissions, and other payments properly chargeable or payable in respect of any business transacted in accordance with subsection (1) in the same manner as it would have been entitled to do if the Company was not a trustee of the estate or trust property or the Company was not a subsidiary or related company of the company with which the business was transacted. | 20
25 |
| (3) | Any payment to which subsection (2) applies must be clearly identified in the account (<i>rendered</i>) <u>provided</u> in respect of the estate or trust property. | 30 |
| (4) | Subsections (1) to (3) have effect despite the fiduciary rights, obligations, and liabilities of the Company (whether arising under this Act or otherwise), and any enactment or rule of law. | |

New (unanimous)

Part 4 Miscellaneous

- 15 Jurisdiction and powers of High Court not affected**
- (1) Nothing in this Act affects the powers or jurisdiction of the Court in respect of trustees, and those powers and that jurisdiction may be exercised in relation to the Company in respect of all trusts undertaken by it. 5
- (2) Nothing in this Act affects the power of the Court to remove the Company from any office whether or not it holds that office by virtue of this Act. 10
- (3) **Subsection (2)** does not limit **subsection (1)**.
- 16 Release of securities held for purposes of Trustee Companies Act 1967**
- (1) The First Schedule of the Trustee Companies Act 1967 is amended by omitting the item relating to the Trustees, Executors, and Agency Company of New Zealand (Limited). 15
- (2) On request by the Company, the Public Trustee must release to the Company any securities deposited with the Public Trustee by the Company under section 6(2) of the Trustee Companies Act 1967. 20
- (3) The receipt of the secretary or a director of the Company is a full and sufficient discharge to the Public Trustee for any securities released, and the Public Trustee is not required to see to the application of the securities released.
- 17 Registers** 25
- (1) Neither the Registrar-General of Land nor the Registrar of Deeds, or any other person charged with the keeping of books or registers, is obliged solely by reason of this Act to change the name of the Company in those books or registers or in any document (except as required by **section 6** and **subsection (2)**). 30
- (2) The presentation to any registrar or other person referred to in **subsection (1)** of any instrument, whether or not comprising an instrument of transfer by the Company,—
- (a) executed or purporting to be executed by the Company; 35
- and

- (b) relating to property held immediately before the commencement of this Act in the name of the Trustees, Executors, and Agency Company of New Zealand (Limited); and
- (c) containing a recital that the name of the Company has been changed by virtue of this Act or under the Companies Act 1993— 5
- (will)* is, in the absence of proof to the contrary, *(be)* sufficient proof that the property is vested in the Company as so named, and the person must register the change of name of the Company in the relevant books and registers. 10

18 Incorporation and powers of company to remain

Nothing in this Act affects the constitution or incorporation of the Company, and the Company continues under its original incorporation with the powers and privileges conferred, and subject to the duties and liabilities imposed, by this Act. 15

New (unanimous)

18A Repeal of Trustees, Executors, and Agency Company Act 1882

The Trustees, Executors, and Agency Company Act 1882 (1882 No 4 (P)) is repealed. 20

19 Consequential amendments

- (1) Section 2 of the Trustee Companies Act 1967 is amended by omitting from the definition of **trustee company** the words “the Trustees, Executors, and Agency Company of New Zealand (Limited)”, and substituting the words “TOWER Trust Limited”. 25
- (2) Section 2 of the Trustee Companies Act 1967 is amended by omitting from the definition of **trustee company Act** (*as added by section 2(2) of the Trustee Companies Amendment Act 1972*) the words “Trustees, Executors, and Agency Company Act 1882”, and substituting the words “TOWER Trust Limited Act **2001**”. 30

Struck out (unanimous)**20 Repeals**

The following enactments are repealed:

- (a) Trustee Companies Act 1967: So much of the Third Schedule as relates to the Trustees, Executors, and Agency Company Act 1882 and the Trustees, Executors, and Agency Company Act 1882 Amendment Act 1884: 5
- (b) Trustee Companies Amendment Act 1979: Section 3(1)(a):
- (c) Trustees, Executors, and Agency Company Act 1882: 10
- (d) Trustees, Executors, and Agency Company Act 1882 Amendment Act 1884:
- (e) Trustees, Executors, and Agency Company Amendment Act 1959.

Legislative history

20 September 2001

Introduction (Bill 158-1)

17 October 2001

First reading and referral to Commerce Committee