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New Trusts Act – *issues to consider for 'Commercial Trusts'*

By Sean Lynch, November 2020

The Trusts Act 2019 comes into full force and effect at the end of January 2021, a few months away.

However, it appears as though many companies and other organisations which operate a "*commercial trust*" model have not fully considered the wording and associated implications of the new Act.

The Act applies to all "*express trusts"*, defined broadly in sections 12 to 15 of the Act. It also applies to trusts created by other legislation, as well as informal types of trusts, if a Court considers it "*necessary or appropriate*".

Certain types of "*specified commercial trusts*" are given more favourable treatment under Schedule 3 of the Act. That Schedule states that a number of sections of the Act do not apply to "*specified commercial trusts*" – which is logical and helpful for those types of trusts.

The issue though which may have escaped the focus of many companies and other organisations which operate a "*commercial trust*", is whether the trust model they operate is in fact a "*specified commercial trust*" as defined in Schedule 3 of the Act. If it isn't, then the broader provisions of the Act would likely apply – and the implications of that for the Trust and the Trustees should be carefully assessed.

For example, 'commercial-type' trust arrangements exist in many different industry sectors including real estate; energy; insurance; property; finance etc. The issue though is whether the specific model operated constitutes a "*specified commercial trust*" as defined in Schedule 3 of the Act (being helpful if it is).

A "*specified commercial trust*" is defined in Schedule 3 of the Act as including:

- an express trust created for the purpose of facilitating one or more "*commercial transactions*" under which;
- <u>every</u> beneficiary of that trust is a beneficiary <u>as a result of</u> entering into a <u>commercial transaction of the type intended</u> (note that if just one beneficiary is a beneficiary by reason other than entry into a "commercial transaction" then it is not a "*specified commercial trust*").

A "*commercial transaction*" is defined in Schedule 3 as being one which "*<u>all parties</u> enter into in trade*". "*Trade*" is defined very broadly.

The flow-on issues therefore become – for example:

- Whether persons buying or selling residential property and who utilise a third party trust arrangement are "*in trade*" and may therefore fall within a "*specified commercial trust*"; or

- Whether persons consuming energy under an energy trust are “*in trade*” and may therefore fall within a “*specified commercial trust*”.

Each set of circumstances for each company or organisation will need to be assessed individually in relation to these new issues.

Regardless of the outcome, the wider “permissive” provisions under the Act should also be fully considered in terms of how best to limit potential liability under any given commercial trust model.

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If you require any commercial legal assistance, please contact Sean Lynch at sean@lynchandco.co.nz, or ph 09 948 8433. The above article is not intended as legal advice because each set of circumstances will differ. Specific legal advice is required for each particular case.