

# Regulatory Impact Statement: Trustee Amendment Bill

## **Agency Disclosure Statement**

1. This Regulatory Impact Statement (RIS) has been prepared by the Ministry of Justice.
2. It analyses options for clarifying the process for appointing a 'trustee of last resort'.

### ***Limitations on the analysis undertaken***

3. The nature and rigour of the analysis of the options has been affected by four main limitations.
4. The limited amount of time means that the Ministry has not been able to fully develop option 4.
5. The second limitation is the Ministry's inability to consult with trustees who will be affected by the proposed options. The inability to consult is due to proceedings between Public Trust and Perpetual Trust which are currently before the High Court, in which Perpetual is applying to have Public Trust appointed replacement trustee for failed finance company Capital + Merchant Finance. Consulting Perpetual Trust (trustee for 22 of 60 failed finance companies), or other licensed trustees, could lead to trustees for failed finance companies filing further court proceedings to have Public Trust appointed as replacement trustee before the Government has an opportunity to amend the law.
6. The third limitation is the lack of information about the financial implications of each option. Public Trust has estimated the cost of being appointed replacement trustee for C+M Finance, but it has no experience of acting as trustee for a failed finance company. Not being able to consult trustee companies means that we have no detailed information about the actual costs of acting for failed finance companies.
7. Finally, we have had to rely on judgment about the impact that the proposed options will have on the behaviour of trustees appointed under the securities regime in the marketplace.

### ***Consistency with the Government Statement on Regulation***

8. The options align with the Government Statement on Regulation.

***Interaction with other legislation and policy initiatives***

9. Some of the options considered in this RIS will be affected by further legislative amendments contained in a Supplementary Order Paper to the Financial Markets Conduct Bill. We have worked closely with the Ministry of Business, Innovation and Employment to ensure that any proposed legislative change is designed so that it works effectively with the amendments contained in the Financial Markets Conduct Bill.

***Further policy work required***

10. The option of reviewing the broader role of trustee of last resort, particularly in relation to wholesale products and family trusts, would require additional policy work. If interest is shown in this option, the Government Response to the Law Commission's forthcoming report on the Trustee Act 1956 would provide an opportunity to undertake this work.

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Date \_\_6 May 2013 \_\_\_\_\_

## Status Quo

1. Trustees may retire from their role, and a replacement trustee can be appointed under section 46 of the Trustee Act 1956 (“the Act”). The retiring trustee may seek assistance from the High Court if it is impracticable or difficult to appoint a replacement trustee without the court’s assistance under section 46(2). The court can appoint ‘a proper person’ as replacement trustee under section 46(3) of the Act.
2. A retiring trustee can apply to the court under section 46(4) of the Act to have Public Trust appointed as replacement trustee. Public Trust has a duty to undertake the trust if so appointed. This makes Public Trust the ‘trustee of last resort’.
3. As an unintended and novel consequence, this “trustee of last resort” mechanism has been recently applied to the securities regime and carries the risk of Public Trust being appointed as trustee for failed finance companies.
4. Under trust law, a trustee is indemnified for its expenses by the trust. If the entity which Public Trust is required to supervise as replacement trustee is insolvent, Public Trust will be required to bear the costs of acting as a replacement trustee.

## Problem definition

5. The rule in section 46(4) of the Act was initially enacted in 1899 and was intended to ensure that private trusts (e.g. family trusts) would not fail through lack of a replacement trustee.
6. This problem arises in relation to “trustee” appointments for products regulated by the Securities Act 1978 (including debt securities and interests in unit trusts that are offered to the public) (“regulated products”).
7. Regulated products are open to investors in the general retail market, and “trustees” are regularly appointed to supervise those regulated products. Many of the failed finance companies have appointed licensed trustees or statutory supervisors to supervise them (referred to as ‘corporate trustees’ in this paper).
8. The recent large-scale failure of finance companies is unprecedented in New Zealand and has led to section 46(4) being used in a way that was never anticipated. The duty on Public Trust under section 46(4) gives corporate trustees a mechanism to have Public Trust appointed as replacement trustee when supervision of securities products becomes onerous.
9. The problem has become apparent as a result of litigation arising out of the failure of Capital + Merchant Finance (C+M). Perpetual Trust is a corporate trustee for C+M. Perpetual has a conflict of interest in continuing as trustee for C+M, and has asked the High Court to appoint Public Trust as replacement trustee. The case is due to be heard on 6 June, and the court is likely to make the appointment. It is unlikely that Public Trust will be able to recover its costs from C+M, which exposes it to an estimated financial risk of at least \$0.200-\$0.300 million.

10. There are 60 failed finance companies currently in receivership, liquidation, or moratorium. Perpetual Trust is a corporate trustee for 22 of those companies.
11. There is a risk that new applications to appoint Public Trust as replacement trustee are waiting to be lodged, pending the Court's decision on C+M.
12. The financial and reputational risks for Public Trust as replacement trustee for failed finance companies are significant, and may jeopardise its ongoing financial viability.
13. The Financial Markets Conduct Bill is expected to be enacted by June 2013, with implementation starting from April 2014. This is intended to provide a longer term solution by permitting the Financial Markets Authority ("FMA") to appoint a replacement trustee from among all available licensed trustees and require an indemnity from the resigning trustee. This provides a solution which appropriately brings the replacement trustee process for supervision of regulated products under the oversight of the FMA and allows Public Trust to be treated more fairly as being only one among a group of potential replacement trustees.
14. The Law Commission is due to issue its report on the Trustee Act 1956 in late June 2013. The Government Response to this report provides an opportunity to consider the role of "trustee of last resort" in relation to unregulated wholesale financial products and private trusts, as well as the wider issue of who bears the cost if a resigning trustee is insolvent.

## **Objectives and assessment criteria**

15. The objectives of the reform are to provide a short term solution to trustee appointments for products regulated by the Securities Act 1978 that ensures:
  - a. regulated products that require a trustee do not fail for lack of a trustee, as there needs to be a trustee to act for failed finance companies to ensure there is communication with and representation for affected investors
  - b. there is certainty in law that does not impact negatively on business confidence
  - c. trustees of regulated products can resign, or be removed if necessary
  - d. the costs of acting as trustee are apportioned fairly and equitably between the resigning trustee and the replacement trustee, if the entity being supervised is unable to pay.
16. Any reform must be in place before 6 June 2013, to ensure the outcome of the court hearing of the C+M case does not set a precedent that exposes Public Trust to an uncertain, but potentially significant, financial liability.

## **Options**

17. We have identified the following options:
  1. Retain the status quo
  2. Amend the Trustee Act 1956 to clarify the process for appointing a replacement trustee and either

- Apply prospectively; or
    - Apply to the current court proceedings
  - 3. Bring forward some of the provisions in the Financial Markets Conduct Bill until that Bill is enacted and comes into force and either
    - Apply prospectively; or
    - Apply to the current court proceedings
  - 4. Review the role of 'trustee of last resort' in relation to all types of trustee appointments (including products regulated by the Securities Act 1978, wholesale products and family trusts).
18. The table set out below assesses whether each option meets the objectives set out above and analyses their costs, benefits and risks.
19. These options are not mutually exclusive. A combination of options (or modifications of options) could be adopted, in a staged approach. For example, adopting options 2A or 2B (amending the Trustee Act on budget day) to provide an immediate solution to the problem does not preclude option 4 (reviewing the role of 'trustee as last resort'). Adopting option 2A now does not preclude adopting elements of options 3A and B, which involve creating an administrative process for replacing a retiring trustee when the Financial Markets Conduct Bill is enacted and comes into force.

## Option 1: Retain the status quo

No legislative change

Description	Does it meet objectives?	Impacts (costs & benefits)	Risks
<p>Section 46 continues to permit appointment of an appropriate person as replacement trustee, and provides that the Public Trust <b>may not</b> refuse appointment.</p> <p>If appointed as replacement trustee, Public Trust may seek to recoup its fees and expenses for acting as replacement trustee. If there are no assets from which Public Trust can recoup its fees and expenses, Public Trust will bear those fees and expenses itself.</p>	<p>a. <u>Regulated products do not fail for lack of a trustee</u> Meets objective. Public Trust is available as trustee of last resort.</p> <p>b. <u>Trustees of regulated products can resign or be removed</u> Meets objective. Section 46 unchanged.</p> <p>c. <u>Costs of acting as trustee apportioned fairly and equitably</u> Does not meet objective if there are no assets from which replacement trustee can recoup costs. Retiring trustee not liable to meet replacement trustee's cost.  Exposes Public Trust to a disproportionate share of the risk – it is the only potential replacement trustee who cannot refuse the appointment. Most corporate trustees are likely to decline replacement trustee appointment if they cannot recoup their costs.</p> <p>d. <u>Timing of reform</u> Not applicable.</p>	<p><u>Financial impact:</u></p> <ul style="list-style-type: none"> <li>Public Trust (and potentially the Crown) will have to bear the cost of acting as replacement trustee for C+M Finance, expected to cost at least \$0.200 - \$0.300 million.</li> <li>Public Trust will have to reorient its business to accommodate the extra duties as replacement Trustee for C+M finance (and other future appointments, if any), which may have flow-on effects for its business</li> </ul> <p><u>Social impact:</u></p> <ul style="list-style-type: none"> <li>Brand risk as investors who have lost money in failed finance companies will hold Public Trust rather than the resigning trustee responsible</li> </ul>	<ul style="list-style-type: none"> <li>If Public Trust is appointed in the C+M case, further applications in relation to other failed finance companies are likely. The risk has not been quantified, but it would only take five appointments of the scale of C+M to cost Public Trust in the order of \$1.00 million unanticipated and unfunded costs. Those costs would have a significant effect on Public Trust's operations and expenditure.</li> </ul>

## Option 2A: Amendment to the Trustee Act 1956

Legislation to be in force before current court proceedings are heard. Legislation does not apply to current court proceedings.

Description	Does it meet objectives?	Impacts (costs & benefits)	Risks
<p>Court may only appoint Public Trust to be trustee of last resort for supervision of regulated products if satisfied that the resigning trustee:</p> <ul style="list-style-type: none"> <li>has made ‘reasonable endeavours’ to appoint a replacement trustee but it is impracticable or difficult to do this without the assistance of the court. ‘Reasonable endeavours’ will be defined as including meeting the reasonable costs of the replacement trustee.</li> <li>will meet the Public Trust’s fees and expenses for acting as a replacement trustee for the, if there are no assets from which Public Trust can recoup its expenses.</li> </ul> <p>The retiring trustee must provide security to indemnify the Public Trust for its reasonable fees and expenses. Transitional provisions make it clear that the amendment does not apply to current court proceedings.</p> <p>This short-term solution would be augmented by option 4 – a longer-term review to examine the role of trustee of last resort in the long term</p>	<p>a. <u>Regulated products do not fail for lack of a trustee</u> Meets objective. Public Trust still available as trustee of last resort.</p> <p>b. <u>Trustees of regulated products can resign or be removed</u> Meets objective. Amendment ensures trustees can resign or be removed.</p> <p>c. <u>Costs of acting as trustee apportioned fairly and equitably</u> Meets objective. Ensures that if there are no assets from which the replacement trustee can recoup costs, it can recover costs from the retiring trustee (unless retiring trustee insolvent). Public Trust still available as trustee of last resort where retiring trustee insolvent.</p> <p>d. <u>Timing of reform</u> Meets objective.</p>	<p><u>Financial impact:</u></p> <ul style="list-style-type: none"> <li>Imposes costs on retiring trustee if there are no assets to cover Public Trust’s expenses in acting as replacement trustee. Retiring trustee may not be guilty of any alleged wrongdoing or negligence.</li> <li>Public Trust (and potentially the Crown) does not have to bear the cost of acting as replacement trustee.</li> <li>Public Trust (and potentially the Crown) will have to bear the cost of acting as replacement trustee for C+M Finance, expected to cost at least \$0.200 - \$0.300 million.</li> </ul> <p><u>Social impact:</u></p> <ul style="list-style-type: none"> <li>Continues to ensure that there is a trustee to act for failed finance companies, ensuring proper communication with thousands of affected investors.</li> </ul>	<p><u>Public Trust</u></p> <p>This option reduces, but does not remove, Public Trust’s exposure to the expense of being appointed trustee of last resort. While the precedent for the future is avoided, Public Trust may still incur expenses as replacement trustee for C+M Finance.</p> <p>These expenses will have to be incurred by Public Trust with a commensurate impact on the Trust’s annual result and additional funding may need to be sought from the Crown. While undesirable, that risk has to be offset against the wider impact on the certainty of the law of changing the rules in relation to the current court proceedings.</p> <p><u>Changing the behaviour of corporate trustees:</u></p> <ul style="list-style-type: none"> <li>A corporate trustee with a conflict of interest may choose to carry on acting as trustee (if feasible) rather than be liable to pay for the replacement trustee.</li> </ul>

Description	Does it meet objectives?	Impacts (costs & benefits)	Risks
			<p><u>Mitigation:</u> If trustee acts in own interests instead of investors, trustee will be in breach of trust and liable accordingly.</p> <ul style="list-style-type: none"> <li>• A replacement trustee may be tempted to charge excessive fees for undertaking the work.</li> </ul> <p><u>Mitigation:</u> Option provides that costs recovered are reasonable. Court can scrutinise expenses if unreasonable.</p> <ul style="list-style-type: none"> <li>• Corporate trustees may have a lower incentive to accept appointment as trustee for higher risk entities, due to risk of becoming liable to pay for a replacement trustee.</li> </ul> <p><u>Mitigation:</u> Market response: reduces possibility of high risk financial products.</p> <ul style="list-style-type: none"> <li>• Given that trustees are paid out of the entity whose products they are managing, trustees may seek to increase their fees to cover the risk that they may be liable to pay the costs of a replacement trustee, if their deeds of appointment allow.</li> </ul> <p><u>Mitigation:</u> fees reflect the risks carried by trustees.</p>

## Option 2B: Amendment to the Trustee Act

Legislation to be in force before current court proceedings are heard. Legislation applies to current court proceedings.

Description	Does it meet objectives?	Impacts (costs & benefits)	Risks
<p>The Court may only appoint Public Trust to be trustee of last resort for supervision of regulated products if satisfied that the resigning trustee:</p> <ul style="list-style-type: none"> <li>has made ‘reasonable endeavours’ to appoint a replacement trustee but it is impracticable or difficult to do this without the assistance of the court. ‘Reasonable endeavours’ will be defined as including meeting the reasonable fees and expenses of the replacement trustee.</li> <li>will meet the Public Trust’s fees and expenses for acting as a replacement trustee for the trust in question, if there are no assets from which Public Trust can recoup its fees and expenses.</li> </ul> <p>The retiring trustee must provide security to indemnify the Public Trust for its reasonable fees and expenses. The provision takes effect on the day after the day on which it receives Royal assent. It applies to all existing and future court proceedings.</p>	<p>a. <u>Regulated products do not fail for lack of a trustee</u> Meets objective. Public Trust still available as trustee of last resort.</p> <p>b. <u>Trustees of regulated products can resign or be removed</u> Meets objective. Amendment ensures trustees can resign or be removed.</p> <p>c. <u>Costs of acting as trustee apportioned fairly and equitably</u> Partially meets objective. While the primary burden of trustee of last resort still likely to fall on Public Trust, it does mean Public Trust is more likely to be able to recoup its costs where there are a lack of assets, Public Trust can recoup costs from retiring trustee (unless retiring trustee insolvent). Public Trust would have to bear costs if retiring trustee insolvent.</p> <p>d. <u>Timing of reform</u> Meets objective.</p>	<p><u>Social impact:</u></p> <ul style="list-style-type: none"> <li>Reduce business confidence in certainty of the law.</li> <li>Send a signal that the Government is prepared to legislate retrospectively to protect its financial interests to the detriment of NZ businesses.</li> </ul> <p><u>Financial impact</u></p> <ul style="list-style-type: none"> <li>Likely to delay and potentially reduce the likelihood of the current proceeding continuing.</li> <li>Perpetual Trust would likely need to delay the hearing so it could enter into ‘reasonable endeavour’ discussions with other available corporate trustees.</li> <li>If no alternative corporate trustee emerges, the court proceeding could resume.</li> <li>Perpetual Trust will have to meet Public Trust’s expenses in acting as replacement trustee, estimated to be \$0.200 - \$0.300 million.</li> </ul>	<p><u>Risks to the rule of law</u></p> <p>This option risks undermining the certainty of law and business confidence by creating the perception that the Government is willing to change the rules without any notice</p> <p><u>Changing the behaviour of corporate trustees:</u></p> <ul style="list-style-type: none"> <li>A corporate trustee with a conflict of interest may choose to carry on acting as trustee (if feasible) rather than be liable to pay for the replacement trustee.</li> </ul> <p><u>Mitigation:</u> If trustee acts in own interests instead of investors, trustee will be in breach of trust and liable accordingly.</p> <ul style="list-style-type: none"> <li>A replacement trustee may be tempted to charge excessive fees for undertaking the work.</li> </ul> <p><u>Mitigation:</u> Option provides that costs recovered are reasonable. Court can scrutinise expenses if unreasonable.</p> <ul style="list-style-type: none"> <li>Corporate trustees may have a lower incentive to accept appointment as</li> </ul>

Description	Does it meet objectives?	Impacts (costs & benefits)	Risks
		<ul style="list-style-type: none"> <li>Public Trust (and potentially Crown) will not have to bear the cost of acting as replacement trustee.</li> <li>Money already spent on litigation may be seen as wasted.</li> </ul>	<p>trustee for higher risk entities, due to risk of becoming liable to pay for a replacement trustee.</p> <p><u>Mitigation:</u> Market response: reduces possibility of high risk financial products.</p> <ul style="list-style-type: none"> <li>Given that trustees are paid out of the entity whose products they are managing, trustees may seek to increase their fees to cover the risk that they may be liable to pay the costs of a replacement trustee, if their deeds of appointment allow.</li> </ul> <p><u>Mitigation:</u> fees reflect the risks carried by trustees.</p>

### Option 3A: Bring forward Financial Markets Conduct Bill provisions dealing with appointment of replacement trustee

The Financial Markets Conduct Bill is currently expected to be enacted by 30 June 2013 and to begin to come into force by 1 April 2014, but this option would bring forward the commencement of those parts of the Bill dealing with appointment of replacement trustees. Legislation does not apply to current court proceedings.

Description	Does it meet objectives?	Impacts (costs & benefits)	Risks
<p>A regulated corporate trustee wishing to resign must apply to the Financial Markets Authority. The Authority would then:</p> <ul style="list-style-type: none"> <li>• assess whether it is necessary or appropriate for the trustee to resign</li> <li>• if it is satisfied the trustee should resign, appoint a replacement trustee (seeking to ensure the burden is spread equitably among all licensed trustees in the retail corporate market, one of which is Public Trust)</li> </ul> <p>If the entity being supervised is unable to do so, the resigning trustee would be required to meet the costs of:</p> <ul style="list-style-type: none"> <li>• the FMA in making the assessment and appointing the replacement trustee</li> <li>• the replacement trustee</li> </ul> <p>Transitional provisions make it clear that the amendment does not apply to current court proceedings</p>	<p>a. <u>Regulated products do not fail for lack of a trustee</u></p> <p>Meets objective. Public Trust still available as trustee of last resort.</p> <p>b. <u>Trustees of regulated products can resign or be removed</u></p> <p>Meets objective. Amendment ensures trustees can resign or be removed.</p> <p>c. <u>Costs of acting as trustee apportioned fairly and equitably</u></p> <p>Meets objective. Shares the burden of acting as replacement trustee equitably among all trustees in the retail corporate market.</p> <p>d. <u>Timing of reform</u></p> <p>Does not meet objective of having the legislation in place before the Court decides the current proceedings.</p>	<p><u>Financial impact:</u></p> <ul style="list-style-type: none"> <li>• Imposes costs on retiring trustee if the trust itself cannot cover replacement trustee's expenses in acting as replacement trustee. Retiring trustee may not be guilty of any alleged wrongdoing or negligence.</li> <li>• Replacement trustee, which may be any licensed trustee, does not have to bear the cost of acting as replacement trustee.</li> </ul> <p><u>Impact on market:</u></p> <ul style="list-style-type: none"> <li>• Burden of acting as replacement trustee is spread equitably among all trustees in the retail corporate market.</li> </ul> <p><u>Social impact:</u></p> <ul style="list-style-type: none"> <li>• Continues to ensure that there is a trustee to act for failed finance companies, ensuring proper communication with thousands of affected investors</li> <li>• Significant change imposing new duties on the corporate trustee market made without consultation or notice could undermine business confidence in</li> </ul>	<p><u>Additional exposure of Public Trust</u></p> <p>The lag between the court hearing the current proceedings and enactment of the FMC Bill leaves Public Trust vulnerable to additional applications being lodged to appoint it as replacement trustee of other failed finance companies.</p> <p>If lodged, those applications would not be subject to the amendment, and that would leave Public Trust exposed to the financial burden of administering regulated products which may not have assets left from which Public Trust may recoup its costs.</p> <p><u>Undermining certainty in the law</u></p> <p>This option involves imposing a new duty on corporate trustees, without having consulted the affected parties. Such a procedural shortcoming affects confidence in the law-making process, and can undermine business confidence in New Zealand.</p> <p><u>Changing the behaviour of corporate trustees:</u></p> <ul style="list-style-type: none"> <li>• A corporate trustee with a conflict of</li> </ul>

Description	Does it meet objectives?	Impacts (costs & benefits)	Risks
		<p>certainty of the law</p>	<p>interest may choose to carry on acting as trustee (if feasible) rather than be liable to pay for the replacement trustee.</p> <p><u>Mitigation:</u> If trustee acts in own interests instead of investors, trustee will be in breach of trust and liable accordingly. A replacement trustee may be tempted to charge excessive fees for undertaking the work.</p> <p><u>Mitigation:</u> Option provides that costs recovered are reasonable. Court can scrutinise expenses if unreasonable.</p> <ul style="list-style-type: none"> <li>• Corporate trustees may have a lower incentive to accept appointment as trustee for higher risk entities, due to risk of becoming liable to pay for a replacement trustee.</li> </ul> <p><u>Mitigation:</u> Market response: reduces possibility of high risk financial products.</p> <ul style="list-style-type: none"> <li>• Given that trustees are paid out of the entity whose products they are managing, trustees may seek to increase their fees to cover the risk that they may be liable to pay the costs of a replacement trustee, if their deeds of appointment allow.</li> <li>• <u>Mitigation:</u> fees reflect the risks carried by trustees.</li> </ul>

### Option 3B: Bring forward Financial Markets Conduct Bill provisions dealing with appointment of replacement trustee

The Financial Markets Conduct Bill is currently expected to be enacted by 30 June 2013 and to begin to come into force by 1 April 2014, but this option would bring forward the commencement of those parts of the Bill dealing with appointment of replacement trustees. Legislation applied retrospectively to current court proceedings.

Description	Does it meet objectives?	Impacts (costs & benefits)	Risks
<p>A regulated corporate trustee wishing to resign must apply to the Financial Markets Authority. The Authority would then:</p> <ul style="list-style-type: none"> <li>• assess whether it is necessary or appropriate for the trustee to resign</li> <li>• if it is satisfied the trustee should resign, appoint a replacement trustee (seeking to ensure the burden is spread equitably among all licensed trustees in the retail corporate market, one of which is Public Trust)</li> </ul> <p>If the entity being supervised is unable to do so, the resigning trustee would be required to meet the costs of:</p> <ul style="list-style-type: none"> <li>• the FMA in making the assessment and appointing the replacement trustee</li> <li>• the replacement trustee</li> </ul> <p>The provision would be applied retrospectively to the C+M case.</p>	<p>a. <u>Regulated products do not fail for lack of a trustee</u></p> <p>Meets objective. Public Trust still available as trustee of last resort.</p> <p>b. <u>Trustees of regulated products can resign or be removed</u></p> <p>Meets objective. Amendment ensures trustees can resign or be removed.</p> <p>c. <u>Costs of acting as trustee apportioned fairly and equitably</u></p> <p>Meets objective. Shares the burden of acting as replacement trustee equitably among all trustees in the retail corporate market.</p> <p>d. <u>Timing of reform</u></p> <p>Meets objective</p>	<p><u>Social impact:</u></p> <ul style="list-style-type: none"> <li>• Legislation would potentially remove an entitlement that had accrued to Perpetual Trust through litigation commenced (and possibly completed) before the legislation came into force.</li> <li>• Reduce business confidence in certainty of the law.</li> <li>• Send a signal that the Government is prepared to legislate retrospectively to protect its financial interests to the detriment of NZ businesses.</li> </ul> <p><u>Financial impact:</u></p> <ul style="list-style-type: none"> <li>• Would halt current proceeding. Perpetual would need to apply to the FMA and the FMA makes the decisions without court involvement.</li> <li>• Perpetual Trust will have to meet replacement trustee's expenses in acting as replacement trustee, estimated to be \$0.200 - \$0.300 million.</li> <li>• Public Trust (and Crown) will not have to</li> </ul>	<p><u>Risks to the rule of law</u></p> <p>This option risks undermining the certainty of law and business confidence by creating the perception that the Government is willing to change the rules without any notice</p> <p><u>Undermining certainty in the law</u></p> <p>This option involves imposing a new duty on corporate trustees, without having consulted the affected parties. Such a procedural shortcoming affects confidence in the law-making process, and can undermine business confidence in New Zealand.</p> <p><u>Changing the behaviour of corporate trustees:</u></p> <ul style="list-style-type: none"> <li>• A corporate trustee with a conflict of interest may choose to carry on acting as trustee (if feasible) rather than be liable to pay for the replacement trustee.</li> </ul> <p><u>Mitigation:</u> If trustee acts in own interests instead of investors, trustee will be in breach of trust and liable accordingly.</p>

Description	Does it meet objectives?	Impacts (costs & benefits)	Risks
		<p>bear the cost of acting as replacement trustee.</p> <ul style="list-style-type: none"> <li>• Money already spent on litigation wasted.</li> </ul>	<ul style="list-style-type: none"> <li>• A replacement trustee may be tempted to charge excessive fees for undertaking the work. <u>Mitigation:</u> Option provides that costs recovered are reasonable. Court can scrutinise expenses if unreasonable.</li> <li>• Corporate trustees may have a lower incentive to accept appointment as trustee for higher risk entities, due to risk of becoming liable to pay for a replacement trustee. <u>Mitigation:</u> Market response: reduces possibility of high risk financial products.</li> <li>• Given that trustees are paid out of the entity whose products they are managing, trustees may seek to increase their fees to cover the risk that they may be liable to pay the costs of a replacement trustee, if their deeds of appointment allow. <u>Mitigation:</u> fees reflect the risks carried by trustees.</li> </ul>

**Option 4: Review the role of ‘trustee of last resort’ in relation to all types of trustee appointments**

Longer term review of the role of ‘trustee of last resort’ in relation to all types of trustee appointments (including products regulated by the Securities Act 1978, wholesale products and family trusts)

Description	Does it meet objectives?	Impacts (costs & benefits)	Risks
<p>There is a broad policy question about the appropriate role of the ‘trustee of last resort’, in relation to regulated corporate trusts, wholesale products and family trusts. A review could examine the need for a ‘trustee of last resort’ in relation to each area and identify a more comprehensive range of options for reform.</p>	<p>a. <u>Regulated products do not fail for lack of a trustee</u> Meets objective. Public Trust still available as trustee of last resort.</p> <p>b. <u>Trustees of regulated products can resign or be removed</u> Meets objective. Amendment ensures trustees can resign or be removed.</p> <p>c. <u>Costs of acting as trustee apportioned fairly and equitably</u> Unclear whether it meets objectives.</p> <p>d. <u>Timing of reform</u> Does not meet objective.</p>	<p><u>Financial impact:</u></p> <ul style="list-style-type: none"> <li>Increases the risk that Public Trust (and the Crown) will bear the cost of future applications for Public Trust to be appointed trustee of last resort for failed finance companies.</li> <li>Public Trust has estimated the costs of acting as replacement trustee for C+M to be \$0.200 - \$0.300 million. There are 60 failed finance companies, and the trustees of those companies may file applications to have Public Trust appointed as a replacement trustee.</li> <li>Public Trust (and Crown) exposed to unknown, extremely large, liability.</li> </ul> <p><u>Social impact:</u></p> <ul style="list-style-type: none"> <li>No social impact.</li> </ul>	<p>Ongoing exposure of Public Trust to financial liability while review is conducted and legislation prepared (if required).</p>

## **Conclusions**

20. On balance, we favour a combination of option 2A and option 4. A short term solution is needed to reduce Public Trust's exposure to an indeterminate, but potentially large, financial risk. A longer-term solution is available through the Financial Markets Conduct Bill currently before Parliament.
21. The Financial Markets Conduct Bill will still leave some unanswered questions about the trustee of last resort, and whether the State has a role in either filling or funding that function, given the way the market has changed since 1899. The Law Commission's review of the Trustee Act 1956 provides an appropriate vehicle to consider this wider issue.

## **Consultation**

22. We have consulted Treasury, the Ministry of Business, Innovation and Employment, Crown Law and the Financial Markets Authority on this proposal. The Department of the Prime Minister and Cabinet has been informed.
23. We have discussed the proposal with Public Trust.
24. We have not consulted with Perpetual Trust or other licensed trustees as this could lead to trustees for failed finance companies filing further court proceedings to have Public Trust appointed as replacement trustee before the Government has an opportunity to amend the law.

## **Arrangements for monitoring, evaluation and review**

25. Officials will continue to monitor the implications on Public Trust and in relation to finance companies.