

CONFERENCE EDITION

Trust Law Protections for E-Money Customers

Lessons and a Model Trust Deed Arising from Mobile Money Deployments in the Pacific Islands

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Acknowledgement

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¹ The Alliance for Financial Inclusion (AFI) is a global network of financial inclusion policymaking bodies, including central banks, in developing and emerging countries: www.afi-global.org

² The Pacific Inclusion Financial Inclusion Working Group (PIWG) was formed in 2009 at the request of the central banks of Fiji, Samoa, Solomon Islands, Vanuatu, Papua New Guinea and Timor-Leste.

EXECUTIVE SUMMARY

This knowledge product examines how trusts law can be used to protect ‘customers’ funds’. These are funds that a customer provides to an e-money provider in exchange for electronic or ‘e-money’.

The Main Risk to Customers’ Funds

There are three main risks to customers’ funds:

- Bankruptcy or insolvency (loss of agent or customers’ funds), which can arise when the Provider is insolvent or otherwise fails, and customers’ funds are used to repay the Provider’s debts;
- Illiquidity (unavailability of agent or customers’ funds), which can arise when the Provider uses customers’ funds for its own purposes and then does not have enough funds left in its account to provide to customers when they request it;
- Operational risk, which is loss of customers’ funds due to the Provider, or an employee of the Provider’s fraud, theft, misuse, negligence, or poor administration.

Trusts Law Can Protect Customers’ Funds

Trusts law can protect customers’ funds in three ways:

- Protection 1: Fund isolation, which primarily involves ensuring the customer, not the Provider, holds the ultimate interest in the funds, and can be achieved by requiring the Provider to store customers’ funds in a ‘trust’;
- Protection 2: Fund safeguarding, which involves liquidity, restriction on use, and diversification rules that aim to ensure the Provider always has a 1:1 ratio between issued e-money and customers’ funds;
- Protection 3: Reducing operational risk, particularly in relation to theft of customer’s funds, by requiring the Provider to regularly audit the trust funds, which are checked by the regulator.

The Model Trust Deed Can Help Create These Protections

A regulator can create these protections by implementing provisions from a ‘Model Trust Deed’, which is attached to this Knowledge Product. The Model Trust Deed contains the following three features:

Feature of Model Trust Deed	Trust Protection Created	Explanation	Clauses of Model Trust Deed
Declaration of Trust	Protection 1: Fund Isolation.	Establishes a trust relationship between customers and the Provider. It also requires that customers’ funds not be mixed with the Provider’s own funds.	2, 3
Customer Protection Rules	Protection 2: Fund Safeguarding.	Contains rules relating to liquidity, restrictions on use, and diversification.	4-7, 10-13
An Active Regulator	Protection 2: Fund Safeguarding. Protection 3: Reduce Operational Risk, Particularly Theft of Funds.	<ul style="list-style-type: none"> • Contains rules relating to auditing of accounts; and • Provides the regulator with authority to ensure the Provider complies with rules relating to: <ul style="list-style-type: none"> ○ Fund Safeguarding; and ○ Auditing. 	8, 9.

Implementing the Model Trust Deed

A regulator should not simply cut and paste the entire Model Trust Deed for use in its jurisdiction. This report contains an implementation strategy which a regulator can use to determine which provisions, if any, of the Model Trust Deed should be implemented. All recommendations in this document are subject to obtaining legal advice on the law in individual jurisdictions.

Structure of Report

This Knowledge Product consists of the following parts:

- Part 1: The three trust protections;
- Part 2: How a regulator can implement the trust protections - in theory;
- Part 3: How a regulator can implement the trust protections - in practice; and
- Appendix: A dictionary of trust law terms used in the Knowledge Product.

PART 1: BACKGROUND OF PROJECT

At the request of the Alliance for Financial Inclusion's Pacific Islands Working Group (PIWG), the Pacific Financial Inclusion Programme (PFIP)³ contracted Jonathan Greenacre, a consultant, to analyse the trust arrangements used by e-money issuers in the following Pacific countries: Fiji, Papua New Guinea, Samoa, Tonga, and Vanuatu (collectively termed 'Pacific focus countries' in this document).

This project was designed to focus upon customer protection mechanisms contained in the trust arrangements in each country and make recommendations on how to strengthen them. It was a remote project, and involved liaising with e-money providers and regulators in each country through email and teleconferences. The regulators included the Reserve Bank of Fiji, the Bank of Papua New Guinea, Central Bank of Samoa, the National Reserve Bank of Tonga, and the Reserve Bank of Vanuatu. The relevant e-money issuers were Digicel Fiji, Digicel Vanuatu, Digicel Samoa, Digicel Tonga, Digicel PNG, Vodafone Fiji, and Post PNG.

The project was undertaken in two separate stages: June-September 2012 and January-March 2013. This Knowledge Product and the Model Trust Deed come from insights obtained from both stages of the project.

PART 2: THE THREE TRUSTS PROTECTIONS FOR E-MONEY

1. The Main Risks to Customers' Funds

Introduction to E-money

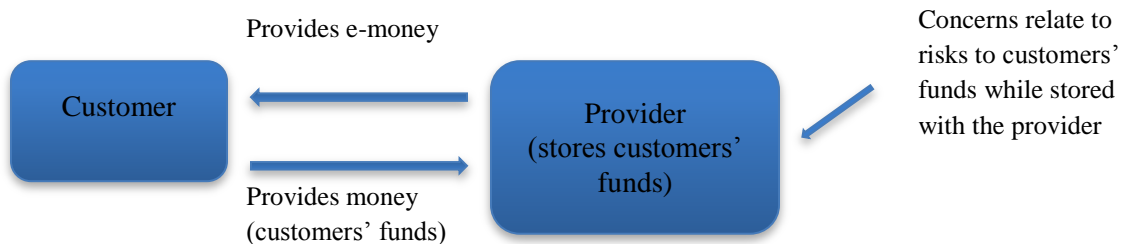
This Knowledge Product relates to electronic money or 'e-money'. While precise terminology tends to vary across countries, *e-money* is typically defined as a type of stored value instrument or product that (i) is issued on receipt of funds, (ii) consists of electronically recorded value stored on a device (such as a server, card, or mobile phone), (iii) may be accepted as a means of payment by parties other than the issuer, and (iv) is convertible back into cash.⁴ The concepts of stored value and convertibility distinguish e-money from credit cards, retail gift cards, airtime, and other payment instruments that are not readily convertible.

An e-money issuer may be a payment service provider, credit issuer, or telecommunications company. This Knowledge Product focuses on these types of 'nonbank' providers, which are labeled 'Providers' for the purposes of this paper. In particular, the Knowledge Product examines (i) *risks that arise when the Provider stores customers' funds*, and (ii) *the use of trust law to minimise these risks*. The basic model operates as follows and is also depicted in the diagram below. The customer deposits or 'cashes in' money ('customers' funds') with the Provider in exchange for e-money. The Provider often stores the customers' funds while the customer uses e-money to trade with other customers. Later, the customer

³ PFIP is a joint programme of the United Nations Capital Development Fund (UNCDF) and United Nations Development Programme (UNDP) with additional funding support from the Australian Agency for International Development (AusAID) and the European Union/Africa, Caribbean and Pacific Microfinance Framework Programme (EU/ACP). The mission of the PFIP is to increase by 500,000 the number of low income and rural households, micro and small enterprises in Pacific Island Countries (PICs) that have on-going access to quality and affordable financial services by 2013.

⁴ Alliance for Financial Inclusion, 'Guideline Note Mobile Financial Services: Basic Terminology' (CGAP, 2012).

‘cashes out’ his or her e-money. This means that the customer returns any remaining e-money that he or she has for an equivalent amount of cash from the Provider. Recently, concerns have been raised that customers’ funds may not be adequately protected while they are stored with the Provider.⁵



It is easiest to understand these concerns by comparing the operation of banks and Providers.

- Regular banking: customers deposit money with banks, and the government uses ‘prudential regulation’ to protect such deposits. Prudential regulation, which involves a variety of tools such as limitations on leverage, aims to reduce the riskiness of banks which then helps ensure that deposits are kept safe as they are intermediated (ie lent) to borrowers;
- E-Money: Prudential regulation is not normally applied to Providers as they are not usually legally permitted to intermediate customers’ funds. E-money is largely treated as ‘counterparty risk’, that is a temporary risk while funds are transferred electronically from one party to another. However, ever larger amounts of customers’ funds are being stored as a ‘float’, the aggregate value of funds stored electronically. This makes it increasingly important to protect such funds.

Usually, rules that outline how a Provider must deal with customers’ funds are contained in a variety of sources. These often include regulations, correspondence from a country’s financial regulator to the Provider, and provisions in the Provider’s contract which the customer signs when he or she begins using e-money (‘non-trust documents’). This knowledge product examines how *trusts law can be used to protect customers’ funds while such funds are stored with the Provider*.

Risks to be Reduced

Three main risks can arise for customers’ funds while they are stored with the Provider. These are:

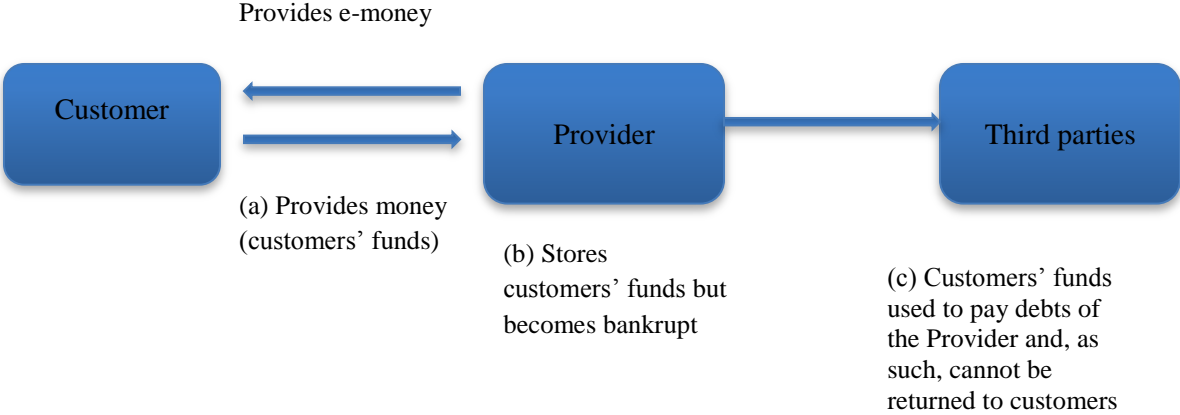
(i) Bankruptcy or Insolvency (Loss of customer or agent funds)

Like a bank, there is a risk that the Provider may become insolvent (cannot pay its debts), bankrupt (court determines the Provider has become insolvent) or otherwise fails. If this occurs, the Provider may use customers’ funds to repay debts that it owes to other parties (‘third parties’). This use of funds might be required under the bankruptcy laws if customers’ funds are not held under a trust.⁶ This problem may be exacerbated if the Provider uses customers’ funds as collateral (ie pledged as security for repayment of a loan) to obtain loans from third parties.⁷ An example of loss of customer funds is outlined from (a) to (c) below.

⁵ See, for example, Michael Tarazi and Paul Breloff, ‘Nonbank MNOs: Regulatory Approaches to Protecting Consumer Funds’ (CGAP, 2012), and Kate Lauer and Michael Tarazi, ‘Supervising Nonbank E-Money Issuers’ (CGAP, 2012). Much of the material in this Knowledge Product is drawn from these texts.

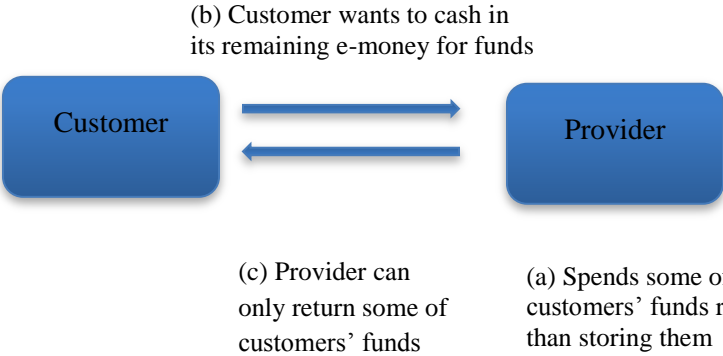
⁶ Note that this use of funds may be required even if the customers funds are clearly distinguished. The customer may be an unsecured creditor – they will be subject to the *pari passu* rule. Their funds will be used to pay outstanding debts.

⁷ Note that in such case they may have a relatively weak claim (rather than an equal claim) against a secured creditor.



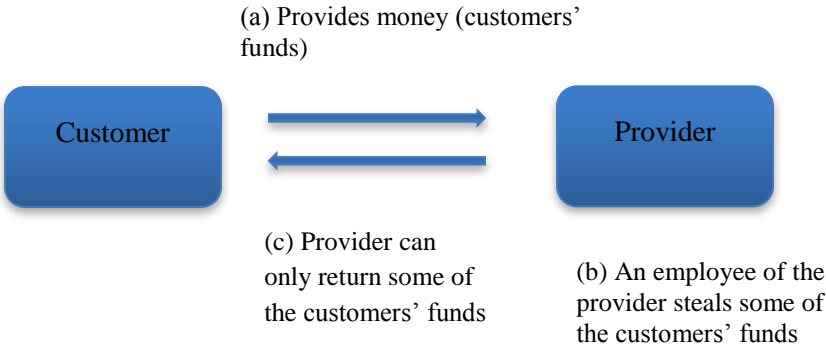
(ii) Illiquidity (Unavailability of customers' funds)

A Provider should provide only as much e-money as exists in the e-money system or 'float', which is held by customers, agents, and itself. In other words there should be a 1:1 relationship between e-money and customers' funds. However, this 1:1 relationship can be broken if the Provider spends some of the customers' funds for its own purposes. For example, the Provider may spend customers' funds to pay for its operating expenses rather than storing them. This may mean that when a customer seeks to cash in its remaining e-money, the Provider cannot return all of it. This is outlined from (a) to (c) below.



(iii) Operational Risk

Operational risk arises due to the Provider's internal activities, such as fraud, theft, misuse, negligence, or poor administration. This form of risk became prominent in May 2012, when it emerged that employees of Telco MTN Uganda had stolen around US\$3.5 million from an account used to store cash which had been incorrectly sent through its e-money service. This Knowledge Product only covers fraud and theft in relation to *customers' funds that are held in the trust fund*. The process of operational risk in relation to customers' funds is outlined from (a) to (c) below.



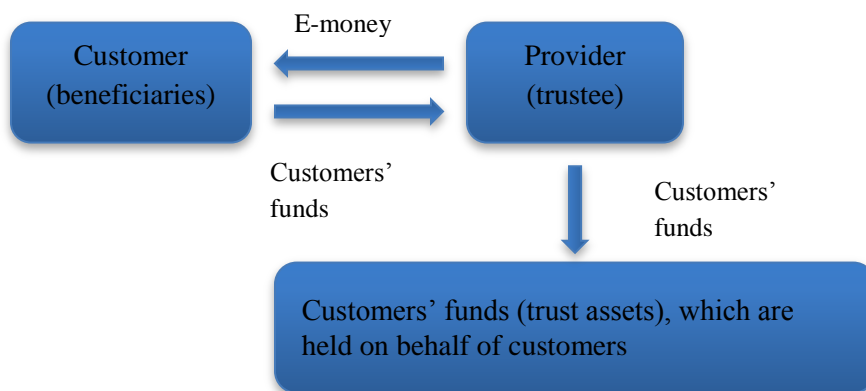
2. Using Trusts Law to Reduce Risks to Customers' Funds

The Basic Operation of Trust Law

A trust is a legal relationship between a trustee, a beneficiary and trust 'assets'. This relationship may be established by the execution of a Model Trust Deed. The trustee has power to use the trust assets. When doing so, the trustee is usually required to comply with a number of *duties* that it owes the beneficiary. An overarching duty is to use the trust assets for the benefit of the beneficiary. A number of other trustee duties are usually imposed on the trustee, such as understand and adhere to its obligations under the trust deed, exercise the skill of a 'prudent' person in the performance of duties under the trust, and not profit from the office of trustee.

Trust legislation operates in many of the Pacific focus countries. This legislation helps determine the duties of the trustee. For example, the *Trustee Act (1966)* applies to trusts in Fiji.

The beneficiary can enforce the terms of the trust deed because he or she has certain *rights* against the trustee, as well as third parties who obtain, or claim a legal interest in trust assets. The beneficiary can enforce those rights by suing the trustee for failing to comply with the trustee duties. In relation to e-money, a trust relationship would consist of the following:



Reducing the Risk of Loss of Customers' Funds

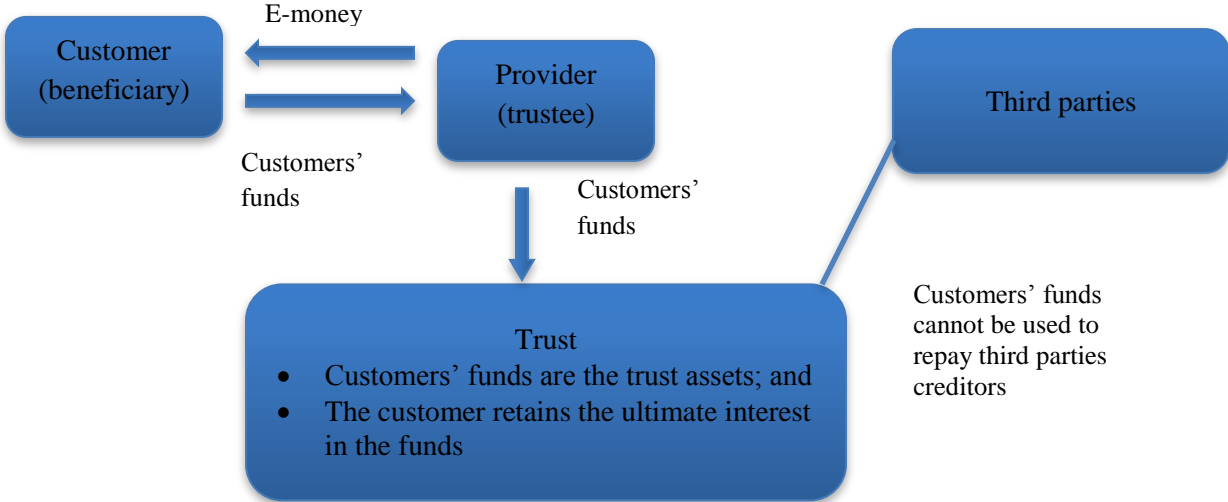
There are three main methods of reducing the risk of loss of customers' funds.

Protection 1: Fund Isolation

Fund isolation rules address the problem of loss of customer or agent funds. This problem occurs because of the way laws tends to classify ownership of funds. Usually, customers' funds are stored in aggregate in one or more bank accounts in the name of the Provider, not the customers. This structure means that the *Provider is the legal owner* of the account. In the event of insolvency the Provider can use the customers' funds to pay off debts.

Fund isolation deals with this problem by requiring the provider to store customers' funds in a separate account, usually a 'trust account' in a bank. If there is a trust declared over the funds which are held in this separate bank account the *customer* retains the ultimate interest in the funds. As such, the funds

cannot be used to pay off the Provider’s debts.⁸ In other words, customers’ funds are held separate and legally *isolated* from the assets of the Provider. This protection operates as follows:



Protection 2: Fund Safeguarding

(i) The Rules

Fund safeguarding rules aim to minimise both the loss of agents’ or customers’ funds and illiquidity risk. These rules aim to ensure the Provider always has a 1:1 ratio between e-money and the float. Maintaining this 1:1 ratio means that the provider will always have enough customers’ funds to repay the customers when they want to cash in their remaining e-money. Three main categories of rules aim to achieve the 1:1 ratio:

- **Liquidity:** Liquidity rules usually require the Provider to hold ‘liquid assets’ (ie can be quickly converted into cash) such as bank deposits or government securities. These liquid assets should be equal to the amount of e-money that it has distributed (the ‘e-float’). This is often achieved by requiring the Provider to hold customers’ funds as deposits in a bank. This example below demonstrates how liquidity rules operate:

A Provider must hold an equal value of:	
E-money	Assets
Eg \$10,000 worth of e-money	Eg \$10,000 worth of deposits in a prudentially regulated bank

These assets operate as a form of insurance over customers’ funds. Because the assets are liquid, the Provider should be able to quickly and easily convert them into regular money. This should mean that the assets are always available to return customers’ funds when customers want to cash in their e-money.

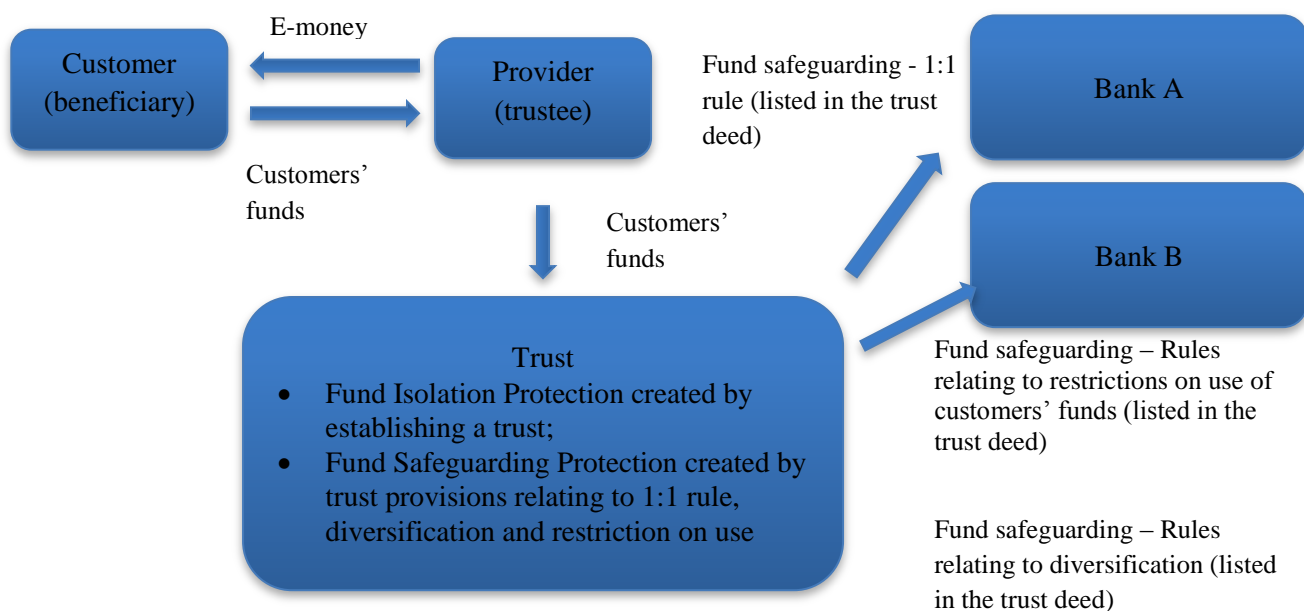
⁸ The distinction between beneficial owner and legal owner is an important one, and should be carefully considered.

- Restrictions on use of customers’ funds:** These restrictions aim to ensure that the Provider isolates and restricts the use of customers’ funds *rather than uses them for any other purpose*. When these funds are isolated, they can later be returned to customers who want to cash in their e-money. Several particularly common examples of restrictions on use of customers’ funds include requirements that the Provider:
 - Cannot use customers’ funds to finance its own operating expenses;
 - Can only use customers’ funds to repay customers who want to cash out their remaining e-money;
 - Cannot use its customers’ funds as collateral or guarantees; and
 - Cannot use customers’ funds to extend credit.
- Diversify e-float fund holdings:** As outlined above, liquidity rules often require the Provider to hold customers’ funds in a bank. These assets may be lost if the bank becomes insolvent. Diversification rules aim to reduce the risk that *all* assets would be lost by requiring the Provider to hold these assets in multiple banks.

(ii) Ways in Which Trust Law Can Create Fund Safeguarding Rules

Trusts law can be used to *outline fund safeguarding rules*. These rules can take the form of ‘trustee duties’, which outline how the trustee (who may be the Provider) must deal with the customers’ funds (the trust assets). These duties can be ‘explicit’, which means they are contained in the trust deed, trusts legislation and general law, or ‘implied’, which means the court determines that a term is required to ‘fill a gap’ in the trust deed. Ultimately, most fund safeguarding rules can be contained in the trust deed, so long as it is adequately drafted. The explicit and implied duties can form a ‘rule book’ which outline how the Provider (as trustee) must deal with customers’ funds. The use of trusts to create fund safeguarding rules appears as below:

The Pacific focus countries tend to have strong fund safeguarding rules. For example, in Fiji, rules exist in relation to liquidity and restrictions on the use of customers’ funds. However, some of these rules are contained in draft guidelines only, and it should be clarified whether they apply to e-money in Fiji.



Protection 3: Reducing Operational Risk

(i) The Rules

There are a wide variety of rules relating to operational risk, such as misappropriation or negligent mismanagement of assets. This Knowledge Product has insufficient length to closely consider all of these rules. Instead, the report focuses on rules that *minimise the risk of theft of customer's funds, including through fraud*. Reducing such theft and fraud involves requiring the Provider to keep records of the account in which customers' funds are held, and ensure that these accounts can be checked by a regulator ('audited'). If accounts are being checked, there may be less opportunity for employees of a Provider to steal from customers' funds.

(ii) Ways in Which Trust Law Can Create Rules that Minimise Operational Risk

Trust law can create rules that minimise operational risk in relation to customers' funds in two ways:

(a) Auditing

The trust deed can contain clauses that outline when the Provider must audit the trust accounts, and describe how this auditing should take place. This auditing process can help ensure the integrity of the system.⁹ These rules can be in the form of trustee duties, like with the duties in relation to fund safeguarding rules (outlined above).

(b) Monitoring

It is advisable that there is a person who is provided with powers to ensure that the Provider is actually auditing the trust account and (more importantly) that trust funds are safe, and that the Provider is complying with the terms of the trust. Normally in trust law the beneficiaries or their designate would do the auditing. This is because, as outlined above, the customers (as beneficiaries in the trust), have the power to enforce the terms of the trust by suing the Provider (as trustee) for breaches of the trust's terms. This means that regulators usually take a largely *passive* approach to monitoring trust accounts adopted by regulatory bodies.

However, this traditional approach to monitoring the Provider's actions may not be feasible in relation to e-money. For many customers, e-money is their first sustained interaction with formal financial services, and they may not be educated and experienced in relation to trust related rules and principles.¹⁰ This lack of practical oversight may enable the Provider to avoid complying with the trust deed, increasing operational risk.

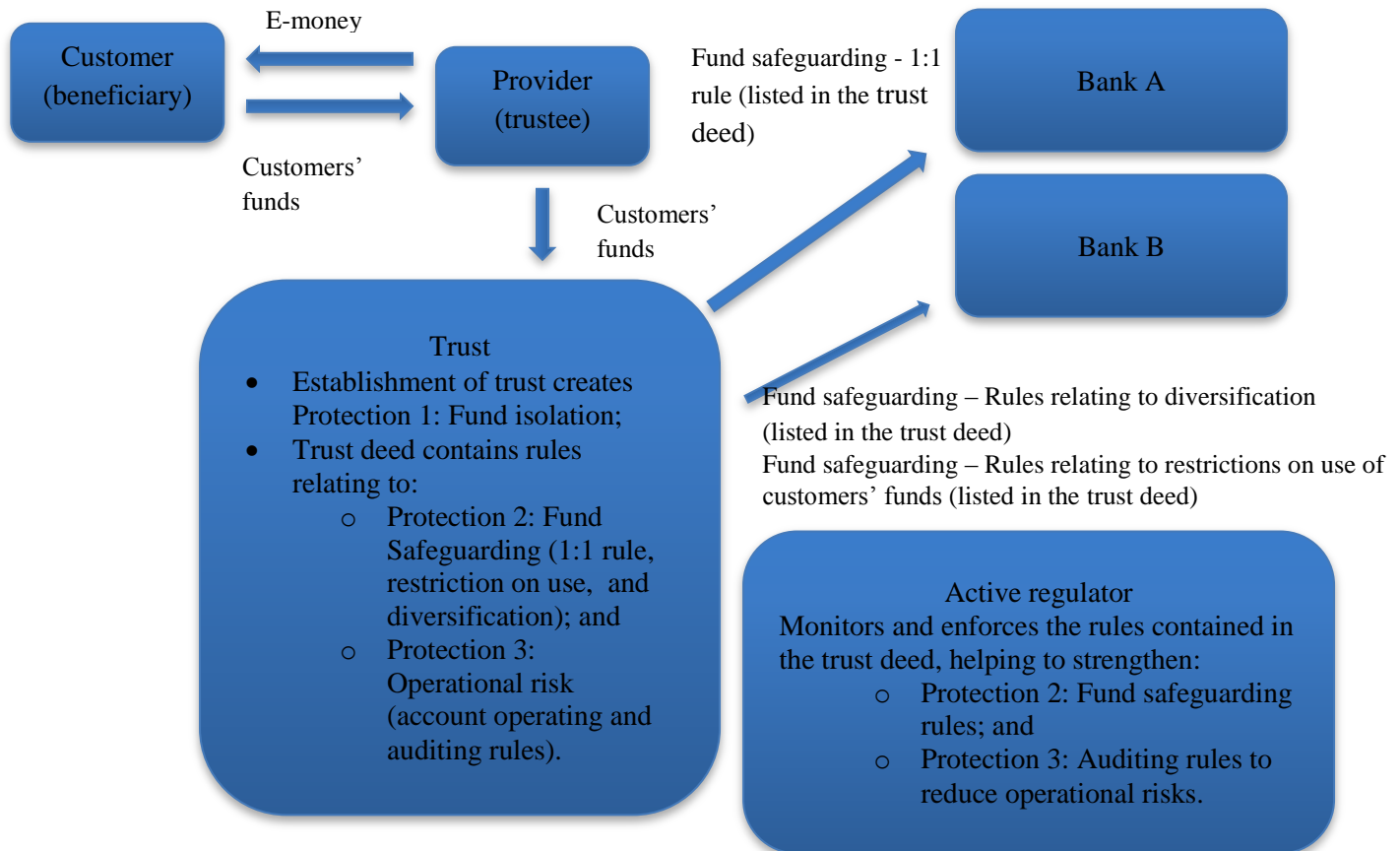
Regulators in Fiji, Samoa, and Vanuatu already take a quasi-active supervisory approach by requiring e-money providers to produce financial reports.

However, the rules around reports are piece-meal and these regulators appear yet to determine an *overall regulatory approach* to e-money. Determining such an approach may help the regulators to design a coherent set of rules for e-money.

⁹ Michael Klein and Colin Mayer, 'Mobile Banking and Financial Inclusion: The Regulatory Lessons' (World Bank, 2011), 13.

¹⁰ Denise Dias and Katharine McKee, 'Protecting Branchless Banking Consumers: Policy Objectives and Regulatory Options' (CGAP, 2012).

In this instance the country’s e-money regulator should take an *active approach* that involves monitoring and enforcing the terms of the trust *on behalf of* the customers. This approach is used in other areas of trust law, such as in off-shore jurisdictions where investors are concerned about the trustworthiness of trustee companies who held funds on their behalf. This role would operate as follows.



As outlined above in Part 1, in many countries, some, or all of these protections are contained in non-trust documents. Furthermore, regulators could impose these rules through non-trust law regulation, such as legislation. A more long-term solution to protecting customers’ funds may come through legislation.

In several Pacific focus countries customer protection provisions may be contained in a variety of non-trust documents. For example, in Samoa, these documents include the *Trustee Act (1975)*, *Trustee Companies Act (1988)*, and Digicel Samoa’s *Mobile Money Operations Manual*.

However, until such legislation is drafted, it may be advisable to implement the trust protections contained in the Model Trust Deed. The benefit of implementing a trust deed which contains the relevant provisions is that an effective trust deed can simultaneously create the fund isolation, fund safeguarding, and operational risk protections. Furthermore, a trust deed can be used as a ‘stop-gap’ measure until a country’s e-money market develops, and a regulatory framework becomes necessary.

However, trusts law has some important limitations which need to be considered. The recognition of the trust law principles outlined in this Knowledge Product is largely limited to jurisdictions which have a ‘Common Law’ legal system. This system, which is based upon the English legal system, is used by a

large number of countries, such as Fiji, Kenya, Papua New Guinea, and Uganda. The recommendations in this Knowledge Product will not be directly applicable to non-Common Law countries, such as Civil Law countries.¹¹

PART 3: HOW A REGULATOR CAN IMPLEMENT THE THREE TRUST PROTECTIONS – IN THEORY

A country’s regulator can create the three trust protections (fund isolation, fund protection, operational risk) by implementing clauses taken from the Model Trust Deed. This document is attached to this Knowledge Product and contains three main features:

Feature of the Model Trust Deed	Trust Protection Created	Explanation
Declaration of Trust	Protection 1: Fund Isolation.	Establish a trust relationship between customers and the Provider.
Customer Protection Rules	Protection 2: Fund Safeguarding.	Model Trust Deed contains rules relating to liquidity, restrictions on use.
An Active Regulator	Protection 2: Fund Safeguarding. Protection 3: Reduce Operational Risk.	Model Trust Deed: <ul style="list-style-type: none"> • Contains rules relating to auditing of accounts; and • Provides the regulator has authority to ensure the Provider complies with rules relating to: <ul style="list-style-type: none"> ○ Fund Safeguarding; and ○ Auditing.

This report does *not* recommend that a regulator necessarily adopt all of the clauses of the Model Trust Deed. Each regulator should consider which of clauses are appropriate, using the implementation principles listed in Part 3 of this Knowledge Product. A regulator may decide that certain terms of the Model Trust Deed are not appropriate in the context of their jurisdiction and/or the commercial context in which the Provider operates.

Feature 1 – Implement a Trust Deed Which Contains a Declaration of Trust

As outlined above in Part 1, the fund isolation protection can protect customers’ funds if there is a trust relationship between the customer and Provider. Usually, to establish such a relationship, there must be *sufficient evidence of an intention to form a trust relationship*.

The strongest evidence of such an intention comes from the following:

In Papua New Guinea, Digicel PNG and Post PNG use trust deeds, each of which contains a declaration of trust. This demonstrates a clear intention to form a trust relationship between the customer and the Provider.

¹¹ An additional limitation of trust law is the traditional difficulty of suing a trustee. For example, if a trustee steals customers’ funds and uses such funds to purchase an asset (e.g. a car), the beneficiaries cannot sue the car dealer; *unless* the car dealer was dishonest (e.g. they knew the money was stolen). This is a technical avenue of law.

- *Implementing a trust deed*: This is a legal document that outlines how the trust relationship between the Provider and customers will operate; and
- *A declaration of trust*: The trust deed should contain a trust declaration, in which the Provider (who is the individual establishing the trust, otherwise known as the ‘settlor’) declares that it holds the customers’ funds (‘trust assets’) on behalf of the customers (the ‘beneficiaries’).

The following clauses of the Model Trust Deed demonstrate a clear intention to establish that a trust relationship exists between the parties:¹²

Clause in Trust Deed	Explanation of How Clause Demonstrates an Intention to Establish a Trust Relationship
Use of trust deed	Demonstrates an intention to operate the relationship through a trust deed and ultimately trust law, rather than as regular relationship established through use of a contract.
Clause 3	Declares that a trust relationship exists between the parties.

Feature 2 – Include Fund Safeguarding Rules in the Model Trust Deed

As outlined above in Part 1, the trust deed can contain trustee duties which can be used as rules that

Any fund safeguarding rules that are imposed will need to be consistent with other regulation in each country. For example, in Vanuatu, the *Trustee Company Act* (1971) may impose obligations upon a trustee that contradict those contained in the Model Trust Deed.

require the provider to deal with customers’ funds in certain ways. The Model Trust Deed contains clauses that have this effect. At the outset, it is important to note that there is no international ‘best practice’ on a number of important customer protection provisions contained in the Model Trust, such as interest payments.¹³ Regulators will need to determine the position they will take on such provisions.

The table below outlines the trust protections listed in the Model Trust Deed.

Aspect of Fund Safeguard	Clause in Model Trust Deed	Explanation of How Provision Provides Fund Safeguarding Protection
Liquidity	Clause 4	Requires the Provider to pay all customers’ funds into an account or accounts at a prudentially regulated banking institution. ¹⁴
	Clause 5	Maintains a 1:1 ratio between e-money and customers’ funds requiring that the Provider ensures the amount of money in the trust fund is at least equal to the amount of e-money it has issued. ¹⁵

¹² Note that the Provider is the trustee in the Model Trust Deed. Other individuals could be the trustee, and there are no set rules about who should serve in this position. However, given that the trustee holds a position of considerable responsibility and power, and is subject to a variety of duties which require competence and diligence, such a person should generally be competent, reliable and have integrity. In many circumstances this may involve a lawyer, a trustworthy member of the community, or a company of good standing who assumes trustee duties. The regulator would not normally serve as trustee. However, the regulator does have an active role under the Model Trust Deed.

¹³ See, eg, Tilman Ehrbeck and Michael Tarazi ‘Putting the Banking in Branchless Banking: Regulation and the Case for Interest-Bearing and Insured E- money Savings Accounts’ (World Economic Forum, 2011).

¹⁴ See similarities with other jurisdictions, for example, Indonesia: Bank Indonesia Regulation Concerning Electronic Money, No. 11/12/PBI/2009, 13 April 2009; and Circular Letter Concerning E-Money, No. 11/11/DASP, 13; see Malaysia also (Guideline on Electronic Money BNM/RH/GL -16-3, July 2008).

¹⁵ See Philippines (Circular 649, 9 March 2009).

Aspect of Fund Safeguard	Clause in Model Trust Deed	Explanation of How Provision Provides Fund Safeguarding Protection
Restriction on the use of customers' funds	Sub-clauses 4.2 and 4.3	The Provider can only <i>invest</i> customers' funds into the bank accounts approved under the terms of the Model Trust Deed, and so the Provider: <ul style="list-style-type: none"> • Cannot use the customer deposits to finance its own business operations, except in so far as funds can pay the trustee's reasonable remuneration and expenses; • Can only use the funds the customer deposits to repay customers who want to cash out their remaining e-money; • Cannot use customers' funds to extend credit.¹⁶
	Clause 6	Requires the Provider to use surplus interest earned on the customers' funds in the bank account(s) for the following payments in order of priority: <ul style="list-style-type: none"> • Operating expenses of the trust fund, including any bank fees; • Reasonable remuneration of the trustee; and • For any remaining balance, to the Provider.¹⁷
	Clause 7	Requires the Provider to cash in e-money for customers' funds when the customer is entitled to such funds, and includes provisions for unclaimed monies.
	Clause 10	Prevents the Provider from changing the trust terms to get access to customers' funds.
	Clause 11	Obliges the trustee to pay customers' funds to customers if the trust is terminated.
	Clause 12	Aims to ensure only reliable and trustworthy persons ('fit and proper') become trustee.
	Clause 13	Enables the regulator to remove a trustee if the regulator believes the trustee: <ul style="list-style-type: none"> • Is not complying with the terms of the trust deed or any other duties according to law; and/or; • Is not a 'fit and proper' person or under the control of people who are fit and proper.
Diversification	Clause 4.1(b)	Enables the Provider to open a deposit account at multiple prudentially regulated banks, but does <i>not</i> oblige it to do so. This is because (i) few regulators require Providers to open deposits at a variety of prudentially regulated banks, and (ii) banks are usually regulated in a manner which provides extensive protection for the deposits, which often makes diversification unnecessary. ¹⁸

¹⁶ See Indonesia (Circular Letter Concerning E-Money, No. 11/11/DASP, 13 April 2009).

¹⁷ Note the international disagreement about whether interest should be payable to customers. See, eg, Tilman Ehrbeck and Michael Tarazi 'Putting the Banking in Branchless Banking: Regulation and the Case for Interest-Bearing and Insured E- money Savings Accounts' (World Economic Forum, 2011).

¹⁸ This approach is used in Afghanistan (Amendment to the Money Service Providers Regulation to Extend Regulatory Oversight to E-Money Institutions, 25 November 2009) and Kenya.

Feature 3 – Provide the Regulator with Active Powers

As outlined in Part 1, an active regulator can monitor the way in which the Provider complies with the trust deed, which can help strengthen the fund safeguarding rules (protection 2) and auditing rules (protection 3). The Model Trust Deed describes the regulator as a ‘Protector’, and provides the institution with the following authority, powers, and responsibilities to this end:

Regulators in Tonga and Vanuatu suggested they may not have legislative authority to regulate e-money. Establishing such authority will be required to take an active approach.

Provision in Model Trust Deed	Explanation of How Clause Provides Clear Authority, Powers and Responsibilities
Clause 8.1	Determines which of a country’s regulators has authority to take an active role in relation to the trust fund.
Clause 8.2	Outlines the duties of the regulator, particularly to operate in the interests of the customers.
Clauses 8.3 and 8.4	<p>Lists the power of the regulator, such as:</p> <ul style="list-style-type: none"> • Demand additional audits of accounts; • Refuse to agree to the Provider’s application to amend the trust deed; • Refuse to provide consent to the Provider’s proposed application to terminate or wind up the trust deed; • Refuse to provide consent to the Provider’s proposed application to appoint a new person as a new trustee; • Remove a Provider; and • Sue the Provider on behalf of the customers. <p>These powers ensure that the trust account is operated in the interests of customers.</p>
Clause 9	<p>Enables the regulator to review the audits of the trust fund, which reduces the opportunity for the Provider, or the employees of the Provider, to engage in theft or fraud.</p> <p>This monitoring process can be done in conjunction with the banks in which the Provider has deposited customer funds.¹⁹</p>

PART 4: HOW A REGULATOR CAN IMPLEMENT THE THREE TRUST PROTECTIONS – IN PRACTICE

As outlined above in Part 2, regulators should not simply transplant the provisions of the Model Trust Deed into their jurisdictions. Experiences from other jurisdictions, particularly Kenya, suggest that regulators should be cautious and careful in designing regulation for e-money. Several steps, outlined below, may help regulators to ensure that regulation adequately minimises risks, while also permitting e-money to develop.²⁰

¹⁹ Section 6.2 of Sri Lanka’s Mobile Payment Guidelines No. 2 (2011) for Custodian Account Based Mobile Payment Services.

²⁰ See, in particular, the experience of the Central Bank of Kenya in designing regulation for M-Pesa (Mwangi S. Kimenyi and Njuguna S. Ndung’u, ‘Expanding the Financial Services Frontier: Lessons From Mobile Phone Banking in Kenya (Brookings, 2009)).

Step 1: Determine Regulatory Authority and Capacity

In many countries, regulators do not have clear authority to supervise e-money. This is often because regulatory authority is shared between a country's central bank, bank regulator, and telecommunications authority.²¹ Providing a regulator (or multiple regulators) with sufficient authority to regulate e-money is the first step in implementing the trust protections.

It is also crucial to ensure the regulator has sufficient capacity to regulate e-money. This is a new and rapidly developing form of financial service, and many regulators are still growing their understanding of the risks in this market, and the technical regulatory approaches of dealing with them. Furthermore, the law of trusts often interacts with a variety of legislation including unit trusts and trustee companies, perpetuities, banking, and bankruptcy. Regulators should only implement regulation that they have sufficient technical understanding to supervise effectively.

Step 2: Use Implementation Principles to Determine Which Clauses of the Model Trust Deed to Use

As outlined above in Part 2, the Model Trust Deed should not be 'cut and pasted' into any country. Regulators should follow three 'implementation principles' to determine which aspects of the Model Trust Deed are appropriate for their home jurisdiction and the specific commercial context of the Provider.

Approach E-money Regulation Holistically

Regulators should aim to use trusts law as part of a wider regulatory framework for e-money. There are various issues which cannot be adequately addressed through the implementation of a trust deed (e.g. limits on the amounts of e-money which can be held by a customer, operational and verification issues and competition concerns), all of which are important for customer protection and the wider development of the e-money market. Implementing the Model Trust Deed without addressing those other issues may create regulatory gaps that distort the operation of the market.²²

Use a Consultative Approach

Countries with the most advanced e-money markets tend to have a consultative regulatory model, in which the regulator, Providers, and banks work together to design effective regulation. By obtaining input from the private sector, regulators tend to be better able to design regulation that protects customers but is also commercially viable and ultimately enables the e-money market to grow.²³ Furthermore, and as outlined in Part 2, regulators will need to decide upon their policy for important aspects of customer protection. A consultative approach with the private sector will enable regulators to determine policy that protects customers but can still enable Providers to continue developing their products.

Likely Effectiveness: Consider Local Circumstances

Each country requires a customised approach. Important issues such as domestic legal principles and rules, culture, politics and corruption levels, will determine whether clauses from the Model Trust Deed are likely to operate effectively (e.g. whether there is legislation which impacts upon the operation of a

²¹ In Kenya, the financial supervisor has established its authority through written agreements with the Provider.

²² For an overview of those issues, see Claire Alexandre, Ignacio Mas, and Daniel Radcliffe, 'Regulating New Banking Models to Bring Financial Services to All' (2011) 54 *Challenge*, no. 3.

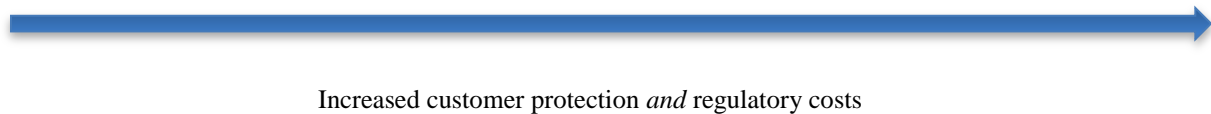
²³ See again, the policy and practice of the Central Bank of Kenya as discussed in Kimenyi and Ndung'u, note 17 above.

trust deed). Furthermore, while some guidance from other countries may assist this process, regulators should not try to mimic other jurisdictions too closely. This is because the regulatory objectives and approach to achieving these objectives will differ from country to country, according to, amongst other things, the types of models and services being offered, the prudential framework, and the level of financial system development.²⁴ Consequently, during the consultative process, regulators should be mindful of which aspects, if any, of the clauses of the Model Trust Deed can operate effectively their home country.

Adopt a ‘Proportional’ and ‘Light Touch’ Approach to Implementing the Recommendations

Regulators should remember that *more extensive implementation of the Model Trust Deed may better protect customers but will also impose increased regulatory costs on the Provider and the regulator*. This point is outlined in the ‘implementation spectrum’, below:

Features of Knowledge Product	Level of implementation of Model Trust Deed		
	Limited	Moderate	Extensive
Declaration of Trust	<ul style="list-style-type: none"> • No trust documents; and • No declaration of trust. 	Declaration of trust in a non-trust document, such as a consumer contract.	<ul style="list-style-type: none"> • Use of trust deed; and • Trust deed contains a declaration of trust.
Customer Protection Rules	Implement few provisions of the Model Trust Deed, if any.	Implement some of the Model Trust Deed.	Implement many or all of the provisions of the Model Trust Deed.
An Active Regulator	Limited regulatory powers.	Moderate regulatory powers.	Strong regulatory powers.



Increased regulatory costs has important consequences for two key players in the regulatory landscape:

- The Provider: increased regulatory costs reduce its ability to experiment with e-money products that can meet the needs of unbanked or underbanked populations; and
- Regulator: increased regulatory costs require greater expertise and resources in order to implement more complex trust law.

In determining which terms of the Model Trust Deed to implement, regulators should be guided by the ‘proportionality principle’. This approach requires the regulator to:

- (i) understand the risks presented by e-money; and
- (ii) design regulation and supervision such that the costs to the regulator, the Provider, and customers are proportionate to the risks that relate to customers’ funds.

In relation to trust law and e-money, the proportionality principle should result in a ‘light touch’ approach to regulation, for the following reasons:

- *Non-regulatory incentives*: Providers tend to have strong non-regulatory incentives to protect

²⁴ See Dias and McKee, note 7 above.

consumers' funds. E-money is still new in many jurisdictions, and many Providers are eager to demonstrate reliability in order to gain credibility with customers and regulators.

- *Experimentation is still required:* The recent introduction of e-money also means that Providers require a high degree of regulatory freedom in order to experiment and develop products that meet the needs of 'unbanked' or 'underbanked' populations.
- *Existing protection:* Many e-money schemes will already have at least some of the protections listed in this report in a variety of non-trusts documents, such as the contract between customers and the Provider.
- *Regulatory Expertise:* Many regulators are still developing expertise in relation to e-money, making it unwise to expect such institutions to implement complex regulation.

Step 3: Consult with Providers to bring Contractual Terms into the Model Trust Deed

Many of the terms of the Model Trust Deed may already be contained in the contract that exists between the Provider and customer. It may be most efficient to transpose modified versions of those contractual terms into the Model Trust Deed, so long as they achieve the same goals as the original clauses in the Model Trust Deed.

Step 4: Develop Additional Regulation If and When Required

As outlined above, this Knowledge Product focuses on using trusts law to target the most pressing regulatory issues in relation to customers' funds. Regulators should also monitor other issues that are increasingly featuring in discussions about the future direction of e-money, such as competition issues, maximum limits on e-money accounts, and maximum transaction volumes between customers.

APPENDIX 1: DICTIONARY OF TERMS²⁵

Agent: A third party acting on behalf of the Provider. This may be pursuant to a services agreement, joint venture agreement, or other contractual arrangement. This agent *may* conduct cash in/cash out services and is described as an agent with a **cash merchant function**.

Beneficiary: Is the person or persons entitled to the benefit of the trust assets. In relation to e-money, the beneficiary is the e-money customer (or the holder of the **e-money account**).

E-float: The total outstanding amount of e-money issued by the Provider.

E-money account: An e-money holder's account that is held with the Provider. In some jurisdictions, e-money accounts may resemble conventional bank accounts, but are treated differently under the regulatory framework because they are used for different purposes (for example, as a surrogate for cash or a stored value that is used to facilitate transactional services).

Electronic Money (e-money): A type of monetary value electronically recorded and generally understood to have the following attributes: (i) issued upon receipt of funds in an amount no less in value than the value of the e-money issued; (ii) stored on an electronic device (e.g. a chip, prepaid card, mobile phone, or computer system); (iii) accepted as a means of payment by parties other than the issuer; and (iv) convertible into cash.

Fund Isolation: Measures aimed at isolating consumer funds (i.e. funds received against equal value of e-money) from other funds that may be claimed by the issuer or the issuer's creditors.

Fund Safeguarding: 'Measures aimed at ensuring that funds are available to meet consumer demand for cashing out electronic value. Such measures typically include: (i) restrictions on the use of such funds; (ii) requirements that such funds be placed in their entirety in bank accounts or government debt; and (iii) diversification of floats across several financial institutions.'²⁶

Implied terms: Trusts legislation and/or courts can imply certain terms into a trust deed if they are absent or unclear in the trust deed, and are not expressly negated by the trust. These terms can include that a trustee must:

- Act in the best interests of the beneficiary;
- Ensure that trust money is retained in a separate account from the trustee's own bank account, or the account of a third party;
- Exercise powers under trust in a manner which is impartial between the beneficiaries;
- Exercise the skill of a 'prudent' person in performing its duties under the trust;
- Invest the trust fund;
- Not profit from the office of trustee;

²⁵ Many of the definitions used in this section have been adopted from the AFI, 'Guideline Note, Mobile Financial Services: Basic Terminology' (2012). This is to ensure consistency across the literature.

²⁶ It has been noted that fund safeguarding and fund isolation protect customer funds in a nonbank-based model.

- Record accounts *and* provide access to relevant trust documents; and
- Understand and adhere to its obligations under the trust deed.

Settlor: The person who settles or declares that certain assets are to be held on trust for the benefit of the beneficiaries. This person may declare themselves (or a related entity) the trustee of the assets.

The Trust: A legal relationship between a trustee and a beneficiary which pertains to certain trust assets. The recognition of this relationship impacts upon the rights of third parties to the trust assets.

Trustee: The person who holds trust assets for the benefit of the beneficiary. There may be more than one trustee. In the e-money context, this individual will often be the Provider (or a related entity).

Trust Deed (sometimes described as a ‘Trust Deed’ or ‘Settlement’): A formal legal declaration by the settlor that is used to create a trust. The terms of the trust deed will specify the trust ‘assets’, the trustee and the beneficiary. It will also specify various aspects of the trust relationship (e.g. provision for the appointment of a new trustee).

MODEL TRUST DEED

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[This model Trust Deed will use the fictional “E-Mobile Pacific” company and its “MobilePAC” service to outline the operation of this Model Trust Deed].

This Trust Deed is made on the date of [_____] between:

[E-Mobile Pacific] (as **Settlor and Trustee**); and

The Central Bank of [_____] in its capacity as the Protector.

Background:

- A. E-Mobile Pacific operates an electronic mobile money service under the name of “MobilePAC”.
- B. E-Mobile Pacific may enter into contractual arrangements with Customers to provide this service.
- C. A Customer may purchase E-Money with Conventional Money. The amount of E-Money purchased is equal in value to the Conventional Money paid to E-Mobile Pacific and that amount shall be held by E-Mobile Pacific on trust on the terms of this Trust Deed.
- D. The money received from Customers for E-Money may be combined and held by E-Mobile Pacific in one or more bank accounts as required by this Trust Deed.
- E. Using mobile phone technology, the Customer may transfer and receive E-Money, redeem it for Conventional Money or use it for other purposes as provided for in the contract with E-Mobile Pacific.
- F. It is intended that at all times the balance of the E-Money of a Customer shall match the amount of Conventional Money held in respect of the customer in the Trust Fund.
- G. There may be charges payable by Customers in relation to the operation of the System which may include payments to agents in the system who amongst other functions, act as an intermediary with a cash-in/cash-out function, and E-Mobile Pacific who operates the service. These charges will be credited to the charge-receiving party in E-Money and debited from the charge-paying Customers’ E-Money account. The amount of these charges will be specified in contracts between the relevant parties.
- H. This Trust Deed sets out the terms of the Trust under which the Conventional Money received from Customers is held and shall be known as the MobilePAC Trust.

It is agreed as follows:

1. Definitions

In this Trust Deed, including the Background, the terms below have the following meanings:

Agent means a person who has entered into an E-Mobile Pacific Agent Agreement with E-Mobile Pacific.

Agent Agreement means the agreement entered into by an Agent for the supply and provision of the Mobile Money Service as an agent for E-Mobile Pacific.

Appointer means E-Mobile Pacific.

Beneficiaries means the Customers of the MobilePAC Mobile Money Service, from time to time.

Business day means a day on which banks are open for business in [_____] [name of country].

Conventional Money means non E-Money either in its physical form, cheque or held in a bank account [e.g. PNG Kina].

Customer means a person who holds E-Money under the MobilePAC Mobile Money Service.

E-Money means an electronic value which reflects a customer credit, which is owed by the Trustee to the Customer. This credit balance can be transferred between Customers of the Mobile Money Service, or redeemed for Conventional Money.

Mobile Money Service means a mobile based transaction service that allows the transfer of electronic value in the form of E-Money. **Protector** means the institution defined in sub-clause 8.1.

Trustee means a person who has been appointed pursuant to the declaration of trust in this Trust Deed, or any new Trustee appointed under the terms of this Trust Deed.

Trust Fund means:

- (a) The funds initially transferred to the Trustee by the Settlor;
- (b) All amounts of Conventional Money that the Customers of the Mobile Money Service provide to the E-Mobile Pacific from time to time; and
- (c) All interest earned on the amounts described in (b).

Trust Deed (or Instrument) means this Deed, and any subsequent amendment or revocation of this Deed.

Unclaimed Monies is defined in sub-clause 7.4(a).

2. Establishment of Trust Fund

2.1. Conventional Money to be Placed into Trust Fund

- (a) All Conventional Money received from Customers in exchange for an equal amount of E-money in respect of the Mobile Money Service must be:
 - a. Held in trust; and
 - b. As soon as practicable, paid into the Trust Fund.
- (b) In the event that E-Mobile Pacific is replaced as Trustee of the Trust Fund, E-Mobile Pacific must:
 - a. Transfer the Trust Fund to the care of the new Trustee; and
 - b. Ensure that all Conventional Money received from Customers in respect of the Mobile Money Service must be:
 - i. Held in trust; and
 - ii. As soon as practicable, paid into the Trust Fund.
- (c) E-Mobile Pacific will make all reasonable efforts to ensure that its Agents comply with sub-clauses 2.1(a) and 2.1(b).

2.2. Customers' Interest in Trust Fund

The Customers' interest in the Trust Fund is equivalent to the following:

$$(A/B) \times C$$

Where:

A is the customer's balance of E-money at any particularly point in time;

B is the total amount of E-money on issue; and

C is the value of the Trust Fund including interest earned on the Fund, subject to clause 6.

3. Operation of Trust

3.1. The Trustee

E-Mobile Pacific is the Trustee of this Deed.

3.2. Declaration of Trust

The Trustee declares that:

- (a) It holds the Trust Fund on trust for the benefit of the Beneficiaries; and
- (b) The Trust Fund will be maintained and applied by the Trustee subject to the powers and provisions of this Trust Deed.

4. Application of Trust Fund

4.1. Establishment of Bank Account

For the purpose of holding and investing the Trust Fund:

- (a) The Trustee must establish and maintain at least one deposit account at a prudentially regulated banking institution; and
- (b) The Trustee may open more than one deposit account at any number of prudentially regulated banking institutions.

4.2. Payment of Trust Fund

- (a) The Trustee must pay all monies held in the Trust Fund into the account or accounts established under sub-clause 4.1., as soon as reasonably practicable, and all money that comprises the Trust Fund from time to time;
- (b) The Trustee may apply the money in the Trust Fund between any of the accounts specified in sub-clause 4.1.

4.3. Unauthorised Payments

The Trustee must not deal with the money otherwise than in accordance with this Trust Deed and the contract with the Customer.

5. Trustee Duties' to Maintain Balanced Account

5.1. Balance of E-Money to Money held in Trust Fund

The Trustee must ensure that at all times the amount of money held in the Trust Fund is at least equal to the amount of outstanding credits owed to Customers in the form of E-Money.

5.2. Duty to Correct Shortfall

- (a) To the extent to that there is a shortfall in the amount of Conventional Money held in the

Trust Fund relative to the total value of E-Money held by Customers, the Trustee must pay into the Trust Fund sufficient money to comply with sub-clause 5.1.

- (b) The Trustee must correct any shortfall under this clause 5 within one business day of discovering that shortfall.

6. Entitlement to Interest from Trust Fund

6.1 Application of Interest from Trust Fund

The Trustee must apply the interest earned on the Trust Fund, at least once every three calendar months.

6.2 Order of Application of Interest

Any interest earned in the Trust Fund must be applied in the following way and following order of priority:

- (a) Pay any operating expenses of the Trust Fund including any bank fees;
- (b) Pay the reasonable remuneration of the Trustee;
- (c) Any remaining balance must be paid to E-Mobile Pacific.

6.3 Remuneration and Operating Costs of Trustee

For the avoidance of doubt, this clause 6 means the Trustee can be remunerated for operating fees and for services rendered in operating the Trust Fund.

6.4 Limitations of Remuneration

The amount of remuneration that may be paid to the Trustee unclear this clause 6 may not exceed the amount of interest available from the Trust Fund.

6.5 Instance in Which E-Mobile Pacific is not Trustee

In the event that E-Mobile Pacific is replaced as Trustee of the Trust Fund, any remaining interest will be transferred to the new Trustee.

7. Entitlement to Redeem E-Money

7.1. The Entitlement of the Customer

If a Customer is entitled, in accordance with the terms and conditions of a customer contract with E-Mobile Pacific, to exchange E-Money for Conventional Money, the Trustee must,

upon notification of the debit and cancellation of E-Money, transfer an equivalent amount of Conventional Money to the Customer or as the Customer directs.

7.2. The Death of a Customer

In the event of the death of a Customer, the Trustee must, on the production of appropriate documentation showing the person as the legal representative, recognise a legal representative of a deceased Customer and the person legally entitled to the interests of the Customer as a person who may exercise the power under sub-clause 7.1.

7.3. The Bankruptcy or Liquidation of a Customer

In the event of bankruptcy or liquidation of a Customer, the Trustee must recognise a trustee in bankruptcy or liquidator of the Customer, or the person legally entitled to the interests of a Customer as a person who may exercise the power under sub-clause 7.1.

7.4 Unclaimed Monies

- (a) Any monies held by the Trustee in the Trust Fund for more than two years that have not been redeemed by a Customer are “Unclaimed Monies” for the purposes of this Trust Deed.
- (b) The Trustee must make reasonable efforts to locate the Customer who is entitled to the Unclaimed Monies.
- (c) After making such efforts in sub-clause 7.4(b), the Trustee must transfer such monies to [_____] [insert name of Government agency that handles unclaimed monies in trust funds and bank accounts].

8. The Protector

8.1. The Protector

The Protector shall be the Central Bank of [_____].

8.2. Duties of the Protector

The Protector must:

- (a) Consider the appropriateness of any act before exercising any of its powers;
- (b) Exercise its power to protect the best interests of the Beneficiaries as a whole; and
- (c) Not exercise a power conferred in a manner inconsistent with the purpose of providing

this power.

8.3. Powers of the Protector

The Protector may, but is not required to, enforce the terms of the Trust on behalf of the Beneficiaries.

8.4. Powers of the Protector

Without limiting the powers that the Protector may have in law or otherwise, the powers include the following:

- (a) Review audits obtained through sub-clause 9.3;
- (b) Refuse to agree to the Trustee's application to amend the Trust Deed under sub-clause 10.4;
- (c) Refuse to provide consent to the Trustee's proposed application to terminate or wind up this Trust Deed under sub-clause 11.4;
- (d) Refuse in writing to provide consent to the Trustee's proposed application to appoint a new person as a new Trustee under sub-clause 12.4;
- (e) Remove and appoint Trustees under Clause 13; and
- (f) Enforce the terms of Trust Deed, and is authorised to take legal proceedings for this purpose on behalf of the beneficiaries.

9. Accounts for Trust Fund

9.1. Books of Account

The Trustee must ensure that proper books of account are kept in regard to the Trust and the Trust Funds according to accounting standards which are generally accepted, or required by law.

9.2. Audit

The Trustee must ensure that the financial affairs of the Trust Fund are audited by a registered auditor at least once each financial year and at intervals of twelve months or less.

9.3. Oversight of Accounts

The Trustee must provide the Protector with:

- (a) The audited statement produced pursuant to sub-clauses 9.1 and 9.2; and
- (b) A written statement at least once a month which outlines the balance of the bank accounts

holding the Trust Fund and the amount of E-Money in circulation.

10. Amendment of Trust Deed

10.1. Trustee Power to Amend Instrument

This Trust Deed may be amended by a later Instrument executed by the parties to this Deed.

10.2. Amendment Cannot Be Adverse to Beneficiaries

No amendment to the Trust Deed is permitted if its effect would be adverse to the Beneficiaries, unless the Protector authorises such amendment.

10.3. Application to Protector

Before exercising the power under sub-clause 10.1, the Trustee must:

- (a) In a written application to the Protector, detail the manner in which it proposes to amend this Trust Deed;
- (b) Obtain the written consent of the Protector to amend this Trust Deed.

10.4. Refusal by the Protector

- (a) The Protector may refuse in writing to provide consent to the Trustee's proposed application to amend this Trust Deed.
- (b) The Protector must provide reasons for its refusal under cause 10.4(a) no later than five business days after notifying the Trustee of such refusal.

11. Termination of the Trust Deed

11.1. Perpetuities and Accumulations

Subject to the terms of this clause, the Trustee may hold the Trust Funds for a period of [_____] years less one day from the date of execution of this Trust Deed [Requires the perpetuities law in the jurisdiction].

11.2. Trustee May Terminate the Trust Deed

Further to any other powers provided by law, the Trust Deed may be terminated in the following circumstances:

- (a) E-Mobile Pacific suspends or has suspended, or ceases to offer or provide the Mobile

- Money Service; or
- (b) E-Mobile Pacific becomes insolvent or is otherwise unable to repay debts to creditors; or
 - (c) The Trustee applies to terminate the Trust Deed, and the Protector agrees to such termination.

11.3.Application to Protector

In obtaining the written consent of the Protector under sub-clause 11.2(c), the Trustee must in a written application to the Protector, detail the request to terminate this Trust Deed.

11.4.Refusal by the Protector

The Protector may refuse in writing to provide consent to the Trustee's proposed application to terminate Trust Deed.

11.5.Termination of the Trust Deed

On termination of the Trust Fund, the Trustee must pay each Customer their beneficial interest in the Trust Fund as calculated under clause 2.2.

12. E-Mobile Pacific Power to Appoint New Trustee

12.1.Power to Appoint and Remove Trustees

The Appointer may:

- (a) Remove a Trustee; and
- (b) Appoint a new Trustee.

12.2.Limitations on this Power

The Appointer in exercising the power in sub-clause 12.1 must:

- (a) Ensure that the new Trustee is a corporation of good standing and that it is under the control of fit and proper persons; and
- (b) Obtain the written consent of the Protector to appoint a new person as the new Trustee of the Trust.

12.3.Application to Protector

In obtaining the written consent of the Protector under 12.2(b), the Trustee must in a written application to the Protector, detail the request to appoint a new person as a new Trustee of the Trust.

12.4. Refusal by the Protector

- (a) The Protector may refuse in writing to provide consent to the Trustee's proposed application to appoint a new person as a new Trustee.
- (b) The Protector must provide reasons for its refusal under cause 12.4(a) to the Trustee no later than five business days after notifying the Trustee of such refusal.

13. Protector Power to Remove Trustee

13.1. Removal of Trustee

The Protector may remove a Trustee if the Protector reasonably believes that:

- (a) A Trustee is not complying with the terms of the Trust Deed, or any other duties according to law; and/or
- (b) A Trustee is not a corporation of good standing or is not under the control of people who are fit and proper to control the Trustee.

13.2. Notice Period

The following procedure must be followed before the Protector can exercise its powers in sub-clause 13.1:

- (a) The Protector must notify the Trustee in writing that it (the Trustee) is:
 - (i) Not complying with the terms of the Trust Deed, or any other duties according to law; and/or
 - (ii) Not a corporation of good standing or is not under the control of people who are fit and proper to control the Trustee.
- (b) Five business days must have passed since the Protector notified the Trustee under sub-clause 13.2(a), during which time, in the Protector's opinion, the Trustee has not remedied the grounds for removal listed in sub-clauses 13.1(a) and/or 13.1(b).

13.3. Appointment of New Trustee

If the Protector exercises the power in sub-clause 13.1, it must appoint a new Trustee which is a corporation of good standing under the control of fit and proper persons.

14. General Provisions

14.1. Governing Law

This Deed is governed by the laws of [_____].

14.2. Severability of Provisions

If part or all of any clauses in this Deed are illegal or unenforceable the offending clause or part thereof may be severed from this Deed and the remaining clauses of this Deed will remain in effect.

SIGNATURE PAGE

To be inserted in accordance with local rules and regulation.