

CLIENT UPDATE

New Zealand, Trusts Act 2019

The Trusts Act 2019 ('Act'), which comes into force on 30 January 2021, applies to most existing and new trusts. Existing trusts have a transitional period until that date. The Act makes trust law more transparent and accessible by clarifying existing law and providing better guidance for trustees and beneficiaries.

The main changes include the extension of the trust period; the trustee's obligations to keep and disclose certain information on trusts; mandatory and default duties of the trustee; restrictions on trustee exemption and indemnity clauses; and trustee powers to administer trusts. More details can be found below.

Duration

The Act increases the maximum duration of a trust to 125 years. This duration will also apply to resettled trusts so that the maximum duration will begin from the date of the original trust.

Appointment and removal of trustees

The Act ensures that the power to remove or appoint a trustee will rest with somebody with set procedures. The power must be exercised honestly and for a proper purpose.

There are compulsory and optional powers for the removal of trustees.

Some people are disqualified from being appointed as a trustee e.g. an undischarged bankrupt.

A trustee may retire but only certain persons can properly discharge the retiring trustee.

Age of majority

An adult is defined as a person 18 years or older.

Trustee duties

Mandatory duties – must be performed and cannot be modified or excluded by the terms of the trust:

- (a) Know the terms of the trust
- (b) Act in accordance with the terms of the trust
- (c) Act honestly and in good faith
- (d) Act for the benefit of beneficiaries or to further the permitted purpose of the trust
- (e) Exercise powers for a proper purpose

Default duties – must be performed by the trustee unless modified or excluded by the terms of the trust:

- (a) General duty of care
- (b) Invest prudently
- (c) Not to exercise power for own benefit
- (d) Consider exercise of power
- (e) Not to bind future exercise of discretion
- (f) Avoid conflict of interest
- (g) Impartiality
- (h) Not to profit
- (i) Act for no reward
- (j) Act unanimously

Anybody who advises on the creation or preparation of a trust and recommends changes to the default duties so that they are excluded or modified must take reasonable steps, before the trust is created, to ensure the settlor is aware of the meaning and effects of such changes. However, the failure to do so does not invalidate the exclusion or modification.

Exemption and indemnity clauses

The terms of a trust must not limit or exclude a trustee's liability nor give any indemnity for any breach of trust involving trustee's dishonesty, wilful misconduct or gross negligence. Any trust clause that states otherwise is invalid.

Anybody who advises on the creation or preparation of a trust and recommends a liability or exclusion clause be included must take reasonable steps, before the trust is created, to ensure the settlor is aware of the meaning and effects of such exclusion or modification. The failure to do so means that the adviser who did not make the settlor aware, and is a trustee, cannot rely on the clause.

Trustee's indemnities

A trustee is personally liable for an expense or liability incurred when acting as trustee and if acting reasonably is entitled to reimbursement from the trust property. A trustee may be indemnified from the trust property for a breach of trust if all of the beneficiaries agree or the High Court approves. A creditor has a limited claim to trust property through the trustee's indemnity.

Trustees' powers

A trustee has all the powers necessary to carry out the trust and to manage the trust property as if the trustee were the absolute owner of the property. There is a list of matters that a trustee may have regard to in exercising any power to invest.

A trustee may delegate certain powers or functions. A trustee may also appoint a nominee or custodian.

Greater transparency - giving information to beneficiaries

The basis for this part of the Act is that someone has to hold the trustees accountable and if no information is given or available beyond the trustees then no one knows if the trustees are acting properly.

It is an essential part of 'trust information' that it be necessary for the beneficiary (even though a trust may have a protector) to have the information too so that the trust can be enforced.

Record retention - what to keep

Before considering what information trustees must give to beneficiaries, a trustee needs to know what trust records must be kept.

A trustee must keep:

- (a) The trust deed and any other document that contains terms of the trust
- (b) Any variations made to the trust deed or trust
- (c) Records of the trust property that identify the assets, liabilities, income, and expenses of the trust and that are appropriate to the value and complexity of the trust property
- (d) Any records of trustee decisions made during the trustee's trusteeship
- (e) Any written contracts entered into during that trustee's trusteeship
- (f) Any accounting records and financial statements prepared during that trustee's trusteeship
- (g) Documents of appointment, removal, and discharge of trustees (including any court orders appointing or removing trustees)
- (h) Any letter or memorandum of wishes from the settlor
- (i) Any other documents necessary for the administration of the trust
- (j) Any documents referred to in paragraphs (a) to (i) that were kept by a former trustee during that person's trusteeship and passed on to the current trustee

An outgoing trustee has an obligation to hand over the trust documents to a continuing or replacement trustee as the case may be.

Where there are multiple trustees, there is an obligation on every trustee to keep the trust deed and variations (a) and (b) but all the other documents (c) to (j) may be kept by only one of the trustees.

The documents must be kept for the duration of the trusteeship.

How to keep it

Original documents should be kept but it is permissible for trust records to be kept electronically. A legal requirement that information be in writing is met by information that is in electronic form or by recording the information in electronic form for subsequent reference.

What to give

Only "trust information" is affected and that is defined as any information:

- Regarding the terms of the trust, the administration of the trust, or the trust property
- That it is reasonably necessary for the beneficiary to have to enable the trust to be enforced

But does not include reasons for the trustees' decisions.

Basic trust information and other trust information

The Act distinguishes between "basic trust information" and "other" requested trust information.

There is a presumption that a trustee must make available to every beneficiary "basic trust information," which is:

- (a) The fact that a person is a beneficiary of the trust
- (b) The name and contact details of the trustee
- (c) The occurrence of, and details of, each appointment, removal, and retirement of a trustee as it occurs
- (d) The right of the beneficiary to request a copy of the terms of the trust or trust information

Transparency and accessibility

The special significance of the beneficiary's right to request trust information is that it shows that the trustee does not have to make all trust information available. The trustee only has to disclose the fact that the beneficiary has the 'right' to request it (subject to the conditions and qualifications set out below).

In summary, basic trust information is like a subset of trust information and must be made available to beneficiaries. All other trust information does not initially have to be made available but the beneficiaries have to be told they have the right to request it.

The Act provides two rebuttable presumptions but there are important differences in their wording:

- "A trustee must make available to every beneficiary ... the basic trust information ..."
- "A trustee must within a reasonable period of time give a beneficiary ... the trust information that person has requested"

A trustee is required to consider at reasonable intervals if basic trust information available should be made available.

To give or not to give – that is the question

When faced with a request for information or an obligation to make basic information available, the trustees must consider these factors:

- (a) The nature of the interests in the trust held by the beneficiary and the other beneficiaries of the trust, including the degree and extent of the beneficiary's interest in the trust and the likelihood of the beneficiary receiving trust property in the future
- (b) Whether the information is subject to personal or commercial confidentiality
- (c) The expectations and intentions of the settlor at the time of the creation of the trust (if known) as to whether the beneficiaries as a whole and the beneficiary in particular would be given information
- (d) The age and circumstances of the beneficiary
- (e) The age and circumstances of the other beneficiaries of the trust.
- (f) The effect on the beneficiary of giving the information
- (g) The effect on the trustees, other beneficiaries of the trust, and third parties of giving the information
- (h) In the case of a family trust, the effect of giving the information on
 - (i) Relationships within the family
 - (ii) The relationship between the trustees and some or all of the beneficiaries to the detriment of the beneficiaries as a whole
- (i) In a trust that has a large number of beneficiaries or unascertainable beneficiaries, the practicality of giving information to all beneficiaries or all members of a class of beneficiaries
- (j) The practicality of imposing restrictions and other safeguards on the use of the information (for example, by way of an undertaking, or restricting who may inspect the documents)
- (k) The practicality of giving some or all of the information to the beneficiary in redacted form
- (l) If a beneficiary has requested information, the nature and context of the request
- (m) Any other factor that the trustee reasonably considers is relevant to determining whether the presumption applies

When a trustee considers these factors no guidance is given as to their weighting. Hence, reliance on one or more of the factors as a reason for non-provision of the information should be carefully and fully considered. Otherwise the presumptions will prevail.

If no beneficiary of the trust has any trust information because the trustee cannot identify any beneficiary to give information to, decides to withhold all of the basic information, or refuses a request for trust information, then the trustee must apply to the Court (for directions and an alternative means to be accountable) except when it is less than 12 months that no beneficiary has any information. No application to the Court is required if at least one beneficiary has the basic trust information within 12 months.

This will not stop a beneficiary applying to the Court to obtain information from a trustee if basic information has not been made available or if a request for information has been refused by the trustee. The costs of disclosure may be demanded from the beneficiary and information retained until payment.

Special advisers

A special adviser is similar to an advisory trustee under the Trustee Act 1956. The adviser is not a trustee and does not have the powers or duties of a trustee. There are provisions as to how the special adviser is appointed. A trustee may consult the special adviser but is not required to follow the special adviser's advice. A trustee is not liable for any act or omission made as a result of following such advice unless it involves the trustee in dishonesty, wilful misconduct or gross negligence.

Termination and variation of trusts

In certain circumstances a trustee must terminate the trust and distribute the trust property on being required to do so by the beneficiaries.

The beneficiaries can, subject to certain conditions require a trustee to vary or resettlement the trust.

Court powers and dispute resolution

The High Court has wide powers under the Act including the power to review a trustee's conduct. The Court can appoint a receiver to administer a trust.

A trustee, in certain circumstances, may refer a matter to an Alternative Dispute Resolution (ADR) process (e.g. mediation or arbitration) and the High Court can order an ADR process be undertaken.

Conclusion

In view of the changing rights and obligations under the Act which might result in different levels of protection or privacy, we recommend a review of all existing trusts in order to implement any changes before 30 January 2021.

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