

THE NEW TRUSTS ACT

Information for trustees



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Introduction

The Trusts Act 2019 (“the Act”) is the most significant change in New Zealand trust law in over 60 years. The Act replaces the Trustee Act 1956 and the Perpetuities Act 1964, creates new obligations for trustees and makes a number of welcome changes. The Act came into effect on 30 January 2021.

Changes to Trust Law

The Act makes a number of changes to trust law. The most significant of these are:

- **An obligation to disclose information to beneficiaries:** the Act outlines what information trustees are obliged to give to beneficiaries, with certain exceptions
- **Mandatory and default duties:** the Act imposes mandatory and default duties on trustees
- **Record retention requirements:** the Act prescribes information that trustees must keep.

There are also a number of other changes, which include:

- **The ability to delegate duties and powers:** the Act outlines what duties and powers trustees can delegate, which is expanded from the current law
- **Trust duration:** the Act extends the maximum duration for a trust to 125 years
- **Dispute resolution:** the Act allows for trust disputes to be determined by alternative dispute resolution (ADR), including disputes between trustees and beneficiaries
- **A simplified process for replacing mentally incapable trustees:** the Act provides a new process to remove mentally incapable trustees from land titles, mostly avoiding the need to involve the High Court.

Disclosure Obligations

In most cases basic trust information will need to be provided to each beneficiary and additional trust information will need to be provided if requested.

Basic trust information is:

- That the beneficiary is a beneficiary of the trust;
- Details of each trustee; and
- The beneficiary's right to request additional trust information.

Additional trust information is:

- The trust deed;
- Any variations to the trust deed;
- Records of trust property (identifying the assets, liabilities, income and expenditure);
- Records of trustee decisions;
- Written contracts entered into;
- Accounting records and financial statements;
- Change of trustee documents; and
- Any other relevant trust documents.

Disclosure Obligations (cont.)

In some situations, trustees may withhold basic trust information or additional trust information from a beneficiary after considering certain factors:

- The beneficiary's interest in the trust;
- Whether information is subject to personal or commercial confidentiality;
- The expectations and intentions of the settlor at the time of the creation of the trust (if known) as to whether a beneficiary would be given information;
- The age and circumstances of the beneficiary;
- The age and circumstances of other beneficiaries;
- The effect on the beneficiary of giving the information;
- The effect on the trustees, other beneficiaries, and third parties of giving the information;
- The effect on family relationships, and on the relationship between the trustees and beneficiaries, of giving the information;
- In a trust with a large number of beneficiaries, the practicality of giving information to all beneficiaries;
- The practicality of imposing restrictions on the use of the information;
- The practicality of giving some or all of the information to the beneficiary in redacted form;
- If a beneficiary has requested information, the nature and context of the request; and
- Any other reasonable factors the trustees consider relevant.

Trustee duties

There are five mandatory duties the trustees must follow:

- To know the terms of trust;
- To act in accordance with terms of trust;
- To act honestly and in good faith;
- To act for benefit of beneficiaries; and
- To exercise powers for proper purpose.

There are also ten default duties the trustees must follow unless the trust deed provides otherwise:

- To exercise reasonable skill and care;
- To invest prudently;
- Not to exercise any power for a trustee's own benefit;
- To regularly consider the trustees powers;
- Not to bind trustees in the future;
- To avoid conflicts of interest;
- To act impartially;
- Not to profit from the trusteeship;
- To act for no reward; and
- To act unanimously.

The mandatory duties should be nothing new to the majority of trustees, and are already present in current law. The Act confirms that these are requirements, and that no trustee can avoid these duties.

If there is a need to depart from the default duties (e.g. it may not be appropriate to require trustees to act impartially when considering all beneficiaries) then it may be appropriate to vary the trust deed to allow this. We expect all trust deeds will need to be reviewed to ensure compliance with the Act's requirements, and many trust deeds will need to be varied.

Record keeping

The following documents must be held by the trustees:

- The trust deed;
- Any variations to the trust deed;
- Records of trust property (identifying the assets, liabilities, income and expenditure);
- Records of trustee decisions;
- Written contracts entered into;
- Accounting records and financial statements;
- Change of trustee documents; and
- Any other relevant trust documents.

The trust deed and any variations must be held by all trustees. All other documents may be held by one trustee who has agreed to make copies available to other trustees when requested.

Other changes

The Act makes a number of other changes to trust law, which include:

- The Act provides more flexibility for trustees to delegate their powers. This includes the delegation of investment decisions and the delegation of powers and duties of a trustee who is temporarily mentally incapable. Neither of these is possible under current law.
- The Act replaces the Perpetuities Act 1964, simplifying the maximum duration of trusts. New trusts can have a maximum duration of up to 125 years, and some existing trusts may be able to extend their current end date.
- Some trust disputes, including disputes between trustees and beneficiaries, may be referred to alternative dispute resolution, such as mediation and arbitration. There is a procedure for a representative to be appointed for minor beneficiaries who cannot participate.
- While current legislation allows for the removal of a mentally incapable trustee, the High Court needs to be involved to transfer the land out of a mentally incapable trustee's name. The Act provides a simplified process to transfer land when a mentally incapable trustee is removed, which will significantly reduce the legal costs in such a situation.

Questions and answers

What does the Act mean for me as a trustee?

The Act clearly sets out your duties, including mandatory and default duties, the duty to disclose the existence of the trust to beneficiaries and the duty to provide further information to beneficiaries. With more onerous obligations on trustees, trustees will need to spend more time ensuring those obligations are met.

It may be an appropriate time to consider the future of the trust. The benefits of the trust (to its beneficiaries) should be weighed up against the compliance costs and the disadvantages of the trust structure. Trustees should consult with their professional advisors and make an informed decision whether to continue with the trust.

What does the Act mean for me as a beneficiary?

The Act sets out a presumption that, as a beneficiary, you will be notified of the existence of any trust you are a beneficiary of, and your right to request information about the trust (such as the trust deed and the trust's financial statements).

What is the benefit of keeping a trust?

For most trusts, the primary benefits are:

- Asset planning – trusts are a flexible way of passing on wealth to future generations; and
- Protecting assets for the trust's beneficiaries.

Other benefits, depending on the beneficiaries' circumstances, may include:

- Protection against relationship property claims (limited to some situations);
- Protecting assets from spendthrift beneficiaries;
- Reducing or preventing estate claims;
- General flexibility to deal with law changes;
- Tax efficiencies for beneficiary income; and
- Confidentiality.

Questions and answers (cont.)

Will the costs of having a trust increase?

As trustees will need to spend more time complying with their obligations and maintaining records, it is likely the trust's legal and accounting costs will increase. Professional trustee's costs are also likely to increase.

Can trustees of a trust be changed?

The Act provides a good opportunity for the settlor of a trust (or whoever controls the appointment of trustees) to consider who the trustees of the trust should be. It may be appropriate to change trustees.

Who are the beneficiaries of a trust?

The trust deed will list the beneficiaries of a trust. These should be reviewed by the trustees. In some situations, it may be possible to add or remove a beneficiary.

Are changes needed to the trust deed?

All trust deeds will need to be reviewed, to ensure compliance with the Act. In many cases, it will be desirable to amend provisions of the trust deed in accordance with a variation power in the trust deed. In circumstances where the trust deed does not include a variation power, changes to the trust deed will need court approval. This means the trustees will have to make an application to the High Court for an order to vary the trust deed.

What is my next step?

We recommend you make an appointment with your trust advisor at Gibson Sheat to discuss the implications of the Act on your trust.