

# TRUSTS ACT 2019

## Introduction

The Trusts Act 2019 (“**Act**”) will take effect from 30 January 2021. The Act is the most significant reform of trust law in New Zealand for some time.

The Act is intended to consolidate existing trust law and make it more accessible and understandable, partly to provide better guidance for trustees and beneficiaries and to enhance the ability of beneficiaries to hold trustees to account. The Act also introduces several changes to trust law.

This document discusses what we see as the most significant changes to trust law contained in the Act. Some of these changes will require trustees to change the way they administer trusts and interact with beneficiaries so it is important that they understand them.

The changes discussed in this document are as follows:

- (a) disclosure of trust information to beneficiaries;
- (b) maximum trust duration;
- (c) age of majority;
- (d) trustees’ duties;
- (e) liability and indemnity of trustees.

## Disclosure of trust information to beneficiaries

To date, the law relating to the disclosure of information to beneficiaries has been developed by the courts. Under the new Act, trustees will have more robust and defined disclosure obligations to beneficiaries.

### *Basic trust information*

There is a presumption under the Act that trustees must make “basic trust information” available to every beneficiary or representative of a beneficiary.

“Basic trust information” is:

- (a) the fact that a person is a beneficiary of the trust;
- (b) the name and contact details of the trustees;

- (c) the occurrence and details of each appointment, removal, and retirement of a trustee as it occurs; and

- (d) the right of the beneficiary to request a copy of the terms of the trust or “trust information”.

Since the right to “basic trust information” is only a presumption, trustees will need to decide whether, and to whom, that information should be disclosed. In making their decision, the trustees must consider the factors in section 53 of the Act (see Schedule A).

Under section 51(4) of the Act, trustees are required to consider at “reasonable intervals” whether they should make “basic trust information” available to beneficiaries. The Act does not define a “reasonable interval”. However, where the Act deals with the consequences of beneficiaries not having any information it refers to a period of 12 months. That suggests that a reasonable interval may well be a period of 12 months.

### *Trust information*

There is also a presumption under the Act that trustees must, within a reasonable period, give to a beneficiary or the representative of a beneficiary “trust information” requested by the beneficiary or the beneficiary’s representative.

“Trust information” is information regarding the terms of the trust, the administration of the trust, or the trust’s property that it is reasonably necessary for the beneficiary to have to enable the trust to be enforced. It does not include reasons for the trustees’ decisions.

In considering whether to provide “trust information” requested by a beneficiary, trustees must consider the factors in section 53 of the Act (again, see Schedule A).

The trustees may take steps to protect trust information by requiring the beneficiary to provide a confidentiality undertaking, redacting documents to protect privacy, or providing information to a trusted third party who is in a position to advise the beneficiary.

### *Where the trustees decide not to give information*

Section 54 of the Act applies if no beneficiary has any “trust information” as a result of one or more of the following:

- (a) the trustee cannot identify any beneficiary to whom information can be given;
- (b) the trustee decides to withhold all of the “basic trust information” from all beneficiaries;
- (c) the trustee decides to refuse a request by a beneficiary for “trust information”.

If section 54 applies, the trustee is required to apply to the court for directions as to:

- (a) whether the trustee’s determination that there is no beneficiary to whom information can be given, or to withhold information or refuse a request for information, is reasonable in the circumstances; and
- (b) the alternative means by which the trustee can be accountable and the trust can be enforced.

The trustee is not required to apply to the court for directions if the period during which no beneficiary has any “trust information” is less than 12 months, and at the end of the 12-month period the trustee gives the “basic trust information” to at least one beneficiary.

#### *Most likely practical position*

Most trustees will be interested in knowing what to do to avoid the need to go to court for directions. In our view, as a minimum, after following due process (that is, after considering relevant factors) trustees should provide “basic trust information” and some “trust information”, for example, the trust deed, to at least one beneficiary. If such disclosures were made then there would be no need to apply to the court for directions.

While the above would satisfy the disclosure requirements of the new Act, it only negates the need to go to court for directions. Trustees will continue to have the duty to account to the beneficiaries for their stewardship of trust assets and, therefore, disclosure that is more extensive may need to be made where there is a request for trust information. Under section 50 of the Act, the purpose of the Act’s disclosure regime is to ensure “beneficiaries have *sufficient information* to enable the terms of the trust and the trustees’ duties to be enforced”. Against that backdrop, disclosure on request by a beneficiary who has standing to make the request will need to be meaningful in the particular circumstances of the trust.

#### **Maximum trust duration**

Under the rule against perpetuities that currently applies trusts must vest in beneficiaries within the applicable perpetuity period. In New Zealand, most trusts have

adopted a perpetuity period of 80 years, which is the maximum allowed under the Perpetuities Act 1964. The new Act repeals the Perpetuities Act and abolishes the rule against perpetuities. Instead, the act will allow trusts to have a maximum duration of 125 years.

The new maximum duration does not apply automatically to existing trusts. For trusts created before the Act is in force, it will be necessary to take steps to adopt the 125-year period if that is permitted under the trust deed. If the trustees decide to take steps to extend the maximum duration, they will need to consider whether doing so is an appropriate exercise of their powers in the circumstances since an extension of the duration will have the effect of deferring the enjoyment of vested entitlements. It will mean that some (and possibly all) beneficiaries who may have been entitled to the trust fund on the original vesting day will not receive their entitlement.

#### **Age of majority**

The Act will change the age of majority (the age at which a person is considered an adult) for the purposes of trusts and wills from 20 to 18. One of the main implications of this change is that a beneficiary who is 18 or older can receive (i.e. can “give a valid receipt” in relation to) an amount distributed to that beneficiary from the trust.

The age of majority also has implications for the standing of beneficiaries to request “trust information”, or receive “basic trust information”. Generally, a beneficiary who is under the age of majority has no standing to make a request for trust information other than through a “representative”. The representative of an under-aged beneficiary is a parent or guardian and in the case of a person who is legally incapable, a person who has legal authority to act on behalf of the person, for example, an attorney under an enduring power of attorney or a property manager appointed under the Protection of Personal and Property Rights Act 1988.

Interestingly, the new Act permits an instrument creating a trust (a trust deed or will) to specify its own age of majority for the purposes of the trust.

#### **Trustees’ duties**

The Act sets out the duties of trustees. The Act sets out mandatory duties, being duties that trustees must perform, and default duties, being duties that trustees must perform unless they are modified or excluded by the trust deed.

The mandatory duties will require trustees to:

- (a) know the terms of the trust;

- (b) act in accordance with those terms;
- (c) act honestly and in good faith;
- (d) act for the benefit of the beneficiaries, in accordance with the terms of the trust; and
- (e) exercise their powers for a proper purpose.

The default duties are set out in sections 29 to 38 of the Act. A copy of these sections is attached as Schedule B. The default duties may be modified or excluded by the trust deed. It is common practice to modify the duties of trustees, particularly those relating to the investment of trust funds, conflicts of interest and trustee remuneration.

### **Liability and indemnity of trustees**

The Act provides that a trust deed must not limit or exclude a trustee's liability for any breach of trust arising from the trustee's dishonesty, wilful misconduct or gross negligence. Exoneration and indemnity provisions in a

trust instrument are permissible so long as they do not seek to exclude liability, or indemnify trustees for dishonesty, wilful misconduct or gross negligence.

Where existing trust deeds include exoneration and indemnity provisions that seek to exclude liability, or indemnify trustees for dishonesty, wilful misconduct or gross negligence, they will be read down to fit within the limits specified by the Act. Trustees should, therefore, not rely on the trust deed provisions relating to exoneration and indemnity exclusively and read those provisions in the context of the limits prescribed by statute.

### **Conclusion**

The Trusts Act is an extensive rewrite of the Trustee Act 1956 and the restatement of some aspects of trust law developed by the courts. This summary seeks to deal with a number of the most important aspects of the new Act. We trust that it is a useful summary of the Act. However, this summary is not a substitute for advice tailored to one's personal circumstances.

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## **Schedule A**

### **53 Procedure for deciding whether presumption applies**

The factors that the trustee must consider (for the purposes of sections 51(2)(a) and 52(2)(a)) are the following:

- (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.

## **Schedule B**

### **29 General duty of care**

When administering a trust (other than when exercising a discretion to distribute trust property), a trustee must exercise the care and skill that is reasonable in the circumstances, having regard, in particular,—

- (a) to any special knowledge or experience that the trustee has or that the trustee holds out as having; and
- (b) if the person acts as a trustee in the course of a business or profession, to any special knowledge or experience that it is reasonable to expect of a person acting in the course of that kind of business or profession.

### **30 Duty to invest prudently**

When exercising any power to invest trust property, a trustee must exercise the care and skill that a prudent person of business would exercise in managing the affairs of others, having regard, in particular,—

- (a) to any special knowledge or experience that the trustee has or that the trustee holds out as having; and
- (b) if the person acts as a trustee in the course of a business or profession, to any special knowledge or experience that it is reasonable to expect of a person acting in the course of that kind of business or profession.

### **31 Duty not to exercise power for own benefit**

A trustee must not exercise a power of a trustee directly or indirectly for the trustee's own benefit.

### **32 Duty to consider exercise of power**

A trustee must consider actively and regularly whether the trustee should be exercising 1 or more of the trustee's powers.

### **33 Duty not to bind or commit trustees to future exercise of discretion**

A trustee must not bind or commit trustees to a future exercise or non-exercise of a discretion.

### **34 Duty to avoid conflict of interest**

A trustee must avoid a conflict between the interests of the trustee and the interests of the beneficiaries.

### **35 Duty of impartiality**

- (1) A trustee must act impartially in relation to the beneficiaries, and must not be unfairly partial to one beneficiary or group of beneficiaries to the detriment of the others.
- (2) This section does not require a trustee to treat all beneficiaries equally (but all beneficiaries must be treated in accordance with the terms of the trust).

### **36 Duty not to profit**

A trustee must not make a profit from the trusteeship of a trust.

**37 Duty to act for no reward**

A trustee must not take any reward for acting as a trustee, but this does not affect the right of a trustee to be reimbursed for the trustee's legitimate expenses and disbursements in acting as a trustee (see section 81(2)).

**38 Duty to act unanimously**

If there is more than 1 trustee, the trustees must act unanimously.