

A matter of trust: are you ready?

Trustees, settlors and beneficiaries should now be aware that the new Trusts Act 2019, came into force on 31 January 2021. The new Act makes some significant changes to current trust law, and everyone who is involved with a Trust needs to know and understand the new legislation and its implications.

At a conservative estimate, there are around 300,000 to 500,000 trusts in New Zealand, so the new legislation will impact many New Zealanders.

Tompkins Wake began publishing information in relation to these changes in 2019, and we summarise our previous work here:

Objectives of the Trusts Act 2019

The Trusts Act 2019 repeals the Trustee Act 1956 and the Perpetuities Act 1964, because they are outdated and overly complex. The objectives of the new Act are to:

- Set out clear and accessible core trust principles;
- Ensure more efficient trust administration; and
- Simplify and clarify the role of the courts in relation to trusts.

The Trusts Act 2019 applies to all trusts that already existed on 30 July 2019 and will apply to all future trusts.

Lifetime of trust extended to 125 years

The Trusts Act has repealed both the Perpetuities Act 1964 and the common law rule known as the rule against perpetuities. The maximum time that a trust can last is now 125 years from the date it was created. If assets are resettled from one trust to another, the 125 years runs from the date that the original trust was created. The Trusts Act does not change the distribution date of existing trusts, but the trustees of existing trust can vary the distribution date in certain conditions.

Creation of a trust

The Trusts Act states that a trust is created under the Act when a trustee holds property of the trust. Trusts are often created in New Zealand with the trust deed recording a nominal settlement amount, such as \$100. However, that nominal settlement amount is frequently not actually paid to the trust, because the settlor intends to settle further, substantial, assets on the trust. Under the new Act, the trust will not actually commence until the nominal sum, or some other assets, are transferred to the trustees, so if a settlor wishes to form a trust with a nominal sum of money, it will be important that the money is actually transferred, and in an identifiable way, so that there is no dispute as to the date on which the trust commenced.

Trustees' Duties

One of the most important aspects of the new Act: the changes to trustees' duties. There are two categories of duties: mandatory, which trustees have to comply with, and default duties, which trustees will have to comply with unless the duties are modified or excluded by the trust deed.

We explore in detail the obligations and duties of trustees including **Mandatory Duties, Default Duties, Exemption and indemnity clauses and Duty to hold documents** [here](#).

Beneficiaries' rights to information

The new Trusts Act clarifies and codifies beneficiaries' rights to certain trust information to help beneficiaries make sure that the trustees are complying with their duties and the terms of the trust. There is a presumption that trustees must tell all beneficiaries:

- That they are a beneficiary of the trust;
- The name and contact details of the trustees;
- When trustees are appointed, removed, or retire; and
- That they can ask for a copy of the trust deed or trust information.

Trustees have to regularly consider, at reasonable intervals, whether they should be making this basic trust information available, for example, if a beneficiary has just turned 18.

There is also a presumption that trustees have to give beneficiaries trust information within a reasonable period of time if requested. Trust information is any information regarding the trust deed, trust administration, or trust property that it is reasonably necessary for the beneficiary to have, so that the beneficiary can enforce the trust. However, trustees do not have to give beneficiaries the reasons for trustees' decisions. Trustees can require the beneficiary to pay the reasonable cost of providing the information before providing it.

There are a range of reasons settlors and trustees may not want beneficiaries to know about trusts for their benefit, for example, until they have reached a sufficient level of maturity, knowledge of future provision from a trust can have a demotivating effect on the beneficiary concerned. It will be important to work with the trust's lawyer to ensure these valid concerns can be appropriately addressed. Fortunately, there are factors which trustees can consider, which may rebut the presumption of disclosure.

When do the presumptions of access to information not apply?

Before providing any of the information, trustees must consider certain factors. If the trustee reasonably considers that they shouldn't make the information available to every beneficiary, the trustee may withhold the basic trust information or refuse a beneficiary's request for trust information. This means that if the trustee thinks that the beneficiary is unlikely to ever receive a distribution from the trust, the trustee can decide not to give them any information about the trust.

Other factors that the trustee must consider are:

- Whether the information is confidential;
- The settlor's intentions when the trust was created, including whether the settlor intended beneficiaries to get information;
- The beneficiaries' ages and circumstances;
- The effect on the beneficiary, other beneficiaries, and third parties, of giving the information, and the effect on family relationships;
- For trusts with lots of beneficiaries, whether it is practical to give information to all beneficiaries;
- Whether it is practical to place restrictions or safeguards on how the beneficiary can use the information or to redact some of the information;
- The nature and context of a beneficiary's request for information.

What is a trustee withholds information?

If a trustee decides to withhold all the basic trust information from all the beneficiaries or decides to refuse a beneficiary's request for trust information, the trustee has to apply to the court for directions whether the decision was reasonable. The trustee must also ask the court for an alternative way to hold the trustee accountable and enforce the trust. In giving directions, the court must keep in mind that trust information should only be withheld from all beneficiaries in exceptional circumstances, and that the alternative way to enforce the trust must be consistent with the trust's objectives and not adversely affect its administration.

The requirement to provide basic trust information to all beneficiaries applies now to all existing trusts with the new Act taking effect on 30 January 2021. If you would like further information on the implications of these requirements, please contact your usual Tompkins Wake lawyer or one of our experts from our [private client team](#).

Removal of Trustees

More and more New Zealand trusts are facing problems due to trustees losing mental capacity from dementia or other age-related issues. At the moment, if a trustee loses capacity, they cannot retire as a trustee. They have to be removed by the person who has the power to appoint and remove trustees of the trust. An enduring power of attorney in relation to property cannot be used to deal with trust property, which is not the personal property of the trustee.

The remaining trustees then have to apply to the Court for a vesting order in order to transfer ownership of the trust property to the new or continuing trustees. This is an expensive and time-consuming process. The situation is even worse if the trustee who has lost capacity is also the person with the power to appoint and remove trustees.

Fortunately, the new Trusts Act makes this process much easier. The Act gives the following people the power to remove a trustee:

- The person named in the trust deed as having the power to remove trustees;
- If no one has the power to remove trustees, or the person who does is unwilling or unable to act, the remaining trustees have the power of removal;
- If no one has the power to remove trustees and there are no remaining trustees who can, a person holding an enduring power of attorney over the property of a trustee who is mentally incapable, or a property manager appointed under the Protection of Personal and Property Rights Act 1988 to manage the trustee's property.

A person who has the power to remove trustees has to remove a trustee if they lose the capacity to perform a trustee's duties. The trustee being removed has to be given notice that they are being removed, which takes effect 20 working days after notice is given. If the trustee has a property manager appointed or a trustee corporation managing their property, the notice takes effect immediately.

Vesting of a trust property

When an existing trustee retires or is removed, or a new trustee is appointed, executing the deed of appointment, removal, or discharge has the effect of removing ownership of the trust property from the previous trustees and vesting it in the new or continuing trustees without the need for any transfer, conveyance or assignment (subject to any mortgage or liabilities attached to the property). If the divesting and vesting need to be notified, recorded or registered under another Act, such as the Land Transfer Act, a copy of the deed and a statutory declaration

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by the new or continuing trustees is enough to achieve the change in title. The new and continuing trustees can complete any formal requirements on behalf of a former trustee who has lost capacity.

The process for appointing and removing trustees should become both easier and cheaper under the Trusts Act 2019. For advice and support in appointing and/or removing trustees please contact your usual Tompkins Wake lawyer or one of our experts from our **private client team**.

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