

THE IMPACT OF THE TRUSTS ACT 2019 ON TRUSTS

The Trusts Act 2019 will come into effect on 30 January 2021 (18 months after it received Royal assent).

See <http://www.legislation.govt.nz/act/public/2019/0038/latest/DLM7382815.html#DLM7382879>

The Trusts Act 2019 will replace the Trustee Act 1956 and the Perpetuities Act 1964 to make trust law more accessible, clarify and simplify core trust principles and essential obligations for trustees, and preserve the flexibility of the common law to allow trust law to continue to evolve through the courts.

The Act provides better guidance for trustees and beneficiaries and make it easier to resolve disputes. Generally, the proposed reforms seek to clarify core trust concepts, make trust legislation more useful, fix practical problems and reduce costs. It also aims to modernise outdated language and concepts. Much of the Act updates or restates law that exists already, either in statute or in case law. In our opinion the new Act improves and clarifies trust law. Some of the changes include:

1. A description of the key features of a trust to help people understand their rights and obligations.
2. Mandatory trustee duties and default trustee duties (which apply unless they are modified or excluded) based on established legal principles to help trustees understand their obligations.
 - The mandatory duties of a trustee are to:
 - know the terms of the trust.
 - act in accordance with the terms of the trust.
 - act honestly and in good faith.
 - hold or deal with trust property and otherwise act for the benefit of the beneficiaries, in accordance with the terms of the trust, or, for a trust for a permitted purpose, to further the permitted purpose of the trust, in accordance with the terms of the trust; and
 - exercise the trustee's powers for a proper purpose.

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3. The default duties of a trustee require, unless modified or excluded, that the trustee will:

- when administering the trust, exercise the care and skill that is reasonable in the circumstances.
- when exercising any power to invest trust property exercise the care and skill that a prudent person of business would exercise in managing the affairs of others.
- not exercise a power for the trustee's own benefit. We have modified that clause so that a trustee who is a beneficiary can benefit.
- consider actively and regularly whether to exercise one or more of the trustee's powers.
- not bind or commit trustees to a future exercise or non-exercise of a discretion.
- avoid a conflict between the interests of the trustee and the interests of the beneficiaries.
- act impartially in relation to the beneficiaries.
- not make a profit from the trusteeship of a trust; and
- make decisions unanimously, if there is more than one trustee.

4. Clarifying that a trustee has an obligation to have regard to the context and objectives of the trust when performing their duties.

5. Requirements for managing trust information. Each trustee will be obliged to keep copies of the trust deed and any variations. As a matter of common sense that should always have occurred as otherwise the trustees would not know if they were observing the terms of the trust deed.

6. Flexible trustee powers, allowing trustees to manage and invest trust property in the most appropriate way.

7. Provisions to support cost-effective establishment and administration of trusts (such as clear rules on the variation and termination of trusts).

8. Options for removing and appointing trustees without having to go to court to do so.

9. The abolition of the rule against perpetuities, and the setting of a maximum duration of a trust at 125 years.

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The Act creates a presumption that 'basic trust information' must be made available to beneficiaries. Basic trust information is that a person is a beneficiary of the trust, the name and contact details of the trustees, details of trustee changes as they occur and the beneficiary's right to request further trust information.

There is also a presumption that if a beneficiary requests further trust information, including a copy of the trust deed, the trustee must provide that information within a reasonable period of time. The trustee may ask the beneficiary to pay the reasonable costs of providing that information. However importantly, Trustees do have the ability to decide that either, or both presumptions, do not apply.

A list of factors is set out in the legislation and the trustees **MUST** consider these factors when deciding whether these apply in the circumstances. Those factors include:

- The nature and interests of the beneficiary (including whether the beneficiary is likely to receive trust property in the future)
- The nature and interests of other beneficiaries
- The intentions of the settlor when the trust was established
- The age and circumstances of the beneficiary in question and the other beneficiaries of the trust
- The effect of giving the beneficiary the information
- The nature and context of any request for further information, and
- Any other factor a trustee reasonably considers is relevant. Trustees will have to carefully consider any decision not to disclose information.

10. A requirement for any person paid to give advice in relation to the creation of a trust (such as a lawyer or accountant) to, prior to the creation of the trust, give specific advice to the settlor about:

- The meaning and effect of any modification or exclusion of a default duty.
- the inclusion of any clause limiting or excluding the trustee's liability for a breach of trust or granting the trustee an indemnity against the trust's property for the trustee's liability for breach of trust.
- a requirement for each trustee to keep specified documents relating to the trust, including records of any decisions that they have made and contracts that they have entered into.

Some of the criticisms of the new Act (which we believe are incorrect) are as follows:

1. Public Trust:

Trustees face increased compliance requirements. {Comment: Independent Trustees until now have too frequently willfully breached their duties as trustees. The “new” requirements are mainly old requirements that have all too frequently been overlooked.}

Beneficiaries now need to be told that they are a beneficiary of a trust and regularly provided with information about the trust without them needing to request it. Information can only be withheld in exceptional circumstances.’ [Comment: That is not what the new Act says. It is a presumption which the trustees have the ability to decide does not apply.]

2. Trustees Executors:

“In some instances, the costs of administering a trust may increase because the trustee or trustees will need to make additional disclosure to beneficiaries.” {Comment: that will only be the case if you have an independent trustee, and the trust deed has not been varied to carefully express the Settlor’s intentions about the supply of trust information.}

Trusts are a very important asset protection tool. It is vital that trustees understand their obligations. In order to ensure that trustees will be able to start administering the trust in accordance with the provisions of the Trusts Act 2019 trust deeds may need to be updated to include the new provisions of the Trusts Act 2019 and in particular:

- Mandatory duties of trustees.
- Standard default duties of trustees, and how they have been modified. Trusts may need to be modified so that a trustee who is a beneficiary can act without breaching them.
- A maximum trust period of 125 years from 30 January 2021 (the date upon which the Trusts Act 2019 comes into force).
- Details of the advice that has given to the Settlor before signing the trust deed (which must be pointed out to the Settlor) about:

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- the meaning and effect of any modification or exclusion of a default duty; and
 - the inclusion of any clause limiting or excluding the trustee's liability for a breach of trust or granting the trustee an indemnity against the trust's property for the trustee's liability for breach of trust.
- Details of the records which it is mandatory for the trustees to keep.
 - New rules for the provision of information to beneficiaries. Taking into account that the wishes of the Settlers (which it is mandatory for the trustees to take into account when deciding whether the above presumptions apply), that the Principal Beneficiaries only receive basic trust information while they are alive and have their mental faculties, then the Other Primary Beneficiaries after the Settlers have died or lost their mental faculties; and that the Secondary Beneficiaries receive no basic trust information unless all of the Primary Beneficiaries die.

To ensure that the Trustees can comply with the Trusts Act 2019 it is essential **that all trust deeds are checked to see if they need to be varied and replaced with an updated trust deed with the features detailed above by a trust expert.**

For a free 30-minute trust review email us now: trudy@kingshans.co.nz or telephone 09 5759873 or 094025133.

If you have any queries at all, please don't hesitate to contact us.

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