



**Trust Law Update  
August 2020**

## CHANGES TO TRUST LAW

### New Legislation for Trusts

The Trusts Act 2019 ("Act") will come into full force on 30 January 2021.

Whilst some provisions of the Act are simply setting out common law obligations which already applied to trusts, there are some aspects of the Act which will affect the vast majority of trusts.

Whilst the Act will apply to all trust, in this update we have focused on the impact that these changes will have on family trusts.

### If you are a Trustee - these changes matter

It is important that trustees are aware of the changes and ensure compliance. If you do not comply with new obligations that you will have once the Act comes into force, you may be found personally liable to beneficiaries for your breach.

In the coming years, there will be significant wealth transfer, particularly from the "baby boomer" generation to their children. Much of this wealth in New Zealand is held in family trusts and many of those trusts are not actively managed and exist simply because "the lawyer or accountant said we needed a trust".

Given the new provisions in the Act, we are expecting that there will be an increase in claims being made against trustees for breach of duties. Unfortunately, these claims often arise in close family situations where the end of a relationship or a falling out between parents and a child or between siblings escalates.

It is risky to assume that simply because you established the trust, your children (or their spouses or a range of other people who may be beneficiaries of the trust), would not seek to question its management.

### What is changing?

Whilst the Act makes a range of changes to trust law, many of the changes made are procedural in nature and cover off issues such as appointment and removal of trustees and practicalities of that process.

There will be an obligation for trustees to retain certain records relating to the trust and for some trusts this will involve some work in trying to locate all the necessary records.

The Act will also extend the maximum allowable term of a trust. Currently a trust may run for a maximum of 80 years at which point the trust fund must then be distributed to the final beneficiaries. The Act will change this to a maximum term of 125 years. This extension of the term will not automatically apply to trusts and an existing trust deed would need to be varied to provide for the longer term if that were desirable.

In terms of your obligations as a trustee, the key changes are:

- A new presumption that trustees will provide a range of information to all beneficiaries (or in the case of minors, to a parent or guardian of that child).
- A range of mandatory duties are provided for. These duties broadly capture duties that trustees already have under common law.
- A range of default duties are provided for. These duties can be contracted out of or varied by the terms of a trust.

### Presumption of Mandatory Provision of Information to Beneficiaries

The Act provides for a presumption that trustees must provide certain information to beneficiaries of the trust. This requirement is not limited to any particular beneficiaries and will capture all discretionary beneficiaries of the trust.

The basic information to be provided is fairly brief - essentially each beneficiary needs to be told that they are a beneficiary of the trust and be given some high level details about it including things such as who the trustees are and the right of the beneficiary to receive certain information.

Trustees are not required to disclose all information about the trust and the amount of further information to be disclosed will be dependent on particular circumstances.

Disclosure can be made in various ways - a simple discussion with a beneficiary may be suitable in some cases. However clear evidence should be held that the necessary disclosure was made.

There is an ability for trustees to withhold all information from certain beneficiaries (including the fact that they are a beneficiary), but this must be on reasonable grounds. It is uncertain what a Court will consider to be reasonable grounds, therefore, withholding information from some beneficiaries is a risk. Given the purpose of the presumption is to ensure that

beneficiaries know that a trust exists, we expect the Courts to have a relatively high threshold for withholding the basic information that a person is a beneficiary, but a lower threshold for provision of more detailed information about the trust and its assets.

Whilst this obligation may sound minor initially, it raises the question of who the beneficiaries of the trust are. Often the definition of discretionary beneficiaries in the trust deed is very wide and information may need to be given to a large number of potential beneficiaries.

If the trust deed enables beneficiaries to be removed (often the person who settles the trust initially will have this power), then it may be appropriate for the person with that power to carefully consider who the beneficiaries actually are and remove some beneficiaries if appropriate to do so, prior to this obligation of disclosure being complied with.

### **Mandatory Duties**

A number of mandatory duties are provided for in the Act. These are duties which trustees already have under trust law.

These duties capture the obligation of trustees to:

- Know the terms of the trust
- Act in accordance with the terms of the trust
- Act honestly and in good faith
- Act for the benefit of the beneficiaries
- Exercise their powers for a proper purpose.

Given these are existing duties, and they are mandatory, we note these simply by way of reminder to trustees.

### **Default Duties**

The default duties in the Act should be a particular focus for every trustee as the Act provides that these duties will apply unless the trust deed specifically negates them or varies them.

The default duties will, unless the trust deed provides otherwise, impose on trustees a duty:

- Of general care
- To invest prudently
- Not to exercise powers for their own benefit
- To regularly consider exercise of powers (including by way of example, to regularly consider the situation of beneficiaries and if there should be some provision made for them)
- Not to bind or commit trustees to future exercise of discretion
- To avoid conflict of interest
- Of impartiality
- Not to profit
- To act for no reward
- To act unanimously

A number of the above default duties will pose obvious problems for many family trusts across New Zealand.

The obvious example is a person who establishes a trust to hold their assets, and is both a trustee and a beneficiary of the trust. That person is likely to live in a home owned by the trust, and may also have certain living expenses met by the trust and receive distributions from the trust. This situation is very common and is likely to breach a number of the default duties noted above.

Some duties will be of particular concern to professional or independent trustees and we anticipate that some advisors will not be willing to accept trusteeships if all of the above default duties will apply.

We recommend that all trustees consider the application of the above default duties and the extent to which the trust deed may already negate or vary those duties.

If there is a power to vary the trust deed, then it may be appropriate for the trust deed to be varied to negate or vary some or all of the above default duties.

### **It's time to review your Trust**

Given the Act will come into force early next year, now is the time to review your trust.

If the trust is one which you established for your family, then your review should include considering:

- Why you established the trust and whether it actually does what you intended?
- Should you be winding up the trust if it is not needed? Or do you have several trusts which you should resettlement onto one trust?
- Who are the beneficiaries and are they who you really intended to benefit from the trust?
- What do you want to do about the new default duties?

It may be time to wind up your trust or vary its terms. If you wish to do so, then this should be done prior to the Act coming into force.

You also need to plan how you will comply with the new obligations under the Act, including how and when the necessary information will be provided to beneficiaries - again that process should be in place prior to the Act coming into force.

When reviewing your trust, it would also be prudent to review other related documentation such as your Will and Enduring Powers of Attorney to ensure that they remain appropriate.

For advice about the changes, please contact your usual Dawson Harford contact or:

**Graham Harford**

Director  
t: + 64 9 355 1520  
m: + 64 21 648 839  
e: [graham.harford@dawsonharford.com](mailto:graham.harford@dawsonharford.com)

**Alan Stones**

Principal  
t: + 64 9 355 1500  
m: + 64 21 688 393  
e: [alan.stones@dawsonharford.com](mailto:alan.stones@dawsonharford.com)

**Bernard Smith**

Special Counsel  
t: + 64 9 355 1539  
m: + 64 21 674 864  
e: [bernard.smith@dawsonharford.com](mailto:bernard.smith@dawsonharford.com)

**Melissa Lyes**

Senior Associate  
t: + 64 9 355 1504  
m: + 64 21 743 681  
e: [melissa.lyes@dawsonharford.com](mailto:melissa.lyes@dawsonharford.com)

**Jeremy Steel**

Special Counsel  
t: + 64 9 355 1525  
m: + 64 27 255 5733  
e: [jeremy.steel@dawsonharford.com](mailto:jeremy.steel@dawsonharford.com)

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