



The Trusts Act 2019

Creating Informed Beneficiaries

The Trusts Act 2019 (**Act**) came into force on 30 January 2021. The more onerous obligations on trustees introduced by the Act have caused settlors and trustees to reassess trusts and whether they are performing the function for which they were established and, if not, whether they should be wound up.

One of the issues being considered by lawyers is whether they are prepared to take on or continue to accept the liabilities imposed on them as independent, professional trustees. This is an important time for professional trustees to familiarise themselves with the Act and to ensure they understand and are complying with their responsibilities.

This article focuses on the information provisions in the Act, which are new to the law of trusts in New Zealand and require early attention by trustees.

Statement of existing principles

One purpose of the Act is to express the law of trusts, including trustees' duties and beneficiary rights, in plain language. The common law and equitable principles around trusts continue to apply and the Deed of Trust remains central to trustees' rights and obligations. The Act restates the existing mandatory duties of trustees, which cannot be modified or excluded by the terms of the trust. The Act also sets out trustees' default duties which are subject to the terms of the trust.

It remains crucial for trustees to:

- Understand the trust assets and the people involved in the trust

- Be familiar with the deed of trust and comply with its terms. For example, the trustees must act unanimously if that is required by the deed and must understand investment obligations.
- Understand the purpose(s) of the trust
- Know the beneficiaries and understand their circumstances
- Not be passive.

Focus on information

The new provisions regarding information for beneficiaries and record keeping are matters that professional trustees are likely to play a central role in.

BENEFICIARY RIGHTS

Beneficiary rights to information is a focus of the Act and this article, because it potentially involves significant work for trustees. Professional trustees will be expected to understand and lead the disclosure process.

Historically there have been many beneficiaries who are not aware that they are named as a beneficiary to a trust, particularly in family trusts where it has been common for wide classes of family members to be named as beneficiaries, such as grandchildren, siblings, nieces, nephews and spouses of those people. They have also often been unaware that financial arrangements have been made in beneficiaries' names.

The Act has remedied this. From 30 January 2021, there is a presumption that trustees will provide every beneficiary with basic information about the trust. This applies to all beneficiaries including those who can only benefit from the trust at the sole discretion of the trustees.

This disclosure obligation is potentially onerous because classes of beneficiaries can be drafted very widely and there are potentially dozens (and more) beneficiaries who must be given the following information:

- that the person is a beneficiary
- name and contact details of trustees
- details of changes in trustees, as they occur
- the beneficiary's right to request the terms of the trust and certain trust information.

There is also a presumption that trustees will give a beneficiary the trust information that s/he has requested. That is more than the basic information set out above and could include any information regarding the terms of the trust, the administration of the trust, or the trust property, that is reasonably necessary for the beneficiary to have to enable the trust to be enforced. However, trustees' reasons for their decisions do not have to be provided.

There are circumstances in which trustees do not have to provide the basic or requested information to a particular beneficiary, but trustees can only make that decision after carefully considering the circumstances of the trust and the beneficiary (set out in the Act).

One response to this obligation is to remove beneficiaries who the trustees do not want to provide information to. But this depends upon there being the ability to do so under the Trust Deed. Some deeds of trust do not allow for the classes of beneficiaries to be changed and in some cases this has already led to trusts being wound up.

These new disclosure rules are likely to have at least two significant impacts on professional trustees:

- Beneficiaries can request and review financial and other trust documents and this could bring trustee actions under the spotlight, and
- Better informed beneficiaries could mean more claims against trustees who have not complied with their investment and other obligations.

RETENTION OF RECORDS AND TRUST DOCUMENTS

The Act requires trustees to keep core trust documents for the duration of the trust. This includes the Trust Deed and any variations to it, records of the trust property, trustee decisions, contracts, accounting and financial statements, appointment, removal and discharge documents, letters of wishes by the settlor, and other documents necessary for the administration of the trust.

All trustees are required to hold a copy of the Trust Deed and any other document that contains the terms of the trust. One trustee may hold most other documents, and this will likely be the professional trustee. Documents must be passed on to replacement trustees.

Summary

The new Act will mean better-informed beneficiaries and potentially more litigation. Trustees need to be aware of their significant liabilities and obligations before accepting professional trusteeships.

Trustees should be aware of the provisions in the Act regarding their personal liability and the indemnities available.

Professional trustees must take an active role in the administration of the trust. They should charge appropriate remuneration that reflects the obligations of a professional trustee and the time required to properly manage a trust that complies with the Trust Deed and the Act.

Lawyers should ensure they have adequate professional indemnity insurance to cover their trustee activities. We recommend discussing this with your broker to ensure you have the right cover for your practice in this changing environment.



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