

Trustee Obligations Guide

Trusts Act 2019

If you have a Trust, it's important that you understand the recent changes to Trust law in New Zealand. If you're a Trustee, you need to be aware of your duties and obligations. The Trusts Act 2019, which comes into force on 30 January 2021, is the first major Trust law reform in New Zealand in 70 years. The Act clarifies and modernises existing Trust law and comes with some significant changes.

What do I need to know?

Many of the key changes are aimed at making Trust law more accessible to lawyers, accountants, and the public, strengthening the ability of beneficiaries to hold Trustees to account. The Trusts Act codifies the duties of Trustees and requires much greater transparency around Trust activity.

Perhaps the biggest change brought about by the Act is that beneficiaries of a Trust must now be notified that they are beneficiaries. Previously, you could be nominated without your knowledge. Not only do beneficiaries now need to be told they're a beneficiary of a Trust, they must be provided with information about the Trust regularly, without needing to request it. Information can only be withheld in exceptional circumstances.

What does it mean for my Trust?

Trusts are an important part of asset protection and asset planning, and provide an excellent option for managing assets under the right circumstances. They're particularly useful for estate and succession planning purposes, e.g. blended families or providing for those with special needs.

However, for Trusts existing before the Trusts Act, it could mean that:

- Compliance duties will increase the time and cost of administering some Trusts, meaning some are no longer cost-effective
- Greater transparency will put things in the open that some Trustees might prefer to keep private
- Some Trustees (individuals, professionals and professional Trustee companies) may choose to no longer act as Trustees due to the increased compliance requirements

What do you need to think about?

If you're a Settlor or a Trustee, you need to start administering your Trust in line with the new law from 30 January 2021. We recommend you consider whether:

- You're willing and able to undertake the increased obligations
- You have access to the advice you need about the new requirements
- The current Trustees are willing and able to continue to act as Trustee
- You're comfortable with providing the increased information to beneficiaries
- The reasons for setting up the Trust are still relevant
- The Trust will offer the same protection
- The Trust will still be cost-effective given the increased compliance requirements

This Trustee Obligations Guide is designed to help you understand what your duties are as a Trustee and give you

an overview of the requirements of the Trusts Act 2019. We appreciate that all Trusts are unique, with many holding the majority of a family's wealth. In some cases, a Trust may no longer be appropriate. If you'd like to discuss whether your Trust should continue, we can undertake a Trust Review to determine whether your Trust still meets your requirements or whether it should be wound up.

Trustees' Duties

In general, the main duties of Trustees are:

- To act in the best interests of the beneficiaries
- To be impartial between beneficiaries
- To pay the correct beneficiaries*
- To get to know the terms of the Trust (the Trust Deed), the assets and liabilities of the Trust, and who the possible beneficiaries may be
- Not to profit from the Trusteeship
- To act personally rather than delegating decisions to others
- To act honestly and with the level of skill and care that would be expected of the reasonable business person in administering the affairs of others

*There are two classes of beneficiaries - discretionary and final. **Discretionary beneficiaries** are those to whom the Trustees have the discretion to distribute income or capital over the life of the Trust. They can expect to have only a hope of benefiting from the Trust. They don't have the right to claim property owned by the Trust.

Final beneficiaries are those to whom the Trust's assets will be distributed on the winding up of the Trust.

Specific Trust Set Up Duties

When setting up a Trust, the following must be undertaken:

- **Payment of the initial settlement to the Trustees** - this is usually stated in the Trust Deed and is paid by the Settlor to the Trustees to settle into a bank account in the Trust's name
- **Obtaining an IRD Number** - if the Trust will have income-earning assets, the Trustees should apply to Inland Revenue for an IRD number for the Trust as the Trust is a separate entity for tax purposes. Inland Revenue will also require the Trustees to complete a standard form that lists the Trustees and beneficiaries and other details of the Trust
- **Registering the Trust for GST** - Trustees will need to consider whether the Trust should be registered for GST
- **Safekeeping of the Trust documents**- the following documents must be kept in a safe place, accessible by all Trustees:
 - The original documents of the Trust, particularly the Trust Deed
 - A record of all Trustees' names and contact details
 - Details of all beneficiaries including ages and contact details
 - Details of each appointment, removal and retirement of Trustee as it occurs
 - Details of all decisions made by Trustees

Mandatory and Default Ongoing Trustee Duties

Trustee duties are central to good governance of your Trust and promote greater accountability to beneficiaries.

Historically, Trustee duties have largely been set out in case law and many Trustees haven't been fully aware of their duties.

The Act now sets out mandatory and default Trustee duties.

Mandatory Duties

- To know the terms of the Trust
- To act in accordance with the terms of the Trust
- To act honestly and in good faith
- To hold or deal with Trust property, and otherwise act, for the benefit of the beneficiaries or for the permitted purpose
- To exercise the powers of a Trustee for proper purpose

Default Duties - Apply unless modified or excluded by the terms of the Trust

- A general duty of care
- To invest prudently
- Not to exercise any power directly or indirectly for the Trustee's own benefit
- Actively and regularly consider the exercise of the Trustee's powers
- Not to bind or commit Trustees to the future exercise or non-exercise of a discretion, e.g. to prevent a future distribution to a beneficiary
- To avoid conflict of interest
- To act impartially
- Not to make a profit from the Trusteeship
- To act for no reward (although the Trust Deed can provide for payment of Trustee fees)
- To act unanimously

The practicalities

With the above duties in mind, the Trustees must:

- **Meet regularly and record minutes** - if the Trust will be actively trading, investing, acquiring assets or distributing funds, the Trustees will need to meet regularly. All meetings should be recorded in a Minute Book, along with all decisions. It's also useful to record the reasons for decisions and background information
- **Prepare Annual Accounts** - Trustees must ensure that proper and professional accounts are prepared each year by the Trust's accountant. Even if the Trust is simply a passive investor or holder of property, it's desirable that proper books of account are prepared, especially if the Trust has a bank account
- **File Annual Income Tax Returns** - Trustees are required to file Income Tax Returns for the Trust when it's involved in taxable activities
- **Maintain other files and records:**
 - Core Trust documents, including the Trust Deed, the terms of the Trust, and any variation of those terms
 - A file or diary of correspondence, including copies of contracts with third parties
 - Lists of Trust property (more relevant when Annual Accounts aren't produced)
 - Insurance details of all assets
 - Records of any forgiveness of debt and distributions to beneficiaries

Duty of Trustees to Inform Beneficiaries

As beneficiaries don't have an absolute right to all Trust information, there can be ongoing problems in knowing

what information to provide. At times, this ends up in the courts. The Trusts Act provides that Trustees must notify beneficiaries of 'basic Trust information'; and must give 'Trust information' on request.

Basic Trust information

This information must be provided to every beneficiary:

- The fact that they're a beneficiary of the Trust (upon reaching 18 years old)
- The name and contact details of the Trustees
- The occurrence of, and details of, each appointment, removal, and retirement of a Trustee as it occurs
- The right of the beneficiary to request a copy of the terms of the Trust or Trust information

Trust information

This information can be requested by the beneficiary:

- A copy of the Trust Deed
- Information regarding the administration of the Trust or the Trust property
- Information that is reasonably necessary for the beneficiaries to have to enable the Trust to be enforced

Trust information doesn't include reasons for Trustees' decisions.

Refusing a beneficiary's request for information

The Trusts Act 2019 sets out a procedure under which Trustees can decide against providing information. Factors to consider include:

- The nature of the interests in the Trust held by the beneficiary and the other beneficiaries of the Trust
- Whether the information is subject to personal or commercial confidentiality
- 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
- The age and circumstances of the particular beneficiary as well as the other beneficiaries
- The effect on the beneficiary of giving the information
- The effect on Trustees, other beneficiaries or the Trust, and third parties of giving the information
- The practicality of giving the information
- Any other factor that the Trustee reasonably considers is relevant to determining whether the presumption applies

If you're unsure what type of Trust information you need to disclose to the beneficiaries of the Trust, we recommend you seek professional advice in advance.

Exemption and Indemnity Clauses

The Act makes it clear that Trust Deeds must not limit a Trustee's liability or provide an indemnity for dishonesty, wilful misconduct or gross negligence. Any terms in a Trust Deed that purport to limit the liability of the Trustee or to indemnify them in breach of the provisions of the Act are invalid.

This means that Trustees can no longer rely on broad indemnity clauses that purport to protect them against gross negligence. They may still be protected in relation to ordinary negligence, if this is covered by an appropriately drafted limitation of liability and indemnity clause.

What if it all goes wrong?

An alternative dispute resolution process, e.g. mediation, for all Trusts is set out in the Act. The process also covers internal disputes between Trustees. The courts have been provided with wide powers to review acts, omissions, and decisions of Trustees.

Conclusion

Now is the time for action. Even if you plan to keep your Trust, you must review it now and ensure you're compliant with the new requirements before 30 January 2021.

It's prime time to have a look at your Trust. Do you really need it? Do the reasons why you set it up still exist? Do you need to consider a change of Trustees? Do you need a Professional Trustee?

We're here to help you navigate your way through these questions and the requirements of the new legislation.

Contact us to arrange your Trust Review.