

# A New Trusts Law for New Zealand

July 2020

The Trusts Act 2019 (**'the Act'**) comes into effect on **30 January 2021**. The Act replaces the existing Trustee Act 1956 and the Perpetuities Act 1964. The Act will become the primary source of law relating to trusts in New Zealand.

## Purpose of the Act

The Act is intended to:

- make the law relating to trusts in New Zealand more accessible to people who are not legally trained;
- clarify core trust principles and essential obligations for trustees;
- preserve the flexibility of the common law to allow trust law to continue to evolve through the Courts.

**The changes made to the law by the Act are important to all settlors, trustees, and beneficiaries of trusts in New Zealand.**

## Restatement of trustee duties

The Act specifies two types of trustee duties – mandatory trustee duties and default trustee duties. Those types of duty are largely a reflection of common law principles, but the default trustee duties can be modified or excluded by the express terms of the trust, unlike mandatory duties. Trustees will need to consider whether an existing Trust Deed is consistent with the restated trustee duties.

## Trustees' obligations to give information to beneficiaries

The requirement to disclose information about the trust to beneficiaries is arguably the most contentious part of the Act. The Act creates two rebuttable presumptions in relation to the provision of information to beneficiaries.

The first presumption is that a trustee must make available to every beneficiary (or representative of a beneficiary) certain basic trust information.

The second presumption states that a trustee must, within a reasonable period of time, give a beneficiary (or representative of a beneficiary) the trust information which that person has requested.

The presumptions can be rebutted in certain circumstances. Unless rebutted, the disclosure obligations extend to all beneficiaries of the trust, including discretionary beneficiaries. Many Trust Deeds contain a broad class of discretionary beneficiaries. With the passage of time it may no longer be appropriate for all of such beneficiaries to receive information about a trust from which they are unlikely to receive future distributions. Trustees can consider the grounds on which the presumption of disclosure can be rebutted and can also consider the possibility of a resettlement of a trust on a narrower class of beneficiaries. Whether this will be possible will depend on the wording of the relevant Trust Deed and a range of other factors.

## Obligation to keep trust information

- The Act provides that each trustee must keep a copy of the Trust Deed and all variations made to it.
- At least one trustee must also hold the following documents:
  - Records of the trust property identifying the assets, liabilities, income and expenses of the trust.
  - Records of trustee decisions.
  - Written contracts entered into by the trustees.
  - Accounting records and financial statements of the trust.
  - Documents appointing and removing trustees.
  - Letters or memoranda of wishes from the settlor.
  - Any other documents necessary for the administration of the trust.

## Review of trustee decisions

- The Act gives beneficiaries of a trust a clearer pathway to ask a court to review the decisions and actions of trustees.
- Trustees will need to be careful about following due process when making decisions and ensuring that they fulfil their fiduciary and regulatory duties.

## Checklist for Trustees

### In the context of the Act, have you considered:

Whether you are willing and able to provide information about the Trust to all beneficiaries, including discretionary beneficiaries?

Whether the people named as beneficiaries are actually intended to receive benefit from, and information about, the trust?

Whether the context and objectives of the trust are clear?

Whether the trust deed adequately deals with the mandatory and default duties set out in the Act?

Whether the trustees can comply with their obligations in relation to holding records?

Whether the trustees are all aware of their rights, interests, powers, and duties under the trust and prepared for greater scrutiny by, and engagement with, beneficiaries?

Whether the trust is still fulfilling the purposes for which it was established?

Dentons Kensington Swan has a team of practitioners with an in-depth knowledge of the law and practice of trusts and who can provide specialist advice on the implications of the Act on your trust.

## Key contacts



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