

KEY POINTS

What is the issue?

The law of trusts in New Zealand is undergoing some changes, with the *Trusts Act 2019* coming into force on 30 January 2021, affecting all express trusts, including foreign trusts.

What does it mean for me?

New Zealand foreign trusts are often used for international wealth-structuring purposes. Trusts are also widely used in New Zealand for domestic purposes and many beneficiaries of these trusts now reside outside of New Zealand. Some STEP members may be trustees of, or advisors to, trusts governed by New Zealand law and/or their beneficiaries, and so should be aware of these changes.

What can I take away?

All New Zealand trusts should be reviewed to ensure they are compliant with the new law, and that governance and administration is optimised.



A change in trust

HENRY BRANDTS-GIESEN ANALYSES THE MUCH-ANTICIPATED CHANGES TO THE LAW OF TRUSTS IN NEW ZEALAND

Some long-awaited changes to the law of trusts in New Zealand have finally been enacted. The *Trusts Act 2019* (the Act) received royal assent on 30 July 2019 and is the first major trust-law reform in the country in 70 years.

The Act comes into force on 30 January 2021 and will be the primary source of law relating to trusts in New Zealand, replacing the existing *Trustee Act 1956* (the 1956 Act) and the *Perpetuities Act 1964*.

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; and
- preserve the flexibility of the common law to allow trust law to continue to evolve through the courts.

The Act generally achieves these objectives but it represents more of an evolution than a revolution in the law of trusts in New Zealand. There has been some commentary that suggests the Act imposes more onerous duties on trustees than currently exist under the law. For the most part, this is misconstrued and the basic duties and powers contemplated by the Act are already provided for in the 1956 Act and/or common law. The problem is that they

are not well known or properly applied in New Zealand.

One of the reasons for some of the concerns expressed by commentators is that the Act highlights some significant issues for the trustees of domestic trusts in New Zealand. These domestic trusts are far more abundant than the foreign trusts that may be familiar to some international readers. The domestic trust industry in New Zealand is unregulated and unsophisticated and, consequently, the quality of governance and administration of domestic trusts is often below the standards of other jurisdictions. It is these domestic trusts that the Act is focused on.

The Act is likely to result in more scrutiny on all trustees of trusts governed by New Zealand law. This scrutiny is, however, no greater than would be expected in any mature trust jurisdiction.

The most contentious aspect of the Act is the presumptive obligation to make available 'basic trust information' to beneficiaries. In New Zealand, it is regrettably common for not all (or sometimes any) beneficiaries to be properly engaged with trustees and often beneficiaries are unaware of trusts under which they may have an interest. As a general principle, the Act requires there to be at least a basic level of reporting to all the adult beneficiaries and to the parents/guardians of all the minor beneficiaries. In other jurisdictions, this would be seen as a prerequisite to the fulfilment of the general duties of a trustee in the governance and administration of a trust.

In any event, the presumption of disclosure is rebuttable and information could be withheld if the circumstances so require. This is typical of most mature trust jurisdictions and not generally considered controversial in



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an international context. It is, however, somewhat controversial in a New Zealand context because most domestic trusts are governed by lay trustees and/or lawyers and accountants who are not always well versed in the law relating to the governance and administration of contemporary trusts or international best practice. Consequently, these domestic trusts are often governed by the trustees with the interests of the beneficiaries being subordinate to the interests of the settlors. This is plainly unsatisfactory; hence, the Act intends to raise the standards of governance and administration to levels similar to those that have been applied in certain other jurisdictions for many years.

The following paragraphs set out in more detail two of the most significant changes made by the Act.

TRUSTEE DUTIES

The Act specifies two types of trustee duty.

Mandatory trustee duties (which cannot be excluded or modified by the terms of a trust) include the specific duties to:

- know the terms of a trust;
- act in accordance with the terms of a trust;
- act honestly and in good faith;
- act for the benefit of beneficiaries or to further the permitted purpose of a trust; and
- exercise powers for a proper purpose.

Default trustee duties (which in theory can be modified or excluded by the express terms of a trust) include the general duty of care and the specific duties:

- to invest prudently;
- not to exercise a power for a trustee's own benefit;
- to consider the exercise of a power;
- not to bind or commit trustees to future exercise of discretion;
- to avoid a conflict of interest;
- of impartiality;
- not to profit;
- of a trustee to act for no reward; and
- to act unanimously.

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) the following basic trust information:

- the fact that a person is a beneficiary;
- the name and contact details of the trustees;

'The most contentious aspect of the Act is the presumptive obligation to make available "basic trust information" to beneficiaries'

- the occurrence of, and details of, each appointment, removal and retirement of a trustee as it occurs; and
- the right of the beneficiary to request a copy of the terms of the trust or 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 that person has requested.

Reasons for trustees' decisions can be withheld, but any information regarding the terms of the trust; administration of the trust or the trust property; and any information that is necessary for the beneficiary to have to enable the trust to be enforced, is subject to the presumption of disclosure.

In determining whether the presumptions can be rebutted, a trustee must consider the following factors:

- the nature of the interests in the trust held by the beneficiary and the other beneficiaries of the trust, including the degree and extent of a beneficiary's interest in the trust and the likelihood of the beneficiary receiving trust property in the future;
- 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 beneficiary requesting disclosure;
- the age and circumstances of the other beneficiaries of the trust;
- the effect on the beneficiary of giving the information;
- the effect on the trustees, other beneficiaries of the trust and third parties of giving the information;
- the practicality of imposing restrictions and other safeguards on the use of the information (e.g. by way of an undertaking or restricting who may inspect the documents);
- the practicality of giving some or all of

the information to the beneficiary in redacted form;

- if a beneficiary has requested information, the nature and context of the request; and
- any other factor that the trustee reasonably considers is relevant to determining whether the presumption applies.

Additionally, in the case of a family trust, a trustee must consider the effect of giving the information on:

- the relationships within the family; and
- the relationship between the trustees and some or all of the beneficiaries to the detriment of the beneficiaries as a whole.

Lastly, for a trust that has a large number of beneficiaries or unascertainable beneficiaries, the practicality of giving information to all beneficiaries or all members of a class of beneficiaries must also be considered before disclosure is made.

If, following consideration of the above factors, the trustee reasonably considers that the basic trust information should not be made available to every beneficiary, or the information should not be given to the person who requested it, then disclosure is no longer presumed.

NEXT STEPS

The Act comes into force on 30 January 2021. Therefore, trustees, settlors, beneficiaries and their advisors have the benefit of a transition period to ensure the trusts are compliant and optimised.

In some situations, this may require changes to the terms of trusts (if possible) and/or the current *modus operandi* for governance and administration.

It is also noteworthy that in June 2018, New Zealand's Ministry of Business, Innovation and Employment published a discussion document¹ proposing the introduction of beneficial ownership registers for New Zealand companies and limited partnerships.

Currently, there is no proposal for such a register for trusts in New Zealand.

However, international developments in this area, notably the EU's Fifth Anti-Money Laundering Directive,² will be followed with interest in New Zealand.

#TRUSTS #LEGISLATION

#REGULATION AND COMPLIANCE

¹Ministry of Business, Innovation and Employment, 'Discussion Document: Increasing the Transparency of the Beneficial Ownership of New Zealand Companies and Limited Partnerships' (June 2018) ²*Directive (EU) 2018/843*