

## The Trusts Act 2019 – what have we learnt so far?

### It is now almost 2 years since the Trusts Act 2019 came into force. During this time, we have assisted many of our clients with reviewing and updating their trust affairs.

As covered in previous editions of this newsletter, the Trusts Act 2019 (**Act**) introduced various changes to the law governing trusts in New Zealand, including:

- codifying the duties which apply to trustees;
- extending the maximum life of a trust from 80 to 125 years; and
- introducing new requirements for record-keeping and disclosure of information to beneficiaries.

In light of these changes and the fact a large number of the trusts and associated documentation we have reviewed has needed updating, we continue to recommend that anyone with a trust should contact their lawyer for a trust review.

#### What clients are considering in relation to their trusts

##### 1. Whether to retain or wind up the trust

When the new Act came into force there was a lot of commentary that trusts should now be wound up as a result, but it is important to remember that many of the Act's obligations already existed before the Act came into force.

When deciding whether to keep or wind up their trust, clients should consider the purpose for which the trust was established, the specific assets held by the trust, who is likely to benefit from the trust, and whether there have been any changes in circumstances.

In addition to legal advice, we strongly recommend that tax advice is sought before deciding to wind up a trust as transferring trust assets into a client's personal name may have unintended tax consequences.

##### 2. Modification of default duties

The Act sets out ten default duties which apply unless modified or excluded by the terms of a trust deed.

If these default duties are not modified or excluded, it can result in situations where:

- trustees cannot validly apply trust assets for the benefit of themselves as beneficiaries;
- the trust deed does not allow for the remuneration of professional trustees or trustee companies (e.g. companies set up by law and accountancy firms to act as trustees); and
- the method of investing trust assets would potentially expose the trustees to liability.

While trust deeds often contain an express power to make the changes necessary to avoid situations like the above, we have encountered many trust deeds which do not. In such circumstances, a lawyer can assist in determining whether any other options are available.

##### 3. Disclosure of information

The Act imposes new obligations on trustees relating to disclosure of trust information, introduced for the purpose of providing beneficiaries with sufficient information to hold trustees to account. The obligations include a presumption that trustees notify all beneficiaries aged 18 and older, or the representatives of beneficiaries younger than 18, of the fact that they are beneficiaries. Trustees were provided with a 12-month timeframe to notify under the Act and

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need to ensure they comply with these obligations on an ongoing basis.

Trustees can decline to provide information requested by beneficiaries after they have considered the factors specified in the Act, and the practicalities of restricting any information.

Depending on the family dynamics involved, these obligations can understandably result in difficult situations whereby beneficiaries, once aware of their status as a beneficiary, may believe they are immediately entitled to trust assets. Lawyers can assist trustees in determining whether to provide trust information and in navigating the Act's requirements, particularly if there are any concerns around disclosing trust information to a particular beneficiary.

### 4. Removal of beneficiaries

Older trust deeds often contain broad lists of beneficiaries, which may include extended members of family, the spouses and partners of other beneficiaries, and any or all charitable institutions.

We are recommending clients review the beneficiaries named in their trust deed and, if permitted by the terms of the particular trust deed, exclude any individuals who are not intended to ever benefit under the trust as this can make compliance with the Act's disclosure obligations more realistic.

Your lawyer can also provide advice on the options available where there is no power to exclude beneficiaries, which may involve recording the settlor's intentions in a Statement of Wishes or other appropriate document that a particular beneficiary is not intended to receive a trust distribution or any trust information.

### 5. Power of appointment of trustees

The role of a trustee is to manage the trust and its assets, and a trustee often also carries the power to vary the trust deed and to appoint or remove beneficiaries. It follows that the power to appoint and remove trustees (i.e. the power to 'hire and fire' trustees) is one of the most important powers associated with a trust.

When reviewing trusts, we often encounter situations where this power will be held by an unintended recipient should the Appointer die or lose mental capacity. It is therefore critical that current Appointers give some thought as to who should hold this power when they die or lose mental capacity and check that the appropriate documentation is in place, if not a lawyer can advise on how this can be achieved, given the specific terms of the trust.

### 6. Independent trustee

When we are discussing trust reviews with clients we are often asked the question – does the trust need an independent trustee (being a trustee who is not a beneficiary of the trust)?

There is no legal requirement for trusts to have an independent trustee, however we still recommend putting in place an independent trustee or an independent director of a trustee company, if there is an appropriate person available and willing to take on the role.

Trusts may be set up for asset protection reasons, including protection from relationship property proceedings and claims from creditors or disinherited children. However, a trust cannot provide this protection if it is found the trust assets are being treated as a settlor's personal property, in which case the trust may be held to be a 'sham'. If a trust is found to be a 'sham', a court can look past the terms of the trust deed and access the trust

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assets as if they were still owned by the settlor personally.

Provided a trust is being run properly and the independent trustee is not a "puppet trustee", the appointment of an independent trustee can help strengthen the argument that the trust is legitimate. Independent trustees may also assist in the overall better management and administration of the trust and can play an important role in ensuring that the beneficiaries are treated impartially and fairly, especially when there is a family tension.

### 7. Expiry date of trust deeds

Trusts are required to have an expiry date, and we have found that some trusts specify an expiry date as early as 30 years from establishment. Once this date is reached, the trustees must distribute the trust assets and wind up the trust in accordance with the trust's expiry provisions.

Depending on the specific wording of a trust deed, this may have unintended or undesirable consequences such as children receiving trust assets before the deaths of their parents.

Clients need to be mindful of the expiry date of their trust to avoid a situation where the trust assets pass to the next generation unexpectedly.

### 8. Statement of Wishes

A Statement of Wishes is a document similar to a Will in which a settlor may set out how they wish the trust to be operated during their lifetime, and how the trust assets are to be managed and distributed following their death. However, unlike a Will, a Statement of Wishes is not legally binding.

We often encounter Statements of Wishes that were signed many years ago and no longer reflect current circumstances or the wishes of our clients. While these documents are not legally binding, trustees are required to consider these documents

and may be challenged by beneficiaries, if they do not distribute trust assets in accordance with outdated wishes, despite knowing that these no longer reflect the settlor's most recent intentions.

We recommend that clients review and update their Statement of Wishes to ensure the trust assets are managed and distributed in the way they intend after their death and to reduce the likelihood of claims by disgruntled beneficiaries.

### 9. Taxation

The IRD introduced new trust disclosure rules in April last year, aimed at making trusts more transparent and accountable. These rules require trusts to produce and maintain financial statements and provide extra information to the IRD regarding trust earnings, distributions to beneficiaries (including the fact a beneficiary is living in a trust property and not paying market rent), and details of the settlors, beneficiaries, and powers of appointment.

Understandably, this can result in increased ongoing costs of having a trust. However, trusts which only hold the family home and do not generate any income may qualify as 'non-active' trusts and so not be captured. Such trusts are still required to apply to the IRD to be excluded from the new reporting rules.

We have been strongly recommending that all of our clients obtain tax and accounting advice to ensure that their trusts remain compliant with the IRD.

### Want to know more?

If you have any questions about the Trusts Act 2019, please contact our specialist [Private Client and Trusts team](#).