

TRUSTS ACT 2019

GETTING READY



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TRUST ACT 2019 IN BRIEF

REPEALS

Trustee Act 1956.
Perpetuities Act 1964.
Trustee (Prescribed Rate of Interest)
Order 2011 (SR 2011/178)

AMENDS

Financial Services Legislation
Amendment Act 2019.

ACT CHANGES OVERVIEW – WHAT DOES IT MEAN FOR:

DUTIES

Duties of trustees are categorised into mandatory (compulsory) and default (optional).

Default duties can be modified or removed in the trust deed.

Disclosure to beneficiaries required.

TRUSTEES

Face increased compliance requirements, statutory duties and obligations.

BENEFICIARIES

Need to be told they are a beneficiary of a trust, and regularly provided with information about the trust without them needing to request it.

Information can only be withheld in prescribed circumstances.

LIFESPAN

Life of a trust moves from 80 years to 125 years.

NORMS

Affects a range of norms, including indemnity provisions, duties and responsibilities.

ARE YOU A TRUSTEE OR BENEFICIARY OF A TRUST?

From 31 January 2021, the new Trusts Act 2019 will usher in a new legislative framework that applies to all family trusts governed under New Zealand law. This new legislation represents the most significant shift in trust legislation in 65 years, and will affect anyone involved in a trust.

In this article, we'll discuss what the changes are, what they could mean for you, and how to move forward and successfully navigate the new legislation.



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DOES MY TRUST NEED TO BE REVIEWED? ARE TRUSTS STILL IMPORTANT?

ARE TRUSTS STILL RELEVANT?

If you

- own property;
- operate a business;
- want certainty for family in your succession planning; and/or
- want to protect assets from third parties,

then yes, trusts remain an essential vehicle to enable effective asset structuring, succession planning and manage risk exposure.

IS MY TRUST STILL IMPORTANT?

We anticipate, yes.

You settled your trust for a reason. Your life may have moved on from then, but trusts are designed for the **long game** – for security, certainty and protection over your lifetime, your children's lifetime and your grandchildren's lifetime. Even if the initial reason for settling the trust no longer remains, trusts can serve multiple purposes and our team can tailor your trust to keep it working well for you for many years to come.

DOES MY TRUST NEED TO BE REVIEWED?

Yes. Not all trust documents are created equal.

Your trust deed should have been tailored to meet the specific goals and purposes you had when creating the trust. A template trust deed (particularly a stale template trust deed) can severely restrict your options in administering your trust. There is a significant difference between a correctly prepared, bespoke trust document and just any trust template.

The new Trusts Act 2019 represents the most significant codification to trust legislation in 65 years.

Given other recent shifts in trust norms for residential care and relationship property considerations, it is strongly recommended you get your trust reviewed by legal professionals specialising in Trust Law, such as our Private Wealth Team at Grayson Clements. We're happy to help anyone who would like a review of their trust.

WHAT ISSUES SHOULD I THINK ABOUT WHEN REVIEWING MY TRUST?

The new Trusts Act 2019 introduces new requirements and options which must be considered in relation to your trust. Let us help you address these questions so your trust is ready for implementing the new Trusts Act and you can move forward in confidence.

WHAT'S NEW?

Trusts can now have a duration of 125 years rather than 80 years.

Trustees must volunteer basic information to beneficiaries.

Trustees have mandatory and default duties.

Increased duties for trust administration.

CONSIDER:

Does your trust deed allow you to extend the life of your trust?

Does your trust deed detail your purposes?

Have these purposes changed?

How will providing this information to beneficiaries impact them?

Are there current beneficiaries you do not want to inform?

Does your trust deed distinguish between mandatory and default duties?

Do you want to opt out of or modify default duties?

Are your trustees able and willing to adhere to the duties they must follow?

Do I have additional assets to transfer to my trust?

How is the record keeping of the trust?

DETAILS OF TERMS AND CHANGES



MANDATORY DUTIES

Mandatory duties cannot be modified or excluded by the trust deed so all trustees will have to abide by these duties.

These duties are to:

- know the terms of the trust;
- act under the terms of the trust;
- act honestly and in good faith;
- deal with the trust property and to act for the benefit of the beneficiaries under the terms of the trust deed; and
- exercise the trustees' powers for a proper purpose.

TRUST DOCUMENTATION

This law change should bring a new level of rigour to trust recordkeeping, which can sometimes be lacking.

Each trustee will be obliged to keep copies of the trust deed and any variations. They must either keep their own copies of 'core trust documents' (which are defined in the Act) or to ensure that at least one of the other trustees holds all of the core trust documents and will make them available on request. If a trustee is not confident in their fellow trustees' abilities with paperwork, they will need to keep these documents personally.

DEFAULT DUTIES

Default duties are obligations by which trustees must abide — unless the settlor decides otherwise when the trust is established. These default duties include a:

- general duty of care, a requirement to invest prudently;
- prohibition on trustees acting in their own interests;
- duty to consider the exercise of trustees' powers;
- duty not to fetter a trustee's discretion;
- duty to act unanimously; and
- duty not to profit from the trusteeship or benefit from exercising trustee discretions.

Default duties **can be modified or excluded** if this is how the settlor wants to set up the trust.

For example, a settlor might want the trustees to be able to purchase depreciating assets such as retirement village units. The settlor may want trustees to be able to act with a majority in favour of any particular decision, or it may be desirable to allow a trustee (who is also a beneficiary) to participate in decisions despite a conflict of interest.

the difference between the almost right word and the right word is really a large matter – 'tis the difference between the lightning-bug and the lightning.

Mark Twain & Henry Shaw


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ACCESS TO BASIC TRUST INFORMATION

The new Act creates a presumption that 'basic trust information' must be provided to beneficiaries. That includes informing beneficiaries that they are a beneficiary of the trust, the name and contact details of the trustee(s), details of trustee changes as they occur and the beneficiary's right to request further trust information.

There is also a presumption that if a beneficiary requests further trust information, including a copy of the trust deed, the trustee must provide that information within a reasonable period of time. The trustee may ask the beneficiary to pay the reasonable costs of providing that information.

Trustees do have the ability to decide that either, or both presumptions, do not apply. A list of factors is set out in the legislation that the trustees must now consider when deciding whether to provide trust information to a beneficiary. Those factors include, amongst other things:

- the nature and interests of the beneficiary (including whether the beneficiary is likely to receive trust property in the future);
- the nature and interests of other beneficiaries;
- the intentions of the settlor when the trust was established;
- the age and circumstances of the beneficiary in question and the other beneficiaries of the trust;
- the effect of giving the beneficiary the information;

- the nature and context of any request for further information, and
- any other factor a trustee reasonably considers is relevant.

Trustees will have to carefully consider any decision not to disclose information as it can expose the trustees to liability.

OTHER CHANGES

Other changes include:

- a reduction of the age of majority from 20 to 18 years old (s20, new Act);
- statutory powers for trustees to appoint delegates and nominees to exercise certain trustee powers (ss67-73, new Act);
- codification and extension of the rule in *Saunders v Vautier* (*Saunders v Vautier* (1841) 4 Beav 115) that adult beneficiaries may unanimously bring a trust to an end (ss121-122, new Act);
- a trustee power to determine whether return on an investment is to be treated as 'income' or 'capital' for the purposes of distribution (ss60, new Act);
- reform of rules about apportionment of receipts and expenses to give trustees discretion (ss61, new Act);
- changes to the grounds on which the court may review trustee decisions (ss126-127, new Act); and
- new alternative dispute resolution procedures (ss142-148, new Act).

CHEAT SHEET

What information do I have to provide to beneficiaries?

There is a presumption that basic information will be provided to a beneficiary. This includes:

- telling a beneficiary they are a beneficiary;
- trustee contact details;
- details of changes of trustee;
- telling a beneficiary they have the right to request information about the trust.

There are situations where you do not have to provide information to a beneficiary.

MOVING FORWARD

The Grayson Clements team would like to meet with you to plan for the changes ahead. We recommend you get in touch before the changes come into law on 31 January 2021. However, we can assist at any time.

Please call us on 07 857 0900 to discuss your trust, and your requirements.

REMEMBER

You have the remainder of 2020 to ensure your private wealth structures are match fit!



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