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Accountants and Advisors

# WHAT YOU NEED TO KNOW TRUSTS ACT 2019

Effective 30 January 2021



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## INTRODUCTION

The Trusts Act 2019 came into force on 30 January 2021 - your Trust must now be compliant with the new Act.

The aim of the new Act is to make the law more accessible and easier to understand. Most of the changes relate to Trustee obligations and strengthening the ability of beneficiaries to hold Trustees to account.

We set out some of the key information here. If you have specific questions or concerns, we encourage you to get in touch with your business advisor.

### Disclaimer

The information contained in this ebook is brief and generic in nature and is no substitute for professional advice for your specific circumstances. If you're unsure about how these changes may impact a Trust you're involved in, get in touch for advice.

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## WHAT THE ACT CLARIFIES

The main provisions of the Act provide clarity about:

### TRUSTEE DUTIES:

The Act provides for both mandatory and default duties. Mandatory duties can't be modified or excluded by the Trust Deed; Default duties can be. Any modifications or exclusions must be documented in the Trust Deed.

### RETENTION OF INFORMATION:

Trustees are required to retain core Trust documents, such as the Trust Deed and any variations, minutes, accounts, and any other documents necessary for the administration of the Trust.

### DISCLOSURE OF INFORMATION:

The Act makes the presumption that Trustees must make 'basic Trust information' available to all beneficiaries and consider making 'other Trust information' available to beneficiaries upon their request. The Act sets out certain factors which the Trustee must consider before providing information that has been requested beyond 'basic Trust information'.

### EXEMPTION AND INDEMNITY CLAUSES:

Trust Deeds must not limit a Trustee's liability or provide an indemnity for dishonesty, wilful misconduct or gross negligence.

### APPOINTMENT AND REMOVAL OF TRUSTEES:

Statutory powers for the appointment and removal of Trustees have been modernised and broadened to minimise the need to apply to the court.

### LIFETIME OF A TRUST:

Trusts can now have a lifetime of up to 125 years, subject to the terms of the Trust. Previously, this was limited to 80 years, so your Trust Deed may need to be updated.

### DEFINITION OF A MINOR:

The age of minority has been reduced from 20 to 18 years old.

### DISPUTES RESOLUTION:

An alternative disputes resolution process is set out in the Act to allow for mediation and arbitration.

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## IS YOUR TRUST RELEVANT AND COMPLIANT?

The new Act brings key changes to the way Trusts are run and imparts stronger duties upon Trustees. If you have a Trust, you'll need to weigh up the benefits of continuing with your Trust against the increased compliance costs.

So, why did you set up your Trust? Are those reasons still relevant? Here are some of the most common reasons for forming a Trust:

### **ASSET PROTECTION:**

Trusts can protect personal assets from creditors in the event of personal bankruptcy or the insolvency of a company (if the donor was solvent when the assets were transferred into the Trust), and from any personal liability as a company director.

### **CONTINUITY:**

Trusts can continue to operate after the death of the Settlor without any immediate need to sell assets to distribute among beneficiaries. This means assets can be progressively distributed to beneficiaries and distribution to vulnerable beneficiaries can be delayed. Trusts can now continue for up to 125 years (previously they were limited to 80 years).

### **GOVERNMENT CLAW-BACK:**

Previously, a key benefit of transferring assets into a Trust was to enable the Settlor/s to access residential care subsidies. However, new rules make this almost impossible to claim now if you have assets in a Trust.

### **PROPERTY (RELATIONSHIPS) ACT:**

A Trust can be used to prevent family assets becoming inter-mingled property and therefore exposed to relationship property claims in the event of a relationship break up.

### **FAMILY PROTECTION ACT:**

A Trust can protect assets from family protection claims by disgruntled family members who disagree with the provisions of a deceased person's Will.

### **PROTECTION IN OLD AGE:**

Trusts can be structured to reduce the risk that an elderly person will lose family assets through a relationship breakdown, undue influence of other family members, or poor financial decision making.

### **INCOME SPREADING:**

Income earned by the Trust may be spread among one or more beneficiaries to take advantage of their lower tax rates.

We'd urge you to consider if a Trust is still your best method of asset protection? If you haven't reviewed your Trust for a while, now is the time to do so. Your Trust must now be compliant with the new legislation. Make sure your Trust is up to date, compliant, and relevant for your current circumstances.

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# UNDERSTANDING YOUR DUTIES AS A TRUSTEE

If you're a Trustee, it's essential you get up to speed with your duties under the new Trusts Act 2019. While most of these duties were already considered best practice, and some were mandated by common law, they're now codified in law and must be adhered to.

## THERE ARE FOUR KEY CHANGES (OR CLARIFICATIONS) TO YOUR DUTIES AS TRUSTEE.

There are new mandatory duties and default duties, as well as a raft of expectations around record keeping and supplying beneficiaries with basic Trust information.

### **Firstly, mandatory duties apply regardless of what the Trust Deed says, these are:**

1. Know the terms of the Trust.
2. Act in accordance with the terms of the Trust.
3. Act for the benefit of beneficiaries or to further the permitted permission of the Trust.
4. Exercise powers for proper purpose.

These are the minimum standard for Trustee Duties and it's likely that Trustees have already been acting in accordance with these duties. Remember, these can't be modified or excluded by the Trust Deed; they apply to all Trustees, no matter what the Trust Deed says.

### **Secondly, default duties apply unless they're modified or excluded by the Trust Deed. These include:**

1. General duty of care.
2. Invest prudently.
3. Not exercise power for own benefit.
4. Consider exercise of power.
5. Not to bind or commit Trustees to future exercise of discretion.
6. Avoid conflict of interest.
7. Act impartially.
8. Not to profit.
9. Act for no reward.
10. Act unanimously.

Most of the default duties are best practice and are unlikely to be modified or excluded by the Trust Deed. However, the duty not to profit and to act for no reward may need to be modified if there are Trustees who are paid for their role, for example, if you use a Professional Trustee.

If your Trust modifies or excludes any of the default duties, you must update the Trust Deed to explicitly state these modifications or exclusions.

### **The Trusts Act 2019 also places a duty on Trustees to retain core documents, such as:**

- The Trust Deed plus any variations
- Trust minutes
- Accounts and other Trust documents

### **Finally, Trustees are now obligated to notify beneficiaries about 'basic Trust information'.**

This includes the fact that they are a beneficiary, details about the Trustees, and their right to request a copy of the Trust Deed.

Beneficiaries also have the right to request other Trust information. Not all requests must be granted, but a request must be considered by Trustees based on factors set out in the Act.

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## HOW TO WORK EFFECTIVELY AS A TRUSTEE

**IF YOU ARE A TRUSTEE, YOU SHOULD BE AWARE THAT THE NEW ACT HAS CHANGES THAT AFFECT YOU AND YOUR RESPONSIBILITIES.**

We share some key points to bear in mind as you conduct your trustee duties:

- A trustee has a decision-making role and must exercise their mind independently.
- Trustees must agree unanimously unless the trust deed says otherwise (e.g. where decisions are made by majority).
- Good decisions are founded on good inquiry, information, advice, and process.
- Trustees should meet at least annually to ensure the outcomes of the trust are being achieved.

### **PROTOCOLS FOR WORKING WITH CO-TRUSTEES:**

It is important to agree on protocols for the way co-trustees work together. All trustees need to understand the governing terms and agree on protocols for making decisions, overseeing trust property, financial transactions, the timing of meetings, managing potential conflicts of interest, etc.

Trustees must also agree on how they will consult and communicate together and who will attend to day-to-day administration tasks.

### **REGULAR REVIEWS:**

#### **Annual reviews**

The trigger for the annual review for each trust appointment is the preparation of the annual statement of account. This is the time for trustees to re-acquaint themselves with the governing terms, property under management, and stakeholder relationships. The annual review enables a trustee to assess the overall performance, communicate with stakeholders, inquire into changes in needs and circumstances, identify potential issues or risks, confirm the risk rating, and plan for what's coming up in the year ahead. The annual review is also the time to consider whether the commercial terms of engagement are appropriate.

#### **Self-initiated reviews**

Trustees are encouraged to undertake a quick high-level review whenever there is a change in the trust circumstances. Examples could include events like a change in investment market conditions, change of tenants, purchase or sale of property, investment activity, requests for assistance, etc.

## TRUSTEE DECISIONS:

When a new person is appointed and accepted as a trustee, the trust deed should be reviewed to understand the terms for making decisions. The trust deed may require decisions to be made either **unanimously** or by a **majority**. Where the trust deed is silent, decisions must be unanimous.

When considering trustee decisions, trustees should check whether any trustees who are also beneficiaries can make decisions in their own favour, or whether there are rules on self-dealing (sale of assets to a trustee).

The broad decision process that trustees go through is:

- **Can we?** (determine the authority)
- **Should we?** (duly consider relevant factors, weigh up pros and cons)
- **Will we?** (make a decision)
- **Have we?** (implemented decision).

Many decisions can involve risk, pressure, deadlines, and potential for conflicts. Take advice when needed.

## REPORTING TO STAKEHOLDERS

Trustees are accountable for their performance to their beneficiaries. Trustees must ensure beneficiaries have sufficient information to enable the trust and the trustees' duties to be enforced against the trustees.

Decide which beneficiaries will receive reporting and financial statements.

## TRUSTEE MEETINGS

Meetings provide an opportunity for trustees to communicate with co-fiduciaries, beneficiaries, principals and other stakeholders. Meetings can be face to face, by a video facility (e.g. Skype, Zoom, etc) or by telephone after the dispatch of the annual accounts.

Factors that may determine the type of meeting to be held will include the geographical location of the other parties and the level of financial or other activity in the appointment. The minimum standard is an annual telephone meeting.

Professional trustees should take the lead in triggering meetings and bringing structure and discipline to meetings. A structured agenda is suggested with time allowed for an appropriate review, questions, decisions, and ongoing learning. Meetings provide an opportunity to sign documentation, agree on protocols and procedures and forward plan. Trustees of more active trusts will meet more regularly.

**Structured agendas, process and formality are a trustee's friend.**

## TIMING OF MEETINGS

Trustees should meet at least annually or whenever significant decisions are required.

## TRUSTEE MINUTES

Prepare minutes recording who attended meetings and what was discussed or considered. Check all trustees sign minutes, resolutions, or ratifications.

## FORWARD PLANNING

Forward planning is an important activity for trustees and planning will generally be undertaken as part of the annual review and meeting process. Trusts run over long periods of time, so it is important to periodically take time out regularly as trustees to reflect and plan for what may be coming up. For example:

- Governing terms (settlor wishes, changes in business practice relating to trusts, whether it is appropriate to consider winding-up an estate or trust, etc).
- Beneficiary needs and circumstances (e.g. completing education and travelling overseas, deteriorating health, addictions, etc).
- Upcoming changes in trust property (continuing suitability of assets, maintenance or capital improvements, upcoming sale of the family business or farm, etc).
- Preparing the next generation of inheritors.
- Preparing for future transitions and known events (minors attaining 18 years, beneficiary moving to a retirement home, changes in trustees, etc).

# TRUSTS AND BENEFICIARIES – WHAT THE NEW ACT REQUIRES

There is some misunderstanding about what the new Trusts Act requires around trust beneficiaries and their rights. We outline some key facts to help clarify any confusion.

## WHAT INFORMATION SHOULD BE SHARED:

Trust information is any information regarding the trust deed, trust administration, or trust property that it is reasonably necessary for the beneficiary to have, so they can enforce the trust.

## GIVING INFORMATION TO BENEFICIARIES

It is expected that trustees must tell all beneficiaries or their representatives:

- That they are a beneficiary of the trust
- The name and contact details of the trustees
- When trustees are appointed, removed, or retire
- That they can ask for a copy of the trust deed or trust information.

**However**, before sharing the above information, the trustees need to consider the following factors, which may result in them not sharing the above information to any particular beneficiary or in fact, all beneficiaries (but this latter decision has further implications that we cover later in this article).

## FACTORS THAT TRUSTEES NEED TO CONSIDER BEFORE SHARING INFORMATION

- The nature of the beneficiaries' interests and the likelihood of receiving trust property
- Whether the information is confidential
- The settlor's intentions when the trust was created, including whether the settlor intended beneficiaries to get information
- The beneficiaries' ages and circumstances
- The effect on the beneficiary, other beneficiaries, and third parties, of giving the information, and the effect on family relationships
- For trusts with lots of beneficiaries, whether it is practical to give information to all beneficiaries
- Whether it is practical to place restrictions or safeguards on how the beneficiary can use the information or two redact some of the information
- The nature and context of a beneficiary's request for information.

## GIVING BENEFICIARIES ADDITIONAL TRUST INFORMATION

Before providing additional information to beneficiaries on request, trustees need to consider the points outlined above. If the decision is to not provide information, the trustees do not have to give the reasons for this decision.

Trustees can require the beneficiary to pay the reasonable cost of providing the information before providing it.

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## WHY INFORMATION MAY NOT BE SHARED

There is a range of reasons trustees may not want certain beneficiaries to know about trusts for their benefit, for instance:

- Until they have reached a sufficient level of maturity.
- Knowledge of future payment from a trust may have a demotivating effect on the beneficiary concerned.

Trustees will need to work with the trust's lawyer to be sure these valid concerns can be appropriately addressed.

## WHAT IF TRUSTEES WITHHOLD INFORMATION:

If trustees decide to withhold all the basic trust information from all the beneficiaries or decide to refuse a beneficiary's request for trust information, the trustees will need to apply to the court for directions as there will be no means by which they can be held accountable. I.e. the beneficiaries will not have sufficient information to enforce the trust.

The court will need to determine an alternative way for the trustees to hold themselves accountable and enforce the trust.

In giving directions, the court must keep in mind that trust information should only be withheld from all beneficiaries in exceptional circumstances, and that the alternative way to enforce the trust must be consistent with the trust's objectives and not adversely affect its administration.

# NEW TRUST ANNUAL RETURN REQUIREMENTS

## IN DECEMBER 2020, LEGISLATION INTRODUCED A NEW 'ANNUAL RETURN' REQUIREMENT FOR TRUSTS.

Not to be confused with the new Trustee Act that came into effect at the end of January 2021, the annual return requirement included in the December 2020 bill imposes the disclosure of various trust information to Inland Revenue on an annual basis.

As enacted, the annual return for trusts will comprise:

- an income statement and balance sheet
- details of any settlements made on the trust during the year.
- the name, date of birth, country of tax residence and IRD number of any person who makes a settlement on the trust in the year, whose details have not previously been provided
- details on every distribution made by the trust during the year, including capital distributions, as well as details on the recipient beneficiaries
- details of any person who has the power to appoint and remove trustees and beneficiaries of a trust.

The requirement will not apply to non-active, charitable, or Maori authority trusts and foreign trusts that are already filing disclosures with IR.

Although the legislation applies for the 2022 income year onward, there is a provision that allows IR to request the same annual return information for any period between the 2015 and 2021 income years.

IR is likely to use the information to monitor the extent to which income is being taxed to trusts at 33 percent, that would have been taxed at 39 percent if derived by individuals. That information could then be used as a basis for the Government to either increase the trust tax rate or increase the extent that beneficiary distributions are taxed to individuals.

The information could also be used by IR to specifically check other areas of compliance. For example:

- Imputation streaming rules require dividends received by a trust that are then distributed to a trust's beneficiaries to be spread proportionately across those beneficiaries, otherwise imputation credits may be forfeited.
- Taxable income can be triggered if a trust receives the benefit of a debt forgiveness and a subsequent distribution is made to a corporate beneficiary.
- Application of the land taxing rules can depend on whether parties are associated. The level of disclosure will enable IR to readily determine who a trust is associated to.

As time passes and the amount of information held by IR increases, it could proactively identify errors in a trust's tax position. Especially if a trust has moved from one accountant to another and IR has a clearer picture of past transactions than the new accountant has.



## Accountants and Advisors

Moore Markhams is working hard to ensure we have all the assistance our clients need in relation to their trusts or role as trustee. Should you have any questions or queries, we encourage you to get in touch.

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