

# The Trusts Act 2019: Charitable Trusts

Alan Knowsley Rainey Collins Lawyers — Copyright © 2020 RAINEY COLLINS LAWYERS. All Rights Reserved



## Introduction

- New Zealand's trust law is being updated and improved for the first time in more than 60 years.
- The Trusts Act 2019 was passed into law on 30 July 2019, but will come into effect on 30 January 2021 (18 months after enactment-being the transitional period).
- The new law will introduce some significant changes which will have implications for all trusts in New Zealand.
- If you are a trustee of any kind of Trust, it is important to know about the changes now to ensure you comply.

## Key features

- Mandatory duties for trustees.
- Trustees will be required to disclose information about the trust to all beneficiaries (excludes Charitable Trusts).
- More flexible trustee powers, so that trustees can manage and invest trust property appropriately.
- Provisions to support cost-effective establishment and administration of trusts, including options for removing and appointing trustees.
- Certain trust disputes may be referred to alternative dispute resolution such as arbitration or mediation.
- Applies to express trusts, and any trusts created by legislation (eg Charitable Trusts).

## Five Mandatory Trustee Duties

The new law will require trustees to:

- Know the terms of the trust;
- Act in accordance with the terms of the trust;
- Act honestly and in good faith;
- Act for the benefit of beneficiaries or to further the permitted purpose of the trust; and
- Exercise their powers for a proper purpose.

## Default Trustee Duties

Unless specifically excluded by the terms of a trust deed, the new law will require trustees to:

- Exercise care and skill that is reasonable in the circumstances;
- Invest prudently;
- Not exercise power for their own benefit;
- Consider exercise of power (ie when or whether to exercise power);
- Not bind or commit trustees to future exercise of discretion;
- Avoid conflict of interest of the trustee vs the beneficiaries;
- Be impartial;
- Not to profit from trusteeship or receive a reward; and
- Act unanimously (ie all trustees agree on decisions).

It will be important to record in your trust deed if you are contracting out of any of these duties.

## Keeping of documents

- The new law specifies core documents that trustees must keep, including trust deed, variation documents, records of trust property and trustee decision making, accounting records and financial statements, trust order and documents appointing, removing and discharging trustees.
- Each trustee is required to hold the trust deed and any variations and needs to be satisfied that at least 1 of the other trustees holds the other documents.

- Trustees will need to hold onto these documents throughout their trusteeship (as far as is reasonable), and then ensure that at least 1 trustee has these documents when they retire or stand down.

## Providing information to Beneficiaries

- Many trusts will have to provide information to beneficiaries but those disclosure requirements do not apply to charitable trusts.

## Removing and appointing Trustees

- The Act provides trustees with clear guidance on appointing and removing trustees.
- Who can remove and appoint trustees –person named in Deed, or remaining trustees, or person holding EPOA for appointor.
- Who may be appointed as a trustee –exclusions: a person under age 18, an undischarged bankrupt, a person without capacity, an insolvent company.
- How a trustee retires –discharged by the person with the power to remove trustees.
- If a trustee dies, the surviving trustees exercise functions until new trustee appointed. If no such surviving trustee, then personal representative of the last surviving trustee is to act.
- How a trustee is removed or replaced:
- Either pursuant to the trust deed; or
- Compulsory removal -when a trustee loses the capacity to perform the functions of a trustee (that is, becomes subject to an order under the Protection of Personal and Property Rights Act 1988); or
- Optional removal -when it is desirable for the proper execution of the trust and the trustee repeatedly fails to act as trustee, becomes bankrupt or insolvent, or is no longer suitable because of the trustee's conduct or circumstances (eg convicted of a dishonesty offence, the trustee cannot be located, is prohibited from being a director); or
- Must give notice to remove trustee;
- Trustee can apply for an order preventing removal; and
- Change of trustee still needs to be documented with Land Information New Zealand if land involved (for private trusts).

## Alternative dispute resolution

- Trustees will be able to refer specific trust matters to an Alternative Dispute Resolution ("ADR") process such as mediation or arbitration to facilitate resolution. The trust matters able to be dealt with through ADR will be:
- A trust-related dispute between a trustee and a beneficiary, a trustee and a third party, or between two or more trustees, that may give rise to a legal proceeding; or
- A legal proceeding brought by or against a trustee in relation to the trust.

## What does this mean for your Trust? And key conclusions...

- Trustees should make sure that they are aware of the changes, and start planning for them now and in particular whether you and your fellow trustees will be able to comply with the new duties (if not, consider changing your trustees);
- The standard Lions Club Charitable Trust Deed is worded such that no changes are required to the standard Lions Clubs Charitable Trust Deed but if you are setting up a new Charitable Trust then some changes of wording may be considered. Contact me to discuss your particular situation.