

Trusts Act 2019

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I INTRODUCTION

The Trusts Act 2019 (the Act) received the Royal Assent on 30 July 2019 but most of its provisions will not come into force until 30 January 2021.¹ It replaces the Trustee Act 1956 and the Perpetuities Act 1964 and their amendments.² The Hon Stephen Kós described the Act as a “radical shift” in New Zealand trust law because it is the first clear divergence from English trust law, upon which the Trustee Act and Perpetuities Act were based.³

The law relating to trusts affects a significant number of people in New Zealand, there being between 300,000 and 500,000 trusts in the country.⁴ The Act aims to make the law relating to trusts more accessible for trustees and beneficiaries by making it easier to understand and apply without assistance from the courts.⁵

This note discusses the reform process and the Act’s key changes. Part II explains why change was needed. Part III discusses the key changes introduced by the Act — in particular, the changes it makes in relation to trustees’ duties and beneficiaries’ rights. Part IV examines potential issues. The note concludes that though there may be an initial increase in litigation, the Act will ultimately make trusts easier and cheaper to administer.

II THE BACKGROUND OF THE ACT

From 2009 to 2013, the Law Commission reviewed the Trustee Act and New Zealand trust law more generally. The Commission’s previous report in 2002 on problems in trust law⁶ led to the Trustee Amendment Bill 2007.⁷ However, the select committee for the Bill recognised that problems with trust law remained despite the Bill and called for a more comprehensive review.⁸

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1 Trusts Act 2019, s 2.

2 Section 162.

3 Stephen Kós “A Short History of the Trust” (paper presented to Law Society Trusts Conference, Auckland, June 2019) at 11 and 14.

4 Law Commission *Review of the Law of Trusts: A Trusts Act for New Zealand* (NZLC R130, 2013) at [2.3].

5 Trusts Act, ss 3 and 4.

6 Law Commission *Some Problems in the Law of Trusts* (NZLC R79, 2002).

7 Trustee Amendment Bill 2007 (144).

8 Trustee Amendment Bill 2007 (144-2) (select committee report) at 3–4.

In its final report, the Law Commission found that the Trustee Act was inaccessible and needed modernisation.⁹ The default provisions of the Trustee Act no longer reflected good practice and there was confusion about trustees' duties and beneficiaries' rights.¹⁰

For these reasons, the Commission concluded that New Zealand needed to enact new legislation to “incorporate, modernise and make more efficacious” the Trustee Act.¹¹ The Trustee Act had to be read alongside case law, which was difficult, even for lawyers, as a considerable amount of New Zealand's trust law is found in cases. For example, the Trustee Act did not set out a general duty of care or beneficiaries' rights; these were only found in case law.

The Government accepted the Law Commission's overarching recommendation for a new Trusts Act. The then Justice Minister, Amy Adams, established a Trusts Reference Group and an exposure draft Trusts Bill was issued for public consultation in 2016.¹² In 2017 Andrew Little (who succeeded Adams as Minister) introduced a Bill reflecting the Commission's final recommendations and feedback from public consultation,¹³ and it received the Royal assent on 30 July 2019.

III KEY FEATURES OF THE ACT

The Act makes two overarching changes to existing law. First, its language was updated in accordance with Parliament's goal for trusts legislation to be easy to understand.¹⁴ Secondly, it introduces substantive changes, with the most notable ones being the introduction of mandatory and default trustees' duties and prescriptive provisions regarding beneficiaries' right to information. These are discussed in detail further on. Other changes include the following:

- (1) The common law rule against perpetuities is abolished and a new 125-year maximum term for trusts is introduced.¹⁵
- (2) Restrictions are placed on trustee exemption and indemnity clauses, including that a trust's terms must not limit or exclude a trustee's liability for any breach of trust arising from the trustee's gross negligence.¹⁶ The Act also sets out factors the court must consider when determining whether a trustee has been grossly negligent.¹⁷

9 Law Commission, above n 4, at iv.

10 At iv.

11 At iv.

12 Ministry of Justice Draft for Consultation: Trusts Bill (2017).

13 Trusts Bill 2017 (290-1) at 2.

14 See (5 December 2017) 726 NZPD 707.

15 Section 16.

16 Sections 40–44.

17 Section 44.

- (3) An obligation is placed on trustees to keep certain core documents for the trust's duration.¹⁸
- (4) There are new rules regarding trustee appointment, retirement, removal and replacement.¹⁹ These rules are clearer than those in the Trustee Act and facilitate trustee replacement and retirement without the need for assistance from the court.
- (5) The Family Court is given jurisdiction to make orders and directions under the Act if it considers them necessary to protect or preserve any property or interest until the proceeding before it can be properly resolved or to give proper effect to the proceeding's determination.²⁰
- (6) Provision is made for alternative dispute resolution for issues relating to trusts, including arbitration.²¹

Trustees' Duties

Sections 22 to 38 of the Act codify mandatory and default duties of trustees previously existing at common law. This is a key way in which the Act makes trust law easier to understand and it should assist trustees in complying with their duties. It reflects the reality that many trusts in New Zealand are run without the assistance of lawyers or other professionals.

Trustees' mandatory duties are found in ss 22 to 27. They cannot be excluded or modified by the terms of the trust deed and must be performed by all trustees of all express trusts. They provide that all trustees must:

- (a) know the terms of the trust;
- (b) act in accordance with the terms of the trust;
- (c) act honestly and in good faith;
- (d) hold or deal with trust property and generally act for the beneficiaries' benefit in accordance with the trust's terms, or in the case of a trust for a permitted purpose to further that purpose in accordance with the trust's terms; and
- (e) exercise trustee powers for a proper purpose.

The default duties are set out in ss 29 to 38. They are:

- (a) a general duty of care;
- (b) a duty to invest prudently;
- (c) a duty not to exercise a trustee power directly or indirectly for the trustee's own benefit;
- (d) a duty to consider actively and regularly whether the trustee should be exercising trustee powers;

18 Sections 45–48.

19 Sections 92–115.

20 Section 141.

21 Sections 142–148.

- (e) a duty not to fetter or commit trustees to a future exercise or non-exercise of discretion;
- (f) a duty to avoid conflicts of interest;
- (g) a duty of impartiality;
- (h) a duty not to make a profit;
- (i) a duty to act for no reward; and
- (j) a duty to act unanimously.

These default duties are not mandatory and can be modified by the trust deed's terms.²² Since the Act will apply to all express trusts from 30 January 2021,²³ the default duties will apply to all trustees from that date unless the trust deed excludes or modifies them. If trustees or settlors want to modify their trust deed so as to modify or exclude the default duties, they must do so before that date (although a trust deed can only be modified where that is permitted by its terms).

Section 39 applies to persons paid to advise on the creation of a trust or to draft a trust deed who recommend or cause the "initial settlor" to modify or exclude any default duties.²⁴ Such persons must take reasonable steps to ensure the initial settlor is aware of the meaning and effect of modifying or excluding those duties.²⁵ That necessarily entails that the person take reasonable steps to ensure the settlor understands the meaning and effect of the duties themselves and their choice to modify or exclude any of them. Section 39(4) provides that the "initial settlor" is the settlor who creates the trust or causes it to be created. This definition is formulated to include the true settlor who causes the trust to be created, even if they are not named in the trust deed.²⁶

Beneficiaries' Right to Information

Provisions relating to beneficiaries' right to information are found in pt 3, subpt 3 of the Act. Section 50 provides that ss 51 to 55 aim to ensure that beneficiaries have sufficient information to monitor the trustees' compliance with the trust deed and to enable the terms of the trust to be enforced against the trustees.²⁷

1 *The Old Law*

The extent of the trustee's duty to disclose information to beneficiaries is controversial.²⁸ For some time it was unclear whether beneficiaries had a right to trust documents and information relating to the trust, and then to what

22 Section 28.

23 Section 2.

24 Section 39(1).

25 Section 39(2).

26 See for example *Ash v Singh* [2017] NZHC 2909, (2017) NZTR 27-034 at [29].

27 Section 50(1).

28 Andrew Butler (ed) *Equity and Trusts in New Zealand* (2nd ed, Thomson Reuters, Wellington, 2009) at [5.3.1(12)].

extent.²⁹ The Trustee Act did not address this issue and the common law position was that there was no absolute right to trust documents. The Privy Council's judgment in *Schmidt v Rosewood Trust* held that the right to disclosure of trust documents was best understood as an aspect of the court's inherent jurisdiction to supervise trust administration.³⁰ In the High Court case of *Foreman v Kingstone*, Potter J held that while beneficiaries were entitled to receive trust information enabling them to ensure trustee accountability, this was subject to the court's discretion in its supervisory jurisdiction.³¹ In *Erceg v Erceg*, the Court of Appeal reiterated that beneficiaries did not have an absolute right to disclosure of trust documents.³²

Prior to the Act, *Erceg* was New Zealand's leading authority on this issue. On appeal, the Supreme Court emphasised that the starting point on information disclosure was "the obligation of a trustee to administer the trust in accordance with the trust deed and the duty to account to beneficiaries."³³ Whether a trustee had to disclose information under the Trustee Act thus depended on whether this was necessary for a beneficiary to assess whether the trustee had acted in accordance with the trust deed.³⁴ The Supreme Court recognised that the appropriateness of trustees' disclosure of trust documents depended on the particular trust and the circumstances surrounding the beneficiary's request.³⁵ There was no blanket rule determining when information was to be disclosed, and no presumption for or against disclosure. Rather, each request for information had to be assessed against a list of factors, including the context of the request, the nature of the beneficiary's interests and any issues of personal or commercial confidentiality.³⁶ O'Regan J stated:³⁷

... the strongest case for disclosure would be a case involving a request from a close beneficiary for disclosure of the trust deed and the trust accounts, which would be the minimum needed to scrutinise the trustees' actions in order to hold them to account.

The Supreme Court also held, following *Schmidt*, that its inherent jurisdiction to require disclosure of documents was not contingent on the beneficiary's having a proprietary interest: the jurisdiction extended to discretionary beneficiaries as well as final beneficiaries.³⁸

29 At [5.3.1(12)].

30 *Schmidt v Rosewood Trust* [2003] UKPC 26, [2003] 2 AC 709 at [51].

31 *Foreman v Kingstone* [2004] 1 NZLR 841 (HC) at [97]–[98].

32 *Erceg v Erceg* [2016] NZCA 7, [2016] 2 NZLR 622 at [27]–[28].

33 *Erceg v Erceg* [2017] NZSC 28, [2017] 1 NZLR 320 at [51].

34 At [51].

35 See Sally Morris and Georgia Angus "Supreme Court's guide for disclosure of trust documents" (2017) 906 LawTalk 32 at 33.

36 *Erceg*, above n 33, at [56].

37 At [60].

38 At [20].

2 The Act

The Act departs from the Supreme Court's approach in *Erceg*. The Law Commission recommended a change as the New Zealand position was uncertain and caused problems in practice for trustees trying to determine the extent of their duty.³⁹ The Commission suggested that the law should provide clearer guidance but should remain abstract rather than introducing fixed rules.⁴⁰

For the most part following the Commission's recommendations, the Act creates two legal presumptions in favour of disclosure. The first is that the trustee must notify all beneficiaries, including objects of a discretionary trust, of certain basic trust information. The second is that the trustee must provide trust information to a beneficiary who requests it. These presumptions are set out in ss 51 and 52 respectively, the relevant parts of which are as follows:

51 Presumption that trustee must notify basic trust information

- (1) There is a presumption that a trustee must make available to every beneficiary or representative of a beneficiary the basic trust information set out in subsection (3).

...

- (3) The basic trust information is—
- (a) the fact that a person is a beneficiary of the trust; and
 - (b) the name and contact details of the trustee; and
 - (c) the occurrence of, and details of, each appointment, removal, and retirement of a trustee as it occurs; and
 - (d) the right of the beneficiary to request a copy of the terms of the trust or trust information.

52 Presumption that trustee must give information on request

- (1) There is a presumption that a trustee must within a reasonable period of time give a beneficiary or the representative of a beneficiary the trust information that person has requested.

These presumptions do not apply in all circumstances. Before disclosing information, the trustee must consider a prescribed list of factors in deciding whether the presumption applies.⁴¹ These factors mostly replicate those from *Erceg*. If after taking them into account the trustee reasonably considers that the information should not be disclosed, they may decide to withhold some or all of the basic trust information⁴² or to refuse a request for trust information.⁴³

In some circumstances, such as where there are a large number of beneficiaries, it will likely be reasonable for the trustee not to disclose information.⁴⁴ If no beneficiary has any trust information due to the trustee's

39 Law Commission, above n 4, at [5.47].

40 At [5.48].

41 Trusts Act, s 53.

42 Section 51(2).

43 Section 52(2).

44 Law Commission, above n 4, at [5.53].

decision to withhold it under s 51(2)(b) or to refuse an information request under s 52(2), the trustee must apply to the court for directions.⁴⁵

The key difference between the Act and the common law position is that the new presumptions for disclosure under the Act give beneficiaries a greater entitlement to trust documents. As the presumptions may be rebutted, the Act does not create an absolute right, but the extent of beneficiaries' right to trust information is much clearer and provides greater guidance to both trustees and beneficiaries.

IV POTENTIAL ISSUES WITH THE ACT

The most immediate issue arising from the Act's introduction is that settlors and trustees may wish to modify the terms of their trust deeds before it comes into force on 30 January 2021. For example, they may want to modify the terms of the trust so that it lasts for the longer period of 125 years or to modify or remove default duties. There could also be an initial increase in litigation and applications to the High Court for directions once the Act comes into force as settlors, trustees, beneficiaries and advisers familiarise themselves with its provisions.

Section 5(8) of the Act provides that it is not an exhaustive code and it is to exist alongside the rules of common law and equity except where they are inconsistent with the Act. Such potential inconsistencies may also lead to an increase in applications to the High Court for directions regarding the Act's interpretation once it comes into force.

Another potential issue with the administration of trusts under the Act is whether the provisions on information disclosure go beyond what is necessary to enable beneficiaries to hold trustees to account. It is widely thought that the new presumptions in favour of disclosure go too far.⁴⁶ For example, the concept of a "qualifying beneficiary"⁴⁷ is not found in the Act. This may result in trustees disclosing information to all beneficiaries regardless of their proximity to the trust or of the likelihood they will receive a distribution, in order to avoid breaching their trustees' duties.⁴⁸ The New Zealand Law Society submitted this will likely cause difficulties for family relations, with more remote beneficiaries being provided with trust information.⁴⁹ The increase in disclosure may also be costly and impractical

45 Trusts Act, s 54.

46 For discussion on this, see New Zealand Law Society "Submission to the Justice and Electoral Committee on the Trusts Bill 2017" at [28]–[41]; and Law Commission *Review of the Law of Trusts: Preferred Approach* (NZLC IP31, 2012) at ch 3.

47 This concept was included in the exposure draft Bill and defined as meaning a beneficiary who has a reasonable likelihood of receiving a distribution: Ministry of Justice, above n 12, cl 41 definition of "qualifying beneficiary".

48 New Zealand Law Society, above n 46, at [37].

49 At [37].

for some trusts.⁵⁰ Only time will tell whether Parliament has struck the appropriate balance.

V CONCLUSION

It is uncontroversial that New Zealand's trust law needed to be updated so as to make it accessible to the public and enable trusts to be administered easily and cost-effectively. Although the Act may cause an initial increase in litigation and some redrafting of trust deeds, it significantly improves upon the current law. After an initial adjustment period, it will make it easier and less expensive for people to manage their trusts without professional assistance.

50 At [37].