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WHITE PAPER

The Great New Zealand Trust Crackdown

The Trusts Act 2019 received Royal Assent on 30 July 2019 and will be in full effect on 30 January 2021 following an 18-month transition period.

The purpose of the Trusts Act is to restate and reform New Zealand trust law by:

- setting out the core principles of the law relating to express trusts
- providing for default administrative rules for express trusts
- providing for mechanisms to resolve trust-related disputes, and
- making the law of trusts more accessible.

The most notable changes introduced by the Trusts Act are:

- a definition of trust (referred to in the Trusts Act as an "express trust")
- a new maximum duration of 125 years
- a new presumption that every beneficiary of a trust will be given basic trust information
- the introduction of new mandatory and default duties
- adviser obligations
- trustee obligations to retain core documents, and
- new streamlined trustee appointment and removal provisions.

Other important changes include a statutory form of the rule, known as the rule in Saunders v Vautier; new alternative dispute resolution options and the new role of special trust adviser in place of the current role of advisory trustee.

The maximum duration of a trust has been extended from 80 years to 125.

Definition of trust

The new statutory definition of express trusts is a restatement of what has been referred to as the "three certainties" and provides that a trust may be created by a person (the settlor) who indicates an intention to create a trust, identifies the beneficiaries and identifies the trust property.

Importantly, the Trusts Act now confirms that a trust created in accordance with the Trusts Act does not commence until the trustee holds trust property. This means that trustees of any existing trusts should use the transition period to ensure that the initial trust settlement is under the control of the trustees and referred to in trust accounts.

THREE CERTAINTIES

1. Indicates an intention to create a trust
2. Identifies the beneficiaries
3. Identifies the trust property

Maximum duration

The maximum duration of a trust has been extended from 80 years to 125. However, the terms of a trust may specify or imply a shorter duration.

The new maximum duration will not apply automatically to existing trusts and will apply only:

"if the terms of a trust do not specify or imply a duration or a mechanism for or means of determining the date on which the trust property will be finally distributed."

Importantly, as is the case now with perpetuity periods, the maximum duration cannot be extended through resettlements.

The maximum duration will not apply to charitable trusts, which can still last indefinitely.

Disclosure

The Trusts Act introduces a new presumption that:

- trustees will give basic trust information to every beneficiary, and
- other information will be made available on request.

This presumption changes the current position, which is that information is provided at the trustees' discretion to a positive obligation. See the Supreme Court and Court of Appeal decisions in *Erceg v Erceg*,[1] which have confirmed that no beneficiary has an entitlement as of right to disclosure of trust documents.

This new presumption regarding disclosure may be considered a large step forward in support of beneficiary rights and is grounded in the view that beneficiaries are required to have knowledge of trusts and trust information in order to enforce the due and proper administration of trusts.

Although the motives for the law change are in line with increasing financial transparency globally, the new presumption is of concern to many advisers and trustees. This is because it will require many settlors, trustees and their advisers to re-visit the core facts regarding their understanding of the trustee–beneficiary relationship and how this can be managed and protected under what, for many trusts, will be a significant burden of additional scrutiny. For some trusts, greater disclosure will enable better long-term relationships between trustees and beneficiaries as information and transparency positively colour the roles and relationships. However, for other trusts, trustees may struggle to identify how to meet their obligations over time and how to address the increase in beneficiary communications and requests.

The Erceg case will remain relevant and will still provide useful guidance on what information might be provided in addition to the basic trust information, and how trustees might undertake the exercise of applying the factors. This has been confirmed in the recent decision in *Jacomb v Jacomb*,[2] where the High Court noted at [12] that:

"Provisions have now been enacted which regulate the issue of disclosure in the Trusts Act 2019. … Under s 52 there is a presumption that trustees must give information on request, subject to the considerations listed in s 53. As a consequence of the s 53 factors a decision can be made to refuse to disclose the information under s 52(2). Under s 54(2) the trustee must then apply to the Court for directions as to whether the decision not to disclose is reasonable. Whilst that involves a different procedural framework for the relevant questions, the factors listed in s 53 are similar to those set out by the Supreme Court. I doubt that any difference between the criteria will be regarded as determinative. For that reason it seems to me that it is likely that the decision of the Supreme Court in Erceg v Erceg, and of the Court of Appeal in ***Addleman v Lambie Trustee*** *are likely to be highly relevant to the application of the statutory provisions when they come into effect".*

THE NEW PRESUMPTION

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Mandatory duties

Section 22 of the Trusts Act provides that there are mandatory trustee duties in ss 23 to 27 that cannot be avoided or contracted out of. These are duties to:

- know the terms of the trust
- act in accordance with the terms of the trust
- act honestly and in good faith
- act for benefit of beneficiaries or to further permitted purpose of trust
- exercise powers for proper purposes.

The scope and rationale of the mandatory duties are self-explanatory and go in large part to the core essence of the trust relationship. Perhaps it is not surprising that these were largely the very duties that the court considered absent or able to be negated in *Clayton v Clayton (Vaughan Road Property Trust)*.[3]

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Default duties

In addition to the five mandatory duties, a number of default duties are outlined in the Trusts Act, which must be performed by trustees unless modified or excluded by the trust deed. These are duties to:

- exert care and skill
- invest prudently
- not exercise powers for the trustee's benefit
- regularly and actively consider exercise of power
- not bind the trustee to future exercise of discretion
- avoid conflict
- act impartially
- not profit from the trusteeship
- act for no reward
- act unanimously.

Care will be required to consider when and how the default duties should be modified and how the terms of current trusts will be interpreted by reference to the mandatory and default duties.

Core trust documents

The Trusts Act also sets out core trust documents that must be held and who must hold these. The core trust documents are:

(a) the trust deed and any other document that contains terms of the Trust

(b) any variations made to the trust deed

(c) records of the Trust property that identify the assets, liabilities, income, and expenses of the Trust and that are appropriate to the value and complexity of the Trust property

(d) any records of Trustee decisions made during the Trustee's trusteeship

(e) any written contracts entered into during that Trustee's trusteeship

(f) any accounting records and financial statements prepared during that Trustee's trusteeship

(g) documents of appointment, removal, and discharge of Trustees (including any court orders appointing or removing Trustees)

(h) any letter or memorandum of wishes from the Settlors

(i) any other documents necessary for the administration of the Trust, and

(j) any documents referred to in paragraphs (a) to (i) that were kept by a former Trustee during that person's trusteeship and passed on to the current Trustee or Trustees.

At least one trustee must hold the core trust documents and all trustees must hold the trust deed and any variations of trust. Moving forward consideration will be needed regarding the identification, retention, storage, transfer on change of trustee and accessibility of core documents. The trustee responsible for retention of the core documents must be clearly determined.

Appointment and removal of trustees

The Trust Act provides for a simpler mechanism for the vesting of trust assets where existing trustees are replaced, or new trustees appointed.

When a decision is made to remove a trustee under s 103, the trustee must be given notice of the decision (see s 106). With some specified exceptions, if a trustee receives a notice made under s 106, the notice is "the document of removal" for the purposes of s 116 (divesting and vesting of trust property). The trustee's removal will be effective 20 working days after the trustee receives the notice, unless the trustee makes an application to prevent removal (s 109) within 20 working days of receipt of the decision to remove the trustee.

Section 118 introduces new requirements on a retiring, continuing or new trustee to assist with the transfer of trust property. As a practical matter, LINZ is expected to provide some guidance on the form and content of removal notices and statutory declarations for the purposes of s 117.

Alternative Dispute Resolution

A new alternative dispute resolution (ADR) process is outlined in ss 143 to 148 that will apply when there is no provision in the trust deed that requires or empowers trustees to refer a matter to ADR.

The ADR provisions provide (in relevant circumstances) an alternative to court for the resolution of trust disputes and will allow trustees to pursue ADR to resolve internal matters or third party (external) matters. Where arbitration is the ADR process, the terms of the Arbitration Act 1996 will apply.

Rule in *Saunders v Vautier*

The rule in Saunders v Vautier allows the final beneficiaries of a trust to bring the trust to an end provided that all of the beneficiaries are in agreement and are of age and full mental capacity.

In New Zealand, the rule is described in *Garrow and Kelly Law of Trusts and Trustees*[4] as follows:

> "If a sole beneficiary has a vested interest in the trust property and has full legal capacity, that beneficiary may put an end to the trust by directing the trustees to transfer the trust property to that beneficiary, despite any directions to the contrary in the trust document. The same rule applies where there is more than one beneficiary. It applies even if they are not all entitled to benefit immediately but one after another. Provided that they are unanimous in wishing to end the trust, they may do so".

The parameters of the rule in *Saunders v Vautier* were considered in *Summerlee v Pool,*[5] which relates to a family dispute regarding the final distribution of a will trust. In that case the majority of the final beneficiaries (who gave notice as to the termination of the Trust) were able to utilise the rule to remove the incumbent trustee and appoint Perpetual Guardian as a new trustee. The scope of the rule in *Saunders v Vautier* has continued to develop over time, which can make the barriers to its application unclear.

Section 121 of the Trusts Act codifies the rule in *Sanders v Vautier*, with some enlargement in s 125 to provide for the application of the rule when all of the final beneficiaries are not in agreement, as was the case in *Gough v Strahl,*[6] where only one of the final beneficiaries of a trust that owned valuable shares wished to call up her share in the trust.

ADVISER OBLIGATIONS

The terms of a trust must not:

- limit or exclude a trustee's liability for any breach of trust arising from the trustee's dishonesty, wilful misconduct, or gross negligence (s 40)
- give a trustee any indemnity against the trust property for liability for any breach of trust arising from the trustee's dishonesty, wilful misconduct, or gross negligence (s 41).

Prior to the introduction of the Trusts Act, gross negligence has not typically been included in limitation of liability and indemnity clauses. Importantly, once the Trusts Act comes into full force and effect, any clause in a trust deed will be invalid to the extent that it purports to do either of these.

Also, an adviser who is paid to advise on the creation of a trust or prepares the terms of a trust must alert the settlor to liability exclusion or indemnity clauses if the adviser recommends that the settlor should, or causes the settlor to, include a liability exclusion or indemnity clause in the terms of the trust.

The Trusts Act also requires advisers to take reasonable steps to ensure that the settlor is aware of the meaning and effect of the clause before the creation of the trust.

Failure to comply with the adviser obligations does not of itself invalidate the clauses but does mean that the exclusion or indemnity clause will have no effect with respect to an adviser who is or becomes a trustee of the trust.

For these purposes, liability exclusion or indemnity clause means a clause that has the effect of—

- limiting or excluding the liability of a trustee for breach of trust, or
- granting a trustee an indemnity against the trust property for the trustee's liability for breach of trust.

The prescriptive nature and regulatory style of the clauses around adviser obligations need to be considered, including how the required advice is drafted and recorded, whether this should form part of the terms of the trust, and how such requirements will be monitored. Additionally, how such clauses and requirements are reflected in third party documents (such as bank documents) may require careful consideration as to when an adviser can or should act as a trustee.

Special Trust Adviser

The Trustee Act 1956 provided for the appointment of "advisory trustees" who do not hold property, have no formal decision-making powers but are appointed to give advice to the trustees of a trust.

Section 74 of the Trusts Act replaces the position of advisory trustee with "special trust adviser". Drafters of trust deeds may wish to start considering how to reflect the fact that nomenclature such as Advisory Trustee and Appointor will be amended by the Trusts Act.

1 *[2016] NZCA 7; (2016) 4 NZTR ¶26-001, [2017] NZSC 28; (2017) 4 NZTR ¶27-003*
2 *[2020] NZHC 1764; (2020) 5 NZTR ¶30-010*
3 *[2016] NZSC 29; (2016) 4 NZTR ¶26-002*
4 *Greg Kelly, Chris Kelly Garrow and Kelly Law of Trusts and Trustees (7th edition, LexisNexis NZ Limited, 2013)*
5 *[2019] NZHC 387*
6 *[2013] NZHC 3184; (2013) 3 NZTR ¶23-019*

SUMMARY

The Trusts Act 2019 was almost 20 years in the making and reflects a changing social paradigm regarding privacy and secrecy. However, when viewed objectively, the new language and the drafting reflect the premise behind the Trusts Act, which is to make trust law more accessible and to promote the proper management of trusts for the benefit of the beneficiaries.