



It's official

The new Trusts Act 2019

The long-awaited Trusts Bill has now received Royal Assent (30 July 2019), meaning the Trusts Act 2019 will replace the

Trustee Act 1956 and the Perpetuities Act 1964. This will make trust law more accessible and clarify and simplify core trust principles and trustee obligations. Overall, this is good news given the significant number of trusts in use in New Zealand (estimated to be between 300,000 and 500,000).



STORY

Nicola Hankinson

National Technical Manager

Why do we have a new Act?

The law governing trusts in New Zealand has developed over a long period, with a significant amount of case law being applied through the court system to fill the gaps left between the Trustee Act and the Perpetuities Act. The Trusts Act codifies current practice, and modernises trusts law, with the intention of making the law more understandable and helping to clarify the legal rights and obligations in relation to trusts.

What are the key changes?

The majority of key changes aim to address the perception that trusts weren't being properly administered or understood and that beneficiary rights weren't being adequately protected. One of the major changes introduced by the Act is the establishment of **mandatory and default trustee duties** (refer table).

Of these duties, we consider that the duty to avoid **conflict of interest** is likely to be the most difficult to adhere to in practice given that, independent trustees aside, there is generally a strong personal link between the trustees and beneficiaries of a trust resulting in an inherent conflict of interest.

The default duties can be modified, and we suggest that this is something trustees may want to consider during the transition period.

Another key change is the enhanced administration requirements intended to allow greater accessibility to trust records. Section 41 of the Act requires trustees to retain

MANDATORY DUTIES

- **Duty to know terms of the trust**
- **Duty to act in accordance with terms of the trust**
- **Duty to act honestly and in good faith**
- **Duty to act for the benefit of beneficiaries or to further permitted purpose of the trust**
- **A trustee must hold or deal with trust property and otherwise act for the benefit of the beneficiaries in accordance with the terms of the trust**
- **Duty to exercise powers for the proper purpose**

These duties cannot be delegated and may not be modified or excluded.

DEFAULT DUTIES

- **General duty of care**
- **Duty to invest prudently**
- **Duty not to exercise power for own benefit**
- **Duty to consider exercise of power**
- **Duty not to bind or commit trustees to future exercise of discretion**
- **Duty to avoid conflict of interest**
- **Duty of impartiality**
- **Duty not to profit**
- **Duty to act for no reward**
- **Duty to act unanimously**
- **Adviser must alert settlor to modification or exclusion of default duty**

“The expectations and risk of an independent trustee are nowadays akin to that of an independent director. Trustees should be doing things like championing good governance and procedures at the very least (e.g. organising regular trustee meetings, ensuring thorough decision making and minute taking and keeping good trust records). If your independent trustee is not perceived to be adding any value by being there, it’s definitely worth looking at what other options there are”.

**KAISON CHANG, DIRECTOR BUSINESS ADVISORY SERVICES,
BAKER TILLY STAPLES RODWAY AUCKLAND**

the **core documents** relating to the trust. This includes the trust deed, any variations, records of the trust property, accounting records and financial statements prepared during the trusteeship, written contracts that have been entered into, letters or memorandum of wishes from the settlor, documents of appointment, removal and discharge of trustees and any documents provided by a former trustee.

If you have a number of trusts, as many New Zealanders do, keeping track of all these documents may be difficult, and we anticipate that more New Zealanders will look to engage professional trustees to assist with the increased administration requirements of a trust, or consider whether a trust structure best meets their requirements.

The Act also introduces a presumption that trustees notify **beneficiaries** of basic **trust information**, including the fact that they are a beneficiary of the trust and the right to request trust information. In the past, particularly in the case of family trusts, beneficiaries may not have been aware that they were set to

benefit from trust distributions. Trustees must now consider whether there are any factors that would allow them not to apply this presumption (such as whether the information is subject to personal or commercial confidentiality or whether the provision of information may impact on relationships within the family, in the case of family trusts). The consideration of whether the presumption applies should be made at regular intervals.

The changes relating to the provision of basic trust information to beneficiaries are intended to increase the degree of transparency through which trusts operates. However, there is likely to be a cost involved in complying with this requirement, and it would be wise to consider whether the benefits of operating through a trust structure outweigh the increased costs of doing so.

Another related cost is the cost of complying with the requirements of the Anti-Money Laundering and Countering Financing of Terrorism Act 2011 (the AML/CFT Act). Under section 22 (1) (a) (i) of the AML/CFT Act, reporting entities, such as law firms and

accounting practices, are required to conduct a higher level of due diligence (enhanced due diligence) for each trust they provide services in scope of the AML/CFT Act to. This includes verifying the source of wealth or source of funds. If you haven't already been asked to provide documentation to support the source of your trust's wealth and funds, the identity and address of trustees and settlors and other information that may be required under the AML/CFT Act then you should prepare yourself to do so.

Who is impacted?

The Act generally only applies to express trusts and certain other trusts described in section 5 of the Act. An express trust is one that is intentionally established by a settlor, as opposed to a trust that arises by operation of law. It is a relationship in which a settlor places property on trust to be held by one or more trustee for the benefit of beneficiaries or for a permitted purpose. As a fiduciary, each trustee owes duties and is accountable for how the trust property is managed and distributed.

Anyone who is involved with an express trust in New Zealand is likely to be impacted, particularly if you have not let your beneficiaries know they are beneficiaries, if you do not currently report to them on a regular basis and if you don't currently store all the trust documents in one place. The Act will more directly impact on trustees, settlors or beneficiaries of a trust, as well as those with business relationships with trusts. So, its impact is quite far-reaching.

When does it come into effect?

There is an 18 month transition period meaning the Act will not come into effect until 1 February 2021. This will come around sooner than you think, so we recommend you contact your normal business advisor to work through the implications for any trusts you are involved with.

nicola.hankinson@bakertillysr.nz