

## **The need to update your trust deed to comply with the Trusts Act 2019, simplifying trusts, and winding up trusts**

### **Why was the Trusts Act needed?**

The present Trustee Act 1956 is 64 years old.

The New Zealand Law Commission reviewed the Trustee Act and the law of trusts in 7 comprehensive papers from 2010 until their last paper in August 2013: Law Commission [Review of the Law of Trusts: A Trusts Act for New Zealand](#) (NZLC R130, 2013). The Law Commission is an independent, publicly funded, central advisory body established by statute to undertake the systematic review, reform and development of the law of New Zealand. Its purpose is to help achieve law that is just, principled, and accessible, and that reflects the heritage and aspirations of the peoples of New Zealand.

They recommended a modern Trusts Act to replace the outdated Trustee Act 1956. In their view:

“it has become outdated and convoluted. Not only are some provisions unnecessarily complex and difficult to understand, but some are simply unreadable. Even more importantly, the default settings that the Act establishes, such as the default powers of trustees, no longer line up with how trusts are administered in practice.”

### **The progress of the Trusts Act 2019**

The Bill was introduced to Parliament on 1 August 2017. There were substantial delays and changes as the Bill progressed. A Select Committee heard submissions and did not report to Parliament with its recommendations until 31 October 2018. The Bill passed its second reading on 9 May 2019, and was passed by Parliament on 24 July 2019. After that date the section numbers included in the Bill were renumbered before the Act received Royal Assent on 30 July 2019.

For detailed information on the Trusts Act 2019 see: <https://rossholmeslawyers.com/trusts-act-2019>

### **The benefits of the Trusts Act 2019**

1. The Law Commission’s aim, which was achieved in the Act, was:
  11. A new Trusts Act should set out the core characteristics of the trust, and the duties of trustees, thereby strengthening the common understanding of the institution of the trust and providing guidance to individual trustees who need to understand, without reference to large tomes or compendia of cases, what their basic obligations as trustees are.

2. It is now known what the mandatory duties of trustees are, and that will limit trust disputes. The mandatory duties of a trustee (sections 23 to 27) are to:
  - 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 otherwise act for the benefit of the beneficiaries, in accordance with the terms of the trust; and
  - e. exercise the trustee's powers for a proper purpose.
3. Under section 4 of the Trusts Act 2019 a trust should be administered in a way that is consistent with its terms and objectives. By detailed the Settlor's objectives in the trust deed those objectives must be followed. This considerably strengthens settlor's "security".
4. In the case of most family trusts the objectives will be to provide a home for and to look after the settlors (the Principal Beneficiaries) while they are alive, and to look after their loved ones (the Other Primary Beneficiaries) after they die, with the Secondary Beneficiaries to receive nothing unless all of the Primary Beneficiaries die.
5. When trust deeds are properly prepared in this manner the potential for disputes is minimised.
6. There is accordingly nothing in the Trusts Act that should cause you concern. The Act codifies, clarifies and improves the law of trusts, including the law concerning the disclosure of information to beneficiaries.
7. With our running instructions, and our latest minute keeping system, trusts are not more difficult or costly to administer than before. We will next year offer regular trust administration webinars and courses, annual 30 minute trust administration review meetings with our trust administration officer Kirsty Hourigan at our office or via Zoom if required (cost \$175.00 plus GST), and our trust administration officer Kirsty Hourigan is available to assist you as required.
8. Trust administration costs will only increase if you have a professional independent trustee.

## **Concerns that have been raised about the Trusts Act 2019**

### **Trustees face increased compliance requirements.**

That is incorrect. The Law Commission's aim, which was achieved in the Act, was:

- "10. It should provide simplified procedures to enable the business of trusts at minimal expense. It is also vital that the default provisions reflect modern realities and expectations rather than legal doctrines whose relevance, importance and justification have long since passed. Our

recommendations are aimed at achieving this while balancing the need to preserve the overall integrity of the settlor's intentions and the rights of the beneficiaries to benefit from the trust, as established by the settlor.

3. Beneficiaries now need to be told that they are a beneficiary of a trust and regularly provided with information about the trust without them needing to request it.

That is incorrect:

The present law:

1. There is no legal obligation to tell all beneficiaries that they are beneficiaries.

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The present law:

1. The decision as to whether a particular beneficiary is entitled to be notified that he or she is a beneficiary or is entitled to receive trust information on request is something that is within the court's inherent jurisdiction to supervise the administration of trusts: *Schmidt v Rosewood Trust* [2003] UKPC 26, [2003] 2 AC 709 at [66].
2. The current law does not provide clear guidance to trustees in particular circumstances as to how decisions regarding notifying beneficiaries and providing beneficiaries with information should be made.

The Trusts Act 2019:

1. The Act creates a presumption that 'basic trust information' must be made available to beneficiaries: see s 51. Basic trust information is that a person is a beneficiary of the trust, the name and contact details of the trustees, details of trustee changes as they occur and the beneficiary's right to request further trust information: see s 51.
2. There is also a presumption that if a beneficiary requests further trust information, including a copy of the trust deed, the trustee must provide that information within a reasonable period of time: see s 52.
3. However importantly, Trustees do have the ability to decide that either, or both presumptions, do not apply: see s 53. A list of factors is set out in the legislation and the trustees **MUST** consider these factors when deciding whether these apply in the circumstances: see s 53. Those factors include:
  - a. The nature and interests of the beneficiary (including whether the beneficiary is likely to receive trust property in the future).
  - b. The nature and interests of other beneficiaries.
  - c. **The intentions of the settlor when the trust was established.**
  - d. The age and circumstances of the beneficiary in question and the other beneficiaries of the trust.
  - e. The effect of giving the beneficiary the information

- f. The nature and context of any request for further information, and
  - g. Any other factor a trustee reasonably considers is relevant.
4. It is therefore vitally important that the settlors expectations and intentions as to the supply of such information are detailed in the trust deed. That is what we have done in our new trusts deeds.
  5. In the vast majority of trusts parents who set up trusts discuss their trusts with their children, and it very rare for disputes between parents and children about trusts to arise.
  6. Loved ones are not going to change their spots because of the Trusts Act 2019.
  7. In the rare cases where disputes arise the Trusts Act 2019 improves the current law by clarifying the law and making it mandatory for the settlors wishes as to disclosure of information to be considered.

## **The need to update your trust deed to comply with the Trusts Act 2019**

What you now have is a trust based estate and asset protection plan. See: <https://rossholmeslawyers.com/trustbased-estate-plan> which consists of:

1. A trust.
2. A memorandum of your wishes.
3. Enduring powers of attorney as to property and welfare.
4. Advance health care directives (including a living will).
5. Wills.
6. Funeral directives (coming soon online).
7. A directory of important contacts.
8. Other asset protection planning documents including:
  - a. Minute book and running Instructions.
  - b. A Deed of sale of assets and loan (and associated documents) selling assets from you to the Trust.
  - c. A Deed of Gift from you to the Trust gifting all or part of the loan the Trust owes you as a result of the sale of assets.

It works now unlike a will.

The Trusts Act 2019 comes into operation on 30 January 2021. It is essential that all trust deeds **prepared before August 2019** be varied and replaced with an updated trust deed. We have done the detailed study and carried out the necessary legal work so that you do not need to read the full details of what the Law Commission recommended in their final report, and why: *Law Commission Review of the Law of Trusts: A Trusts Act for New Zealand* (NZLC R130, 2013). Our Trust deeds were completely rewritten in August 2019 to incorporate trust law developments and the changes required by the Trusts Act 2019.

As well as making the changes required by the Trusts Act 2019, if some of your trust-based estate and asset protection plan documents no longer reflect your current wishes, you can update them at the same time.

## **New Bill requiring active trust's to file annual reports with Inland Revenue**

Specifically, the Bill's new s.59BA requires trustees to file an annual return including:

1. a profit-and-loss statement and a statement of financial position;
2. the amount and nature of each settlement to or distribution from the trust; and
3. the name, date of birth, jurisdiction of tax residence, tax file number and taxpayer identification number of each settlor and beneficiary, and each person having a power under the trust to appoint or dismiss a trustee, to add or remove a beneficiary, or to amend the trust deed.

Proposed section 59BAB(1)(c) makes it clear that trustees are only required to provide the requested information if it is within the knowledge, possession or control of the trustee. IRD cannot impose any taxation liability on beneficiaries who receive no income from the trust.

Non-active trusts are exempt from the new Bill.

The non-active trust declaration is form IR633. It should be completed when a complying trust has met all of the following conditions for an entire tax year:

1. It hasn't derived or been deemed to have derived any gross income from any source.
2. It has no deductions.
3. It has not been party to, or continued with, any transactions with assets of the trust that give rise to any of the following during the tax year:
  - a. Income or deemed income in any person's hand.
  - b. Fringe benefits to any employee or former employee.

S 43B of the Tax Administration Act 1994 provides that:

- (3) In determining whether a trust complies with the requirements of subsection (2), no account shall be taken of any—
- (a) reasonable fees paid to professional trustees to administer the trust; or
  - (b) bank charges or other minimal administration costs totalling not more than \$200 in the tax year; or
  - (c) interest earned on trust assets in any bank account during the tax year, to the extent to which the total interest does not exceed \$200; or
  - (d) insurance, rates, and other expenditure incidental to the occupation of a dwelling owned by the trust and incurred by the beneficiaries of the trust.

You will need:

1. The trust details and IRD number.
2. The balance date normally 31 March.

3. The tax year that the trust met the criteria for being a non-active trust.

After you finish, please print, sign, and post the completed form to the Inland Revenue address on the form.

Keep a copy of this form for your records.

If the trust has made a declaration and stops meeting any of the criteria deeming it non-active it must notify the Commissioner that it is no longer a non-active trust and is therefore required to file annual income tax.

### **Simplifying Trusts**

Trusts with limited investments should simplify matters by the Trust selling those investments to the settlors, with the purchase price being satisfied by a Deed of Loan from the Trust to the settlors upon demand and without interest (cost \$360.00). That Deed of Loan is needed as it is recognised by Work and Income as a liability. The Trust can then be made non-active and avoid the need to file tax returns and avoid the need for these new disclosure obligations.

### **The continuing asset protection benefits of trusts**

There has been a lot of misinformation circulating that Trusts no longer provide any asset protection benefits and should be wound up.

The continuing asset protection benefits of your trust are detailed in our *Guide to starting a trust based estate and protection asset plan or a will based estate plan* <https://www.rossholmeslawyers.com/s/Guide-to-trust-based-and-will-based-estate-and-asset-protection-plans.pdf>. That also sets out the current geriatric care means testing rules.

That Guide sets out clearly the differences between will based estate plans (which do not work until you die or lose your mental faculties), and trust based estate and asset protection plans which in most cases work from dat one.

Trusts have always been an insurance policy which protects your important assets against risks during your lifetime and ensures that your loved ones inherit your important assets safely in a manner in which others cannot take those assets from them.

Clients who set up their trusts many years ago have obtained significant asset protection benefits.

A client who sold her home to a trust in 1986 for \$180,000, which is now worth \$1.18 million was told incorrectly by friends that the Trust gave her no geriatric care means testing protection. The \$1 million increase in value is completely safe in the Trust. If the Trust had been wound up only \$236,336 would have been protected from geriatric care means testing.

A couple sold their Trust's home (which had been fully gifted), and on their lawyer's advice distributed the \$800,000 proceeds of sale to themselves to purchase a retirement village apartment. That incorrect advice has placed \$563,664 at risk for geriatric care means testing purposes.

### **Winding up trusts**

For detailed information on winding up trusts see: <https://rossholmeslawyers.com/winding-up-trusts> which details what is required. In addition to the resettlement of assets from the Trust to the beneficiaries you need a new will based estate plan consisting of:

1. Enduring powers of attorney as to property and welfare (which do not need changing).
2. Advance health care directives (including a living will) which replace the memorandum of wishes provisions.
3. Wills.
4. Funeral directives.
5. A directory of important contacts.

See: <https://rossholmeslawyers.com/willbased-estate-plan>

You need to carefully consider what you are achieving by winding up the trust, and the problems you may be creating with the bright line rules if your trust owns rental properties or a beach house.

For example if you just have a home or a home and a beach home in the Trust there is no administration. You pay all the outgoings. If you transfer them from the Trust to you, there is no administration. You pay all the outgoings.

The only difference is that you will be considerably wealthier. If you are a couple and one of you dies, a future partner could get half the home with the safety of the Trust removed.

If you have children and no trust, on your death their personal wealth will be increased and exposed to risk. If they inherit your trust, noone can take that wealth from them. They can carry on the trust, or transfer the assets to their own trust.