

Acting as Trustee

1. The following is a summary of trustee duties and obligations taken from the Trust Act 2019 ("the Act") which came into effect on 30 January 2021.
2. Trustee duties and information obligations can be found under Part 3 of the Act. There are two types of duties trustees are bound to; Mandatory duties, and Default duties.
3. The mandatory duties are:
 - (a) Duty to know the terms of the Trust Deed;
 - (b) Duty to act in accordance with the terms of the Trust Deed;
 - (c) Duty to act honestly and in good faith;
 - (d) Duty to act for the benefit of beneficiaries or to further permitted purposes of the Trust;
 - (e) Duty to exercise powers for a proper purpose.
4. The default duties, which can be modified by the Trust Deed, are:
 - (a) General duty of care;
 - (b) Duty to invest prudently;
 - (c) Duty not to exercise power for own benefit;
 - (d) Duty to consider exercise of power;
 - (e) Duty not to bind or commit trustees to future exercise of discretion;
 - (f) Duty to avoid conflict of interest;
 - (g) Duty of impartiality;
 - (h) Duty not to profit;
 - (i) Duty to act for no reward;
 - (j) Duty to act unanimously.
5. When forming the trust, the settlor must be alerted to any modification or exclusion of any default duties.
6. All Trustees must keep copies of certain Trust documents (those under 6 (a) and (b) below, and must be satisfied that at least one trustee holds all other core documents on their behalf so that those documents or copies of them will be made available to the other trustee or trustees on request. Core documents are:
 - (a) the Trust Deed or document that contains terms of the Trust;
 - (b) Any variations made to the Trust Deed or Trust;
 - (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 trustees' 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;
 - (h) Any letter or memorandum of wishes from the settlor;
 - (i) Any other documents necessary for the administration of the Trust;
 - (j) Any documents that were kept by a former trustee during that person's trusteeship and passed on to the current trustee.
7. A key duty of trustees is to ensure that appropriate beneficiaries receive basic Trust information so that the beneficiaries are able to enforce the terms of the Trust and the trustees' duties against the trustees.
8. Although there is a presumption that a trustee must make available to every beneficiary, or their representative, basic Trust information the presumption may be denied (rebutted) if the trustees consider that it should not apply. Section 53 of the Act sets out 13 factors the trustees must consider before deciding whether the presumption applies. If the trustee believes that the information should be given then the following basic Trust information, and possibly further information if permitted under (d) below, will be given:
 - (a) The fact that the person is a beneficiary of the Trust;
 - (b) The name and contact details of the trustees;
 - (c) The occurrence of and details of each appointment, removal and retirement of a trustee as it occurs;
 - (d) The right of the beneficiary to request a copy of the terms of the Trust and/or Trust information.

9. As noted under paragraph 8(d) above, beneficiaries are also entitled to request other information relating to the Trust. This might include the trust deed, or trust financial statements. Trust information does not include reasons for the trustees' decisions. Trustees must consider the factors under Section 53 before determining to release or withhold trust information.

Trustee liability

10. Trustees are personally liable for any expense or liability incurred by the trustee when acting as a trustee. Any trustee who is acting independently for a Trust should look to first obtain a limitation of liability or exemption in the Trust Deed. As referred to above, any limitation of liability or exemption clause must be drawn to the settlor's attention so that they may understand the meaning of the exemption or limitation of liability and agree to the same. Without this requirement being met the trustee will not be able to rely on any limitation of liability or exemption clause.
11. A trustee may be indemnified from trust property for a breach of trust if the beneficiaries agree. Section 82 of the Act sets out the conditions upon which the beneficiaries must satisfy before an indemnity can be given to a trustee. Any trustee whose breach of trust arises from the trustee's dishonesty or wilful misconduct cannot be indemnified.
12. A trustee's liability can be limited as between the trustee and the beneficiary by a clause to that effect in the Trust Deed.
13. To limit liability between trustee and a third party a limitation of liability clause must be inserted into all documents or agreements between the trustee and any third party. This will only apply if the trustee is an independent limited liability trustee.
14. No limit of liability or indemnity will apply where a trustee has acted fraudulently and/or dishonestly or in breach of trust i.e. not in compliance with the terms of the Trust Deed.
15. Liability can attract to trustees personally where the Trust is directly involved with matters under the Resource Management Act and under various Health and Safety acts and also with regards to tax i.e. unpaid tax.
16. If a Trust cannot discharge its debts the trustees may be called upon personally to do so.

Retirement of trustee

17. Should you no longer wish to act as trustee either the terms of the Trust Deed or the Act will provide the mechanism under which you can be retired or removed. Until you have been validly discharged as trustee your trustee duties, obligations and liabilities will remain in place.

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