

Record Keeping and Disclosure requirements

In our previous article, we introduced the Trusts Act 2019 (**Act**), which received Royal Assent on 20 July 2019. We outlined some of the key changes under the Act and identified a number of issues for trustees to consider. In this article we provide more detail on the issues arising under the Act relating to record keeping and disclosure of information. The Trusts Act comes into force from 30 January 2021 so it is important that trustees and clients using trusts are prepared. In particular, trustees should review carefully the new record keeping requirements and obligations to disclose trust information to beneficiaries.

New record keeping requirements

Under the new Act each trustee must keep, so far as is reasonable, all documents relating to the administration of the trust. These documents have been specifically listed under section 45 of the Act. The documents included:

- The trust deed and any other document that contains the terms of the trust;
- Any variations made to the trust deed or trust;
- Records of the trust property that identify assets, liabilities, income and expenses of the trust;
- Any records of trust decisions;
- Any written contracts entered into during the trustee's trusteeship;
- Any accounting records and financial statements prepared;
- Documents of appointment, removal and discharge of trustees;
- Any letter of memorandum of wishes from the settlor;
- Any other documents necessary for the administration of the trust.

To meet the requirements of the Act trustees should review all the trust documents they hold and make sure there is a complete set of trust records.

If there is more than one trustee of the trust the Act allows for one trustee to hold the set of trust documents on behalf of all trustees. However, each trustee must have at least a copy of the trust deed and any variations made to the trust deed in his or her possession. If you are a trustee of a trust you should meet with your co-trustees and review what documents each of you hold and resolve to have these documents kept as a single set in one location. If you have a professional trustee as one of your trustees an option is to keep the documents with them.

It is a requirement under the new Act that a retiring trustee must pass on any documents he or she holds to the new or continuing trustees. One solution is to set up an online portal where all documents are held together in one place. It will facilitate the process of transferring documents from a retiring trustee to the new or continuing trustees. Where a retiring trustee holds paper copies of trust documents he or she will need to physically transfer these documents to the new or continuing trustees.

Using an online portal will also allow for easy access by all trustees in the event they need any trust documents immediately and will also help to maintain an accurate record of any trust related transactions over the duration of the trusteeship.

In the event that a portal is not used, trustees should keep a checklist of the trust documents to allow each trustee to know where the documents are held. This will keep track of trust documents and assist in complying with their record keeping obligations under the Act.

Disclosure of information to beneficiaries

Under section 51 of the new Act trustees must make available to every beneficiary the basic trust information of a trust. Basic trust information consists of the following:

- The fact that a person is a beneficiary of the trust;

- The name and contact details of the trustee;
- The occurrence of, and details of, each appointment, removal, and retirement of a trustee as it occurs;
- The right of the beneficiary to request a copy of the terms of the trust or trust information.

The trust information that a beneficiary may request is further defined as meaning any information:

- regarding the terms of the trust, the administration of the trust, or the trust property; and
- that it is reasonably necessary for the beneficiary to have to enable the trust to be enforced; but
- does not include reasons for trustees' decisions.

The obligation to disclose information now applies to every beneficiary. The Act defines a beneficiary as meaning "a person who has received or will or may receive, a benefit under a trust (other than a trust for a permitted purpose) and includes a discretionary beneficiary". This definition of a beneficiary is very broad. Any individual that meets this definition must be informed of their right to request trust information.

It is also important to note that the obligation to disclose information applies to a representative of a beneficiary. The Act provides a definition for a representative of a beneficiary as meaning "the parent, guardian, attorney, or property manager of a beneficiary who lacks capacity". Where a beneficiary is a minor or other person who lacks capacity the trustees must disclose information to the representative of the beneficiaries.

Can trustees decide not to disclose information

Under section 53, in certain circumstances trustees can decide not to disclose information to a beneficiary provided they consider the 13 factors set out in the Appendix to this article. Trustees can only decide not to disclose information after considering all of these factors.

Some of the key factors to consider include the settlor's expectations and intentions at the time of the creation of the trust. We recommend that trustees review the existing memoranda of wishes from the settlor and determine whether the memoranda needs to set out the settlor's intentions regarding disclosure of information.

We also recommend that trustees review the trust deed to ensure that the list of beneficiaries is appropriate given the purpose of the trust and these disclosure requirements. It may be appropriate to either remove beneficiaries who are unlikely to benefit or restructure the trust in a way that achieves the succession planning goals of the settlor.

After considering all of the 13 factors, there may be situations where trustees decide to give no information to any beneficiary of the trust. When trustees make the decision not to disclose information to any beneficiary, trustees must apply to the court for directions in relation to whether the trustees' decision is reasonable in the circumstances and the alternative means by which the trustee can be accountable to the beneficiaries, and the trust can be enforced.

HOW CAN WE HELP?

The new rules under the Act are more prescriptive and increase the likelihood that beneficiaries will seek detailed information from trustees. To ensure trustees meet their obligations under the new Act, trustees should seek advice on how they will comply with the new record keeping and disclosure of information requirements.

We can help by:

- reviewing your trust documents to ensure there is a complete set of trust records;
- assisting you to comply with your record keeping obligations under the new Act;
- reviewing any existing memoranda of wishes from the settlor of the trust and updating these memoranda to deal with disclosure of information;

- reviewing your trust deed to determine whether the trust needs restructuring to deal with the disclosure of information requirements under the Act.

APPENDIX

The 13 factors trustees must consider before deciding not to disclose information to a beneficiary are:

1. the nature of the interests in the trust held by the beneficiary and the other beneficiaries of the trust, including the degree and extent of the beneficiary's interest in the trust and the likelihood of the beneficiary receiving trust property in the future;
2. whether the information is subject to personal or commercial confidentiality;
3. the expectations and intentions of the settlor at the time of the creation of the trust (if known) as to whether the beneficiaries as a whole and the beneficiary in particular would be given information;
4. the age and circumstances of the beneficiary;
5. the age and circumstances of the other beneficiaries of the trust;
6. the effect on the beneficiary of giving the information;
7. the effect on the trustees, other beneficiaries of the trust, and third parties of giving the information;
8. in the case of a family trust, the effect of giving the information on –
 - (a) relationships within the family;
 - (b) the relationship between the trustees and some or all of the beneficiaries to the detriment of the beneficiaries as a whole.
9. in a trust that has a large number of beneficiaries or unascertainable beneficiaries, the practicality of giving information to all beneficiaries or all members of a class of beneficiaries;
10. the practicality of imposing restrictions and other safeguards on the use of the information (for example, by way of an undertaking, or restricting who may inspect the documents);
11. the practicality of giving some or all of the information to the beneficiary in redacted form;
12. if a beneficiary has requested information, the nature and context of the request;
13. any other factor that the trustee reasonably considers is relevant to determining whether the presumption applies.

KEY JACKSON RUSSELL CONTACTS

Israel Vaealiki PARTNER

PROPERTY & PRIVATE CLIENT TEAM

DDI +64 9 300 6928 | M +64 21 517 172

E Israel.vaealiki@jacksonrussell.co.nz

Lana Dixon LAWYER

PROPERTY & PRIVATE CLIENT TEAM

DDI +64 9 300 6940

E ana.dixon@jacksonrussell.co.nz



Disclaimer: The information contained in this fact sheet is a general overview and is not legal advice. It is important that you seek legal advice that is specific to your circumstances.