



Trusts Act 2019: Charitable trusts & other permitted purpose trusts

What you need to know

- The Trusts Act 2019 (Act) came into force on 30 January 2021.
- The Act codifies the obligations of trustees and the rights of beneficiaries, with the aim of making trustees more accountable and trust law more understandable.
- The Act applies to charitable trusts and other “permitted purpose” trusts.
- There are, however, important differences in how the Act applies to these trusts – especially given that they may exist indefinitely and their focus is their purposes, not “beneficiaries”.
- This guide outlines key features of the Act and their application to charitable and other permitted purpose trusts.

Charitable and other “permitted purpose” trusts

DISTINCT CATEGORY OF TRUSTS

The Act recognises trusts for charitable purposes or “any other purpose for a trust that is permitted at law” as a separate category of trusts, which it designates as “permitted purpose” trusts. The Act distinguishes permitted purpose trusts from trusts established for fixed or discretionary beneficiaries.

Most permitted purpose trusts are charitable trusts, established for purposes falling within the four heads of charity that are recognised by New Zealand law –

the relief of poverty, the advancement of education, the advancement of religion, and other purposes beneficial to the community. Charitable trusts will generally be registered under the Charities Act 2005, for tax concession (income tax exemption and donation tax incentive) purposes, and their trustees will often be incorporated as a board under the Charitable Trusts Act 1957.

There are, however, other permitted purpose trusts that are not established for charitable purposes, or are not limited to charitable purposes (for example, certain community trusts).

FOCUS IS PURPOSES, NOT BENEFICIARIES

The focus of charitable and other permitted purpose trusts is their purposes, not “beneficiaries”.

The apparent intent and effect of the Act is that permitted purpose trusts do not have “beneficiaries” as defined and referred to in the Act – even if the trustees may be required under the terms of the trust to pursue the trust’s purposes for the benefit of a specified group or class of persons and/or a specified area or region.

This has a significant impact on the way in which the Act applies to permitted purpose trusts.

OTHER ASPECTS OF PURPOSE TRUSTS

Many trusts for charitable or other purposes will also be governed by a corporate entity, such as an incorporated board of trustees or a company, rather than trustees acting in their own names. This needs to be taken into account when applying the provisions of the Act.

The Act also does not affect the continued application of other legislation to charitable and other permitted purpose trusts, including (where applicable) the Charities Act 2005, the Charitable Trusts Act 1957 or any other enactment by or under which a permitted purpose trust has been created.

Application of key features of the Act to permitted purpose trusts

KEY FEATURES OF THE ACT

Key features of the Act include provisions relating to:

- basic aspects of express trusts, including their duration;
- mandatory and default trustee duties;
- restrictions on the limitation or exclusion of trustee liability;
- trustee obligations to keep and disclose trust information;
- trustee powers and indemnification;
- appointment and discharge of trustees;
- trust termination and variation; and
- Court powers and dispute resolution.

While many of the provisions will apply equally to trusts for charitable or other permitted purposes and trusts for beneficiaries, there are some important differences. Some of the key differences are highlighted below.

BASIC ASPECTS OF EXPRESS TRUSTS

Part 2 of the Act recognises and affirms the basic aspects of “express trusts”, ie trusts created by or under an enactment or by a settlor, to which the Act applies. In this context, the Act expressly acknowledges that express trusts may be created either for beneficiaries or for charitable or other permitted purposes.

Part 2 also confirms that a trust may accumulate income, to the extent this is consistent with the trust’s terms. This confirmation is particularly topical for tax-exempt charitable trusts, as the accumulation and reinvestment of tax-exempt income by charities has been highlighted as an area for possible future reform as part of recent charity and tax policy reviews.

An important change to previous trust law under this part of the Act is that the maximum duration of a standard trust is increased to 125 years. However, this provision does not apply to charitable trusts, which are allowed to continue indefinitely, and it does not apply to other permitted purpose trusts that are allowed to continue indefinitely.

MANDATORY AND DEFAULT TRUSTEE DUTIES

Part 3 of the Act prescribes mandatory and default trustee duties that, subject to certain exceptions, apply to the trustees of charitable and other permitted purpose trusts:

Mandatory trustee duties, which cannot be modified or excluded by the terms of the trust, are as follows:

- (a) Know and act in accordance with the terms of the trust
- (b) Act honestly and in good faith
- (c) Hold and deal with trust property and otherwise act to further the permitted purpose of the trust and, in the case of a trust with beneficiaries, act for the benefit of the beneficiaries
- (d) Exercise all trustee powers for a proper purpose.

Default trustee duties, which apply unless modified or excluded by the terms of the trust, are as follows:

- (a) A general duty of care in relation to administering the trust
- (b) A duty to invest trust property prudently
- (c) A duty not to exercise trustee powers for one’s own benefit
- (d) A duty to consider, actively and regularly, the exercise of trustee powers
- (e) A duty not to bind or commit trustees to the future exercise of any trustee discretion
- (f) A duty to avoid any conflict between trustee and beneficiary interests – but this only applies to trusts for beneficiaries, not permitted purpose trusts
- (g) A duty to act impartially in relation to beneficiaries – but this only applies to trusts for beneficiaries, not permitted purpose trusts
- (h) A duty not to profit from trusteeship

- (i) A duty to act for no reward – but this does not affect a trustee’s right to reimbursement/indemnification
- (j) A duty to act unanimously – which, for charitable trusts, is contrary to the previous ‘default’ position supported by case law that trustees of a charitable trust could act by majority (unless the trust’s terms provided otherwise)

LIMITATION/EXCLUSION OF TRUSTEE LIABILITY

Part 3 of the Act restricts the extent to which trustee liability can be limited or excluded, and the relevant provisions apply equally to trustees of charitable and other permitted purpose trusts. The terms of a trust must not limit or exclude a trustee’s liability, nor give any indemnity for any breach of trust, in circumstances involving dishonesty, wilful misconduct or gross negligence on the part of the trustee.

TRUST RECORDS AND DISCLOSURE

Part 3 of the Act prescribes the core trust information that trustees must keep, and these provisions apply equally to charitable and other permitted purpose trusts.

The core trust information that must be kept (which may be kept electronically) includes:

- (a) the terms of the trust and any variations – which must be held by **all** trustees of a trust; and
- (b) records of trust assets, liabilities, income and expenses, records of trustee decisions, written contracts, accounting records and financial statements, trustee appointment/removal/discharge documents, any settlor letter or memorandum of wishes, and any other documents necessary for the trust’s administration – which may be kept by one trustee on behalf of multiple trustees.

The Act also requires outgoing trustees to hand over trust documents to continuing or replacement trustees.

A key feature of the Act that has attracted a lot of attention is its regime for trust information to be disclosed to the beneficiaries of a trust. However, the relevant provisions of the Act do not apply at all to charitable trusts or to other permitted purpose trusts that do not have beneficiaries.

Of course, for charitable trusts registered under the Charities Act 2005, a lot of core trust information is already required to be filed and published on the Charities Register (and charitable trust terms may also be filed and published on the register of incorporated boards under the Charitable Trusts Act 1957), and trust information may be requested by DIA Charities Services and by the Attorney General. Other permitted purpose trusts may be similarly regulated.

TRUSTEE POWERS AND INDEMNIFICATION

Part 4 of the Act confirms the general powers of a trustee and also sets out various specific trustee powers, and the provisions of this part of the Act generally apply to the trustees of charitable and other permitted purpose trusts unless the trust’s terms provide otherwise.

In particular, the Act helpfully confirms that, as a starting point, a trustee has all the powers necessary to manage the trust property, including all the powers of an absolute owner of the property, and has all powers necessary to carry out the trust.

The specific trustee powers set out in the Act relate to the investment of trust property (including factors that may be taken into account in relation to investments), determining matters relating to the capital and income of the trust, third party appointments, and delegation, and the delegation provisions include important restrictions on the delegation of certain powers/discretions by trustees. The provisions relating to specific trustee powers also cover various other matters, but many of these matters relate to beneficiaries and are not relevant to permitted purpose trusts.

In relation to trustee indemnification, the Act confirms that as a starting point a trustee is personally liable for liabilities incurred as a trustee. However, if a trustee incurs a liability acting reasonably on behalf of the trust, the trustee is entitled to meet, or be reimbursed for, the liability out of trust property.

APPOINTMENT AND DISCHARGE OF TRUSTEES

Part 5 of the Act sets out (subject to the terms of the trust) who holds the power to appoint trustees, together with further provisions regarding the appointment, retirement, death, removal and replacement of trustees and also the divestment/ vesting of trust property upon a change of trustees.

These provisions apply to charitable and other permitted purpose trusts, although for charitable trusts the Charitable Trusts Act 1957 may instead apply in relation to the divestment/vesting of trust property.

The Act also sets out trustee disqualification criteria, excluding any child (under 18 years of age), undischarged bankrupt or insolvent body corporate, or any person who lacks capacity, from acting as a trustee. It is important to bear in mind that additional disqualification criteria may also apply in relation to the trustees of a trust, for example under the terms of the trust or under the Charities Act 2005 if the trust is registered under that Act.

TERMINATION AND VARIATION OF TRUSTS

Part 6 of the Act includes provisions relating to the termination and variation of trusts, but these provisions are focused on trusts with beneficiaries, not permitted purpose trusts.

In relation to charitable and other permitted purpose trusts, the terms of the trust may specifically deal with termination of the trust (but bear in mind that such trusts may continue indefinitely) and variation of the trust's terms, and in the case of charitable trusts the assistance of the High Court may be sought under the Charitable Trusts Act 1957 (or under the High Court's inherent jurisdiction in relation to trusts).

COURT POWERS AND DISPUTE RESOLUTION

Part 7 of the Act confers on the High Court broad powers in relation to trusts – including powers to review trustee acts/omissions/decisions, relieve trustees from personal liability, give directions to trustees, appoint a receiver of a trust, and approve trustee remuneration – and these powers generally apply in relation to charitable and other permitted purpose trusts.

The Act clarifies, however, that the High Court's power to review trustee acts/omissions/decisions under the Act does not limit or affect either the Court's jurisdiction to supervise trusts (including its jurisdiction under the Charitable Trusts Act 1957) or the Attorney General's powers and duties in relation to charitable trusts.

The Act also provides for trustee or Court referral of internal (eg, trustee/trustee) and external (trustee/third party) disputes or other matters to alternative dispute resolution, such as mediation or arbitration, and these provisions also generally apply to charitable and other permitted purpose trusts.

Action Points

Make sure you understand the implications of the Act and how it applies to your trust, and review your trust and its terms to ensure they are up-to-date and compliant.

[Click here](#) for a checklist of steps for trustees and stakeholders of charitable and other permitted purpose trusts to take in light of the Act.

Get in touch

Please get in touch with our experts if you require further information or wish to discuss any aspect of the Trusts Act 2019 or any other charity or trust law matter.

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