

Duties of Trustees

The duties of the trustees are split into two categories: mandatory duties (which cannot be modified or excluded) and default duties (which apply unless these have been modified or excluded).



Mandatory duties

- ✦ The trustee must know the terms of trust.
- ✦ Trustee must act in accordance with the terms of trust.
- ✦ A trustee must act honestly and in good faith.
- ✦ A trustee must hold property or otherwise act for the benefit of the beneficiaries or to further the permitted purposes of the trust.
- ✦ Trustee powers must be exercised for proper purpose.

Default duties

Default duties are split into two types - general and specific. These are listed below:

General duties

- ✦ Duty of care: the trustee must exercise care and skill that is reasonable.
- ✦ Duty to invest: a trustee must exercise the care and skill that a prudent person of business would exercise in managing the affairs of others.

However, if the trustee has special knowledge or experience, then the above mentioned duties have to be exercised having regard to any special knowledge/experience that the trustee holds out as having; and if the trustee acts in the course of a business/profession, to any special knowledge/experience that is reasonable to expect of a person acting in the course of that kind of business or profession.

Specific duties

- ✦ Duty not to exercise power for own benefit whether directly or indirectly.
- ✦ Duty to regularly consider whether to exercise one or more of the trustee's powers.
- ✦ Duty not to fetter the exercise of powers by future trustees.
- ✦ Duty to avoid conflict between the trustee and beneficiaries.
- ✦ Duty to avoid conflict of interest.
- ✦ Duty to keep proper records.
- ✦ Duty of impartiality.
- ✦ Duty not to profit.
- ✦ Duty not to act for reward (other than the reimbursement of legitimate expenses).
- ✦ Duty to act unanimously.



Exemption and indemnity

Terms of trust cannot exclude the trustee from being liable for, or being indemnified against, any breach arising from the trustees’ dishonesty, wilful misconduct, or gross negligence.

And, paid advisors must take reasonable steps to ensure that the settlors of the trust understand the meaning and effect of any liability exclusion or indemnity clauses to be included in the terms of trust.

Giving information to beneficiaries

A trustee must make available to a “sufficient number of beneficiaries” “sufficient trust information” to enable the terms of trust to be enforced against trustees.

Trust information is defined as any information regarding the terms of trust, administration of trust or the trust property and that is reasonably necessary for the beneficiary to have, to enable them to enforce the terms of trust.

Interesting, the exposure draft to the Bill states that the trustee “must proactively disclose some information to at least one beneficiary” when discussing this clause in contrast to the use of “sufficient” in the actual wording of the clause.



These provisions cannot be overridden by the terms of trust.

There is also a presumption that a trustee must provide basic trust information to all qualifying beneficiaries as soon as practicable.

Qualifying beneficiary is defined as a beneficiary who has a reasonable likelihood of receiving trust property under the terms of trust.

And, basic trust information is defined to include:

- (a) the fact that a person is a beneficiary of the trust; and
- (b) the name and contact details of the trustee; and
- (c) the occurrence of, and details of, each appointment, removal, and retirement of a trustee as it occurs; and
- (d) the right of the beneficiary to request a copy of the terms of the trust or trust information.



There is also a presumption that a trustee will provide trust information, if requested by a beneficiary, in a timely fashion.

These presumptions will apply unless the trustee reasonably considers, based on specified factors, that this should not be done.

Specified factors include whether the information is subject to personal or commercial confidentiality, the expectations of the settlor at the time of the creation of the trust, nature of the interests held by the beneficiary, etc.

Trustee powers and indemnities

Trustee powers and indemnities are split between general and specific.

General powers give trustees the legal capacity to deal with trust property and carry out the trust. Whereas specific powers include the power to invest, to determine whether returns are income or capital, application of trust property for education/advancement/maintenance, delegation of trustee powers in relation to the trust, etc.

Power to invest: the Bill specifies matters that a trustee may take into account when exercising this power such as, the likely income return, the duration of the trust, the proposed investment in relation to the tax liability of the trust, the objectives of the trust, the desire to diversify investments, and the like.

Powers to delegate and appoint: special advisors can be appointed to assist with and provide advice on matters relating to the trust. The appointment can be made if provided for in the trust deed, or by an appointor of the trust, or by order of the court made on the application of a beneficiary or trustee.

If there is a special advisor, the trustee may consult them but is not obliged to follow the advice provided. If the trustee does follow the advice, then the trustee will not be liable for any act or omission made by following the advice (unless it involves dishonesty, wilful breach of trust, or gross negligence on part of the trustee).

Revocation and variation of trust

All adult beneficiaries of the trust, who are all legally competent and if in agreement, can instruct the trustee(s) to terminate or vary the trust.

Other

The above is a summary of the Bill. To find out more, refer to:

✦ [A new Trusts Act for NZ: Exposure Draft of the Trusts Bill](#)

✦ [Trusts Bill](#)

The deadline for feedback on the Bill is 21 December 2016.



Even lawyers don't think tax lawyers are funny.