AN OVERVIEW OF THE TRUSTS ACT 2019 – REVOLUTIONARY CHANGES OR MUCH OF THE SAME?

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Abstract

The Trusts Act 2019 (the Act) is now fully in force. The Act repeals and replaces the former Trustee Act 1956. The Act has modernised the law of trusts and made the law more accessible. It restates many common law principles as well as modifying some of the pre-Act common law. Few provisions depart entirely from the former Trustee Act 1956 and the common law applicable prior to the Act. These changes combined make for interesting discussion, particularly to what extent the common law continues to be relevant, and whether the new provisions are revolutionary or are better described as improvements to the pre-Act position. The Paper finds that overall, very little has changed substantively under the Act. Where the Act restates the common law, the common law may continue to provide context and interpretational assistance. Where the Act provision modifies the common law, the common law will remain relevant to the extent it is consistent with the provision. Those provisions which entirely depart from pre-Act principles are few. There is little in the Act that will require major adjustments to trust deeds or the way trusts are administered.

I. Introduction

The Trusts Act 2019 (the Act) is the first major reform of trusts law in over 60 years. The Act repeals and replaces the Trustee Act 1956. The Act also codifies some of the common law relating to trusts to create a concise piece of legislation that improves accessibility of the law.

Prior to the Trusts Act 2019, much of law relating to trusts was set out in the common law (for example, most of the duties of trustees were derived from the common law and did not appear in the Trustee Act 1956). This resulted in a

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multifaceted legal regime where trustees would need to navigate often lengthy and less accessible common law judgments to know their obligations.

During the reform, the former Trustee Act 1956 was considered to be outdated and no longer fit-for-purpose. The Trustee Act 1956 did not contain many of the trustees' legal obligations. The rules of common law and equity therefore supplemented the former statute to fill these gaps. There was confusion about the role of settlors, the duties of trustees and the rights of beneficiaries that threatened the institution of the trust.[1] It was important that the new Act addressed these shortcomings.

The Act is a result of many years of research, consultation, and debate.[2] It improves accessibility, by including the obligations of trustees into the Act. Many common law principles have been codified in the Act, thereby providing clarity of what is required of trustees, and enabling beneficiaries to better understand their rights.

The Act makes some notable changes to the pre-Act regime including:

- the abolition of the rule against perpetuities;
- the inclusion of mandatory and default duties for trustees;
- the inclusion of information retention and disclosure obligations imposed on trustees;
- the prohibition of exemptions or indemnities for dishonesty, wilful misconduct, or gross negligence in trust terms;
- providing trustees with power to determine whether a return on an investment is income or capital and to apportion receipts and outgoings between income and capital;
- the appointment of special trust advisors;
- modernising the rules for the appointment and removal of trustees; and
- the introduction of alternative dispute resolution provisions.

This Paper provides a high-level overview of the Act. The focus of this Paper is to contrast the pre-Act position and the position under the Act, and also to assess to what extent the changes reflect, codify, or depart from common law principles. It does not attempt to provide an exhaustive comparison between the Act and the former trusts regime, nor does it provide a detailed analysis of the Act, but instead identifies those changes that would likely be of most interest to settlors, trustees,

1 The Law Commission's comprehensive review took place between 2009 and 2013. Five issues papers were published and consulted on which resulted in the final Law Commission Paper: Law Commission *The Law of Trusts – A Trusts Act for New Zealand* (NZLC R130, 2013) ["Report 130"], see "Foreword".

2 Report 130, above n 1.

and beneficiaries as they now look to apply the Act's provisions to new and existing trusts.

Part I of the Paper has introduced the Paper. Part II considers the background to the enactment of the Act. Part III discusses the notable changes, including the motivation for the changes, and whether they are entirely new concepts or whether they are derived from pre-existing legal principles. The reasons for, and the potential benefits of the changes are identified and discussed. Part IV concludes that there is little in the Act that is revolutionary. Many provisions restate or modify the common law, with very few provisions that depart entirely from pre-Act principles.

II. An Overview of the Trusts Act 2019

The Act came into force on 30 January 2021. The Act attempts to modernise New Zealand trust law and makes trusts law more accessible to trustees and beneficiaries. The Act applies to express trusts that are governed by New Zealand law.[3]

The Act covers: the requirements for express trusts,[4] trustee duties and information obligations,[5] trustees' powers and indemnities,[6] the appointment and discharge of trustees,[7] termination and variation of trusts,[8] court powers and dispute resolution,[9] miscellaneous provisions,[10] and amendments to other legislation.[11]

The purpose of the Act is to restate and reform New Zealand trust law by:[12]

> (a) setting out the core principles of the law relating to express trusts; and
> (b) providing for default administrative rules for express trusts; and
> (c) providing for mechanisms to resolve trust-related disputes; and
> (d) making the law of trusts more accessible.

3 Trusts Act 2019, s 5(1). The Act also applies to some other trusts in accordance with s 5(2) of the Act.
4 Part 2.
5 Part 3.
6 Part 4.
7 Part 5.
8 Part 6.
9 Part 7.
10 Part 8.
11 Part 9.
12 Section 3.

The principles of the Act require a trust to be administered in a way that is consistent with its terms and objectives and that avoids unnecessary cost and complexity.[13]

The Act is also not intended to be an exhaustive code of the law relating to express trusts but should be complemented by common law and equity to the extent that law is consistent with the Act.[14]

Similarly the Act provides that in interpreting the Act, regard can be had to the common law and equity to the extent that law is consistent with the Act and the promotion of its purpose and principles.[15]

The Act's provisions (with some limited exceptions) apply to trusts created both before and after the commencement of the Act.[16] Some provisions in the Act can be modified or excluded by the expressed or implied terms of the trust and these are set out in sch 2 of the Act.[17]

Accordingly, the Act will apply to most express trusts created both before and after the Act commenced, and covers a broad range of areas. The Act intends to improve the accessibility of the law, but the common law will continue to complement the Act and may serve as an aid to the interpretation of its provisions.

III. Notable Changes from the Pre-Act Position

There are several changes that the Act brings. This Paper considers the more notable changes that would likely be of interest to settlors, trustees, and beneficiaries including:

- the abolition of the rule against perpetuities;
- the inclusion of mandatory and default duties for trustees;
- the inclusion of information retention and disclosure obligations of trustees;
- the prohibition of exemptions or indemnities for dishonesty, wilful misconduct, or gross negligence in trust terms;
- providing trustees with power to determine whether a return on an investment is income or capital, and to apportion receipts and outgoings between income and capital;

13 Section 4.
14 Section 5(8).
15 Section 7.
16 Schedule 1 cl 2.
17 Section 5 (4)–(5).

- the appointment of special trust advisors;
- modernising rules for the appointment and removal of trustees; and
- the introduction of alternative dispute resolution provisions.

A. Abolition of the rule against perpetuities

1. Position prior to the Trusts Act 2019

The common law rule against perpetuities was unnecessarily complex, creating many issues for settlors and trustees applying the rule. Only some of the issues were resolved by the Perpetuities Act 1964.

Before the Act, the common law rule against perpetuities applied where an issue was not specifically covered by the Perpetuities Act 1964. The common law rule against perpetuities was not straightforward, as noted by the Law Commission:[18]

> The rule against perpetuities is one of a collection of rules and restrictions developed by the courts to promote unfettered ownership and free transfer of property. The classic statement of the rule is this: no interest is good unless it must vest, if at all, not later than 21 years after some life in being at the creation of the interest. This technical rule is underpinned by a more fundamental and abstract principle of land law, that the "freehold must not be in abeyance."

In short, the rule against perpetuities required that an interest in a trust must be certain to vest within the perpetuity period. There must be a date for the vesting of trust property. At common law, the date for vesting was either on creation of the trust or "no later than 21 years after the death of a person (or persons) who was alive (or in utero) at the time that the interest was created".[19] If the common law rule was breached, then the property interest was considered invalid. Generally, the rule did not apply to charitable trusts, so charitable trusts could be perpetual.[20]

Also, under the common law, a trust could be varied to provide for an earlier distribution where all the beneficiaries consented to the variation.[21]

18 Law Commission *Review of the Law of Trusts: Preferred Approach* (NZLC IP31, 2013) ["Preferred Approach Paper"] at [14.4].

19 Law Commission *Perpetuities and the Revocation and Variation of Trusts – Review of the Law of Trusts Third Issues Paper* (NZLC IP22, 2011) at [1.6].

20 *Re Chambers (deceased)* [1971] NZLR 703; and *Perpetual Trust v Roman Catholic Bishop of Christchurch* [2006] 1 NZLR 282.

21 *Saunders v Vautier* (1841) Cr & Ph 240, 41 ER 482.

The Perpetuities Act 1964 modified the common law in a number of ways which assisted with applying the perpetuity period, and softened the rigid consequences for breaching the common law. Among the changes included: enabling wait-and-see provisions (to see whether interest would vest within the perpetuity period albeit void at common law); and extending the perpetuity period by creating a long-stop period of up to 80 years.[22]

However, the Perpetuities Act 1964 did not abolish the common law rule entirely, resulting in a "halfway house" situation that was complex to apply.

2. The position in the Trusts Act 2019

Section 16 of the Act now abolishes the common law rule and repeals the Perpetuities Act 1964. It codifies the maximum duration of a trust, providing clarity that (unless the trust is able to continue indefinitely under subs (6)), the trust will continue for 125 years as the default position. A trust may stipulate a shorter duration, but if no duration is specified, the trust will continue for 125 years.

Given the complexities of the pre-Act position, the abolition of the rules against perpetuities and the repeal of the Perpetuities Act 1964 was well received by submitters.

As s 16 cannot be modified or excluded by the terms of the trust,[23] a trust (unless the trust is able to continue indefinitely under subsection (6)), cannot have terms that exceed 125 years' duration.

Section 16 does not automatically apply to trusts formed before the commencement of the Act, as set out in sch 1 of the Act. The Act provides that a trust created before 30 January 2021 can have a duration that is more than or less than 125 years. If it is less, then the Act (as from 30 January 2021) permits the trust to be varied in accordance with the rules relating to variation in the Act or the trust terms so that the duration is extended to 125 years. Section 122 of the Act effectively codifies the rule in *Saunders v Vautier*,[24] enabling a trust to be varied with the consent of the beneficiaries.

If a trust created before 30 January 2021 does not have a distribution provision, but does specify or imply a mechanism for determining the distribution date, then the trust will endure for 125 years or in accordance with that mechanism in the trust, whichever is earlier.

22 Perpetuities Act 1964, s 6.

23 This is because s 16 does not appear in schedule 2 of the Act. Provisions contained in the schedule can be modified or excluded by contrary trust terms pursuant to subs 5(4) and 5(5).

24 *Saunders v Vautier* [1841] EWHC J82.

If the rule against perpetuities did not apply to a trust created before 30 January 2021, then the trust will continue indefinitely in accordance with pre-Act law governing its duration.

3. Summary

The abolition on the rules against perpetuities and the repeal of the Perpetuities Act 1964 is a positive change creating clarity for settlors when establishing duration of trust clauses. Section 16 of the Act is a clear codified exposition of the law relating to duration of trusts, unlike the Perpetuities Act 1964, which merely modified the existing common law rule against perpetuities. Section 16 of the Act will therefore be much more straightforward to apply in practice.

B. The duties of trustees

1. The position prior to the Trusts Act 2019

Prior to the Act, trustees' duties were set out in various cases over centuries. There was no list of duties in the Trustee Act 1956. The Trustee Act 1956 did, however, contain the duty to invest prudently (s 13B) and the duty that certain trustees must exercise special care, diligence, and skill in investing trust property (s 13C).

Armitage v Nurse was a leading case on the trustees' duties that are necessary for a trust to exist.[25] Millett LJ in the case stated that: "The duty of the trustees to perform the trusts honestly and in good faith for the benefit of the beneficiaries is the minimum necessary to give substance to the trusts".[26] He considered these duties as the "irreducible core" of a trust. Accordingly, in his view, what was absolutely required for a trust to exist, was quite narrow. Other duties may be required of a trustee, but that would depend on the trust terms. It was possible under the common law for trust deeds to exclude other duties, otherwise known as default duties. Despite this, the duty to retain and disclose trust information in order to give account to beneficiaries (the duty to account) has been considered another duty that is fundamental to the trust.[27]

25 *Armitage v Nurse* [1997] 2 All ER 705 (CA).
26 At 713.
27 *Foreman v Kingston* [2004] 1 NZLR 841 (HC) at [93].

Prior to the Act, finding a list of trustees' duties required an understanding of the common law, looking at a number of judgments, supplemented by academic textbooks and articles. Texts such as Underhill[28] and Butler[29] have been useful.

Butler considered the default duties that were derived from the common law included: the duty to make acquaintance with the trust's terms, the duty to adhere to the trust's terms, the duty to maintain impartiality between beneficiaries, the duty to act in the beneficiaries' best interests, the duty not to profit from trusteeship, the duty to act gratuitously (free of charge), the duty to invest, the duty not to delegate, the duty to be active, the duty to act unanimously, the duty to pay correct beneficiaries, and the duty to keep proper accounts and give information as required.

While Butler's list is helpful, it is a secondary source of the law compiling numerous cases over many years. The lack of accessibility of the law was therefore an issue prior to the Act. Under the common law, trustees would not necessarily know what their duties were without researching centuries of case law or relying on legal texts to understand their obligations. This difficulty of accurately and readily establishing applicable legal trust rules, was a real problem for trustees prior to the Act.

2. The position in the Trusts Act 2019

The Act has clarified what duties trustees owe to beneficiaries. It contains a list of trustees' duties and these are either mandatory duties or default duties.

Mandatory duties must be complied with as they are the minimum necessary to constitute a trust. These mandatory duties do go beyond the duties noted by Millet LJ as forming the 'irreducible core' of the trust.[30] What is necessary for a trust under the Act, includes the:

- Duty to know the terms of trust;[31]
- Duty to act in accordance with terms of trust;[32]
- Duty to act honestly and in good faith;[33]
- Duty to act for benefit of beneficiaries or to further permitted purpose of trust;[34] and

28 Underhill & Hayton *Law of Trusts and Trustees* (19th ed LexisNexis, London, 2018).
29 Andrew Butler and others *Equity and Trusts in New Zealand* (2nd ed Thomson Reuters, Wellington, 2009).
30 *Armitage v Nurse*, above n 25, at 713.
31 Trusts Act 2019, s 23.
32 Section 24.
33 Section 25.
34 Section 26.

- Duty to exercise powers for proper purpose.[35]

The default duties will apply unless they have been modified or excluded by an expressed or implied term of the trust. The default trustee duties include:

- A general duty of care;
- The duty to invest prudently;
- The duty not to exercise power for own benefit;
- The duty to actively and regularly consider whether the trustee should be exercising a power(s);
- The duty not to bind or commit trustees to a future exercise or non-exercise of a discretion;
- The duty to avoid conflict of interest;
- The duty of impartiality;
- The duty not to profit;
- The duty to act for no reward; and
- The duty to act unanimously.

The trustees' duties in the Act apply to all express trusts with the exception of some exclusions for trusts governed by financial markets' legislation.[36] The Act's duties apply to trusts created both before and after the commencement of the Act.[37]

While the Act effectively restates the common law duties of trustees, these duties are non-prescriptive. The effect of this is that the common law will continue to aid the interpretation of the statutory duties, as is expressly permitted by s 7(c) of the Act.[38] It was never intended that the statutory duties would replace the common law. As noted by the Law Commission, the Act's trustees' duties "would not be intended to replace the common law, but would concisely summarise the duties that generally apply to trustees."[39]

3. Summary

The Act greatly assists trustees in knowing what their legal duties owed to beneficiaries are. Unlike the Trustee Act 1956, the duties imposed on trustees are

35 Section 27.
36 Part 9 sub-pt 2, 3 and 5,
37 Schedule 1 cl 2. As the trustees' duties in the Act reflect pre-Act common law, trustees would already be complying with the duties as set out in the Act. As such, the application of the duties to trusts created before commencement of the Act (retrospectively), appears to create no real concern to trustees.
38 Section 7(1)(c).
39 Law Commission *The Duties, Office and Powers of a Trustee: Review of the Law of Trusts Forth Issues Paper* (NZLC IP26, 2011) at [1.8].

now set out in the Act and are categorised as either mandatory or default. Only default duties can be modified or excluded by the terms of the trust. The inclusion of trustees' duties in the Act is a significant improvement on accessibility and clarity of the law. Also, the Act does not depart from established common law principles nor has it created additional duties on trustees. As the duties derive from the common law, that common law will continue to assist in interpreting and applying the Act's duties.

C. Information Obligations of Trustees

1. The position prior to the Trusts Act 2019

Prior to the Act, there was a common law "duty to account" to beneficiaries but the Trustee Act 1956 was silent on this duty and any corresponding obligations to retain or provide trust information to beneficiaries.

Under the common law, the duty to account has been considered fundamental to the trust concept.[40] Accordingly, for a trust to exist, beneficiaries needed to have access to certain trust information in order to hold the trustees accountable and enforce the trust. In order to also be accountable, trustees would need to retain certain trust documents.

The common law on the disclosure of trust information was quite complex with principles developing and evolving in numerous cases over many years. For example, there has been a significant amount of litigation on the rights of discretionary beneficiaries to receive trust information. Over time, the rights of the discretionary beneficiary were clarified and the cases of *Schmidt v Rosewood*[41] and *Foreman v Kingston*,[42] settled the legal position that access to trust information was not dependent on a proprietary right, so discretionary beneficiaries (who have only a mere hope of receiving a distribution from the trust) can seek trust information. The cases held that ordering disclosure of trust information was part of the court's inherent jurisdiction to supervise and intervene in the administration of trusts rather than based on any proprietary right of the beneficiary.

In the common law, the right of access to trust information was subject to a number of factors that the court would consider before releasing trust information to a beneficiary. Provision of trust information was not always considered appropriate, for example, if it would adversely affect other beneficiaries. The most recent case that identified the factors that should be considered prior to releasing trust

40 *Foreman v Kingston*, above n 27, at [93].
41 *Schmidt v Rosewood Trust Limited* [2003] UKPC 26.
42 *Foreman v Kingston,* above n 27, adopting *Schmidt v Rosewood Trust Limited* [2003] UKPC 26.

information to a beneficiary was the case of *Erceg v Erceg.*[43] The factors identified in *Erceg* included:[44]

> (a) The [type] of documents sought;
> (b) The context for the request and the objective of the beneficiary in making the request;
> (c) The nature of the interests held by the beneficiary seeking access;
> (d) Whether there are issues of personal or commercial confidentiality;
> (e) Whether there is any practical difficulty in providing the information;
> (f) Whether the documents sought disclose the trustee's reasons for decisions made by the trustees;
> (g) The likely impact on the trustee and the other beneficiaries if disclosure is made;
> (h) Whether disclosure can be made while still protecting confidentiality; and
> (i) Whether safeguards can be imposed on the use of the trust documentation.

The beneficiary's right to access trust information was therefore not absolute.

2. The position in the Trusts Act 2019

Sections 45–55 of the Act set out the obligations on trustees to keep trust documents and give trust information to beneficiaries.

(a) Keeping trust information

The Act restates the common law principle for trustees to retain trust information.

Section 45 of the Act provides that trustees must keep, so far as reasonable, core documents relating to the trust as set out in that provision. These core trust documents include the trust deed, variations, records of the assets and liabilities relating to the trust property, records of trustee decisions, contracts entered into, accounting records and financial statements, documents about appointment,

43 *Erceg v Erceg* [2017] NZSC 28 [56].
44 *Erceg v Erceg*, above n 43.

removal, and discharge of trustees, memorandum of settlor's wishes, and other documents necessary for the administration of the trust.

Where there is more than one trustee, each trustee must hold the trust deed and documents that contain the trust terms, and any variations made to the trust deed or trust (or copies of these documents).[45] At least one trustee must hold the other documents in s 43, and make them available to other trustees on request.[46]

So far as is reasonable, the documents must be kept for the duration of the trustees' trusteeship,[47] and the trustee must pass on the documents that the trustee holds to an incoming trustee, in circumstances where the trust continues.[48]

The s 45 requirement to keep core documents is mandatory, and its provisions cannot be modified or excluded by the terms of the trust.[49] The requirement applies to all express trusts with the limited exception of trusts governed by financial markets' legislation[50] and specified commercial trusts.[51] The provision applies both to trusts created before and after the commencement of the Act.

(b) Giving information to beneficiaries

The rules for trustees giving trust information to beneficiaries are contained in ss 49–55 of the Act. Section 50(1) states that the purpose of these rules is to "ensure that beneficiaries have sufficient information to enable the terms of the trust and the trustees' duties to be enforced against the trustees".[52]

Section 49 of the Act defines 'trust information' which:

> (a) means any information–
> (i) regarding the terms of the trust, the administration of the trust, or the trust property; and
> (ii) that it is reasonably necessary for the beneficiary to have to enable the trust to be enforced; but
> (b) does not include reasons for trustees' decisions.

45 Trusts Act 2019, s 46(a).
46 Section 46(b).
47 Section 47.
48 Section 48.
49 This is because there is no reference to ss 43–48 in sch 2 of the Trusts Act 2019. Only provisions in that Schedule can be modified or excluded by contrary trust terms (see subs 5(4)–(5)).
50 See Trusts Act 2019, pt 9 sub-pts 2, 3, and 5.
51 Schedule 3 cl 4.
52 Section 50(1).

Section 51 sets out the regime for when trustees must notify beneficiaries of the basic trust information, which includes:[53]

> (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 a presumption that this basic trust information will voluntarily be made available to beneficiaries.[54]

Section 52 of the Act then sets out the requirements for trustees to provide trust information to beneficiaries who have requested the information. There is a presumption that the trustees will make available trust information (as defined in s 49) to beneficiaries who ask for it.[55]

Before either notifying a beneficiary of the basic trust information, or providing the requested trust information, the trustee must consider the factors set out in s 53 of the Act.[56] Where the trustee reasonably considers (having considered the s 53 factors) that the information should not be provided to a beneficiary, the presumption does not apply, and the trustee may withhold the information from the beneficiary.[57]

The s 53 factors largely replicate the *Erceg* common law factors. However, there are a few additional factors included in the Act.[58] Also, the *Erceg* factor "[w]hether the documents sought disclose the trustee's reasons for decisions made by the trustees" (as this information would not normally be made available to a beneficiary), does not appear in s 53. The definition of trust information in s 49 of the Act, however, excludes reasons for trustees' decisions from its scope. The exclusion raises the question whether reasons for trustees' decision can continue to be made available under the court's inherent jurisdiction or whether that power has now been abrogated by the Act.[59] It is out of scope to answer this question however.

53 Section 51(3).
54 Section 51(1).
55 Section 52(1).
56 Sections 51(2) and 52(2).
57 Sections 51(2) and 52(2).
58 Trusts Act 2019, ss 53(c), (d), (e), (f) and (m).
59 This issue was also raised in *Lambie Trustee Limited v Addleman* [2021] NZSC 54 at [59] but was not discussed so was left unresolved.

Where no beneficiary has any trust information, the trustee must apply to the court for directions under s 54(2) in relation to whether its determination that there is no beneficiary to whom information can be given, or to withhold information or refuse a request for information, is reasonable and whether there is an alternative means by which the trustee can be accountable and the trust can be enforced.

However, the trustee does not have to apply to the court for directions where:

(a) the period during which no beneficiary has any trust information is less than 12 months; and

(b) at the end of that period, the trustee gives to at least 1 beneficiary the basic trust information.

Where a beneficiary has requested trust information, a trustee may require that the beneficiary pays the reasonable cost of giving that information.[60]

The information disclosure provisions in the Act cannot be modified or excluded by the terms of the trust,[61] except in the case of a specified commercial trust,[62] and they apply to trusts created both before and after commencement of the Act.[63] However, the provisions do not apply to trusts governed by financial markets' legislation[64], and ss 51–55 do not apply to charitable trusts, or other trusts without beneficiaries.[65]

Because the Act's provisions modify the common law position, case law will remain influential in interpreting its provisions to the extent the common law is consistent with the Act.[66]

3. Summary

The common law duty to account to beneficiaries required trustees to keep trust information and give trust information to beneficiaries who required this to enforce the trust and hold the trustees to account. The beneficiaries' right to access trust information was not absolute and a court would consider a number of factors when exercising its inherent jurisdiction whether to order disclosure of the requested information.

The Act's rules regarding disclosure of trust information largely derive from the common law, but there are some differences. Unlike the common law, the Act now creates a presumption that trust information will be provided to beneficiaries unless it is reasonable to withhold the information on the basis that a factor or factors in s 53 apply. The s 53 factors largely replicate the common law *Erceg* factors with some

60 Trusts Act 2019, s 55.
61 Schedule 2.
62 Schedule 3 cl 4.
63 Schedule 1 cl 3.
64 Part 9 sub-pts 2, 3, and 5.
65 Section 50.
66 Section 7(1).

additions. Where the presumption to provide the basic trust information applies, trustees must notify beneficiaries of the basic trust information. Where a beneficiary has requested trust information and the presumption to provide this information applies, the trustee must provide this information to the beneficiary within a reasonable period of time. Also, unlike the pre-Act position, trust information is defined in the Act, and the rules around disclosure and applying to the court for directions where no beneficiary has any trust information are set out in the Act.

D. The prohibition of exemptions or indemnities for dishonesty, wilful misconduct, or gross negligence in the terms of the Trust

1. The position prior to the Trusts Act 2019

The Trustee Act 1956 did not regulate trust exemption clauses relieving a trustee from liability, nor contain provisions regulating the ability for trustees to seek an indemnity against the trust assets.

However, the common law prohibited trusts from including "exemption clauses" that excluded liability for fraud or dishonesty. This principle derived from the case of *Armitage v Nurse,*[67] which considered that the trustee must act honestly and in good faith and for the benefit of the beneficiaries, in order for a trust to exist.[68] Accordingly, as noted by the Law Commission, *Armitage v Nurse* permitted:[69]

> … exemption clauses to be used to exempt a trustee for liability for a breach of trust as long as the trustee acts in good faith and in the honest belief that he or she is acting in the best interests of beneficiaries. This case has established that a trust deed can exclude trustees' liability for a breach of trust arising from conduct that is not fraud (in the sense of dishonesty).

Given the correlation with exemption clauses, indemnity clauses would also need to be restricted in the same way as exemption clauses.

The position in New Zealand, based on *Armitage v Nurse,* was considered by the Law Commission during the trusts law reform process. The Law Commission was

67 *Armitage v Nurse*, above n 25.
68 At 713.
69 Preferred Approach Paper, above n 18, at [3.33].

not convinced that the common law adequately balanced the interests and needs of trustees, beneficiaries and settlors.[70]

The common law position allowed for trustees to have limits on liability, and to seek indemnities for a broad range of reasons (with only fraud or dishonesty being prohibited from exclusion of liability). The common law position therefore arguably undermined the importance of the duties of trustees. This is because a trustee may breach a duty unintentionally, but by being grossly negligent, and should therefore be liable for such a breach.

2. The position in the Trusts Act 2019

The Act places limits on the trust terms excluding trustee liability and when a trustee can seek to be indemnified for breach of trust from trust property.

Section 40 of the Act provides that: "The terms of a trust must not limit or exclude a trustee's liability for any breach of trust arising from the trustee's dishonesty, wilful misconduct, or gross negligence."

Section 41 of the Act provides that:

> The terms of a trust must not give a trustee any indemnity against the trust property for liability for any breach of trust arising from the trustee's dishonesty, wilful misconduct, or gross negligence.

These provisions which include "gross negligence" give the trustee duties more significance as trustees could find themselves liable for even non-intentional breaches that amount to gross negligence, and trust terms cannot limit or exclude liability for such behaviour nor can the trust terms give the trustee any indemnity where the trustee has been grossly negligent.

Section 44 of the Act sets out the factors that a court must consider when making an assessment whether the trustee has been grossly negligent. However, the stringent test for a finding of gross negligence contained in s 44 (2), (effectively that the trustee's conduct must be found to have been so unreasonable that no reasonable trustee would have acted in that manner), probably means that, in practice, there will not be a substantial difference between an inference of wilful misconduct and an inference of gross negligence. So, this departure from the common law position is not quite as stark as it would appear at first blush.

70 At [3.37].

Sections 41 to 44 of the Act cannot be modified or excluded by the terms of a trust[71] and apply to trusts created before and after commencement of the Act.[72]

3. Summary

The limitations in ss 40 and 41, are an advance on the pre-Act law as they also prohibit exclusion of liability and indemnifying trustees for "gross negligence". This change gives more appropriate weight to the trustee duties as the ability to limit the trustee's liability or be indemnified, is now narrower.

E. The Discretion of a Trustee to Determine Whether a Return on an Investment is Income or Capital and to Apportion Receipts and Outgoings as Income or Capital

1. The Position Prior to the Trusts Act 2019

The Trustee Act 1956 was silent on rules about the apportionment of a return or allocating receipts or expenses. Accordingly, the default position was that the common law rules applied.

(a) The distinction between income and capital

Under the common law, unless the duty to act impartially had been overridden in the terms of the trust, trustees would be required to ensure income went to life tenants and capital appreciation to the reminder beneficiaries.[73] Trustees, therefore, had a difficult task to ensure investments did not prejudice either income or capital beneficiaries. Applying these rigid rules meant the overall benefits to the trust were compromised, so as noted by the Law Commission, both categories of beneficiaries were potentially left dissatisfied.[74]

The distinction was considered outdated and artificial by the Law Commission in that the rules restricted trustees from doing what non-trustee investors do - investing for a maximum return.[75]

The rigidity of the rules meant many trust deeds contracted out of them.

71 Trusts Act 2019, ss 5(4)–(5) and sch 2.
72 Schedule 1 cl 2.
73 Andrew S Butler "Investment of Trust Funds" in Andrew S Butler (ed) Equity and Trusts in New Zealand (2nd ed, Thomson Reuters, Wellington, 2009) 213 at [8.2.11(1)].
74 See Report 130, above n 1, at [7.19].
75 At [7.17].

(b) The apportionment of receipts and outgoings

Prior to the Act, trustees would also need to rigidly categorise receipts and expenses as either income or capital. In order to make the distinction, trustees would need to apply complex rules and calculations, often for relatively small amounts.[76] Although expenses of an income nature would be borne by income beneficiaries, and those of capital nature by capital beneficiaries, this was not always easy to apply in practice. It would sometimes be a difficult exercise to work out for whose benefit the expense was actually incurred.[77]

In addition to the case law rules, there were a number of provisions in the Trustee Act 1956 dealing with apportionment of expenses and receipts, adding to the complexity.[78]

As a result, many trust deeds also contracted out of these rules.[79]

2. Trusts Act 2019 position

Section 60 of the Act gives a trustee the power to determine whether a return on an investment should be treated as income, or capital. This means that trustees can select investments based on their overall return (rather than their legal category) thereby attempting to maximise the total value of the trust portfolio.[80]

Although s 60 gives trustees broad discretion whether to treat a return as income or capital, they still need to comply with their trustees' duties in exercising the power and consider the overall interests of all beneficiaries. As noted by the Law Commission during the trusts law reform:[81]

> Trustees would be required to make such determinations in a manner that is consistent with their duties as trustees and fairly and reasonably takes into account the interests of all beneficiaries. This approach relies on trustees' mandatory duties rather than on prescribing rules for trustees to follow. Trustees, guided by their duties to beneficiaries, would have discretion to adopt a suitable mechanism to determine how much of the fund should be returned to income beneficiaries (where this is applicable) but would be required to do this in a manner that is in the overall interests of all beneficiaries.

76 At [33].
77 At [7.24].
78 For example, Trustee Act 1956, ss 83, 84, and 85.
79 Report 130, above n 1, at [7.25].
80 At [32].
81 At [7.21].

Section 61 gives the trustees discretion to apportion receipts and outgoings as income or capital, where it is fair and reasonable in the circumstances[82] and in accordance with accepted business practice.[83]

What constitutes "accepted business practice" (in s 61(1)(b)) has not been defined in the Act, and the Law Commission did not think that the "generally accepted accounting practice" reporting standards promulgated by the External Reporting Board under the Financial Reporting Act 1993 (as proposed by some submitters) should be the trustees' only guide.[84] Accordingly, what is accepted business practice is unsettled, and is not subject to any particular legal guidelines.

In addition, s 61 also expressly extinguishes the rules of common law and equity relating to the apportionment of receipts and outgoings.[85]

As both ss 60 and 61 are default provisions, they can be modified or excluded by the terms of the trust.[86] The provisions also apply to trusts created both before and after commencement of the Act.[87]

3. Summary

Sections 60 and 61 of the Act will enable trustees to invest more effectively, and to apportion receipts and outgoings without being constrained by rigid distinctions between income and capital. Conversely, the provisions are appropriately balanced with the duties that the trustee must comply with in exercising the powers. And, the s 61 discretionary power is subject to situations where it is fair and reasonable and in accordance with accepted business practice.

The change will likely be welcomed by trustees giving them more flexibility and extinguishing outdated rules.

F. The Appointment of Special Trust Advisors

1. The position prior to the Trusts Act 2019

Section 49 of the Trustee Act 1956 enabled an "advisory trustee" to be appointed to act alongside the trustee. The trustee was able to consult with the advisory trustee and act on its advice or direction. This terminology caused some confusion given its reference to "advisory trustee" when that entity was not actually a trustee at law.[88]

82 Trusts Act 2019, s 61(1)(a).
83 Section 61(1)(b).
84 Report 130, above n 1, at [7.29].
85 Trusts Act 2019, s 61(3).
86 See, Trusts Act 2019, s 5 (4)–(5) and sch 2.
87 Schedule 1 cl 3.
88 Report 130, above n 1, at [37].

2. Trusts Act 2019 position

Sections 74 to 76 of the Act provide for the appointment of "special trust advisers". These provisions are substantively similar to the former s 49 provision but now more accurately describe the entity advising the trust as a "special trust adviser" rather than advisory trustee.

If a person had been appointed as an advisory trustee under the Trustee Act 1956, then that entity is now considered to be a special trust adviser appointed under the Act.[89] However, the Act's provisions on the amount of remuneration payable to the special trust adviser in s 76(2) will not apply if a determination regarding remuneration was made under the Trustee Act 1956 and that determination took place before 30 January 2021.[90] A power created before 30 January 2021 to appoint an "advisory trustee" is now taken to be a power to appoint a "special trust adviser".

3. Summary

The Act, in ss 74–77, has modernised and clarified the former provision in s 49 of the Trustee Act 1956. Rather than referring to "advisory trustee" (when that entity is not a trustee at law) the Act now uses the term "special trust adviser" which more accurately reflects their role. This is a minor change but will improve clarity and avoid confusion around the legal status of this entity.

G. Appointment and Removal of Trustees

1 The position prior to the Trusts Act 2019

(a) Appointment of trustees

Prior to the Act, no one could be compelled to be a trustee of an express trust. There needed to be an acceptance of appointment as a trustee, and this acceptance could be expressed or implied.[91] The law was however not clear about the effect of inaction. The Law Commission noted that:[92]

> There is case law that supports the proposition that inaction for a long period will be presumed to constitute rejection. There is also case law for the proposition that a long period of inaction will be presumed to constitute acceptance (because

89 Trusts Act 2019, sch 1 cl 6(1).
90 Schedule 1 cl 6(2).
91 See *Lord Montfort v Lord Cadogan* (1816) 19 Ves 635, 35 ER 841 (Ch); and *James v Frearson* (1842) 1 Y & C Ch Cas 370, 62 ER 929.
92 Report 130, above n 1, at [8.4].

> there has been no express rejection). Whether the court finds there has been an implied acceptance or an implied rejection is assessed on the facts.

Due to the uncertainty in the law, the common law rules around the effect of inactivity were difficult to apply and needed to be assessed on a case-by-case basis. There was also no defined period after which inaction was to be considered a rejection of the appointment as a trustee.

(b) Removal of trustees

Sections 43 and 51 of the Trustee Act 1956 dealt with discharge and replacement of a trustee. Section 43 of the Trustee Act 1956 provided that certain persons were able to appoint a replacement trustee in certain situations.[93] These included a situation that the trust deed allowed; or where the trustee had died, was out of the country, desired to be discharged, refused to act, was unfit to act, or was a company trustee in liquidation.[94] Section 51 of the Trustee Act 1956 provided a list of circumstances where the court could replace an existing trustee.[95] These circumstances included: misconduct, where the trustee was convicted of a crime of dishonesty, mental incapacity, bankruptcy, or the liquidation of a trustee company.[96]

Prior to the Act and during the trusts reform, the Law Commission noted a number of issues with the way ss 43 and 51 of the Trustee Act worked:

> These sections are neither aligned nor clearly differentiated, which causes confusion and a lack of clarity about the circumstances in which a trustee may be removed without recourse to the court. Some of the court's specific powers of removal, for example the power to remove a bankrupt trustee, have been held to come within the broad power under section 43 to remove a trustee who is "unfit to act". There is some case law on the meaning of the terms "unfit to act" and "incapable of acting". However, there remains ambiguity and these terms may not provide sufficient guidance to persons wishing to exercise a power under section 43.

93 Trustee Act 1956, s 43(1).
94 Section 43(1).
95 Section 51(1).
96 Section 51(2).

This ambiguity has meant applications to court were common under the previous trusts' regime, which was a cost to the trust and caused some delays in having trustees removed or replaced.

(c) Duty to act honestly and in good faith

Before the Act, persons exercising the power to appoint and remove a trustee would need to comply with the duty to act in good faith, but this was not settled by the courts.[97] There was no provision in the Trustee Act 1956 requiring honesty or good faith, so the duties owed were unclear. As noted by the Law Commission, some cases held that a person appointing and removing a trustee was subject to more extensive fiduciary duties.[98] However, whether or not these fiduciary duties arose, depended on the circumstances of the particular trust.[99]

2. Trusts Act 2019 position

The Act provides guiding principles and mechanisms for appointment and removal of trustees.[100] The broader grounds for removal should significantly reduce the number of applications to court to have a trustee removed.

(a) Appointment of trustees

Section 99(1) of the Act is consistent with the pre-Act position in that no one can be compelled to be a trustee of an express trust. The provision provides that trusteeship does not take effect until the appointee accepts the appointment.[101] Section 99(2) also preserves the common law position that acceptance of a trustee appointment may be expressed or implied, so the common law will continue to assist in interpreting this provision.[102]

Sections 99(1) and (2) are default provisions so can be modified or excluded by the trust terms.[103]

97 Butler, above n 29, at [5.2.3]; and see Report 130, above n 1, at [8.38].
98 Report 130, above n 1, at [8.38].
99 At [8.38].
100 At [8.2].
101 Trusts Act 2019, s 99(1).
102 Section 99(2). The provision reflects the Law Commission's recommendation that it not be "too prescriptive of the types of conduct that may imply acceptance as the case law should continue to apply": Report 130, above n 1, at [8.7].
103 See Trusts Act 2019, ss 5(4)–(5) and sch 2.

The Act also clarifies in s 99(3) that inactivity is considered to be rejection if that inactivity lasts for 90 days after the appointment.[104] This provision is mandatory so cannot be modified or excluded by contrary trust terms.[105]

Section 99 of the Act applies to trusts created both before and after the Act's commencement.[106]

(b) The removal of trustees

The Act states that a trustee may be removed by the person with power to remove a trustee in accordance with either:[107]

> (a) a power in the terms of the trust (if there is a person nominated in the trust terms as having power to remove trustees); or
> (b) the power to remove a trustee on compulsory grounds under section 104 or on optional grounds under section 105.

The compulsory grounds for removal of a trustee are:

> (a) if a trustee loses the capacity to perform the functions of a trustee; and
> (b) that trustee's powers have not been delegated in a manner authorised by an enactment or by the terms of the trust.

The optional grounds for removal of a trustee require:[108]

> (a) that removal is desirable for the proper execution of the trust; and
> (b) that one or more of the following grounds apply:[109]
>
> (i) the trustee repeatedly refuses or fails to act as trustee:
> (ii) the trustee becomes an undischarged bankrupt:
> (iii) the trustee is a corporate trustee that is subject to an insolvency event:

104 Section 99(3).
105 The provision does not appear in schedule 2 of the Act as required by ss 5(4)–(5) if it can be modified or excluded.
106 Trusts Act 2019, sch 1 cl 2.
107 Section 103(1).
108 See s 105(1).
109 Section 105(2) sets out when the trustee's conduct or circumstances may justify removal.

(iv) the trustee is no longer suitable to hold office as trustee because of the trustee's conduct or circumstances.

The problematic terms "unfit" and "incapable" in s 43 of the Trustee Act 1956 have,[110] therefore, been replaced in the Act with a list of comprehensive circumstances where a person with power to remove a trustee (without having to go to court) can have a trustee removed.[111] Accordingly, it is anticipated that a court's involvement, in what should be a trust process, is greatly reduced.

Note, however, that the court's inherent jurisdiction is preserved in the Act,[112] so a court may remove and replace trustees for reasons outside of these statutory circumstances.

The provisions in the Act governing the removal of a trustee cannot be modified or excluded by the terms of the trust.[113] However, s 103 in the Act expressly allows the terms of the trust to include terms that enable trustees to be removed that are in addition to those set out in ss 104 and 105 of the Act.[114] The provisions also apply to trusts created before and after commencement of the Act.[115]

(c) Duty to act honestly and in good faith

The Act incorporates the duties imposed on a person exercising the power to appoint or remove a trustee. Section 94 provides that a person with the power to remove or to appoint trustees must exercise these powers of removal or appointment (a) honestly and in good faith; and (b) for a proper purpose.

This provides clarity to the pre-Act position. As mentioned, prior to the Act, a person exercising the power to appoint or remove a trustee may not have known they had duties, and even if they did, what duties were owed was unclear. The statutory requirement now sets the duties that must be complied with in exercising this power. Those persons with power to appoint and remove trustees that are also trustees, will also be subject to their duties as trustees.[116]

Section 94 is mandatory so cannot be modified or excluded by the trust terms,[117] and it applies to trusts created both before and after the Act's commencement.[118]

110 As per the Law Commission, Report 130, above n 1, at [8.16].
111 See Trusts Act 2019, s 92.
112 Section 8.
113 Section 5(4)–(5) and sch 2.
114 Section 103(2).
115 Schedule 1 cl 2.
116 Part 3, sub-pt 1.
117 Section 5(4)–(5) and sch 2.
118 Schedule 1 cl 2.

3. Summary

The Act improves clarity by codifying the common law principles in respect of appointment of a trustee and rejection which can be expressed or implied by inaction of the appointee. The Act sets a timeline of when inaction will be implied rejection, thereby clarifying the pre-Act position.

Removal of trustees under the Act is more comprehensive than what was included in the former Trustee Act 1956. It also broadens and clarifies the situations where the person with power to remove must or may remove a trustee. This will relieve the court from having to make the determination to remove a trustee, which was often the case under the Trustee Act 1956.

The Act clarifies the duties required of the person exercising the power to appoint and remove a trustee. While duties were owed under the pre-Act common law, trustees would not necessarily be aware of the duties (as they were not expressed in the Trustee Act 1956) and there was uncertainty as to the extent of the duties owed.

H. Alternative Dispute Resolution Provisions

1. The position prior to the Trusts Act 2019

The Trustee Act 1956 did not contain provisions enabling trustees to refer disputes to an Alternative Dispute Resolution (ADR) process. The terms of the trust would therefore need to contain provision allowing for a dispute to be refereed to ADR. If there was no such provision, the beneficiaries could vary the trust terms to enable the use of ADR, or a court could order or approve the use of ADR.

Section 20(g) of the Trustee Act 1956 did contain a narrow power for a trustee to:

> compromise, compound, abandon, submit to arbitration, or otherwise settle any debt, account, claim, or thing whatever relating to the trust or the trust property,-
>
> and for [that purpose] may enter into, give, execute, and do such agreements, instruments, instruments of composition or arrangement, releases, and other things as to him seem expedient, without being responsible for any loss occasioned by any act or things so done by him in good faith.

This provision was discussed by the Law Commission who noted its narrow application (it does not make ADR generally available) and that it appears to

apply to external disputes, rather than disputes between beneficiaries and other beneficiaries or beneficiaries and trustees.[119]

Accordingly, prior to the Act, disputes that could benefit from being resolved through ADR were restricted by the terms of the trust. The position was less than ideal given the higher costs and time delays associated with litigation compared to the quicker and cheaper ADR option. During consultation on the Trusts Bill, there was in principle, unanimous agreement for ADR provisions to be included in the new Act.[120]

2. The position in the Trusts Act 2019

The Act now provides a legislative mechanism that enables disputes to be settled using ADR. Section 142 empowers a trustee to refer a matter to ADR with the agreement of each party to the matter. A matter can be an internal matter (a dispute between trustees or trustees and beneficiaries) or an external matter (one that involves a third party).

Section 144 sets out the process for an internal matter if the trust has beneficiaries who are unascertained or lack capacity. A court can also order that an internal matter be submitted to an ADR process (unless the terms of the trust create a contrary intention).[121]

The ADR provisions in ss 142–146 are default provisions, and can therefore be modified or excluded by the express or implied terms of the trust.[122] Section 147, regarding a trustee's liability, may be completely excluded but may not be modified.[123] The ADR provisions apply to trusts created both before and after the commencement of the Act.[124]

3. Summary

The ADR provisions are likely be welcomed by both trustees and beneficiaries. There are several advantages to ADR over litigation. The Act gives trustees the ability to refer a matter to be resolved by ADR without being constrained by the trust terms, which previously had to provide them with that power.

119 Preferred Approach Paper, above n 18, at [13.20].
120 Report 130, above n 1, at [14.8]: "No submitter objected to the ADR proposals".
121 Trusts Act 2019, s 145.
122 See ss 5(4)–(5) and sch 2.
123 Schedule 2.
124 Schedule 1 cl 2.

IV. Conclusion

This Paper has provided a high-level overview of some of the more notable changes that the Act brings.

Overall, the Act is not much of a game-changer and trustees will already be complying with many of its obligations. This is because very few provisions actually depart entirely from pre-Act principles. These limited departures are also not major reforms but provide improvements to the administration of trusts.

The abolition of the rule against perpetuities is a complete departure from the pre-Act position. However, the rule was complex and difficult to apply. The Act which now requires a trust to have a life of no more than 125 years, provides clarity that will likely be welcomed by trustees.

The consolidation of trustee duties into statute significantly improves accessibility of the law. Prior to the Act, trustees would need to search for uncollated, and sometimes difficult to locate, case reports to identify applicable duties. The Act does not create new or additional obligations but rather restates the pre-Act common law principles. Because the Act's duties derive from common law, that common law will continue to be relevant to aid interpretation of those duties.

The more significant change is the introduction of disclosure obligations on trustees. Prior to the Act, the obligation to provide trust information to beneficiaries formed part of the common law duty to account. While the Act provisions are consistent with the general principle to account to beneficiaries, the Act makes some changes in relation to the giving of trust information to beneficiaries. The Act creates a presumption that trust information will be provided to beneficiaries either voluntarily (this is limited to provision of the basic trust information) or on request. However, this presumption will not apply where the trustee reasonably considers that the information should be withheld, having considered the various factors set out in s 53.

The Act now prohibits the trust terms containing limits on trustee liability where the trustee has been grossly negligent and prohibits trust terms that indemnify trustees for breaches due to gross negligence. This is an extension on the pre-Act position that only prohibited limits on liability or allowing indemnities where conduct amounted to fraud or dishonesty.

A fairly modest change, but one that will assist trustees significantly, is that they now have the ability to determine whether a return on an investment should be treated as income or capital, and may apportion receipts and outgoings as either income or capital. This change will be welcomed by trustees as they are no longer bound by the rigid pre-Act rules which gave them no discretion.

A minor change but, again, one of improvement is the change of terminology relating to appointment of advisers. The Act replaces the pre-Act "advisory trustee" with "special trust advisor", which more accurately reflects the role as that person.

The appointment of trustees and removal of trustees has been improved and modernised. The appointment rules in the Act reflect common law principles but also clarify where there was confusion under the pre-Act regime. The removal process of trustees under the Act is more comprehensive and has been broadened to provide removal of trustees without the intervention of the courts.

The ADR provisions are new and welcome, and enable a trustee to refer a matter to ADR without having to have that power expressed in the trust terms.

The benefits from the reforms are therefore apparent. Some changes effectively restate or clarify common law principles while others modify them. To that end, much of the pre-Act common law will remain either relevant or influential. Very few provisions depart completely from pre-Act principles.

The Act overall improves accessibility of the law and attempts to modernise the law of trusts. Most of the changes will likely be welcomed by settlors, trustees, and beneficiaries. Analysis of particular provisions (which is out of scope of this paper) will likely raise some interpretation issues making for interesting future discussions as we move to the next phase of implementation of the Act.