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# Private Wealth

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## Trends and Developments

*Contributed by Hesketh Henry*

**Hesketh Henry** is a commercial law firm based in Auckland, New Zealand. The private wealth team comprises three partners, one senior associate and three solicitors. They advise clients on a wide range of services with a focus on trusts and estates; establishing, administering and restructuring trusts and advising on trust structures; opinions on complex trust issues for existing clients of the firm and referrals from other law firms; preparing and advising on relationship property agreements and help in assisting in the resolution of relationship property issues; wills and advice on issues that arise relating to wills and estate plan-

ning; enduring powers of attorney; administering estates; trust disputes and advice on the establishment and operation of charitable trusts; establishing family office structures and advice in managing those through the generations. The firm is unique in that it combines a depth of expertise in both contentious and non-contentious areas of private wealth law. There are also three practitioners in the litigation team that specialise in this area of law. The firm also has a significant practice established in acting for individuals and families dealing with a wide range of issues that affect their personal, property and business interests.

### Authors



**Mary Joy Simpson** leads Hesketh Henry's private wealth team. Her principal areas of practice are estate planning, trusts, relationship property and estate management. A specialist in trust law, Mary Joy regularly reviews and provides

advice on personal asset management. Mary Joy is often asked to speak at seminars and is a member of the Society of Trust and Estate Planning Professionals. Relationships are important to Mary Joy and she has developed strong and trusted relationships with her clients. Mary Joy also regularly advises charitable organisations on legal and structuring issues.



**Emma Tonkin** is a partner in the private wealth team. She specialises in private wealth, real estate and overseas investment. Emma regularly advises on trust structures, both private and charitable, estate and asset planning and

enduring powers of attorney. Emma is also an expert in relation to the Overseas Investment Act and guides clients through the regulatory process surrounding overseas ownership of sensitive New Zealand assets. She has broad experience across a number of industries with a particular focus on real estate. Emma is a trusted family adviser who guides clients on all aspects of their New Zealand estate plan.



**John Kirkwood** is a highly experienced commercial and trust lawyer with more than 30 years in private practice. He operates at the intersection of commercial and private wealth law. John's particular expertise is in small to medium enterprise

businesses and the business, personal and wealth planning requirements of the people who own and operate them. He has experience across the wide range of legal issues affecting these individuals, with a particular interest in business and trust structuring, succession planning for individuals and exit and transition planning for the businesses they own. John also oversees the estate administration practice.



**Brett Morley** is the firm's senior litigation partner, with more than 30 years' experience, and has been counsel in litigation at all court levels. One of his specialities is complex trusts and estate disputes and he is sought after to provide opinions and resolve conflicts in this area. Key clients include a number of charitable trusts, including several that were created many years ago through specific acts of parliament. Brett has appeared as counsel in a number of significant cases in this area.

## **Introduction**

A number of factors, both domestic and international, are presently influencing New Zealand practice in the Private Wealth arena. Taxation is one area where there is a continuing dialogue. The increase in sophistication of the domestic market is providing opportunities for more developed family office structures. The global trend towards transparency evidenced by AML, FATCA and CRS is also playing its part.

New Zealand is a relatively small market and it has some very idiosyncratic features, including, it is estimated, the largest number of express trusts per capita in the world. A large number of these trusts lack independent governance or have lay trustees who are not sufficiently familiar with their fiduciary duties. Trends which affect the use of trusts, therefore, have the potential to have a disproportionate effect on the New Zealand market.

## **New forms of Taxation**

### ***Capital Gains Tax***

In general terms, New Zealand has a relatively benign taxation system. In line with its policy statements, the new Labour Government reviewed the case for a comprehensive capital gains tax during its second year in office in 2019. The report by the Government's Tax Working Group canvassed a number of areas of taxation but the main focus was on whether capital gains tax should be introduced across a very wide range of asset classes. Comment on the resulting recommendations was that they were harsh and would add unnecessary complexity to the tax system. The government was unable to obtain support for their proposal from coalition partners, and so that tax will not proceed.

### ***Climate Change***

Consultation is underway regarding how New Zealand can develop and implement clear and stable climate-change policies that fulfil its obligations under the Paris Agreement. This is a contentious domestic issue because it is estimated that nearly half of New Zealand's greenhouse gas emissions result from its agricultural sector. This sector is a high contributor to New Zealand's GDP. The levers available to Government to encourage less intensive farming uses include forms of taxation which will be vigorously debated. As most farmland is owned generationally by families via trust structures, this legislation and any resulting regimes will influence the practice of legal advisers to these families.

### ***Family Office***

Given New Zealand's size and relative youth as a country, it has a limited number of multi-generational businesses to support integrated and comprehensive family office arrangements. However, the domestic market now recognises that these arrangements can be tailored to suit individual family business needs. There is a small, but growing, industry of legal and other service-providers who can offer support to family businesses wishing to create a more formal structure

around the relationship that family members and future generations have with their business and family wealth.

## **Reform of Trusts Legislation**

### ***Legislative Process***

The Trusts Act 2019 has made its way through the final stages in Parliament and was passed into legislation in July 2019. The proposed changes represent a partial codification of trust law for New Zealand, and as such may see this jurisdiction head down a more distinctive branch of trust law.

Although some of the changes represent the existing common-law position, practitioners are expecting the changes to be of significance to many New Zealanders, because duties and obligations which have previously been seen as opaque and inaccessible will now be set out in stark relief in legislation.

The Law Commission commenced a review of New Zealand's trust legislation in 2009 and completed it in September 2013. The legislation was introduced in late 2016 and reintroduced as part of the order papers in 2017 following the last general election. It had its first reading in December 2017 and the Justice Committee reported back to the House of Representatives in October 2018. The rest of the process occurred in 2019. The reform process has been lengthy and arduous.

### ***Objectives of Reform***

The Justice Committee set out three main objectives of the new legislation which are:

- set out clear and accessible trust principles;
- ensure more efficient trust administration;
- simplify and clarify the role of the courts in relation to trusts.

The legislation will not apply retrospectively, but it will apply to all trusts in existence at the time the Act comes into force into force, in January 2021.

Two areas relating to key trust principles are worthy of expansion to demonstrate present practice and the mindset shift which will be required of lay New Zealand fiduciaries. These relate to trustee duties, and the rights of beneficiaries to trust information.

### ***Trustee Duties***

The Trusts Bill seeks to set out clearly the duties of a trustee. These provisions are aimed at bringing clarity to the role of trustee and educate people who are connected to a trust, in particular, beneficiaries.

Duties are grouped into two:

- **Mandatory Duties:** duties which must be performed by the trustee and which may not be modified or excluded by the terms of the trust (Section 22 of the Trusts Act).
- **Default Duties:** duties that must be performed by the trustee unless modified by the terms of the trust as permitted by the legislation (Section 28 of the Trusts Act).

The Justice Committee has added to the duties' provisions a 'guiding principle'. Section 21 provides that, in performing the duties set out in the legislation, be they mandatory or default duties, a trustee must have regard to the context and objectives of the trust. The Justice Committee has stated that provision is intended to clarify that the "nature and extent of the trustee's duties depend on the terms, context, and objectives of the particular trust". It recognises that trustee duties are nuanced and should be applied in each case according to their own particular circumstances.

### ***Mandatory Duties***

The Mandatory Duties, which cannot be modified, are to: know the terms of a trust (Section 23);

- act in accordance with the terms of the trust (Section 24);
- act honestly and in good faith (Section 25);
- act for the benefit of the beneficiaries, or for the furtherance of a permitted purpose, in accordance with the terms of the trust (Section 26); and
- exercise the trustee's powers for a proper purpose (Section 27).

The Mandatory Duties are basic principles which are obvious to the good management of a trust. However, written starkly in plain language, as they are, the obligations they impose may weigh heavily on many New Zealand trustees highlighting oversights in practice.

### ***Default Duties***

The Default Duties, which a trustee must carry out, unless modified by the terms of the trust are:

- exercise the care and skill that is reasonable in the circumstances (Section 29);
- invest prudently (Section 30);
- not act directly or indirectly for the trustee's own benefit (Section 31);
- consider actively and regularly whether the trustee should be exercising any of the trustee's powers (Section 32);
- not to bind or commit trustees to a future exercise or non-exercise of discretion (Section 33);
- avoid conflict between the interests of the trustee and the interests of the beneficiaries (Section 34);
- act impartially as between the beneficiaries (Section 35);

- not make a profit from the trusteeship of a trust (Section 36);
- act for no reward (except for legitimate expenses) (Section 37); and
- act unanimously (if more than one trustee) (Section 38).

It is worthwhile expanding on a couple of the Mandatory Duties.

### ***General Duty of Care***

Under section 29, a trustee must exercise the care and skill that is reasonable in the circumstances having regard to any special knowledge or experience that the trustee has or that the trustee claims to have; and if the person is a trustee in the course of a business or profession, then to any special knowledge or experience that it is reasonable to expect of a person acting in that kind of business or profession.

Professional trustees, such as lawyers who fulfil trustee roles, do have higher obligations in the way that they carry out their duties and powers as trustees.

### ***Duty to Act Impartially***

Under section 35, a trustee must act impartially between beneficiaries. The clause makes it clear that this does not necessarily mean that all beneficiaries must be treated equally.

This duty may be modified by the terms of the trust. This may well result in an increase in the appointment of some beneficiaries as primary beneficiaries so that the trustees are expressly authorised to prefer certain discretionary beneficiaries.

### ***Consider Actively and Regularly***

Section 32 provides that trustees must consider actively and regularly whether the trustee should be exercising one or more of the trustee's powers. While this provision does not dictate that there must be a regular meeting of trustees, it must mean that it would be unwise for trustees not to meet at least once a year. It is presently not uncommon where trusts do not hold income-producing assets for trustee meetings to be limited to times when transactions are occurring.

### ***Beneficiary Rights and Communication***

#### ***Drafting Practice in New Zealand***

In certain periods in New Zealand legal practice, the drafting practice for discretionary trust deeds was to include very wide classes of discretionary beneficiaries. In some cases it is doubtful that the settlor ever intended certain of those classes to benefit from trust property. A great number of those trusts are still in existence.

In order to ensure that beneficiaries have enough information to enable the terms of the trust and the trustees' duties to be enforced against the trustees, the Trusts Act sets out a prescribed set of disclosure requirements. As there are a

large number of beneficiaries who will not be aware of their status, this part of the Act is likely to be of significant concern to settlors and trustees. This aspect of the legislation is undoubtedly the area that will attract the most media coverage in New Zealand once the legislation is passed and receives attention.

### ***Presumption of Notification***

Section 51 of the Act contains the presumption that a trustee must notify 'basic trust information', by making available to every beneficiary or representative of a beneficiary the basic trust information set out in subsection (3).

### ***Basic Trust Information***

The basic trust information is:

- 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; and
- the right of the beneficiary to request a copy of the terms of the trust or trust information.

A trustee is required to consider at reasonable intervals whether the trustee should be making the basic trust information available. This echoes the requirement for trustees to consider actively and regularly the management of the trust.

The notification requirement, which includes the right of the beneficiary to request a copy of the terms of the trust or trust information, clearly puts the onus on the trustees to let beneficiaries know that the trust exists. For a beneficiary who was not previously aware that they might qualify, an invitation to request a copy of the terms of the trust or trust information is one that might reasonably be expected to be taken up.

### ***Requests for Trust Information***

The Act then anticipates the next level of information request to arrive and provides in section 52 that there is a presumption that a trustee must, within a reasonable period of time, give a beneficiary or the representative of a beneficiary the trust information that person has requested.

The Act contains a definition of trust information which:

- means any information:
  - (a) regarding the terms of the trust, the administration of the trust, or the trust property; and
  - (b) 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.

### ***Factors for Consideration***

Before notifying or giving out information the trustee must consider the factors set out in section 53, which are set out below:

- 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;
- whether the information is subject to personal or commercial confidentiality;
- 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;
- the age and circumstances of the beneficiary;
- the age and circumstances of the other beneficiaries of the trust;
- the effect on the beneficiary of giving the information;
- the effect on the trustees, other beneficiaries of the trust, and third parties of giving the information;
- in the case of a family trust, the effect of giving the information on relationships within the family and the relationship between the trustees and some or all of the beneficiaries to the detriment of the beneficiaries as a whole;
- 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;
- 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);
- the practicality of giving some or all of the information to the beneficiaries in redacted form;
- if a beneficiary has requested information, the nature and context of the request;
- any other factor that the trustee reasonably considers is relevant to determining whether the presumption applies.

As with many trustee decisions, the decision to notify or provide information will be defensible if the trustee has considered all relevant considerations and has otherwise complied with their trustee duties. The Act anticipates that there may be circumstances where the trustee decides not to notify beneficiaries of basic trust information, or to refuse to provide information on request but that the presumption is that information should be made available wherever possible.

### ***No Information***

Section 524 of the Act sets out the procedure which applies if, as a result of one or more of the following circumstances or events, no beneficiary has any trust information:

- the trustee cannot identify any beneficiary to whom information can be given;
- the trustee decides to withhold all of the basic trust information from all beneficiaries;

- the trustee decides to refuse a request for trust information.

### *The Court's Role*

In those circumstances, the trustee must apply to the court for directions in relation to two matters. The first is whether the trustee's determination that there is no beneficiary to whom information can be given, or to withhold information, or to refuse a request for information, is reasonable in the circumstances. The second is the alternative means by which the trustee can be accountable and the trust can be enforced.

To the extent that disclosure has not occurred, the trustee is not required to apply to the court for directions if the period during which no beneficiary has any trust information is less than 12 months and, at the end of that period, the trustee gives to at least one beneficiary of the trust the basic trust information.

In giving directions under this section, the court must take into account two guiding principles: that trust information may be withheld from all beneficiaries only in exceptional circumstances; and that an alternative means of enforcing a trust pending disclosure of information to beneficiaries must be consistent with the objectives of the trust and must not adversely affect its administration.

### *Trustee Decisions*

In both notifying and deciding to provide information, a trustee will likely be making a decision with other trustees, which decision will be required to be unanimous. Our expectation is that independent trustees will take a more conservative view when making this assessment as they are less likely to be emotionally invested in the decision.

If the trustees cannot reach a decision, they may have two options. They are able to apply to the court for directions under section 133 of the Act but, in doing so, they will have to persuade the court not to serve the application on each person interested in the application. They may also consider whether it is best that they resign, but must consider their fiduciary obligations, and whether the trust can still function, before they do so.

### *In Practice*

The result of these impending changes is that trust practitioners are receiving instructions to undertake a large number of reviews of trust structures. We expect that this will continue as New Zealand settlors come to terms with the shift in landscape.

#### **Hesketh Henry**

Level 14, PWC Tower  
188 Quay Street  
Auckland 1010  
New Zealand

**Hesketh  
Henry** The Art of Law

Tel: +64 9 375 8700  
Fax: +64 9 309 4494  
Email: [lawyers@heskethhenry.co.nz](mailto:lawyers@heskethhenry.co.nz)  
Web: [www.heskethhenry.co.nz](http://www.heskethhenry.co.nz)