

The Trustee's Role

A Guide for Trustees of New Zealand Trusts

If you are a trustee of a New Zealand Domestic trust or have been asked to be a Trustee it is important to be fully aware of your responsibilities that come with this role.

A trust itself is not a separate legal entity, and it is the trustees who are the legal owners of any assets held by the trust as caretakers for the beneficiaries. The beneficiaries can hold trustees accountable for their actions or failure to act. This guide is here as an introduction to the duties of a Trustee and their significance.

A Trustee's duties

All trustees have general key duties which are:

1. Duty of Efficient Management

the requirement to thoroughly know the terms of the Trust Deed and obey those terms, regularly take stock of trust assets and liabilities, setting up structures for the administration and management of the trust and keeping abreast of trust issues.

2. Duty to Keep Full and Candid Accounts

keeping appropriate and adequate accounting records and preparing financial statements in respect of appropriate accounting periods. Trust accounts kept must be proper, faithful and accurate.

3. Duty of Objectivity / Impartiality

acting in the best interests of all the beneficiaries, present and future. Trustees must act impartially in their decision making and at all times protect the interests of the beneficiaries.

4. Duty to Consider

A trustee has a duty to act personally and not delegate decisions to others. Trustees must consider whether or not and in which ways they should exercise their powers and discretions having regard to the terms of the trust and the interests of the beneficiaries.

Prudent Investment

Under the Trustee Act 1956 a trustee of a trust may invest any trust funds in any property, provided it is invested prudently. A trustee must take all precautions which would normally be taken by an ordinary prudent person managing the affairs of others. The law looks at the process the trustees have followed to determine how and where to invest rather than the outcome. The 'prudent person' test would look, for example, at investment plans and the diversification of investments based on this plan.

In addition to these requirements, if a trustee is a professional person (such as a lawyer or an accountant), when investing trust funds, for example, a professional trustee must exercise the care, diligence and skill that a prudent person engaged in his or her line of business would exercise in managing the affairs of others.

Potential Liability

What does a breach of duty mean for a trustee? There can be both internal consequences which are governed by the Trust Deed as well as External Liability

Usual problems include:

- Not all trustees participate in decisions;
- The trust deed is not properly drafted so fails to deliver the proper structure for the type of investments the trust has;
- Poor written record keeping and no/few trustee resolutions;
- No annual meetings;
- No accounts;
- No proper audit trail of assets sold or gifted to the Trust;
- No memorandum of wishes to guide trustees;
- No investment strategy;
- Poor use of other advisors, solicitors, bankers, financial advisors;
- Failure of the trustees to all take responsibility; and

- A general passive approach to the management of the Trust.

The consequences of failing to manage a Trust correctly include:

- Disputes between trustees;
- Beneficiaries may have a claim against the trustees personally for failing to comply with their obligations;
- Creditors may be able to claim against trustees personally as well as access Trust assets;
- In the worst of cases the Trust could be considered a sham and of no effect.

How to Protect Yourself

It is important to understand all the risks of being a Trustee and to work towards minimising them. To protect yourself from personal liability a trustee should take the following steps:

- Understand and be familiar with the terms of the Trust Deed and other trust documents under which you will be incurring a liability.
- To act in accordance with the terms of the Trust.
- Ensure that the Trust can meet all its obligations based on the means and assets of the Trust.
- To be seen to be acting honestly and in good faith.
- To be seen to be acting impartially between beneficiaries and to be seen acting in the beneficiaries best interests.
- To be familiar with the Trust assets and liabilities and obligations;
 - (a) The Trust assets are insured and are kept current.
 - (b) To maintain stewardship over Trust assets and ensure that they are maintained in good order
 - (c) All income producing assets' potential are maximised;
- Be fully active in the Trust Affairs;
- All proposals or recommendations by fellow trustees are considered and to consider all beneficiaries needs;
- Professional advice is sort where necessary.

- Ensure that detailed records are kept.
 - (a) Regular meetings are held;
 - (b) Minutes are kept recording all decisions and the reasons behind those decisions;

We are here to help

While each trust is very different, every trust needs to follow the rules set out in the Trust Deed, the Trustee Act and case law. These apply strictly to every trustee. The time administering the Trust will vary based on the complexity and assets held in Trust.

Some will own a family home and do nothing else. This type of trust would require very little in way of administration. Other trusts may own a substantial variety of assets such as shares in family businesses and some will have funds to invest from Income-producing investments. The administration for these types of trusts would be more substantial. Firstly, in the ongoing upkeep and administration of the trust assets as well as the requirement to complete annual accounts and tax returns and to review investment strategies.

Each Trust requires a different level and degree of trustee involvement. In nearly all cases Trustees can only act unanimously.

Being a Trustee is a personal obligation. To be a trustee you need to be fully aware of your duties and responsibilities and be prepared to be actively involved in the administration and management of the trust. The beneficiaries of the Trust depend on you and in the long run, you owe them a duty of care.

The Covisory Group is experienced in dealing with trust administration and formation. We can assist you if you would like to know more about the formation of a trust or about acting as a trustee. We can also assist you by acting as an independent trustee for the trust by establishing a trustee company for this purpose.

For further information, please contact our Trust team of Marcus Diprose or Nigel Smith.