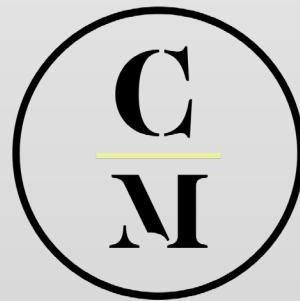


# The New Zealand Trustee Bill



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# Trusts in New Zealand

There are 250,000 registered domestic trusts in New Zealand, and 10,000 foreign or international trusts; the actual total is probably close to 400,000. This compares to 204,000 trusts in the United Kingdom (2006).

Trusts are commonly used for family succession, asset protection, to hold businesses and real property, collections, and for charitable purposes.

# History of Trusts

Early origins:

- Roman fideicommissum –used by priests to avoid imperial restrictions or inheritances to clergy.
- Under Gaelic law a salamannus was a type of trustee, who held property for a specific purpose on another’s behalf.
- The Islamic waqf has been suggested as a progenitor of the trust, and that it was imported to England after the crusades in the 11<sup>th</sup> century.

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# The English Trust

The English trust is derived from a “use” – “on his behalf”. In 1224 a jury found that a man had validly granted custody of his land as use, while he travelled to the Holy Land.

Religious Orders began to use the use to hold land, on their behalf, to avoid the restrictions of their order to holding property.

In the 13<sup>th</sup> century, the use became commonly used for tax avoidance (to avoid feudal taxes and inheritance taxes) and the forfeiture of land as a penalty.

From the 14<sup>th</sup> century, the Court of Chancery had begun regularly enforcing the rights of the beneficiaries of the use.

## Statute of Uses 1535

“Uses” being of an untrue invention to put the King and his subjects from that which they ought to have of right [i.e. taxes] by the good true common law of the land.”

The statute was designed to enable the Crown to obtain fees, taxes and revenues, from the beneficiaries of the uses.

The trust was developed to avoid the statute and to ensure that property was held for the benefit of a settlor’s heirs. From this time to 1914 trusts were used to provide residences and income for the large landed families of England

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# Trusts in New Zealand

New Zealand became an English colony in 1840.

From that point all English law was applied in New Zealand.

On 28 May 1858 the English laws Act was passed.

“The laws of England as existing as at the 14<sup>th</sup> day of January 1840, shall, ... be deemed and be taken to be in force therein on or after that day, and shall continue to be therein applied ...”

This included the law of trusts, as developed by the English Courts. It did not include any subsequent English trust legislation.

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# New Zealand Legislation

In 1883 New Zealand Enacted a Trustee Act. This was amended a number of times and was consolidated in 1908 but not as a code. In 1956 the current Trustee Act was passed; it was based on the English Trustee Act of 1925.

Problems with the 1956 Trustee Act:

- Archaic language
- Lack of definitions
- Irrelevant and lengthy recitals of trustee's process
- Limited powers of variation
- Lack of interaction with modern case law

# The Trust Bill

The Trust Bill is the result of a 16 year consultation process.

The report of The Law Commission runs to 6 volumes and 4,200 pages. It was compiled by leading trust practitioners and advisers, in consultation with New Zealand lawyers, accountants, lay persons and academics.

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# Principal Characteristics of the Trusts Bill

It is not a code – the Bill seeks to take the fundamental principles of trust law from the common law and put them into accessible legislation.

Existing rules of law continue to apply – a court may draw on the Act, or an existing common law and equity principles in interpreting the Law. It is commonly thought that the Bill changes the law: this misconception is based on ignorance of what the law is, rather than a sound understanding of the Bill.

There are three main objectives of the Bill.

- To set out clear and accessible trust law principles
- Ensure more efficient trust administration
- Simplify the role of the courts

# Mandatory Duties

The Bill set out the core (mandatory) trustee duties that cannot be excluded in a trust.

- The trustee must know the terms of the trust
- The trustee must act according to the terms of the trust
- The trustee must act honestly and in good faith
- The trustee must act for the benefit of the beneficiaries
- The trustee must exercise its powers for a proper purpose



# Default Duties

- Reasonable standard of care and skill
- To invest prudently
- Not to exercise power for own benefit; and consider exercise of power, for present and future trustees
- To avoid conflicts of interest, and act impartially
- Not to make a personal profit, or take a reward other than fees
- To act unanimously

These duties may be modified by express provision in the trust instrument.  
This modification must be explained to the settlor.

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# Right to Trust Information

Presumption that a trustee must make available trust information, that is reasonably necessary to enable the trust to be enforced, this does not include reasons for trustee decisions:

- Existence of beneficiary
- Contact details of trustee
- Details of change of trustee
- Right to request copy of trust instrument or information

The right to provide trust information is in the discretion of the trustee, and the Bill lists 13 factors which a trustee must take into account:

- i. Nature and remoteness of the beneficiary's interest, including likelihood of distributions being received
- ii. Is the information confidential?
- iii. What were the settlor's intentions (which may be specified in the Trust instrument)
- iv. Age and circumstances of a beneficiary
- v. Age and circumstances of other beneficiaries
- vi. Effect of giving the information on the beneficiary
- vii. Effect on trustee, other beneficiary, and third parties

- viii. The effect on relationships in a family
- ix. Practicality - where there is a wide class of beneficiary
- x. Practicality of imposing restrictions or use of information
- xi. Redaction of information?
- xii. Context of beneficiary's request
- xiii. Any other relevant factor

# Preservation of Special Features of New Zealand Trustee Law – Trust Advisers

- Investment Manager  
The appointment of an investment manager will absolve a trustee from responsibility for management of trust investments.
- Advisory Trustee  
An advisory trustee has extensive powers to advise the principal trustee.
- Custodial and Managing Trustees  
A custodial trustee simply acts as the owner of the trust assets. These assets are managed by the managing trustee.



## Trust Adviser

All of these functions are now in the provenance of a Trust Adviser who:

- May advise the trustee on any matter relating to a trust;
- Is not a trustee of the trust.

If a trustee consults a Trust Advisor:

- It may disregard the advice;
- If it takes the advice it will be protected from liability (except in cases of misconduct).

A Trust Adviser will include a protector, an investment adviser, an appointer, or a general adviser. The scope of the role can be defined in the trust document, and the Trust Adviser may be appointed at any time.

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# Delegation of Powers

The trustee's powers to delegate were limited under New Zealand law.

The Bill extends these powers:

“A trustee may appoint a person to exercise power or make decisions, or to hold trust property as a nominee or custodian.

This does not apply to a power of appointment, payment of fees, appropriation of income or capital, removal of a trustee, a power to distribute or resettle the trust, or apply to court.

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# **Powers of the Court Extended**

- Review acts of trustee
- Extend powers of variation
- Power to correct errors or mistakes in administration, or in drafting the trust document