

Introduction

The position of trustee is an extremely important one, as trustees are in a "fiduciary" relationship with the trust's beneficiaries. This means that they are in a special position of trust and accordingly have a number of significant duties. If you are a trustee, it is vital that you familiarise yourself with those duties, as you can be liable for "breach of trust" if you do not fulfil them.

This sheet gives information about the duties of trustees, and also gives practical advice about how to ensure that those duties are complied with.

Who can be a trustee?

Any person who can own property may be a trustee. A minor (someone under 20) can be a trustee, but a court would have to appoint someone to act as trustee until the minor turns 20.

The main duties of trustees

In general, the main duties of trustees are:

- to act in the best interests of the beneficiaries of the trust
- to act in an even-handed manner between beneficiaries and between groups of beneficiaries
- not to use knowledge or influence gained as a result of being a trustee to advance the trustee's own position (except when the trustee discloses his or her personal interest to the settlor of the trust and obtains the settlor's informed consent)
- to act personally rather than delegating decisions to others (except if the trust document explicitly permits delegation)
- to act honestly and with the level of skill and care that would be expected of the reasonable businessperson in administering the affairs of others
- to be thoroughly familiar with the terms of the trust in the trust deed (the main trust document), and with who the possible beneficiaries may be and what the assets and liabilities of the trust are.

Specific duties when the trust is set up

Trustees should be aware of the following issues when a trust is first created:

- Payment of the initial settlement to the trustees - The trust deed will usually state that an amount of money is to be paid by the settlor to the trustees as the initial settlement of the trust. It is advisable that this amount be paid to the trustees and banked immediately into a bank account opened in the trustees' name. Similarly, if land is transferred to the trust, a memorandum of transfer should be completed and registered.

- Obtaining an IRD number for the trust - If the trust will hold income-earning assets, the trustees should apply to Inland Revenue for an IRD number for the trust, because the trust is a separate entity for tax purposes. A copy of the trust deed will need to be sent with the application. The IRD will also require the trustees to complete a standard form that lists the trustees and beneficiaries and other details of the trust.
- Registering for GST - You will need to consider whether the trust should be registered for GST, especially if the trust is going to be a trading entity: see How to work out whether you must register for GST.
- Keeping the trust documents - The original documents of the trust, centrally the trust deed, should be kept in safekeeping. Copies of the trust documents should be freely available for the trustees and beneficiaries. A good practice is to bind together photocopies of the trust deed, the trustees' opening minutes, and all initial transaction documents (such as memoranda of transfer) and for these to be given to each trustee for their own records, and also to the trust's accountant. (The documents of title to any assets bought by or gifted to the trust should be held in safekeeping, along with the original trust documents.)

Specific ongoing duties of trustees

- maintain a file or diary of correspondence, including copies of contracts with third parties
- capital and income accounts
- cash books
- lists of trust property (which also state where documents of title are kept)
- a document containing the relevant details of the trust, including: the date of settlement; the identity of the settlor and trustees; the names, addresses and dates of birth of the beneficiaries; records of the births, deaths, marriages and divorces of beneficiaries; and any indemnities and guarantees.
- Trustees' meetings & minutes - If the trust will be actively trading or acquiring assets, then the trustees will probably need to meet regularly. But if the trust is intended simply to acquire and hold assets, then the need for trustee meetings is less. However often the trustees meet, all meetings should be recorded in the minute book, along with all decisions; it is also useful to record the reasons for the decision and background information.
- Annual accounts - The trustees must ensure that proper and professional accounts are prepared each year by the trust's accountant. Even if the trust is simply a passive investor or holder of property, it is desirable that proper books of account be prepared, especially if the trust has a bank account.
- Annual income tax returns - The trustees are required to file separate income tax returns for the trust.

- Other files and records - The trustees should maintain:
 - Investment of trust assets - Trustees should develop, maintain and review an appropriate investment strategy for the trust. They should keep accurate and thorough records about the strategy they have adopted. The level of care required of trustees is stated in Part 2 of the TRUSTEE ACT 1956 (as amended by the TRUSTEE AMENDMENT ACT 1988). This requires that they exercise the care and skill that a "prudent" businessperson would exercise in managing other people's affairs. Professional trustees and trustees who invest money for others as a profession are required to exercise the special care and skill that someone in their profession would exercise. A trustee will not be liable for any losses suffered by the trust if he or she acts prudently and considers the interests of all beneficiaries (discretionary or otherwise).
 - Changes in trustees - When the trustees change (for example, one retires and another is appointed), it is important that the change be formally documented and that the trust's lawyer be notified. If not, the incorrect trustee names may be recorded on documents of title to new assets that are acquired, and this will mean that when the asset comes to be sold there will need to be an extra round of legal documentation before the sale can be completed. See below for the appointment of new trustees.
 - Information for beneficiaries - Trustees should provide the beneficiaries with any information that they request about the operation of the trust and its assets.
 - Not mixing trust and personal property - Trustees must not mix their personal property with the trust property. If this happens, the onus is on the trustee to distinguish the separate assets, and to the extent that the trustee fails to do this those assets belong to the trust. To ensure that assets aren't mixed, the purchase price for all assets bought by the trust should be paid for out of the trust's bank account. Similarly, the sale price for all assets sold by the trust, and all income belonging to the trust, should be paid into the trust's account.

Decision-making by trustees

Before making decisions the trustees should acquaint themselves fully with all the relevant facts, and consider whether they need expert advice from lawyers, accountants, investment advisers or other specialists

After considering any expert advice that they think is necessary, the trustees must ensure that they turn their own minds to the question in hand, acting honestly and in good faith. The decision must

be theirs, and not that of their expert advisers, as trustees are not permitted to delegate their decision-making power, except when this is authorised by the trust deed.

In general, trustees should not commit themselves in advance as to how they will exercise a discretion in the future.

Trustees can apply to the courts for directions concerning any of the trust property, or the management or administration of the trust property, or the exercise of any power or discretion vested in them. In this way trustees who are in doubt about the legality of an intended course of action can get the court's approval and be protected from any liability for the action.

Trustee decisions must be unanimous, unless the trust deed allows for majority decisions.

The trustees should record all their decisions. They should also record the reasons for their decisions, and attach all the relevant documents including any expert advice given.

Can the beneficiaries challenge decisions of the trustees?

In general the courts won't interfere with decisions made by trustees: if the trustees are exercising their discretion in a proper manner, the courts won't substitute its own decision for that of the trustees.

However, the TRUSTEE ACT 1956 gives beneficiaries a limited right to apply to the court for it to review a decision of the trustees; this applies only when the trustees have exercised a power under the Act, not a power given by the trust deed.

The courts may also interfere in some cases when the trustees have acted outside their powers or have acted capriciously, or have taken into account irrelevant or improper factors, or have made a decision that no reasonable trustee could make.

Trustees are liable for any transactions they enter into that they are not authorised by the trust deed or by statute.

Are trustees paid for their services?

Trustees may be paid for their services only if the trust deed specifically provides for this. The deed often provides for the trustees to be paid, particularly if the trustees include professional independent trustees - for example, lawyers, accountants or financial advisers.

If the trust deed doesn't provide for payment, then the trustees would need the consent of the beneficiaries or of the court to receive payment.

How are new trustees appointed? How are trustees removed?

Usually the trust deed will provide for when and how new trustees will be appointed. But if the trust deed doesn't deal with this, the matter is governed by the TRUSTEE ACT 1956 (any provision in the trust deed overrides the Act). The Act provides that a new trustee may be appointed when a trustee

- is dead
- is unfit to act or incapable of acting
- refuses to act
- is overseas for more than a year
- no longer wishes to be a trustee
- is a company that has stopped trading or been liquidated

The Act says that the new trustee is appointed by the person whom the trust deed nominates to make new appointments, or, if the trust deed doesn't nominate anyone, by the other trustees.

The beneficiaries cannot control the exercise of the power of appointing new trustees conferred on a continuing trustee by the Act.

The court also has a general power to appoint new trustees, whether instead of or in addition to existing trustees, when it is "expedient" to do so. In particular the court can appoint a new trustee in place of an existing trustee who:

- is guilty of misconduct in administering the trust
- is convicted of a crime involving dishonesty
- is mentally disordered
- is bankrupt
- is a company that has stopped trading or been liquidated

Trustees can also be removed under any express power contained in the trust deed.

Cautionary notes

- The duties of trustees are important and often complex. A trustee should obtain legal advice in order to understand them fully.