



# PROPERTY TAX RETURNS

Smart Fixed Fee Property Accounting, Quick, Easy and Affordable.

## TRUSTEES DUTIES

This factsheet outlines trustees duties in accordance with the new Trusts Act 2019.

There are two categories of trustees duties: mandatory, which trustees have to comply with and default duties, which trustees will have to comply with unless the duties are modified or excluded by the trust deed.

### Mandatory duties

These are duties which the trustee must comply with; they cannot be modified or excluded by the terms of the trust.

The trustee must:

- Know the terms of the trust;
- Act in accordance with the terms of the trust;
- Act honestly and in good faith;
- Act for the benefit of the beneficiaries and hold or deal with trust property for their benefit; and
- Exercise the trustee's powers for a proper purpose.

### Default duties

These duties are not compulsory; they can be modified or excluded by the trust deed, but they will apply unless they are expressly excluded. The following duties will apply to existing trusts from 30 January 2021 and to new trusts.

The trustee must:

- Exercise reasonable skill and care in administering the trust, having regard to any special knowledge or expertise that the trustee has, or to any special business or professional knowledge or expertise if the trustee is acting in the course of a business or profession;
- Invest prudently, with the same regard to special knowledge or experience as above;
- Not exercise their power for their own benefit, whether directly or indirectly;
- Regularly and actively consider whether they should be exercising their powers;
- Not bind or commit trustees to the future exercise or non-exercise of their powers;
- Avoid conflicts of interest;
- Act impartially between beneficiaries;
- Not make a profit from being a trustee;
- Not take any reward for being a trustee (this doesn't prevent reimbursement for legitimate expenses and disbursements); and
- Act unanimously with the other trustees.

The above duties can be modified in the terms of the trust. Therefore we recommend that you if you modify or exclude one or more of the default duties you are aware of the effect of the modification.

### Exemption and indemnity clauses





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From 30 January 2021, the trust deed can no longer limit trustees' liability for breach of trust arising from dishonesty, wilful misconduct or gross negligence (rather than 'ordinary' negligence), nor can trustees be indemnified out of trust property for such breaches.

If there is a clause in your trust deed that tries to do this, the clause will be invalid under the new Trust rules. This applies to existing trusts, as well as new trusts, so we encourage you to look at your exclusion and indemnity clauses to make sure that they comply with the new legislation. We can assist you with this if required.

In deciding whether a trustee has been grossly negligent, the factors that the Court will consider includes:

- The circumstances, nature and seriousness of the breach;
- The trustee's knowledge and intention relating to the breach;
- The trustee's knowledge and skills and whether the trustee has been paid;
- The purpose for which the trustee was appointed, and
- The type of trust, including the degree to which the trust is part of a commercial arrangement, the assets held by the trust, how the assets are used, and how the trust operates.

These changes have the potential to affect a significant number of trusts and trustees. Although the threshold for gross negligence has been set very high, it is important that trustees are aware of changes in their exposure to liability.

### Duty to hold documents

Another significant part of the Act clarifies for trustees what documents they must hold. Often trust documents are held by just one trustee, or by the trust's accountants or lawyers.

The new Act provides that each trustee must keep the following documents, so far as it is reasonable, and pass them on to at least one continuing or replacement trustee when they stop being a trustee:

- The trust deed and any other document that contains terms of the trust;
- Any variations made to the trust terms;
- Records of trust property identifying the assets, liabilities, income and expenses of the trust;
- Records of trustee decisions made during the trustee's trusteeship;
- Written contracts entered into during that trustee's trusteeship;
- Accounting records and financial statements prepared during that trustee's trusteeship;
- Documents of appointment, removal, and discharge of trustees;
- Any letter or memorandum of wishes from the settlor;
- Any other documents necessary for the administration of the trust, and
- Any of the above documents that were kept by a former trustee and passed on to the current trustee.





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If you want to discuss anything covered in this factsheet please email [info@propertytaxreturns.co.nz](mailto:info@propertytaxreturns.co.nz) or phone +64 9 320 4947.

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