

Trust eSpeaking

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CRUICKSHANK PRYDE
Barristers and Solicitors

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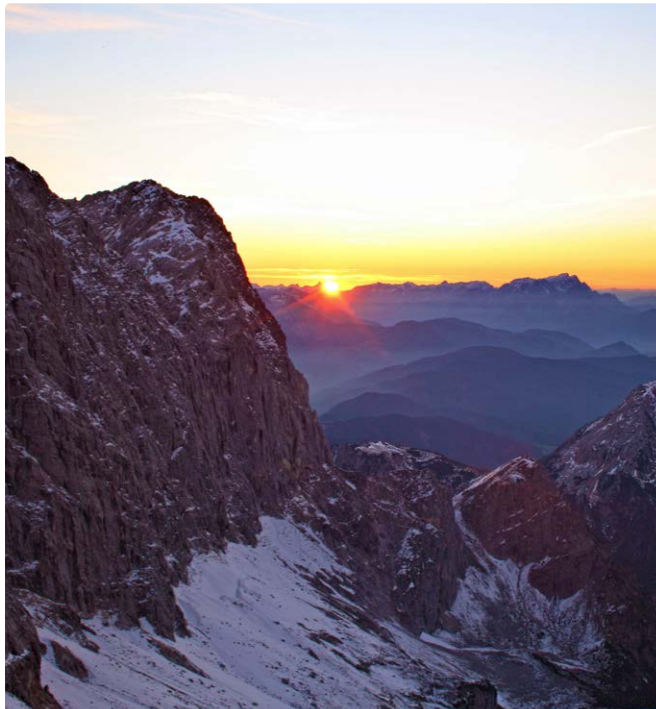
42 Don Street, P.O. Box 857, Invercargill 9840
T: 03 214 4069 | F: 03 214 4760 | office@cplaw.co.nz | www.cplaw.co.nz
Unit 23, Gorge Road Retail Centre, 159 Gorge Road, Queenstown 9300
T: 03 441 2424 | F: 03 441 2426 | adminqt@cplaw.co.nz | www.cplaw.co.nz

BANNERMAN CRUICKSHANK PRYDE

5 Fairfield Street, P.O. Box 185, Gore 9740
T: 03 209 0183 | F: 03 208 9251 | gore@cplaw.co.nz | www.cplaw.co.nz

This Spring edition of *Trust eSpeaking* summarises the proposed new trusts legislation which has started its path through the House. As well, we look at the process for a trustee who is retiring and what to do about a trustee who is getting a little old for their role.

To talk further about any of these articles, or about trusts in general, please don't hesitate to contact us – our details are above.



Trusts Bill Deals with practical issues

The long-awaited Trusts Bill was introduced to Parliament on 1 August 2017. The Bill is largely an update and restatement of the Trustee Act 1956 and the common law. However, it also deals with practical issues that have faced lawyers and trustees for some years. We outline some of the most important parts of the Bill.

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Trusts Bill

Deals with practical issues

The long-awaited Trusts Bill was introduced to Parliament on 1 August 2017. The Bill is largely an update and restatement of the Trustee Act 1956 and the common law. However, it also deals with practical issues that have faced lawyers and trustees for some years. We outline some of the most important parts of the Bill.

'Express trust' defined

An 'express trust' is defined in the Bill. The definition makes it clear that trust property is separate from a trustee's personal property, it must be administered in accordance with the trustee's obligations in the trust deed, and that trustees will be accountable to beneficiaries for their compliance with the duties imposed on them by the trust deed and by law.

Trust life will be longer

The life of a trust has also been extended. Currently the life of a trust is either

specified in the trust deed (as up to 80 years) or it's determined according to the current (and confusing rule) against perpetuities. This has been replaced; if a trust deed does not specify a duration for the trust, or provide a way of determining the date at which the trust is to come to an end, the trust will continue for 125 years. A trust can come to an end earlier if the trust deed says so.

Trustee duties

The Bill also contains duties that must be performed by trustees. Trustees must know the terms of the trust, act in accordance with these, act honestly and in good faith, act for the benefit of beneficiaries and exercise powers for a proper purpose. These duties cannot be negated or modified by the trust deed – all trustees must perform them.

There are also 'default' duties which will apply to trustees unless the trust deed says otherwise. These duties are largely a restatement of existing law, but it is expected that their being listed in the Bill will be helpful for trustees to better understand their obligations, and for beneficiaries to understand the function of trustees.

Trust information

Trustees will also have clear duties in relation to trust information. Trustees will be required to keep copies of trust documents – these include the trust deed, any other deeds such as deeds of variation and any deeds changing the trustees, a record of all trust assets and liabilities, any accounting records or financial statements, and any letter of wishes from the settlor. If a trustee retires and hands these documents on to a new trustee, the new trustee will be required to keep these documents.

Beneficiaries' rights clarified

Beneficiaries' rights are also clarified in the Bill. Beneficiaries must be notified of basic trust information including the fact that they are beneficiaries, the names and contact details of trustees and their right to request a copy of the trust deed and/or other trust information. This is designed to ensure that beneficiaries have sufficient information to hold trustees accountable for their actions.

The Bill also clarifies the process for beneficiaries who wish to challenge trustees' decision-making.



Wider powers for the Family Court

The Family Court will have wider powers to make directions under the Bill in some circumstances (usually relationship property proceedings involving trusts). If parties are in dispute, in some circumstances, the Bill also allows them to consent to allow the Family Court to make orders that would usually be available only to the High Court such as, for example, appointing and removing trustees. This may make relationship property proceedings involving trusts more effective.

The Bill contains a number of other provisions, and there are likely to be changes as it passes through the parliamentary process. We will keep you informed. ■

Retiring as a Trustee?

There's a process that should avoid any problems down the line.

Many people agree to act as trustees of trusts set up by friends or relatives on the basis that they wish to help out or assist their friend or relative in some way. Eventually it comes time to retire as trustee for reasons such as age, the winding up of the trust or other changes of circumstance.

Retiring as a trustee is not as simple as it sounds and there are a number of potential liabilities that need to be covered off.

It's not widely known that when accepting appointment as trustee, you are taking on a number of personal obligations and accountabilities. Therefore, it's essential that once you stand down you are completely released from any ongoing liabilities.

Follow the process

If you want to retire as trustee you need to ensure that you are fully released and protected from any obligations:

1. It's essential that the document recording your retirement follows the terms of the trust deed. For example,

if the trust deed requires there to be three trustees at all times and you attempt to retire leaving only two trustees, then your retirement is likely to be ineffective until a replacement trustee is appointed.

2. The documents recording your retirement must be signed by all trustees including you, the continuing trustees and any new trustees. There are legal requirements that must be met for the documentation to be effective.
3. If the trust owns property, the individual names of the trustees will be recorded on the title to that property; there will be no reference to the name of the trust itself on the title. It's essential that documents be completed to get your name off the title and to ensure it's registered in the names of the continuing trustees and any new or replacement trustees.
4. If there's a mortgage or guarantee provided by the trustees you must get the consent of the lender to the release of your personal obligations. In many cases the lender will require new documents to be completed by the remaining or new trustees.
5. It's common for loan documents with lenders to state that the liability of an 'independent' trustee is limited to the assets of the trust. If, however, you are a family member or a beneficiary of the trust the lender may take the view that you are not 'independent' and therefore you are personally liable for the borrowings of the trust. Unless the lender's documents specifically limit your liability, the rule is that you are personally responsible to the full extent of the obligations. When you retire as trustee it's essential that you obtain a full release and protection from the lender for any personal obligations to it.
6. In order to transfer the trust property over to the new trustees, it is necessary for the trust to have an IRD number. Many trusts which don't earn income have not obtained IRD numbers. However, to transfer the property over to the continuing/new trustees an IRD number will need to be obtained.
7. Any signing authorities with the trust's bank need to be updated, and the retiring trustee must be taken off any mandates or signing authority forms.
8. The IRD must be advised, in writing, that a trustee has retired otherwise it will take the view that the retiring trustee remains liable for any tax.
9. The local authority will also need to be advised once a trustee has retired otherwise it will assume that the trustees in its records are personally liable for the rates on the trust's property.

It's important that you insist on all these steps being followed through even if it's inconvenient to other parties and some institutions are slow to respond. If you don't ensure that all these matters have been completed, it may result in significant personal liability for you. ■



Ageing Trustees

Know when to walk away

When Barack Obama was US president, he made an historic visit to Africa. One of the messages he repeated was that, under the US Constitution, he could only be president for eight years and this time limit is generally a good thing.

Obama was, of course, making an indirect reference to the tendency in some African countries for leaders to have themselves declared to be president for life. This, in Obama's view, was not only unhealthy but also an excessive burden for one person to bear for too long.

Something similar could be said of some trustees. No one should want to be trustee for life. It's useful for trustees to think about a succession plan: which trustees should we expect to retire or be replaced and who are the likely replacement trustees? Sometimes, likely future trustees are asked to sit in on trustee meetings to understand how the

trust runs. (We have an article about the process for retiring trustees [here](#).)

One of the biggest problems facing family trusts at present is the difficulty of replacing an elderly trustee who is no longer mentally competent. Even if still mentally alert, an elderly trustee may not be contributing a great deal. Trustees should be encouraged to retire if the job is becoming too much.

Old trustees don't just fade away

Some people assume that a trustee who is no longer mentally competent, need not take part in trustee decisions any more. They seem to think the other trustees can ignore the trustee who is no longer able or willing to be involved. Legally that's not the case. The trustee will remain trustee until he or she retires, or is replaced or removed. Most trust deeds have clauses allowing for removal and replacement of trustees. If someone remains a trustee, then he or she must join in all decisions, unless the trust deed allows for majority decision-making. Even then all trustees need to take part. One trustee cannot simply be ignored.

The problem of ageing trustees has been causing a number of problems. In many

cases it has proved necessary to apply to the High Court to have a trustee removed. Even where the trust deed gives some other person (sometimes called *appointor* or *protector*) the power to change trustees it may still be necessary to apply to the High Court to get the incapacitated trustee's name removed from a land title. In some cases, this has had to be done quite urgently because the other trustees have arranged to sell a property and suddenly find there is a problem completing the sale if one of the trustees can no longer sign.

Often it may not be possible simply to remove an incapacitated trustee. In some situations the law may require there to be at least two people acting as trustees. We can advise about what is required when a trustee is removed or replaced.

Fortunately some of these problems may be solved in future. The Trusts Bill, which was introduced to Parliament on 1 August, contains some processes which should simplify the replacement of trustees and correction of land titles. However the Bill has only just reached Parliament and no one knows how long it will take to bring this into law. (We have more detail on the Trusts Bill [here](#).)

Points to remember

- » A person does not cease to be a trustee just because he or she is no longer mentally competent: incapacitated trustees need to be removed or replaced.
- » Ask trustees to resign if there is any cause for concern about their health status.
- » Talk about a succession plan for trustees so that there will be other trustees coming along to replace those who need to retire.
- » Check that the trust deed has a clause saying who is to have the power to appoint *and* remove trustees.
- » If the person who has the power to appoint and remove trustees is elderly or giving rise to concerns, can a new appointor be named?
- » Don't leave it too late – it can be very expensive making urgent applications to the High Court if trustees need to be changed in a hurry.

If you'd like more advice on encouraging elderly trustees to retire or removing trustees, please be in touch. ■