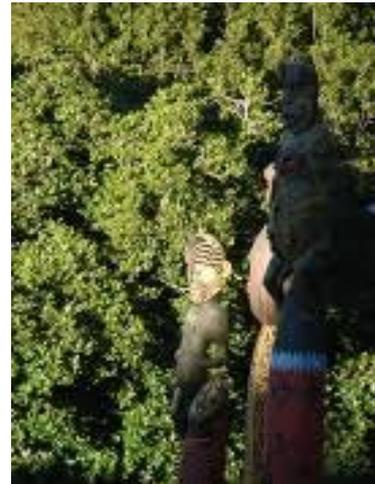


# What do Trustees and Beneficiaries of Māori land need to know about the new Trusts Act 2019?



The Trusts Act 2019 has been passed and takes effect in January 2021.

The current act is the Trustees Act 1956, so it is fair to say that an update was due.

Trustees of Maori land may be most used to hearing about ‘their’ Act – Te Ture Whenua Māori 1993 – which grants oversight of Māori land trusts to the Māori Land Court and the Māori Appellate Court. Nothing has changed in this regard.

However, the High Court has always had an underlying jurisdiction in relation to Māori land trusts and this continues, as does the application of Aotearoa’s general law of trusts (currently in the form of the Trustee Act 1956, soon to be replaced by the new Act). The new Trusts Act will therefore apply in any cases where Te Ture Whenua Māori is silent and/or it may help to clarify anything in the Māori land jurisdiction for trusts that is unclear. In short, Te Ture Whenua continues to apply, but the new Trusts Act will also apply, so Māori land trustees need to be aware of its provisions.

The new Trusts Act is intended to be an easily accessible piece of legislation for the general public to follow. The new act does little to change the law as it relates to trusts and trustees; it largely codifies and clarifies it in a way that makes it plain.

Yet again the Act

The new Act makes it clear that trusts must be managed proactively by trustees. Trustees cannot sit back passively, only acting in response to a need to complete some requirement in relation to the land that they manage, or leave their responsibilities to be fulfilled by other trustees.

One of the big talking points of the new Act is that it imposes “mandatory duties” on trustees. Mandatory duties cannot be modified or excluded by the terms of the Trust. The mandatory duties are:

- The trustees must know the terms of the Trust. All trustees should have their trust deed in an accessible place, refer to it regularly, and do what it says;
- A trustee must act in accordance with the terms of the trust;
- A trustee must act honestly and in good faith;
- A trustee must hold/deal with trust property and otherwise act for the benefit of the beneficiaries; and
- A trustee must exercise the trustee’s powers for a proper purpose.

We are sure that none of these duties will be a surprise, as most trustees would have at least a sense that such requirements rest on them as trustees. However, the new Act puts these compulsory duties in an accessible black and white.

The Act also contains a number of default duties (duties which apply unless modified or excluded by the trust deed). One of these is that *a trustee must consider actively and regularly whether the trustee should be exercising one or more of the trustee's powers.*

If we had to sum up the new Act in the simplest of forms, it would be that trustees of Māori land trusts must know the terms of their trust deed and proactively manage their trust.

There are two aspects of the new Act that we want to draw to the attention of Māori land trustees:

- The presumptions around the provision of information; and
- The requirements for record keeping.

### **The Provision of Information**

The first presumption relating to the provision of information is that **Trustees must notify “basic trust information” to every beneficiary or representative of a beneficiary.** Basic trust information is defined as:

- The fact that a person is a beneficiary of the trust;
- The name and contact details of the trustees;
- The occurrence of and details of each appointment, removal and retirement of a trustee as it occurs; and
- The right of the beneficiary to request a copy of the terms of the trust or trust information.

Furthermore, a trustee is required to *consider at reasonable intervals* whether the trustee should be making basic trust information available.

Some whānau trusts have numerous beneficiaries. As whānau move around the country or overseas and tamariki and mokopuna of the trust's main tipuna multiply, the trustees may not even be aware who they all are. Are the trustees required to take reasonable steps to track down all the descendents of that tipuna, find out their contact details and inform them that they are a beneficiary?

Short answer, yes.

We think the trustees should make due and proper effort to ensure that they know who the beneficiaries of the trust are and how to contact them. Trustees must make at least a minimum of effort to obtain contact details for all their beneficiaries (or if this is too onerous, maybe this requirement could be met by appropriate advertising, including through appropriate social media channels). Trustees should keep proper records of their efforts in case they are ever challenged about meeting this statutory requirement.

Trustees will also need to consider at reasonable intervals making basic trust information available. Clearly, what is a reasonable interval will vary from trust to trust. For those trusts that are small and have regular whānau gatherings, maybe a formal communication once every five years would be enough. For those trusts that have large numbers of beneficiaries who otherwise have little to no contact with the trustees, a formal letter once a year might be more appropriate to ensure this requirement is fulfilled.

The second information presumption is **that a trustee must, within a reasonable period of time, give a beneficiary (or the beneficiary's representative) the trust information that the person has requested.**

In this context, trust information means any information —

- (i) regarding the terms of the trust, the administration of the trust, or the trust property; and
- (ii) that it is reasonably necessary for the beneficiary to have to enable the trust to be enforced; but
- (iii) does not include reasons for trustees' decisions.

This is an empowering provision for trust beneficiaries to hold their trustees to account. Beneficial owners of Māori land are likely to find it useful to be able to refer to this statutory requirement when making such requests, thus giving their requests some extra force.

Trustees have the option of requesting a *monetary contribution* from the requesting beneficiary for the provision of information. This should be a useful means of ensuring that requests for information are not unreasonable, overly broad, or maliciously or mischievously motivated.

If either of the above principles regarding provision of information are too much of a burden for the trustees, it should be emphasised that these are *presumptions*. In other words, the starting point is that they apply, but they don't have to apply. The Act lists a number of factors that a trustee can consider when deciding whether the presumptions apply, including:

- in a trust that has a large number of beneficiaries or unascertainable beneficiaries, the practicality of giving information to all beneficiaries or all members of a class of beneficiaries;
- in the case of a family trust, the effect of giving the information on relationships within the family; and
- the age and circumstances of the beneficiary.

### **Proper Records**

Another feature of the new Act that trustees would do well to be aware of is the requirement to maintain proper records.

Every trustee must keep the following “core documents” for the trust (section 45):

- a) The Trust Deed and any other document that contains the terms of the trust;
- b) Any variations made to the trust deed or trust;
- c) records of the trust property that identify the assets, liabilities, income and expenses of the trust and that are appropriate to the value and complexity of the trust property;
- d) any records of trustee decisions made during the trustee's trusteeship;
- e) any written contracts entered into during that trustee's trusteeship;
- f) any accounting records and financial statements prepared during that trustee's trusteeship;
- g) documents of appointment, removal and discharge of trustees (including any court orders appointing or removing trustees);
- h) any letter or memorandum of wishes from the settlor (this one is typically not relevant for Maori land trusts);
- i) any other documents necessary for the administration of the trust;
- j) any documents referred to in paragraphs (a) to (i) that were kept by a former trustee during that person's trusteeship and passed on to the current trustee.
- k) All trustees must hold at very least the trust deed and any variations to the trust deed.

If this list looks daunting, where there are multiple trustees, the requirement is that all trustees must hold *at least* the trust deed and any variations to the trust deed. If this requirement is in place, it is enough that *at least one* of the trustees holds the other documents specified above, and that those documents (or copies of them) will be made available to the other trustees on request.

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