

Trustee Duties – A Guide for Trustees

Trustees of a trust generally possess wide discretionary powers and authority. That authority carries with it responsibility. Trustees owe their duties to the trust beneficiaries and in certain situations can be held accountable for their actions or failures to act.

The following summarises some of the duties imposed on trustees and provides an introduction as to their practical significance to trustees. While the summary is not exhaustive and you should always seek specific legal advice as to your particular circumstances, this guide may be useful if you are considering acting as a trustee.

What are Trustee Duties?

The basic duties of a trustee are:

Duty of Efficient Management

Trustees must take responsibility to ensure that the trust fund is managed in an efficient and economic manner.

In summary:

- A trustee has a duty to get to know thoroughly the terms of the trust deed and to obey those terms.
- An incoming trustee must enquire into the propriety of the acts of an outgoing trustee.
- Once appointed, the trustee should “take title” to the trust assets – if the title for a property is registered in the names of the trustees, it is important to ensure that this is amended when trustees retire and are appointed.
- The most important duty is the general duty to take all those precautions which an ordinary prudent business person would take in managing similar affairs of his or her own.

Duty to Keep and Render Accounts

Trustees have the duty to keep and render to the beneficiaries a full and proper record of their administration of the trust assets.

The trustees must keep proper accounting records and prepare financial statements relating to appropriate accounting periods.

If the trust is relatively simple and the only property it owns is a home occupied by one or more of the beneficiaries, the financial records will be relatively straightforward.

However, when the trust owns significant amounts of property and/or is receiving income, it is important that the trustees instruct qualified accountants to keep accounting records and prepare periodic financial statements and tax and associated returns for the trust.

Beneficiaries are entitled to inspect “trust documents” unless there is good reason why they should not.

Duty to Act Personally

A trustee has the duty to act personally in managing trust affairs. Trustees may get advice from experts but the trustees are responsible for decisions regarding the trust and cannot delegate

the exercise of their discretions, even to experts, unless they are specifically authorised to do so by the trust deed or by law.

Trustees must remain conscious that they:

- Do not let others dictate how discretions should be exercised, although trustees are entitled to refer to relevant documentation such as memoranda of wishes.
- Exercise their powers in a timely fashion and with reference to relevant facts and circumstances.
- Act unanimously (unless the trust deed allows majority rule, which we do not recommend).
- Together are responsible for the trustees’ decisions and actions – there is no room for a passive trustee.

It is important to remember that trustees as the owners of the trust assets and persons responsible for their management, will be personally liable for any liabilities incurred in the performance of the trust. If a trust earns income, income tax will be payable on that income and it is the trustees who will be personally liable to the IRD to pay.

Duty of Loyalty

Trustees must observe the terms of the trust and manage the trust assets in the beneficiaries’ best interests. The main aspects of this duty are:

- Trustees should act exclusively in the best interests of all the beneficiaries of the trust, present and future.
- Trustees should act impartially for the beneficiaries and in practical terms gain an understanding of the beneficiaries’ circumstances.
- In most cases, trustees must not profit from their position as trustee, although a trustee may receive benefits from the trust in their capacity as a beneficiary of the trust.
- Trustees have a general duty to avoid putting themselves in a position of conflict between their duties to the trust, their personal interests, or their duty to others.

Prudent Investment

The Trustee Act 1956 allows trustees to invest any trust funds in any property, provided that it is invested prudently. The “prudent person” test examines the process the trustees’ use in determining how and where to invest, rather than assessing the eventual performance of the trust investments. Failure to maintain the real value of the trust is not necessarily a breach of trust. World events may result in losses even for the most prudent investors. A loss in these circumstances is not necessarily a breach of trust as long as the trustees have acted prudently in carrying out their duties.

Indications as to whether trustees have invested prudently include whether they have an investment plan and have diversified their investments appropriately.

What does a breach of duty mean for a trustee?

For breaches of trust there may be internal consequences. These internal consequences are governed largely by the trust deed itself, although it is impossible to completely contract out of liability. Breaches may have the following potential consequences:

- An intentional breach of trust involving dishonesty or an intentional act known to be a breach will give rise to personal liability to the beneficiaries.
- Our standard trust deed provides that if you act honestly and in good faith and breach the terms of the trust, generally your liability to the beneficiaries for the consequences of that breach will be limited to the assets of the trust only.
- Negligence is a grey area and may be treated as an intentional breach.
- You will not be liable for the neglect or default of a professional adviser or agent if they are employed in good faith and if they are adequately supervised.

External Liability

Trustees can also be liable to other parties who they contract with as trustees. When you enter into a contract in your own name, you are normally personally liable. However, the right of indemnity contained in the trust deed and terms in the contract can reduce your liability to "trustee liability."

Our standard trust deed provides an indemnity for any liability or obligation that you incur as trustee. Any contract you enter into should contain a term stating that your liability or obligations will be limited to the assets of the trust.

Where you have contracted in your capacity as trustee, the other parties to the contract will not be able to recover against your personal assets to satisfy the obligation under the contract - provided particular requirements are met. This is why it is important you seek independent advice before committing to any legal obligation in your capacity as trustee.

Potential Liability

Trustees cannot avoid potential liability when they have lost their right of indemnity (which they will lose in the case of an intentional breach of trust and, arguably, negligence). In this situation you may have full personal liability, both internal and external.

What can Trustees do to protect themselves?

Trustees should take the following basic steps to protect themselves against personal liability:

- Familiarise themselves with the trust deed and any other documents under which they are incurring a liability.
- Satisfy themselves that the trust can perform the obligations given the means and assets of the trust and familiarise themselves with assets held by the trust and any liabilities and obligations it has.
- Actively involve themselves in the trust affairs rather than just passively.
- Demonstrate obvious compliance by keeping detailed records ensuring that:
 - regular trustee meetings are convened

- trustee minutes recording all decisions and reasons for those decisions are signed and retained
- the trust assets are insured and that the insurance policies are renewed and kept current and all trust assets are maintained in good order and repair
- the income-producing potential of any investment asset is maximised
- separate bank accounts are opened for the trust and ensuring that trust funds are not mixed with other funds (whether of other trusts or not)
- recommendations or proposals made by co-trustees are critically reviewed
- professional advice is taken when necessary (for example, accounting, investment and legal advice).

While this may seem complicated, the actual time required to administer a trust need not be great and we are able to help you meet your responsibilities. The trustees should meet formally at least once a year to review investment portfolios, strategies, distribution issues, and to consider and approve the trust's accounts and balance sheet. Additional meetings and attendances may be required, depending on the nature and extent of the trust fund.

The trustees should also meet regarding major decisions such as the sale or purchase of a major asset. These decisions must be recorded in resolutions in the trustee minute book. We will also ensure that any gifting required is completed annually. The meeting of the trustees to approve the gifting is a good opportunity to conduct an annual review of the trust and ensure records are maintained.

How can we help?

The more complicated and varied the assets that are held in trust, the greater the time required to administer the trust properly. A trust with only one asset, such as a mortgage-free family home and all outgoings paid by the family members, would require very little administration and may not have to complete an annual tax return.

On the other hand, a trust with a substantial variety of assets, including income-producing investments, would require a lot of administration, not just in terms of the completion of an annual tax return, but also in regards to the review of investment strategies and the on-going up-keep and administration of the assets themselves.

ARL Lawyers is experienced in dealing with all aspects of trust administration and general property and estate planning matters. If you would like to know more about acting as a trustee or have any queries, we are always available to assist. In many cases we are also able to support and advise trustees by acting as an independent trustee for the trust by establishing a trustee company solely for that purpose.

For further information, please contact our Personal Planning and Business Solutions Team.