

Will the Trusts Act 2019 apply to my existing trust?

As from 30 January 2021, the Trusts Act 2019 (“**Trusts Act**”) will apply to all express trusts that already exist. This includes the most common type of trusts, including discretionary family trusts and testamentary trusts (trusts created by will).

If you have any concerns about how the new provisions or requirements brought in by the Trusts Act are going to affect your trust and its ongoing compliance and administration, please contact us for advice.

Do trustees have to disclose basic trust information to all beneficiaries in writing?

While the Trusts Act does not specifically state that basic trust information must be provided in writing, we recommend as good practice that all information disclosure to beneficiaries (whether of ‘basic trust information’ or ‘trust information’) be made in writing. This will allow you to keep track of what, when, and to whom, disclosures have been made over time. Written disclosures will also serve as a safeguard to all parties involved, should parties’ respective rights and obligations regarding information disclosure be brought into question.

Likewise, if having considered the specific considerations set out in the Trusts Act, the trustees decide not to disclose certain basic information to beneficiaries, we recommend that such decision and the reason for the decision be recorded in writing. If you are a trustee of a trust considering whether basic trust information can be withheld, we recommend that you seek further legal advice.

What if a beneficiary asks for trust information and the trustees don’t want to disclose this?

If a beneficiary asks for trust information, the trustees must review the specific considerations set out in the Trusts Act and determine, in light of those considerations and the circumstances at hand, whether the presumption to disclose the trust information applies. This means that with each beneficiary request for trust information, the trustees will need to conduct a case-by-case assessment.

We recommend as good practice that all requests for trust information disclosure from beneficiaries be made in writing. Likewise, we recommend that the trustees’ assessment and their ultimate decision whether to disclose information requested be recorded in writing.

Note that where trustees are to provide trust information requested, it must be provided within a reasonable period. This means trustees should act promptly on any beneficiary requests for trust information.

What are the ‘specific considerations’ that the trustees need to assess before disclosing basic trust information or trust information on request?

The specific considerations are set out in [section 53 of the Trusts Act](#). These considerations include, but are not limited to:

- with respect to each beneficiary:
 - their age and circumstances
 - their likelihood of receiving trust property in the future
 - the impact that receiving the trust information might have on them;
 - the impact that disclosing the trust information might have on the trustees and other beneficiaries
 - whether the trust information is subject to personal or commercial confidentiality

What happens if the beneficiary is a minor (i.e. a child)?

If a beneficiary is a minor (under 18 years old), the trustee duty to make basic trust information and requested trust information available to the beneficiary still applies. However, the information disclosure should be made to the beneficiary's parent or guardian.

Note that the age of a beneficiary is one of the specific considerations for trustees to take into account when deciding whether or not to disclose information.

What happens if trustees breach their duties?

As a general rule, trustees are personally liable for consequences of their own breach of trust. However, some trust deeds limit trustee duties and/or include limitation of liability and trustee indemnity clauses as a safeguard against personal liability.

From the date that the Trusts Act comes into effect, a trust deed is not able to limit a trustee's liability or provide an indemnity, where their breach of trust arises from dishonesty, wilful misconduct or gross negligence. Any clause that attempts to limit a trustee's liability for breach arising from this conduct, or indemnify the trustee for the same, will be deemed invalid. This restriction applies to both existing trusts and new trusts.

If your trust deed contains a limitation or indemnity clause that is too broad, it may be deemed invalid to the extent that it overreaches the restrictions imposed by the Trusts Act. We recommend having your trust deed reviewed to ensure that any limitation of liability and indemnity provisions in your trust deed are in line with the Trusts Act.

Could the trustees wind up the trust?

If you are considering the option of winding up your trust, please contact us. We will conduct a review of your trust deed and advise if this is possible. Once we have completed this assessment, we can discuss with you (and your accountant, where applicable) whether winding up your trust is an appropriate option.

If you use an accountant for your trust, we recommend letting them know you are thinking of winding up your trust as soon as possible and obtain their advice accordingly.

What if the trustees don't agree on a course of action?

One of the default duties under the Trusts Act is the duty of trustees to act unanimously. The requirement for trustees to act unanimously is a default duty. This means that the duty can be expressly modified by the terms of a trust deed.

Where the duty of unanimity is not modified, and trustees cannot agree, then they will not be able to give effect to any proposed course of action. In these circumstances the trustees' options may be:

- to abstain from effecting the proposed course of action in question
- to modify the default duty of unanimity in trust deed (subject to the terms of trust)
- in limited circumstances, remove the trustee who cannot agree with other trustees (subject to the terms of trust)

If trustees cannot agree on any proposed course of action to the extent that it becomes prohibitive of their ability to give effect to the terms of the trust, we recommend that you seek legal advice as to how the situation should be remedied.

Does the Act apply to charitable trusts?

Yes, however the trustee duties pertaining to disclosure of information to beneficiaries do not apply to charitable trusts because they do not have named beneficiaries. This exclusion also applies to other trusts which are set up for a permitted purpose and have no named beneficiaries.