

March 2017 | Issue 9

## IN THIS ISSUE

Page ONE

### Draft Trusts Bill

Page TWO

### Winding up Trusts

Page TWO

### New Enduring Power of Attorney Forms

Page THREE

### NZ CA Member Contact Details

## DRAFT TRUSTS BILL

14 years since a paper called "Some Problems in the Law of Trusts" was released a draft Trusts Bill has been released for consultation

The draft Bill largely reflects the recommendations from the Law Commission's review of trust law that commenced in 2009 culminating in a final report that was released in 2013.

The Bill has been introduced to address problems with current trust law such as:

- the complex nature of trust law (and that fact there is no one place to find it)
- the view that the Trustee Act 1956 is outdated, doesn't reflect trust practice and is too narrow in scope
- the cost of trust administration

The new legislation is stated as being designed to enhance the current law, rather than introduce fundamental changes. In large part it is intended to restate existing law (from the Trustee Act 1956 and common law) in plain language.

The proposed reforms include:

- a description of the key features of a trust

- clear mandatory and default trustee duties (based on principles set down by the courts)
- requirements for trustees to manage and provide information to beneficiaries who have a reasonable likelihood of receiving trust property under the terms of the trust (qualifying beneficiaries)
- flexible trustee powers and updated rules about when trustees can authorise others to carry out certain trustee duties
- clear rules for variations and terminations of trust
- more options for removing and appointing trustees without needing to seek the assistance of the court
- preserving the ability to ask the courts to intervene to resolve problems or disputes.

For many trustees the biggest challenge to face if the draft Trusts Bill is enacted as legislation will be dealing with obligations to provide information to beneficiaries.

For this reason it might be prudent for any trustees to review trust deeds in advance of the proposed new legislation to identify who the beneficiaries are and to review whether or not the classes of beneficiaries are appropriate.

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# WINDING UP TRUSTS

## “More to consider than you think”

A trust is wound up (brought to an end) when all of the trust's assets are distributed to the beneficiaries or to another trust, either directly or by way of resettlement.

Trusts are wound up for many reasons. Sometimes the trust is simply no longer needed. In some cases defects in the trust mean that the trust assets should be re-settled onto a trust settled on more appropriate terms.

Whether the trust is wound up early or because the trust has come to the end of its permissible life (a maximum of 80 years for a non-charitable trust) certain formalities are required to record the end of the trust.

Care is also required to establish whether any tax liability arises due to the transfer of assets when a trust is wound up.

Tax matters to consider include:

- **Gift duty:** Although gift duty was abolished with effect from 1 October 2011, any gift duty liability incurred prior to that date will survive the end of a trust.
- **Loss of continuity:** The continuity rules for shareholdings in companies do not contain any exceptions that address a loss of continuity because a trust is wound up.
- **Capital distributions:** Distributions of capital made on winding up the trust are treated as any other capital distribution and will be tax-free to the same extent as would have been the case for an earlier capital distribution. Particular care needs to be taken in the case of Foreign and non-complying trusts as an income tax liability may attach to capital distributions
- **Any tax losses are lost when a trust is wound up:** Any losses retained on winding up will be lost. There are no provisions that allow tax losses to be distributed to the beneficiaries when a trust is wound up.
- **Winding up the trust will cause the cessation of a taxable activity for GST purposes:** If the trust is GST registered there will be a cessation of the taxable activity on or before the winding up of the trust. A final GST return will be required and the trustees will need to de-register the trust from GST.

## There are practical matters for a trustee to attend to when winding up a trust

The act of winding up the trust itself is normally the result of a trustee resolution and may or may not also require a deed to bring about the winding up.

Although there are limited, if any legal formalities there are practical matters to attend to. These include:

- notifying the trust's bankers that the trust has been wound up and that the trust's bank accounts should be closed
- preparing accounts so that the trustees can provide final accounts to the beneficiaries

- notifying Inland Revenue that the trust is no longer trading if the trust has an Inland Revenue number
- filing the final tax return and obtaining confirmation from the IRD that there are no outstanding tax matters
- deregistering from GST if relevant, and confirming the registration of any property transfers.

## Winding up a trust does not remove any liability a trustee has for tax

Trustees will remain liable for the trust's tax liabilities following the winding up of a trust. Once the trust's assets are fully distributed the trustee's right to indemnity from the trust's assets is practically limited.

For this reason a trustee may wish to seek personal indemnification from the final beneficiaries for any shortfalls or liabilities in respect of any tax obligations, prior to making the final distribution of the trust's assets. Where a beneficiary will not provide a satisfactory indemnity the trustee can apply to the Court for directions in this matter.

## NEW ENDURING POWER OF ATTORNEY FORMS

Legislation amending the law relating to enduring powers of attorney came into effect on **16 March 2017**. From this date any new enduring powers of attorney must be in the new form.

Any partially signed enduring powers of attorney (EPA) may no longer be valid and so advice should be sought if you have a partially signed enduring power of attorney.

The new forms use plain language and include a plain language explanation of the effects and implications of entering into an EPA.

The Law Society has a plain language guide to enduring powers of attorney available at:

Click on the form icon for a link to more information



[http://www.lawsociety.org.nz/\\_data/assets/pdf\\_file/0004/69223/Powers-of-Attorney-March-2017.pdf](http://www.lawsociety.org.nz/_data/assets/pdf_file/0004/69223/Powers-of-Attorney-March-2017.pdf)

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## About NZ CA



NZ CA Limited was formed in May 2001 and currently has 29 independent Chartered Accounting firms in 35 locations throughout New Zealand. NZ CA has a 'nationwide' network spanning from Kaitia to Invercargill and has further potential to grow. Members of NZ CA share resources to provide the ultimate innovative and practical business advice tailored to their clients' requirements.

NZ CA Member firms have access to specialist expertise in the areas of tax, accounting, business growth, benchmarking and valuation throughout the network of members and through NZ LAW Limited, a 'nationwide' network of 58 independent legal practices.

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