

# NEW TRUST ACT

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## WHAT THIS MEANS FOR YOU

TRUST



INGHAM MORA  
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# Your Moderator Today



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# PRESENTERS



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**Jen Ruffley**

Trust Manager  
Ingham Mora Chartered Accountants



**INGHAM MORA**  
CHARTERED ACCOUNTANTS

# Trusts Act 2019 - Recap

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- New Zealand law on trusts and their operation is changing
- New legislation replaces current Trustee Act 1956
- Comes into force on 30 Jan 2021
- Applies to existing and future trusts

# Purposes of the Trusts Act 2019

The objectives of the new Act are to:

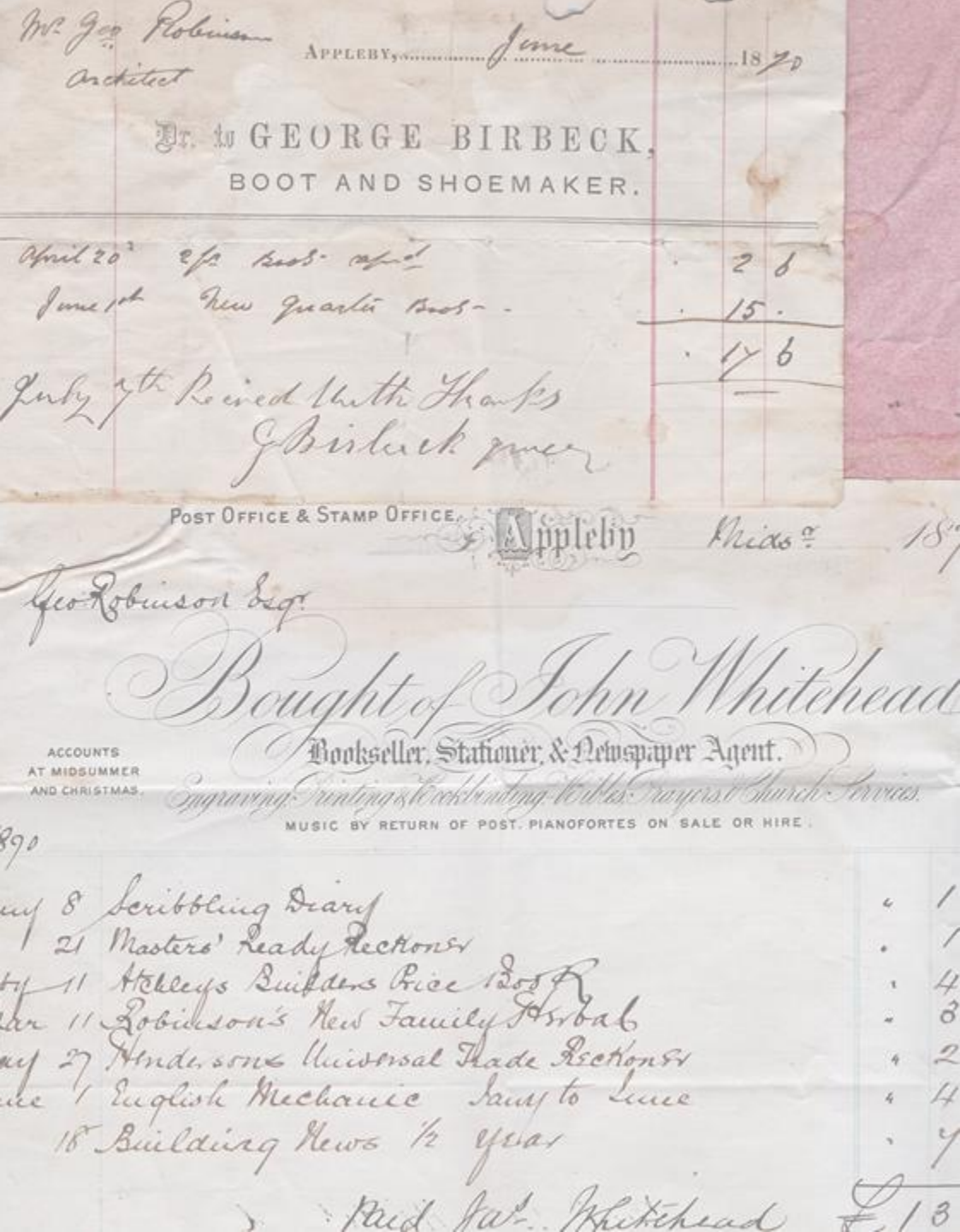
- Restate and clarify existing law
- Modernise legislation and make it more accessible
- Ensure efficient Trust Administration
- Hold Trustees accountable
- Simplify role of High court
- Common law still applies

# Benefits to Retaining Trusts

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There are many reasons why you might want to retain your trust:

- Creditor Protection
- Succession Planning
- Tax advantages
- Relationship property
  - Some limitations



# Main changes under Trusts Act 2019

Six **key** areas of change to note:

1. Beneficiary disclosure requirements
2. Mandatory Duties
3. Default Duties
4. Restrictions on trustee exemption & indemnity clauses
5. Extension of perpetuity period
6. Record keeping



# Beneficiary Disclosure

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- Purpose of beneficiary disclosure is to ensure trustees can be held to account
- **S51** of the Act introduces a new presumption that “**basic trust information**” will be given to all beneficiaries
- Basic trust information:
  - a. the fact that a person is a beneficiary of the trust
  - b. the name and contact details of the trustee
  - c. the occurrence of, and details of, each appointment, removal, and retirement of a trustee as it occurs, and
  - d. the right of the beneficiary to request a copy of the terms of the trust or trust information. Trustees need to be proactive in providing trust information
- Trustees need to be proactive in providing trust information
- **S52** of the Act – a presumption that information requested will be provided

# Beneficiary Disclosure

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- Trustees may reasonably decide not to provide basic trust information
- Trustee can refuse requests for further information
- The Trustees will need to consider several factors before disclosing or providing further information.
- **S53** provides a helpful list, including some of the following:
  - Likelihood of beneficiary receiving trust property in the future
  - Age and circumstance of beneficiary
  - The practicality of giving information to a large number of beneficiaries

# Beneficiary Disclosure – in practice

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- In most cases, the trustees should be providing basic trust information to beneficiaries
- Any failure or refusal by trustees to give information to any beneficiary could be subject to challenge by the beneficiaries and reviewed by the Court
- There must be good and justifiable reasons for any failure or refusal to provide information

# Mandatory Trustee Duties

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- The trustee **must** comply with these duties
- Any clauses in trust documents which have varied or negated mandatory duties are invalid
- Mandatory duties – the trustees must:
  - know their trust terms;
  - act in accordance with those trust terms;
  - act honestly and in good faith;
  - act for the benefit of beneficiaries or the trust's purpose; and
  - exercise their powers for a proper purpose.



# Default Duties

- The Act creates a range of default duties that will apply to trustees unless they are specifically excluded or varied by the trust documents.
- Default duties - the trustees must:
  - exercise reasonable skill and care
  - invest prudently
  - not exercise trustee powers for their own benefit
  - consider actively and regularly whether the trustee should be exercising one or more of the trustee's powers
  - not bind trustees to a future exercise of discretion
  - avoid conflicts of interest
  - act impartially
  - not profit from their position
  - not act for reward
  - act unanimously
- There is a statutory duty to take reasonable steps to ensure that the initial settlor/s understand the meaning and effect of any default duty contracted out of in the trust deed



# Restrictions on Trustee Exemption & Indemnity Clauses

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- Trustees can no longer rely on broad indemnity clauses that purport to protect them against gross negligence
- There is a statutory duty to take reasonable steps to ensure that the settlor understands the meaning and effect of any limitation or indemnity clause contained in the trust deed

# Extension of Perpetuity Period

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- The maximum term of a trust is extended from 80 to 125 years
- Extension is not automatic for existing trusts
- Perpetuity period (now called “maximum duration”) of existing trusts can be extended by varying the trust deed at any time after 30 Jan 2021.
- New trusts established after the Act comes into force will have a maximum duration of 125 years.

# Record Keeping

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- Trustees have the mandatory duty to know, and act, in accordance with the terms of the trust deed.
- Often trust documents are held by just one trustee, or by the trust's lawyers or accountants.
- The Act provides that **each trustee** must keep a copy of the core trust documents which are:
  - The trust deed and any variations made to the trust terms;
  - Records of trust property identifying the assets, liabilities, income and expenses;
  - Records of trustee decisions;
  - Written contracts entered into during that trustee's trusteeship;
  - Accounting records and financial statements
  - Documents of appointment, removal, and discharge of trustees;
  - Any letter or memorandum of wishes from the settlor;
  - Any other documents necessary for the administration of the trust.
- If there is more than one trustee of a trust, each trustee can comply with the obligation in the Act by holding the trust deed and any variations, if they are satisfied that at least one trustee holds all other documents.



# Other changes to note

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Other changes include:

- Reduction of the age of majority from 20 to 18 years;
- Codification and extension of the rule in *Saunders v Vautier* (1841) 4 Beav 115 that adult beneficiaries may unanimously bring a trust to an end;
- New requirements for the compulsory removal of a trustee. The person who has the power to appoint and remove trustees must use that power to remove a trustee if that trustee loses capacity and there is no other person able to affect the removal.
- Changes to the grounds on which the court may review trustee decisions; and
- The introduction of mechanisms to resolve trust disputes. In the interest of keeping trust related disputes out of Court where possible, the Act provides for alternative dispute resolution mechanisms such mediation or arbitration.

# Problem Trusts

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- Some trusts have been established with no mechanism to exclude/remove beneficiaries or vary the terms of the trust.
- Options:
  - Resettle
  - Apply to High court
  - Wind up

# Estate Planning Documents

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- Should you wish to make any changes or wind up your trust, it is important to update your wills to reflect these changes.
- Please consult with your lawyer
- It is helpful to provide any updated documents to the independent trustee for their records



# What should the trustees do now?

- Review the terms of the trust documents to ensure they will comply with requirements of the Act (particularly in relation to default and mandatory trustee duties);
- Ensure all trustees keep the required trust records;
- Consider if any beneficiaries need to be excluded (if possible);
- Ensure that trustees have an investment strategy where appropriate; and
- Ensure trustees have regular meetings to ‘actively and regularly’ consider the exercise of their powers.

# Conclusion

- The Act is a good attempt at setting out the core principles of trust law and making the law of trusts more accessible
- Increased scrutiny will lead to improved trust governance and better outcomes for beneficiaries
- Fear should not be the driver for change!

# Your next steps

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- Doing nothing is not an option
- Make a plan
- Get help from us
  - Trust Review
  - Trust Administration
  - Professional Trustee Service





Questions?

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Parting thought

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***“An ounce of prevention  
is worth a pound of cure.”***

**- Ben Franklin**





Thank you