

Trustee Amendment Bill

Government Bill

Explanatory note

General policy statement

This Bill amends the Trustee Act 1956 in the light of recommendations made by the New Zealand Law Commission in its report *Some Problems in the Law of Trusts* (NZLC R79, 2002). This Bill also contains related amendments to the Administration Act 1969, District Courts Act 1947, and Wills Act 1837 (UK). Those amendments are intended, at the committee of the whole House stage, to be divided into 3 separate but related Bills.

Clause by clause analysis

Clause 1 is the Title clause.

Clause 2 relates to commencement. Most of the amendments are to come into force on the day after Royal assent, but *clauses 7 and 8* come into force 3 months later to ensure advisory trustees and protectors have fair notice of the amendments affecting them.

Part 1 Amendments to Trustee Act 1956

Clause 3 provides that *Part 1* amends the Trustee Act 1956. (References in this analysis to sections are, unless the context otherwise requires, references to sections of the principal Act amended or modified by the relevant Part or subpart of this Bill.)

Power of trustees to insure

Clause 4(1) substitutes a *new section 24*. Section 24 empowers a trustee to insure—

- any of the trust property up to its full insurable value; and
- any of the trust property on a replacement basis, but only with the consent of the person entitled to the income (for example, the life tenant) or the High Court (presumably reflecting what was thought to be the unfairness of that person's income being reduced by the additional cost of replacement cover); and
- against any risk or liability that it is prudent for a person acting for himself, herself, or itself to insure against.

Section 24 also empowers the trustee—

- to pay the premiums for the insurance out of the income of the building or property concerned or out of the income of any other property subject to the same trusts without obtaining the consent of any person who may be entitled wholly or partly to that income; and
- to recover the costs of any premiums paid in respect of the insurance from the life tenant or other person entitled to, or in receipt of, the rents and profits of the building or property concerned.

New section 24 extends section 24 by empowering the trustee—

- to insure, on any terms (including, without limitation, terms requiring the insurer to replace all or any of the property so insured) the trustee thinks fit, against risks of loss or damage due to any event; and
- to pay, out of assets of, or property subject to, the trust, and apportion between income and capital as the trustee thinks fit the costs of, premiums under policies of insurance authorised by *new section 24* except those under policies to indemnify the trustee against the trustee's personal liability for breach of the trustee's obligations as trustee.

Clause 4(2) makes it clear that *new section 24* applies to insurance whether it is effected (originally, or by way of a renewal of a policy on foot) before or after the commencement of *new section 24*.

Power of trustees acting collectively to authorise agents or attorneys to perform administrative functions

Clause 5(1) substitutes *new sections 29 and 29A*. These new sections are generally based on, but in certain respects differ from, sections 11 and 23 of the Trustee Act 2000 (UK).

New section 29(1) empowers the trustees of a trust acting collectively or the sole trustee of a trust acting alone (**the trustees**), instead of acting personally, to—

- employ and pay a person to be an agent, or appoint and pay a person to be an agent or attorney, of the trustees; and
- authorise that agent or attorney to exercise or perform all or any of the functions of the trustees that are administrative functions.

An authorisation under *new section 29* must be in writing, may be subject to conditions stated in it, and does not prevent the trustees from exercising or performing (after first notifying the agent or attorney) the functions covered by it (*new section 29(2)*).

New section 29(3) imposes on the trustees duties of review and intervention that must be performed—

- after an authorisation is given under *new section 29*; and
- while the agent or attorney concerned acts for the trust.

New section 29(4) protects the trustees, in proceedings brought by or on behalf of a person beneficially interested under the trust, from liability for acts or defaults of an agent or attorney authorised under *new section 29* to perform functions unless—

- the agent or attorney was not employed or appointed in good faith and without negligence; or
- the giving of the authorisation concerned was not effected in good faith and without negligence; or
- the trustees refused or failed to comply with *new section 29(3)*, or their actions to comply with it were not in good faith and without negligence; or
- 2 or more of those grounds apply.

Clause 29A defines, for the purposes of *clauses 29 and 29A*, the terms **administrative function**, **agent**, and **trustee function**.

Clause 5(2) and (3) make clear the position of agents and attorneys who, immediately before the commencement of *clause 5*, are employed or appointed under section 29 (which is to be repealed by *clause 5(1)*).

Clause 6 amends the heading to section 31. The amendments are simply to make it clear that section 31 empowers a trustee *acting alone* to delegate trusts *because of absence or incapacity*.

Advisory trustees and protectors

Clause 7 amends section 49, which permits a trustee to act, in the administration of trust property and to the extent provided in section 49, with an advisory trustee. (Advisory trustees include, for certain estates, the persons specified in section 49(1), and may be appointed in respect of all or any trust property in the ways specified in section 49(2).) The amendment substitutes *new section 49(3)*, which re-enacts the opening words of section 49(3). (The proviso to section 49(3) is re-enacted in *new section 49A*.) *New section 49(3)* provides that, if a trustee (the **responsible trustee**) acts with 1 or more advisory trustees (the **advisory trustees**),—

- the trust property must be vested in the responsible trustee; and
- the responsible trustee has the sole management and administration of the estate and its trusts, as fully and effectually as if the responsible trustee were the sole trustee; and
- *new sections 49A and 49C* apply to the responsible trustee and the advisory trustees, and override *new section 49(3)*.

New sections 49(3) and 49A to 49C (as substituted and inserted by *clauses 7 and 8*)—

- apply in respect of advisory trustees appointed before or after the commencement of those clauses; but
- apply in respect of advice or direction given by advisory trustees only if that advice or direction is given after that commencement.

Clause 8 inserts *new sections 49A to 49C*.

New section 49A contains further provisions relating to advisory trustees. It re-enacts, with amendments, the proviso to section 49(3). *New section 49A(2)* makes clear that the responsible trustee has a discretion whether to consult the advisory trustees. The amendments relate to when the responsible trustee may rely on, and may or must apply to the High Court for directions in respect of, advice or direction from the advisory trustees.

New section 49A(4) requires the responsible trustee to apply to the High Court for directions in the matter if the responsible trustee proposes to follow and act on advice or direction given by the

advisory trustees but considers that the advice or direction concerned does all or any of the following:

- conflicts with the trusts, any law, or both:
- exposes the responsible trustee to any liability.

New section 49A(5) relates to advice or direction given by the advisory trustees and that the responsible trustee considers does not do all or any things specified in *new section 49A(4)(a) and (b)*. It provides that the responsible trustee—

- may follow and act on that advice or direction; and
- is not liable for anything the responsible trustee does or omits to do because of the responsible trustee's following that advice or direction.

New section 49A(6) permits, but does not require, the responsible trustee to apply to the Court for directions in the matter if the advisory trustees—

- are not unanimous and give the responsible trustee conflicting advice or direction; or
- are unanimous but give the responsible trustee advice or direction that the responsible trustee considers is for any reason objectionable.

New section 49B relates to protectors. A **protector**, in *new section 49B* and in relation to a trust, means a person who by virtue of the terms of the trust instrument may give a trustee of the trust either or both of the following:

- a direction that the trustee is obliged to follow (a **direction**):
- consent that permits, and that is necessary to enable, the trustee to exercise a power (**consent**).

A direction or refusal or failure to give consent contravenes *new section 49B(2)* if the trustee knows or believes on reasonable grounds that the direction or refusal or failure to give consent does either or both of the following:

- conflicts with the trusts, any law, or both:
- exposes the trustee to any liability.

New section 49B(3) requires the trustee to determine, as soon as is reasonably practicable after being given a direction, or becoming aware of a refusal or failure to give consent, by a protector, whether the direction or failure or refusal to give consent contravenes *new section 49B(2)*.

If the trustee determines that a direction or refusal or failure to give consent by the protector contravenes *new section 49B(2)*, *new*

section 49B(4) requires the trustee to apply to the High Court, as soon as is reasonably practicable, for directions in the matter.

New section 49C specifies the procedure to be followed when the trustee applies to the High Court for directions in the matter in accordance with *new section 49A or 49B*.

Duty of trustees to notify certain beneficiaries of their right to call for transfer to them of trust property

Clause 9 inserts *new section 87A*, which requires trustees to notify certain beneficiaries of their right to call for transfer to them of trust property. The beneficiaries concerned are those who—

- have a vested interest in property held under the trust; and
- are entitled, alone or with any other beneficiaries of the trust, to call for the transfer to the beneficiary, or to all the beneficiaries of the trust, of property held under the trust.

The section requires trustees to determine annually, or more often, whether it applies to a beneficiary and, if it does, to advise the beneficiary as soon as practicable (unless another trustee of the trust is to do so) of his, her, or its entitlement of that kind.

Part 2

Amendments to other Acts

Subpart 1—Ensuring trustee’s remuneration not treated as specific bequest subject to requirement for abatement

Clause 10 provides that *subpart 1 of Part 2* amends the Administration Act 1969.

Clause 11 substitutes *new section 37*, which relates to the liability of specific devises or bequests to abatement if the estate primarily liable for the payment of debts is insufficient for that purpose. *New section 37* re-enacts section 37 in a form consistent with current drafting practice, but also adds to it *new subsection (3)*. *New subsection (3)* excludes from the specific devises and bequests liable to abatement certain payments or dispositions of money or property. The excluded payments or dispositions are those to which an administrator is entitled in respect of, and by way of reimbursement or remuneration for, services provided by or on behalf of the administrator acting as administrator.

Subpart 2—Requiring proceeding to be removed to High Court if trustee seeks relief from personal liability

Clause 12 provides that *subpart 2 of Part 2* amends the District Courts Act 1947.

Clause 13 inserts *new section 45AA*, which relates to a proceeding commenced in a District Court and that is one—

- brought against a trustee; and
- claiming relief that is or includes redress for a breach of trust by the trustee; and
- in which the trustee, by statement of defence or otherwise, seeks relief under section 73 of the Trustee Act 1956 from personal liability for a breach of trust.

New section 45AA requires a proceeding of that kind to be—

- removed to the High Court for determination; and
- disposed of as if that Court had under section 45(2)(a) ordered that it be transferred to that Court.

Subpart 3—Ensuring trustee’s remuneration not treated as gift to attesting witness and therefore void

Clause 14 provides that *subpart 3 of Part 2* must, for the purposes of the law of New Zealand, be read together with the Wills Act 1837 of the United Kingdom Parliament.

Clause 15 provides that, in *subpart 3 of Part 2*, the Wills Act 1837 is called the principal Act.

Clause 16 modifies, for the purposes of the law of New Zealand, section 15 of the Wills Act 1837. That section makes void a gift to an attesting witness, or his or her wife, husband, civil union partner, or de facto partner. The modification ensures certain payments and dispositions are not gifts for the purposes of the section. The excluded payments or dispositions are ones to which an administrator is entitled in respect of, and by way of reimbursement or remuneration for, services provided by or on behalf of the administrator acting as administrator.

Regulatory impact statement

Executive summary

The Trustee Act 1956 contains certain provisions relating to trusts and trustees. The Law Commission identified the principal points of

difficulty with the Trustee Act in its 2002 report *Some Problems in the Law of Trusts* (NZLC R79).

Adequacy statement

The Ministry of Justice has reviewed the regulatory impact statement (RIS) and considers that the RIS is adequate according to the adequacy criteria.

Status quo and problems

Trustees' collective powers of delegation

Section 29 of the Trustee Act empowers trustees to employ agents (including trust corporations) to perform various commercial functions, but the power to delegate falls short of authorising the delegation of trustees' fundamental decision-making powers.

The prohibition on the delegation of fiduciary discretions can inhibit rather than promote the conscientious discharge of the obligations of trusteeship, particularly in New Zealand as a consequence of the more sophisticated investment regime enacted as Part 2 of the Trustee Act in 1988. Trusteeship is an increasingly specialised task that often requires professional skills that trustees may not have.

Problematic advice from advisory trustees and problematic directions from trust protectors

Section 49 of the Trustee Act provides for the role of "advisory trustee" who may be appointed to assist the responsible trustee. The responsible trustee may consult an advisory trustee on any matter relating to the trust or estate and is not liable for following the advice or direction of an advisory trustee. Section 49(3)(d) enables a responsible trustee to apply to the Court for directions where the advice received from an advisory trustee conflicts with the terms of the trust or any rule of law or exposes the responsible trustee to liability or is otherwise objectionable. But there is no strict obligation to do so.

A "protector" is a person with certain powers such as the power to direct or veto the exercise of trustee powers or the power to choose or veto the trustees' choice of beneficiaries of the trust.

Trustees are obliged to act on the direction of a protector, with no statutory provision enabling them to challenge any such direction if it is fundamentally objectionable.

A responsible trustee should not be able to disregard the fact that advice from an advisory trustee is wrong. A responsible trustee should be empowered to challenge a problematic direction from a trust protector.

Insurance powers

Section 24 of the Trustee Act empowers a trustee to insure:

- any of the trust property up to the full insurable value; and
- with the consent of the life tenant or the High Court, any of the trust property on a full replacement basis; and
- “against any risk or liability against which it would be prudent for a person to insure if he was acting for himself”.

The main difficulty with section 24 is the need for the consent of the life tenant to replacement cover.

Beneficiaries’ rights to information

The law as it stands, as part of the fundamental requirement of accountability, imposes on trustees certain obligations to proffer information to beneficiaries.

The law is uncertain as to whether a trustee is under an obligation to notify beneficiaries where they have the right (either solely or together with the other beneficiaries) to end the trust and call for a transfer of the trust property. Without this information, beneficiaries are not able to exercise their legal entitlement to assume control of the trust property.

Classification of payments to administrators

In the case of a will, a remuneration clause is classified as a legacy, with implications in relation to attestation and abatement. Describing charging provisions in wills as legacies does not reflect their true nature.

Objective

To ensure that the relevant provisions of the Trustee Act 1956 are modified to resolve the identified difficulties.

Alternative options

No alternative options have been considered.

Preferred option

The preferred option is to modify the relevant provisions of the Trustee Act as follows:

- replacing section 24 of the Act to remove the need for the trustees to obtain the consent of the life tenant of the trust property or the High Court to the insurance of the trust property on a full replacement basis:
- replacing section 29 of the Act to authorise trustees to delegate to agents their collective decision-making powers, including powers of investment and management, but excluding—
 - any function relating to whether or in what way any assets of the trust should be distributed, used, possessed, or otherwise beneficially enjoyed:
 - any power to decide whether any fees or other payment due to be made out of the trust funds should be made out of income or capital:
 - any power to decide whether payments received by the trustees should be appropriated to income or capital:
 - any power to appoint a person to be a trustee of the trust:
 - any right to apply to the Court conferred by the Act:
 - any power conferred by any other enactment or the trust instrument which permits the trustees to delegate any of their functions:
- replacing section 49(3)(c) and (d) of the Act to provide that where a trustee knows or ought to know that advice from an advisory trustee conflicts with the trust or any rule of law or exposes the trustee to liability, the trustee must apply to the Court for directions:
- adding a new section providing that where a trustee knows or ought to know that a direction or refusal to consent by a protector conflicts with the trust or any rule of law or exposes the trust to liability, the trustee must apply to the Court for directions:
- adding a new section providing that a “protector” is a person who, by virtue of the provisions of a trust instrument, may give to the trustee a direction which the trustee is obliged to

follow or whose consent to the exercise by the trustee is necessary:

- adding a new section providing that a trustee must notify each beneficiary of any entitlement (either solely or together with other beneficiaries) to end the trust and call for a transfer of the trust property.

In relation to the classification of payments to administrators, the preferred option is to add a new section to the Administration Act 1969 (which would also amend the Wills Act 1837) clarifying that payments to administrators are remuneration for services and not a gift.

Implementation and review

A Trustee Amendment Bill will be required in order to make the changes necessary to resolve the difficulties identified.

Consultation

The Law Commission consulted individual lawyers, academics, the New Zealand Law Society, the Institute of Chartered Accountants, and the New Zealand Trustees' Association on release of its discussion paper in 2002.

The Ministry of Economic Development, the Inland Revenue Department, the Treasury, and the Law Commission have been consulted on the implementation of these reforms.

Hon Clayton Cosgrove

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Contents

		Page
1	Title	2
2	Commencement	2
Part 1		
Amendments to Trustee Act 1956		
<i>Principal Act amended</i>		
3	Principal Act amended	3
<i>Power of trustees to insure</i>		
4	New section 24 substituted	3
	24 Power to insure	3
<i>Power of trustees acting collectively to authorise agents or attorneys to perform administrative functions</i>		
5	New sections 29 and 29A substituted	4
	29 Power of trustees acting collectively to authorise agents or attorneys to perform administrative functions	4
	29A Definitions for sections 29 and 29A	5
6	Power to delegate trusts	6
<i>Advisory trustees and protectors</i>		
7	Advisory trustees may be appointed to assist responsible trustee	6
8	New sections 49A to 49C inserted	7
	49A Further provisions relating to advisory trustees	7
	49B Trustees' duties in respect of protectors' direc- tions or refusals or failures to consent	8
	49C Procedure when trustee applies to Court for directions	8
<i>Duty of trustees to notify certain beneficiaries of their right to call for transfer to them of trust property</i>		
9	New section 87A inserted	9

87A	Trustees must notify certain beneficiaries of their right to call for transfer to them of property held under trust	9
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Part 2

Amendments to other Acts

Subpart 1—Ensuring trustee’s remuneration not treated as specific devise or bequest subject to requirement for abatement

10	Principal Act amended	9
11	New section 37 substituted	10
37	Liability of specific devise or bequest if estate primarily liable is insufficient	10

Subpart 2—Requiring proceeding to be removed to High Court if trustee seeks relief from personal liability

12	Principal Act amended	10
13	New section 45AA inserted	10
45AA	Removal to High Court of proceeding in which trustee seeks relief from personal liability	10

Subpart 3—Ensuring trustee’s remuneration not treated as gift to attesting witness and therefore void

14	Subpart must, for law of New Zealand, be read together with Wills Act 1837	11
15	Principal Act modified for law of New Zealand	11
16	Gifts to attesting witness, or his or her wife, husband, civil union partner, or de facto partner, to be void	11

The Parliament of New Zealand enacts as follows:

1 Title

This Act is the Trustee Amendment Act **2007**.

2 Commencement

- (1) The following provisions (which relate to advisory trustees and protectors) come into force on the day that is 3 months after the date on which this Act receives the Royal assent:
 - (a) **sections 7 and 8**; and
 - (b) the heading before those sections.
- (2) The rest of this Act comes into force on the day after the date on which it receives the Royal assent.

Part 1 Amendments to Trustee Act 1956

Principal Act amended

3 **Principal Act amended**

This **Part** amends the Trustee Act 1956. 5

Power of trustees to insure

4 **New section 24 substituted**

(1) Section 24 is repealed and the following section substituted:

“24 Power to insure

“(1) A trustee may insure all or any of the property that is subject to the trust— 10

“(a) against risks of loss or damage due to any event; and

“(b) on any terms (including, without limitation, terms requiring the insurer to replace all or any of the property so insured) the trustee thinks fit. 15

“(2) A trustee may also insure, on any terms the trustee thinks fit, against a risk or liability that it is prudent for a person acting for himself, herself, or itself to insure against.

“(3) The trustee may, with no further authority than this subsection, but subject to section 2(4) and (5) and to **subsection (4)** of this section,— 20

“(a) pay, out of any asset of, or property that is subject to, the trust, the premiums under any policies of insurance authorised by **subsection (1) or (2)**; and

“(b) apportion the costs of those premiums between income and capital as the trustee thinks fit. 25

“(4) Nothing in this section authorises a trustee to pay, or apportion the costs of, a premium under a policy of insurance to indemnify the trustee against the trustee’s personal liability for breach of the trustee’s liability as trustee. 30

“(5) Nothing in this section obliges a trustee to insure.

“(6) **Subsection (3)** does not limit section 2(4) and (5).

Compare: 1908 No 200 s 90; 1921–22 No 48 s 21(2); Trustee Act 1925 s 19(1) (UK); Trustee Act 1925 s 41 (NSW)”.

(2) **Section 24** of the principal Act (as substituted by **subsection (1)**) applies to insurance whether it is effected (originally, or by way of a renewal of a policy on foot) before or after the commencement of this section. 35

Power of trustees acting collectively to authorise agents or attorneys to perform administrative functions

5 New sections 29 and 29A substituted

(1) Section 29 is repealed and the following sections are substituted: 5

“29 Power of trustees acting collectively to authorise agents or attorneys to perform administrative functions

“(1) The trustees of a trust acting collectively or the sole trustee of a trust acting alone (the **trustees**) may, instead of acting personally,— 10

“(a) employ and pay a person to be an agent, or appoint and pay a person to be an agent or attorney, of the trustees; and

“(b) authorise that agent or attorney to exercise or perform all or any of the functions of the trustees that are administrative functions. 15

“(2) An authorisation under this section—

“(a) must be in given in writing; and

“(b) may be given subject to conditions stated in it; and

“(c) does not prevent the trustees from exercising or performing (after first notifying the agent or attorney) all or any of the functions covered by the authorisation. 20

“(3) After giving an authorisation under this section, and while the agent or attorney concerned continues to act for the trust, the trustees— 25

“(a) must keep under review the arrangements under which that agent or attorney acts and how those arrangements are being put into effect; and

“(b) must, if the circumstances make it appropriate to do so, consider whether there is a need to exercise any power of intervention exercisable by the trustees; and 30

“(c) must exercise a power of that kind if the trustees consider there is a need to do so.

“(4) The trustees are not liable in proceedings brought by or on behalf of a person beneficially interested under the trust for any act or default of an agent or attorney authorised under this section to perform functions unless— 35

“(a) the agent or attorney was not employed or appointed in good faith and without negligence; or

“(b) the giving of the authorisation concerned was not effected in good faith and without negligence; or 40

- “(c) the trustees refused or failed to comply with **subsection (3)**, or their actions to comply with it were not in good faith and without negligence; or
- “(d) 2 or more of **paragraphs (a) to (c)** apply.
- “(5) This section and **section 29A**— 5
- “(a) do not limit or affect section 2 or 31; but
- “(b) override other enactments or rules of law or equity.
- Compare: 1908 No 200 s 84; Trustee Act 1925 (UK) s 23; Trustee Act 2000 (UK) ss 11, 23
- “**29A Definitions for sections 29 and 29A** 10
- “(1) In this section and **section 29**, unless the context otherwise requires,—
- “**administrative function**, in relation to a trust, means any function (other than a trustee function) that it is necessary or desirable to perform in executing the trust, administering the trust property, or both 15
- “**agent** includes an accountant, a bank, a lawyer, a stockbroker, and a trustee corporation
- “**trustee function**, in relation to a trustee of a trust, means any of the following vested in the trustee as one of the trustees, or as the sole trustee, of the trust: 20
- “(a) a function that is, or is related to, the determination of whether, or in what way, any assets of the trust should be distributed, used, possessed, or otherwise beneficially enjoyed: 25
- “(b) a power to decide whether any fees or other payment due to be made out of the trust funds should be made out of income or capital:
- “(c) a power to decide whether payments received by the trustees or trustee should be appropriated to income or capital: 30
- “(d) a power to appoint a person to be a trustee of the trust:
- “(e) a right conferred by this Act to apply to the Court:
- “(f) a power conferred by **section 29**, another enactment, or the trust instrument, and that permits the trustees or trustee to authorise another person to perform any of the functions of the trustees or trustee. 35
- “(2) The purpose of **paragraph (f)** of the definition of trustee function in **subsection (1)** is to prevent authorisation that is inconsistent

with the authorisation permitted by the enactment or trust instrument concerned.

Compare: 1908 No 200 s 84; Trustee Act 1925 (UK) s 23; Trustee Act 2000 (UK) s 11”.

- (2) **Subsection (3)** applies to agents or attorneys who, immediately before the commencement of this section, were employed or appointed— 5
- (a) under section 29 of the principal Act (as repealed by **subsection (1)**); and
 - (b) subject to any applicable terms and conditions of employment or appointment; and 10
 - (c) for 1 or more purposes.
- (3) Agents or attorneys of the kind specified in **subsection (2)** must be taken to have been— 15
- (a) employed or appointed on the commencement of this section, subject to those applicable terms and conditions (if any), and under **section 29** of the principal Act (as substituted by **subsection (1)**); and
 - (b) authorised at that time, and under that section, to perform all administrative functions reasonably necessary for those 1 or more purposes. 20

6 Power to delegate trusts

The heading to section 31 is amended—

- (a) by inserting “**of trustee acting alone**” after “**Power**”; and 25
- (b) by adding “**because of absence or incapacity**”.

Advisory trustees and protectors

7 Advisory trustees may be appointed to assist responsible trustee

- (1) Section 49 is amended by repealing subsection (3) and substituting the following subsection: 30
- “(3) If a trustee (the **responsible trustee**) acts with 1 or more advisory trustees (the **advisory trustees**),—
- “(a) the trust property must be vested in the responsible trustee; and 35
 - “(b) the responsible trustee has the sole management and administration of the estate and its trusts, as fully and effectually as if the responsible trustee were the sole trustee; and

- “(c) **sections 49A and 49C** (which override this subsection) apply to the responsible trustee and the advisory trustees.”
- (2) **Sections 49(3) and 49A to 49C** of the principal Act (as substituted and inserted by this section and **section 8**)— 5
- (a) apply in respect of advisory trustees appointed before or after the commencement of this section; but
- (b) apply in respect of advice or direction given by advisory trustees only if that advice or direction is given after that commencement. 10
- 8 New sections 49A to 49C inserted**
- The following sections are inserted after section 49:
- “49A Further provisions relating to advisory trustees**
- “(1) This section applies, as **section 49(3)(c)** provides,—
- “(a) to a trustee (the **responsible trustee**) who acts with 1 or more advisory trustees (the **advisory trustees**); and 15
- “(b) to the 1 or more advisory trustees.
- “(2) The responsible trustee may consult the advisory trustees on any matter relating to the trusts or the estate.
- “(3) The advisory trustees may advise the responsible trustee on any matter relating to the trusts or the estate, but must not be trustees in respect of the trust. 20
- “(4) The responsible trustee must apply to the Court for directions in the matter if the responsible trustee proposes to follow and act on advice or direction given by the advisory trustees but considers that the advice or direction concerned does all or any of the following: 25
- “(a) conflicts with the trusts, any law, or both;
- “(b) exposes the responsible trustee to any liability.
- “(5) If the responsible trustee considers that advice or direction given by the advisory trustees does not do all or any things specified in **subsection (4)(a) and (b)**, the responsible trustee— 30
- “(a) may follow and act on that advice or direction; and
- “(b) is not liable for anything the responsible trustee does or omits to do because of the responsible trustee’s following that advice or direction. 35
- “(6) The responsible trustee may, but need not, apply to the Court for directions in the matter if the advisory trustees—

- “(a) are not unanimous and give the responsible trustee conflicting advice or direction; or
- “(b) are unanimous but give the responsible trustee advice or direction that the responsible trustee considers is for any reason objectionable. 5
- “(7) This section overrides **section 49(3)**.
- “49B Trustees’ duties in respect of protectors’ directions or refusals or failures to consent**
- “(1) **Protector**, in this section and in relation to a trust, means a person who by virtue of the terms of the trust instrument may give a trustee of the trust either or both of the following: 10
- “(a) a direction that the trustee is obliged to follow (a **direction**):
- “(b) consent that permits, and that is necessary to enable, the trustee to exercise a power (**consent**). 15
- “(2) A direction, or refusal or failure to give consent, by the protector contravenes this subsection if the trustee knows or believes on reasonable grounds that the direction or refusal or failure to give consent does either or both of the following:
- “(a) conflicts with the trusts, any law, or both: 20
- “(b) exposes the trustee to any liability.
- “(3) As soon as is reasonably practicable after being given a direction, or becoming aware of a refusal or failure to give consent, by a protector, the trustee must determine whether the direction or refusal or failure contravenes **subsection (2)**. 25
- “(4) If the trustee determines that a direction or refusal or failure to give consent by the protector contravenes **subsection (2)**, the trustee must as soon as is reasonably practicable apply to the Court for directions in the matter.
- “49C Procedure when trustee applies to Court for directions** 30
- “(1) If the responsible trustee or the trustee applies to the Court for directions in accordance with **section 49A or 49B**,—
- “(a) the application must be served on all persons interested in the application unless the Court, on an application for the purpose, directs otherwise; and 35
- “(b) all persons on whom the application is served may attend and be heard at the hearing unless the Court, on an application for the purpose, directs otherwise; and
- “(c) the Court’s decision in the matter is final; and

- “(d) its order in the matter binds the responsible trustee and the advisory trustees or, as the case may be, the trustee and the protector; and
- “(e) it may make any order as to costs as appears proper.
- “(2) This section overrides **section 49(3)**.” 5
- Duty of trustees to notify certain beneficiaries of their right to call for transfer to them of trust property*
- 9 New section 87A inserted**
- The following section is inserted after section 87:
- “87A Trustees must notify certain beneficiaries of their right to call for transfer to them of property held under trust** 10
- “(1) This section applies to a beneficiary under a trust who—
- “ (a) has an interest—
- “ (i) in all or any property held under the trust; and
- “ (ii) that is vested in possession; and 15
- “(b) has an entitlement, alone or in conjunction with the other beneficiaries of the trust (if any), to call for the transfer to the beneficiary, or to all the beneficiaries of the trust, of property held under the trust.
- “(2) Trustees of a trust must determine annually or more often 20 whether this section applies to a beneficiary of the trust.
- “(3) As soon as practicable after determining that this section applies to a beneficiary under a trust, a trustee of the trust must advise the beneficiary of his, her, or its entitlement of the kind specified in **subsection (1)(b)**. 25
- “(4) A trustee of a trust need not comply with **subsection (3)** if another trustee of the trust is to do so because that other trustee has determined, at the same time as the trustee, that this section applies to the beneficiary.”

Part 2 30

Amendments to other Acts

Subpart 1—Ensuring trustee’s remuneration not treated as specific devise or bequest subject to requirement for abatement

- 10 Principal Act amended** 35
- This subpart amends the Administration Act 1969.

11 New section 37 substituted

Section 37 is repealed and the following section substituted:

“37 Liability of specific devise or bequest if estate primarily liable is insufficient

“(1) This section applies— 5

“(a) only if a testator’s estate primarily liable for the payment of debts is insufficient for that purpose; and

“(b) only to the 1 or more specifically devised or bequeathed estates of the testator (the **estates**).

“(2) Each of the estates is liable to make good the deficiency, and must do so in the proportion that the value of each of the estates bears to the aggregate value of the estates. 10

“(3) For the purposes of this section, the estates do not include a payment or disposition of money or property to which an administrator is entitled in respect of, and by way of reimbursement or remuneration for, services provided by or on behalf of the administrator acting as administrator. 15

Compare: 1952 No 56 s 22; Trustee Act 2000 s 28(4)(b) (UK)”.

Subpart 2—Requiring proceeding to be removed to High Court if trustee seeks relief from personal liability 20

12 Principal Act amended

This subpart amends the District Courts Act 1947.

13 New section 45AA inserted

The following section is inserted after section 45:

“45AA Removal to High Court of proceeding in which trustee seeks relief from personal liability 25

“(1) A proceeding commenced in a Court must be removed to the High Court for determination if the proceeding is one—

“(a) brought against a trustee; and

“(b) claiming relief that is or includes redress for a breach of trust by the trustee; and 30

“(c) in which the trustee, by statement of defence or otherwise, seeks relief under section 73 of the Trustee Act 1956 from personal liability for a breach of trust.

“(2) A proceeding removed under this section must be disposed of as if the High Court had under section 45(2)(a) ordered that it be transferred to that Court.” 35

Subpart 3—Ensuring trustee’s remuneration not treated as gift to attesting witness and therefore void

14 Subpart must, for law of New Zealand, be read together with Wills Act 1837

This subpart must, for the purposes of the law of New Zealand, be read together with the Wills Act 1837 of the United Kingdom Parliament. 5

15 Principal Act modified for law of New Zealand

In this subpart, the Wills Act 1837 is called the principal Act.

16 Gifts to attesting witness, or his or her wife, husband, civil union partner, or de facto partner, to be void 10

(1) For the purposes of the law of New Zealand, section 15 of the principal Act must be read as if a beneficial devise, legacy, estate, interest, gift, or appointment does not include a payment or disposition of money or property to which an administrator is entitled in respect of, and by way of reimbursement or remuneration for, services provided by or on behalf of the administrator acting as administrator. 15

(2) **Administrator**, in this section, has the same meaning as in section 2(1) of the Administration Act 1969. 20