

Trustee Amendment Bill

Government Bill

As reported from the Justice and Electoral
Committee

Commentary

Recommendation

The Justice and Electoral Committee has examined the Trustee Amendment Bill and recommends by majority that it be passed with the amendments shown.

Introduction

This bill amends the Trustee Act 1956. In 2002 the New Zealand Law Commission released its report *Some Problems in the Law of Trusts* (NZLC R79, 2002), and recommendations from this report resulted in the drafting of this bill.

In addition this bill amends the Administration Act 1969, District Courts Act 1947, and Wills Act 2007, which replaced the Wills Act 1837 (UK).

This commentary covers the key amendments that we recommend to the bill. It does not cover minor or technical amendments.

Insurance

We recommend amending clause 4 to make it clear that, as under existing law, an income beneficiary could be asked to pay insurance premiums on trust property or assets in trusts. As introduced the bill is not clear about whether beneficiaries could pay insurance premiums for assets or property in a trust. In some cases a trust might not have the appropriate assets to pay for insurance on trust property so beneficiaries might want to pay for insurance premiums themselves.

Agents to perform administrative functions

We recommend amending clause 5, which replaces section 29 of the principal Act with new provisions covering trustees' ability to employ and authorise, or appoint, agents or attorneys. Our recommended amendments replicate important elements of the existing law that were not included in the bill as introduced. We also recommend that trustees be required to use reasonable care, diligence, and skill in employing, and reviewing the performance of, an agent; and changes to clarify what fees and charges a trustee can be paid for employing, and can pay, an agent. We also recommend a clarification of the definition of "administrative function". We consider these changes would aid trustees and beneficiaries.

Advisory trustees and protectors

Seeking advice from the courts

We recommend amendments to clause 8 (including the deletion of new section 49A) so that responsible trustees would not be required to seek, but would have the option of seeking, the Court's direction when a protector or advisory trustee gave directions the responsible trustee believed to be in conflict with the trusts or any laws, or exposed the responsible trustee to liability. We consider that the proposed new sections place an onerous obligation on responsible trustees, which in practice might be unnecessarily expensive and time-consuming for beneficiaries.

Liability

To clarify the effect of the deletion of new section 49A (clause 8), we recommend inserting new section 49(3A) in clause 7. This would

make it clear that a responsible trustee is not protected from a breach of trust or failure to comply with general duties in law by following the advisory trustee's advice or direction (including not seeking the Court's direction). We consider these amendments desirable to make a responsible trustee's obligations clear to all parties.

Proceedings in a District Court

We recommend giving District Courts jurisdiction over breach of trust cases within their monetary jurisdiction, by inserting new section 34(2A) into the District Courts Act 1947 (new clause 13). This is instead of the bill's proposal that new section 45AA (clause 13) be inserted in the District Courts Act, requiring certain proceedings in a District Court to be removed to the High Court. Under the current Trustee Act, only the High Court has jurisdiction to relieve a trustee from personal liability for breach of trust.

We also recommend amending section 73 of the Trustee Act (new clause 8A) to allow District Courts to transfer proceedings to the High Court if necessary because of complexity. We recognise that it is appropriate to have most such cases heard in District Courts, and having these cases heard in the High Court might result in delays and high costs for beneficiaries.

Issues with the bill

Although we agree in principle with this amendment bill we do not think it reforms the law relating to trusts extensively enough. During the course of our examination of this bill many related issues that were outside the scope of this bill were brought to our attention, including

- the rule against perpetuities
- the removal of trustees
- New Zealand becoming a signatory to the Hague Convention on the Law Applicable to Trusts and on their Recognition
- supervision of, and trust principles in relation to, superannuation trusts
- the extent to which a settlor or trustee can contract out of trustee duties
- the irreducible core of trustee duties

- trading trusts
- access to trust information by beneficiaries
- statutory powers to vary and resettle a trust.

We urge the Government to conduct a comprehensive review of the law relating to trusts as soon as practicable.

New Zealand National Party minority view

This is very poor legislation which results from an ancient Law Commission report. It misses some big issues while concentrating on a series of minor ones. The real need is to repeal the out-of-date Trustee Act 1956 and replace it with legislation which is relevant and up to date.

National cannot support this inadequate amendment Bill.

Appendix

Committee process

The Trustee Amendment Bill was referred to us on 16 October 2007. The closing date for submissions was 5 December 2007. We received and considered 12 submissions from interested groups and individuals. We heard eight submissions.

We received advice from the Ministry of Justice.

Committee membership

Lynne Pillay (Chairperson)

Christopher Finlayson (Deputy Chairperson)

Chris Auchinvole

Charles Chauvel

Hone Harawira (non-voting member)

Ann Hartley (until 29 February 2008)

Nándor Tánzos (until 27 June 2008)

Mētīria Turei (from 1 July 2008)

Nicky Wagner

Louisa Wall (from 6 March 2008)

Trustee Amendment Bill

Key to symbols used in reprinted bill

As reported from a select committee

text inserted by a majority

~~text deleted by a majority~~

Hon Lianne Dalziel

Trustee Amendment Bill

Government Bill

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The Parliament of New Zealand enacts as follows:

1 Title

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

2 Commencement

(+) ~~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:~~ 5

(a) ~~sections 7 and 8; and~~

(b) ~~the heading before those sections:~~

~~The rest of this This Act comes into force on the day after the date on which it receives the Royal assent.~~ 10

Part 1

Amendments to Trustee Act 1956

Principal Act amended

3 Principal Act amended 15

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

Power of trustees to insure

4 New section 24 substituted

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

“24 Power to insure 20

“(1) A trustee may insure all or any of the assets of, or property that is subject to, the trusts—

“(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 assets or 25 property so insured) the trustee thinks fit.

“(2) A trustee may also insure, on any terms the trustee thinks fit, against a risk or liability (other than a risk, due to any event, of loss of, or damage to, all or any of the assets of, or property

- that is subject to, the trusts) 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;~~— 5
- “(a) pay, out of, or recover from any person who is entitled to the income of, any asset of, or property that is subject to, the same trusts, 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. 10
- “(4) Nothing in this section authorises a trustee to pay, recover, 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 obligations as trustee. 15
- “(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. 20
- Power of trustees acting collectively to employ and authorise, or appoint, agents or attorneys to perform administrative functions* 25
- 5 **New sections 29 and 29A to 29E substituted**
- (1) Section 29 is repealed and the following sections are substituted:
- “29 **Power of trustees acting collectively to employ and authorise agents or attorneys to exercise or perform administrative functions** 30
- “(1) ~~The trustees of a trust acting collectively or the sole trustee of a trust acting alone (the trustees)~~ A trustee may; ~~instead of acting personally;~~— 35
- “(a) employ ~~and pay~~ a person (for example, an accountant, a bank, a financial adviser, a lawyer, a stockbroker, or a

- trustee corporation) 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, on behalf and (except as provided in **subsection (2)(c)** instead of the trustee, all or any of the functions of the trustees that are administrative functions; and 5
- “(c) allow and pay that person reasonable fees for, and any fees and charges reasonably incurred by that person in the course of, being an agent of the trustee exercising or performing under this section functions of the trustee that are administrative functions; and 10
- “(d) be allowed and paid all fees and charges reasonably incurred by the trustee in employing and authorising under this section, and reviewing under this section the arrangements relating to, that agent. 15
- “(2) An authorisation under this section—
- “(a) must be ~~in~~ given, and may at any time be amended, revoked, or revoked and replaced, in writing given or delivered to the agent; and
- “(b) may be given subject to conditions stated in it; and 20
- “(c) does not prevent the trustees from exercising or performing (after first notifying the agent ~~or attorney in writing given or delivered to the agent~~) all or any of the functions covered by the authorisation.
- “(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 30
- “(b) must, if the circumstances make it appropriate to do so, consider whether there is a need to a trustee exercising reasonable care, diligence, and skill would exercise any power of intervention exercisable by the trustees (for example, a power to give directions to the agent, or to amend, revoke, or revoke and replace the agent’s authorisation under this section); and 35

- “(c) must exercise a power of that kind if ~~the trustees a~~ trustee exercising reasonable care, diligence, and skill would consider there is a need to do so.
- “(4) The trustees ~~are is~~ 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 ~~exercise or perform functions unless—~~ 1 or more of the following applies:
- “(a) the agent ~~or attorney~~ was not employed ~~or appointed~~ in good faith and ~~without negligence~~ with reasonable care, diligence, and skill; ~~or~~
- “(b) the giving of the authorisation concerned was not effected in good faith and ~~without negligence~~ with reasonable care, diligence, and skill; ~~or~~
- “(c) the trustees refused or failed to comply with **subsection (3)**, or ~~their~~ the trustee’s actions to comply with it were not taken in good faith and ~~without negligence~~ with reasonable care, diligence, and skill; ~~or~~
- “(d) ~~2 or more of paragraphs (a) to (c)~~ apply.
- “(5) ~~This section and section 29A—~~
- “(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 (UK); Trustee Act 2000 (~~UK~~) ss 11, 23 (UK)
- “**29A Duty of certain trustees to exercise special skill**
- “(1) This section applies only to a trustee whose profession, employment, or business is or includes acting as a trustee or investing money on behalf of others.
- “(2) In order to act as a trustee exercising reasonable care, diligence, and skill would act for the purposes of **section 29(3)(b) or (c)**, or to act with reasonable care, diligence, and skill for the purposes of **section 29(4)(a), (b), or (c)**, a trustee to whom this section applies must exercise the care, diligence, and skill that a prudent person engaged in that trustee’s profession, employment, or business would exercise in managing the affairs of others.

“29AB Definitions for sections 29 and 29A Administrative and trustee functions defined

“ In ~~this section and section 29~~ and this section, unless the context otherwise requires,—

“**administrative function**, in relation to a trust, means any power, right, or function (other than a trustee function) that it is necessary or desirable to exercise or perform in executing the trusts, administering any asset of, or property that is subject to, the trusts property, or both (for example, a power to manage trust funds, to invest trust funds in any property, or to vary from time to time the investment of trust funds in any property) 5 10

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 powers, rights, or functions vested in the trustee as ~~one of the trustees; or as the sole~~ a trustee; of the trust: 15

“(a) a function that is, or is related to, the determination of whether, when, or in what way, any assets of, or property that is subject to, the trusts should be distributed, used, possessed, or otherwise beneficially enjoyed (for example, a power specified in paragraph (da) or (db)): 20

“(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: 25

“(c) a power to decide whether payments received by the ~~trustees or~~ trustee should be appropriated to income or capital:

“(d) a power to appoint a person to be, or to remove, a trustee of the trust: 30

“(da) a power of appointment (including, without limitation, a power to appoint a person to be, or to remove, a beneficiary):

“(db) a power to appoint or change the distribution date of trust funds: 35

“(dc) a power to resettle the trust, or to amend, revoke, or revoke and replace all or any terms or provisions of an instrument constituting or creating the trust:

“(e) a right conferred by this Act to apply to the Court:

“(f) the power conferred by **section 29** (which is a power exercisable only by the trustee personally), and any other power conferred by 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 and exercisable only by the trustee personally. 5

“(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. 10

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

“29C Power to appoint agents or attorneys to administer, etc, trust property outside New Zealand 15

“(1) A trustee may appoint any person to act as the trustee’s agent or attorney—

“(a) for the purpose of selling, converting, collecting, getting in, and executing and perfecting assurances of, or managing or cultivating, or otherwise administering any property, real or personal, movable or immovable, subject to the trust in any place outside New Zealand; 20

“(b) for the purpose of executing or exercising any discretion or trust or power vested in the trustee in relation to any property of that kind. 25

“(2) The appointment may be made with any ancillary powers (for example, a power to appoint substitutes), and with and subject to any provisions and restrictions, the trustee thinks fit.

“(3) A trustee is not, by reason only of the trustee’s having made an appointment under this section, responsible for any loss arising from the appointment. 30

“29D Power to appoint agents to receive property, or money payable under policy of insurance

“(1) A trustee may appoint a solicitor to be the trustee’s agent to receive, and give a discharge for, any money or valuable consideration or property receivable by the trustee under the trust 35

by permitting the solicitor to have the custody of, and to produce, a deed or instrument that complies with **subsection (2)**.

- “(2) A deed or instrument complies with this subsection if—
- “(a) a receipt for the money or valuable consideration or property is contained in, or endorsed on, the deed or instrument; and 5
- “(b) the deed or instrument is executed, or the endorsed receipt is signed, by the person entitled to give a receipt for that money or valuable consideration or property.
- “(3) The production, by a solicitor appointed under **subsection (1)**, of a deed or instrument that complies with **subsection (2)**, has the same validity and effect as if the person who appointed the solicitor was not a trustee. 10
- “(4) A trustee may appoint a bank or solicitor to be the trustee’s agent to receive and give a discharge for any money payable to the trustee under or by virtue of a policy of insurance, by permitting the bank or solicitor to have the custody of and to produce the policy of insurance with a receipt signed by the trustee. 15
- “(5) A trustee is not chargeable with a breach of trust by reason only of the trustee’s having made, or concurred in making, an appointment under **subsection (1) or (4)**. 20
- “(6) However, nothing in this section exempts the trustee from any liability that the trustee would have incurred had this section, and any corresponding earlier enactments, not been enacted if the trustee permits money or valuable consideration or property received in accordance with **subsection (1) or (4)** to remain in the hands, or under the control, of the bank or solicitor for longer than is reasonably necessary to enable the bank or solicitor to pay or transfer it to the trustee. 25
30
- “29E **Effect on other laws of sections 29 to 29D**
- Sections 29 to 29D—**
- “(a) do not limit or affect section 2 or 31 of this Act, section 85 of the Public Trust Act 2001, or section 14 of the Trustee Companies Act 1967; but 35
- “(b) override other enactments or rules of law or equity.”

- (2) ~~Subsection (3) applies to agents or attorneys who, immediately before the commencement of this section, were employed or appointed—~~
- (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~~
 - (c) ~~for 1 or more purposes.~~
- (2) Subsection (3) applies to agents whose employment or appointment, subject to any applicable terms and conditions of employment or appointment, and for 1 or more purposes, under section 29(1) or (2A) of the principal Act (as repealed by **subsection (1)**) is in force immediately before the commencement of this section.
- (3) Agents ~~or attorneys~~ of the kind specified in **subsection (2)** must be taken to have been—
- (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.
- (4) Agents or attorneys whose appointments for 1 or more purposes (if applicable, with ancillary powers, and subject to provisions and restrictions) under section 29(2) of the principal Act (as repealed by **subsection (1)**) are in force immediately before the commencement of this section must be taken to have been appointed, on that commencement, for those purposes (and, if applicable, with those ancillary powers, and subject to those provisions and restrictions) under **section 29C** of the principal Act (as substituted by **subsection (1)**).
- (5) Agents whose appointments under section 29(3)(a) or (c) of the principal Act (as repealed by **subsection (1)**) are in force immediately before the commencement of this section must be taken to have been appointed, on that commencement, under **section 29D(1) or (4)** of the principal Act (as substituted by **subsection (1)**).

6 Power to delegate trusts

The heading to section 31 is amended—

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

5

The heading to section 31 is amended by adding “**because of absence or incapacity**”.

Advisory trustees and protectors

7 Advisory trustees may be appointed to assist responsible trustee

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(1) Section 49 is amended by repealing subsection (3) and substituting the following subsection:

“(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

15

“(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

20

“(c) **sections 49A and 49G** (which override this subsection) apply to the responsible trustee and the advisory trustees.”

(2) **Sections 49(3) and 49A to 49G** of the principal Act (as substituted and inserted by this section and **section 8**)—

25

(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.

30

(1) Paragraph (c) of the proviso to subsection (3) of section 49 is amended by inserting “except as provided by **subsection (3A)**” before “shall not be liable”.

(2) Section 49 is amended by inserting the following subsection after subsection (3):

35

“(3A) Nothing in paragraph (c) of the proviso to subsection (3) protects the responsible trustee from liability for a breach of trust,

or a breach of the trustee's obligations as trustee, in respect of anything—

- “(a) done or omitted by the trustee by reason of the trustee's following the advisory trustee's advice or direction; and
“(b) that would have been a breach of trust, or a breach of the trustee's obligations as trustee, if it were done or omitted by the trustee otherwise than by reason of the trustee's following the advisory trustee's advice or direction.”

8 New sections 49A to 49C and 49B 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 † or more advisory trustees (the advisory trustees); and
“(b) to the † 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:**
- “(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:**
“(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—**
“(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:
- “(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)**.~~

“49BA Trustees’ duties may apply to Court for directions in respect of protectors’ directions or refusals or failures to consent

~~“(1) **Protector**, in this section and In this section and **section 49B**, **protector**, 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:~~

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~~“(a) a direction that the trustee is obliged to follow (a **direction**):~~

15

~~“(b) consent that permits, and that is necessary to enable, the trustee to exercise or perform a power, right, or function (**consent**).~~

~~“(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 The trustee may apply to the Court for directions in the matter if the trustee considers that a direction or refusal or failure to give consent by the protector does either or both of the following:~~

20

~~“(a) conflicts with the trusts, any law, or both:~~

25

~~“(b) exposes the trustee to any liability for a breach of trust or a breach of the trustee’s obligations as trustee.~~

~~“(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)**:~~

30

~~“(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.~~

35

~~49C~~B Procedure when trustee applies to Court for directions

“ 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 5

“(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 10

“(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)**.”~~ 15

Giving District Courts jurisdiction to relieve trustees from personal liability

8A Power to relieve trustee from personal liability

(1) Section 73 is amended—

(a) by inserting “or to a District Court” after “If it appears to the Court”; and 20

(b) by inserting “or (as the case may be) the District Court” after “then the Court”.

(2) Section 73 is amended by adding the following subsections as subsections (2) and (3): 25

“(2) A District Court may order that a proceeding commenced in a District Court and in which relief under this section is sought be transferred to the High Court if satisfied that the High Court is the more appropriate venue for dealing with the proceeding, because of its complexity or the complexity of a question in issue in it. 30

“(3) **Subsection (2) does not limit or affect sections 43 and 48 of the District Courts Act 1947.”**

*Duty of trustees to ~~notify~~ use best endeavours
to advise certain beneficiaries of their right
entitlement to call for transfer to them of trust
property*

- 9 **New section 87A inserted** 5
The following section is inserted after section 87:
- “87A Trustees must ~~notify~~ use best endeavours to advise certain beneficiaries of their right entitlement to call for transfer to them of trust property held under trust**
- “(1) This section applies to a beneficiary under a trust who— 10
- ~~“(a) has an interest—~~
- ~~“(i) in all or any property held under the trust; and~~
- ~~“(ii) that is vested in possession; and~~
- ~~“(a) has an absolute and immediate right to all or any part of the trust property; and~~ 15
- “(b) has an entitlement, alone or in conjunction with the other beneficiaries of the trust (if any), to call for the transfer of all or any part of the trust property to the beneficiary, or to all the beneficiaries of the trust; ~~of property held under the trust.~~ 20
- “(2) Trustees of a trust must determine annually or more often 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~~ the trustees of the trust must use their best endeavours to 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.”~~ 30

Part 2 Amendments to other Acts

Subpart 1—Ensuring trustee’s remuneration
not treated as specific devise or bequest
subject to requirement for abatement 5

10 Principal Act amended

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 insufficient and liability not made clear by will 10

“(1) This section applies—

“(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**). 15

“(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.

“(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. 20

“(4) This section does not apply if the will makes it clear that each of the estates— 25

“(a) is not liable to make good the deficiency; or

“(b) is not liable to do so in the proportion that the value of each of the estates bears to the aggregate value of the estates. 30

“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~~
Giving District Courts jurisdiction to relieve trustees from personal liability

- 12 Principal Act amended** 5
 This **subpart** amends the District Courts Act 1947.
- 13 Equity jurisdiction**
 Section 34 is amended by repealing subsection (2A) and substituting the following subsection:
- “(2A) Despite subsection (2), the District Courts have the power, subject to subsection (1), to make orders, or to grant any other relief that may be granted, under the following sections:
- “(a) section 49 of the Administration Act 1969 (which relates to following of assets, etc):
- “(b) section 73 of the Trustee Act 1956 (which relates to relieving a trustee from personal liability for a breach of trust).” 15
- 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** 20
- “(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** 25
- “(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.”** 30

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** 5
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.
- 15** **Principal Act modified for law of New Zealand** 10
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**
- (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
- 14** **Principal Act amended**
This **subpart** amends the Wills Act 2007.
- 15** **Witnesses affected by dispositions made to them** 25
Section 13(2) is amended by inserting the following paragraph after paragraph (b):
- “(ba) the disposition is one to which a personal representative is entitled in respect of, and by way of reimbursement or remuneration for, services provided by or on behalf of the personal representative acting as personal representative; or”. 30

Trustee Amendment Bill

Legislative history

21 September 2007
16 October 2007

Introduction (Bill 144-1)
First reading and referral to Justice and Electoral
Committee
