

DRAFT FOR CONSULTATION

Trusts Bill

Government Bill

Explanatory note

[To come]

References in the compare notes in this draft bill that begin with ‘R’ are references to the numbered recommendations in the Law Commission Report ‘Review of the Law of Trusts: A Trusts Act for New Zealand’ (NZLC R130).

Hon Amy Adams

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The Parliament of New Zealand enacts as follows:

1 Title

This Act is the Trusts Act **2017**.

2 Commencement

This Act comes into force on the day that is 6 months after the date on which it receives the Royal assent.

Part 1
Preliminary provisions

3 Purpose and scope

- (1) The purpose of this Act is to restate and reform New Zealand trust law by—
- (a) setting out the core principles of the law relating to trusts; and
 - (b) providing for default administrative rules for express trusts; and
 - (c) providing for mechanisms to resolve trust-related disputes; and
 - (d) enhancing access to the law of trusts.
- (2) However, this Act is not an exhaustive code of the law relating to trusts.
- (3) This Act is informed by and complements the rules of common law and equity relating to trusts (except where otherwise indicated or where those rules are inconsistent with the provisions of this Act).

4 Interpretation

In this Act, unless the context otherwise requires,—

adult means a person aged 18 years or older

beneficiary means a person who has received, or who will or may receive, a benefit under a trust, and includes a discretionary beneficiary

child means a person under the age of 18 years

court means the High Court

discretionary beneficiary means a person who may benefit under a trust at the discretion of the trustee or under a power of appointment but who does not have a fixed, vested, or contingent interest in the trust property

express trust has the meaning given to it in **section 8**

incorporated law firm has the meaning given to it in section 6 of the Lawyers and Conveyancers Act 2006

permitted purpose, in relation to a trust, means a charitable purpose and any other purpose for a trust that is permitted at law and specified in the terms of the trust

person with the power to remove and appoint trustees means, in any particular case of removal or appointment, a person described in **section 88** as having the relevant power in that case, and,—

- (a) in **section 67**, means a person with the power under **section 88(1)** to remove a trustee; and
- (b) in **section 70(2)(c)**, means a person with the power under **section 88(2)** to appoint a trustee; and
- (c) in **section 94(1)(a)**, means a person nominated under the terms of the trust as having the power to remove and appoint trustees

personal representative, in relation to a deceased person, means an executor who has obtained probate or an administrator of the deceased person's estate appointed by the court

portfolio investment entity has the meaning given to it in section YA 1 of the Income Tax Act 2007

statutory trustee means a trustee created and appointed under an enactment and includes a trustee corporation

trustee,—

- (a) means a person who holds or deals with property under a trust; and
- (b) includes the plural; and
- (c) in relation to a decision, application, notice, direction, consent, or agreement, and in a context where there are 3 or more trustees and the duty under **section 32** has been excluded, means the majority of the trustees

trustee corporation has the meaning given to it in section 2 of the Protection of Personal and Property Rights Act 1988

wholesale investment trust has the meaning given to it in **clause 1 of Schedule 2**.

Compare: R1(4)

5 **Transitional, savings, and related provisions**

The transitional, savings, and related provisions set out in **Schedule 1** have effect according to their terms.

6 **Act binds the Crown**

This Act binds the Crown.

Part 2

Express trusts

7 **Act applies to express trusts**

- (1) This Act applies only to express trusts.

- (2) However,—
- (a) the court may, where the court finds it appropriate, apply provisions of this Act to resulting trusts and constructive trusts; and
 - (b) **Schedule 2** provides that the application of certain provisions of this Act is modified or excluded in relation to wholesale investment trusts.

Compare: R1(1)

8 Meaning of express trust

For the purposes of this Act, an **express trust** means a trust that—

- (a) has each of the characteristics set out in **section 9(1)** or has the characteristics determined under **section 9(2)** or is referred to in **section 9(3)**; and
- (b) is created in accordance with **section 10**.

9 Characteristics of express trust

- (1) The characteristics of an express trust are as follows:
- (a) it is a fiduciary relationship in which a trustee holds or deals with trust property for the benefit of the beneficiaries or for a permitted purpose; and
 - (b) the trustee is required to hold or deal with the trust property in a way that it is identifiably separate from the trustee's own property; and
 - (c) the trustee has a duty to hold or deal with the trust property in accordance with the terms of the trust and the duties imposed on the trustee by law; and
 - (d) the trustee is accountable in respect of the way the trustee carries out those duties.
- (2) If a trust does not have each of the characteristics in **subsection (1)**, but has characteristics that are recognised at common law as being sufficient to constitute an express trust, the court may determine that the trust has the characteristics of an express trust for the purposes of this Act.
- (3) A trust that is specified in **Schedule 3** is taken to have the characteristics of an express trust even if it does not have each of the characteristics in **subsection (1)**.

Compare: R1(2)

10 Creation of express trust

An express trust may be created,—

- (a) by or under an enactment; or
- (b) subject to any formalities prescribed by any enactment, by a person (the **settlor**) who, clearly and with reasonable certainty,—
 - (i) indicates an intention to create a trust; and

- (ii) identifies the beneficiaries or the permitted purpose of the trust; and
- (iii) identifies the trust property.

Compare: R1(3)

11 Maximum duration of trust

- (1) The maximum duration of a trust is 125 years.
- (2) The terms of a trust may specify or infer a shorter duration.
- (3) If the terms of a trust do not specify or infer a duration or a mechanism for or means of determining the vesting date, the trust continues until the date that is 125 years after the establishment of the trust.
- (4) If the terms of a trust specify or infer a mechanism for or means of determining the vesting date, the trust continues until the earlier of—
 - (a) the date determined by that mechanism or means; and
 - (b) the date that is 125 years after the establishment of the trust.
- (5) When a trust expires, all trust property must be vested in accordance with the terms of the trust.
- (6) However, if the terms of the trust do not specify who is to receive the trust property, the property must be vested in all surviving beneficiaries in equal shares.
- (7) The common law rule known as the rule against perpetuities is abolished.
- (8) Despite anything in this section—
 - (a) a charitable trust may continue indefinitely; and
 - (b) a trust created by or under an enactment that provides that the trust continues indefinitely or for a term longer than 125 years may continue in accordance with that enactment.

Compare: R49

12 Age of majority

- (1) For the purposes of an express trust, the age of majority is 18.
- (2) In the terms of a trust, in the absence of a definition or any indication of a contrary intention, the expressions **adult**, **child**, **full age**, **infant**, **infancy**, **minor**, **minority**, **full capacity**, **majority**, and similar expressions must be construed in accordance with **subsection (1)** and with the definitions of **adult** and **child** in **section 4**.
- (3) This section—
 - (a) overrides section 4(1) of the Age of Majority Act 1970; and
 - (b) is subject to any contrary intention in the terms of the trust.

Compare: R9

Part 3

Trustees' duties and information obligations

Subpart 1—Duties of trustee

Types of duties

13 Mandatory and default duties

- (1) The duties set out in the following provisions are mandatory duties:
 - (a) the duty to know the terms of the trust (*see* **section 17**):
 - (b) the duty to act in accordance with the terms of the trust (*see* **section 18**):
 - (c) the duty to act honestly and in good faith (*see* **section 19**):
 - (d) the duty to hold or deal with trust property, and otherwise act, for the benefit of the beneficiaries or for the permitted purpose (*see* **section 20**):
 - (e) the duty to exercise the powers of a trustee for a proper purpose (*see* **section 21**).
- (2) The duties set out in the following provisions are default duties:
 - (a) the general duty of care (*see* **section 22**):
 - (b) the duty to invest prudently (*see* **section 23**):
 - (c) the duty not to exercise any power directly or indirectly for the trustee's own benefit (*see* **section 24**):
 - (d) the duty to actively and regularly consider the exercise of the trustee's powers (*see* **section 25**):
 - (e) the duty not to fetter the future exercise of the powers of trustees of the trust (*see* **section 26**):
 - (f) the duty to avoid a conflict of interest (*see* **section 27**):
 - (g) the duty to keep proper accounts (*see* **section 28**):
 - (h) the duty of impartiality (*see* **section 29**):
 - (i) the duty not to make a profit from the trustee's position as trustee (*see* **section 30**):
 - (j) the duty to act for no reward (*see* **section 31**):
 - (k) the duty to act unanimously (*see* **section 32**).

Compare: R2 and R3

14 No exclusion or modification of mandatory duty

- (1) A trustee's mandatory duty—
 - (a) must be performed by the trustee; and

(b) may not be excluded or modified.

- (2) The mandatory duty in **section 20** (to hold or deal with trust property, and otherwise act, for the benefit of the beneficiaries or for the permitted purpose) must be interpreted in the context of the terms of the trust.

Compare: R2(1)

15 Default duty applies unless modified or excluded

- (1) A default duty applies unless modified or excluded in accordance with this section.
- (2) A trustee's default duty may be modified or excluded by the terms of the trust, but only to the extent that the modification or exclusion is consistent with the mandatory duties.
- (3) To avoid doubt, the exclusion or modification of a duty in **section 23** (to invest prudently), **30** (not to profit), **31** (to act for no reward), or **32** (to act unanimously) is not inconsistent with the mandatory duty in **section 20** (to act for the benefit of beneficiaries or to further the permitted purpose of the trust).
- (4) Any person who is paid to give advice in relation to the creation of a trust or to prepare the terms of the trust and who causes, or gives effect to an instruction from, a settlor to modify or exclude 1 or more default duties in the terms of the trust must, before the creation of the trust, take reasonable steps to ensure that the settlor is aware of the meaning and effect of the modification or exclusion.
- (5) Failure to comply with **subsection (4)** does not of itself invalidate the modification or exclusion in the terms of the trust.

Compare: R3

16 Terms of trust may impose additional duties

The terms of a trust may impose duties on a trustee in addition to the duties imposed under this Act.

Mandatory duties

17 Duty to know terms of trust

A trustee must know the terms of the trust.

Compare: R2(1)(a)

18 Duty to act in accordance with terms of trust

A trustee must act in accordance with the terms of the trust.

Compare: R2(1)(b)

19 Duty to act honestly and in good faith

A trustee must act honestly and in good faith.

Compare: R2(1)(c)

20 Duty to act for benefit of beneficiaries or to further permitted purpose of trust

A trustee must hold or deal with trust property, and otherwise act, for the benefit of the beneficiaries or to further the permitted purpose of the trust.

Compare: R2(1)(d)

21 Duty to exercise powers for proper purpose

A trustee must exercise the trustee's powers as trustee for a proper purpose.

Compare: R2(1)(f)

*General default duties***22 General duty of care**

When exercising any power or performing any function in relation to a trust (other than the exercise of a discretion to distribute trust property), a trustee must exercise the care and skill that is reasonable in the circumstances, having regard in particular—

- (a) to any special knowledge or experience that the trustee has or holds the trustee out as having; and
- (b) if the person acts as a trustee in the course of a business or profession, to any special knowledge or experience that it is reasonable to expect of a person acting in the course of that kind of business or profession.

Compare: R3(1)(j) and R13

23 Duty to invest prudently

When exercising any power of investment of trust property, a trustee must exercise the care and skill that a prudent person of business would exercise in managing the affairs of others, having regard in particular—

- (a) to any special knowledge or experience that the trustee has or holds the trustee out as having; and
- (b) if the person acts as a trustee in the course of a business or profession, to any special knowledge or experience that it is reasonable to expect of a person acting in the course of that kind of business or profession.

Compare: R3(1)(k), R14(2); 1956 No 61 ss 13B, 13C

*Specific default duties***24 Duty not to exercise power for own benefit**

A trustee must not exercise a power of a trustee directly or indirectly for the trustee's own benefit.

Compare: R3(1)(a)

25 Duty to consider exercise of power

A trustee must actively and regularly consider whether the trustee should be exercising 1 or more of the trustee's powers.

Compare: R3(1)(b)

26 Duty not to fetter future exercise of powers

A trustee must not fetter the future exercise of the powers of trustees of the trust.

Compare: R3(1)(c)

27 Duty to avoid conflict of interest

A trustee must avoid a conflict between the interests of the trustee and the interests of the beneficiaries.

Compare: R3(1)(d)

28 Duty to keep proper records

A trustee must keep records of the trust property that—

- (a) identify the assets, liabilities, and income and expenses of the trust; and
- (b) are appropriate to the value and complexity of that property.

Compare: R3(1)(e)

29 Duty of impartiality

- (1) A trustee must act impartially in relation to the beneficiaries, and must not be unfairly partial to 1 beneficiary or group of beneficiaries to the detriment of the others.
- (2) This section does not require a trustee to treat all beneficiaries equally (but all beneficiaries must be treated in accordance with the terms of the trust).

Compare: R3(1)(f)

30 Duty not to profit

A trustee must not make a profit from the trusteeship of a trust.

Compare: R3(1)(g)

31 Duty to act for no reward

A trustee must not take any reward for acting as a trustee, but this does not affect the right of a trustee to be reimbursed for the trustee's legitimate expenses and disbursements in acting as a trustee (*see* **section 76(2)**).

Compare: R3(1)(h)

32 Duty to act unanimously

If there is more than 1 trustee, the trustees must act unanimously.

Compare: R3(1)(i)

Subpart 2—Exemption and indemnity clauses

33 Restriction on trustee exemption clauses

The terms of a trust must not limit or exclude a trustee's liability for any breach of trust arising from the trustee's dishonesty, wilful misconduct, or gross negligence.

Compare: R4(1)(a)

34 Restriction on trustee indemnity clauses

The terms of a trust must not grant a trustee any indemnity against the trust property in respect of liability for any breach of trust arising from the trustee's dishonesty, wilful misconduct, or gross negligence.

Compare: R4(1)(a)

35 Invalidity of exemption clause or indemnity clause

A clause in the terms of a trust is invalid to the extent that it purports to have the effect stated in **section 33 or 34**.

Compare: R4(1)(b)

36 Adviser must alert settlor to liability exclusion or indemnity clause

- (1) This section applies if a person who is paid to advise on the terms of a trust or the drafting of the terms of a trust (the **adviser**) recommends the inclusion of, or includes, a liability exclusion or indemnity clause in the terms of the trust.
- (2) The adviser must, before the creation of the trust, take reasonable steps to ensure that the settlor is aware of the meaning and effect of the clause.
- (3) The liability exclusion or indemnity clause has no effect with respect to an adviser who is or becomes a trustee of the trust and who is in breach of **subsection (2)**.
- (4) Failure to comply with **subsection (2)** does not of itself invalidate the clause (except as provided in **subsection (3)**).
- (5) In this section, **liability exclusion or indemnity clause** means a clause that has the effect of—
 - (a) limiting or excluding the liability of a trustee; or
 - (b) granting a trustee an indemnity against the trust property in respect of the trustee's liability.

Compare: R4(1)(c), (d)

Subpart 3—Trustees’ obligations to keep and give trust information

Documents to be kept by trustees

37 Trustee must keep core documents

Each trustee of a trust must keep, so far as is reasonable, copies of the following documents relating to the trust:

- (a) the trust deed and any other document that contains terms of the trust:
- (b) any variations made to the trust deed or trust:
- (c) a list of all the assets that comprise trust property and of all the liabilities of the trust:
- (d) any records of trustee decisions made during the trustee’s trusteeship:
- (e) any written contracts entered into during that trustee’s trusteeship:
- (f) any accounting records and financial statements prepared during that trustee’s trusteeship:
- (g) documents of appointment, removal, and discharge of trustees (including any court orders appointing or removing trustees):
- (h) any letter or memorandum of wishes from the settlor:
- (i) any documents referred to in **paragraphs (a) to (h)** that were kept by a former trustee during that person’s trusteeship and passed on to the current trustee.

Compare: R5(1)

38 Keeping documents where there is more than 1 trustee

If there is more than 1 trustee of a trust, each trustee must comply with the obligation in **section 37** by—

- (a) holding copies of the documents specified in **section 37(a) and (b)**; and
- (b) being satisfied that at least 1 of the trustees holds copies of the other documents specified in **section 37** and that those documents will be made available to the other trustee or trustees on request.

Compare: R5(2)

39 Documents must be kept for duration of trusteeship

A trustee must keep, so far as is reasonable, the documents for the duration of the trustee’s trusteeship.

Compare: R5(3)

40 Trustee must pass on documents

At the time that the trusteeship of a trustee ends, if the trust continues, the trustee must give at least 1 replacement trustee or continuing trustee copies of the documents that the trustee holds at that time.

Compare: R5(3)

*Giving information to beneficiaries***41 Definitions for purposes of sections 42 to 47**

In **sections 42 to 47**,—

qualifying beneficiary means a beneficiary who has a reasonable likelihood of receiving trust property under the terms of the trust

representative means the parent, guardian, attorney, or property manager of a beneficiary who—

- (a) is a child; or
- (b) is not competent to act and in respect of whom a guardian, attorney, or property manager has been appointed

trust information—

- (a) means any information—
 - (i) regarding the terms of the trust, the administration of the trust, or the trust property; and
 - (ii) that it is reasonably necessary for the beneficiary to have to enable the trust to be enforced; but
- (b) does not include reasons for trustees' decisions.

Compare: R6(4)

42 Trustee must make available sufficient information to sufficient beneficiaries

- (1) A trustee must make available to a sufficient number of beneficiaries sufficient trust information to enable the terms of the trust to be enforced against the trustees.
- (2) To avoid doubt, the general obligation under **subsection (1)** means that a trustee cannot, under **section 43(2) or 44(2)**, decide to withhold all trust information from all beneficiaries.

Compare: R6(1)

43 Presumption that trustee must notify basic trust information

- (1) There is a presumption that a trustee must, as soon as is practicable, make available to every qualifying beneficiary or representative of a qualifying beneficiary the basic trust information set out in **subsection (3)**.

- (2) However, if the trustee reasonably considers (after taking into account the factors set out in **section 45(2)**) that the information should not be made available to every qualifying beneficiary,—
 - (a) the presumption does not apply; and
 - (b) the trustee may decide to withhold some or all of the basic trust information from 1 or more particular qualifying beneficiaries or classes of qualifying beneficiaries (but not from all qualifying beneficiaries).
- (3) The basic trust information is—
 - (a) the fact that a person is a beneficiary of the trust; and
 - (b) the name and contact details of the trustee; and
 - (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.

Compare: R6(2)(a)

44 Presumption that trustee must give information on request

- (1) There is a presumption that a trustee must within a reasonable period of time give a beneficiary the trust information that a beneficiary has requested.
- (2) However, the presumption does not apply if the trustee reasonably considers (after taking into account the factors set out in **section 45(2)**) that the information should not be given.

Compare: R6(2)(b)

45 Procedure for deciding against giving information

- (1) For the purposes of **sections 43 and 44**, a trustee may only decide against making available or giving information to a beneficiary or class of beneficiaries after the trustee has taken into account—
 - (a) the trustee's general obligation under **section 42**; and
 - (b) the factors set out in **subsection (2)**.
- (2) The factors are the following:
 - (a) the nature of the interests in the trust held by the beneficiary and the other beneficiaries of the trust, including the degree and extent of the beneficiary's interest in the trust and the likelihood of the beneficiary receiving trust property in the future;
 - (b) whether the information is subject to personal or commercial confidentiality;
 - (c) the expectations and intentions of the settlor at the time of the creation of the trust (if known) as to whether the beneficiaries as a whole and the qualifying beneficiary in particular would be given information:

- (d) the age and other circumstances of the beneficiary:
- (e) the age and circumstances of the other beneficiaries of the trust:
- (f) the effect of giving the information on the trustees, other beneficiaries of the trust, and third parties:
- (g) in the case of a family trust, the effect of giving the information on—
 - (i) relationships within the family:
 - (ii) the relationship between the trustees and some or all of the beneficiaries to the detriment of the beneficiaries as a whole:
- (h) in a trust that has a large number of beneficiaries or unascertainable beneficiaries, the practicality of giving information to all beneficiaries or all members of a class of beneficiaries:
- (i) the practicality of imposing restrictions and other safeguards on the use of the information (for example, by way of an undertaking, or restricting who may inspect the documents):
- (j) the practicality of giving some or all of the information to the beneficiary in redacted form:
- (k) if a beneficiary has requested information, the nature and context of the request.

Compare: R6(3)

46 Beneficiary may be required to pay cost of giving information

A trustee may require the beneficiary to whom trust information is given under **section 44** or in accordance with the terms of the trust to pay the reasonable cost of giving that information.

Compare: R6(5)

47 Application to court in relation to trust information

A beneficiary may apply to the court for an order that the trustee give the beneficiary the information that the beneficiary has requested.

Compare: R6(6)

Part 4

Trustees' powers and indemnities

Subpart 1—Powers of trustee

48 General powers

- (1) A trustee has the following general powers:
 - (a) all the powers necessary to manage the trust property including, in relation to the trust property, all the powers of an absolute owner of the property:

- (b) all the powers necessary to carry out the trust, including powers incidental to those in **paragraph (a)**.
 - (2) The general powers in **subsection (1)** can be modified or excluded in the terms of the trust, but not in a way that would be inconsistent with the trustee's inherent capacity to hold or deal with trust property.
- Compare: R7(1), (4)

49 Status of provisions on specific powers of trustees

Sections 50 to 75 set out specific powers of a trustee and the way in which those powers may be exercised, but they are not an exhaustive source or description of the specific powers of a trustee.

50 Protection of purchasers, etc, dealing with trustee

- (1) If a trustee purports to exercise a power to transfer or assign an estate or interest in trust property, but the purported exercise of the power exceeds the powers of the trustee or is otherwise contrary to the terms of the trust, then the transferee or assignee receives good title to the estate or interest in the trust property only if the transferee or assignee—
 - (a) acted in good faith in relation to the transfer or assignment; and
 - (b) did not have notice that the trustee was acting beyond the trustee's powers or contrary to the terms of the trust.
- (2) This section is subject to the Land Transfer Act 1952.

Compare: 1956 No 61 s 22

Investment powers

51 Power to invest

- (1) A trustee may invest trust property in any property.
- (2) This section is subject to any contrary intention in the terms of the trust.

Compare: R14(1); 1956 No 61 s 13A

52 Matters to which trustee may have regard in exercising power of investment

- (1) Without limiting the matters that a trustee may take into account, a trustee exercising any power of investment may have regard to the following matters, so far as they are appropriate to the circumstances of the trust:
 - (a) the objectives of the trust or the permitted purpose of the trust:
 - (b) the desirability of diversifying trust investments:
 - (c) the nature of existing trust investments and other trust property:
 - (d) the need to maintain the real value of the capital or income of the trust:
 - (e) the risk of capital loss or depreciation:

- (f) the potential for capital appreciation:
 - (g) the likely income return:
 - (h) the length of the term of the proposed investment:
 - (i) the probable duration of the trust:
 - (j) the marketability of the proposed investment during, and on the expiry of, the term of the proposed investment:
 - (k) the aggregate value of the trust estate:
 - (l) the effect of the proposed investment in relation to the tax liability of the trust:
 - (m) the likelihood of inflation affecting the value of the proposed investment or other trust property:
 - (n) the trustee's overall investment strategy.
- (2) This section is subject to any contrary intention in the terms of the trust.
Compare: R14(5); 1956 No 61 s 13E

53 Return on investment: power to determine whether return is income or capital

- (1) For the purposes of distribution, a trustee may in the trustee's discretion determine whether a return on an investment is to be treated as income or capital.
- (2) This section is subject to any contrary intention in the terms of the trust.
Compare: R15(1)

54 Apportionment of receipts and outgoings

- (1) A trustee's powers under **subsection (2)** may be exercised only—
 - (a) if the exercise of the power is fair and reasonable in all the circumstances; and
 - (b) in accordance with accepted business practice.
- (2) A trustee may—
 - (a) apportion any receipt or outgoing in respect of any period of time between the income and capital accounts, or charge any outgoing or credit any receipt exclusively to or from income or capital:
 - (b) transfer funds between capital and income accounts—
 - (i) to recover or reimburse an outgoing previously charged to the account that is to receive the funds:
 - (ii) to recover or deduct any receipt previously credited to the account from which the funds are to be recovered:
 - (c) deduct from income an amount to meet the cost of depreciation, and add the amount to capital.

- (3) This section extinguishes the rules of common law and equity relating to the apportionment of receipts and outgoings.
- (4) If a trustee is the landlord, tenant, vendor, or purchaser of land, the apportionment rules in the Property Law Act 2007 apply in respect of that land.
- (5) This section is subject to any contrary intention in the terms of the trust.
Compare: R16(1), (4), (5)

55 Court may set off gains and losses arising from investment

- (1) This section applies to a proceeding for breach of trust in relation to an investment by a trustee if a loss has been or is suspected to have been incurred by the trust.
- (2) The court may set off all or part of the loss resulting from the investment against all or part of any gain resulting from any other investment whether in breach of trust or not.
- (3) The power in **subsection (2)** does not limit or affect any other power or entitlement to set off all or part of any loss against any property.
- (4) The rule of law that requires the assessment of the decisions of a trustee on an investment-by-investment basis if the decisions are called into question (known as the anti-netting rule) is taken to have been abolished on 1 October 1988.
- (5) This section applies despite any contrary intention in the terms of the trust.
Compare: R14(7); 1956 No 61 s 13Q

Powers to apply trust property for maintenance, education, and advancement

56 Application of sections 57 to 63

Sections 57 to 63—

- (a) apply if a beneficiary has an interest in the trust property that includes an entitlement to intermediate income; but
- (b) are subject to any prior interests or charges affecting the income.

Compare: R8(1); 1956 No 61 s 40(1)

57 Income on child beneficiary's interest may be paid towards maintenance, etc

- (1) The trustee may pay some or all of the income on a child beneficiary's interest in the trust property to the child's parent or guardian (if any) or otherwise for or towards the child's maintenance, education, advancement, or benefit (including past maintenance or education).
- (2) In deciding whether to make a payment and the amount of any payment, the trustee must consider—
 - (a) the child's age; and
 - (b) the child's requirements; and

- (c) any other relevant circumstances.
- (3) In this section, it does not matter—
 - (a) whether the child’s interest is vested or contingent or absolute or liable to be divested; or
 - (b) whether there is—
 - (i) another fund that may be applied to the child’s maintenance, education, or advancement; or
 - (ii) another person who is bound by law to provide for the child’s maintenance or education.
- (4) In this section and in **sections 61 and 62**, **benefit** includes comfort and well-being.
- (5) This section is subject to any contrary intention in the terms of the trust.
Compare: R8(1); 1956 No 61 s 40(1), (2)

58 Unexpended income on child beneficiary’s interest

- (1) While a beneficiary is a child, the trustee must invest any income on the beneficiary’s interest in the trust property.
- (2) If either of the following applies, the trustee must hold the income for the child absolutely:
 - (a) the child’s interest is a vested interest and the child turns 18:
 - (b) the child, on turning 18, is entitled to the property from which the income arose in fee simple absolute or determinable or absolutely.
- (3) In all other cases, the trustee must hold the income as an accretion to, and in a single fund with, the capital of the property from which the income arose.
- (4) Despite **subsections (1) to (3)**, the trustee may, at any time during the period before the child turns 18, pay the income under **section 57** as if it were income arising in the current year.
- (5) This section is subject to any contrary intention in the terms of the trust.
Compare: R8(1); 1956 No 61 s 40(3)

59 Vested annuities

- (1) **Sections 57 and 58** apply to a vested annuity as if—
 - (a) a reference to the income of the trust property were a reference to the vested annuity; and
 - (b) a reference to the period before a child beneficiary turns 18 were a reference to the period for which the annuity is payable.
- (2) However, the income of the annuity must be held in trust for the annuitant or the annuitant’s personal representative absolutely.
Compare: R8(1); 1956 No 61 s 40(4)

60 Income on adult beneficiary's contingent interest

- (1) If a beneficiary, on turning 18, does not have a vested interest in the income of the trust property (or part of it), the trustee must from that point on pay the income of the property and any accretion under **section 58(3)**.
- (2) This section is subject to any contrary intention in the terms of the trust.
Compare: R8(1); 1956 No 61 s 40(1)(b)

61 Capital of trust property may be applied for maintenance, etc

- (1) If a person is entitled to the capital of the trust property or any share of the capital, the trustee may pay or apply amounts of that capital for the maintenance, education, advancement, or benefit (including past maintenance or education) of the person.
- (2) The trustee may pay or apply an amount regardless of—
 - (a) whether the person is entitled to the capital absolutely or contingently on the person reaching a specified age or on the occurrence of any other event; or
 - (b) whether the person is entitled to the capital subject to a gift over on the person's death under a specified age or on the occurrence of any other event; or
 - (c) whether the person is entitled to the capital in possession, in remainder, or in reversion; or
 - (d) whether the person's interest is liable to be defeated by the exercise of a power of appointment or revocation; or
 - (e) whether the person's interest is liable to be diminished by the increase of the class to which the person belongs.
- (3) However, the trustee must not pay or apply an amount to a person where there is only a remote possibility that the person will ultimately acquire a vested interest.
- (4) No amount may be paid or applied if the payment or application would prejudice a person entitled to a prior life or other interest (whether vested or contingent) in the amount paid or applied, unless—
 - (a) the person whose interest may be prejudiced is an adult and consents in writing to the payment or application; or
 - (b) the court, on the trustee's application, orders the amount to be paid or applied.
- (5) An amount paid or applied must be brought into account as part of the share in the trust property to which the person is or becomes absolutely or indefeasibly entitled.
- (6) This section is subject to any contrary intention in the terms of the trust.
Compare: R8(2); 1956 No 61 s 41

62 Trustee may impose conditions on payment of income for maintenance, etc

- (1) A trustee exercising a power to pay or apply an amount of income or capital for the maintenance, education, advancement, or benefit of a person may make the payment or application of the amount subject to 1 or more conditions.
- (2) A condition may require the repayment of the amount, the payment of interest on the amount, or the giving of security for the amount.
- (3) **Subsection (2)** does not limit **subsection (1)**.
- (4) At any time after imposing a condition, the trustee may, either wholly or in part, waive the condition or release an obligation undertaken or any security given because of the condition.
- (5) A trustee, when imposing a condition about giving security, is not affected by any restriction on the investment of trust property, whether imposed under this Act or otherwise.
- (6) This section is subject to any contrary intention in the terms of the trust.

Compare: 1956 No 61 s 41A(1), (3); Draft Trusts Bill 2013 cl 101 (Qld)

63 Amounts repaid not to be taken into account when working out amount that may be paid or applied

- (1) This section applies when working out the amount of income or capital that a trustee who has imposed a condition under **section 62** may pay or apply in exercise of the power.
- (2) An amount repaid to the trustee or recovered by the trustee is taken not to have been paid or applied by the trustee.
- (3) This section is subject to any contrary intention in the terms of the trust.

Compare: 1956 No 61 s 41A(2); Draft Trusts Bill 2013 cl 102 (Qld)

*Exercise of trustee powers and functions by others***64 Power to appoint others to exercise certain powers or functions in relation to trust**

- (1) A trustee may—
 - (a) appoint a person to exercise, on behalf of the trustee, specified functions or powers in relation to the trust:
 - (b) appoint a person to make specified decisions in relation to all or part of the trust property:
 - (c) appoint an eligible person to hold or deal with all or part of the trust property as nominee or custodian and vest all or part of the trust property in that person.
- (2) However, a trustee may not under this section or under any comparable power in the terms of the trust appoint a person to perform or exercise, on behalf of the trustee, any of the following functions or powers:

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- (a) a function that is, or is related to, the determination of whether, when, or in what way any trust property should be distributed, used, possessed, or otherwise beneficially enjoyed:
 - (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 (where the decision affects a beneficiary's entitlement to trust property):
 - (c) a power to decide whether payments received by, or payable to, the trustee should be appropriated to income or capital (where the decision affects a beneficiary's entitlement to trust property):
 - (d) a power to appoint a person to be, or to remove, a trustee of the trust:
 - (e) a power of appointment (including a power to appoint a person to be, or to remove, a beneficiary):
 - (f) a power to appoint or change the distribution date of trust property:
 - (g) a power to resettle the trust, or to amend, revoke, or replace all or any terms of the trust:
 - (h) a right conferred by this Act to apply to the court:
 - (i) the powers of appointment conferred by **subsection (1)** (which are powers exercisable only by the trustee personally) and any other power conferred by an enactment or the terms of the trust and exercisable only by the trustee personally.
- (3) A person appointed under **subsection (1)** or under any comparable power in the terms of the trust—
- (a) must act in accordance with the terms of the appointment and with any directions of the trustee; and
 - (b) is liable to the trustee for any failure to comply with those terms or directions.
- (4) For the purposes of **subsection (1)(c)**, **eligible person** means—
- (a) a person who carries on a business that consists of or includes acting as a nominee or custodian; or
 - (b) a body corporate that is controlled by the trustee; or
 - (c) an incorporated law firm.
- (5) The terms of a trust relate to the provisions in this section as follows:
- (a) **subsection (1)(a) and (b)** may be modified or excluded by the terms of the trust:
 - (b) **subsection (1)(c)** can be completely excluded but cannot be modified, despite any contrary intention in the terms, where it is proposed that another party should hold or deal with trust property as nominee or custodian:

- (c) **subsections (2) and (3)** apply despite any contrary intention in the terms of the trust.

65 Duty to keep appointments under review and to fulfil general duty of care

- (1) If a trustee exercises a power of appointment under **section 64** or any comparable power in the terms of the trust, the trustee must—
- (a) keep under review the arrangements under which the appointee acts and how those arrangements are being put into effect; and
 - (b) if the circumstances make it appropriate to do so, consider whether the trustee should exercise any power of intervention (for example, a power to give directions to the appointee, or to amend, revoke, or replace the appointment).
- (2) The general duty of care in **section 22** applies to the exercise of a power referred to in **subsection (1)**.
- (3) This section applies despite **section 15(1)** and despite any contrary intention in the terms of the trust.

66 Power to delegate all or any of trustee's powers and functions in specified circumstances

- (1) Despite **sections 64 and 65**, a trustee may, by power of attorney, delegate all or any of the trustee's powers and functions to any person qualified to be a trustee.
- (2) However, the power in **subsection (1)** may be exercised only if the delegation is necessary (or the trustee expects that it may from time to time become necessary) because of the trustee's—
- (a) absence from New Zealand; or
 - (b) temporary inability to be contacted; or
 - (c) temporary physical incapability; or
 - (d) temporary mental incapacity.
- (3) A delegation under this section—
- (a) commences as provided in the document creating the power, or, if the document is silent on commencement, on the execution of that document; and
 - (b) continues for 12 months or any shorter period provided in the document; and
 - (c) may be extended by the delegating trustee once only for a further period of up to 12 months.
- (4) A trustee may delegate powers to a sole co-trustee only if that sole co-trustee is a statutory trustee.
- (5) A delegate may exercise the delegating trustee's power to resign.

- (6) This section applies despite any contrary intention in the terms of the trust.

Compare: R 12(1), (2), (8), (9); Trustee Act 1925 s 25 (UK)

67 Notice of delegation

- (1) Not later than 7 days after the execution of the document of delegation, the delegating trustee (or, if the trustee is incapable, the delegate) must notify any co-trustees and any person with the power to remove and appoint trustees of the following:
- (a) the date or event on which the delegation commences:
 - (b) the duration of the delegation:
 - (c) the name and contact details of the delegate:
 - (d) the reason for the delegation:
 - (e) which powers are delegated, if only some are delegated.
- (2) If a document of delegation commences on a date or an event that occurs after the date of execution and it is likely that the persons who were notified under **subsection (1)** of the execution of the document may not be aware that the delegation has commenced, the delegating trustee (or, if the trustee is incapable, the delegate) must, not later than 7 days after the commencement of the delegation, notify any co-trustees and any person with the power to remove and appoint trustees that the delegation has commenced.
- (3) For a sole delegating trustee (or, if the sole trustee is incapable, the trustee's delegate), it is sufficient compliance with **subsections (1) and (2)** if the trustee notifies—
- (a) any person with the power to remove and appoint trustees; or
 - (b) if there is no person authorised under **paragraph (a)**, all competent adult beneficiaries; or
 - (c) if, in the circumstances, it is unreasonable or impractical to comply with **paragraph (b)**, a reasonably representative sample of beneficiaries.
- (4) However, a trustee or delegate is not required to comply with notification requirements under **subsection (3)(b) or (c)** if the trustee or delegate reasonably considers, after taking into account the factors in **section 45(2)**, that beneficiaries should not be notified.
- (5) Failure to comply with a notification requirement under this section does not, in favour of a person dealing with a trustee's delegate, invalidate any act done or document executed by the delegate.
- (6) This section applies despite any contrary intention in the terms of the trust.

Compare: R 12(3) to (6); Trustee Act 1925 s 25 (UK)

68 Trustee's liability for acts of delegate limited

- (1) The trustee is not liable in a proceeding brought by or on behalf of a beneficiary for any act or default of a delegate unless the trustee failed, in appointing the delegate, to fulfil any of the trustee's mandatory duties.
- (2) This section applies despite any contrary intention in the terms of the trust.
Compare: R12(7)

69 Application to Public Trust to consent to become delegate

- (1) This section applies in relation to a trust where—
 - (a) a trustee is, for any of the reasons listed in **section 66(2)**, unable to perform the trustee's functions as trustee; and
 - (b) that trustee has not delegated the trustee's powers.
- (2) A co-trustee or a beneficiary of the trust may apply to the Public Trust for consent for the Public Trust to be made the delegate of the trustee.
- (3) If the Public Trust reasonably believes that an application under **subsection (2)** or the circumstances relating to it involve a dispute or present significant complexity, the Public Trust must refuse to consent to the application to be made the delegate of the trustee.
- (4) If the Public Trust consents to be made the delegate of the trustee, **sections 66 to 68** apply (with any necessary modifications) to the delegation.
- (5) This section applies despite any contrary intention in the terms of the trust.
Compare: R12(10), R43(1)

*Special trust advisers***70 Appointment of special trust advisers**

- (1) A special trust adviser—
 - (a) may advise the trustee on any matter relating to the trust; but
 - (b) is not a trustee in respect of the trust and does not have the powers or duties of a trustee.
- (2) A special trust adviser may be appointed—
 - (a) in, or in accordance with, the terms of the trust; or
 - (b) by order of the court made on the application of—
 - (i) a beneficiary or trustee; or
 - (ii) a person on whose application the court would have the power to appoint a new trustee; or
 - (c) by a person with the power to remove and appoint trustees; or
 - (d) in respect of property for which the court has jurisdiction under Part 3 of the Protection of Personal and Property Rights Act 1988, by order of the court made on the application of—

- (i) the manager or person authorised to administer the property; or
- (ii) a person specified in section 26 of that Act; or
- (e) in respect of property of a person in respect of whom a property order has been made under the Protection of Personal and Property Rights Act 1988, by order of the court made on the application of—
 - (i) the manager of the property; or
 - (ii) a person specified in section 26 of that Act.
- (3) In this section, **manager** and **property order** have the meanings given in section 2 of the Protection of Personal and Property Rights Act 1988.
Compare: R28(a), (b); 1956 No 61 s 49(2), (3)(a), (b)

71 Reliance on special trust adviser's advice

- (1) If there is a special trust adviser, a trustee—
 - (a) may consult the special trust adviser on any matter relating to the trust; and
 - (b) is not required to follow the special trust adviser's advice; and
 - (c) is not liable for an act or omission the trustee makes as a result of following the special trust adviser's advice unless the act or omission involves the trustee's dishonesty, wilful breach of trust, or gross negligence.
- (2) A special trust adviser's disagreement with or objection to a proposed action to be taken by a trustee in respect of trust property does not affect a person dealing with the trustee in the matter.
Compare: R28(c), (d); 1956 No 61 s 49(3)(c), (4)

72 Remuneration of special trust advisers

- (1) If remuneration is payable to a trustee, remuneration may also be paid to a special trust adviser.
 - (2) The amount of remuneration is to be determined,—
 - (a) if the trustee is the Māori trustee, by or under regulations made under the Maori Trustee Act 1953; or
 - (b) if the trustee is the Public Trust, in accordance with the Public Trust's scale of charges; or
 - (c) if the trustee is entitled to fix the trustee's remuneration, by the trustee; or
 - (d) in all other cases, by the court.
- Compare: R28; 1956 No 61 s 49(5)

*Other powers and rights of trustee***73 Application of insurance money**

- (1) This section applies in respect of money receivable by a trustee or a beneficiary under an insurance contract against the loss or damage of trust property (**insurance money**).
- (2) If the insurance money is receivable by a beneficiary, the beneficiary must—
 - (a) use the beneficiary's best endeavours to recover and receive the money; and
 - (b) pay the money received less any recovery costs to the trustee or, if there is no trustee capable of giving a discharge for the money, to the Crown under **section 139**.
- (3) The trustee must hold the insurance money in trust on the same terms and subject to the same powers and provisions as (or those corresponding as nearly as possible to) those to which the lost or damaged property is subject.
- (4) The trustee may apply the insurance money (or part of it) to rebuilding, reinstating, replacing, or repairing the lost or damaged property.
- (5) If the insurance money is held by the Crown, the court may direct that the money (or part of it) be applied to rebuilding, reinstating, replacing, or repairing the lost or damaged property.
- (6) This section does not affect—
 - (a) any right a person may have to require the insurance money (or part of it) to be applied to rebuilding, reinstating, replacing, or repairing the lost or damaged property; or
 - (b) the rights of a mortgagee, lessor, or lessee.

Compare: 1956 No 61 s 25

74 Power to adjust interests in trust property of portfolio investment entity

- (1) This section applies where any trust property is employed in an activity that the trustee is empowered or authorised to carry on as a portfolio investment entity.
- (2) The trustee may adjust the interest of the beneficiaries in the property in any of the ways specified in section HM 48 of the Income Tax Act 2007 in order to comply with that section.
- (3) This section applies despite any other provision in this Act, in the Financial Markets Conduct Act 2013, or in the terms of the trust.

Compare: 1956 No 61 s 42E

75 Power to distribute trust property without regard to claims of which trustee does not have notice

- (1) A trustee may distribute trust property without regard to any claim of which the trustee does not have notice, but only if—

- (a) the trustee has first given a notice to potential creditors and other claimants in accordance with **subsection (2)**; and
 - (b) the distribution is made after the notice deadline mentioned in **subsection (2)(c)**.
- (2) A notice to potential creditors and other claimants must—
- (a) be given in a manner likely to come to their attention;
 - (b) identify the trust or estate affected;
 - (c) state that any creditor or other claimant who asserts a right or an interest relating to that trust property must give notice of their claim to the trustee before a date specified in the notice that is at least 30 days after the date the notice is given (the **notice deadline**);
 - (d) set out the physical and email addresses to which a notice of claim and details of a claim may be sent or delivered;
 - (e) state that the proposed distribution may be made without regard to any claim of which the trustee does not have notice before the notice deadline.
- (3) This section applies despite any contrary intention in the terms of the trust.
- Compare: R39; 1956 No 61 s 35

Subpart 2—Trustees’ indemnities

76 **Trustee’s liability for expenses and liabilities, and trustee’s right to indemnity**

- (1) A trustee is personally liable for an expense or a liability incurred by the trustee when acting as a trustee.
- (2) However, a trustee who reasonably incurs an expense or a liability when acting on behalf of the trust is entitled,—
 - (a) if the trustee has paid the expense or discharged the liability out of the trustee’s own funds, to reimbursement from the trust property; or
 - (b) in any other case, to pay the expense or discharge the liability directly from the trust property (or to have it paid or discharged by a remaining trustee).
- (3) **Subsection (1)** applies regardless of any contrary intention expressed in the terms of the trust.
- (4) **Subsection (1)** applies to a former trustee in relation to an expense or a liability incurred as a trustee acting on behalf of the trust.

Compare: R47(1), (2), (3), (5); 1956 No 61 s 38(2)

77 Indemnification with agreement of beneficiaries

- (1) A trustee may be indemnified from the trust property for a specific performance or exercise or non-performance or non-exercise of a trustee duty, power, or function if all of the adult beneficiaries agree.
- (2) However, the beneficiaries cannot indemnify the trustee if the exercise or non-exercise of the trustee duty, power, or function involved dishonesty, gross negligence, or wilful misconduct by the trustee.
- (3) In **subsection (1), adult beneficiaries** means the beneficiaries with full capacity who are together absolutely entitled to the trust property.

78 Ranking of trust property

- (1) For the purposes of **section 76(1)** (and despite **section 76(2)**), the terms of the trust may rank the order in which the trust property must be applied to reimburse the trustee or pay or discharge an expense or a liability.
- (2) However, the court may set aside the ranking of trust property on the application of—
 - (a) the trustee; or
 - (b) a creditor; or
 - (c) a beneficiary.

Compare: R47(4)

79 Creditor's limited claim to trust property through trustee's indemnity

- (1) This section applies if—
 - (a) a trustee has incurred an expense or a liability to a creditor; and
 - (b) the creditor has given value; and
 - (c) the trust property has received a benefit from the transaction between the trustee and the creditor; and
 - (d) the creditor has acted in good faith.
- (2) In a case to which this section applies, the creditor may claim to be indemnified out of the trust property as if the creditor were a trustee, even if the trustee for any reason is not entitled to be fully indemnified (for example, if the trustee incurred the liability in breach of trust).
- (3) The creditor has not acted in good faith if the creditor had knowledge of any circumstances that excluded or limited the trustee's indemnity.
- (4) A claim under this section—
 - (a) is limited to the value given by the creditor; and
 - (b) must be paid in priority over any payment to a beneficiary, unless the court orders otherwise; and

(c) does not affect the ranking of creditors.

Compare: R48

80 Trustee's lien on insurance money for premiums

- (1) This section applies where a trustee pays any premiums in respect of any insurance contract for trust property.
- (2) The trustee has a lien on—
 - (a) the policy money for the amount of the premiums paid; and
 - (b) interest on that amount at the rate of 6% or any higher rate that the Governor-General prescribes by Order in Council.

Compare: 1956 No 61 s 34A

81 Trustee's indemnity in respect of rents, etc, under lease

- (1) This section applies if a trustee is, for any reason, liable in relation to—
 - (a) any rent, covenant, or agreement reserved by or contained in a lease; or
 - (b) any indemnity given for any rent, covenant, or agreement mentioned in **paragraph (a)**.
- (2) The trustee may assign the lease to a person entitled to call for an assignment of the lease if the trustee—
 - (a) satisfies all liabilities under the lease that may have accrued, and been claimed, up to the date of the assignment; and
 - (b) if necessary, sets apart a fund that is enough to pay any future claim that may be made in relation to a fixed and ascertained amount that the lessee agreed to expend on the leased property (even though the time for expending the amount may not yet have arrived).
- (3) If the trustee acts under **subsection (2)**, the trustee—
 - (a) is not required to appropriate any further amount from the trust property to meet any future liability under the lease; and
 - (b) may distribute the remaining trust property, other than any fund set apart under **subsection (2)(b)**, to the persons entitled to the trust property.
- (4) A trustee who acts under **subsection (2)** and distributes the remaining trust property under **subsection (3)(b)** is not personally liable for any later claim under the lease.
- (5) This section does not affect the right of the lessor, or a person deriving title under the lessor, to follow the trust property into the hands of the persons to whom it was distributed.
- (6) This section applies despite any contrary intention in the terms of the trust.

Compare: 1956 No 61 s 34; Draft Trusts Bill 2013 cl 115 (Qld)

82 Protection of trustee in handing over personal property to life tenant

- (1) If personal property is given by will to a person (including a child) for a life interest or another limited interest, the trustee may deliver the personal property to the person on the terms and conditions that the trustee thinks fit.
- (2) However, before delivering the personal property to the person, the trustee must—
 - (a) prepare an inventory of the property; and
 - (b) ensure that the inventory is signed by the person and by the trustee; and
 - (c) give the person a copy of the inventory and retain a copy.
- (3) On and after the delivery of the property, the trustee—
 - (a) is not bound to repair or insure the property; and
 - (b) is not liable for any loss or destruction of the property or the failure of the person to repair or insure the property.
- (4) A copy of the inventory signed by the person and the trustee is a security interest for the purposes of the Personal Property Securities Act 1999, and a financing statement may be registered accordingly.

Compare: 1956 No 61 s 39A

83 Protection of trustee in handing over personal property to child

- (1) A trustee may deliver to a child, or the child's parent or guardian, any personal property that is absolutely vested in the child.
- (2) The receipt of the child or parent or guardian is a good discharge to the trustee for the property.

Compare: 1956 No 61 s 39B

84 Trustee not liable for certain losses in relation to amounts paid or applied for maintenance, etc

A trustee is not liable for any loss that may be incurred in relation to an amount that is paid or applied under **section 57, 58, 59, 60, or 61** if the loss arises—

- (a) because of a failure to impose any or adequate conditions under **section 62**; or
- (b) without limiting **paragraph (a)**, because of a failure to take security or adequate security; or
- (c) because of a failure to take action for the protection of the security; or
- (d) through the release or abandonment of the security without payment; or
- (e) from any other matter in relation to the conditions imposed or the waiver of any condition.

Compare: 1956 No 61 s 41A(4); Draft Trusts Bill 2013 cl 103 (Qld)

85 Protection relating to notice when person trustee of more than 1 trust

- (1) This section applies to a trustee acting for more than 1 trust.
- (2) The trustee is not, in the absence of fraud, to be taken to have notice of a matter in relation to a trust only because notice of the matter is, or was, given to the trustee when acting for another trust.
- (3) In this section, **matter** includes document, fact, and thing.

Compare: 1956 No 61 s 36; Draft Trusts Bill 2013 cl 111 (Qld)

Part 5**Appointment and discharge of trustees****86 Who may be trustee**

- (1) Any person may be appointed as a trustee of a trust, unless the person is disqualified under **subsection (2)**.
- (2) The following persons are disqualified from being appointed as a trustee:
 - (a) a child;
 - (b) an undischarged bankrupt;
 - (c) a person who lacks the capacity to perform the functions of a trustee;
 - (d) a body corporate that has entered into receivership, liquidation, statutory management, a compromise with creditors, or voluntary administration.
- (3) Despite **subsection (2)(b)**, an undischarged bankrupt may be appointed as a trustee with the consent of the court.
- (4) For the purposes of **subsection (2)(c)**, and without limiting that paragraph, a person lacks the capacity to perform the functions of a trustee if the person—
 - (a) is subject to an order appointing a manager under section 31 of the Protection of Personal and Property Rights Act 1988; or
 - (b) has a trustee corporation managing the person's property under section 32 or 33 of that Act.

Compare: R19

87 Statutory trustee may be sole trustee

- (1) A statutory trustee may be appointed and may lawfully act as the sole trustee of any trust, even if the terms of the trust provide for or require the appointment of 2 or more trustees.
- (2) This section does not—
 - (a) prevent any other body corporate from acting as a trustee in accordance with any authority vested in it by its constitution or otherwise (except that a body corporate may not administer the estate of any deceased person unless expressly authorised to do so by any enactment); or

- (b) permit the appointment of a body corporate as trustee if the terms of the trust forbid the appointment of the body corporate.

Compare: 1956 No 61 s 48

88 Who may remove trustee and appoint replacement

- (1) The following persons have the power to remove a trustee in writing under **section 95**:
- (a) the person nominated in the terms of the trust as having the power to remove and appoint trustees:
 - (b) if there is no person authorised under **paragraph (a)** or the person is unavailable or unwilling to act, the remaining trustees:
 - (c) if there is no person authorised under **paragraph (a) or (b)** or the person or persons are unavailable or unwilling to act, any of the following representatives of the trustee being removed that may be relevant:
 - (i) a property manager appointed under the Protection of Personal and Property Rights Act 1988 to act as manager of the trustee's property:
 - (ii) a person holding an enduring power of attorney over the property of a trustee who is incapacitated:
 - (iii) the liquidator of a corporate trustee that enters into liquidation.
- (2) The following persons have the power to appoint a trustee in writing:
- (a) in the case of an appointment to replace a retiring trustee,—
 - (i) the person nominated in the terms of the trust as having the power to remove and appoint trustees:
 - (ii) if there is no person authorised under **subparagraph (i)** or the person is unavailable or unwilling to act, the remaining trustees:
 - (iii) if there is no person authorised under **subparagraph (i) or (ii)** or the person or persons are unavailable or unwilling to act, the retiring trustee:
 - (b) in the case of an appointment to replace a trustee who has been removed, a person with the power to remove a trustee under **subsection (1)**:
 - (c) in the case of an appointment of a trustee to replace a trustee who dies while in office,—
 - (i) a person with the power to remove a trustee under **subsection (1)**:
 - (ii) if there is no person authorised under **subparagraph (i)** or if that person is or those persons are unavailable or unwilling to act, the executor or administrator of the trustee.
- (3) This section does not affect the court's inherent jurisdiction to remove a person with the power to remove and appoint trustees if—

- (a) that person has exercised the power unlawfully; or
 - (b) that person has been removed as, or otherwise ceased to be, trustee; or
 - (c) the court otherwise finds it desirable to do so.
- (4) **Subsections (1) and (2)** are subject to any contrary intention in the terms of the trust.
- Compare: R21(1), R24(2)

89 Person with power to remove and appoint trustee may apply to court for directions

- (1) A person with the power to remove and appoint trustees may apply to the court for directions on the exercise of a power of removal or appointment.
 - (2) The application must be served, in accordance with the High Court Rules 2016, on each person interested in the application or any of them the court thinks fit.
- Compare: R24(3)

90 Duty to exercise power to remove and appoint trustee honestly and for proper purpose

- (1) A person with the power to remove and appoint trustees (and who is not a trustee of the trust) must exercise any power of removal or appointment conferred by this Act—
 - (a) honestly and in good faith; and
 - (b) for a proper purpose.
 - (2) To avoid doubt, a person with the power to remove and appoint trustees who is also a trustee of the trust must exercise any power of removal or appointment conferred by this Act in a manner that complies with the trustee's mandatory duties under this Act and any other relevant duties that apply to that trustee.
 - (3) This section applies despite any contrary intention in the terms of the trust.
- Compare: R24(1)

91 Application to review exercise of power to remove and appoint trustee

- (1) A beneficiary may apply to the court for the review of the exercise, by a person with the power to remove and appoint trustees, of a power to remove or to appoint a trustee.
- (2) **Sections 114 and 115** apply with all necessary modifications to the application.

92 Appointment of trustee

A trustee may be appointed—

- (a) by the settlor on the creation of the trust; or

- (b) by the person or persons nominated for the purpose of appointing new trustees by the terms of the trust in the manner specified in those terms; or
- (c) under **section 99 or 100**.

93 Acceptance or rejection of appointment

- (1) An appointment of a trustee does not take effect until the appointment is accepted by the appointee.
- (2) An appointment may be accepted expressly or implied through conduct unless there is a contrary intention in the terms of the trust.
- (3) An appointee who gives no express indication of acceptance or rejection of the appointment and who for 90 days after the appointment is inactive in relation to the trust is taken to have rejected the appointment.

Compare: R18

94 Retirement of trustee

- (1) A trustee who expresses in writing a wish to retire may be discharged in writing—
 - (a) by a person with the power to remove and appoint trustees; or
 - (b) if there is no person authorised under **paragraph (a)** or that person is unavailable or unwilling to act, and the minimum number of trustees required by the terms of the trust will remain, by the retiring trustee alone; or
 - (c) if the trustee is a sole trustee and there is no person authorised under **paragraph (a)** or that person is unavailable or unwilling to act, by the retiring trustee and a replacement trustee (selected by the retiring trustee) together.
- (2) This section is subject to any contrary intention in the terms of the trust.

Compare: R 23(a)

95 Removal of trustee

- (1) A person with the power to remove and appoint trustees must act to remove a trustee if—
 - (a) a trustee becomes disqualified under **section 86(2)(c)**; and
 - (b) that trustee's powers have not been delegated in a manner authorised by an enactment or by the terms of the trust.
- (2) A person with the power to remove and appoint trustees may act to remove a trustee if—
 - (a) it is desirable for the proper execution of the trust; and
 - (b) 1 or more of the following grounds for removal are met:
 - (i) the trustee repeatedly refuses or fails to act as trustee:

- (ii) the trustee becomes an undischarged bankrupt:
 - (iii) the trustee is a corporate trustee that enters into receivership, liquidation, a compromise with creditors, statutory management, or voluntary administration or that ceases to carry on business, is dissolved, or does not satisfy the solvency test in section 4 of the Companies Act 1993:
 - (iv) the trustee is no longer suitable to hold office as trustee because of the trustee's conduct or circumstances.
- (3) For the purposes of **subsection (2)(b)(iv)**, examples of conduct and circumstances that may make a trustee no longer suitable to hold office as trustee include the following:
- (a) the trustee is convicted of a dishonesty offence:
 - (b) the whereabouts of the trustee is unknown and the trustee cannot be contacted:
 - (c) the trustee is prohibited from being a director or promoter of, or being concerned or taking part in the management of, a company under the Companies Act 1993:
 - (d) the trustee is prohibited from being a director or promoter of, or being concerned or taking part in the management of, an incorporated or unincorporated body under the Financial Markets Conduct Act 2013 or the Takeovers Act 1993.
- (4) This section does not—
- (a) limit the grounds on which a person nominated in the terms of the trust as having the power to remove and appoint trustees may exercise that power in accordance with the terms of the trust; or
 - (b) affect the court's inherent jurisdiction to remove a trustee if the court finds it desirable to do so.

Compare: R20

96 Notice of decision to remove and application to prevent removal

- (1) A person who makes a decision to remove a trustee must give that trustee notice of the decision.
- (2) The trustee may (unless **subsection (3)** applies), within 20 days after receiving the notice, apply to the court for an order preventing the trustee's removal.
- (3) This subsection applies in relation to a person who is removed under **section 95(1)**, and who—
 - (a) is subject to an order appointing a manager under section 31 of the Protection of Personal and Property Rights Act 1988; or
 - (b) has a trustee corporation managing the person's property under section 32 or 33 of that Act.

- (4) If **subsection (3)** applies, the notice of the decision to remove the trustee—
 - (a) is the document of removal for the purposes of **section 102**; and
 - (b) is executed and takes effect when it is given under **subsection (1)**.
- (5) In the case of a trustee who receives a notice under **subsection (1)** and in relation to whom **subsection (3)** does not apply, the notice—
 - (a) is the document of removal for the purposes of **section 102**; and
 - (b) is executed and takes effect—
 - (i) 21 days after the trustee receives the notice, if the trustee has not made an application under **subsection (2)**; or
 - (ii) only if and when ordered by the court, if the trustee has made an application under **subsection (2)**.

97 Procedure on application to prevent removal

- (1) An applicant under **section 96(2)** must adduce evidence that raises a genuine dispute as to whether the removal decision was reasonably open to the person in the circumstances.
- (2) If the court is satisfied that the applicant has established a genuine dispute, the onus is on the person who made the removal decision to establish that the decision was reasonably open to the person in the circumstances.

98 Court may make order preventing removal

The court may make an order preventing the removal of the trustee only if the court is satisfied that none of the grounds for removal specified in **section 95** or recognised at common law or in equity is made out.

99 Replacement of trustee

- (1) If a trustee retires or is removed or dies while in office and it is necessary (because the trustee was a sole trustee or because the terms of the trust require it) to replace the trustee, a person with the power to remove and appoint trustees must appoint a replacement trustee.
- (2) If a trustee retires or is removed or dies while in office and it is not necessary to replace the trustee (because the number of remaining trustees meets or exceeds the minimum number specified in the terms of the trust), a person with the power to remove and appoint trustees may, but need not, appoint a replacement trustee.
- (3) The appointment of a trustee to replace a trustee who has been removed takes effect only when the removal takes effect under **section 96**.

Compare: R22

100 Court may appoint or replace trustee

- (1) Whenever it is necessary or desirable to appoint a new trustee and it is difficult or impracticable to do so without the assistance of the court, the court may make an order appointing a new trustee.
- (2) However, this section does not empower the court to appoint an executor or administrator.
- (3) If the court (except on application by a supervisor within the meaning of section 6(1) of the Financial Markets Conduct Act 2013) appoints the Public Trust as the replacement trustee, the Public Trust must accept the appointment.

Example

The court may make an order appointing a trustee as a replacement for or in addition to any existing trustee, or where there is no existing trustee.

The circumstances in which it may be necessary or desirable to appoint a new trustee include—

- (a) where, as a result of the death or retirement or removal of a trustee, there are fewer trustees than required by the terms of the trust:
- (b) the circumstances specified in **section 95(2)**.

Compare: 1956 No 61 ss 46(4), (5), 51(1), (4)

101 Number of trustees

If a sole trustee retires or is removed or dies while in office, the trustee may be replaced with more than 1 replacement trustee unless there is a contrary intention in the terms of the trust.

Compare: R25(b)

102 Vesting of trust property

- (1) This section applies if—
 - (a) a new trustee of a trust is appointed; or
 - (b) a trustee of a trust retires or is removed.
- (2) The execution of the document of appointment, removal, or discharge—
 - (a) divests the trust property from the persons who were the trustees immediately before the document was executed; and
 - (b) vests the property in the persons who become and are the trustees as joint tenants without any conveyance, transfer, or assignment (but subject to any liabilities attaching to the property).
- (3) **Subsection (2)** is subject to **section 103**.
- (4) In this section and in **section 103**, a court order appointing a trustee or removing a trustee without replacement—
 - (a) is a document of appointment, removal, or discharge (unless the court otherwise orders); and

- (b) is, for the purposes of section 99 of the Land Transfer Act 1952, a vesting order vesting the trust property in the persons who become and are the trustees (unless the court otherwise orders).

Compare: R26

103 Requirements to notify, register, or record vesting of trust property

- (1) If, or to the extent that, the divesting and vesting of trust property must be notified, registered, or recorded under the requirements of another Act,—
- (a) the divesting and vesting are subject to the requirements and do not take effect until the requirements are satisfied; and
 - (b) the execution of the document of appointment, removal, or discharge vests in the persons who become and are the trustees a right to call for the transfer of the trust property; and
 - (c) a copy of that document or those documents and a statutory declaration by a continuing or new trustee of the trust that each relevant document was validly executed are sufficient proof of a right claimed under **paragraph (b)**.
- (2) **Subsection (1)(c)** does not apply where the document is a court order, and a copy of the order is sufficient proof of a right claimed under **subsection (1)(b)**.

104 Requirement to assist in transfer

- (1) The following persons must do all things necessary to assist in any transfer and any required notification, registration, or recording of the divesting and vesting of the trust property:
- (a) a trustee who has retired or been removed:
 - (b) a continuing trustee of the trust:
 - (c) a new trustee of the trust.
- (2) The persons who become and are the trustees may complete any formalities necessary for the divesting and vesting of trust property on behalf of a former trustee who is unable to act or who fails or refuses to act under **subsection (1)**.

105 Protection in relation to transfer

A person who transfers, or notifies, registers, or records the transfer of, property in reliance on **section 102(4), 103(1)(c) or (2), or 104(2)** is not liable for any loss or deprivation that may result from that act.

106 Documents to be provided to departing trustee

As soon as any requirements relating to the transfer, or notification, registration, or recording of the transfer, of trust property referred to in **section 103** are complete, a continuing or new trustee must give to a trustee who retires or

is removed (the **departing trustee**) a copy of any documents that demonstrate that the departing trustee has been divested of trust property, including any document of transfer and registration.

107 Devolution of powers on death of trustee

- (1) If a power or function is vested in or imposed on 2 or more trustees jointly and 1 or more of those trustees dies, the surviving trustees (if any) may exercise the power or perform the function until a replacement trustee (if any) is appointed.
- (2) If a sole trustee or the last surviving or continuing trustee dies, the personal representative of the trustee—
 - (a) may exercise any power or perform any function that was vested in, or capable of being exercised or performed by, that trustee; but
 - (b) is not a trustee for the purposes of **subsection (1)**.

Compare: 1956 No 61 s 23

Part 6 Revocation and variation of trusts

108 Revocation by unanimous consent of beneficiaries

- (1) The trustees of a trust must terminate the trust and distribute the trust property on being required to do so by the beneficiaries if the conditions set out in **subsection (2)** are satisfied.
- (2) The conditions for the termination of the trust are that—
 - (a) the trustees have received a written notice requiring the trustees to terminate the trust; and
 - (b) the notice is signed by each beneficiary or by the duly authorised agent of that beneficiary; and
 - (c) each beneficiary is, at the date on which the notice is signed, 18 years of age or older and otherwise a person of full legal capacity.
- (3) The conditions are treated as satisfied in respect of a person on whose behalf the court has made an order of approval under **section 111** or an order of waiver or consent under **section 112**.

Compare: R29(1)(a)

109 Other actions with unanimous consent of beneficiaries

- (1) The beneficiaries of a trust acting unanimously may do any of the following things, if the conditions set out in **subsection (2)** are satisfied:
 - (a) confer new powers on the trustees:
 - (b) vary the terms of the trust:
 - (c) deviate from the terms of the trust:

- (d) consent to the resettlement of the trust.
- (2) The conditions for an action by the beneficiaries are that—
 - (a) the trustees have received a written notice of the proposed new powers, variation, deviation, or resettlement; and
 - (b) the notice is signed by each beneficiary or by the duly authorised agent of that beneficiary; and
 - (c) each beneficiary is, at the date on which the notice is signed, 18 years of age or older and otherwise a person of full legal capacity; and
 - (d) the trustees have agreed to the proposal.
- (3) The conditions are treated as satisfied in respect of a person on whose behalf the court has made an order of approval under **section 111** or an order of waiver or consent under **section 112**.

Compare: R29(2) and (3)

110 Beneficiary's right to share of trust property

A beneficiary of a fixed share of the trust property may require the trustees to transfer that share to the beneficiary (and the trustees must do so) if—

- (a) the beneficiary is absolutely entitled to that share (for example, any condition relating to the vesting of that share set by the terms of the trust has been met); and
- (b) the property is in a form, or can be changed into a form, that can be transferred to the beneficiary; and
- (c) the transfer is not detrimental to the interests of the other beneficiaries; and
- (d) the beneficiary is 18 years of age or older and otherwise a person of full legal capacity.

Compare: R29(1)(b)

111 Power of court to approve revocation, variation, or resettlement of trust

- (1) The court may, on behalf of any of the persons set out in **subsection (2)** who has an interest in the property of a trust, approve the revocation, variation, or resettlement of the trust.
- (2) The persons referred to in **subsection (1)** are—
 - (a) a child;
 - (b) a person who lacks full legal capacity;
 - (c) a person who may acquire an interest at a future date or on the happening of a future event or on becoming a member of a certain class of persons;
 - (d) a future person.

- (3) On an application for an order of approval under **subsection (1)**, the court must take into account each of the following factors:
 - (a) the nature of any person's interest in the trust property and the effect of the proposed order on that interest:
 - (b) the benefit or detriment that may result to any person with an interest in the trust property if the court makes or refuses to make the proposed order:
 - (c) the intentions of the settlor of the trust in settling the trust, if it is practicable to ascertain those intentions.
- (4) The court must not make an order of approval if its effect would be to reduce or remove any vested interest in the trust property or to cause serious detriment to the person on whose behalf the court is acting.
- (5) An order of approval binds the person on whose behalf it is made and takes effect without any further step.
- (6) In this section and in **section 112**, **variation** includes a change to the scope or nature of the powers of the trustee.

Compare: R30

112 Power of court to waive requirement of consent to revocation, variation, or resettlement of trust

- (1) The court may waive the requirement that the consent of a person be obtained for the revocation, variation, or resettlement of a trust.
- (2) On an application for an order of waiver of consent, the court must take into account each of the following factors:
 - (a) the nature of any person's interest in the trust property and the effect of the proposed order on that interest:
 - (b) the benefit or detriment that may result to any person with an interest in the trust property if the court makes or refuses to make the proposed order:
 - (c) the intentions of the settlor of the trust in settling the trust, if it is practicable to ascertain those intentions.
- (3) The court must not make an order of waiver of consent if its effect would be to reduce or remove any vested interest in the trust property or other property right held by a beneficiary.
- (4) An order of waiver of consent binds the person on whose behalf it is made and takes effect without any further step.

Compare: R30

113 Power of court to vary or extend trustees' powers in relation to property

- (1) The court may vary or extend the powers of the trustees of a trust in relation to a property transaction or a class of property transactions if—

- (a) the court considers that the variation or extension is necessary for the proper management of the trust property; and
 - (b) the variation or extension does not alter or otherwise affect a beneficiary's interest under the trust.
- (2) An application for an order may be made by—
- (a) the trustees or any 1 of them:
 - (b) any person with a beneficial interest in the trust property.
- Compare: R31

Part 7

Court powers and dispute resolution

114 Court may review trustee's act, omission, or decision

- (1) The court may review the act, omission, or decision (including a proposed act, omission, or decision) of a trustee on the ground that the act, omission, or decision was not reasonably open or is not reasonably open to the trustee in the circumstances.
- (2) The court may undertake a review under **subsection (1)** on the application only of—
- (a) a beneficiary; or
 - (b) if a beneficiary does not have full legal capacity, his or her legal guardian or attorney acting under an enduring power of attorney for property or his or her property manager appointed under the Protection of Personal and Property Rights Act 1988.
- (3) The review must be conducted in accordance with **section 115**.
- (4) This section and **section 115** do not limit or affect—
- (a) the court's jurisdiction under the Charitable Trusts Act 1957; or
 - (b) the Attorney-General's powers and duties under that Act.

Compare: R32(1), (6)

115 Procedure for trustee review

- (1) An applicant for a review under **section 114** must adduce evidence that raises a genuine and substantial dispute as to whether the act, omission, or decision in question was reasonably open or is reasonably open to the trustee in the circumstances.
- (2) If the court is satisfied that the applicant has established a genuine and substantial dispute, the onus is on the trustee to establish that the act, omission, or decision was reasonably open or is reasonably open to him or her in the circumstances.

- (3) If the court, after hearing the trustee, is satisfied on the balance of probabilities that the act, omission, or decision was not reasonably open or is not reasonably open to the trustee in the circumstances, the court may (but subject to **subsection (4)**)—
- (a) set aside the act or decision, or direct the trustee to act in the case of an omission:
 - (b) restrain the trustee from acting or deciding in the case of a proposed act or decision, and direct the trustee to act in the case of a proposed omission:
 - (c) make any other orders that the court considers necessary.
- (4) The court must not make an order that affects—
- (a) a valid distribution of the trust property that was made before the trustee had notice of the application; or
 - (b) any right or title acquired by a person in good faith and for value.

Compare: R32(2)–(4)

116 Court may take into account investment strategy in action for breach of trust

In considering whether a trustee is liable, in respect of any investment made by that trustee, for any breach of trust in respect of any duty under **section 23** (to invest prudently to the standard applicable under **paragraph (a) or (b)** of that section), the court may take into account—

- (a) whether the trust investments have been diversified, so far as is appropriate to the circumstances of the trust; and
- (b) whether the investment was made in accordance with any investment strategy formulated in accordance with the duty under **section 23(a) or (b)**.

Compare: R14(6); 1956 No 61 s 13M

117 Court may relieve trustee from personal liability

- (1) If **subsection (2)** applies, the court may relieve a trustee who is or may be personally liable for any breach of trust from personal liability for the breach.
- (2) This subsection applies if it appears to the court that—
 - (a) the trustee has acted honestly and reasonably; and
 - (b) the trustee ought fairly to be excused for the breach of trust.
- (3) The court may relieve the trustee in whole or in part.

Compare: R4(3)

118 Court may make beneficiary indemnify for breach of trust

- (1) This section applies if a trustee commits a breach of trust at the instigation or request or with the written consent of a beneficiary.

- (2) The court may, if it considers it appropriate, make an order indemnifying the trustee out of the beneficiary's interest in the trust property.

Compare: R35; 1956 No 61 s 74; Draft Trusts Bill 2013 cl 121 (Qld)

119 Court may give judgment in absence of trustee

- (1) This section applies if in any proceeding the court is satisfied that—
- (a) a diligent search has been made for any person who was made defendant in the proceeding because the person is or was a trustee; and
 - (b) that person cannot be found.
- (2) The court may hear and determine the proceeding and give judgment against that defendant in the defendant's capacity as a trustee as if the defendant—
- (a) had been duly served, or had entered an appearance in the proceeding; and
 - (b) had been represented by a lawyer at the hearing.
- (3) **Subsection (2)** does not affect any interest the defendant has in the matters in question in the proceeding in any capacity other than as a trustee.

Compare: 1956 No 61 s 70

120 Trustee may apply to court for directions

- (1) A trustee may apply to the court for directions about—
- (a) the trust property or the administration of the trust property; or
 - (b) the exercise of any power or performance of any function by the trustee.
- (2) The application must be served on each person interested in the application or any of them as the court thinks fit.
- (3) On an application under this section, the court may give any direction it thinks fit.

Compare: R33; 1956 No 61 s 66

121 Protection of trustee while acting under direction of court

- (1) A trustee acting under any direction of the court must be treated as having discharged the trustee's duties as a trustee in relation to the direction, even though the order giving the direction is later declared invalid, overruled, set aside, or found to be otherwise ineffective.
- (2) However, **subsection (1)** does not indemnify a trustee in respect of any act done in accordance with a direction of the court if the trustee has been guilty of any fraud or wilful concealment or misrepresentation in—
- (a) obtaining the direction; or
 - (b) acquiescing in the court's making of the order or giving of the direction.

Compare: 1956 No 61 s 69

122 Trustee may apply to court to bar claims

- (1) The court may, on application by a trustee,—
 - (a) bar a claim by any person that directly or indirectly affects the trust property; or
 - (b) authorise the trustee to administer the trust property without regard to the person's claim.
- (2) Before making an application, a trustee must have served on the person, in accordance with the High Court Rules 2016, a notice—
 - (a) describing the nature of the claim; and
 - (b) stating that if a legal proceeding is not, within 90 days after the service of the notice, commenced to enforce the claim, a court may bar the claim or authorise the trustee to administer the trust property without regard to it.
- (3) The court may not make an order under this section barring—
 - (a) a claim under the Family Protection Act 1955; or
 - (b) an application for revocation of a grant of administration.
- (4) An order made by the court under **subsection (1)** does not affect the right of any beneficiary of the trust to contest a claim by the trustee to any payment or indemnity from the trust property unless the beneficiary is a party to the proceeding.

Compare: R36; 1956 No 61 s 75

123 Trustee may apply to court to allow distribution of missing beneficiaries' shares

- (1) The court may, on application by a trustee, make an order authorising the trustee to distribute trust property—
 - (a) as if a potential beneficiary or a class of potential beneficiaries does not exist or never existed or has died before a date or an event specified; and
 - (b) if, because of the order, it is not possible or practicable to determine whether any condition or requirement affecting a beneficial interest in the property or any part of it has been complied with or fulfilled, as if that condition or requirement had been or had not been complied with or fulfilled.
- (2) The court may make an order only if it is satisfied that—
 - (a) reasonable measures have been taken to bring to the notice of the potential beneficiary or beneficiaries their potential beneficial interest or interests; and
 - (b) at least 60 days have passed since the last of those measures was taken; and

- (c) no potential beneficiary with respect to whom an order is sought has come to the attention of the trustee as a result of those measures or the claim of any such beneficiary may be disregarded in the distribution because of an order under **section 122**.

Compare: R38; 1956 No 61 s 76

124 Trustee may sue self in different capacity

- (1) Despite any rule of law or practice to the contrary, a trustee in that capacity may sue, and be sued by, the trustee in any other capacity, including the trustee's personal capacity.
- (2) However, in every such case the trustee must obtain the directions of the court in which the proceeding is taken about the way in which the opposing interests are to be represented.

Compare: 1956 No 61 s 33A

125 Appointment of receiver for trusts

- (1) The court may, on application by an interested person or on its own motion, appoint a receiver to administer a trust.
- (2) The court must be satisfied that the appointment of a receiver to administer the trust is—
- (a) reasonably necessary in the circumstances of the trust; and
 - (b) just and equitable.
- (3) Only a person qualified to be a trustee may be appointed under **subsection (1)**.
- (4) When appointing a receiver under this section, the court (having regard to the terms of the trust and the interests of justice) must determine—
- (a) the extent of the duties and powers of the receiver; and
 - (b) the duration of the receivership; and
 - (c) the principles that the receiver is to apply in determining priorities; and
 - (d) whether the receiver is to be paid from the trust assets.

Compare: R46

126 Payment of fee to trustee

- (1) Despite **section 31** (duty to act for no reward), the court may order that a reasonable fee be paid out of the trust property to a person who is or has been a trustee of the trust if the court is satisfied that the person, as trustee, has provided (or is providing or will provide) services that far exceed the services normally expected of a trustee.
- (2) In determining under **subsection (1)** what fee is reasonable, the court must consider the following:
- (a) the total amount that has already been paid to any trustee of the trust:

- (b) the number and difficulty of the services provided by the trustee:
 - (c) the liabilities to which the trustee is or has been exposed, and the responsibilities imposed on the trustee:
 - (d) the skill and success of the trustee in administering the trust:
 - (e) the value of the trust property:
 - (f) the time and services reasonably required of the trustee:
 - (g) whether any payment that might otherwise have been allowed or ordered should be refused or reduced due the conduct of the trustee in the administration of the trust:
 - (h) any other circumstances that the court considers relevant.
- (3) If there are 2 or more persons who are or have been trustees, an order made under **subsection (1)** may specify whether and how the fee is to be apportioned among the trustees.

Compare: R34; 1956 No 61 s 72

127 Court may charge costs on trust property

The court may order that the costs of an application to the court under this Act—

- (a) be paid or raised out of—
 - (i) the trust property to which the application relates; or
 - (ii) the income of the trust property to which the application relates;
 or
- (b) be borne and paid in the way and by the persons that the court considers just.

Compare: 1956 No 61 s 71; Draft Trusts Bill 2013 cl 149 (Qld)

Vesting orders

128 Vesting order consequential on order for sale or mortgage of land

- (1) This section applies if the court gives a judgment or makes an order directing the sale or mortgage of any land.
- (2) Each person who is entitled to, or who has any interest in, the land, or who has any contingent right in the land, and who is a party to the proceeding to which the judgment or order relates or is otherwise bound by the judgment or order is deemed to be so entitled or to have an interest, as the case may be, as a trustee.
- (3) The court may make an order vesting the land or any part of the land for any estate or interest that the court thinks fit in the purchaser or mortgagee or in any other person.

Compare: 1956 No 61 s 55

129 Vesting order consequential on judgment for specific performance

- (1) This section applies if a judgment is given for the specific performance of a contract concerning any interest in land, or for the sale or exchange of any interest in land, or generally where any judgment is given for the conveyance of any interest in land.
- (2) The court may declare—
 - (a) that any of the parties to the action are trustees of any interest in the land or any part of the land; or
 - (b) that the interests of unborn persons who might claim under any party to the proceeding, or under the will or voluntary settlement of any deceased person who was during his or her lifetime a party to the contract or transaction to which the judgment relates, are the interests of persons who, on coming into existence, would be trustees.
- (3) If the court makes an order under **subsection (2)**, the court may make a vesting order relating to the rights of those persons, born and unborn, as if they had been trustees.

Compare: 1956 No 61 s 56

130 Court may appoint person to convey

- (1) In any case where, in relation to an interest in trust property, a vesting order can be made under this Act, the court may instead make an order appointing a person to convey the property or any interest in the property or to release a contingent right.
- (2) A conveyance or release by a person appointed under **subsection (1)** in accordance with the order has the same effect as a vesting order.

Compare: 1956 No 61 s 58

*Jurisdiction of Family Court***131 Jurisdiction of Family Court**

- (1) This section applies where the Family Court has jurisdiction under section 11 of the Family Court Act 1980 to hear and determine a proceeding.
- (2) The Family Court may during the proceeding make any order or give any direction available under this Act if the Family Court considers the order or direction is necessary—
 - (a) to protect or preserve any property or interest until the proceeding before the Family Court can be properly resolved; or
 - (b) to give proper effect to any determination of the proceeding.
- (3) Where the parties to the proceeding consent, the Family Court may make any order available under this Act to resolve an issue or a dispute between the parties that is closely related to the proceeding (but only if the Family Court con-

siders that making the order is necessary or desirable to assist the resolution of the proceeding).

- (4) To avoid doubt, an exercise by the Family Court of jurisdiction under this section is not subject to financial limits in relation to the value of any property or interest.

Compare: R41

Alternative dispute resolution

132 Definitions for purposes of sections 133 to 138

In **sections 133 to 138**,—

ADR process means an alternative dispute resolution process (for example, mediation) designed to facilitate the resolution of a matter

ADR settlement, in relation to a matter, means an enforceable agreement reached through an ADR process that resolves the matter

external matter means a matter to which the parties are a trustee and 1 or more third parties

internal matter means a matter to which the parties are a trustee and 1 or more beneficiaries

matter—

- (a) means—
- (i) a legal action brought by or against a trustee in relation to the trust; or
 - (ii) a dispute in relation to the trust between a trustee and a beneficiary or between a trustee and a third party that may give rise to a legal action; and
- (b) does not include a legal action or a dispute about the validity of all or part of a trust.

Compare: R42(1), (2); cl 91 (new s 268(4)) Resource Legislation Amendment Bill

133 Power of trustee to refer matter to alternative dispute resolution process

- (1) A trustee may, with the agreement of each party to the matter, refer any matter to an ADR process.
- (2) For the purposes of this section, a beneficiary is not a party to an external matter.
- (3) This section is subject to any contrary intention in the terms of the trust.

Compare: R42(1)

134 ADR process where trust has unascertained or incapacitated beneficiaries

- (1) If a trust has any unascertained or incapacitated beneficiaries, then, for a matter relating to that trust that is subject to an ADR process,—

- (a) the court must appoint representatives for those beneficiaries; and
 - (b) those representatives may agree to an ADR settlement on behalf of the unascertained or incapacitated beneficiaries; and
 - (c) any ADR settlement must be approved by the court.
- (2) This section applies only in relation to internal matters.
Compare: R42(7)

135 Power of court to order ADR process

- (1) The court may, at the request of a trustee or a beneficiary or on its own motion,—
- (a) enforce any provision in the terms of a trust that requires a matter to be subject to an ADR process; or
 - (b) otherwise submit any matter to an ADR process (except where the terms of the trust indicate a contrary intention).
- (2) In exercising the power under **subsection (1)**, the court may make any of the following orders:
- (a) an order requiring each party to the matter, or specified parties, to participate in the ADR process in person or by a representative;
 - (b) an order that the costs of the ADR process, or a specified portion of those costs, be paid out of the trust property.
- (3) This section applies only in relation to internal matters.
Compare: R42(6)

136 Trustee may give undertakings for purposes of ADR settlement

- (1) Despite **section 26** (duty not to fetter the future exercise of powers), a trustee may, for the purposes of an ADR settlement, give binding undertakings in relation to the trustee's future actions as trustee.
- (2) This section is subject to any contrary intention in the terms of the trust.
Compare: R42(3)

137 Trustee's liability in relation to ADR settlement limited

- (1) This section applies to a proceeding brought by or on behalf of a beneficiary and arising from or relating to an ADR settlement.
- (2) A trustee is not liable in the proceeding unless, in relation to the ADR settlement, the trustee failed to comply with—
- (a) the trustee's mandatory duty under **section 19**; or
 - (b) any duty specified in the terms of the trust for the purposes of establishing liability under this section.

- (3) Despite **subsection (2)(a)**, a trustee is not liable in the proceeding by reason only that the settlement was not strictly consistent with the terms of the trust.

Compare: R42(4)

138 ADR settlement cannot override creditor priority rules

To avoid doubt, an ADR settlement cannot override creditor priority rules as they affect creditors that are not party to the settlement.

Compare: R42(5)

Part 8 Miscellaneous provisions

Transfer to the Crown

139 Transfer of non-distributable trust property

- (1) A trustee who is administering trust property that the trustee is not able to distribute in accordance with the terms of the trust may transfer the trust property to the Crown if the trust property consists of funds or of securities that can legally be transferred to the Crown.
- (2) The trustee must provide to the Secretary to the Treasury all the information that the Secretary reasonably considers necessary to allow the Secretary to know—
- (a) the terms of the trust; and
 - (b) the persons having a beneficial interest in the trust property; and
 - (c) the state of the trust accounts with respect to the trust property being transferred; and
 - (d) the measures taken by the trustee to attempt to distribute the trust property and the reasons why it was not possible to do so.
- (3) The Secretary to the Treasury may refuse a transfer if the required information has not been provided by the trustee.
- (4) A trustee is discharged from any further responsibility with regard to trust property transferred to the Crown under this section.
- (5) The Secretary to the Treasury may at any time sell any securities transferred to the Crown under this section.

Compare: R37(1) and (2); 1956 No 61 s 77

140 Administration by the Crown of transferred property

- (1) The Secretary to the Treasury must hold trust property transferred to the Crown under **section 139** (the **transferred property**) in a Trust Bank Account established under section 67 of the Public Finance Act 1989 and must deal with the property as follows:

- (a) if the court makes an order in relation to the transferred property, in accordance with the order:
 - (b) if any person claims that the person is the beneficiary entitled to any part of the transferred property and the Secretary is satisfied that the person is so entitled, in accordance with the directions of that person:
 - (c) if the trustee requests that the transferred property be returned to the trustee, in accordance with the request.
- (2) The Secretary to the Treasury is not liable for any interest on the transferred property and may deduct from any payment made under **subsection (1)(a) to (c)** any reasonable costs or expenses incurred in connection with the Crown's administration of the transferred property.
 - (3) After the expiry of a period of 6 years after the date on which the transferred property was transferred to the Crown, the Secretary to the Treasury may transfer the property to a Crown Bank Account.
 - (4) Any property that is transferred to a Crown Bank Account under **subsection (3)** and that is required to be paid under **subsection (1)** may be paid out of the Crown Bank Account without further authority than this subsection.
 - (5) The Crown is not subject to the duties or liabilities of a trustee in respect of any transferred property, and no claim lies against the Crown or the Secretary to the Treasury if a payment was made under **subsection (1)** in good faith.

Compare: R37(3), (4), (5); 1956 No 61 s 78

141 Public notice of property transferred to the Crown

- (1) The Secretary to the Treasury must arrange, before 31 March in each year, for a notice to be published on an Internet site maintained by or on behalf of the Treasury setting out all property transferred to the Crown under **section 139(1)** in the previous calendar year and identifying the trustees or trusts from which the property was transferred.
- (2) The Secretary must ensure that a notice published under **subsection (1)** remains available on the Internet site for inspection by members of the public for at least 3 years.

Audit of condition and accounts of certain trust property

142 Application for audit of condition and accounts of trust property

- (1) A trustee or a beneficiary of a trust may apply to the Public Trust for the conduct of an investigation and audit of the condition and accounts of the trust property (unless that property is being administered by a trustee corporation).
- (2) However, the Public Trust must not proceed with the application if an investigation or audit of the trust property has been concluded in the previous 12 months (unless the applicant has obtained the leave of the court to make the application).

- (3) Before proceeding with the application, the Public Trust may require the applicant to pay a deposit or give security for the costs of the investigation and audit.

Compare: R44; 1956 No 61 s 83B(1)

143 Appointment of auditor

- (1) When proceeding with an application under **section 142**, the Public Trust must ensure that a person (the **auditor**) is appointed in accordance with **subsection (2)** and that the auditor is—

- (a) either—
- (i) a lawyer; or
 - (ii) a qualified statutory accountant (within the meaning of section 5(1) of the Financial Reporting Act 2013); and
- (b) not a beneficiary.

- (2) The auditor may be appointed—

- (a) by agreement between—
- (i) the applicant trustee, the co-trustees, and the Public Trust; or
 - (ii) the applicant beneficiary, the trustees, and the Public Trust; or
- (b) if no agreement can be reached under **paragraph (a)**, by the Public Trust.

Compare: R44; 1956 No 61 s 83B(1), (1A)

144 Conduct of, and reporting on, audit

- (1) The auditor appointed under **section 143**—

- (a) has a right of access to the books, accounts, and vouchers of the trustees, and to any securities and documents of title held by the trustees in relation to the trust property; and
- (b) may require from the trustees any information and explanations necessary to perform the auditor's duties.

- (2) When the investigation and audit are complete, the auditor must forward to the applicant, and to each trustee, and to the Public Trust,—

- (a) a copy of the accounts of the trust property and a report on those accounts; and
- (b) a certificate signed by the auditor and stating that the accounts—
- (i) correctly show the state of affairs of the trust property, and that the auditor has seen and verified the securities of the trust fund investments (if any); or
 - (ii) are deficient in the ways and to the extent set out in the certificate.

- (3) Subject to any regulations made under **section 147**, each beneficiary of the trust is entitled, at all reasonable times,—
- (a) to inspect and take copies of the accounts, report, and certificate; and
 - (b) at the beneficiary's own expense, to be given copies or extracts of those documents.

Compare: R44; 1956 No 61 s 83B(2), (3), (4)

145 Costs of audit borne by trust

- (1) The remuneration of the auditor and the other expenses of the investigation and audit (including the Public Trust's charges) are to be borne by the trust in respect of which the investigation and audit were conducted.
- (2) All expenses and costs for which the trust is liable under this section are a charge on the trust property.

Compare: R44; 1956 No 61 s 83B(6), (11)

146 Offence to make false statement

A person who in any statement of accounts, report, or certificate required for the purposes of **section 144(2)** wilfully makes a statement that is false in any material particular commits an offence and is liable on conviction to imprisonment for a term not exceeding 2 years or to a fine not exceeding \$[X], or both.

Compare: R44; 1956 No 61 s 83B(9)

147 Regulations relating to audit

The Governor-General may, by Order in Council, make regulations for all or any of the following purposes:

- (a) prescribing the form in which applications under **section 142** must be made;
- (b) regulating the remuneration, charges, and expenses of auditors appointed under **section 143**;
- (c) prescribing limits or conditions on the inspection by beneficiaries of documents under **section 144**;
- (d) prescribing the manner in which inspection and copying of documents under **section 144** must be granted or facilitated;
- (e) providing for any other matters contemplated by or necessary for giving full effect to **sections 142 to 146**.

Compare: R44; 1956 No 61 s 83B(12)

Life tenant to have powers of trustee in certain cases

148 Life tenant to have powers of trustee in certain cases

- (1) This section applies in relation to land if—
- (a) there is no trustee of the land; but

- (b) the land is vested in a person (the **life tenant**) who is entitled to possession of the land or entitled to receive rents and profits from the land for—
- (i) a life estate; or
 - (ii) another limited estate.
- (2) The life tenant may (subject to **subsection (4)**) exercise all the powers of a trustee under this Act, and the court may confer on the life tenant all the powers that it could confer on a trustee under this Act.
- (3) Anything done by the life tenant in exercise of any power referred to in **subsection (2)** has the same force and effect as if it had been exercised by a trustee.
- (4) However, this section does not authorise the life tenant to sell the land or to raise money by a mortgage or other dealing with the land, unless the money paid on the sale or raised by the mortgage or other dealing is paid to a trustee who is duly appointed and entitled to receive it.

Compare: 1956 No 61 s 88

Transitional regulations

149 Regulations providing for transitional matters

- (1) The Governor-General may, by Order in Council made on the recommendation of the Minister, make regulations—
- (a) providing transitional and savings provisions concerning the coming into force of this Act that may be in addition to, or in place of, the transitional and savings provisions in **Schedule 1**;
 - (b) providing that, subject to any conditions specified in the regulations, during a specified transitional period,—
 - (i) specified provisions of this Act (including definitions) do not apply;
 - (ii) specified terms have the meaning given to them by the regulations;
 - (iii) specified provisions repealed or amended or revoked by this Act continue to apply;
 - (c) providing for any other matters necessary for facilitating or ensuring an orderly transition from the provisions of any enactments replaced by this Act to the provisions of this Act.
- (2) No regulations under this section may be made, or continue in force, later than 2 years after the date of commencement of this section.

Compare: 2015 No 70 s 216

*Consequential amendments and repeals***150 Consequential amendments**

Amend the enactments specified in **Schedule 4** as set out in that schedule.

151 Repeals

The following enactments are repealed:

- (a) the Trustee Act 1956:
- (b) the Perpetuities Act 1964:
- (c) section 59(2) of the Property Law Act 2007.

Schedule 1

Transitional, savings, and related provisions

s 5

Part 1

Provisions relating to this Act as enacted

1 Definitions for this Part

In this Part,—

commencement date means the date on which **section 5** commences

repealed Act means the Trustee Act 1956.

2 Application of Act to trusts created before and after commencement

Except as provided in this Act (and in **clauses 3, 4, 5, 6, 7, 8, 9, 10(2), 12, and 15** of this schedule in particular), this Act applies to all express trusts, whether created before or after the commencement date.

3 Duration of trusts created before commencement date

(1) Despite **section 11**,—

(a) a trust created before the commencement date continues until the vesting date (if any) specified in the terms of the trust; but

(b) that date may, after the commencement date and in accordance with **section 109 or 111** or in any way permitted in the terms of the trust, be extended so that the trust has a maximum total duration of up to 125 years.

(2) However, if a trust created before the commencement date does not specify a vesting date or duration but specifies or infers a mechanism for or means of determining the vesting date, **section 11(4)** applies to that trust.

4 Transitional provision for trustees' obligations to give trust information

Sections 41 to 47 (relating to trustees' obligations to give trust information) do not apply in relation to a trust created before the commencement date until the date that is 1 year after the commencement date.

5 Transitional and application provision in relation to exemption and indemnity clauses

(1) **Sections 33, 34, and 35** do not apply in relation to a trust created before the commencement date until the date that is 1 year after the commencement date.

(2) **Section 36** does not apply in relation to a trust created before the commencement date.

6 Transitional provision in relation to trustees' general administrative powers

Section 48 does not apply in relation to a trust created before the commencement date until the date that is 1 year after the commencement date.

7 Application of sections 53 and 54

Sections 53 and 54 apply in relation to a trust created before the commencement date despite anything to the contrary in the terms of the trust, unless the terms of the trust are modified within 6 months before the commencement date to expressly exclude or modify the application of those sections.

8 Saving of appointment of agent, nominee, or custodian

A person who, in relation to a trust or any part of it, was, immediately before the commencement date, a duly appointed agent, nominee, or custodian continues in that office on and after the commencement date, subject to the terms of the appointment and the terms of the trust.

9 Saving of delegations

- (1) A delegation that was in place before the commencement date continues, subject to the terms of the delegation and the terms of the trust, on and after the commencement date.
- (2) However, on and after the date that is 1 year after the commencement date, the delegation is subject to the requirement under **section 67(1) or (2)**.

10 Transitional provision for advisory trustees

- (1) A person who, immediately before the commencement date, was an advisory trustee appointed under section 49 of the repealed Act is, on and after the commencement date, taken to be a special trust adviser appointed under **section 70(2)** of this Act.
- (2) However, to avoid doubt, **section 72(2)** does not require the review or re-determination (or otherwise of itself affect) any remuneration payable to the person in accordance with a determination made under the repealed Act before the commencement date.
- (3) A power created before the commencement date to appoint an advisory trustee is, on and after the commencement date, taken to be a power to appoint a special trust adviser.

11 Saving of notice of application to bar claim under section 75 of repealed Act

- (1) This clause applies if, no more than 120 days before the commencement date, a trustee—
 - (a) has served on a person a notice under section 75(1) of the repealed Act; but

- (b) has not made an application under section 75(2) of that Act.
- (2) The trustee is entitled to make an application under **section 122(1)** as if the notice served under the repealed Act were a notice served under **section 122(2)**.

12 Saving of rights and proceedings under repealed Act

This Act does not—

- (a) enable any proceeding to be brought that was, before the commencement date, barred under the repealed Act; or
- (b) affect the application of section 18 of the Interpretation Act 1999 in relation to the effect of the repeal of the repealed enactments.

13 Transitional provision for offences and contravention under repealed Act

- (1) This clause applies to an offence committed under section 31(7C), 77(8), or 83B(9) of the repealed Act, or a contravention of the repealed Act, before the commencement date.
- (2) The repealed Act continues to have effect as if it had not been repealed for the purpose of—
 - (a) investigating an offence or a contravention to which this clause applies:
 - (b) commencing or completing a proceeding for an offence or a contravention to which this clause applies:
 - (c) imposing a penalty or other remedy, or making an order, in relation to an offence or a contravention to which this clause applies.

14 Transitional provision for jurisdiction of Family Court

Despite **clause 12(b)**, on and after the commencement date the Family Court may exercise the jurisdiction conferred by **section 135** in any proceeding commenced, but not heard, before the commencement date.

15 Transitional provision for transfer of trust property

- (1) This clause applies if—
 - (a) a trustee resigns or is removed before the commencement date; and
 - (b) on the commencement date, the divesting and vesting of trust property as a result of the resignation or removal has not taken effect.
- (2) The divesting and vesting of trust property, and the satisfaction of any requirements to which the divesting and vesting are subject, must be completed as if this Act had not commenced.

Schedule 2

Wholesale investment trusts

s 7(2)(b)

1 Meaning of wholesale investment trust

- (1) A **wholesale investment trust** is an express trust (within the meaning of **section 8**) that is established by or for an investment business, a government agency, or a large entity and that has the following characteristics:
- (a) the trustee—
 - (i) offers financial products exclusively to other wholesale investors; or
 - (ii) guarantees out of the trust assets 1 or more obligations, or holds on trust 1 or more rights, relating to financial products, that are offered by an investment business, a government agency, or a large entity exclusively to other wholesale investors:
 - (b) each beneficiary is 1 or more of the following:
 - (i) a wholesale investor:
 - (ii) an associated person of the manager or investment manager of the wholesale investment trust or the originator of any loans or mortgage securities of the trust:
 - (iii) an entity that—
 - (A) is named in the terms of the trust as the sole beneficiary of any residual assets of the trust at the termination of the trust once all other claims on the trust have been satisfied; and
 - (B) has no other prior entitlement during the term of the trust to income or assets of the trust; and
 - (C) at the time of the creation of the trust, carried on activities of a charitable, sporting, academic, philanthropic, community, social, or similar nature.
- (2) A security trust or custodial trust that is established in connection with the offer or guarantee of financial products referred to in **subclause (1)(a)** is also taken to be a wholesale investment trust.
- (3) In this clause,—
- financial products** has the meaning given to it in section 7 of the Financial Markets Conduct Act 2013
- government agency** has the meaning given to it in clause 40 of Schedule 1 of the Financial Markets Conduct Act 2013

investment business means an entity that is an investment business as defined in clause 37 of Schedule 1 of the Financial Markets Conduct Act 2013, and includes an equivalent overseas entity

large has the meaning given to it in section 45 of the Financial Reporting Act 2013

wholesale investor has the meaning given to it in clause 3 of Schedule 1 of the Financial Markets Conduct Act 2013.

2 **Certain provisions do not apply in relation to wholesale investment trust**

The following provisions do not apply in relation to a wholesale investment trust:

- (a) **section 15(4)** (requiring paid adviser to ensure settlor aware of meaning and effect of any modification or exclusion of default duties):
- (b) **section 36** (requiring paid adviser to alert settlor to liability exclusion or indemnity clause):
- (c) **section 108(1)** (requiring trustees to terminate trust and distribute trust property if required to do so by beneficiaries acting unanimously):
- (d) **section 109** (empowering beneficiaries by unanimous consent to take certain actions such as varying the terms of the trust).

3 **Trustee of wholesale investment trust not liable for gross negligence when required to act on instructions**

Despite **section 34**, the trustee of a wholesale investment trust cannot be found liable for gross negligence in relation to an act or omission where the trustee—

- (a) did the act or made the omission on the lawful instructions of another person; and
- (b) was required under the terms of the trust to act in accordance with those instructions.

Schedule 3

Trusts that are taken to have the characteristics of an express trust

section 9(3)

[List of statutory trusts to come]

Schedule 4

Consequential amendments

section 150

[to come]