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Trustee decision-making

How much weight should settlors' directions carry?

It is estimated that there are between 300,000 to 500,000 trusts in New Zealand, and it is often said that we have one of the highest numbers of trusts per capita in the world. Although the reasons for having a trust are not quite as compelling as they used to be, trusts remain a large part of the legal and asset planning landscape. Trusts arise in many contexts including property ownership, investments, relationship property, insolvency and estates – to name a few.

We explore some of the interplay between settlors and trustees of a trust, particularly in relation to directions given by the settlors to trustees. It is very common for settlors to provide a form of guidance to trustees as to how the trust should be administered. However, *must* trustees follow the settlor's directions? *Should* they follow those directions? What effect, if any, do a settlor's wishes have on the trustees' administration of the trust?

Operation of a trust

It is useful to begin with a reminder of the core mechanics of a trust. When assets are settled on a trust, they are transferred from the ownership of the settlors to the trustees. The trustees manage those assets for the benefit of the trust beneficiaries, and in accordance with the purpose and terms of the trust.

A settlor can also act as a trustee, but trustees must exercise their powers independently and in accordance with their duties to the beneficiaries. This is often achieved by having an independent trustee. The role of an independent trustee is becoming increasingly important and a lack of separation between the settlors, trustees and beneficiaries may undermine the trust's purpose and leave it vulnerable to challenge.

It is for this reason that a settlor may choose to give written directions to the trustees about how the trust's assets should be managed, how various beneficiaries should be treated, how the assets should be distributed and when that distribution should happen.

In this issue +

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These directions take various forms but are often referred to as a 'letter of wishes' or a 'memorandum of guidance.' They are typically separate from the trust deed and kept with the core documents of the trust. Settlors can update these documents over time and they are often referred to or repeated in the settlor's will. It is common for these directions to take effect on the settlor's death or incapacity.

Effect of settlor guidance in trustee decisions

Guidance of this sort is not legally binding on trustees, but it is still an important consideration. As discussed above, the role of a trustee is to administer the trust in the best interests of the beneficiaries. A trustee is not an agent – nor puppet – of the settlor.

Trustees must exercise their own independent judgement when making decisions about the administration of the trust. They must consider all relevant factors. A settlor's expressed wishes are one such factor, provided those wishes are consistent with the purposes and terms of the trust.

There is some authority in case law to suggest that this guidance is a mandatory consideration for trustees,[1] but it is clear that – as a minimum – trustees should read and understand the document. The Court of Appeal stated in the *Chambers* case, 'It is necessary for trustees to read and understand a memorandum of guidance to discern the settlor's wishes, and then with those wishes in mind make an independent assessment of the appropriate course of action, taking into account not just the memoranda, but all relevant factors.'

Independent decision-making

Trustees should take particular care when exercising powers in a way that departs from the settlor's expressed wishes, as these decisions are more likely to be challenged by beneficiaries.

Although trustees are not ordinarily required to give reasons for their decisions, if that reason is challenged, they may be required to show that their decision was properly reached. Where a beneficiary can convince a court that there is a genuine and substantial dispute about whether a decision was reasonably open to the trustees, the court may scrutinise the decision-making process.

In those circumstances, trustees will need to show that the decision was within their powers, was made for a proper purpose and was rational, that it took into account relevant considerations and ignored irrelevant ones, and that the decision was reasonably open to the trustees in the circumstances. This list is not exhaustive but illustrates that the exercise of trustee powers can be complex.

Other options for trustees

Where trustees propose to make a decision that departs significantly from the wishes of the settlor – or involves a particularly significant or 'momentous' decision regarding trust assets or beneficiaries – the trustees should consider applying to the High Court for a 'blessing order.' This type of application takes advantage of the High Court's supervisory role in relation to trusts and asks the court to ensure that the trustees have properly formed their view and that the proposed decision is one that is reasonably open to them. If granted, the order can provide trustees with protection from later challenge.

Difficulties can arise where the settlor's later wishes differ from the context and purpose for which the trust was originally established. Over time, a settlor's intentions may evolve; guidance provided years after the establishment of the trust may sit uneasily with the trust's original objectives. In such cases, trustees may conclude that the later expression of wishes carries less weight than the underlying purposes of the trust, given the trustees' duty to administer the trust in accordance with those purposes.

If faced with this situation it would be worth discussing with us whether there are powers to vary the trust and to add/remove beneficiaries, and whether restructuring the trust through these means may achieve a more secure outcome.

While it is common for settlors to leave written guidance for trustees, such documents are not binding but instead form part of the broader context that trustees should consider when making decisions. Trustees must ultimately exercise their own independent judgement. They should neither follow a settlor's wishes blindly nor disregard them entirely.

Where significant decisions are required and uncertainty exists, it would be prudent to take legal advice and consider all available options including whether to seek the guidance of the High Court through an application for a blessing order. +

1 *Chambers v S R Hamilton Corporate Trustee Ltd* [2017] NZCA 131.

Cleared for take-off

Using your drone the right way

Over the past decade, drones have gone from niche gadgets to everyday tools. Drones help farmers to check stock, let filmmakers capture sweeping aerial shots and give hobbyists a fun way to explore the skies. In New Zealand, drones are part of a fast-growing aviation sector: with that growth comes a clear need for sensible rules to keep people, property and other aircraft safe.

Whether you're a teenager flying a drone in the backyard or a business experimenting with new technology, knowing the rules helps everyone share the skies safely.

New Zealand has a well-developed structure for drone regulation overseen by the Civil Aviation Authority (CAA). In this article, we explain the Civil Aviation Rules that govern drone use in New Zealand.

CAA Rules

Civil Aviation Rules Part 101 sets out the provisions that must be adhered to when piloting a drone that weighs under 25kg. These are the default rules for everyday recreational and simple commercial use of drones. Any drone that weighs more than 25kg requires certification from the CAA in accordance with Part 102 of the CAA Rules. Most commercial drones, however, weigh less than 25kg.

When and where can you fly a drone?

It is important to be familiar with the Rules before flying your drone. A drone is considered a remotely piloted aircraft, so it can be a hazard to people, property and other aircraft. Under Part 101 of the CAA Rules, drone pilots must:

+ Fly below 120 metres (400 feet)
+ Always ensure the drone is within their line of sight
+ Fly only during daylight hours and in good weather
+ Stay at least four km away from airports and aerodromes (unless specific conditions are met), and
+ Not fly over homes without the property owner's consent.

Privacy issues

Drone rules aren't just about aircraft safety; they're also about protecting people on the ground. The requirement to get consent before flying over people or private property helps reduce anxiety and avoid misunderstandings. In practice, this means:

+ Asking before flying over someone's property
+ Being mindful when operating near crowds, and
+ Avoiding capturing photos or videos when people reasonably expect privacy.

Some public areas, such as national parks, require separate permits from the Department of Conservation.

What can you do about drones over your property?

No, you cannot shoot down a drone flying over your property! This would open you up to prosecution under the Summary Offences Act 1981, the Crimes Act 1961 and the Arms Act 1983. Any complaints about drones intruding over private property without consent or in breach of the CAA Rules should be addressed to the Privacy Commissioner or the CAA.

Penalties

As drones are legally treated as aircraft in New Zealand, unsafe flying isn't just 'messing around.' Breaches of the Civil Aviation Act 2023 and the Civil Aviation Rules carry significant penalties. Under the CAA Rules, fines can vary, usually ranging from around $500 for minor breaches, such as flying too close to an airport, and up to $10,000 for serious violations such as endangering or tampering with an aircraft. For companies that breach drone rules, the maximum fines are higher – up to $30,000.

The Civil Aviation Act 2023 which came into force on 5 April 2025 states that the CAA and the Police have the power to require a drone operator to provide any information that may help identify the pilot in command. Refusing to provide that information is itself an offence.

Understand the Rules

Drones open up exciting possibilities, but they also turn every operator, no matter how young, into a participant in New Zealand's aviation system. By understanding the Rules, keeping safety in mind and showing respect for other's privacy, we can ensure drones remain a positive and innovative part of Aotearoa's future. +

Navigating redundancy

Understanding the legal process for employers

Redundancy refers to a situation where an employee's position is deemed superfluous to an employer's needs. Understandably, a redundancy proposal can bring stress and uncertainty to those affected. Unfortunately, it is a term that many New Zealanders may be familiar with.

We provide a summary of the required process, and obligations by you, as an employer, in proposing a potential redundancy in your organisation.

Lawful redundancy

For a redundancy to be lawful, it must be both justified and carried out through a fair process. A redundancy is justified only where there is a *genuine commercial reason* for it; redundancy cannot be used as a means to dismiss a poor performing employee or as an alternative to a disciplinary process for misconduct.

'Genuine commercial reasons' may include a downturn in work/revenue, declining financial performance, organisational restructuring, or the merger or acquisition of a business. Courts are increasingly applying scrutiny into the 'commercial rationale' for a redundancy. However, even where a genuine reason exists, the dismissal will not be lawful unless the correct process is followed.

Process

The process that all employers must follow includes:

+ Providing your employees with relevant information about the proposed change and the potential impact on their employment if the proposal is adopted
+ Consultation with your employees and considering their feedback (and enabling your employees opportunities to seek advice or support within the consultation period)
+ Considering alternatives to redundancy, and
+ Following any additional procedural requirements specified in the relevant employment agreement or policy documents.

Providing information

The Employment Relations Act 2000 sets out that an employer who is proposing to make a decision that will, or is likely to, have an adverse effect on the continuation of employment of one or more of his or her employees, is required to provide the affected employees with *access to relevant information about the decision.*

The term 'relevant information' will depend on the specific circumstances. It includes, however, information necessary for employees to understand the rationale for the proposed change and to enable them to provide informed feedback. Your employee is entitled to ask for additional information relevant to your proposal. While an employer is not required to provide confidential information, they must be able to genuinely demonstrate that disclosure would cause actual, unreasonable prejudice, and must show that they have explored alternative options for confidential consultation.

Consultation

You are not only required to provide a potentially affected employee with all relevant information, but you must also ensure there is a genuine opportunity for your employee to comment on that information before any decision is made. This includes providing sufficient time to provide feedback.

You must approach this process with an open mind and genuinely consider any feedback received before deciding whether to proceed with the proposed change. Without genuine consultation, the redundancy may be deemed a pre-determined outcome, and a breach of your obligation as their employer to act in good faith.

Selection criteria

In circumstances where you are reducing a number of same/similar roles, a fair and reasonable selection process must be followed to decide which of your employees will be appointed to the remaining roles. Clear and relevant selection criteria should be provided to your employees in advance, and their feedback sought. This includes providing details as to how that criteria will be assessed and weighed.

Redeployment

If a role is disestablished, you have an obligation to consider redeployment opportunities within your organisation for any of your affected employees. The affected employee/s continuing employment must be considered before a new or vacant role is advertised externally. Redeployment must be considered for an affected employee, even if some (reasonable) training or upskilling may be required.

Your obligation to consider all redeployment options, stems from an employer's statutory requirement of good faith – to be active and constructive in maintaining the employment relationship, including being responsive and communicative.

A challenging time

Proposed redundancy can be a challenging and uncertain time for all; but understanding the legal framework and the required process can help you to navigate this with more confidence.

It is also important to carefully review employment agreements and relevant workplace policies to carefully identify any relevant provisions, including any entitlement to redundancy compensation.

If your organisation is contemplating redundancies, we recommend you talk with us at the outset; this will help you and your employees better understand their rights and obligations. +

New Zealand Superannuation beneficiaries

Overseas travel

Getting ready for a trip overseas, and suddenly the burden of your NZ Super benefit weighs on your mind? Many wonder how their island getaway or their skiing holiday will impact their payments.

Travel is split into three distinct categories by the Ministry of Social Development (MSD) so the length of your overseas adventure becomes important.

Travelling overseas for 26 weeks or less

If you are travelling for less than 26 weeks, and you are only receiving New Zealand Superannuation (NZ Super) or a Veteran's Pension, you do not need to notify MSD. You will continue to receive these payments while you are away.

If you receive other payments such as an accommodation supplement or disability allowance, however, you must contact MSD. You may still be eligible for these payments for up to 28 days while you are away. However, you will need to be careful when travelling for long periods. If your trip lasts more than 30 weeks, you may have to pay back the full 26 weeks of payment you received. This all depends on whether your delay is expected or unexpected.

Travelling overseas for more than 26 weeks

If you are travelling for more than 26 weeks, you may still be able to receive NZ Super or Veteran's Pension payments. This section applies to those who still intend to keep New Zealand as their place of residence; it involves an application being made at least six weeks before you leave New Zealand. The assessment covers various aspects including things like time spent living in New Zealand between the ages of 20 and 65. Any other payments you receive will cease when you begin your travel.

Living overseas

If you are intending to move overseas, you may be happy to know that this does not immediately mean you will stop receiving your NZ Super or Veteran's Pension payments. In this situation, you must also apply at least six weeks in advance of your departure from New Zealand. How much ongoing NZ Super or Veteran's Pension you receive will depend on similar assessment criteria to travel longer than 26 weeks (see above), as well as the country you are moving to and its relationship with New Zealand. For example, New Zealand has transferable arrangements with 22 Pacific countries.

The last thing you want to worry about when away on holiday is your NZ Super. Rest assured, if it is only a short trip, you need not worry; if it is a long sojourn, a touch of preparation may alleviate your stress.

For the specifics of applications and further detail around other payments and arrangements relating to your overseas journey, Work and Income New Zealand's website **www.workandincome.govt.nz** is very helpful or contact them on **0800 552 002**. +

Postscript

Contacting the Office of the Privacy Commissioner

The Office of the Privacy Commission (OPC) has changed how it responds to enquiries.

Until recently, the OPC had operated a bespoke service with a dedicated email address and 0800 number to ask privacy questions. Many of those queries could have been answered by looking at their website or their contacting the organisation's privacy officer.

With a massive increase in enquiries, the OPC has changed how New Zealanders can contact it.

The email address (enquiries@privacy.org.nz) is no longer operational and any emails sent to that address are not answered.

The 0800 803 909 number remains. From 1 May 2026, an automated message will give callers a suite of options to choose from, rather than a personalised response.

The OPC's website (www.privacy.org.nz) can help answer privacy questions, including outlining your privacy rights.

Privacy breach notification: There are no changes to the way to contact the OPC of a notifiable privacy breach. The online NotifyUs reporting tool is unchanged and will help you assess the seriousness of the privacy breach. +

Resource Management Act 1991 overhaul

As many of you will know, the government has proposed changes to the 35-year-old Resource Management Act.

Rather than tweaking the existing legislation, the government has proposed an entirely new approach to development and environment protection with two new core pieces of legislation: the Planning Bill and the Natural Environment Bill.

Submissions to the select committee on both bills closed on Friday, 13 February.

The select committee is currently reviewing the submissions; the new legislation is expected to be enacted by mid-2026.

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