



SUBMISSION

to

The Law Commission

Review of the Law of Trusts

**Fourth Issues Paper:
The Duties, Office and Powers of a Trustee**

August 2011

Introduction

1. This Submission is from Trustee Corporations Association of New Zealand Inc (“**TCA**”) in response to the Issues Paper dated June 2011. We are available to meet with the Law Commission to discuss our Submission. We can be contacted at:

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2. TCA is a long established association to which all Trustee Corporations belong. The members of the TCA are Public Trust and each of the Trustee Corporations authorised under the Trustee Companies Act 1967 to act as Corporate Trustee for financial products – being Trustees Executors Limited, The New Zealand Guardian Trust Company Limited, New Zealand Permanent Trustees Limited (wholly owned by Public Trust) and Perpetual Trust Limited. The Māori Trustee joined TCA on 1 June 2011. Covenant Trustee Company Limited, although not authorised under the Trustee Companies Act 1967, is an associate member of TCA.
3. TCA maintains relationships with government ministries, regulatory bodies and financial sector groups. TCA sets minimum standards as practice guidelines for the performance of Corporate Trustees – standards for integrity, competence, financial capacity, internal controls, powers and duties, standards for conflict of interest management and for reports from scheme operators.
4. Trustee Corporations are most often associated with drawing up wills and trusts, putting in place enduring powers of attorney and handling estates, a service known as Personal Trusts. TCA contends that its members are uniquely qualified to fill this important role which requires independence, experience, professionalism and above all a focus on investor and beneficiary protection.
5. TCA members also provide prudential supervision of a wide range of investment products and financial arrangements in a number of ways and at various levels. In certain instances, fund managers must appoint a Corporate Trustee to meet regulatory requirements before they can offer a financial product to the market.
6. As at 30 June 2011, total Personal Trusts (excluding agencies and administrations) under supervision exceeded 26,000 with a value in excess of \$6.3b. Corporate Trust funds under supervision exceeded \$173b.
7. TCA appreciates this opportunity to comment on the Issues Paper.

TCA's General Comments

1. The Trustee Act 1956 is not fundamentally broken. There is no need for a wholesale change to the Act or to Trust Law.
2. However, the drafting of the Trustee Act 1956 is outdated and some provisions do not work well in the modern context. Accordingly, it would be desirable to redraft the Act into plain English and to update some provisions to ensure that they work appropriately in practice.
3. Codifying generally accepted aspects of Trust Law would also be useful as would allow greater flexibility and bringing further clarification to some areas.
4. TCA membership now includes the Māori Trustee. The Office of the Māori Trustee operates within its own statutory framework and encounters unique challenges in the discharge of its functions. Accordingly, submissions are made separately on behalf of the Māori Trustee from Te Ao Māori.

Responses to Questions

Q1	Have the duties of Trustees' been correctly identified? Are there any other duties that should be included?
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The duties of a Trustee appear to have been correctly identified. It would be helpful for the Trustee Act to contain a list of Trustee duties but it should be clear that the list is expressed as a summary only of a Trustee's duties and that the list is not intended to replace the common law. The list should be of a general nature.

It would be unwise to add further to the onerous duties of Trustees. The main need is to clarify existing duties. The standard list of duties has worked well for centuries and no obvious gaps have been identified.

Office of the Māori Trustee

The core duties identified, and in particular acting in good faith, remain appropriate. However, there are always going to be circumstances when it is not possible to be 'absolute'. Māori land, by its nature, is handed down through generations, and Trustees need to be able to take into account a wide range of short and long term circumstances and changing interests, requiring a wide degree of flexibility. The courts should retain the latitude to provide guidance to Trustees on a case by case basis.

There could be some benefit in having guidance on the duties of Trustees in legislation, to assist Trustees and beneficiaries to understand their relationship, but not as detailed definitions, because to give effect to the trust will always depend on the circumstances and 'doing the right thing'.

Q2	Should trust legislation contain a list of Trustees' duties?
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TCA considers that it would be useful and sensible for the generally accepted duties of Trustees to be codified in legislation in the similar manner to which that directors' duties have been codified in Companies legislation.

It would be helpful for Trustee Corporation staff to be able to refer to a clear, statutory list of Trustees' duties. An issue that TCA Members' experience regularly is that their staff will advise clients of their Trustees' duties (e.g. to provide information or not to fetter one's

discretion) but clients find this hard to accept when there is no legislation to which they can refer.

Q3 How should such duties be expressed? Should they be stated in general terms like the duties of directors in the Companies Act 1993 or in greater detail?

TCA agrees that those duties should be expressed in general terms like the duties of directors in the Companies Act 1993. TCA considers that the purpose of codification should be merely to put what are commonly accepted as being the Trustees' duties into legislation. TCA does not consider that the purpose should be to refine or change those duties at all.

However, TCA notes that the sections of the Companies Act containing directors' duties are helpful but often overlooked because they are buried in the middle of the Act. Trustees' duties need to be given greater visibility in legislation.

TCA also notes that the Companies Act directors' duties sections are also written in legal language which may be understood by company directors but not by many lay Trustees. Any legislative pronouncement of Trustees' duties should be short and to the point – more detail will simply ensure no one ever reads them.

Q4 Which duties should be treated as irreducible core duties that cannot be excluded?

TCA's view is that New Zealand should maintain consistency with the approach in other common law countries and treat only the duty to act honestly and in good faith for the benefit of the beneficiaries as an irreducible core duty. Most of the other duties mentioned in the Butler list flow from that one core duty. TCA also considers that other duties should be default duties, but the Settlor should be able to exclude those, if he or she so wishes.

Q5 Should trust legislation contain a list of beneficiaries' rights?

TCA considers this unnecessary. If the legislation codifies Trustee duties there is no need for there to also be a list of beneficiaries' rights. This is because beneficiaries' rights are the natural corollary of Trustees' duties. Adopting a dual approach of setting out beneficiary rights as well would be liable to confuse rather than clarify the situation.

Q6 Is reform of any of the Trustees' duties listed in this chapter desirable?

Yes, TCA suggests the following duties should be clarified in legislation:

- The duty to give information to beneficiaries, and
- The duty to act without being paid (unless specially authorised) needs to be revisited. As the Commission's report notes at paragraph 1.51, s 72 allows the High Court to approve a "commission or percentage". Charging on a commission basis is no longer the most common way to charge for trust services. It would be preferable for the Court to be able to authorise a "reasonable fee" for work performed.

TCA's preference would be for any major reform of Trustee duties to be conducted by the legislature rather than through the Courts.

Q7 Should provision be made in new trust legislation for Trustees to act by majority? If so, what safeguards, if any, should be provided to protect the position of a dissenting Trustee? Should a dissenting Trustee have continuing obligations to assist in giving effect to a decision by a majority of Trustees?

No. TCA considers that the default position should remain that Trustees are required to act unanimously. However, the Settlor should be able to change this default position in the terms of the trust instrument so as to provide that the Trustees may act by majority.

TCA perceives danger in having the default position that the Trustees may act by majority. As noted in the paper, this would raise difficult questions about the responsibilities of a dissenting Trustee. An example of such a difficult situation is a recent case where the dissenting Trustee was only able to escape liability for the actions of the other Trustees because the Te Ture Whenua Māori Act 1993 applied to the transaction.

Furthermore, many thousands of existing trust deeds have been drafted on the basis of current law. Any change would upset the balance intended by the Settlor.

Office of the Māori Trustee

In general the Māori Trustee is a sole responsible Trustee over a trust. While the general approach is that Trustees should be bound to act as one, Te Ture Whenua Māori Act provides for circumstances where the Trustees can act by majority, or with dissenting Trustees.

<p>Q8 Is the current law regarding access to trust information as stated in <i>Schmidt v Rosewood Trust Ltd, Foreman v Kingstone, and Re McGuire (deceased)</i> satisfactory?</p>
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It is TCA's view that whilst Potter J in *Foreman v Kingstone* provided a very good analysis of the law in this area some legislative change may be required to provide some clarity for Trustees and beneficiaries alike. The law should be clarified, so that Trustees have some guideline to refer to and in a convenient place. This could usefully include guidelines about what information needs to be released and when.

Of the options mentioned in the paper, the one that has the most appeal is option three because this provides flexibility as to what can be provided by the Trustee whilst at the same time giving a direction as to what should be provided.

As a general point, TCA also considers that cited decisions may go too far in providing that any class of beneficiary should have access to financial information about the trust, regardless of how remote the beneficiary's interest in the trust assets. TCA agrees with the principle that the beneficiaries need access to information to hold the Trustees to account. However, TCA considers that the scope of a particular beneficiary's right to information should be informed by the nature and extent of that beneficiary's interest in the trust assets. So, in cases where the beneficiary's interest is very remote or discretionary, it would be inappropriate for that beneficiary to have full access to financial information about the trust as of right.

Office of the Māori Trustee

The general approach under Te Ture Whenua Māori Act and the Māori Land Court is for active participation by beneficiaries in the decision-making processes, and generally the Māori Land Court tends to be relatively active in overseeing the operations and processes of trusts, including periodic reviews of trusts within the ambit of the Māori Land Court.

In the context of Māori land, given the number of beneficiaries per trust, and the relative "economic" size of those trusts, it would not be desirable to establish minimum disclosure requirements in legislation, but rather enable Trustees to use their judgement on the reasonableness in light of the circumstances. Further, codification could potentially limit the information provided and the Court's determination of the relative merits of information to be

provided across numerous beneficiaries.

Q9 Should the current law regarding access to trust information be enacted in new trust legislation (option one)?

Yes. As above, TCA considers that given the importance of the issue, we think it would be sensible for the guidelines about beneficiary access to information to be set out in new trust legislation.

Q10 Should the current law on access to trust information be reformed and, if so, how might it be done? Would it be possible for legislation to list certain kinds of trust information that Trustees must make available (option two)? Alternatively, could the principle in *Schmidt v Rosewood* and *Foreman v Kingstone* be combined with an indicative list of information that Trustees would normally be required to disclose (option three)?

TCA favours option three with the modification that financial information about the trust should be excluded from the list in the case of beneficiaries with a remote or discretionary interest. The guiding principle should be that the Trustees are under a duty to give sufficient information to ensure accountability but that the scope of that duty is informed by the nature of the beneficiaries' interest in the trust and entrusted to the discretion of the Trustees in the first instance.

Q11 What kinds of information might be included in such a list? Are there certain kinds of information that should always be disclosed, or never disclosed?

TCA considers that the Law Commission's list at page 34 of the issues paper is a good starting point. However, we believe that Trustees should be allowed flexibility in determining the information that needs to be disclosed to different classes of beneficiaries. We therefore do not think it would be appropriate for there to be certain kinds of information that should be classified as always needing to be disclosed, or that should never be disclosed.

In this regard, TCA is of the view that personal information should generally be kept confidential and, while rights to individual personal privacy are not absolute, they should be respected where ever possible. Furthermore, circumstances may arise from time to time which would make it undesirable to release other information. Attempting to define when/why certain information may be kept confidential is unrealistic. Trustees have to be able to exercise their discretion to make the appropriate decision in the circumstances.

Q12 Should Trustees be required, as in some jurisdictions in the United States, to disclose information regarding:

- **significant investment or management strategies;**
- **significant transactions or possible transactions under consideration;**
- **plans for distribution on termination or partial termination;**
- **resettlement proposals; and**
- **information known to be of particular significance to a beneficiary?**

Following from the above, TCA considers that this would depend on the nature and extent of the beneficiary's interest, but generally speaking, no. In relation to the specific events in question:

- Plans for possible distribution at some future time are necessarily tentative. Making

these public may create unnecessary problems with beneficiaries.

- The Commission's report, at paragraph 2.21, suggests beneficiaries could be given a right to apply to Court for a direction that Trustees must provide reasons. Trustees may well have discussed a decision carefully, have good reasons for the decision agreed on, but be unable to recall these in detail even a few days later. TCA submits that it would be undesirable to have a situation where Trustees felt obliged, as a matter of prudence and risk management, to record every informal discussion and incur legal fees for the purposes of double checking notes.

Q13 Should there be an obligation on Trustees to disclose trust information as a matter of course or should disclosure depend on a request from a beneficiary? Should Trustees be required as a matter of course to provide certain key information, for example, notifying persons of the existence of the trust, that they are beneficiaries, and the identity of the Trustees, coupled with an obligation to provide other trust information only on request?

It is TCA's view that a Trustee should only be required to provide key information to certain beneficiaries. This would allow Trustees to focus on discharging the office of Trustee rather than spending unnecessary time and incurring unnecessary costs collating information for beneficiaries who have no interest in receiving it.

TCA is also of the view that there should be the ability for the Settlor to request that certain information is withheld. There are numerous situations where the provision of information to one beneficiary may cause friction amongst the other beneficiaries or it may well be that the particular information is relevant and private to one beneficiary only. Whilst the Trustees need the information to carry out their duties, there will be valid reasons for not disclosing this. The ability to withhold information at the request of the Settlor should therefore be retained.

It should also be noted that in many cases it would not be practical to give information to every single potential beneficiary of the trust. Many standard family trusts cast the net of discretionary beneficiaries very wide. It makes no sense to require disclosure of information to all of those beneficiaries, many of whom may not end up with any vested interest in the trust assets.

Q14 Should a duty to disclose trust information be a duty that cannot be overridden or should a Settlor be able to prevent disclosure and, if so, in what circumstances?

As above, TCA considers that the Settlor should have the ability to draft the terms of the trust instrument so that the provision of information to one or more beneficiaries is limited. Settlers give their own assets to the trust and should be entitled to impose any conditions they like, including non-disclosure in specified instances, provided there is someone with power to enforce the trust (and sufficient information to do so) should be enough.

With respect to the point raised in paragraph 2.45 of the Commission's paper, it should be noted that it is the obligation to be accountable which is a core aspect of Trusteeship. Provision of information is simply a means towards that end. If the Settlor has adopted some other form of accountability eg, supervision by a named protector or some other form of reporting then this should be sufficient provided it is clear the Settlor has made an informed choice.

One solution might be, before a trust instrument is signed, the standard duties of a Trustee are explained by a qualified person and clauses which override those duties are drawn to the

Settlor's attention (section 94A(4) Protection of Personal and Property Rights Act).

Q15 Should legislation provide for differing amounts or kinds of information to be provided to different categories of beneficiaries (such as vested or discretionary beneficiaries) depending on their degree of remoteness?

Following from the above, TCA considers it appropriate for differing amounts of information to be provided to different categories of beneficiary. Many trust deeds have very wide lists of beneficiaries, many of whom are included only so that if there are no other obvious primary beneficiaries, the trust will not fail as to objects. Requiring a Trustee to give even basic information on the trust to all named beneficiaries places too much of a burden on the Trustee, not to mention the administrative costs of carrying this out. Accordingly it would be appropriate for legislation to provide, as a general principle, that less information need be given to beneficiaries with a more remote interest.

Trustees frequently withhold information because they believe the Settlers entrusted the Trustees with decision making and gave them confidential information about family members. Sadly, some beneficiaries assume the worst and jump to the conclusion the Trustees have something to hide or are trying to protect themselves. Any attempt to reinforce beneficiaries "rights" may lead to Settlers not giving Trustees all the information they need.

Q16 How should trust law deal with exemption clauses in trust instruments? Do you think regulation of exemption clauses is needed?

Members have varying views, but TCA suggests that it is consistent with the nature of the office of Trustee that liability cannot be excluded for gross negligence, fraud or wilful breach of trust.

Office of the Māori Trustee

By and large within the Māori land tenure system, the Settlers and beneficiaries can be considered to be the same people. The Māori Land Court establishes the trust orders and appoints the Trustee(s) usually at the request of, or with reference to the Māori beneficial owners, and is therefore without the tension between the Settlor and beneficiary, sometimes apparent in other trusts. In this regard, exemptions in relation to Māori land require no further regulation, as accountability is not unbalanced as between Settlers and beneficiaries.

The fundamental approach of limiting liability only where the Trustee is acting honestly and reasonably, which can be determined by the courts, provides a fair approach. Considering that Māori land trusts may have over time several Trustees, professional Trustees, or the Māori Trustee, it would not be appropriate (or fair to the beneficiaries or Trustees) for there to be changes in the duties to the beneficiaries.

As a professional Trustee, the Māori Trustee may have higher standards to meet, but should not have different requirements to meet. The nature of the Māori Trustee is such that in reality there is little choice in taking on a particular trust and very often the income is less than the cost of providing the basic service.

The ability to have insurance, or to indemnify in other ways, is not always possible to charge against the trusts in light of the characteristics of the trusts.

Q17 Is the current law too favourable to Trustees? Are beneficiaries disadvantaged by the current law?

TCA is not aware of any evidence that exemption clauses encourage poor performance by

Trustees but considers that limiting exclusion clauses so that they cannot exclude gross negligence, fraud or wilful breach of trust is consistent with the nature of the office of Trustee. TCA notes that, in addition, the Consumer Guarantees Act will apply to TCA Members as professional Trustees and imposes obligations which cannot be contracted out of.

Q18 Should fraud (dishonesty) continue to be the only type of behaviour for which liability of Trustees cannot be excluded by exemption clauses? Or should exemption clauses excluding liability for other types of behaviours, such as wilful misconduct, negligence or gross negligence, also be prohibited?

As noted above, Members have varying views, but TCA suggests that it is consistent with the nature of the office of Trustee that liability cannot be excluded for gross negligence, fraud or wilful breach of trust.

Q19 How valuable is the court's discretion under section 73 of the Act to relieve Trustees from personal liability in certain circumstances? Should such a power be retained in legislation?

TCA considers that this is a useful power and it should be retained. It is always easy to accuse Trustees of something wrong but not all Trustees have a comprehensive knowledge of trust law and practice. Therefore there should be a mechanism to provide for relief from liability for Trustees who are honestly doing their best.

Office of the Māori Trustee

The discretion under section 73 is fundamentally necessary, and should be retained. The law should not remove the ability to exclude other areas of liability, although the Māori Land Court in establishing trusts should be able to take this into account in determining the trust deed.

Q20 Do you support any of the options listed above as possible approaches to exempting Trustees from liability? Are there any other options for reform?

Members have varying views but TCA generally supports option four, the partial prohibition on exclusion of liability clauses. The prohibition should be against clauses that exclude liability for gross negligence, fraud or wilful breach of trust.

Who may be a Trustee?

Q21 Should trusts legislation specify grounds on which a person is prohibited from being appointed or continuing to hold office as a Trustee? What should those grounds be? Should they include:

- **persons who are overseas;**
- **unfit and incapable persons;**
- **minors**
- **any other grounds?**

TCA suggests that any new Trustee Act should specify the grounds on which a person is prohibited from being appointed or continuing to act as a Trustee. The list might include those categories stated at paragraph 4.25 of the paper but with some time limitations where appropriate. It may also be helpful to specify that those over the age of 18 may act as Trustee, but those below that age cannot. (At present the position is unclear, see Garrow & Kelly Law of Trusts & Trustees, 6th edition page 33).

TCA also considers that being overseas should not be an impediment to appointment as a Trustee and that the ability to remove a Trustee who has been absent from New Zealand for over 12 months be removed. With modern communications, there is now no impediment to a Trustee being able to carry out their duties whilst they are outside the country.

Office of the Māori Trustee

Te Ture Whenua Māori provides the requirements in relation to appointment and removal processes. The Māori Land Court is responsible for all appointment and removal processes within Māori land trusts. Te Ture Whenua Māori provides guidance and requirements on who may be appointed. As noted above the distinction between Settlers and beneficiaries has little impact in the appointment processes.

The ability of Trustees to remain engaged even while overseas is increasingly a reality for Māori land trusts.

Q22 Should trusts legislation continue to specify the categories of persons who may be removed from office by the continuing Trustees or by the court? What should be the grounds for this? Should it still be possible to remove a Trustee who has been absent from New Zealand for 12 months and has not delegated his or her powers?

As above.

Q23 Should trusts legislation continue to allow the court to appoint new Trustees? What should be the grounds for this?

Yes, the Courts (or some other authority - see later comments) should still continue to have the ability to appoint new Trustees. Members vary in their approach to the factors to be considered by the Court (or other authority) when making such an appointment. However, TCA suggests that the Court, in exercising its unlimited discretion to appoint a new Trustee, should have regard to the grounds set out *Mendelssohn v Centrepoint Community Growth Trust* as a non-exclusive list of factors to take into account, including:

- The Settlor's intentions;
- Neutrality between beneficiaries;
- Promotion of the purposes of the trust; and
- If the Settlor intended Trustees to be or not to be of a particular description, the Court should give considerable weight those intentions but be able to depart from them for good cause.

[NOTE: TCA Members varied in their views as the grounds that the Court should consider for appointment. TCA considers that the Settlor's intentions should be a significant factor, along with the other criteria set out in the Mendelssohn decision and accordingly suggests this approach.]

Q24 Should the principle in *Mendelssohn v Centrepoint Community Growth Trust* be incorporated in legislation?

As above, TCA suggest that the *Mendelssohn v Centrepoint Community Growth Trust* should be incorporated into legislation.

Q25 Is there an alternative to the High Court power to appoint Trustees? Should District Courts or Family Courts have this jurisdiction?

TCA notes that the High Court is an expensive forum in which to process matters dealing with Trusts. This is particularly the case where the issue is administrative, such as the appointment of a new Trustee. TCA therefore considers that an alternative, more cost effective forum would be an ideal. However, TCA has concerns about the appropriateness of putting these specialist and sometimes complex issues into the jurisdiction of Courts that often deal with very different matters (eg, the Family Court or the District Court). In the alternative, TCA suggests that there may be some merit in exploring the creation of a specialist tribunal to deal with Trust issues, such as a "Trustee ombudsman".

[NOTE: This issue of whether the High Court is always the appropriate forum for deciding Trust issues is one that relates to a number of the Commission's questions throughout the Paper, but is not directly addressed in its own right. TCA's suggested approach is set out above and is followed on similar questions throughout the paper. However, Members had varying views.]

Q26 Should the liquidator of a Corporate Trustee be able to appoint a new Trustee in the place of the company in liquidation?

Yes, provided that the power of appointment is subject to appropriate limits to ensure that the new appointee is appropriately qualified to take on the responsibilities of Trustee. There could be safe harbours, for example, the appointment of a Trustee Corporation as a replacement Trustee. This would avoid the cost and inconvenience of Court proceedings.

Replacement of incapacitated Trustee

Q27 Should the holder of an enduring power of attorney or a property manager of a Trustee who has become mentally incapable be able to appoint a replacement Trustee if no one else is able to do so?

In TCA's view that it is a sensible option for the holder of an EPA to be able to appoint a replacement Trustee if no one else is capable of doing so. In the case of an EPA, a requirement for a medical certificate (as to mental capacity of the Trustee being replaced) would be required. Perhaps if this power is given, the holder of the EPA would have to follow the principles in *Mendelsohn v Centrepont Community Growth Trust*.

Removal of Trustees

Q28 Should the court be able to remove a Trustee without necessarily having to appoint a replacement Trustee?

Yes, provided there are at least two Trustees (or one Trustee Corporation acting as Trustee). The Court should not be required to appoint a replacement if it is satisfied the remaining Trustees are suitable.

Q29 Should the statute make it clear that where three or more Trustees were originally appointed, a Trustee can be discharged without the need for a new appointment to be made? Should there be a power for Trustees to simply remove and discharge a Trustee, in limited circumstances?

In TCA's view, the Trustee Act 1956 is already clear that where there are three or more Trustees and one resigns that a replacement need not necessarily be appointed. However, it would be an improvement if it specifically provided that there must be two Trustees or one Trustee Corporation, except where the trust deed overrode this rule by stating that one Trustee is permitted.

TCA considers that it would be desirable for the default position to provide for some the Trustees to be able to remove and discharge another Trustee. Removing a Trustee may be a sure fire method of resolving situations where one Trustee is holding up the proper discharge of the Trust by being inappropriately obstructive, incompetent or refusing to discharge his or her duties. However, with the absence of specific provisions in the trust instrument, it is dangerous to put this power in the hands of Trustees. One could easily imagine a situation where two Trustees may want to proceed with an action and one does not, perhaps for very good reasons. It would not be a desirable situation if the default setting was that the two Trustees could influence the remaining Trustee by threatening to remove and discharge that Trustee. The answer is to put the power of removal in the hands of an independent, specialist body such as the suggested Trustee ombudsman.

Retirement of Trustees

Q30 Are there any problems with the operation of sections 45 and 46 of the Act and, if so, how might they be addressed?

Section 45 is not as useful as it might be because of the need to get co-Trustees consent. It should be sufficient if all Trustees are notified.

Section 46 currently requires an application to the High Court. If one is to go to that expense, one might as well apply under section 51 and ask a Judge to do the whole job. As it stands section 46 is of little practical use.

Q31 Is section 46 still needed?

No. The section 46 procedure is rarely used and could be dispensed with. As a general comment, it is unclear what 'pass his accounts before the Registrar' means. TCA suggests that there might be more appropriate persons to be reviewing and approving accounting statements than High Court Registrars.

Q32 Is there a more effective way of enabling a Trustee to retire?

Many trust deeds allow a Trustee to retire unilaterally simply by giving notice to the other Trustees. The Act could include such a provision but whoever has the power to appoint Trustees should be notified also.

Removal of appointors and protectors

Q33 Should trusts legislation enable the court to remove an appointor or protector and replace that person with someone else? On what grounds should this be possible?

In TCA's view, the Trustee Act 1956 should provide for the Court (or other appropriate authority, such as the suggested Trustee ombudsman) to be able to appoint or remove any person who acts in a fiduciary capacity or has a power to appoint or remove Trustees or beneficiaries in respect of a Trust.

Vesting of trust property on removal or discharge of Trustee

Q34 What problems, if any, exist with regard to sections 47, 52, 57, and 59 of the Act? How might the operation of these sections be improved and simplified? Does the British Columbia model provide a satisfactory basis for this? Are there other ways in which the current legislation could be made simpler and more efficient?

TCA considers that the transfer of real property or an interest in real property, from a Trustee who has lost capacity is a major issue that needs to be addressed. Currently there are varying opinions as to whether the holder of an EPA for property could transfer the interest to the new or continuing Trustees. The only certain way of transferring the interest is to make an application under section 52. Therefore, TCA considers that the suggestions in paragraphs 4.52 and 4.53 make sense.

As an additional issue, TCA submits that it would be useful for there to be some kind of administrative power to confirm the vesting of the assets of a trust in the persons who are rightfully Trustees of the trust at the relevant time. Currently, the problem is persuading share registrars, banks, insurance companies etc to accept that the assets have vested in the new Trustees by law (they often want the comfort of a decision by an official body). It is TCA's suggestion that the power to confirm vesting of assets should be exercisable by the Trustee ombudsman.

Appointment of first Trustees: acceptance and disclaimer

Q35 Should the common law rules relating to acceptance and disclaimer (rejection) of the office of Trustee be set out in legislation? If so, should a time limit be imposed, with the effect that a person would be deemed to have disclaimed the office if he or she has not indicated his or her acceptance within a certain period of time?

Yes. This would make the law clearer. Rather than inaction being treated as a deemed disclaimer, it would be safer to impose the duties and obligations of a Trustee unless the named Trustee disclaims within (say) one month of becoming aware of appointment as Trustee.

Custodian Trustees

Q36 How commonly are custodian Trustees appointed under section 50, and for what purpose? Are there any problems with the operation of section 50?

TCA is not aware of any problems with the operation of section 50. Trustee Corporations regularly act as custodian Trustees. Having a custodian Trustee avoids having to register share transfers (and other changes of ownership of assets) every time a Trustee retires or is appointed. The section works well but there may be problems with small "shell" Trustee

companies of the type referred to in the *Chester Trustees* case.

Administrative powers

Q37 Should trusts legislation confer on a Trustee the same administrative powers in relation to trust property that the Trustee would have if the Trustee were the absolute owner of the property?

In TCA's experience, most professional Trustees already have something similar in their trust deeds. However TCA can see no harm in inserting such a power into the Act. Any such statutory provisions should be able to be modified by the Settlor in the trust deed.

Office of the Māori Trustee

The approach of providing Trustees general powers (within the bounds of Trustee duties), supplemented by any express powers would in general be useful and is essentially the approach now used for many trust orders determined by the Māori Land Court.

If there are wide powers, then this would include administrative powers, and while it may be possible to provide a non-exhaustive list, it may be possible to have such a list developed by the industry, rather than legislatively.

Q38 Would it be desirable for trusts legislation to list the administrative powers of Trustees, possibly in a schedule, in clear terms? What powers should such legislation contain?

Yes. TCA considers that this is a good idea particularly for larger, more complex trusts. No matter how broad terms of general power (as above) many lawyers will be uncomfortable advising Trustees unless they can point to a specific clause. Furthermore, Trustees would be able to reference the Schedule when considering the exercise of their powers.

It would also form a useful base from which trust instruments could be drafted to ensure that Trustees were granted appropriate scope of administrative powers needed to discharge in the trust in the manner intended by the Settlor.

Power to appoint agents

Q39 Should trust legislation allow Trustees to appoint agents to perform their administrative functions along the lines of the proposed new sections 29 and 29A of the Trustee Amendment Bill 2007?

Yes. The 2007 bill, as amended by the Select Committee, contains a useful set of provisions (as outlined in paragraph 5.8 and 5.9 of the current report). This would make it much clearer when Trustees may delegate. It also ensures Trustees themselves must carry out functions that Settlers would expect Trustees to carry out themselves.

Office of the Māori Trustee

A fundamental premise for Trusteeship is that Trustees remain responsible, even where they appoint agents. While the function may be delegated, the Trustee obligations and responsibilities may not be, although this does not remove the agent's (professional) duties.

Q40 Do you agree with the changes recommended by the select committee?

Yes, as above.

Power to delegate

Q41 Are there any problems with section 31 of the Trustee Act 1956 that require attention? Is the section used in practice?

Yes. The main problem is that the section does not cover mental incapacity – only physical incapacity is covered. The section is often used for Trustees to delegate their role if going overseas or into hospital but its limits are often overlooked.

Q42 Should section 31 be expanded to allow a Trustee to delegate all trusts, powers, and discretions?

Yes. This would be useful. But there must be restrictions: Trustees should not be able to delegate a “Trustee function” (as defined in paragraph 5.9 of the Commission's report).

Q43 What safeguards, if any, should there be in relation to such a power of delegation?

It must not include “Trustee functions” as above. The other Trustees and whoever has power to appoint Trustees must be notified.

Q44 Should a Trustee be required to give written notice to co-Trustees and any person with power to appoint Trustees or, in the absence of such persons, to all adult beneficiaries with vested interests and the guardian of any minor and the manager of any incapacitated persons?

Yes, as above, the Trustees and appointers should be notified. Notifying all adult beneficiaries would be unduly onerous and impossible in some cases, such as charitable trusts which have many potential beneficiaries. If there are no co-Trustees or appointers who can be notified of a delegation, a reasonably representative sample of beneficiaries, including guardians of minors, should be notified.

Q45 Should the Trustee be required to exercise reasonable care in making such a delegation?

Yes. Trustees already have a general duty to act prudently. Reasonable care when delegating some of the Trustee's functions is simply an example of the duty to act prudently. Failure to exercise reasonable care and no considered process for selecting agents and measuring outcomes of the appointments will leave the Trustees responsible and without much of a defence should things go wrong.

Q46 Should the Trustee remain liable for the default of the delegate?

Yes, but only if the Trustee did not exercise reasonable care in making the appointment. If there is a proper documented selection process, if there are performance reviews, if the Trustee acts in good faith and if all parties who should be informed are informed, the Trustee

has a good defence. If these disclosures are not in place the Trustee may still remain responsible for any losses arising from the appointment.

Q47 Should a Trustee be able to delegate to a sole co-Trustee?

No. Not unless the co-Trustee is a Trustee Corporation. This is the current rule.

Q48 Should a sole Trustee be able to delegate? To whom should notice of the delegation be given in such a case: to adult beneficiaries with a vested interest in the trust property and any guardian or manager of an incapacitated person?

Yes. See response to question 44 and the section dealing with information to be provided to beneficiaries.

Q49 Are there any other matters regarding delegation of Trustees' powers, duties, and discretions that should be addressed?

Legislation needs to distinguish between one of several Trustees delegating some aspects of that role, and all the Trustees collectively delegating (e.g. appointing agent to manage rental property). The distinction between delegation by a Trustee and all of the Trustees collectively appointing an agent for administrative tasks is not always clear and, to avoid misinterpretation, the same rules should cover both.

Investment Power

Q 50 Are the current powers of investment in Part 2 of the Act adequate? In what respects, if any, do they require change?

The 1988 reforms generally work well.

The main problem now is the out of date income/capital rules. Most modern trusts do not split income and capital in the old way but this antiquated set of rules still constrains Trustees. It is time to revisit the utility of the income/capital distinction for trust law purposes, including with regard to the tax treatment of returns. Given the varied forms of investment in the modern context, the classification of money flows or realised or unrealised gains as income or capital is problematic and does not necessarily accord with economic reality or the tax position. Without a meaningful connection to economic reality, the question has to be asked as to whether the income / capital distinction continues to serve a useful purpose?

In our view, the income/capital distinction creates more problems than it solves. When considering a distribution, the Trustees should be simply subject to the requirement that the distribution be fair and equitable as between the classes of beneficiary. Life tenants should receive distributions calculated on the basis of this principle.

Office of the Māori Trustee

Te Ture Whenua underpins Māori land, establishing the primary role of Trustees to retain and protect the corpus land assets for future generations. The investment of other assets within a trust is a means to give effect to the objectives of the trust. The current legislative investment powers are adequate, in that they provide a broad framework and guidance, enabling Trustees to invest to meet the objectives and of the trust and to have flexibility to meet changing circumstances.

Income (like dividends) is based on the shareholding of the beneficiaries in the trust, and trusts rarely result in the distribution of capital, and almost always Trustees do not have discretion to allocate to different classes of beneficiary (ie there are not 'discretionary beneficiary' classes).

The "dividends" are distributed in line with business practices, such that very often the income may be first applied to capital maintenance and remainder in dividends.

Q51 Should trust legislation allow Trustees to follow a total return investment policy?

TCA considers that there is merit in considering allowing total return investment policies. It should be noted that allowing the adoption of a total return policy without addressing the underlying difficulties with the income/capital distinction raises a number of difficult issues.

For example:

- How should this be done to ensure fairness between income and capital beneficiaries?
- Is it appropriate to take an assumed inflation rate and boost capital assets by this amount before distributing income?
- Is it fair to deem income for a 12 month period and distribute to income beneficiaries even when was little cash income received and most of the increase in value came through capital asset revaluations?
- How should a deemed income be calculated?
- How do Trustees manage a situation where a capital asset such as equities may retain all or most of its income rather than distribute? Are they to reduce the capital portfolio or adjust by having a deemed dividend from the equity?
- If there is no company profit in a year do they still deem there to be a dividend? Do they sell shares to pay that dividend? And
- For most discretionary family trusts, the obligation to distinguish between capital and income is pointless and an unnecessary imposition.

Q52 Should trust legislation allow Trustees to invest trust assets without regard to whether the return is of an income or capital nature? Should Trustees still be required to maintain a fair balance between income and capital beneficiaries and ensure a reasonable level of income is obtained?

As noted above, TCA considers that the entire income/capital distinction should be revisited. One suggested approach is to rely on the underlying duty to act impartiality and therefore determine distributions that are fair and equitable as between all classes of beneficiaries (regardless of the classification of the gains and receipts as income or capital).

Q53 Should trust legislation provide that Trustees may, if authorised by the trust instrument, invest on a percentage trust? Should there be a requirement to value the trust assets on a regular basis and, if so, how often and on what basis should the period be set? What percentage is appropriate and how should it be set?

TCA considers that there is merit in considering allowing percentage trusts, provided that the trust deed provided for this. The question of how often the trust assets should be valued and what percentages are appropriate needs to be considered further as this raises a number of complex issues. For example the value of certain assets (particularly illiquid assets such as commercial property) can swing wildly from year to year and from economic period to

economic period. The question is how any percentage trust rules in legislation should deal with this? Perhaps it would be better to leave such matters to the trust deed or the Trustee's discretion.

Office of the Māori Trustee

Trusts under Te Ture whenua Māori Act operate in some ways similarly to businesses, seeking to preserve the capital base, as well as provide income to shareholders. This means that managing the capital and income follows business practices, including attributing income to the capital, or to recover expenditure.

The focus is for most Māori land trusts not on 'a balanced portfolio' but rather primarily on the long term preservation of the land for future generations and meeting the income requirements to manage liabilities without recourse to the capital (which is generally not liquid).

Q54 Should trust legislation provide that Trustees may, if authorised by the trust instrument, allocate or apportion receipts and outgoings between income and capital accounts without regard to the legal categorisation of those receipts and outgoings (a discretionary allocation trust)?

As noted above, TCA considers that the entire income/capital distinction should be revisited. It follows that Trustees should have the discretion deal with receipts and outgoings without the need to refer to income/capital accounts for trust purposes.

Apportionment of outgoings between capital and income

Q55 Should trusts legislation allow Trustees to apportion expenses between income and capital accounts or charge an outgoing to one or the other? Should the power be subject to the Trustee being satisfied that doing so is just and equitable, in accordance with normal business practice, and in the best interests of beneficiaries?

As above.

Q56 Should trusts legislation allow Trustees to transfer funds between capital and income to recover expenditure previously charged to one or the other?

The British Columbia draft legislation provides a good example of how this could be done.

Q57 Should trusts legislation enable a Trustee to deduct an amount from income derived from trust property subject to depreciation and add the amount to capital?

As noted above, TCA considers that the income/capital distinction should be revisited. TCA's suggested approach is that Trustees must act in a way that is fair and even handed to all beneficiaries. This would deal with the situation where there are life tenants and remaindermen.

Delegation of investment decision-making

Q58 Should trust legislation allow Trustees to delegate their duties and powers in relation to investment of trust property? What safeguards, if any, should there be in relation to such delegation? Should the legislation prescribe the classes of organisation or people that can be delegated investment decision-making (such as financial advisers, banks etc)?

Yes. The reality of the modern investment world is that Trustees need to be able to delegate to investment managers. Markets can move quite swiftly and Trustees cannot be expected to devote sufficient time every day to monitor the markets. Therefore, TCA strongly believes that Trustees should be able to delegate investment management.

TCA suggest that the main safeguard should be the obligation of the Trustees to act prudently and in good faith in selecting investment managers and monitoring their performance.

TCA considers that it would be unwise to be too prescriptive about who Trustees can delegate to. The investment world changes fairly frequently and the legislation is not updated all that often. This may be something that could be covered by way of an example in the legislation.

Office of the Māori Trustee

The beneficiaries look to the Trustees to manage the assets and the overall administration of the trust. A prescriptive approach to investment is not required, but rather ensuring that Trustees exercise a governance role (not necessarily a management role) to investment.

For trusts under the aegis of the Māori Trustee, the responsible Trustees are not responsible for the investment decision of funds held with the Māori Trustee's Common Fund.

Q59 Should a Trustee remain liable for the actions and decisions of a person to whom the duties and functions of investment have been delegated? Could a Trustee be liable if the decision to appoint an investment manager was not made in good faith or the Trustee failed to monitor the investment manager's performance?

Generally speaking, yes. However, TCA considers that the test must be whether the Trustee acted prudently. Failure to appoint in good faith and failure to monitor performance sufficiently would certainly be examples of lack of prudence.

It should be possible for Settlers to contract out of these requirements if necessary. For example a Settlor may wish Trustees to continue with a particular type of investment or to rely on a particular investment advisor.

Q60 Are there any other matters relating to Trustee investment that should be considered?

The Commission's paper covers most of the issues that need to be considered in relation to Trustee investments. The question of whether a professional such as a lawyer or accountant is covered by s13C has been mentioned. This needs to be clarified. Trustees must be cognisant that fund managers might have little knowledge of trust matters and invest on a total return basis. This means it is never right to rely entirely upon the fund managers for decisions on asset allocation and maintaining equity between income and capital.

Business related powers

Q61 Should trusts legislation confer power on Trustees of all trusts, whether estate or inter vivos trusts, to carry on business? If so, what ancillary powers might also be desirable?

Yes, TCA strongly believes that Trustees should have all the powers of a natural person, which would include full powers to carry on a business. We do not think that any limitation on this power is necessary and it will always be subject to the Trustees' discharge of their duties. The main ancillary power would be to charge losses to capital or income.

Office of the Māori Trustee

The beneficiaries look to the Trustees to manage the assets and the overall administration of the trust. A prescriptive approach to investment is not required, but rather ensuring that Trustees exercise a governance role (not necessarily a management role) to investment. For trusts under the aegis of the Māori Trustee, the responsible Trustees are not responsible for the investment decision of funds held with the Māori Trustee's Common Fund.

Q62 Is it necessary to retain an express power to acquire shares in co-operative companies (section 33)?

It is probably needed in order to avoid doubt. This is really an ancillary administrative power. If the Act were to have an 'all powers' provision, a Schedule could list matters such as this: as examples and 'without limiting the wide power of Trustees' and simply in order to avoid any doubt.

Q63 If the power to carry on business were to remain limited to estate trusts, should any changes be made to section 32 of the Act?

Section 32 should be revoked. Trustees should have full power to carry on business, subject to the discharge of their duties.

Q64 Should Trustees continue to have express power to convert a business into a company? Is section 33 adequate for this purpose?

Yes. Ideally a general power of competence would cover this but it should be covered briefly in a list of specific powers.

Q65 Should the powers in section 42A (establishment of capital reserve), section 42B (application of capital of business to income beneficiary), section 42C (exercising powers under section 42A and 42B), and section 42D (adoption of accounting periods) continue?

All of these sections are useful in making it clear that Trustees have necessary and appropriate powers to deal with assets. This could be refined by including a general provision requiring Trustees to follow usual accounting treatment and normal business practices. However it might also be helpful (either by way of example or as a further clarification of the general principle) to specify such matters as adoption of accounting periods, capital reserves and so on.

Q66 Are there any other matters relating to these provisions that require attention?

It would be helpful if the act provided that accounts are to be deemed conclusive as between Trustees and beneficiaries (and as between different classes of beneficiaries) if prepared by a chartered accountant or checked and certified by a chartered accountant.

Liability for actions of a co-Trustee

Q67 Are there any issues or problems with section 38 of the Trustee Act? How can this provision be improved?

The section largely clarifies the common law rules relating to indemnity of Trustees. It is useful in clarifying the law.

One point that is not entirely clear is whether the words “a Trustee may reimburse himself or pay or discharge out of the trust property all expenses reasonably incurred...” mean that any one of the Trustees may unilaterally recoup expenditure incurred, for example legal fees in commencing proceedings against the other Trustees.

There are good reasons for saying that legal expenses in particular should be able to be recovered from the trust fund since ensuring Trustees act on legal advice and the resolution of disputes are in the best interests of any trust. See for example *Macedonian Orthodox Community Church St Petka Incorporated v His Eminence Petar The Diocesan Bishop of The Macedonian Orthodox Diocese of Australia and New Zealand* [2008] HCA 41 (4 September 2008).

Power to appoint advisory Trustees

Q68 Are any changes needed to section 49?

The substance of section 49 should be retained, but its language modernised.

Advisory Trustees are widely used by Trustee corporations. They are very useful in enabling family members or trust advisors to be involved and oversee the administration of the estate or trust while also allowing the Trustee Corporation to get on with the day to day administration work, without having to get multiple signatures for routine documents.

We do not believe that the way the section is currently worded has any impact on what we see as the Trustees fundamental core duty to act honestly and in good faith for the benefit of the beneficiaries. The responsible Trustee is not obliged to follow the advice of the advisory Trustee and if it feels that following the advice could mean a breach of trust or exposes them to liability they can choose to ignore it or can apply to the court for directions. The advice from an advisory Trustee can be a very useful in that they generally have a closer relationship to the beneficiaries than the responsible Trustee and therefore are better able to give advice in relation to them. We do not agree with the select committee's recommendation that the responsible Trustee should be liable for following the advice of the advisory Trustee in the circumstance mentioned. To do so would, in our view, mean that the responsible Trustee is less likely to follow any advice from an advisory Trustee and accordingly would make the section redundant.

Office of the Māori Trustee

The Māori Trustee very often has the benefit of advisory Trustees who are beneficiaries of that particular trust, and very often are key people in the community of beneficiaries. The

Māori Trustee places emphasis on their knowledge of the land and the aspirations of the beneficiaries, but remains responsible. The Māori Trustee would not support the requirement to go to court where there was conflicting views.

A Trustee should remain responsible for following good process and judgement, seeking judicial guidance as a last resort.

Q69 Do you agree with the changes to the section proposed by the Law Commission and included in the Trustee Amendment Bill?

The changes proposed by the Law Commission in its paper “Some problems in the law of trusts” went too far in trying to impose liability. The result could easily have been that Trustees no longer relied on advisory Trustees and this useful mechanism fell into disuse. Despite appearances to the contrary, the section never really absolved a Trustee from all liability if the Trustee was acting in a manner known to be improper.

Q70 Do you agree with the position recommended by the select committee that the responsible Trustee should not be under an obligation to apply to the court but should still be liable for following the advice of an advisory Trustee if the responsible Trustee would have been liable for the action he or she took in the absence of any such advice?

Responsible Trustees are much more inclined to listen to advisory Trustees because they can reduce personal liability in this way. Without this provision, advisory Trustees may cease to have any value. TCA suggests that a better provision would be that the responsible Trustee is only liable if the responsible Trustee acted, in reliance on the advisory Trustee’s advice, in a manner the responsible Trustee knew (or ought reasonably to have known) to be wrong.

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

Q71 Are there problems with the operation of sections 40, 41, and 41A of the Act?

We do not consider that there are any problems with the intent of sections 40, 41 and 41A of the Act.

However, these sections should be updated (along with the rest of the Act) so that they are in plain English. They also need to be adjusted to make them relevant to the modern context particularly so that the restrictions which those provisions place on the application of trust property are removed. We think that the duties of the Trustees provide an appropriate level of protection without the need for complex statutory provisions imposing anachronistic restrictions of questionable efficacy, given the ability to contract out of those provisions in the trust instrument.

Guardianship now ceases at age 18. Once a beneficiary has reached 18, Trustees should be accounting to the beneficiary, not a parent or guardian.

Q72 Do the terms maintenance, education, advancement, and benefit provide Trustees with sufficient guidance? Is more specificity required in this regard? Would examples help?

These terms do not cause problems for professional Trustees. However, they are terms of legal art and therefore difficult to understand for lay Trustees. TCA favours having these provisions redrafted so that the concepts are expressed in plain English. Redrafting may require the use of more specific language and should be careful not to change the underlying concepts as determined by case law but merely to express the existing concepts in plain English.

TCA can also see some merit in there being examples included in the Act so that Trustees who might not have as good a grasp of the law as a professional Trustee for example, can see immediately in the section the types of situations that distributions can be made.

Q73 Is it appropriate to retain the requirement in section 40 to accumulate income for an infant beneficiary until he or she reaches 20 or marries or enters into a civil union under that age? Is 20 still an appropriate age or should it be reduced to 18?

TCA does not consider that there should be any default limits on discretionary payments to or for the benefit of minors. Where a Settlor desires such limits, he or she is free to provide for them in the terms of the particular trust instrument. In our view, the restrictions on payments imposed by sections 40 and 41 are out-dated and unnecessarily fetter the discretion of Trustees of trusts where the trust deed does not explicitly exclude their operation.

TCA supports reducing the age limit to 18 years.

Q74 Should the monetary limits in section 41 be removed or made subject to a legislative mechanism that ensures continuous updating?

TCA considers that the monetary limits in section 41 should be removed entirely. This will mean that the section will be consistent with the powers of capital distribution contained in most modern trust deeds. The imposition of the current monetary limits serves no useful purpose.

Q75 Would the provisions benefit from being rewritten in more accessible language?

Yes. The maintenance and advancement powers in s 41 are core discretions of Trustees and we consider lay Trustees often overlook this because of a lack of understanding. While other provisions do not appear to have been misunderstood to the same extent they could certainly use some tidying up.

Applications for directions

Q76 Does section 66 of the Trustee Act 1956 operate satisfactorily?

No. Some further clarity around how the uses for which section 66 can be deployed would be useful.

Two cases are of particular concern: *Cockle v Roydhouse* (19 December 2003) HC Ak CP 438/SD02, Nicholson J and *New Zealand Guardian Trust Co v Hewitt* (19 May 1998) HC Ham M314/96, Fisher J. In other cases (not involving professional Trustees) the Courts have happily provided guidance to Trustees even on matters which could have been answered simply by obtaining a suitable legal opinion. There seems to be a suggestion, in the two

cases mentioned, that those who are paid for acting as Trustee have lesser rights to apply under section 66. There is no logic for such a position. We recommend clarification so that all Trustees (whether paid or professional or not) are entitled to apply to the Court for directions and guidance.

We also suggest the section could provide that the Trustees may be obliged to meet the costs of the application under section 66 if the Trustees have acted unreasonably or have failed to obtain proper advice.

Q77	Is the scope of the section clear or would there be benefit in incorporating some of the key common law principles in a new provision?
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Except as noted above, the section is clear. It is not necessary to incorporate any common law principles.

Trustee Corporations Association of New Zealand Inc
31 August 2011