The background is a dark blue field filled with a pattern of interlocking puzzle pieces. One puzzle piece in the center is a vibrant lime green and contains the main title text. Another puzzle piece in the bottom right corner is white and contains the author's name and firm name.

How to review
a trust deed
with the Trusts Act
2019 in mind

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Purpose of the Trusts Act

What needs to be thought about when reviewing a trust deed? It is important to keep a review real and to avoid significant technicality. The purpose of the Trusts Act, as stated is to:

- Set out the core principles of law relating to express trusts
- Provide default administrative rules
- Provide mechanisms to resolve trust-related disputes
- Make the law of trusts more accessible

Express trust is defined in the Trusts Act and includes a discretionary family trust.



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Trust deed

It is important to locate the original trust deed and ensure that the deed is fully signed, dated and that the trustees hold any variations of trust.

See s 45 and 46 of the Trusts Act, which provides that each trustee must keep core documents as set out in s 45, and that where there is more than one trustee each trustee must hold the trust deed and any variations and that at least one trustee must hold all of the core trust documents.



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Supporting documents

In addition to the trust deed, when reviewing a trust, other relevant documents can include:

- Memorandum of wishes
- The settlor's will
- Title documents
- Deeds of variation
- Trustee resolutions
- Deeds of appointment and retirement
- Gifting documents
- Schedules of assets and liabilities
- Deeds of nomination



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Trust settlement

Trust deeds commonly provide that the settlor or settlors “... have paid into the joint names of the Trustees the sum of ten dollars be held by the Trustees upon the trusts, and with and subject to the powers and discretions, set out or implied in this deed.”

It is important to confirm the initial settlement. The Trusts Act provides at s 15(2) that a trust commences “... when a trustee holds property of the trust.”



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Trustees

Confirm the identity of the current trustees. This is not always as straightforward as it might seem. Reconcile the trustees as named in the trust deed against title deeds, deeds of appointment and retirement and bank authorities.

Review who the trustees are in light of requirements for independence (if any), terms of appointment and consider whether subsequent appointments and retirements are valid.

Are minimum or maximum number requirements met?

See Jasmine Trustees Limited v Wells & Hind



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Adviser obligations


The Trusts Act provides that an adviser must take reasonable steps to alert settlor to the meaning and effect of any modification or exclusion of a default duty and to the liability exclusion or indemnity clauses.

A person is an adviser if the person advises on prepares the terms of the trust. A trust is will not be invalid because of a failure to comply with s 39 or 43.

Where an adviser does not meet the obligations imposed by s 43, if the adviser is a trustee, indemnity and exclusion of liability clauses will have no effect with respect to the adviser.



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Definition considerations

The Trusts Act introduces new terms such as:

- Express trust (s 12, 13 and 15)
- Power of appointment (s 9)
- Special trust adviser (s 74 to 76)
- Person with the power to remove trustees (s 92(1))
- Person with the power to appoint trustees (s 92 (2))
- Maximum duration (s 16)
- Mandatory duties (s 22 to 27)
- Default duties (s 28 to 39)



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Maximum duration

When the Trusts Act comes into full force and effect on 30 January 2021 the Perpetuities Act will be abolished and there will be a new maximum duration of 125 years.

If a trust does have a date or mechanism for determining the date of the final distribution, which is usually the case, the trust will continue until the earlier of that date or the maximum duration.

Most trust deeds currently allow for the appointment of an earlier vesting date, but not a later one.

Certain trusts such as charitable trusts can still continue indefinitely.
See s 16(6).



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Beneficiary considerations

When reviewing the class of beneficiaries matters to take into consideration include:

- Are the beneficiaries correctly identified?
- Is there a ranking of beneficiaries
- Who was intended to benefit. See ***Judd v Cowley***, where the settlor was not a beneficiary despite her expectations and how the trustees acted
- Are the final beneficiaries clear – named vs default
- Can the classes of beneficiaries be amended – what legal ramifications might flow from this?



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Presumption - basic trust information

There is a presumption in s 51 of the Trusts Act that a trustee must make basic trust information available to every beneficiary (or their representative). However, before giving the information, the trustee must consider the factors set out in s 53.

If the trustee reasonably considers (after taking into account those factors) that the information should not be made available to every beneficiary then the presumption does not apply and the trustee may decide to withhold “some or all of the basic trust information from 1 or more particular beneficiaries or classes of beneficiaries”



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Basic trust information

51 Presumption that trustee must notify basic trust information ...


- (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.
- (4) A trustee is required to consider at reasonable intervals whether the trustee should be making the basic trust information available under this section.



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Procedure for deciding if the presumption in s 53 applies

- 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 beneficiary in particular would be given information:
- d) the age and circumstances of the beneficiary:
- e) the age and circumstances of the other beneficiaries of the trust:



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Procedure for deciding if the presumption in s 53 applies ...

- f) the effect on the beneficiary of giving the information:
- g) the effect on the trustees, other beneficiaries of the trust, and third parties of giving the information:
- h) 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:
- f) 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:



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Procedure for deciding if the presumption in s 53 applies ...

- j) 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):
- k) the practicality of giving some or all of the information to the beneficiary in redacted form:
- l) if a beneficiary has requested information, the nature and context of the request:
- m) any other factor that the trustee reasonably considers is relevant to determining whether the presumption applies.



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Procedure for deciding if the presumption in s 53 applies ...

The trustees are required to regularly consider whether the trustee should be making the basic trust information available under this section. See s 51(3).

There is a procedure in s 54 to adopt if information is not given to any beneficiaries.

Section 55 provides that beneficiaries can be required to “pay the reasonable cost of providing additional information.” Payment can be required before the information is provided.



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Procedure for deciding if the presumption in s 53 applies ...

Practically, how will trustees make these decisions?

Consider self-benefit clauses.

Is it sufficient for the trustee / beneficiaries to be informed?



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Retirement

The Trusts Act provides how a trustee is to retire. See s 101. Unlike the current Trustee Act 1956, s 101 of the Trusts Act does not specify the requirement for at least 2 “individuals” to act as trustees as a requirement of discharge.

This addresses the issue that has the potential to arise when a trustee retires leaving for example one natural person trustee and one corporate trustee. See ***Jasmine Trustees Ltd v Wells & Hind***. Also see ***CDT 12 Limited v Millar*** and ***Oldfield v Oldfield***.

Consider against the terms of the trust. Also see ***Chan Chi Cheong (trustee of the will of the testator) v Chan Yun Cheong (trustee of the will of the testator)***



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Exemption and indemnity clauses

40 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**.

41 Restriction on trustee indemnity clauses

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



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Exemption and indemnity clauses

42 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 prohibited by section 40 or 41.

This means that trust deeds are to be read subject to the provisions of the Trusts Act 2019.



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Mandatory duties

It is important to review current deeds in light of the mandatory duties proscribed in the Trust Act. These duties, which cannot be contracted out of, or otherwise negated are

- know the terms of the trust (s 23)
- act in accordance with the terms of the trust (s 24)
- act honestly and in good faith (s 25)
- act for benefit of beneficiaries or to further permitted purpose of trust (s 26), and
- exercise powers for proper purpose (s 27).

See *Enright v Enright*



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Default duties

The default duties, will apply unless modified. It is important to consider whether these duties are adequately modified (if required to be) by current trust deeds. The default duties are the duty:

- of general care (s 29)
- to invest prudently (s 30)
- not to exercise power for own benefit (s 31)
- to consider exercise of power (s 32)
- not to bind or commit trustees to future exercise of discretion (s 33)
- to avoid conflict of interest (s 34)
- of impartiality (s 35)
- not to profit (s 36)
- to act for no reward (s 37)
- to act unanimously (s 38)




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Duty to invest prudently

Investment discretion: In exercising their powers of investment the Trustees may acquire any property, or retain or deal with any property which from time to time comprises the whole or part of the Trust Fund, in the exercise of the powers and discretions vested in the Trustees by law or by this deed, notwithstanding that any act or omission by the Trustees in the exercise of those powers and discretions would be, or could be, contrary to the principles governing the investment of trust funds set out in section 13E of the Trustee Act 1956; this clause being a “contrary intention” as that phrase is defined by section 13D of that Act.



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Resettlement


Does the trust deed have a power of resettlement?

If so, is it fit for purpose?

Are there limitations.



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Decision mechanisms

- Self-benefit
- Unanimity
 - Specific considerations
 - Does the deed have any internal conflict regarding unanimity?
 - Record of decisions where a trustee benefits
- Distribution decisions:
 - Timing
 - Capitalisation
 - Current accounts
 - Tax implications



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Rectification / Variation

For many trustees variation will be a live matter if there is a suitable power, and in more extreme cases, variation. See for example ***Judd v Cowley***: “In my view there is ample evidence to support the inference that the original draft Deed did not reflect Ms Reid’s intentions at the time the Trust was settled and that rectification should be ordered. ... First, and plainly the most significant, is the failure to include Ms Reid as a discretionary beneficiary. The effect of this is that she is unable to benefit from the Trust.

... On the evidence it is plain to me that Ms Reid’s original solicitors failed to record her intentions in the Deed. This omission was not rectified by the first tranche of changes.”

Perhaps most tellingly is a margin note made by Ms Reid on a copy of the trust deed: “What the hell does all this mean?”



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Questions

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