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Welcome to the new edition of the Bulletin, which we are now sending electronically.

**In This Issue:**

- > Are Trustees Financial Service Providers?
- > 60% of trustees plan re-stand in elections
- > Ward v. Ward – Which Trusts are likely to get the judicial chop?
- > Rise in KiwiSavers cashing up due to hardship

## **Are Trustees Financial Service Providers?**

An opinion piece By Peter Marriott

Association members should be aware of two important pieces of legislation which may cover their activities and possibly prevent them from engaging in trustee business from later on this year. The statutes in question are the Financial Service Providers (Registration and Dispute Resolution) Act 2008 and the Financial Advisers Act 2008. Despite these Acts having a huge impact on the financial services industry, both the industry and the general public seem largely unfamiliar with them, in part because Government has not actively promoted the effect of them..

The Financial Service Providers (Registration and Dispute Resolution) Act 2008 requires all Financial Service Providers (FSPs) to be registered. Financial Services are defined by Section 5 (with exclusions in Section 7) to include anybody:

- (a) keeping, investing, administering, or managing money, securities, or investment portfolios on behalf of other persons"; ...
- (b) participating in the offer of a security to the public as ... a trustee, a unit trustee, a superannuation trustee ...

But excluding (section 7):

- (c) a lawyer in the course of that person's professional practice as a lawyer if the financial service is a necessary incident of legal practice;
- (d) a chartered accountant in the course of that person's professional practice as a chartered accountant if the financial service is a necessary incident of professional accounting practice;
- (e) a tax agent in the course of that person's professional practice as a tax agent if the financial service is a necessary incident of tax practice;
- (f) a trustee of a family trust in respect of financial services provided by the trustee to the beneficiaries of that trust ..."

Section 6 also states that being "in the business of providing a financial service means carrying on a business of providing or offering to provide a financial service (whether or not the business is the provider's only business or the provider's principal business)".

Section 48(1) provides that "Every financial service provider must be a member of either an approved dispute resolution scheme, or the reserve scheme, in respect of a financial service provided to the public".

On the face of it, trustees are included by description (Section 5(d)) and by name (Section 5(i)). Certainly Workplace Savings New Zealand considers all superannuation fund trustees are caught, as they have sought specific exclusion for employers who might also be caught.

The exclusions for lawyers accountants and tax agents may appear helpful, but the phrase "necessary

incident” is there for a reason. As certain trustees are specifically named it seem unlikely that persons acting in that capacity could claim it was necessarily incident to legal, accounting or tax advice, even if they set up the trust.

The only exclusion of some comfort is that for trustees of family trusts are excluded, but here “family trusts” has the meaning ascribed to it under the Income Tax Act – it is confined to trusts purely for charitable purposes or beneficiaries who linked to the settler by “natural love and affection”. This has always been considered fairly confined.

The good news is that compliance is not so difficult, the only requirements being to pass a criminal record check and to be a member of an approved dispute resolution scheme. No such dispute resolution schemes are presently open to trustees but Financial Services Complaints Limited ([www.fscl.org.nz](http://www.fscl.org.nz)) has approached the NZTA to offer the service to trustees. The Government will set up a default facility for all those who cannot choose a provider, but the fees will still be payable and (in order to foster finance industry led solutions) they will be no cheaper than private schemes.

The Financial Advisers Act could be more onerous. If trustees are construed to offer a “financial adviser service” under Section 10, substantial regulation applies. “Financial adviser service” includes (a) giving financial advice, (b) making an investment transaction, or (c) providing a financial planning service. Some trustees may well be caught.

Again there are exclusions for lawyers, accountants and tax advisers with the words “if the advice or transaction is a necessary incident” used again. Plus trustees are excluded only in relation to securities (under the Securities Act) and Unit Titles.

The new adviser rules applying seem geared towards financial planners. There are measures of competence, codes of conduct overseen by a Commissioner of Financial Advisers, requirements for disclosure and disciplinary procedures administered by the Securities Commission all overlaid on top of the requirements of the Financial Service Providers (Registration and Dispute Resolution) Act.

There are also fees applying under both Acts.

And there are substantial and ongoing penalties for conducting business if not registered or authorised under the provisions of the legislation.

Professional trustees may consider this legislation worth a second look. The fact that Government has been so quiet upon the implementation of this new regime should not lull members of the association into believing that those laws have no application here. The legal maxim is “ignorance of the law is no excuse”. Failure to comply could have major repercussions.

## **60% of trustees plan re-stand in elections**

Friday, 12 February 2010, 10:38 am

Press Release: New Zealand School Trustees Association

60% of trustees planning to re-stand in school trustee triennial elections

60% of school trustees are planning to re-stand in the 2010 triennial trustee elections, with a further 10% yet to make up their mind says the President of the New Zealand School Trustees Association.

This is a very encouraging result says Lorraine Kerr, and at this point in time, indicates that the percentage re-standing may be higher than in previous years, which has traditionally run at round 50%.

NZSTA, which is undertaking the national promotion and school support for the 2010 triennial elections, has recently surveyed almost 500 boards to assess the current state of play leading up the launch of the national election campaign in late February.

Those trustees deciding to re-stand identified a number of reasons why they have made this decision:- 75% stated they feel they have something to offer, 59% stated they enjoy the experience while others indicated they are re-standing to provide continuity between board (61%) or have a child(ren) at school.(58%). (note some respondents made multiple choices).

For those 30% that will not be re-standing, 63% identified children leaving/left the school as the reason for not standing, while 42% thought it was time for some "new blood". (note some respondents choose both reasons).

Overall, 93% of trustees described their experience as a school trustee as very positive (58%) or positive (35%) while only 1.4% had negative feelings about the trustees experience.

92% of trustees surveyed considered that the time on the board had benefited them in terms of personal growth, with many respondents identifying they had gained key skills in such as leadership, in understanding the education system, working with school staff, strategic planning, finance, property, as so on. Strong leadership and governance, focus on student achievement, better school environment, a catalyst for change and representing the school community were some of the common areas where boards thought they had benefited the school.

This first survey paints a very positive picture of value of trusteeship in NZ, both for the school and students, and for trusteeship itself, says Lorraine Kerr, and provides a positive outlook for the triennial election process in May 2010.

I am also delighted that the vast majority of boards of trustees (92% of respondents) have confirmed that the boards policy framework and documentation is in place for the new incoming board says Ms Kerr, as this makes for an easier transition for new newly elected board members.

The common date for the 2010 triennial trustee elections is set for 7 May 2010.

[To read the original press release click here](#)

## **Ward v. Ward – Which Trusts are likely to get the judicial chop?**

By Anthony Grant

I wrote recently about the Supreme Court's decision in *Ward v Ward* [2009] NZSC 125. In this article, I refer to some of the lessons Trust lawyers can learn from it.

Trusts that are "premised on the continuance of [a specific] marriage" that has failed (at [15]) are now prime candidates for modification under section 182 of the Family Proceedings Act 1980. On the other hand, "if the dissolution [of a marriage] has not affected the implementation of the applicant's previous expectations, there will be no call for an order" (at [25]).

Spouses who jointly settle a Trust with relationship property for their intended benefit can therefore expect to see the Trust modified if their relationship ends.

What Trusts are less vulnerable to modification?

1. Trusts that are established by parents for their children at a time when no specific marriage for any of the children is in contemplation.
2. Trusts whose beneficiaries extend well beyond the immediate members of a family.
3. Trusts that are not "premised on the continuance of [a specific] marriage".
4. Trusts that are not "nuptial" settlements, ie they were not entered into in contemplation of a particular marriage or during the course of a particular marriage.

Some of these principles can be seen from *Kidd v Van den Brink & Anor* (21 December 2009, High Court, Auckland CIV 2009-404-4694), a decision of Justices Harrison and Winkelmann. The decision was released shortly after the Supreme Court delivered its judgment in *Ward v Ward*.

In 1990, a father established a Trust for the benefit of his five children, their future spouses, their children, and so on. The Trust was settled when none of the children were married (they were aged between 16 and 22 years at the time).

One of the children subsequently married Ms Kidd, and much of the material benefits that were brought to the marriage came from the Trust. When the marriage ended, there was little relationship property to be divided. The wife sought an order that the father's Trust should be modified to her benefit.

The Court's first task was to determine if the Trust was a nuptial settlement. If it wasn't, section 182 had no role to play. The Court said that a nuptial settlement "will be primarily directed towards and provide for the benefit of the particular family unit; that is, the husband and wife and their children. The assumption of the

existence of the marriage and its continuation is the qualifying nuptial characteristic" (at [28]).

It held that, in accordance with this definition, the father's Trust was not a nuptial settlement. Instead:

"It is an orthodox discretionary trust created for the benefit of two distinct classes of objects. One, the final beneficiaries, [who are] confined to the settlor's children, who now number five. The other, the discretionary beneficiaries, encompasses a much wider group including the final beneficiaries, but extending to their children or spouses, family trusts, family companies and charitable trusts" (at [31]).

"The trust was not premised upon the existence or continuation of this marriage... The trust's purpose was to provide for a range of individuals who might include [the applicant] wife while [she] remained in the state of marriage" (at [33]).

The Court gave a second reason for not invoking section 182:

"Furthermore, an order under section 182 would affect the rights or interests of third parties... Section 182 does not contemplate interference with the rights enjoyed by nominated beneficiaries other than the members of the immediate family unit created by this marriage" (at [34]).

Settlors who wish to establish Trusts that will not later be modified by a Court should therefore:

- (If possible) establish the Trust before a particular marriage is contemplated.
- Record in a contemporaneous document the function of the Trust and how – if it be true – it is not premised on the existence of a specific marriage.

What about creditor-protection Trusts?

The extent to which these Trusts are liable to modification following the end of a relationship will depend upon whether they were "premiered on the continuation of [a specific] marriage". This test is not easy to apply to such Trusts. Are the assets being sheltered for the benefit of the spouses, in anticipation that they will be able to gain the benefit of them? Or are the assets being sheltered for the benefit of one of them, or for their children? If there is contemporary documentation to record that the assets are being sheltered for the benefit of children and other wider members of a family, it may be more difficult for section 182 to be invoked.

Does it make a difference if the Trust assets contain property that was originally separate property? It depends. If the trustees have a practice of distributing such property to spouses it may indicate that the Trust was premised on the existence of a specific marriage. If, on the other hand, they have only been willing to lend it, this may show that it was intended to be used multigenerationally.

These observations illustrate how settlors need to add a new level of sophistication when they settle Trusts that might be categorised as nuptial settlements, since actions can be taken that will reduce the prospect of the Courts later rewriting the Trusts under section 182.

It is inevitable with a law that is structured like this that many lawyers and accountants will face claims in negligence for setting up Trusts that were made more vulnerable to attack than they might otherwise have been.

[To read the original document on the NZ Lawyer Magazine website click here](#)

## **Rise in KiwiSavers cashing up due to hardship**

Thursday Feb 11, 2010

Concerns have been raised over people trying to "game" the KiwiSaver market by switching providers to get their money out on financial hardship grounds.

The number of people trying to cash in both their and their employers' contribution has swelled with rising unemployment.

The rules governing financial hardship claims were set down by the Government but it is up to individual scheme trustees to make a final call and some fear the discretion has led to some savers changing providers to try to get their money out.

Bryan Connor, general manager of corporate trustees for New Zealand Guardian Trust, the trustee for several KiwiSaver schemes, said anecdotal evidence had trustees worried.

"The rules around hardship should be pretty tight. But we have certainly heard stories where investors will

switch from one provider to another to get their money out."

Connor said he had raised the problem with the industry and the Trustee Corporations Association had come up with its own guidelines to ensure consistency across its members.

"Our providers are quite concerned they might be losing money to another provider simply so the individual can take money out."

KiwiSaver is big business for the fund management industry, whose earnings have been battered in the global financial crisis.

Government Actuary David Benison, who is in charge of monitoring KiwiSaver funds, said he had also heard anecdotal evidence of the problem but said savers should realise the financial hardship policy was not there to help with short-term issues.

"People have got to realise this is a retirement savings scheme."

Figures from the actuary's annual report show 858 people pulled \$1.29 million out of their KiwiSaver accounts in the year to March 31 on the grounds of financial hardship.

But since then applications appear to have increased. A spokeswoman for ING, one of the largest providers, said that from January to July last year requests for financial hardship applications had tripled and they had stayed at the same level since then.

Typically those applying were blue-collar workers with families where one of the parents had lost their job, she said.

Trustee Corporations Association chairman Clinton Hardy said trustees were having to make some hard calls over KiwiSaver.

Some savers had wanted to get their money out to fly home to Samoa after losing a relative in the tsunami. But Hardy said that was not enough of a reason because KiwiSaver was put in place to be a long-term savings scheme for retirement.

"We had to be quite firm there."

#### FINANCIAL HARDSHIP

\* 858 people made claims in the year to March 31, 2009.

\* \$1.29m withdrawn from KiwiSaver accounts.

\* \$1505 per person (on average).

Source: The Government Actuary

[To read the article on the NZ Herald website click here](#)

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