

# Submissions by Ian & Christine Boniface on the proposed changes to Trust Deed of the King Country Electric Power Trust

*“Only property owners can be beneficiaries of the King Country Electric Power Trust!”<sup>1</sup>*

## Introduction

1. It appears that the name of the King Country Electric Power Trust was changed to the King Country Trust (KCT). We use that name in these submissions.
2. In recent years, the KCT believes it has been paying its distributions (called KCEPT distributions) to its beneficiaries (defined as “Consumers”) via The Lines Company Ltd (TLC). During October and November 2021, TLC ceased issuing lines charges accounts to what I will call its “customers”, transferring the billing of their lines charges to electricity retailers. That meant that KCT had to either arrange payment of its KCEPT distributions directly to Consumers or find another way to make those payments. It is clear from all the correspondence that the Trustees decided that paying Consumers directly was too difficult and/or costly and that it should follow TLC’s lead and have those KCEPT distributions paid via the electricity retailers. This raised the question of whether the trusts of the KCT trust allowed the Trustees to take that course. Changes to the KCT’s trust deed (Trust Deed) were proposed to “clarify” those people who were the objects (beneficiaries) of the KCT. Several other changes to the Trust Deed are also proposed.
3. I note at this stage that in their Summary of the proposed changes<sup>2</sup>, KCT’s solicitors use the word “clarify” 6 times and the word “update” 11 times. The use of those words, particularly the word “clarify” gives the impression that the proposed amendments do nothing more than use better language to express the trusts of the KCT. In relation to some of the proposed changes, we disagree.
4. Over a period of more than 20 years, the Law Commission (LC) carried out a review of the law of trusts, publishing Issues Papers and Reports as that review progressed. The review culminated in the *Trusts Act 2019*. We acknowledge use of some of the LC’s materials.
5. One of the issues that instigated the LC’s review was the problem an ever-increasing number of trustees were having in not only in meeting and complying with legislative changes but also in administering their trusts in a rapidly changing commercial world.
6. The primary obstacle to varying a trust deed is the fundamental duty of trustees is to adhere to the terms of the trust.<sup>3</sup> Also, there is a general rule of equity that once established, unless there is a power to do so, a trust cannot be varied.

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<sup>1</sup> Statement to Ian Boniface by Trustee during a general enquiry in or about April 2014.

<sup>2</sup> Titled: Explanatory Document - Proposed Substantive Changes to Trust Deed (Deed) of the King Country Electric Power Trust (Trust)

<sup>3</sup> Kelly, Kelly & Kelly, Garrow and Kelly Law of Trusts and Trustees (6<sup>th</sup> ed.)

7. A trust deed may only be varied in the following ways:
  - (a) To the extent allowed by a power, if any, in the trust deed;
  - (b) To the extent allowed by legislation;
  - (c) Through the unanimous agreement of all beneficiaries who are of legal age; or
  - (d) By the High Court through its inherent jurisdiction to supervise trusts.
8. 7 (b), (c) and (d) are of no assistance here.
9. A power to vary included in a trust deed does not give carte blanche to the trustees to make any changes they want. Even powers of variation cast in the broadest language are still subject to the rules of equity, for example:
  - That the trustees must be acting in the interests of all beneficiaries; and
  - Equity will not allow a variation to the objects (the beneficiaries) of a trust without the clearest and most explicit power.
10. Examples of the limitation of even wide general powers of variation include:
  - There is a rebuttable presumption that a variation power cannot be used to extend its own scope or amend its own terms.<sup>4</sup>
  - Trustees cannot use a variation power to remove a specific restriction to which they were subject from the very foundation of the trusts.<sup>5</sup>
11. The problem was that some trust deeds provided either no or limited power to the trustees to vary the trust deed. In this respect there are several general rules of trust law that are relevant:
  - Trusts must have certainty of:
    - Intention to create a trust for the benefit of others;
    - Objects (beneficiaries); and
    - Subject matter (assets/property).
12. So many trustees were faced with an inability to vary the trust deed to function efficiently and effectively in ever changing economic, social and legal environments.
13. While the *Trusts Act 2019* provided additional statutory powers to trustees and the Court to vary the terms of trusts in certain limited circumstances, it did not otherwise change the general rules of equity set out above.
14. So, the critical question in this matter is, “Do the Trustees of the KCT have the power to make the proposed changes to the Trust Deed?”

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<sup>4</sup> Law Commission’s 3<sup>rd</sup> Issues Paper on the Review of the Law of Trusts, @4.31

<sup>5</sup> *Re UEB Industries Ltd Pension Plan* [1992] 1 NZLR 294 (CA) at 301

## Commentary

15. Clause 14 of the Trust Deed contains the power of variation. When the Trust Deed was amended in 2011, replacing the 1993 trust deed, while subclause (a) and (b) of clause 14.2 were changed to reflect the changed definition of shares<sup>6</sup> no changes were made to clause 14.1 (the substantive clause) or to the opening sentence of clause 14.2.
16. Clause 14.1 contains the Trustees power to vary the Trust Deed. It provides:
- This Deed may be altered or amended only by the unanimous resolution of the Trustees in writing provided however that no amendment shall be effective unless it has been subject to the Public Consultative Procedure.
17. So, is clause 14.1 specific enough, or wide enough to allow the Trustees to make all the changes they propose?
18. In our view, the answer is no. While clause 14.1 will allow the Trustees to make the administrative changes they wish to make, clause 14.1 does not allow the Trustees to change the definition of Consumers.
19. The question then becomes, “Is the definition of Consumers wide enough to include retail electricity account holders who are not property owners? Consumers is defined in clause 1.1(f) of the Trust Deed as” [highlighting added]:
- means persons, who at any appropriate date designated by the Trustees from time to time, are named in the records of the Lines Company as **persons whose premises are connected to the Lines Company’s lines network within the District**, unless any such person who qualifies as a Consumer in accordance with this definition advises the Lines Company or the Trustees irrevocably in writing that he, she or it does not wish to be a Consumer for the purposes of this deed
20. “persons whose premises are connected to the Lines Company’s network” can only be property owners. Neither tenants (residential) nor lessees (commercial) can be persons who have/own premises.
21. That analysis accords with the statement made to Ian back in 2014. With respect, it also accords with statements on the “Trust Deed Review” page of the KCT’s website.<sup>7</sup>
22. We also submit that the proposed changes would result in some bizarre, presumably unintended, outcomes. Here are a couple of examples:

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<sup>6</sup> The word “shares” was deleted from both subparagraphs (a) and (b) and replaced with the words “Review Shares”, and the words “in the company” was deleted from subparagraph (a).

<sup>7</sup> A beneficiary is anyone in the Turangi, Taumarunui and Ohakune area **whose homes are connected** to the Lines Company’s lines network. [emphasis added]

- A. Property owner lives in property but visits family for a couple of months every year. Needs to rent property to help cover costs while away. Does not want any risks, so requires short-term tenant to have power bill in their own name. The two-month period they are away each year spans the date the KCEPT payment is made.

Result: Property owner, who pays all property bills for 10 months a year, with a bit of a subsidy for 2 months a year, misses out on KCEPT payment.

- B. Property owner lets property to occupiers on a short-term basis, usually 30 – 90 days. One of the requirements is that the occupier has the retail electricity account in their own name.

Result: The obvious result is that the occupier of the property at the time the KCEPT payment was made would receive a windfall of the full years KCEPT payment, not just to the detriment of the property owner, but if the Trustees' proposed change was made, then to the detriment of the other occupiers who have been paying the lines charges for the rest of the year.

### *Possible Catch 22*

23. We have not had the opportunity to analyse the 1993 trust deed and compare it to the 2011 Trust Deed. However, we have read the comments by KCT's solicitors who claim that the proposed "clarified" definition of Consumers accords with the original Terms of Settlement. We have not been provided with a copy of that document, but we do say that, if that were true, there are two, possibly three outcomes.

Outcome 1: Is that Simpson Grierson are correct, and that the change does nothing more than reinstate the correct beneficiaries (occupiers who are retail account holders). If that is correct, then the Trustees have been in breach of the terms of the Trust up to 2011 by allowing thousands of dollars to be paid to persons (owners not in occupation) who are not beneficiaries of the Trust prior to that date. A serious breach!

Outcome 2: Is that Simpson Grierson are wrong, and that the correct beneficiaries are in fact property owners as the 2011 Trust Deed specifies. If that is correct, then the Trustees have been in breach of the terms of the Trust since 2011 by allowing thousands of dollars to be paid to persons (tenants) who were not beneficiaries of the Trust after that date. A serious breach!

Outcome 3: Is a combination of 1 and 2 above. Still a serious breach.

### *Is it possible to apply to the Court to sanction any past breaches or the proposed variations?*

24. While it is always possible to apply to the Court, the prospects of the Court sanctioning serious past breaches by the Trustees is low.
25. In *Re New*, the Court said "*as a rule, the court has no jurisdiction to give and will not give, its sanction to the performance by trustees of acts with reference to the trust which are not, on the face of the instrument creating the trust, authorised by its terms*"<sup>8</sup>

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<sup>8</sup> *Re New* [1901] 2 Ch 534 at 544

26. However, the Trustees could make an application to the High Court to determine once and for all who the beneficiaries (Consumers) of the KCT are.

## **Other issues**

### *Clause 5.2*

The Summary document suggests that the Trustees could in any event simply exclude property owners who are not occupiers/retail account holders by virtue of clause 5.2. In our view, that is not correct. That is tantamount to changing the objects (beneficiaries) and clear intent of the Trust Deed by stealth. The clear intent of the Trust Deed is to benefit all Consumers. So, when clause 5.2 is read as part of a whole Trust Deed, clause 5.2 gives the Trustees a basis for omitting some Consumers, say where the Consumer cannot be located, identified, or refuses to provide bank account details. It does not allow the Trustees to make a “lazy” choice because of perceived problems with setting up a database.

### *The claim that there is no data base of property owners*

You say that as TLC will no longer be maintaining a data base of property owners, that would make it difficult for KCT to identify property owners. Seriously! The KCT has a starting point (the last KCEPT payment) and there are a number of comprehensive data bases of property owners in New Zealand. LINZ, Ruapehu District Council, TrustPower and so on. There is nothing private or confidential about the ownership of property in NZ. It is a matter of public record. It is just a matter of finding the most efficient/cost effective method of updating that information. An ex-director of another energy company said to me “how hard would it be to put an ad in the local papers each year requesting updated information on property ownership?” We agree. In our view, that effort on its own would be enough to avoid any Trustee liability in relation to identifying Consumers.

## **Summary of Submissions**

Neither the Trust Deed nor the *Trusts Act 2019* provide the Trustees with the power to make many of the changes proposed.

The proposed change to the Trust Deed relating to the definition of Consumer would not only breach the terms of the Trust Deed, it would also breach the rule in equity that the objects (beneficiaries) of a trust cannot be changed. The proposed changes are therefore unlawful.

We respectfully suggest that the Trustees put their efforts into complying with the trusts of the KCT, rather than looking for dubious ways around them.

This review has highlighted that another, more serious problem may exist. That problem is that, if it is correct that only property owners can be beneficiaries (Consumers) of the KCT, the Trustees have breached the terms of the KCT by allowing KCEPT payments to be passed on people who were not Consumers. Given the large proportion of tenanted properties in the Ruapehu region, that breach would be significant.

Finally, while this submission has concentrated on the proposed change to the definition of Consumer, much of the reasoning applies to many of the other proposed changes. We have concerns that the proposed non-administrative amendments to the Trust Deed would also be in breach of the trusts of the KCT

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