

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

Reasons for further submissions

1. In this submission, the varied trust deed of the KCT trust is called the Trust Deed, the reasons for this are set out below.
2. In both our written¹ and oral² submissions, which were based on the Trust Deed, we submitted that:
 - (a) Trustee law requires three certainties to exist before a trust is validly created. Those three certainties are:
 - Certainty of intention (to create a trust);
 - Certainty of objects (beneficiaries); and
 - Certainty of property.
 - (b) If the Trustees wished to vary the terms of the KCT, then:
 - In relation to administrative changes, the Trust Deed only required a general power of variation; however
 - In relation to changes to the second or third of the certainties, the Trust Deed had to contain a clear and specific power to make those changes.
3. It was our submission that the Trust Deed only contained a general power of variation and as such, unless evidence of a different intention could be found, the only changes that could be made to the Trust Deed were those effecting the administration and management of the KCT.
4. We noted that that other evidence could include some form of terms of reference, and if that other evidence reflected that it was the “settlor’s”³ intention that the Trustees have the power to vary the objects of the Trust, then the outcome may be different. At this point the Trust’s solicitor stated that there was an establishment plan that included the proposal to establish the Trust.
5. Following the Zoom meeting on the 21st of January 2022, the Trustees provided us with a document titled King Country Electric Power Board Establishment Plan, dated 22 September 1992 (the Establishment Plan), including the original 1993 trust deed (1993 Trust Deed).
6. The Establishment Plan and the 1993 Trust Deed are game changers in relation to the proposal to change the beneficiaries of the KCT, which was the primary focus of our original submissions.

¹ Dated 17 January 2022

² Made 21 January 2022

³ The term “settlor” is used loosely here because the establishment of an energy trust by the local power board was a requirement of *The Energy Companies Act 1992*. Accordingly, some of the usual characteristics of a settlor may not be present here.

Opening comments

7. We have now had the opportunity to read the 1993 Trust Deed, the 2011 Trust Deed and the proposed trust deed showing how the “trust deed” will appear if all proposed amendments are made.
8. When considering these matters, it may be helpful to note that the original 1993 Trust Deed contained a power to vary, not a power to replace. As such, there is only:
 - The original 1993 Trust Deed.
 - The Original 1993 Trust Deed as amended in 2011, i.e. the varied Trust Deed.

Further submissions

9. The Establishment Plan clearly reflects that the KCT was established as part of the then Governments nationwide plan to restructure and deregulate the electricity industry. That plan was set out in *The Energy Companies Act 1992*, including the requirement that each power board prepare an establishment plan.
10. The Establishment Plan contained a draft trust deed for the KCT. The executed 1993 Trust Deed appears to be identical to the draft, even containing the same grammatical and syntax errors.
11. We have already stated that it is our view that the 1993 Trust Deed does not contain the power to vary the beneficiaries of the KCT.
12. There is also no indication in the Establishment Plan that the Trustees would have the power to vary the beneficiaries of the KCT.
13. Out of caution, we have reviewed Hansard⁴ to see if the intention of Parliament was different to the executed Trust Deed. The only reference that we could find on variation of trust deeds was a statement from the Minister for Energy during the second reading of the *Energy Sector Reform Bill* that the proposed *Energy Act 1992* would contain a provision requiring that the trust deeds of all energy trusts contain a provision “Specifying the manner in which the trust deed may be varied”. That provision was enacted.
14. Unless there is something that we have missed, Parliament appears to have left it up to the various power boards to determine the extent of the power of variation included in their respective trust deeds. Whether by accident or design, the King Country Electric Power Board (Power Board) included only a general power of variation in the Trust Deed of the KCT.

Is the limited power of variation fatal to the Trustees’ proposed changes to the Trust Deed?

15. In our view, the Establishment Plan clearly sets out the general objects of the KCT. It also specifies (even if somewhat tortuously) who the beneficiaries are.

⁴ Particularly 7 May 1992 when the Report and Interim Report of the Planning and Development Committee was debated, and the 16th of June 1992 when the Bill was read for the second time.

16. The aims and objects stated in the 1993 Trust Deed were stated in paragraph D of the preamble and in clauses 3 and 4. In summary those general objects were:
- To acquire and hold shares in King Country Energy Ltd (KCEL) for the benefit of the beneficiaries.
 - To review that shareholding within 3 years and then every 5 years after that.
 - To pay dividends to the beneficiaries.
 - To hold or distribute the proceeds of any sale of the shares in KCEL for the benefit of the beneficiaries until the winding up of the KCT.
 - With a default provision to distribute to Electors (as defined).
17. The beneficiaries are:
- (i) Persons named in the records of the Company as being liable under a contract between the Company and any person for the payment of any amount payable in respect of the supply of electricity by the Company pursuant to that contract; or
 - (ii) Persons named in the records of the Company as being liable under a contract between the Company and any person for the payment of any amount payable in respect of the connection to and use by that person to the Company's distribution network pursuant to that contract; or
 - (iii) Persons:
 - named in the records of the Company as persons whose properties are connected to the Company's distribution network; and
 - who are liable to the Company or another energy company for the payment of any amount in respect of use of and connection to the Company's distribution network.
18. In our submission:
- (i) The beneficiaries specified in 13 (i) above include property owners, tenants, lessees and guarantors.
 - (ii) The beneficiaries specified in 13 (ii) above include property owners , tenants, lessees and guarantors.
 - (iii) The beneficiaries specified in 13 (iii) above are property owners.
19. In 2011, the then Trustees purported to change the beneficiaries of the KCT to:
- "Consumers" 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. The effect of the 2011 amendment was that people such as tenants, lessees and guarantors were removed as beneficiaries.
21. If our analysis of who the original beneficiaries of the KCT were and of the Trustees' power to vary the Trust Deed are correct, the 2011 variation of the definition of beneficiaries was a breach of the terms of the KCT. It was unlawful.
22. From our limited enquiries, the change did not change the classes of person who received KCEPT dividends. It appears that The Lines Company kept paying the KCEPT dividend to its account holders, i.e., property owners with a Lines Company account, tenants with Lines Company accounts, lessees with Lines Company accounts etc. If this is correct, then the beneficiaries named in the 1993 Trust Deed received their rightful entitlements despite the 2011 amendment.

The current proposal to change the beneficiaries

23. The solicitors for KCT have stated that the proposed new definition of Consumers does no more than return (in simpler wording) the definition in the 1993 Trust Deed. If that is the case and the proposal is nothing more than reinstating the original definition, which would be both appropriate and necessary.
24. Our objection to the reason for the change remains. Perceived difficulties in paying beneficiaries is not an acceptable reason for the change. Correcting a previous breach is.

Other proposed changes

25. Significant amendments (changes 1 – 3)

Change 1: We are concerned that the proposed change would be a breach of the terms of the KCT. The KCT was set up for a purpose, and the relationship of the purpose of the KCT with clause 15.1 (to be renumbered 14.1) appears clear. Unless the purpose of the Trust had words to the effect of "or such other purposes as the Trustees may from time to time determine" and in those circumstances stated that the early wind-up provisions of clause 15.1 did not apply, then once that purpose has been achieved, or is no longer able to be achieved, the Trust must be wound up.

Change 2: Again, we have concerns about this proposal. If changes go to administrative or management matters then we have no issue, but anything beyond those matters would be a breach of the terms of the KCT.

Change 3: There are arguments that this change is not a significant amendment. The initial appointment of 5 trustees from across the region reflects an intention to have a wide range of skills and experience available. As the region grows and times change and arguably become much more complicated, we are sure that ensuring the availability of appropriate skills and experience would be seen as a prudent decision falling under the administrative/management change banner and within the settlor's intention.

26. Other Substantive Amendments (changes 5 – 12)

- Change 5: We have no concerns about this proposed change. We see this as a helpful change.
- Change 6: We have serious concerns about this proposed change. Even though such a change might be welcomed by many beneficiaries, in our view the Trustees do not have the power to vary the beneficiaries of the KCT.
- Change 7: As for 6 above.
- Change 8: In our view, none of these changes is necessary. One of the primary obligations of trustees is look after the interests of the beneficiaries in terms of the trust's deed and the law. Trustees of all trusts should be taking all those steps already. Usual practice is to develop such "policies and procedures" outside of the trust deed. This also makes changing and updating those policies a much simpler and more straightforward task.
- Change 9: We have no concerns about this proposed change.
- Change 10: With the greatest respect, the suggestion that there is a need to amend the Trust Deed to state that if a trustee dies then they cease to hold office is bizarre. It is unnecessary. If you are dead, you are dead.
- The second proposal, while it clearly has merit, would be a breach of the terms of the KCT.
- Change 11: We have no concerns about this proposed change. We believe this is a prudent change.
- Change 12: We have no concerns about this proposed change.

27. Modernisation and Technical Amendments (changes 13 – 19)

- Change 13: We have no concerns about this proposed change.
- Change 14: The introduction to change 14 states:
- There would be a number of amendments made on the basis that they are required or desirable as a result of the Trusts Act 2019*
- While it may be desirable to make some of the proposed changes to the Trust Deed of the KCT to bring the Trust Deed in line with the *Trusts Act 2019*, as far as we are aware, nothing in the *Trusts Act 2019* requires the amendment of existing trust deeds. As has been discussed, the ability to make any desirable changes to a trust deed is still determined by the extent of the power of variation, if any, contained in the trust deed.
- In relation to the proposed changes that are listed:
- The proposed amendment to the Trust Expiry Date would likely be a breach of the Terms of the KCT – see 15 below.

- While we have no specific concern about these proposed changes, the amendments to the Specific Powers, Investment Powers, Disclosure to Beneficiaries, Liability of Trustees and Indemnity, and Eligibility of Trustees are not strictly necessary. If provisions of the *Trusts Act 2019* apply, they override any contrary provision in the Trust Deed.

Change 15: We have concerns about the proposed change. On our reading, the *Trusts Act 2019* did not contain any provisions requiring or enabling existing trusts to amend their trust deeds to come into line with the Act. We have reviewed the websites of a number of New Zealand’s larger law firms. The consistent statement on this matter may be summarised as follows:

- The changes in the *Trusts Act 2019* do not change the final distribution date for existing trusts; and
- Existing trusts may change the final distribution date in certain circumstances [*this is usually where the trust deed of the trust allows or where the trust deed refers only to the perpetuity period and not to a specific number of years or date*].

In our view the Trustees cannot change the 80-year period.

Change 16: We have no concerns with these proposed changes.

Change 17: So long as the “updating” does no more than add what has occurred since the original 1993 Trust Deed was executed, we have no concerns about this proposed addition.

Change 18: We do not agree with the reasons for this proposed change. Every trust must have a settlor, it is a requirement of the first of the certainties referred to in our first submission. Also, a variation of a trust deed is just that. As stated above, variation does not create a new trust deed, it just amends the original.

Change 19: If the composition of the KCT means the shares in the Company, or any company in substitution for the Company, and any further investments accrued from profits etc, then we have no concern about this proposed change. However, if it means replacing the Company shares with some other investment that is not in accordance with the purpose of the KCT, then we believe that would be in breach of the terms of the KCT

The objects of the KCT cannot be changed.

Apart from that we have no concern about the remaining proposed changes.

Summary of Submissions

Neither the Trust Deed, the *Trusts Act 2019* nor general trust law 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 to reinstate the definition in the 1993 Trust Deed would not be a breach the terms of the KCT. This is doing no more than correcting the mistake made in 2011.

Ian & Christine Boniface
9 March 2022