

# Memorandum

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To: The Consumers as referred to in the TECT Trust Deed

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## Potential restructuring of TECT

### Introduction

- 1 We have been engaged to advise the Trustees of Tauranga Energy Consumer Trust (**TECT**) in respect of matters arising from the strategic review by Trustpower Limited (**TPW**) of its retail consumer business.
- 2 Consequential upon the strategic review or possible sale by TPW of its retail consumer business, the Trustees propose a restructuring of TECT. Prior to any such restructuring being undertaken, the Trustees propose to undertake a Consumer Consultative Procedure and apply (if the restructuring proposal proceeds thereafter) for directions from the High Court under the Trusts Act 2019. The Trustees have requested that we provide Consumers with a summary of the submissions we would put before the Court in support of the proposed restructuring, in that application to the Court for directions.

### Non-reliance

- 3 This memorandum does not constitute legal advice to Consumers. Our engagement as legal advisers is with the Trustees and nothing in this memorandum should be relied upon as legal advice to the Consumers or any other persons. Consumers should, if they wish, obtain their own legal advice in respect of matters referred to in this memorandum.

### Background understandings

- 4 The background understandings on which this memorandum is based are as set out in the Consumer Information Memorandum dated on or about the date of this memorandum. We refer Consumers to that document for a description of the strategic review announced by TPW and the potential sale of TPW's retail consumer business, and the proposed TECT restructuring.

### Summary of approach on directions application

- 5 The application for directions that the Trustees would make to the Court can be summarised as set out below. The application would be tailored to meet the precise facts as they turn out to be at the time, including importantly as to whether a sale of the TPW retail consumer business has been announced or whether it remains only a possibility arising out of the strategic review of the business by TPW.



#### 5.1 Need for proposed TECT restructuring:

- (a) If the strategic review of TPW leads to a sale of the TPW retail consumer business to a third party purchaser, this would be a change of such substance to the circumstances surrounding TECT that its purpose and objectives would be frustrated. This is because:
  - (i) The beneficiaries of the Trust Deed are defined by reference to "Consumers" of the "Company". Any purchaser of the TPW retail consumer business cannot be regarded as the "Company" for the purposes of the definition of that term in the TECT Trust Deed. The definition of "Company" in clause 1.1 of the Trust Deed refers to TPW and includes the words "any company arising out of any reconstruction, amalgamation or merger of the Company". A purchaser of the retail consumer business from TPW cannot be regarded as the Company for the purposes of the definition.
  - (ii) As such, current retail Consumers who transfer to a purchaser of TPW's retail consumer business as part of a sale of that business would not be Consumers following that sale and transfer, and would not be entitled (without amendment to the Trust Deed) to rebates or other benefits under the Trust Deed.
  - (iii) It follows that consequential upon any sale and the transfer of the current retail Consumers to a purchaser, the Consumer base served by the Trust would be limited to approximately 150 commercial and industrial electricity customers. This contrasts with the current Consumer base, with approximately 49,000 retail customers of TPW in the TECT District (amounting to approximately 53,000 individual connections).
- (b) In light of that frustration of the Trust that would occur if there was such a sale by TPW, the Trustees have considered the options available to them. These include winding up the Trust (with consequential resettlement or distribution of the assets in a manner to be determined), resettling the Trust and/or varying the Trust.
- (c) If the strategic review does not immediately lead to a sale of the retail consumer business, the Trustees are nevertheless of the view that they should proceed with the proposed restructuring of TECT, subject to undertaking a Consumer Consultative Procedure to obtain Consumer feedback in respect of their preferred restructuring option. Restructuring TECT is still, in the Trustees' view, the most prudent course of action to protect TECT from future uncertainty raised by the TPW strategic review.

#### 5.2 Powers of the Trustees to undertake the proposed restructuring:

- (a) The Trustees have the powers in the Trust Deed to undertake the settlement of the new charitable trust, the transfer to that trust of



TECT's TPW shares and the variations to the Trust Deed which are necessary for the proposed restructuring of TECT including in particular to the rebate arrangements. Those powers are a combination of the power to vary the Trust Deed (clause 13), the "dispositive" powers, i.e. the powers to distribute by way of payment, application or allocation income and capital (clauses 5 and 6) and the power to wind up the Trust (clause 14). There is no express power of resettlement in the Trust Deed, but that power is incumbent on the Trustees by virtue of their broad dispositive powers and the winding up power.

- (b) The express provisions of a trust deed must be considered in accordance with the principles of interpretation of trust deeds, to confirm that there are no implied restrictions on those powers which would prevent the Trustees undertaking the proposed restructuring. The following are the relevant principles of interpretation of trust deeds:
- (i) Deeds are to be interpreted from a standpoint that is "practical and purposive, rather than detached and literal".<sup>1</sup> The factual matrix within which the relevant trust was formed is relevant.<sup>2</sup> Trust deed provisions are to be interpreted objectively in the context of the whole document, relevant statutory background and factual matrix.<sup>3</sup>
  - (ii) A court, when interpreting a trust deed, is required to construe each provision according to its natural meaning and give provisions "ample operation" rather than approach interpretation in a narrow way or limited by reference to historical presumption.<sup>4</sup> The test of what is intended by the settlor or in the "reasonable contemplation of the parties" is an objective question, to be answered by ascertaining the actual meaning of words used in their context.<sup>5</sup> The search for 'intention' in relation to trusts, as with contracts, is for the intention as revealed in the words used by the parties. The expressed intention of the parties is to be found in the answer to the question, "What is the meaning of what the parties have said?", not to the question, "What did the parties mean to say?".<sup>6</sup>
  - (iii) Interpretation of trust deeds should be tailored having regard to the type of trust involved. In particular, interpretation should

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<sup>1</sup> *Re Courage Group's Pension Scheme* [1987] 1 All ER 538, [1987] 1 WLR 495.

<sup>2</sup> *Boat Park Limited v Hutchinson* [1999] 2 NZLR 74.

<sup>3</sup> *Pryor v Bulley* [2013] NZCA 559.

<sup>4</sup> *Kearns v Hill* (1990) 21 NSWLR 107.

<sup>5</sup> *PNPF Trust Co Ltd v Taylor* [2010] EWHC 1573 (Ch).

<sup>6</sup> *Mercanti v Mercanti* [2016] WASCA 206.



reflect the modern commercial context of many trusts.<sup>7</sup> Energy trusts have been recognised as having a commercial aspect that is relevant to matters of interpretation.<sup>8</sup>

- (iv) The test of what is intended by the settlor or in the “reasonable contemplation of the parties” is an objective question, to be answered by ascertaining the actual meaning of words used in their context.<sup>9</sup>
- (c) It is clear in applying these principles of interpretation to the express provisions of the TECT Trust Deed that the Trustees have the necessary powers to effect the restructuring. There are no express or implied fetters on the power to vary the Trust Deed (clause 13), the “dispositive” powers (clauses 5 and 6) and the power to wind up the Trust (clause 14) which are relevant to the proposed restructuring and which would prevent the Trustees from effecting that restructuring, assuming the undertaking of a Consumer Consultative Procedure as required by the Trust Deed including clauses 13.2 and 9.3 thereof.

### 5.3 Duties of the Trustees relevant to exercise of powers:

- (a) In proposing to exercise their powers under the Trust Deed the Trustees have been mindful of their fiduciary duties to which they are subject as a consequence of their trusteeship:
  - (i) The duties having most relevance to the current issues are the duties to act in the best interests of the Consumers and to act for a proper purpose. In ascertaining what is in the best interests of Consumers and is for a proper purpose, the Trustees have had regard to the line of case law to the effect that a variation that alters the core basis of the trust can be said to be an attack on the “substratum” or core essence of the trust. Such issues were considered in or relevant to the prior energy trust cases in New Zealand, namely *Cave and Brown v Berkett*<sup>10</sup> (the Hutt Mana Energy Trust case), *Re Hennessy*<sup>11</sup> (the Eastern Bay Energy Trust case) and *Re Andrews*<sup>12</sup> (the South Canterbury Power Trust case). The Trustees have also considered more recent case law from other Commonwealth jurisdictions which has favoured an analysis weighted to the “proper construction” of the relevant

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<sup>7</sup> *Harrison v Harrison* [2015] NZHC 2935.

<sup>8</sup> *Re applications by Andrews* HC Christchurch M5/02, 21 June 2002 per Pankhurst.

<sup>9</sup> *PNPF Trust Co Ltd v Taylor* [2010] EWHC 1573 (Ch) (a decision of the High Court of England and Wales).

<sup>10</sup> (2001) 1 NZTR 11-010 (High Court Wellington, Wild J).

<sup>11</sup> (2006) 2 NZCLR 1,210 (High Court Rotorua, Keane J).

<sup>12</sup> (2002) 1 NZTR 12-003 (High Court Christchurch, Panckhurst J).



trust deed, applying the principles of interpretation of trust deeds described above.<sup>13</sup>

- (ii) Taking into account all relevant factors, and having regard to the need to undertake a restructuring as a consequence of the announced strategic review of its retail consumer business by TPW and the potential for TPW to sell that business shortly or in the future, the Trustees are satisfied that they are acting in the best interests of the Consumers and for a proper purpose in recommending to Consumers (by means of the Consumer Consultative Procedure) the proposed restructuring (including the necessary variations to the Trust Deed), and the subsequent application to Court for directions should the Trustees proceed with the restructuring after the Consumer consultation. As described further below, the Trustees believe that an application to Court for directions is prudent given the “momentous nature” of the decision to be made and is in the interests of the Consumers as beneficiaries.

#### 5.4 Procedure for Court application and Consumer Consultative Procedure:

- (a) Such directions of the Court would be sought under section 133 of the Trusts Act 2019 (comparable to section 66 of the Trustee Act 1956) which came into force on 30 January 2021, to the extent necessary under section 130 of the new Trusts Act (comparable to section 64 of the Trustee Act 1956) and/or pursuant to the inherent jurisdiction of the Court to supervise trusts.
- (b) In *New Zealand Maori Council v Foulkes*<sup>14</sup> Kós J stated that section 66 of the Trustee Act 1956 (as noted, comparable to section 133 of the Trusts Act 2019) can be used to resolve any live question of interpretation of a trust deed, but also “any uncertainty as to the exercise of a power”. It allows (without limitation) trustees to obtain directions when they are in doubt about how to exercise their discretion. Kós J also said that “the existence of a dispute, or at least a doubt, is essential” for section 66 to be engaged. A more expansive interpretation of the section was taken in *Re PV Trust Services Limited*<sup>15</sup> where it was held that one of the situations in which trustees could seek approval of the Court was where there was no doubt as to the existence of the powers in question, but “because the decision is particularly momentous” the trustees wish to obtain the blessing of the court for the proposed action.

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<sup>13</sup> Including *Grand View Private Trust Co Ltd v Wong, Wen Young & Ors*, Court of Appeal of Bermuda, Civil Appeal No. 5A of 2019, 20 April 2020 (an appellate level decision from Bermuda), and *Mercanti v Mercanti* [2016] WASCA 206 (Supreme Court of Western Australia).

<sup>14</sup> [2014] NZHC 1777.

<sup>15</sup> [2018] 3 NZLR 160.



- (c) As noted above, the application to the Court would take place after the undertaking of a Consumer Consultative Procedure. A Consumer Consultative Procedure must be undertaken if:
  - (i) the power of variation in the Trust Deed is to be used in respect of key terms of the Trust Deed including the definition of "Consumer", clause 4 of the Trust Deed (relating to the purpose of the Trust), clauses 5 and 6 of the Trust Deed (containing the powers of disposition of income and capital from the Trust), clause 9.3 (relating to the sale or other disposition of the Trust's shares in TPW);
  - (ii) if the Trust proposes to sell or otherwise dispose of more than a base level of its shares in TPW; or
  - (iii) if the trust is to be wound up prior to its scheduled termination date.
- (d) As the proposed restructuring involves a disposition of TECT's shares in TPW to a new charitable trust and variations to most of the terms of the Trust Deed including various of the provisions noted in paragraph (c)(i) above, the Trustees must therefore ensure that a Consumer Consultative Procedure is carried out in accordance with the Trust Deed and that due consideration and regard is given to submissions received. However, Trustees retain responsibility for decisions taken following the consultation. For this reason the Trustees do not intend to undertake a vote as this could amount to an inappropriate delegation of power, and in any event may not represent the views of all Consumers.

#### 5.5 Alternative restructuring options which have been considered:

- (a) The Trustees have considered the availability of alternative restructuring proposals in light of TPW's strategic review. These alternatives are described in the Consumer Information Memorandum. They include the following:
  - (i) amending the definition of "Consumers" in the Trust Deed to provide that the beneficiary class includes retail consumers who are customers of the purchaser of TPW's retail consumer business within the District, going forward; or
  - (ii) winding up the Trust in its entirety upon the TPW sale and (after liquidating all Trust assets) distributing the resulting cash (pro rata or in some other pre-determined manner) to the persons who were Consumers immediately prior to the sale date.
- (b) Pursuit of either option would present substantial difficulties to the Trustees given their duty to act for proper purposes, interpreted in light of the proper construction of the Trust Deed and the scheme and



purpose of the Trust (its substratum, or core basis). By way of explanation:

- (i) The first option is inconsistent with the concept that TECT was established to represent a cornerstone shareholding in the successor electricity company to the Tauranga Electricity Power Board (i.e., the entity that is now TPW) and to provide the community with an indirect stake and the resulting benefits thereof in that locally established energy company. The TECT Trust Deed clearly contemplates that TECT would be a substantial shareholder in that energy company (the “Company” referred to in the Trust Deed). Several provisions in the TECT Trust Deed no longer make sense if that is not the case. Changing the Trust Deed to provide for TECT not being a shareholder in the energy company with which the TECT Consumers have their accounts, but with the Trust otherwise continuing in operation unchanged, would be a material divergence from the purpose and objectives for which TECT was established.
- (ii) The second option is also inconsistent with the purpose and objectives of direct and indirect community benefit for which TECT was established:
  - (A) It is clearly evident from the TECT Trust Deed that community benefit is a key purpose for which TECT was established. Numerous provisions of the Trust Deed contemplate the giving of indirect benefits to Consumers (which as noted above originally represented essentially the whole of the Tauranga and the Western Bay of Plenty community), and the application of Trust Funds to community purposes such as infrastructure improvement and other local projects.
  - (B) A liquidation and cash distribution is the back-up or default option in clause 6.2 of the Trust Deed should the Trustees fail to determine an alternative distribution plan on a winding up of TECT. This is a default mechanism on wind up. It is only intended to apply if the Trustees have not been able to determine a different application of funds. This fact supports the Trustee’s view that a simple pro rata cash distribution is not intended to be the preferred option for the trustees of the day on a winding up. Rather, those trustees should apply their minds to ways of dealing with the Trust Fund which better reflect the purpose and objectives of the trust, such as community grants or other distributions for the benefit of the wider community.
- (c) Other alternatives considered by the Trustees face the same issue, i.e. that the changes that would be required to the Trust Deed to facilitate



them are substantially inconsistent with the objectives for which the Trust was established, applying either a “proper construction” of the trust deed approach or a “substratum” approach. For example, payment of rebates or provision of other benefits to persons who have voluntarily chosen not to be TPW customers is clearly not contemplated by the Trust Deed.

- (d) Accordingly, although the Trustees are required to consider these alternatives, the other alternatives listed in the Consumer Information Memorandum and any others proposed to them, these alternatives are not favoured by the Trustees.

**Chapman Tripp**