



TRUSTEES' MANUAL

April 2022

The Appendices to this manual include more detailed material covered in the first sections and contain key information for trustees.

TRUSTEES' MANUAL INDEX

Table of Contents

<i>Key Information for Trustees</i>	5
<i>Deed of Trust</i>	7
<i>Constitution of Lines Company</i>	8
<i>Dividends and Payments to Beneficiaries</i>	9
<i>Electricity Industry Act 2010</i>	10
<i>Energy Companies Act 1992 and the SCI</i>	11
<i>Trusts Act 2019</i>	12
Mandatory duties.....	12
Default duties.....	13
Trust documentation and public availability of core documents	13
<i>Trust Act Guidelines for Access to Information</i>	14
<i>Trust Act guidelines on obtaining expert advice and potential exposures</i>	15
<i>Trusts Act on Trust Investment Powers</i>	16
<i>Trusts Act Penalties</i>	17
Insuring Trust Assets, and Trustee Liability Insurance	18
<i>Insurance Policies</i>	19
<i>More on key Legislation:</i>	20
Electricity Act 1992.....	20
Energy Companies Act 1992	20
Commerce Act 1986	21
Health & Safety Legislation	22
Companies Act 1993.....	22
Financial Reporting Act 2013	23
Public Audit Act 2001	23
Incorporated Societies Act 1908	23
Perpetuities Act 1964 (repealed)	23
<i>Other</i>	24
<i>General Duties of Trustees</i>	25
<i>Corporate Governance</i>	31
Trustees as Shareholders.....	31

Trustee Directors	32
Information Disclosure:	33
General Law.....	33
History of trust information requirements	33
Impact of the Trusts Act 2019	34
Trust Act Guidelines for Access to Information.....	34
REMUNERATION	35
Trustees.....	35
Part 2: Regulation.....	36
Commerce Act 1986	36
Background.....	36
The 'Part 4' Regulatory Regime.....	37
Oversight of EDB performance	39
Electricity Authority & the Electricity Industry Act.....	40
The Energy Efficiency & Conservation Act 2000.....	44
Appendix 1	45
Trust Deeds – essential information	45
Appointment and Reappointment of Directors	45
Dividends to the Trust from the Company, and Payments to Beneficiaries.....	45
Trusts Deeds – the Background	46
Appendix 2	48
The Trusts Act 2019 – Information disclosure requirements & High Court's role.....	48
Retention of Documents by Trustees	54
Supreme Court rules on trust disclosure requirements.....	54
Appendix 2B.....	57
Commentary on Trusts Act from Cull J in Taylor vs trustees of the Marlborough Electric Power Trust.....	57
Appendix 3	65
The Statement of Corporate Intent – essential information.....	65
Appendix 4	67
Legislation Restricting Line/Energy Cross-Involvement.....	67
Appendix 5	69
Audit and Auditor-General financial oversight of trusts and trust-owned distributors.....	69
Trust-owned electricity distributors	69
Consumer and community trusts.....	70
Subpart 2—Financial statements of customer and community trusts	70
Appendix 6	73
The Commerce Commission's Tableau tool for benchmark comparisons of EDBs	73
Appendix 7	74
Electricity industry acronyms and jargon	74
Common Electricity Industry Definitions	74
Electricity conversion factors & equivalents	87

Appendix 8	89
About ETNZ.....	89
ETNZ’s Objectives	89
What we do	89
Contact us.....	89
Rules of ETNZ.....	90
Appendix 9.....	91
Important Current Issues.....	91
1. Electricity Industry Amendment Bill 2021	91
2. Parliamentary review of Energy Trusts	94
Appendix 10	97
Contents and links for Trusts Act 2019 - Version as at 28 October 2021.....	97

Part I – Key Documents

KEY INFORMATION FOR TRUSTEES

As the electricity industry and related legislation becomes more complex, trustees will face a variety of challenges and should familiarise themselves with the material covered in this manual. Some of the most important matters covered are summarised briefly in this introductory section. It is important to also give careful attention to the information in the Appendices covering Trust Deeds, Information disclosure, and Statements of Corporate Intent. Look, too, at the very specific procedural requirements for audit of trust-owned companies and of their trusts set out in Appendix 5. You can also find direct on-line links to the various clauses of the Trusts Act in Appendix 10.

The Appendices include relevant data on the various acronyms and definitions that you'll encounter, as well on the specifics of energy trust governance including the following:

1. Trust Deeds are the foundation document for your trust, stating its objectives and the processes that must be followed to achieve those objectives, including its funding and its disbursement policies. All trustees are legislatively required to be familiar with their Deed.
2. The company's Statement of Corporate Intent (SCI) is agreed with its trust near the start of each financial year, and is the primary means whereby trustees may direct company behaviour by setting targets and processes that directors should meet or adhere to. The SCI has taken on additional significance for Trustees as a result of the Trusts Act and the pending amendment of the Electricity Industry Act.
3. As well as defining audit requirements for trusts, The Energy Companies Act gives the Electricity Authority a wide range of powers to regulate and direct all electricity distributors, including trust-owned companies. Those powers are in the process of being extended.
4. The Trusts Act **took** effect from 30 January 2021. While it mainly pulls together and simplifies existing trust law, it introduces more demanding responsibilities for all trustees relating to holding and disclosing information requested by the public. It also makes the duties of trustees more specific, especially where assessing and approving investments is involved.
5. The electricity distribution industry is heavily regulated. The Commerce Commission has strict information disclosure requirements of its own that apply to all electricity distributors (including trust-owned ones), and sets income levels and service quality requirements for about half of the electricity distribution companies – with around half of the trust-owned companies exempted from these direct controls. In parallel the Electricity Authority has broad quasi-regulatory powers to direct the behaviour of electricity distributors.

ETNZ members are part of the community of energy trusts. You should keep in touch with other ETNZ members, be familiar with their key documents (available on their websites) and also keep an eye on how your distribution company

compares with other similar EDBs. The Commerce Commission provides useful company-by-company comparative data that you might refer to in evaluating the performance of the directors you appoint. In addition the Electricity Authority has introduced a similar ‘Trading conduct summary’ tool that seems likely to be extended to cover some distribution issues, while *Utilities Disputes* (formally the Electricity & Gas Complaints Commissioner) maintains a ‘Resources for consumers’ site that contains information ranging from understanding your power bill through to case notes on complaints received.

DEED OF TRUST

[Insert your trust's Deed of Trust here]

Each energy trust has a trust deed that defines the purpose, duties and powers of it and its trustees. This is the trust's foundation document.

Essential information on Trust Deeds is set out in **Appendix 1** to this manual.

CONSTITUTION OF LINES COMPANY

[Insert your Company's Constitution here]

Most trust owned electricity distribution company have a Constitution, although this is not a legal requirement. (Companies operating without a constitution must instead conform with the requirements of the **Companies Act – which states – s28 - *If a company does not have a constitution, the company, the board, each director, and each shareholder of the company have the rights, powers, duties, and obligations set out in [the Companies] Act.***). Bear in mind that the Constitution is not the Trust Deed, it is a separate document defining the company's objectives and duties, not the Trust's.

Usually, **the process for appointing company directors** is covered in the Constitution.

DIVIDENDS AND PAYMENTS TO BENEFICIARIES

Your **Trust Deed** will define the trust's rights to receive income in the form of dividends from the company and, normally, the ways in which that income will be used for the benefit of the trust's beneficiaries.

Your company's **Statement of Corporate Intent** will normally include a targeted rate of return on shareholders' funds, along with a commitment to pay a dividend in accordance with an agreed dividend policy. In some cases companies pay a discount to consumers of an amount specified in the SCI. In other cases the trust may provide a dividend to its beneficiaries directly.

At present any discounts from trust-owned electricity distributors are excluded from IRD's definition of taxable dividends. However, a dividend paid by a company to its trust will normally be subject to tax and IRD periodically investigates options for extending this approach to discounts, so keep this under review.

The Social Security Regulations 2018 exempt energy trust dividends and discounts from determinations of welfare benefit recipients' income or assets:

Social Security Regulations 2018

16 Cash assets exemptions

A person's cash assets, under [sections 68\(2\)\(c\)](#) and [423\(1\)\(b\)](#) of the Act, exclude any amount, item, or kind of cash assets, declared by [Part 1](#) of Schedule 8 of these regulations not to be cash assets.

Schedule 8 – clauses 38 & 39

38. Interpretation

In this Part, unless the context otherwise requires, energy **trust dividend** means a payment that—

(a) is received by a person as a discount on a power bill, or as a distribution, from a lines company or an energy trust; but

(b) is not made because the person has bought or owns shares in the company or the trust.

39. Payments

This clause applies to an energy trust dividend received on or after 18 August 2017

ELECTRICITY INDUSTRY ACT 2010

IMPORTANT! In reading this section bear in mind that, as of April 2022, an ‘*Electricity Amendment Bill*’ is nearing enactment. This includes significant new requirements for trustees to ensure that there is no discrimination in provision of dividends and rebates, etc.- see the section of this manual on ‘The Electricity Authority and the Electricity Industry Act’ for details.

Background

The Electricity Industry Act supersedes sections of the Electricity Act 1992 (including the Electricity Amendment Act 2001, which contained provisions relating to Trust meetings, audits, etc.) and other legislation relating to the ownership of electricity distribution assets. **The Electricity Authority** administers the Electricity Industry Act, and has wide powers for monitoring and enforcing its various provisions. **Those powers apply to Trustees** - s104(4) of the Act. Also, the Electricity Authority’s central role in overseeing electricity industry governance (part 2 of the Electricity Industry Act) apply to “**any person who owns lines**” as well as to “electricity distributors”.

Electricity Industry Act 2010: sections 99-104 - replacing Electricity Act 1992: sections 158A – 158F

These provisions require Lines Trusts to:

1. Prepare annual financial statements in accordance with generally accepted accounting practice. Sections 99-102 require Lines Trusts to prepare consolidated financial statements of the Trust and the Lines Company, and to have those statements audited. Audited financial statements must be published and made available to beneficiaries.
2. Hold an annual meeting of beneficiaries, with a quorum minimum of 20 beneficiaries. There are only two items of official business at annual meetings. These are:
 - The appointment of an auditor; and
 - The fixing of the remuneration of the auditor.

If this is not done at the annual meeting then the auditor will be the Auditor-General.

The provisions also deal with notices and other procedural requirements for the annual meeting. (Sections 207B and 207T to 207W of the Companies Act 1993, on the reappointment or termination of auditors also apply.)

Note that Trustees must comply with sections 99-103 of the Electricity Industry Act (i.e. the sections relating to preparing audited annual financial statements),

rather than section 46A of the Energy Companies Act 1992. This point is also covered in **Appendix 5**.

The provisions of section 172C of the Electricity Act 1992, allowing Cabinet to make regulations relating to the conduct of the annual meeting and requiring the Chair of the annual meeting to allow a reasonable opportunity for beneficiaries at the meeting to question, discuss, or comment on the management of the Trust, have been abolished. Nevertheless, it is appropriate for Trusts to make time for questions, discussion and comments at the annual meeting.

ENERGY COMPANIES ACT 1992 AND THE SCI

More detail on the Energy Companies Act (the legislation that laid the foundation for modern Electricity Distribution Companies such as the one that is your trust's primary asset) is included later in this manual.

One all-important document to every trust is the annual **Statement of Corporate Intent (SCI)**

The Energy Companies Act 1992 requires all trust and local body owned electricity distributors to deliver to shareholders annually a Statement of Corporate Intent. This is a fundamental governance tool for trusts, as it's the one gateway they have into the operations of the company that enables them to protect beneficiaries' interests. Each trust is required to renegotiate the SCI near the start of the company's financial year.

Essential information on SCIs is contained in **Appendix 3** of this manual.

[Insert your Company's **Statement of Corporate Intent** here]

TRUSTS ACT 2019

The Trusts Act 2019 took effect on 30 January 2021 (18 months after it was adopted), replacing the Trustee Act 1956. It can be viewed on-line at

<http://www.legislation.govt.nz/act/public/2019/0038/latest/DLM7382815.html>

This is the main piece of legislation governing the conduct of trustees. It covers a wide range of issues including:

- Trustees' powers of investment.
- The appointment and discharge of trustees.
- Information disclosure requirements (these are now much more demanding and are covered in detail in **Appendices 2 and 2B** of this Manual).
- The powers of the Court in relation to the supervision of trusts and trustees.

The Trusts Act is not a complete code of the rules that apply to trusts and trustees. While an existing Trust Deed can modify some of the provisions of the Act (notably the default duties listed in sections 29-38 of the Act) this must be done through due process, either as specified in the trust deed or – in exceptional cases – as a result of a court order.

The supposed certainty that the Act is meant to deliver isn't very apparent, at least for Energy Trusts. A fundamental problem is that it's a one-size-fits-all piece of legislation that has been developed against a background of family trust and similar case law that may not be very relevant to large commercial operations overseen by trustees elected by numerous beneficiaries. For example, there are frequent references to trustees having to take into account factors such as the age and circumstances of the beneficiaries, "the effect on the beneficiary of giving the information", etc.

Much of the Act updates or restates law that exists already, either in statute or in case law. However, as well as the new information disclosure requirements there are a number of changes about which trustees and settlors should be aware.

The Act contains 'mandatory' and 'default' duties for trustees.

Mandatory duties

The following list of key mandatory duties cannot be modified or excluded by the trust deed so apply to all trustees who must:

- Know the terms of the trust
- Act in accordance with the terms of the trust
- Act honestly and in good faith

- Deal with the trust property and to act for the benefit of the beneficiaries in accordance with the terms of the trust deed, and
- Exercise the trustees' powers for a proper purpose.

Default duties

Default duties are obligations by which trustees must abide — unless the trust deed allows otherwise, which for most of the key duties is unlikely. These default duties include a general duty of care, a requirement to invest prudently, a prohibition on trustees acting in their own interests, a duty to consider the exercise of trustees' powers, a duty not to fetter a trustee's discretion, a duty to act unanimously (some trust deeds provide for non-unanimous decisions) and duties not to profit from the trusteeship or benefit from the exercise of trustee discretions.

Trust documentation and public availability of core documents

Trustees [now](#) also have more rigorous duties relating to trust documentation ([more on that at the end of Appendix 2](#), and in the High Court Judgement excerpt in **Appendix 2B**). Each trustee will be obliged to keep copies of the trust deed and any variations. They will have to either keep their own copies of 'core trust documents' (which are defined in the Act) or to ensure that at least one of the other trustees holds all of the core trust documents and will make them available on request. If a trustee is not confident in their fellow trustees' record keeping then they will need to keep these documents personally.

Trust Act Guidelines for Access to Information

Trustees should note that new requirements governing extensive information disclosure to trust beneficiaries are embodied in the Trusts Act 2019. A more detailed description of the Act's information disclosure requirements, and of the justifications for accepting or rejecting disclosure request, is attached to this manual as **Appendix 2**.

All trusts were required to have systems up and running by January 2021 to cope with one of the new Act's most demanding requirements: a very involved information disclosure regime - set out in sections 51-55 of the Act, which states "The purpose of [sections 51 to 55](#) is to ensure that *beneficiaries have sufficient information to enable the terms of the trust and the trustees' duties to be enforced against the trustees*." The relevant sections are appended to this newsletter.

Essentially the Act provides for two types of information to be disclosed:

- **basic trust information (intended to be available for all beneficiaries)**
 - (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.
- **Trust information requested by a beneficiary**

This applies to all information held by the trust (bearing in mind that the Act also requires all trusts to have available core documents, such as

- records of the trust property that identify the assets, liabilities, income, and expenses of the trust and that are appropriate to the value and complexity of the trust property;
- any records of trustee decisions made during the trustee's trusteeship;
- any written contracts entered into during that trustee's trusteeship;
- any accounting records and financial statements prepared during that trustee's trusteeship;

Trustees will have to make (sometimes difficult) decisions on whether or not they can withhold information requested, noting that many of the justifications recognised in the Act relate to family trust-type sensitivities. There is scope for information to be withheld due to commercial sensitivity and, 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 can be taken into account by trustees. A beneficiary can seek a court order to overturn a trust decision to withhold information.

Factors that trustees should consider in deciding whether or not to provide information include, amongst other things:

- The nature and interests of the beneficiary (including whether the beneficiary is likely to receive trust property in the future)
- The nature and interests of other beneficiaries
- The intentions of the ‘settlor’ as reflected in the trust deed
- The effect of giving the beneficiary the information
- The nature and context of any request for further information, and
- Any other factor a trustee reasonably considers is relevant.

Trust Act guidelines on obtaining expert advice and potential exposures

The Trusts Act recognises that trustees may engage “special trust advisers” and are free to either act on or to not follow any such adviser’s recommendations. Importantly, section 75 (1) (c) states that a trustee “is not liable in a proceeding brought by or on behalf of a beneficiary for an act or omission the trustee makes as a result of following the special trust adviser’s advice unless the act or omission involves the trustee’s dishonesty, wilful misconduct, or gross negligence.”

On that last point, the Act (section 44) specifies factors that a court must consider when deciding **whether a trustee has been grossly negligent**. In deciding that conduct has occurred “was so unreasonable that no reasonable trustee in that trustee’s position and in the same circumstances would have considered the conduct to be in accordance with the role and duties of a trustee” the court must have regard to:

- (a) the circumstances, nature, and seriousness of the breach of trust; and
- (b) the trustee’s knowledge and intentions relating to the breach of trust; and
- (c) the trustee’s skills and knowledge that are relevant to the role of trustee; and
- (d) the purpose for which the trustee was appointed; and
- (e) any other circumstances, including whether the trustee has been remunerated for the role, or characteristics of the trustee that are relevant to the role of trustee; and
- (f) the type of trust, including, without limitation, the degree to which the trust is part of a commercial arrangement, the assets held by the trust, how the assets are used, and how the trust operates; and
- (g) the purpose of the trust, including, without limitation, what the trust is intended to achieve, and whom the trust is intended to benefit and in what ways; and
- (h) any other factor the court considers relevant.

It would be up to a court to judge whether or not failure to get appropriate professional advice on an important matter, such its assessment of a major investment proposal by the company, would constitute gross negligence. Similarly, a failure by trustees to be adequately informed about matters that are relevant to the responsibilities of the trust or the value of its assets might lead to an adverse judgement.

It would be sensible for trustees to keep this potential legal exposure in mind when considering the trust's interaction with its company's board, e.g. in approving a Statement of Corporate Intent, being adequately informed on insurance and investment matters (see below) and ensuring that it is kept aware of the company's health and safety performance.

Trusts Act on Trust Investment Powers

As the agent of its beneficiaries the trust has an obligation – at General Meetings - to assess, approve (or reject) proposals by its company or companies to make major investment decisions.

If trustees are uncertain about the extent of their duties and powers where such decisions are involved, especially given the strict separation of trustee and director roles required by the Energy Companies Act, they should obtain legal advice.

The Trusts Act (section 59) provides the following list of matters that a trustee may consider in “exercising the power to invest” and it would be sensible to consider these matters when assessing an investment proposal from either the company or the trust itself:

- (a) the objectives of the trust or the permitted purpose of the trust:***
- (b) the desirability of diversifying trust investments:***
- (c) the nature of existing trust investments and other trust property:***
- (d) the need to maintain the real value of the capital or income of the trust:***
- (e) the risk of capital loss or depreciation:***
- (f) the potential for capital appreciation:***
- (g) the likely income return:***
- (h) the length of the term of the proposed investment:***
- (i) the probable duration of the trust:***
- (j) the marketability of the proposed investment during, and on the expiry of, the term of the proposed investment:***
- (k) the aggregate value of the trust property:***
- (l) the effect of the proposed investment in relation to the tax liability of the trust:***
- (m) the likelihood of inflation affecting the value of the proposed investment or other trust property:***
- (n) the trustee's overall investment strategy.***

This list should also be taken into account in reviewing the development or evolution of a ***trust investment strategy***, bearing in mind the need for trustee decisions to be unanimous.

Trusts Act Penalties

The Act's focus on giving beneficiaries greater ability to enforce their rights reflects its origins as a Law Society initiative. Supposedly, the intention is to give all parties, including the courts, much more certainty about what is required of trusts. A less positive view is that it is likely to create a great deal more work for lawyers and other professional advisers. Without doubt it will create a lot more work for trustees. It is important for trustees to be aware of the potential penalties they are exposed to under the Act, for example if a court determines that a trustee is guilty of a breach of duty in relation to an investment strategy:

128 Court may take into account investment strategy in action for breach of trust

In considering whether a trustee is liable, in respect of any investment made by that trustee, for any breach of trust in respect of any duty under [section 30](#) (to invest prudently to the applicable standard), the court may take into account—

(a) whether the trust investments have been diversified, so far as is appropriate to the circumstances of the trust; and

(b) whether the investment was made in accordance with any investment strategy.

It will be up to the courts to determine appropriate penalties for breaches under the Trusts Act.

Note that trustees are exposed to a wide range of penalties under other legislation, and this exposure will increase when the Electricity Industry Bill is enacted later in 2022.

Insuring Trust Assets, and Trustee Liability Insurance

Trustees may be considered to be in breach of their duties if they failed to ensure that trust assets are **adequately insured**. Here ‘trust assets’ should be presumed to include the assets administered by the trust’s company or companies, and it is worth considering making this point in each annual Statement of Corporate Intent negotiation with the company. See Appendix 3 for more on this.

In addition, trustees should review the level of **Trustees’ liability insurance** cover they may have. This can provide for exposures such as:

- Individual trustees and corporate trustees (if declared)
- Judgements and settlements
- Fidelity cover to protect trust assets against theft or fraud by a trustee
- Defence costs
- Costs to appear at inquiries or investigations

It is important for all trustees to recognise that their exposure to claims relating to their actions as trustees can continue even after they have stepped down or not been re-elected to the trust. For example, a retired trustee might become involved in an action taken by a disgruntled beneficiary over, say, an alleged failure to get appropriate expert advice when approving the company making a major acquisition or asset divestment.

Insurance of electricity distribution assets is based on some unusual conventions, reflecting the potential costs of extending it to pole and wire networks, liabilities for ‘car vs pole’ damage, and - potentially – liabilities for damage to other parties’ assets etc. attributable to the malfunction etc. of the equipment involved. You might consider asking your company for an explanatory document that identifies the extent of its insurance cover.

All trustees should check with their Trust’s secretary to ensure that they are protected against the costs arising from any such actions both during and after their tenure as trustees.

INSURANCE POLICIES

[Insert relevant policies here]

MORE ON KEY LEGISLATION:

Some areas of trustee responsibility are not covered by either the Trust Deed or the Trusts Act. Other legislation, such as the Health and Safety at Work Act and the Companies Act can apply to trusts and there is a substantial body of commercial and general law that has been built up over several centuries by the Courts. Key legislation to be aware of is:

Electricity Act 1992

This is a very substantial Act covering a wide range of issues including:

- The powers and duties of electricity operators and owners of electrical works.
- Rights of access to maintain safe power supply.
- Codes of practice for the industry.
- Registration and licensing of electrical workers.

In the main it is much more relevant to the companies rather than the trusts but you may from time-to-time encounter it, especially where your trust's beneficiaries interests may be involved, e.g. in discussions with directors on the company's required safety management systems, public discussion on EDB's rights of entry to private land to clear vegetation or public discussion on tree clearances etc.

Energy Companies Act 1992

This is the Act that provided for the formation of energy companies and the vesting of the undertakings of electricity power boards in those companies. It is the Act that laid the foundation for modern Electricity Distribution Companies, such as the one that is your trust's primary asset.

Section 45(1) states that every company incorporated under this Act and its subsidiary is a public entity, meaning that it is subject to audit by the Auditor-General or by an auditor who may be overseen by the Auditor-General as provided for in the Public Audit Act 2001.

The legislative role of the Auditor-General in the financial oversight of trust-owned companies sometimes causes confusion. See **Appendix 5** for full details.

Sections 36 to 46 of the Energy Companies Act set out provisions relating to the operation of distribution companies and include the requirement for statements of corporate intent ("SCI") (section 39) as outlined above and described in more detail in **Appendix 3**.

Part 3 of the Energy Companies Act – the so-called ‘arms-length rules requirements’ - has proved contentious (and confusing) over many years. When the Electricity Amendment Bill is enacted it is intended that administration of these requirements will pass from the Minister of Energy and MBIE to the Electricity Authority and will become part of its ‘Code’. This move will give the Electricity Authority the ability to vary and extend their coverage.

The separation legislation requires the “corporate separation” of line and energy activities, and places limits on the level of involvement in electricity generation or retailing that EDBs can be involved in before such separation is required. Further separation requirements extending into operations such as control systems and electricity storage are a possibility once amendments to the Electricity Industry Act take effect.

More detail on this is given in **Appendix 4**. The main points are:

- Off-network investment in generation of up to 250MW connected to the national grid is unlimited. Ownership separation is required for such generation above 250MW;
- On-network generation investment is permitted up to 50MW with no specific requirements on cross-involvement of management and arms-length arrangements between the generation/retail business and the lines business up to that limit;
- On-network generation investment over 50MW, requires arms-length arrangements to separate generation activities from electricity lines activities;
- On-network retailing of up to 75 GWh per year is permitted. Corporate separation/arms-length rules are required for retailing above 75 GWh.
- Rebates and dividends must not discriminate between customers of Trust-owned retailers and customers of other retailers connected to the network.
- The arms-length rules for generation over 50MW or retailing over 74 GWh per year include a requirement for at least two independent directors, although a common board for different corporate entities is permitted.

Commerce Act 1986

See Part II. There are several clauses in the Commerce Act that are of particular relevance to Trustees:

- Section 54G exempts most trust-owned electricity lines companies from price and quality regulation under the Act (Section 54D of the Act sets out the requirements for trustee elections that must be met to maintain exempt status, defines ‘consumer-owned’, ‘community trust’, ‘customer co-operative’, etc. and sets a maximum size limit for exemption of 150,000 ICPs). ***Note that all lines companies remain subject to the information disclosure requirements of the Act.***

It is possible for a non-exempt lines company to seek to become exempt from price-quality regulation provided that its trust can adapt its trust deed to meet the requirements for exemption (and comply by dispensing with appointed trustees, etc.) This requires High Court approval and also the Commerce Commission's support, making it a fairly lengthy and uncertain process.

- A number of clauses give the Commerce Commission wide information-gathering powers. In particular, s98 gives the Commission the power to require any person – including a Trustee or Trust – to provide any information that it considers necessary or desirable to allow it to carry out its functions. These powers are in the process of being extended.
- Section 53Z etc. allows a regulated company to apply for a 'customised price path' if it feels it is unduly disadvantaged by the normal 'default price path' arrangements. See *Part II* for discussion on this.
- **Section 54Q** requires the Commission to provide incentives and avoid imposing disincentives for energy efficiency and demand-side management investments. The Commission has proved reluctant to move decisively in meeting this requirement. This failure is frequently pointed out in ETNZ submissions.

Health & Safety Legislation

Workplace and public safety are critical issues for the electricity industry. The Electricity Act 1992 requires regulations to be in place for electricity safety management systems, and – significantly for Trustees – the ***Health and Safety at Work Act 2015*** creates clear lines of responsibility for workplace safety, reaching up to senior staff and directors of all companies.

While the functions of Trustees are strictly limited by the Energy Companies Act, ***it would be prudent and sensible for Trusts to ensure that appointees to Boards are aware of their responsibilities under health and safety legislation, and to ensure that company reporting requirements to Trusts include regular updates on workplace safety performance.*** Health and safety outcomes should be taken into account when considering reappointment and replacement of directors.

Companies Act 1993

In general the Energy Companies Act 1992 specifically covers some of the 'Companies Act' types of provisions as these relate to Trusts. However, sections 207B and 207T to 207W of the Companies Act (relating to audits, financial disclosures, etc.) apply as if references to a company were to a trust, references to a director were to a trustee, references to a board were to the trustees, etc. Also, directors of all companies must have responsibilities under the Companies Act, including the requirement to act in the best interests of the company. If, in rare occasions, trustees consider that their beneficiaries'

interests do not coincide with the company's interests then they should obtain appropriate legal advice on how this situation might be resolved. (As a totally hypothetical example, a regulated trust-owned company might wish to become exempt from regulation, whereas the trustees may feel more comfortable with their consumers' interests being overseen by the Commerce Commission.)

Financial Reporting Act 2013

Any trust auditor must be qualified in terms of the Financial Reporting Act.

Public Audit Act 2001

This Act (in conjunction with the Energy Companies Act) gives the Auditor-General a role in financial overview of trust-owned electricity distributors. The Auditor-General reports to Parliament on the results of any such audits and, from time-to-time, carries out an investigation into the adequacy of EDB risk management processes and similar behaviours.

Auditor-General recommendations relating to EDBs should be carefully considered by trustees, who may wish to look for an appropriate company response in the *Statement of Corporate Intent*.

Incorporated Societies Act 1908

This legislation is **relevant to ETNZ**, which is an incorporated society that must comply with its requirements. An amended version of the Act is expected to take effect in 2022 – this looks likely to introduce processes for settling disputes, emphasise that the role of society executive committee members is similar to that of company directors, and modernise a range of technical and operational requirements. There are a few contentious clauses (e.g. one requiring the 'Secretary' to be a committee member).

Perpetuities Act 1964 (repealed)

This Act had the effect of limiting the life of a trust to around 80 years after its formation. *The Trusts Act now extends this span to up to 125 years from formation, subject to any earlier termination date specified in a trust deed – a point to be considered in any revision of a trust deed.*

OTHER

[Insert any other key documents here]

Part 2

GENERAL DUTIES OF TRUSTEES

This summary is by no means meant to be a substitute for the kind of detailed analysis which trustees can obtain from their own legal advisors. It is intended to serve as an introduction to the topic only. The duties discussed here are not exhaustive.

Most of the rules and principles governing trust law have been developed with private investment trusts and, more recently, family trusts as the model. The Trusts Act 2019 and the general law do not cater specifically for the Energy Trusts which arose after the enactment of the Energy Companies Act 1992. The duties of trustees of Energy Trusts need to be understood and applied in a manner which is consistent with the principles and duties set out in the Trusts Act but which also takes into account the particular challenges facing Energy trustees.

The Duty To Know and Adhere to the terms of the Trust

When a person is appointed to be a trustee his or her first duty is to know the contents of the Trust Deed. As outlined in Appendix 1, the Trust Deed is the primary guide for trust business. It should identify the beneficiaries of the trust and provide trustees with guidance or directions as to the treatment of those beneficiaries. Trustees must strictly carry out the terms of the trust. The Trust Deed is not a contract which can be varied simply by the agreement of the trustees. It contains a mixture of powers and duties which can be varied only in certain circumstances. In the exercise of their authority trustees are subject to the supervision of the High Court.

The Trust Deed is not, however, the only source of a trustee's duties and powers. The Trusts Act 2019 sets out a number of duties and powers, some of which may be varied by the Trust Deed. There are other general principles of law applying to trustees which are not covered by that Act. There is also other legislation which will affect trustees and the administration of trusts.

Trustees will need legal advisors to give them guidance in relation to the interpretation of the Trust Deed, as well as their other duties and obligations under legislation and the general law. Where trustees are in doubt about a proposed course of action they are entitled to seek the guidance of the High Court. The Trusts Act provides that trustees can apply for "directions" from the Court and, in an extreme situation, the court may appoint or remove a trustee. As a general rule, an application to the court is a procedure to be used when there are genuine situations of doubt, but not to resolve a contest either among trustees, or between trustees and beneficiaries.

Mandatory Duties to be performed by trustees

Mandatory duties are set out in *sections 23 to 27 of the Trusts Act*. Trustees are personally required to make decisions in respect of the powers and discretions conferred upon them by the Trust Deed. They may not delegate the authority to make those decisions to any

other person, including fellow trustees, except in very limited circumstances. In other words, a trustee must form his or her own view in respect of decisions affecting the assets of the trust and cannot give a “proxy” to any other person.

For example, in the context of an Energy Trust where trustee/shareholders are required to approve a major company transaction, the trustees must make their own decision and cannot simply rely on the recommendations of the board of directors of the company. Such situations may require trustees to take independent external advice on various aspects of the transaction, and in the case of large transactions it would be prudent to do so. However, trustees must always remember that “advisors advise and trustees decide”.

The Trust Deed itself may provide trustees with the authority to entrust administrative tasks to a secretary or other officers they appoint.

The general law recognised that trustees could not necessarily carry out personally every act required for the administration of the trust. In *Re Speight*, Bowen LJ held

“...in the administration of a trust a trustee cannot do everything himself – he must to a certain extent make use of the arms, legs, eyes and hands of other persons, and the limit within which it seems to me he is confined has been described... to be this – that a trustee may follow the ordinary course of business, provided he runs no needless risk in doing so...In other words, a trustee may not employ an agent where he should do the work himself; but he may employ an agent where... it is in the ordinary course of business to use others, and if he runs no needless risk in doing so.”¹

Under sections 67 to 76 of the Trusts Act a trustee, instead of acting personally, may employ an agent, whether a solicitor, accountant, bank, trustee corporation, stockbroker, “special trust adviser” or other person to transact business or do any act required to be transacted or done in the execution of the trust or in the administration of the trust property, including the receipt and payment of money. However this right to appoint others does not confer authority on trustees to delegate their fundamental powers and discretions under the Trust Deed.

These passages from a leading legal text on trusts put the issue in perspective:

Agents are employed to implement decisions taken by the trustees. For instance only the trustees of a business can decide whether to carry it on as a continuing investment or merely for the purposes of selling it as a going concern. But once that decision has been taken the trustees may commit to agents the day to day conduct of the business for the purpose authorised...

Trustees who properly employ agents are under a continuing duty personally to supervise their agents’ conduct...

There remains the question of how great a degree of control the trustees must retain over an agent who has been properly employed. It is submitted that there can be no clear rule in this respect because of the degree of control must be related to the size and complexity of the trust...

¹ (1883) 22 Ch D 727, 739-740

...in the case of a large trust, say of a substantial business operation, the trustee must be allowed to relinquish many, perhaps most of the duties of management, including the receipt and payment of trust monies: in a trust of a supermarket, for instance, ... it cannot be the law that the trustees or their bankers must sit at the tills².

The Duty to Act Unanimously

The general rule in private trusts is that trustees' decisions are required to be unanimous, and the Trusts Act specifies that this is a "default duty" unless it is inconsistent with the trust deed. The Trust Deed may, however, expressly provide that the trust is to act by a majority vote. If it does not expressly provide for majority decision making this may still be implied from the administrative structure of the trust provided for under the Deed. For example, in a case where a valid trust meeting can be held, and binding resolutions passed where there is only a quorum of trustees (as opposed to attendance by all trustees), that is by implication a modification of the rule that trustees must act unanimously. If a Trust Deed provides that a chairman is to have a casting vote this is also an indicator that unanimous decision making is not required.

In a trust where majority rules, dissenting trustees may have their dissent recorded in the minutes of meetings, in particular if they consider that the actions of the majority may constitute a breach of trust.

Where a trust resolves to apply to the Court for directions in respect of a particular matter and one or more trustees dissented from the resolution which lead to the making of the application, or those trustees opposed the proposed course of action which is being put forward to the Court for directions, the dissenting trustees are entitled to separate legal representation. The cost of that representation can be paid, as the costs of the representation of the majority, from the assets of the trust.

Duty not to exercise power for own benefit, duty to avoid conflict of interest, etc.

It is a fundamental principle of trust law that trustees must not allow their personal interests to conflict with their duties as trustees.

This includes acting in good faith and not putting oneself in a position where one's duty and one's personal interests may conflict. Nor should trustees put themselves in a position where their duty to one person, company or group conflicts with their duty to another.

One of the usual expressions of the duty of loyalty is that a trustee may not receive unauthorised benefits from the trusteeship. The Trust Deed may, however, authorise benefits to be received, such as remuneration for holding the office of trustee.

There is a general view that trustees must not deal with the trust property for their own benefit, for example, purchase trust property from the trust. It doesn't matter if the trust does not suffer a loss – trustees are not entitled to use their special position for their own financial advantage. In a situation where trustees are in agreement that an arrangement

² Ford & Lee, Principles of the Law of Trusts, para 9550.

involving a trustee is in the best interest of beneficiaries it may be prudent for a legal opinion be obtained.

The Courts have held that there is a potential conflict of interest if a reasonable man looking at the relevant facts and circumstances of the particular case would conclude that there was a real sensible possibility of conflict.

Of relevance in particular to elected trustees of Energy Trusts is *Collinge v Kyd*, in which Paterson J stated that trustees elected by consumers assume the duties imposed upon them by the Trust Deed and the law relating to trustees: “*Political platforms do not allow them [trustees] to breach duties imposed on them by law*”.³

General Duty of Care and Duty to Invest Prudently

This duty relates to the management of assets and of investments. The general duty is for trustees to invest prudently. This basic duty is defined in section 29 of the Trusts Act as “exercising the care and skill that is reasonable in the circumstances, having regard, in particular, -

- (a) to any special knowledge or experience that the trustee has or that the trustee holds out as having; and
- (b) if the person acts as a trustee in the course of a business or profession, to any special knowledge or experience that it is reasonable to expect of a person acting in the course of that kind of business or profession.”

The duty to invest prudently is a default duty under the Trusts Act, meaning that it can be modified by the terms of the Trust Deed, including by way of limitation of liability clauses. However, where no Trust Deed modifications exist, this duty is subject to much the same requirements as those for the Duty of Care – i.e. “a trustee must exercise the skill and care that a prudent person of business would exercise in managing the affairs of others”, having regard to any special knowledge or experience held or that might reasonably be expected of a professional trustee.

In *Jones v AMP Perpetual Trustee Company NZ Ltd*, Thomas J summarised the decision making process of a prudent person as follows:

*“This duty (the trustees’ duty of care) includes the duty to seek advice on matters which the trustee may not understand, such as the making of investments, and in receiving that advice to act with a degree of prudence. It is not enough to act in good faith and with sincerity. Consequently, although a trustee may take advice on investments, he or she is not bound to accept and act on that advice. They must, in addition to being honest and sincere in relation to the advice which is received, continue to act as an ordinary prudent person would act”.*⁴

In the American decision of *Stark v United States Trust Company of New York* the Court held:

³ [2005] 1 NZLR 847, para 52

⁴ [1994] 1 NZLR 690, 706

“It is clear that a trustee is neither an insurer nor guarantor of the value of the trust’s assets and that the trustee’s performance is not to be judged by success or failure, that is whether he or she was right or wrong. While negligence may result in liability a mere error of judgment will not. Neither prophecy or prescience is expected of trustees and their performance must be judged, not by hindsight, but by facts which existed at the time of the occurrence”.⁵

Section 59 of the Trusts Act sets out matters to which trustees may have regard in exercising the powers of investment. The Trust Deed may amplify or modify those matters. While the s59 list of relevant factors may be helpful, there is still a need for trustees to exercise judgment and discretion when making investment decisions and to put the appropriate weight on each of the factors, and to consider other relevant factors, all depending on the circumstances of the situation.

Where substantial or significant decisions are being made on investments or divestments trustees *should always* consider obtaining appropriate independent professional advice.

Duty to Act for benefit of beneficiaries or to further permitted purpose of trust

This is a mandatory duty under the Trusts Act, and is closely connected to the requirements of the trust deed.

Section 26 of the Trusts Act 2019

A trustee must hold or deal with trust property and otherwise act –

(a) for the benefit of the beneficiaries, in accordance with the terms of the trust

(b) in the case of a trust for a permitted purpose, to further the permitted purpose of the trust, in accordance with the terms of the trust

Subject to and legal advice you may get on the requirements of your trust deed, you should assume that your trust must always act for the benefit of its beneficiaries.

Trustees are required to be impartial towards beneficiaries where they have similar rights under the Trust Deed, and to be fair to all beneficiaries where those beneficiaries have dissimilar rights under the Trust Deed. The particular duties of trustees to the beneficiaries can be varied by the provisions of the Trust Deed. For example, the Trust Deed might expressly provide that trustees are entitled to prefer the interest of one class of beneficiaries over another. Here however there may be a conflict the new requirement⁶ to ensure that there is no discrimination in applying dividends and rebates, and their like. **Trustees should discuss this requirement with their companies when the new legislation is enacted and, if necessary seek expert guidance.**

⁵ 445 F Supp 670,678 quoted in *Jones* at 707

⁶ To take effect when the Electricity Amendment Bill is enacted.

Where the purpose of the trust is to provide financial benefits, the “best interests of the beneficiaries” usually means matters that are in their best financial interests. In the case of Energy Trusts the purposes of the trust may be to provide a range of benefits to beneficiaries, and so acting in their best interests may require a balancing act by the trustees. One example is proposals to on-sell key assets, where trustees may consider that local control is in their beneficiaries’ best interests.

CORPORATE GOVERNANCE

Trustees as Shareholders

Trustees are under a general duty to act as prudent persons of business in respect of the trust's assets.

When the assets comprise shares in Lines Companies, the duty brings with it the rights and obligations attaching to the shares under the Constitution of the company, as well as legislation such as the Companies Act 1993 and the Energy Companies Act 1992.

If the Lines Company is a listed company, obligations can arise under the Securities Act 1978, the Takeovers Act 1993 and Takeovers Code and the NZX Listing Rules.

The classic statement of a trustee's duties as a shareholder is set out in two cases: *Bartlett v Barclays Bank Co Limited*¹ and *re Lucking's Will Trusts*².

In summary, trustees must consider in the context of the company's particular circumstances how to ensure that they receive an adequate flow of information in time to enable them to make use of their controlling interest in the company, should this be necessary for the protection of the trust asset (namely the shares). For example, where a formal shareholder approval is sought, the trustees must ensure that they have sufficient information on which to make a decision. The duty does not involve monitoring every move of the directors. Nor is obtaining information an end in itself. It is a means of enabling the trustees to safeguard the interests of the beneficiaries.

One of the most important functions of shareholders is to appoint and set the remuneration of directors of the company. The formal way in which directors are appointed will be covered by the Constitution of the company. However the Energy Trust may consider adopting a process for reviewing directors' performance and assessing new candidates for the Board.

Also, it is prudent for the level of that remuneration to be the subject of a review by independent consultants. This review should be submitted to the trustees for consideration before they make a decision.

The Constitution of the company will usually provide for directors to retire by rotation at the annual meeting of the company. Depending on the structure of the shareholding in the company, either a public annual meeting of the company is to be held or the shareholders may proceed by way of resolution in lieu of an annual meeting.

¹ [1980] 1 All ER 150 (ChD)

² [1967] 3 All ER 726

Trustee Directors

One of the options at the disposal of trustee shareholders is to appoint trustees to sit as directors on the Board of the company.

If trustees hold shares in the company and, by virtue that holding, become directors of the company, they must account to the trust for fees earned as a director. Where, however, the Trust Deed expressly gives to the trustees the power to have themselves appointed as directors of a company then it may be implied that the intention of the Trust Deed was to authorise retention by the trustees of the directors' fees.

The basic rules in the Company's Constitution regarding the appointment of directors will apply. The Trust Deed, however, may put limits on the ability of trustees to make such appointments, for example by limiting the number of trustees who may be directors. Alternatively the Trust Deed may prohibit trustees from appointment to the Board.

Company directors have a number of duties under the Companies Act 1993, including the duty to act in the best interests of the company. It may be said that there is a potential conflict between a trustee's position as a shareholder with a duty to beneficiaries, and as a director of a company. While this may be the case in theory, for the most part it may also be argued that the interests of energy trusts (particularly those which wholly own their companies) are more likely than not to be aligned with the interests of the company. It is impossible in advance to define where such a conflict may arise and what steps trustees must take when it does. Trustees who act as directors need to be alive to the possibility of such a conflict, and deal with each circumstance as it arises, taking appropriate advice if necessary.

INFORMATION DISCLOSURE:

General Law

Over the past 20 years a number of legal decisions have dealt with the entitlement of beneficiaries to information in the possession of the trustees about the trust. However, the very specific requirements of the Trusts Act 2019 in some cases either codify or overtake those decisions, and should serve as the guideline for consideration of information disclosure requests.

History of trust information requirements

Note: While the decisions outlined here provide useful background, the guidelines in the next section and fleshed out in Appendix 2 relate to the legal position on disclosure that has applied from January 2021.

The decision of the Privy Council in *Schmidt v Rosewood Trust Ltd*¹ was the catalyst for defining entitlement to trust information.

Before *Schmidt* some argued that beneficiaries had a “property right” in respect of certain types of documents. Some cases suggested that there were certain predefined categories of documents said to be either available or unavailable to beneficiaries.

The Privy Council held that a beneficiary’s right to seek disclosure of trust documents is one aspect of the Court’s inherent jurisdiction to supervise, and if necessary to intervene in, the administration of trusts.

Documents which beneficiaries will be entitled to see include the Deed of Trust itself, other formal documents such as variations of the Deed of Trust or relating to the appointment and retirement of trustees, and the trust’s financial statements.

The issue of what constitutes “trust documents” arose in relation to the Auckland Energy Consumer Trust in a High Court decision prior to the *Schmidt* case. Williams J held that “trust documents” comprise all information which is the property of the trust and which relates to the getting in, administration, management and distribution of the trust, that definition being construed on an inclusive rather than restrictive basis. The following categories of information were, however, excluded from the definition:

- (a) information for the trustees’ own purposes and not for getting in, administration, management and distribution of the trust;
- (b) information relating to the exercise of discretions by trustees;

¹ [2003] 3 All ER 76

- (c) agendas, minutes of trustee meetings, which may include reasons for the exercise of a discretion in a particular way and information about particular beneficiaries and their individual circumstances;
- (d) information supplied to or by the trust to trustees on a confidential basis;
- (e) legal advice given to the trust or trustees in relation to litigation between the trust and beneficiaries but not other legal advice;²

As far as discovery in litigation is concerned, the normal rules apply.

Deciding whether or not to make disclosure involves a careful analysis of all relevant circumstances. In the light of *Schmidt*, the provision of information or documents to beneficiaries is a discretionary matter for the trustees, subject to review by the Court. There remain, however, as discussed above, certain classes of information or documents in respect of which the Courts will be predisposed to either grant or refuse access.

Impact of the Trusts Act 2019

The Trusts Act has a focus on ensuring that beneficiaries are better informed, and its information disclosure requirements go well beyond those applying under previous trust law. Future legal decisions and court rulings will be influenced by the prevailing legal requirements.

The first substantive court decision under the Trust Act is the February 2022 High Court judgement by Cull J on Taylor vs. the trustees of the Marlborough Electric Power Trust³. the plaintiff's request for disclosure of documents and redacted information in the Trustees' minutes was declined.

The judgement discussed what is determined to be "Trust information" in relation to the Trusts Act 2019. See **Appendices 2 and 2B** for details.

Trust Act Guidelines for Access to Information

Appendix 2 sets out the requirements for providing and withholding information, set out in sections 51 to 55 of the Trusts Act. These requirements have been designed to cover the wide spectrum of trusts (including small family trusts). In particular, trustees should be aware that [54(4)(a) "**trust information may be withheld from all beneficiaries only in exceptional circumstances.**"]

Trustees are strongly advised to give Appendix 2 careful attention.

² Manukau City Council v Lawson (HC Auckland, CP 400/98, 30/06/00) at para 37

³ CIV-2020-406-28
[2022] NZHC 73

REMUNERATION

Trustees

The position of trustee is a gratuitous one unless the Trust Deed provides otherwise.

While the terms of the Trust Deed will control the basis on which trustees are to be remunerated, the level of remuneration must be reasonable having regard to the commitment required of trustees, and the size of the trust assets.

It would be prudent for trustees to seek advice on the appropriate level of remuneration, as well as the frequency of reviewing the level of remuneration. This is not required where the Trust Deed clearly provides a formula for the calculation of trustee remuneration and the frequency with which it should be reviewed.

It is good governance practice to decide and confirm Trustee remuneration immediately after the election of Trustees.

PART 2: REGULATION

Commerce Act 1986

Background

Following the passage of the Commerce Act in 1986, regulation of natural monopolies became subject to “light-handed regulation”. The idea was that through publishing information on prices, quality of service and profits, consumers would be able to negotiate their own fair and reasonable prices, with a back-stop provision for regulation in the event of price gouging. The threat of regulation was intended to discipline behaviour. An information disclosure regime to support this light-handed regulation prevailed from 1994 for Lines Companies.

In 2000, the Government undertook an independent inquiry into the performance of the entire electricity market. One of the recommended reforms was to increase the regulatory disciplines on Lines Companies, but not go to the full extent of formal price controls. This culminated in the Part 4A of the Commerce Act being enacted in August 2001. A “thresholds” regime was established. The thresholds were intended to be set as screening devices, where those businesses breaching thresholds would probably be those “out of control” businesses that would warrant formal price controls.

The Commerce Commission introduced an initial set of thresholds in June 2003. These initial thresholds were established as a holding pattern until the first proper thresholds were established for the period 2004 to 2009.

Price and quality thresholds were set for the period 2004 to 2009, and if businesses breached the thresholds then they could become subject to investigation and, if considered necessary to meet the objectives of the regime, the Commission could impose more formal binding price controls.

The Price Path regime allowed Lines Companies to increase prices annually in reliance on a formula based on the CPI modified according to an “X” factor determined by the Commission.

The Price Path threshold also allowed for certain “pass-through” costs including transmission charges, council rates and Electricity Commission levies, thereby (in theory) reducing exposure to unpredictable changes in these costs, which were outside of Lines Company control.

In respect of network reliability, the Commission established SAIDI (outage duration) and SAIFI (outage frequency) thresholds, which required no deterioration compared to the preceding five year average of these measures.

Issues arose concerning the efficacy and implementation of the thresholds regime by the Commission. This resulted in a review of the regulatory control provisions in the Commerce Act.

The 'Part 4' Regulatory Regime

The Commerce Amendment Act 2008 changed the regulatory regime. The key elements of the new regime under Part 4 of the Commerce Act are as follows:

1. The Commission has only 12 months after any breach of Part 4 to act.
2. From 1 April 2010 certain Lines Trust-owned businesses that met defined criteria have been exempt from default-price quality regulation. They remain subject to information disclosure requirements, and to the threat of regulation if a disaffected group of consumers petition for inclusion in the regime.
3. A new default price-quality path (DPP) for non-exempt Lines Companies and those not subject to a CPP (see '5' below) took effect on 1 April 2020 for the period to April 2025, most significantly involving a 'maximum return on investments' rather than a 'maximum allowed price per kWh' formula (see next paragraph). Previously (from 2015) key criteria had been redefined – notably a series of '**Input Methodologies**' (IMs) covering fundamentals such as the regulatory cost of capital, and the regulatory asset valuation methodology. The Input Methodologies were last revised in 2017 and are revised again at approximately 7 year intervals – the review of the IMs to apply for the 2025-30 period will start around Q3 2022.
4. From the start of the 2020 regulatory period the Commission has moved from its original price control approach (that regulates a lines company's prices on the basis of kWh of electricity entering its network) to one that caps the company's revenue rather than its prices. This still has the effect of controlling prices, as the formula used maintains the relationship between revenue and the weighted sum of those prices.
5. Provision exists in Part 4 for a company to apply for a Customised Price Path (CPP), for example when it faces exceptional costs or is recovering from an unusual event. The Canterbury earthquake triggered the first CPP, by Orion Ltd. A CPP application gives the Commerce Commission the ability to conduct an in-depth investigation of the distribution business involved, and to use wide discretion in setting its prices upwards or downwards going forward. Once lodged, a CPP application cannot be withdrawn. Accordingly, Trusts should be fully briefed on any CPP proposal and may seek advice on its potential to have an impact on asset values.
6. Default price-quality paths and customised paths are legally binding. Failure to comply may result in civil or criminal sanctions, and the Commission may obtain injunctions to enforce the regime.

7. In establishing price-quality paths, the Commission's obligation to set the "input methodologies" (e.g., WACC, asset valuation, tax approach, cost allocation, pricing methodologies) following consultation was designed to promote certainty for investors and consumers. The requirement for these input methodologies to last for 7 years (rather than the 5 year regulatory periods) is also designed to promote stability.

a). How is the WACC set?

Beginning with the so-called risk-free rate of debt (established on the basis of NZ government bond yields for periods up to 5 years) the ComCom makes adjustments for factors such as tax, industry debt/equity ratios, the actual cost of debt to companies such as Powerco that are major borrowers, and – in particular – the asset beta it thinks should apply to the lines industry.

In doing this it weights its calculation to 'the 67th percentile' of the range of 'cost of capital' inputs it receives, in order to give some recognition to the uncertainties facing EDBs activities. Lobbyists such as the Major Energy Users Group (MEUG) have advocated using a simple 50% average, while EDBs would regard a '75th percentile' approach as more realistic – especially given their need to make very long-term investment decisions.

The asset beta is a simple risk-free rate add-on that increases the allowed rate of return for regulated EDBs by an amount that the Commerce Commission thinks gives a fair return on a typical EDB's assets, given that it regards distribution as a low-risk business. (For a normal, unregulated investment, this would be equivalent to the profit margin a company would need to expect in order to make an investment risk seem worthwhile.)

As an example, for the 2015-20 control period the beta was incorporated in the ComCom's allowed WACC for EDBs as follows:

<i>Risk-free rate for 2015-19</i>	<i>3.26%</i>
<i>+ Beta for EDBs x ComCom's assumed EDB equity/debt asset ratio of 56%</i>	<i>0.34</i>
<i>+ Cost of debt, tax etc. adjustments</i>	<i><u>2.24%</u></i>
<i>Total</i>	<i>5.84%</i>

b). Implications of a low WACC

If a regulated EDB's directors don't consider the allowed WACC will give a fair return then they will be reluctant to allow the company to invest in its network. Here the asset beta is critical – conventional electricity distribution was a low-risk business due to the absence of competitive threats, and the beta that the ComCom uses reflects this. However, most EDB boards are likely to feel that the risk environment is changing, with new investments only assured of a reasonable return for perhaps 5-10 years vs the 40-50 years of returns their predecessors

could expect. Also, changing social and commercial conditions in the post-Covid19 environment create risks and uncertainties that are particularly acute for companies making long-term investment plans.

The debt/equity ratio that the ComCom uses can also have an impact on investment decisions. Under the current regulatory formula, debt is assumed to cost a bit less than the WACC that the Commission thinks would make investments worthwhile. If a company feels that the WACC is too low then it may choose to take on more debt, although it will have its own views on additional risks associated with borrowing.

c). Emerging regulatory risk

While the ComCom's WACC formula builds in financial market risks, it's silent on the increasing risks that some trusts and EDBs see emerging due to regulatory incursions.

The Commerce Act's regulatory regime was structured to provide reasonable investor certainty, with an impartial regulator setting company returns every 5 years and keeping focused on avoiding price shocks to consumers and to companies. However, this regulatory stability was called into question when, in 2014, the ComCom decided to adjust the WACC in mid-term. The industry's exposure to political policy shifts and regulatory changes needs to be kept under review.

8. If the default price-quality paths are too onerous on a lines company then it may apply for a customised proposal ('CPP), which could take into account company-specific circumstances (e.g., major new investment requirements);
9. Customised proposal decisions can be appealed by way of merits review. The High Court hears the appeal and the judge sits with two lay experts;
10. Input methodologies are subject to merits appeal in the same way as customised proposal decisions (as above). If any input methodology changes following an appeal, the Commission is obliged to make adjustments to allow for clawback of any financial consequences of different decisions.

Oversight of EDB performance

The Commerce Commission acquires a vast array of data from electricity distributors, and packages this in various ways to better inform itself, electricity consumers, companies and their owners.

One relatively new, and potentially very useful tool for trustees is **Tableau**, a dynamic spreadsheet that enables any interested person to get a fairly intimate view of each EDB's performance. Comparisons can be made with similar EDBs (to the extent that such similarities exist) and also with the electricity distribution industry as a whole. A sample

Tableau print-out is attached as **Appendix 6** (bear in mind that this is only an image. To access the dynamic version where you can set your data queries follow the instructions in Appendix 6).

Electricity Authority & the Electricity Industry Act

The Electricity Authority succeeded the Electricity Commission in 2010 as the primary regulator for the wider electricity industry. The Electricity Industry Act 2010 gives it wide-ranging powers: effectively it can set its own regulations in areas covered by the ‘Electricity Industry Participation Code’ (the Code), and “must have regard” to any government policy statements but not necessarily adhere to them. Periodically the Minister of Energy will address a “letter of expectations” to the Chair of the Authority, setting out relatively loose requirements for the year ahead and typically covering matters such as support for the business growth strategy, and promoting consumer benefits.

The Authority is tasked with promoting competition, ensuring reliable supply, and encouraging the efficient operation of the industry. It does this principally through the Code – a set of rules governing nearly every aspect of the electricity industry, including generation, transmission, system operation, security of supply, marketing metering, distribution and retailing. It is funded indirectly by a levy spread across various parts of the industry.

Much of the EA’s work is undertaken by its various ‘technical and advisory groups’. The two that are often of most interest to trustees are IPAG – the Innovation and Participation Advisory Group, and SRC – the Security & Reliability Council. You can view their work programmes and meeting minutes on the Electricity Authority web site: www.EA.govt.nz

An *Electricity Authority Work Programme* is published annually, with the recent/ongoing projects of greatest relevance to Trusts including a default distribution use-of-system agreement, a distribution pricing review, and the development of pricing principles for distributed generation. The Authority collaborates with the Commerce Commission in the review of the distribution pricing methodology regulatory ‘Input, and have a joint memorandum of understanding covering areas where their two regulatory regimes overlap, notably:

- taking a coordinated approach to regulating distributors and Transpower;
- managing interactions, interdependences and overlaps in pursuing their statutory objectives;
- coordinating monitoring and reporting of distributors and Transpower; and
- 4.4 keeping each other informed on matters and developments of common interest.

Following on from recommendations of the 2019 Electricity Price Review report, the Cabinet endorsed proposals to:

- Amend the Electricity Industry Act 2010 to give the Electricity Authority more powers to regulate distributors’ involvement in contestable markets. This would entail ‘shifting’ several of the provisions from Part 3 of the Act (the part covering ‘Separation of

distribution from certain generation and retailing’) into the EA’s Electricity Industry Participation Code, which the Electricity Authority can then develop and amend itself.

- Giving the Minister power to step-in and amend the Code if she’s not satisfied with the EA’s progress over the next 2 years or so. It would also apply only to matters relating to the EPR’s recommendations to:
 - develop a streamlined way for retailers to process consumer requests for consumption data;
 - make distributors offer retailers standard terms for network access;
 - prohibit saves and win-backs (now implemented);
 - establish a pilot scheme to help non-switching households find better deals;
 - introduce a mandatory market-making obligation unless the sector develops an effective incentive based scheme; and
 - make generator-retailers release information about the profitability of their retailing activities.

This Cabinet decision has now resulted in the **Electricity Amendment Bill**, due for enactment later in 2022. The introduction to the Bill states that:

Businesses providing monopoly services in the industry (Transpower and distributors) may also be involved in contestable activities, including emerging markets related to distributed energy resources. Such involvements have the potential to deter or limit competition because the monopoly businesses may “self-deal” in a manner that favours their own businesses or affiliates. In short, such businesses have the opportunity and incentive to leverage market power from one market into related markets, potentially limiting competition to the detriment of consumers.

While Part 3 of the [Electricity Industry] Act contains some provisions addressing this problem, it is limited to rules governing distributors’ involvements in retail and generation markets, and emerging technologies increasingly blur the traditional boundaries of these markets. Moving key provisions from Part 3 of the Act into the Code will give the Authority jurisdiction to develop proportionate and targeted rules to address any competition-related problems arising from Transpower’s or distributors’ involvements in other contestable markets if and when they emerge.

This comprehensive update of the current Electricity Industry Act strengthens the Electricity Authority’s powers and widens its scope to include, in particular, oversight and direction of retailers and distributors in their dealings with domestic consumers and small businesses:

The additional objective of the Authority is to protect the interests of domestic consumers and small business consumers in relation to the supply of electricity to those consumers.

The additional objective applies only to the Authority's activities in relation to the dealings of industry participants with domestic consumers and small business consumers.

It creates a framework for establishing a 'small electricity consumers agency' to be funded by a levy on the industry participants involved, while the EA's Code will be extended to cover:

(a) competition in the electricity industry:

(b) the reliable supply of electricity to consumers:

(c) the efficient operation of the electricity industry:

(d) the protection of the interests of domestic consumers and small business consumers in relation to the supply of electricity to those consumers

For Energy Trusts, a new clause specifically applies to rebates and dividends:

6A.6 No discrimination when paying rebates or dividends

(1) This clause applies if a distributor has a connected retailer.

(2) Every person listed in **subclause (3)** must ensure that any rebates or dividends or other similar payments paid do not discriminate between—

(a) customers of the connected retailer; and

(b) customers of other retailers where those customers are connected to the distributor's networks.

(3) The persons are—

(a) the directors of the distributor:

(b) the trustees of any customer trust or community trust that is involved in the distributor and the connected retailer:

(c) the directors of any customer co-operative that is involved in the distributor and the connected retailer.

(4) In this clause, **connected retailer** has the same meaning as in **clause 6A.4**.

(5) A director or trustee who knowingly fails to comply with this clause breaches this Code.

Another significant addition allows the EA to (after over a decade of threatening to do it) impose a distribution agreement on EDBs:

44A Distribution agreements

- (1) [Without limiting section 32,] the Code may require a distributor and 1 or more other industry participants to enter into 1 or more agreements for connection to, and use of, the distributor's network (a **distribution agreement**).
- (2) The Code may prescribe default terms and conditions that are deemed to be included in distribution agreements, including terms and conditions that relate to quality or information requirements.
- (3) The parties to a distribution agreement may, by mutual consent, agree to modify any default terms and conditions, but only if and to the extent that the Code permits those terms and conditions to be modified.
- (4) A distribution agreement is binding on both parties and enforceable as if it were a contract between the parties that had been freely and voluntarily entered into.
- (5) If the parties do not comply with a requirement in the Code to enter into 1 or more distribution agreements, the default terms and conditions in the Code are binding on the parties and enforceable as if they were set out in a distribution agreement.

Lastly, the *Bradford era* 'arms-length rules' separating lines and energy businesses get yet another tweak by being moved into the Electricity Authority's 'Code', which means that the Authority can police and (potentially) reinterpret them. The basic principle of preventing distributors from investing in major non-renewable energy activities remain.

The Energy Efficiency & Conservation Act 2000

This Act establishes EECA – the Energy Efficiency and Conservation Authority – and requires it to produce and administer a rolling 5-year efficiency and conservation strategy. Typically, this focuses on issues such as the promotion of renewable energy resources, achieving warm dry and healthy homes, energy efficient transport, and better consumer information.

A 2019 review of the Energy Efficiency and Conservation Act 2000 and the Energy Efficiency (Energy Using Products) Regulations 2002 identified a number of key issues, including:

- a lack of flexibility in terms of market movement and innovation;
- a misalignment with Australia's system;
- limited access to information;
- limited market coverage;
- limited investigative powers and enforcement tools; and
- an unnecessary burden on Cabinet decision-making.

In mid-2021 MBIE released together a range of proposals that aim to enhance the energy efficiency regulatory system and support the achievement of New Zealand's future energy efficiency and emissions reductions goals under the *Heat Industry and Power Emissions Reduction Plans* for 2022 to 2035. The proposals are grouped into five parts in the discussion document: future-proofing the system, consistent and fair regulation, improving system administration, ensuring competitive compliance, and delivering good and fair processes.

APPENDIX 1

Trust Deeds – essential information

Your trust deed, like all the others, has been in place and may well have been largely unchanged for around 30 years (although minor amendments such as allowing for electronic communications etc. have been common). Pressures to update trust deeds have been mounting and, typically, each deed explains the process needed to vary it.

A legal opinion is almost certainly necessary on the process necessary to vary a trust deed. The Trusts Act 2019 provides for this to be achieved via unanimous consent of the beneficiaries, or via a court approval.

In 2019 the government's Electricity Price Review reached the following conclusion on Trust deed's suitability:

...we think trusts could greatly benefit ... from reviewing and updating their trust deeds so any performance or ownership reviews take into account the benefits of new technology for beneficiaries and consumers generally. We also think trustees should have direct oversight of any ownership review and should examine the trust's role in the governance of the distribution business they own. These steps would anticipate the pending Trust Bill, which aims to encourage trusts to be more active in working for their beneficiaries. Again, we would hope trusts take this step voluntarily

In reviewing the adequacy of their trust deeds trustees should bear in mind the importance of focussing on consumer benefits, recognising that consumers or communities of consumers are their beneficiaries.

Also, while the life of a trust had been set at a maximum of 80 years from its inception under now repealed legislation, some trust deeds may still specify a termination year. Trustees should be aware that, if no such termination date is included in the trust deed, the trust may now have a duration of 125 years.

Appointment and Reappointment of Directors

Each Trust Deed provides for trustees to appoint the directors of its Electricity Distribution Business. Directors have defined terms before they come up for reappointment, and the trust has the power to not reappoint directors that do not meet its expectations.

Dividends to the Trust from the Company, and Payments to Beneficiaries

Normally the Trust Deed states how income will be received from the company by way of a dividend, although it may instead include alternative arrangements for ensuring that the activities of the company benefit its beneficiaries.

Trusts Deeds – the Background

It's useful to consider the following background when reviewing whether or not your trust deed is still fit for purpose.

Trust deeds emerged from the 'corporatisation' of the old power boards that had managed local electricity supply, under one guise or another, since the 1920s. The Electric Power Boards Amendment Act 1990 was a specific piece of legislation designed to achieve the transition to electricity businesses owned by local consumers or communities. This 1990 Act required a number of key steps in the transition process, including:

- The Minister of State Owned Enterprises to approve “a trust deed establishing an Electric Power Trust to acquire shares [in the company succeeding the previous supply authority]”
- A range of matters that must be included in the initial trust deed.

Those 'matters to be included' ranged from the trust's purpose through to specifying the size of a quorum for trustee meetings. The full list of these original requirements is reproduced below.

In addition, the 1990 Amendment Act resulted in the elected board members who had overseen the old power boards being given a reduced role as power board trustees, and a new tier of commercially focussed board members being appointed to run the businesses. The Act defined the qualities that people appointed to the boards of the new companies should have collectively, such as giving representation to 'constituent districts'. However, the Act's focus was on establishing the first trusts and company boards, and it is important to recognise that it involved the changeover from statutory entities to privately owned ones, that were then intended to make their own way.

In 1992 the Energy Companies Act went further, creating a more orthodox structure for electricity businesses based on tradeable shares, and requiring local consumers and communities to be consulted on the form of ownership that should apply to their local electricity business. In most cases this resulted in new trusts being formed, with the assets and documents – including trust deeds – transferring to each new trust.

Electric Power Boards Act 1990:**Matters to be included in trust deed**

Every trust deed establishing an Electric Power Trust shall contain provisions-

- (a) Specifying the purposes for which the Electric Power Trust is being established:
- (b) Specifying the persons or classes of persons who are not capable of being appointed or reappointed, or holding office, as a trustee of the Electric Power Trust:
- (c) Specifying the term or the maximum term for which every trustee of the Electric Power Trust may be appointed: (
- d) Specifying circumstances in which a trustee of the Electric Power Trust vacates office:
- (e) Specifying the circumstances in which, and the manner in which, a trustee of the Electric Power Trust may be removed from office:
- (f) For the holding of, and voting at, meetings of trustees and specifying the quorum necessary for the holding of meetings of trustees:
- (g) For the remuneration of trustees:
- (h) Specifying the manner in which a vacancy in the office of trustee shall be filled:
- (i) For the appointment of officers, employees, managers, and agents:
- (j) Specifying the powers of investment of the trustees:
- (k) Specifying the powers of the trustees to expend capital and income of the trust:
- (l) For the keeping of accounts:
- (m) For the appointment of an auditor:
- (n) Requiring the publication in each year of the financial statements prepared under section 6 of this Act and of the auditor's report on those financial statements:
- (o) Specifying the manner in which the trust deed may be varied: (
- p) Specifying such other matters as the Minister for State Owned Enterprises considers appropriate.

APPENDIX 2

The Trusts Act 2019 – Information disclosure requirements & High Court's role

It is very important for trustees to be familiar with the Trusts Act's disclosure rules, especially those we've highlighted below. Some of the clauses are clearly not relevant, and a few seem to be designed for trusts with relatively few beneficiaries - e.g. clause 54 (3)(b) where disclosure requirements may be met if at least 1 beneficiary has received trust information - and may require court clarification:

Note also that, following an urgent request from ETNZ, amending legislation was enacted on 30 March 2021 to exclude energy trusts from the effects of the Taxation (Income Tax Rate and Other Amendments) Act 2020. Without this amendment trustees would have faced a near impossible requirement to obtain and file tax numbers, birth dates, etc of all beneficiaries, as well as their voting behaviour at trust elections.

ACCESS TO INFORMATION BY BENEFICIARIES OF ELECTRICITY COMMUNITY AND CUSTOMER TRUSTS

These comments reflect the more extensive information requirements of the Trusts Act 2019 (succeeding those of the Trustee Act 1956) and other relevant information. They should be read in conjunction with any specific requirements of the Trust Deed and, especially where a decision is made to withhold information, appropriate legal advice should be sought.

ETNZ emphasises that, at the time of drafting these Guidelines, few court decisions are available to assist in interpreting the new Act's disclosure requirements and therefore care should be taken in applying them and expert advice sought if necessary.

Note, too, that the Act applies to 'trustees' rather than 'trusts'. All references to trust requirements in these guidelines are in fact references to trustee requirements.

Overview

Under the Act there is a presumption that the trustees will make available to every beneficiary the following "basic trust information":

- the fact that the person is a beneficiary
- the name and contact details of the trustee
- the occurrence of, and details of, each appointment, removal and retirement of a trustee, as it occurs, and
- the right of the beneficiary to request a copy of the terms of the trust or trust information.

The obligation to make this information available is an ongoing one. The trustees are required to consider at reasonable intervals whether they should be making the information available.

There is also an assumption that beneficiaries should, on request, be given other “trust information” as defined below (potentially a great deal). This is the more confusing requirement: clearly commercially sensitive information must be withheld, and the trust has a right to withhold this, along with certain other information. In turn, a beneficiary may challenge a decision to withhold information in the High Court.

On this last point, key extracts from the first legal precedent to emerge are set out in *Appendix 2B*. **Trustees are strongly advised to read that appendix (and if necessary refer to the full judgement) to better understand their responsibilities – particularly where information disclosure is an issue.**

The Act is mainly directed at entities such as family trusts, and it requires the Court to start from the premise that information that beneficiaries of that type should have access to all trust information. This clearly doesn’t fit easily with the responsibilities of Energy Trust trustees overseeing major commercial enterprises.

Lastly, there are the usual specific requirements for beneficiaries to be provided with financial and other information at [Annual General Meetings](#).

1 Definitions in the Trusts Act

1.1 “Basic trust information” means:

- (a) The fact that a person is a beneficiary of a 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.

1.2 “Beneficiary” means a beneficiary of a Trust.

1.3 “Document” means a document in any form, and includes:

- (a) Any writing on any material;
- (b) Any information recorded or stored by means of any tape-recorder, computer, or other device, and any material subsequently derived from information so recorded or stored;
- (c) Any label, marking, or other writing that identifies or describes any thing of which it forms part, or to which it is attached by any means;
- (d) Any book, map, plan, graph, or drawing;
- (e) Any photograph, film, negative, tape, or other device in which one or more visual images are embodied so as to be capable (without the aid of some other equipment) of being produced.

1.4 “Trust” means either a “community trust” and/or a “customer trust” as those terms are defined in the Electricity Industry Act 2010.

1.5 **“Trust Information” means information regarding the affairs of a Trust** (i.e. information about the terms of the trust, the administration of the trust, and the trust property, that is reasonably necessary for the beneficiary to have the trust’s duties enforced).

2 Status

3.1 The trustees of a Trust are at all times obliged to comply with their obligations under the relevant trust deed, the Trusts Act 2019, the Electricity Industry Act 2010, the common law and any other applicable rule of law.

3.2 These Guidelines are subject to the obligations of trustees described in clause 3.1 (i.e. they are part of the trust information that beneficiaries might reasonably ask for).

3 Information for Meetings of Beneficiaries

4.1 The Electricity Act 2010 (Sections 99-104) requires Lines Trusts to:

3. Within 4 months of the end of the trust’s financial year, prepare annual financial statements in accordance with generally accepted accounting practice. Sections 99-102 require Lines Trusts to prepare consolidated financial statements of the Trust and the Lines Company, and to have those statements audited. Audited financial statements must be published and made available to beneficiaries.

4. The trustees must also notify the fact that copies of the documents referred to are available (and where) by advertisement in the news section of 2 separate editions of each newspaper that is widely read by customers of the customer trust or by persons in the community of the community trust (as the case requires).

5. Hold **an annual meeting of beneficiaries**, with a quorum minimum of 20 beneficiaries. There are only two mandatory items of official business at annual meetings. These are:

- (a) The appointment of an auditor; and
- (b) The fixing of the remuneration of the auditor.

If this is not done at the annual meeting then the auditor will be the Auditor-General.

4.2 The provisions of section 172C of the Electricity Act 1992, allowing Cabinet to make regulations relating to the conduct of the annual meeting and requiring the Chair of the annual meeting to allow a reasonable opportunity for beneficiaries at the meeting to question, discuss, or comment on the management of the Trust, have been abolished. **Nevertheless, it is appropriate for Trusts to make time for questions, discussion and comments at the annual meeting.**

4.3 The trustees must give no less than 14 days' notice of the annual meeting of Beneficiaries in the news section of two separate editions of each newspaper that is widely read by the Beneficiaries of the customer trust or by persons in the community of the community trust, as the case may be.

4.4 Every trustee commits an offence and is liable on conviction to a fine not exceeding \$200,000 who, without lawful justification or excuse, knowingly acts in breach of, or fails to comply in any respect with, these provisions.

4.5 See also **Appendices 2 and 5, and especially Appendix 2B of this ETNZ Trustees' Manual** for further background.

4.6 Disclosure of Trust Information and requirement for High Court decision before information can be withheld

5 The Trust is obliged to make available to Beneficiaries upon request:

- (a) The trust deed which governs the Trust;
- (b) Financial statements of the Trust, which may include a statement of assets and liabilities and a statement of income and expenditure;
- (c) The Trust's annual report;
- (d) Minutes of annual meetings;
- (e) Any other information which a Trust makes publicly available, whether through its website or any other means.

5.3 Beneficiaries may request disclosure of Trust Information other than that referred to in clauses 6.1 and 6.2. The Trust Act presumes that a trustee must within a reasonable period of time give a beneficiary the trust information that has been requested.

However, —

- (a) before giving the information, the trustee must consider the factors set out in section 53 of the Act; and
- (b) if the trustee reasonably considers (after taking into account those factors) that the information should not be given to the person, —
 - (i) the presumption does not apply; and
 - (ii) the trustee may decide to refuse the request for trust information.

5.4 The key factors that the trustee must consider are:

(a) whether the person requesting the information is/is acting for a beneficiary, 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. This factor is largely irrelevant for energy trusts but, as an example, a local authority may have an interest for planning purposes, or in terms of its status as a future beneficiary when the trust is wound up:

- (b) whether the information is subject to personal or commercial confidentiality;
- (c) the effect on the trustees, other beneficiaries of the trust, and third parties of giving the information;
- (d) 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);
- (e) the practicality of giving some or all of the information to the beneficiary in redacted form;
- (f) if a beneficiary has requested information, the nature and context of the request;
- (g) any other factor that the trustee reasonably considers is relevant to determining whether the presumption applies.

5.5 Procedure when trustee decides to give no information

In the words of the Trusts Act “This section applies in relation to a trust if, as a result of 1 or more of the following circumstances or events, no beneficiary has any trust information:

- (a) the trustee cannot identify any beneficiary to whom information can be given;
- (b) the trustee decides under section 51(2)(b) of the Trust Act to withhold all of the basic trust information from all beneficiaries;**
- (c) the trustee decides under section 52(2) of the Act to refuse a request for trust information.”

5.6 The High Court’s role

This is a confusing part of the Act. Essentially, if no beneficiary has any trust information – a very unlikely situation as far as energy trusts are concerned) then an obligation arises for the trustee to apply to the High Court for directions.

This obligation applies if no beneficiary can be identified, if the trustee has decided not to disclose basic trust information to any beneficiary, or if the trustee has declined a request for information. A beneficiary can apply to the High Court to challenge the Trustee’s decision, and

The trustee must apply to the court for directions in relation to—

- (a) whether the trustee’s determination that there is no beneficiary to whom information can be given, or to withhold information or refuse a request for information, is reasonable in the circumstances; and
- (b) the alternative means by which the trustee can be accountable, and the trust can be enforced.

5.7 However, the trustee is not required to apply to the court for directions if—

- (a) the period during which no beneficiary has any trust information is less than 12 months; and

- (b) **at the end of that period, the trustee gives to at least 1 beneficiary of the trust the basic trust information.**

5.8 In giving directions under this section, **the court must take into account** the following principles:

- (a) **trust information may be withheld from all beneficiaries only in exceptional circumstances:**
- (b) alternative means of enforcing a trust pending disclosure of information to beneficiaries must be consistent with the objectives of the trust and not adversely affect its administration.

5.9 A beneficiary may be required to pay cost of giving information.

- (a) A trustee may require the beneficiary to whom trust information is given **under section 52** of the Trust Act or in accordance with the terms of the trust to pay the reasonable cost of giving that information.
- (b) The trustee may require the beneficiary to pay some or all of that cost before the trustee gives the information to the beneficiary.

6. Procedure for beneficiaries and trusts in handling information requests

6.1 A Beneficiary may request disclosure of Trust Information orally or in writing. The Trust may require a Beneficiary to put any oral request for Trust Information in writing.

6.2 Before the Trust is required to respond to a request the Beneficiary may be required provide evidence to demonstrate to the Trust's satisfaction that person's status as a Beneficiary of the Trust, provided that such a requirement will not be used to unduly delay the processing of a Beneficiary's request.

6.3 Once the Trust is satisfied of the Beneficiary's status it shall, within a reasonable period of time, decide whether the request is to be granted and, except where it is endeavouring to withhold the information, provide it to the Beneficiary.

6.4 While the Trust Act is unclear on process, if the steps required under the previous legislation are adhered to, then the request for Trust Information shall be dealt with in the following manner:

- (a) If the Trust agrees to disclose the whole or any part of the information requested then, **where the information is comprised in a document**, that information may be made available for inspection at every office of the Trust or at any other place advised by the Trust, or by providing to the Beneficiary a copy of the document. If the information requested is comprised in a document and there is a good reason for withholding other information contained in that document, the information in that document may be made available with such deletions or alterations as are necessary.
- (b) Subject to clause 6.5 above, if the request is declined in whole or in part the Trust would be advised to provide the Beneficiary with reasons for the refusal. However, disclosure of the reasons is not mandatory.

Retention of Documents by Trustees

Each trustee of a trust must keep, so far as is reasonable, the following documents relating to the trust:

- (a) the trust deed and any other document that contains terms of the trust:
- (b) any variations made to the trust deed or trust:
- (c) records of the trust property that identify the assets, liabilities, income, and expenses of the trust and that are appropriate to the value and complexity of the trust property:
- (d) any records of trustee decisions made during the trustee's trusteeship:
- (e) any written contracts entered into during that trustee's trusteeship:
- (f) any accounting records and financial statements prepared during that trustee's trusteeship:
- (g) documents of appointment, removal, and discharge of trustees (including any court orders appointing or removing trustees):
- (h) any letter or memorandum of wishes from the settlor:
- (i) any other documents necessary for the administration of the trust:
- (j) any documents referred to in paragraphs (a) to (i) that were kept by a former trustee during that person's trusteeship and passed on to the current trustee.

One trustee may hold most documents, but each trustee must hold at least a copy of the trust deed and any variation to the deed. The documents must be kept by the trustee for the duration of their trusteeship and must be given to any replacement or continuing trustee when their trusteeship ends.

Supreme Court rules on trust disclosure requirements

On 1 June 2021 the Supreme Court issued an important judgement (Lambie vs Addleman)¹² on trustees' requirements for disclosing information to beneficiaries. *While this was directed at disclosure of information subject to legal privilege*, it makes several points that have wider relevance. We've bolded a few key sentences below, and it's worthwhile for trustees to skim through the following extracts from the judgment:

.... Information generated or held for the purposes of a trust – that is information held by trustees as trustees – is not the personal property of the trustees. In this part of the judgment we will refer to such information as “**trustee information**”. We

¹² <https://www.courtsofnz.govt.nz/assets/cases/2021/2021-NZSC-54.pdf>

distinguish such information from information held by a trustee relating to a trust which is personal to the trustee, to which we refer as “**personal information**”.

.... **Trustee information is susceptible to court-ordered disclosure to beneficiaries.** But disclosure will only be required by the courts if appropriate to ensure trustee accountability. Under equitable principles, disclosure will not normally be ordered in relation to information bearing on discretionary decisions by trustees. As we will note, **it may be that the residual power to order disclosure of such information has been abrogated by the Trusts Act.** More importantly for our purposes, trustees who have legal professional privilege as against a particular beneficiary in relation to particular information may not be compelled to disclose that information to that beneficiary. In this part of the judgment, we describe information which ought to be disclosed to a beneficiary as “disclosable information”.

.... **There is some awkwardness over this terminology. What we call trustee information corresponds to what the Trusts Act describes as “core documents”. A difficulty with using that expression in this judgment is that “core documents”, or like expressions, have sometimes been used in the different sense of “disclosable information”.**

.... trustees are required to retain documents recording trustee information, and where there is a change of trustees, outgoing trustees must hand over such documents to their successors. This latter obligation is discussed in Lewin on Trusts in this way:

Transfer of trust papers on change of trusteeship A new trustee is entitled to require the former trustee to deliver up to him all records, books and other papers belonging to the trust. He is also entitled to inspect and copy other papers (not belonging to the trust) in the hands of the former trustee so far as they contain information relating to the trust. The papers to which he is so entitled include the minutes of meetings of the trustees and the internal memoranda of a corporate trustee, and correspondence files.

.... **Trustee information may include advice trustees obtain from third parties.** Trustees must retain and hand over to their successors records of such advice. For reasons which will become apparent, it is difficult to see how a retiring trustee could ever claim legal professional privilege as against a successor in respect of such advice.

.... **Whether information is personal to the trustee and thus not subject to court-ordered disclosure is distinct from whether a trustee may claim legal professional privilege. That said, where the information consists of legal advice, some considerations (for instance who paid for the advice) may be material to both issues.**

.... **As a rough rule of thumb, advice paid for using trust money is most unlikely to be personal to a trustee. This is because trustees must not use trust funds for their own purposes.**

.... **Although not subject to court-ordered disclosure, personal information which is not privileged may have to be produced in discovery.**

.... A beneficiary seeking to hold trustees to account may need access to documents to assess whether the trustees have acted in accordance with their obligations. The underlying principle is to identify the course of action most consistent with the proper administration of the trust and the interests of beneficiaries generally, not just the beneficiary seeking disclosure.

Interests of confidentiality must be considered. **Trustees are not usually required to disclose to discretionary beneficiaries their reasons for exercising their discretion in the manner they did.**

.... **legal professional privilege, whether statutory or common law, cannot be exercised against a person who is jointly interested in the documents in respect of which privilege is claimed.** In respect of statutory privilege, this is provided for by s 66(1)(b) of the Evidence Act...

.... Interestingly, the joint interest exception first developed in respect of the law of trusts and the ability of beneficiaries to obtain legal advice given to trustees in relation to the administration of the trust. There is now a substantial body of authority applying the joint interest exception to disputes between trustees and beneficiaries. This is summarised in a passage cited by the Court of Appeal from the then latest version of Lewin on Trusts:

*Normally disclosure will be ordered of cases submitted to, and opinions of, counsel taken by the trustees, and other instructions to and legal advice obtained from the trustees' lawyers, for the guidance of the trustees in the discharge of their functions as trustees, and paid for from the trust fund. **Even though such advice is privileged, the privilege is held for the benefit of the beneficiaries, not for the personal benefit of the trustees, and so privilege is no answer to the beneficiary's demand for disclosure.** A beneficiary should, of course, seek disclosure from the trustee, or if necessary in proceedings to which the trustee is a party, and not directly from the lawyer who gave the advice since the lawyer is bound by privilege and is in no position to waive it at the instance of a beneficiary.*

APPENDIX 2B

*Commentary on Trusts Act from Cull J in Taylor vs trustees of the Marlborough Electric Power Trust*¹³

Note: The following extract covers just key comments on the application of the Trusts Act and the obligations of trustees in relation to information disclosure. It is incomplete and interested trustees and their advisors should refer to the full judgement for further details (which cover a broader range of relevant topics such as redactions from information disclosed). The Judgement will be available on the Justice website later in 2022: <https://forms.justice.govt.nz/jdo/Introduction.jsp>

Trusts Act 2019

[15] Both parties drew the Court's attention to the Act's purposes and the guiding principles of the Trustees in performing their duties. The Act's purposes are set out in s 3. They are to "restate and reform" trust law by setting out core principles relating to express trusts, providing for default administrative rules, providing mechanisms for resolving trusts dispute and making the law more accessible. The Act is to be applied having regard to core principles under s 4, being that:

- (a) a trust should be administered in a way that is consistent with its terms and objectives; and
- (b) a trust should be administered in a way that avoids unnecessary cost and complexity.

[16] The guiding principle for Trustees in performing their duties is to have regard to the context and objectives of the Trust.⁴

Principles of disclosure

[17] Sections 49–55 of the Act govern the provision of trust information to beneficiaries. "Trust information" is defined under s 49 as follows:

trust information—

- (a) means any information—
 - (i) regarding the terms of the trust, the administration of the trust, or the trust property; and
 - (ii) that it is reasonably necessary for the beneficiary to have to enable the trust to be enforced; but
- (b) does not include reasons for trustees' decisions.

[18] The purpose of the disclosure provisions is identified in s 50 of the Act as "ensuring beneficiaries have sufficient information to enable the terms of the trust and the trustees' duties to be enforced against the trustees". Section 13(b) of the Act provides that trustees are accountable for the way in which they carry out the duties imposed on them by law. Thus, the disclosure provisions enable beneficiaries to hold their trustees to account.

⁴ Trusts Act, s 21.

¹³ CIV-2020-406-28
[2022] NZHC 73

[19] As noted in the definition above, the trust information covered by the disclosure provisions includes the terms of the trust, its administration and the trust property but excludes reasons for Trustees' decisions. It is only trust information that the beneficiary reasonably needs to enable the trust to be enforced. Commentators caution that not all information held by a Trustee is necessarily trust information.⁵

[20] There is a presumption that a trustee will provide "basic trust information"⁶ and any requested trust information,⁷ subject to consideration of s 53 mandatory factors.⁸ If after taking those factors into account the trustee reasonably considers that the information should not be provided, the presumption will not apply, and the trustee may decide to withhold basic trust information or refuse the request.⁹

[21] The s 53 factors reflect the Supreme Court's decision in *Erceg v Erceg*, where disclosure of information was considered in relation to the 1956 Act. A trustee must consider the following factors when making a disclosure decision:¹⁰

- (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:
- (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—

⁵ Nicola Peart (ed) *Brookers Family Law Brookers — Family Property* (online ed, Thomson Reuters) at [TU52.01].

⁶ Trusts Act, s 51(1).

⁷ Section 52(1).

⁸ Sections 51(2)(a) and 52(2)(a).

⁹ Sections 51(2)(b) and 52(2)(b).

¹⁰ Section 53; see also *Erceg v Erceg*, above n 2, at [56].

- (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;
- (i) 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;
- (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.

[22] The Act is not intended to be an exhaustive code of the law relating to express Trusts.¹¹ Rather, it is intended to be complemented by the rules of common law and equity relating to Trusts.¹² In this regard, the parties are also in agreement that the principles expressed in *Erceg* apply.

[23] Mr Taylor places reliance on ss 126 and 127 of the Act. Under s 126 of the Trusts Act 2019, the Court may review the acts, omissions or decisions of a Trustee on the ground that it was not reasonably open to the Trustee in the circumstances and such review must be undertaken in accordance with s 127. Under s 127, any applicant must produce evidence that there is a genuine and substantial dispute. The onus is then on the Trustee to show that the act, omission or decision was available to the Trustee.

[24] Mr Taylor pleads that there is a “genuine and substantial dispute” and thus s 127(2) of the Act that the onus of proof on the Trustees is therefore triggered under s 127(2) of the Act. The Law Commission emphasised that the role of the Court under s 127 should continue to be a supervisory one, ensuring that actions and decisions by Trustees are properly exercised by them. Importantly, the Commission added the rider

¹¹ Trusts Act, s 5(8)(a).

¹² Section 5(8)(b). See also s 7(1)(c).

that the Court should not be invited to review the merits of the Trustee's decision or impose its own view as to what was reasonable in the circumstances.¹³

The Trust Deed

[25] Given that s 4 of the Act requires a Trust to be administered in a way that is consistent with its terms and objectives, the terms of the Trust Deed are relevant. Mr Taylor relies on the terms of the Trust Deed in full but highlights certain clauses of the Trust Deed as being material.

[26] The object and purpose of the Trust, relied on by all counsel, are as follows:

- (a) The object of the Trust is to hold the shares in the Company (and any other investments in the Trust Fund) on behalf of the Consumers, and to distribute to the Consumers in their capacity as owners, the benefits of ownership of the shares in the Company, and to carry out future ownership reviews involving public consultation in accordance with the terms of this Deed.
- (b) This Trust has been established to enable the Trustees [among other things] To encourage and facilitate the Company in meeting its objective of being a successful business as required by section 36 of the Energy Companies Act 1992 and to require the business of the Company to be operated on a commercial, for profit, basis (as opposed to a non-commercial basis) with a view to earning an optimal return on its assets and, in their capacity as legal owners of the shares in the Company, to distribute to Consumers in their capacity as beneficial owners of the Trust Fund, the benefits of ownership of the shares in the Company, by means which are efficient and appropriate in the circumstances. For the purposes of this clause, "optimal" means "best or most favourable, but not necessarily the maximum."

[27] The Trustees have the power to do all acts and things, subject to the provisions of the Deed, that they may consider proper or advantageous for accomplishing the purposes and objects of the Trust. In addition to the Trustees' general powers and duties in equity, the Trustees' express powers and duties materially include:

- (i) to appoint directors of the Company (cl 9.1);
- (ii) subject to the provisions of this Deed, to exercise as the Trustees in their absolute discretion think fit all the voting powers

¹³ Te Aka Matua o te Ture | Law Commission *Review of the Law of Trusts: A Trust Act for New Zealand* (NZLC R130, 2013) at [11.10]–[11.12].

attaching to any shares in the Company forming part of the Trust Fund (cl 9.8);

- (iii) to make public the Trust's audited accounts immediately on completion of the audit (cl 12.4);
- (iv) to engage with the Company board as to drafting, modification and completion of the Company Statement of Corporate Intent (SCI), which is the same requirement, but in less detail, set out in the Energy Companies Act 1992 as outlined below (cl 12.8-12.11);
- (v) at the annual public meeting of the Trust, to comment on the Company's compliance with the then current SCI (cl 12.10).

[28] Of significance to this proceeding, these general powers are subject to the express proviso in cl 8.1, that the Trustees are not permitted to participate in the Company's management but are restricted to their rights as a shareholder only:

For the avoidance of doubt, the Trustees shall have no general power, authority or discretion to participate in the management or operation of the Company. In exercising [their powers] the Trustees shall be restricted to exercising their rights as a shareholder subject always to the provisions of this Deed.

[29] In the exercise of these powers, the Trustees are to act as a diligent shareholder and monitor the performance of the Directors of the Company with respect to the Company's statement of corporate intent. They are also to exercise the rights of shareholders for the benefit of the Trust Fund and with due regard to the objective of the Company to be a successful business.

[30] The Trustees have a duty to exercise the care, diligence and skill that a prudent person of business would exercise in managing the affairs of others and they must prepare financial statements for the Trust, have them audited and make those financial statements and auditor's report publicly available. In doing so, they must advertise the availability of those documents in local newspapers. The Trustees must hold an annual public meeting of consumers each financial year to:

- (i) have the consumers appoint the auditor;
- (ii) report on the operation of the trust during the preceding financial year and on the trust's financial statements for that year; and

- (iii) comment on the Company's compliance with its then current statement of corporate intent.

[31] It is worth noting, in relation to the Trustees' obligations and powers under the Trust Deed, that the Trustees and the Company entered into a non-binding memorandum of understanding dated 23 September 2019 (MOU). This recorded their "understandings and intentions with regard to the provision of information by [the Company] to [the Trustees]." The MOU was intended to improve the flow of information to the Trustees by supplementing earlier guidelines for monitoring company performance. I return to consider the MOU under the relief sought by Mr Taylor.

[32] The Trustees and the Directors of the Company must also operate within the statutory framework of the Energy Companies Act 1992 and Electricity Industry Act 2010.

[33] The Energy Companies Act provides that the principal objective of an energy company is to operate as a successful business.¹⁴ Relevantly, it requires the directors of every energy company to share particular information with its shareholders (in this case, the Trustees), including:

- (a) a draft statement of corporate intent provided no later than one month after the commencement of each financial year containing a range of information, including, amongst other categories, the Company's objectives, the nature and scope of its activities, accounting policies, and performance targets;¹⁵
- (b) a completed statement of corporate intent considering any comments the shareholders may have had on the draft, to be made publicly available within three months of commencement of the financial year;¹⁶

¹⁴ Energy Companies Act 1992, s 36(1).

¹⁵ Sections 39(1) and (2).

¹⁶ Section 39(3).

- (c) end of year reports on the Company's operations containing sufficient information to enable an informed assessment of the operations of the Company and its subsidiaries,¹⁷ with half yearly reports on the Company's operations;¹⁸ and
- (d) audited financial statements.¹⁹

[34] Importantly, the directors' reporting and disclosure obligations do not oblige them to include in any statement of corporate intent, annual report, financial statement, or half-yearly report any information that could be properly withheld if the Local Government Official Information and Meetings Act 1987 applied to energy companies.²⁰

[35] The Electricity Industry Act 2010 requires the Trust to prepare annual financial statements²¹ and make these publicly available following their audit, advertising the availability of the audited statement in a newspaper "widely read" by consumers.²²

The information sought

[36] As noted, Mr Taylor's revised request for Trust information is threefold. He seeks:

- (a) documents relating to the Yealands' Group acquisition in 2015;
- (b) documents relating to the remaining share acquisition by 2018; and
- (c) copies of redacted Minutes.

[37] I will deal first with the parties' submissions and my conclusions on the acquisition information in (a) and (b) above. I will then deal with the redacted Minutes request, the defendants/trustees' counterclaim for breach of confidence and Mr Taylor's suggested disclosure conditions.

¹⁷ Section 44(3)(a) and 44(4).

¹⁸ Section 44(1).

¹⁹ Section 44(3).

²⁰ Section 46.

²¹ Electricity Industry Act 2010, s 99.

²² Section 100.

Is the requested information reasonably necessary?

[38] Each of the Trust and the Company have specific objections to the release of the information sought by Mr Taylor.

[39] The principle objection raised by the Trustees is that these documents do not constitute Trust information that is “reasonably necessary” to enable the Trust to be enforced. They contend that Mr Taylor is attempting to “all but take a seat at the Trustee’s table” and is essentially seeking this information in order to bring the proceedings he has threatened against the Trustees for their conduct and the resulting breaches of Trust, which is beyond the scope of both *Erceg* and the 2019 Act.

[40] The Trustees say they have already provided a substantial amount of information to Mr Taylor in response to his requests and in addition, the Trustees say, they convene annual meetings of beneficiaries and publish audited financial statements for the Trust every year. In addition, the Company has published its statement of corporate intent and annual report, including annually audited financial statements.

[41] Finally, the Trustees say they do not hold the agreements for sale and purchase or any of the settlement documents for either of the 2015 or 2018 acquisition of the Yealands Group shares.

Information provided

[42] The information already disclosed to Mr Taylor goes well beyond that envisaged in s 51(3). The Trustees have described the information which has already been disclosed to Mr Taylor as follows:

- (a) minutes of all trustee meetings between January 2015 and May 2020 (redacted as appropriate);
- (b) three letters from the Trust to Marlborough Lines regarding the draft statements of corporate intent for 2015, 2016 and 2018;
- (c) an internal Trust procedure document called “Monitoring Company Performance”;
- (d) a copy of the MOU between the Trust and Marlborough Lines;

.....etc.

APPENDIX 3

The Statement of Corporate Intent – essential information

No later than 1 month after the start of each financial year every trust is required to approve an SCI that has been drafted by its company. As well as setting performance goals for the company, the SCI is likely to include objectives for the company's community or consumers, health and safety objectives, and business management objectives.

Given the additional responsibilities imposed on trustees by recent/pending legislation, trustees should consider formally requesting their company (via the SCI) to provide them with clear, accurate and timely advice on issues of direct relevance to their trust's legal requirements and on matters that could have a significant impact on the financial position of the company, including in the light of recent legislative requirements¹⁴:

- Reassurance on the adequacy and continuity of the company's insurance cover.
- Regular updates on the company's performance against its health and safety performance indicators.
- An assurance that any rebates or dividends or other similar payments paid do not discriminate between –
 - (a) customers of the connected retailer; and
 - (b) customers of other retailers where those customers are connected to the distributor's networks.

In approving an SCI trustees should be mindful of their Trust Deed, the impacts of company proposals on their beneficiaries, risks to the value of the trust's assets (notably the company itself), and the requirements of the Trusts Act - especially the requirement to ensure that beneficiaries are given information they may request (subject to protection of commercially sensitive material) and the trust's responsibility to approve or disallow significant investments.

Before approving an SCI the trust can suggest changes and, e.g. if the company ignores those suggestions, has the right (via a resolution passed at any general meeting) to require directors to modify the SCI by including or omitting any provision or provisions from the following list of items required to be covered by an SCI:

Section 39 of the Energy Companies Act 1992 (not to be confused with the Electricity Industry Act)

¹⁴ The Trust Act 2019 lists a 'general duty of care' and a 'duty to invest prudently' among default duties for trusts. It would be prudent to ensure that the trust's principal assets are adequately insured at all times. Section 6A.6 of the Energy Amendment Bill includes a requirement for trustees (and directors) to ensure that there is no discrimination in applying dividends or rebates.

...(2) Each statement of corporate intent shall specify for the group comprising the energy company and its subsidiaries (if any), and in respect of the financial year in which it is delivered and each of the following 2 financial years, the following information:

- (a) the objectives of the group:
- (b) the nature and scope of the activities to be undertaken:
- (c) the ratio of consolidated shareholders' funds to total assets, and definitions of those terms:
- (d) the accounting policies:
- (e) the performance targets and other measures (including the rate of return on shareholders' funds after payment of tax) by which the performance of the group may be judged in relation to its objectives:
- (f) an estimate of the amount or proportion of accumulated profits and capital reserves that is intended to be distributed to the shareholders:
- (g) the kind of information to be provided to the shareholders by the group during the course of those financial years, including the information to be included in each half-yearly report:
- (h) the procedures to be followed before any member of the group subscribes for, purchases, or otherwise acquires shares in any company or other organisation:
- (i) the details of all transactions intended to be entered into between any member of the group and—
 - (i) any local authority that is a shareholder in any member of the group:
 - (ii) every company that, in relation to any member of the group, is a related company (as defined in [section 2\(3\)](#) of the Companies Act 1993):
 - (iii) every company in relation to which any member of the group is a related company (as so defined):
 - (iv) every company that, in relation to any local authority that is a shareholder in any member of the group, would be a related company (as so defined) if the local authority were a company:
- (j) such other matters as are agreed by the shareholders and the directorate.

(3) The directorate—

- (a) shall consider any comments on the draft statement of corporate intent that are made to it within 2 months of the commencement of the financial year by the shareholders; and
- (b) shall deliver the completed statement of corporate intent to such shareholders within 3 months of the commencement of the financial year.

APPENDIX 4

Legislation Restricting Line/Energy Cross-Involvement

Background

Notwithstanding the restructuring of the electricity industry in the early 1990's, by the late 1990's little competition had emerged in the electricity retail market. It was argued that local incumbent electricity supply businesses (incorporating both distribution and retail operations) were stymieing retail competition through favoring their own retail businesses by providing cross-subsidies from the lines side of the operation. In consequence, the EIRA was passed requiring local electricity supply businesses to sell either their retail/generation or distribution business on 1 April 1999. Most supply businesses elected to retain their lines operations and sell their retail/generation operations, which were purchased by the newly formed generators (Contact, Meridian, Genesis and Mighty River Power) or Transalta, an independent retailer.

The EIRA prevented a lines business from owning generation or retail businesses, except under onerous provisions requiring arms-length operations. Exemptions could be granted if the Commerce Commission ("Commission") which enforces EIRA, was satisfied that the cross-involvement would not give rise to "incentives or opportunities" to cross-subsidise. To date the Commission has taken a very narrow view in considering exemptions from the EIRA requirements.

Progressively EIRA has been relaxed. Lines Companies have consistently argued that EIRA is poor policy. Many other jurisdictions allow cross-ownership of distribution and retail/generation, using accounting separation to ensure that competition is fair. Policymakers have continued to argue that concerns about anti-competitive behaviour mean that EIRA will remain Government policy. However, EIRA was relaxed in amendments passed in 2008 to facilitate renewable investments, including by allowing such generators to sell the resulting electricity in the spot market, and hedge up to the capacity of the generation plant.

Post-EIRA legislative limits on-line/energy involvement

In 2010 the EIRA was merged into the new Electricity industry Act, with further amendments aimed at encouraging investment in renewables.

Key changes to the legislation in so far as it limits distributors' behavior are as follows:

- Off-network investment in generation of up to 250MW connected to the national grid is unlimited. Ownership separation is required for such generation above 250MW;
- On-network generation investment is permitted up to 50MW with no specific requirements on cross-involvement of management and arms length

arrangements between the generation/retail business and the lines business up to that limit;

- On-network generation investment over 50MW, requires arms length arrangements to separate generation activities from electricity lines activities;
- On-network retailing of up to 75 GWh per year is permitted. Corporate separation/arms length rules are required for retailing above 75 GWh.
- Rebates and dividends must not discriminate between customers of Trust-owned retailers and customers of other retailers connected to the network.
- The arms length rules for generation over 50MW or retailing over 74 GWh per year include a requirement for at least two independent directors, although a common board for different corporate entities is permitted.

In essence, the succession of changes to EIRA and its incorporation first into the Electricity Industry Act (and now – pending enactment of the Electricity Amendment Bill – it's administration being incorporated in the Electricity Authority's Code) enable lines businesses to re-enter the generation and retail markets subject to various internal governance arrangements being in place in the relevant lines business, although the 75 GWh limit on annual retail sales remains as a constraint (the average network handles over 1000 GWh annually).

APPENDIX 5

Audit and Auditor-General financial oversight of trusts and trust-owned distributors

Trust-owned electricity distributors

While trust-owned electricity distributors are clearly not the property of the Crown, they are regarded as ‘public companies’ legally, as defined in the Energy Companies Act 1992. Section 45 of that Act empowers the Auditor-General to oversee them in the same way that local bodies are.

45 Auditor-General to be auditor of energy companies and subsidiaries

- (1) Despite [sections 207P to 207V](#) of the Companies Act 1993 and subject to subsection (3), every energy company and every subsidiary of every energy company is a public entity as defined in [section 4](#) of the Public Audit Act 2001 and, in accordance with that Act, the Auditor-General is its auditor.
- (2) Without limiting the provisions of this section, the directors of an energy company may, after consultation with the Auditor-General, appoint a person or firm that is qualified for appointment as an auditor of a company to be an additional auditor of the energy company or any subsidiary of it.
- (3) If an energy company is not a public energy company,—
 - (a) *the company is not a public entity under subsection (1); and*
 - (b) *the Auditor-General is not the auditor of the company; and*
 - (c) *the directors of the company and of every subsidiary of the company must appoint an auditor or auditors of the company and of every subsidiary of the company and, where such appointment is made consequent on the Auditor-General ceasing to be the auditor of the energy company, every such appointment must be treated as having been made by the directors to fill a casual vacancy in the office of auditor under [section 207R\(3\)](#) of the Companies Act 1993.*
- (4) Despite subsection (3), if, in respect of any energy company that has ceased to be a public energy company, and its subsidiaries (if any), financial statements have been submitted to the Auditor-General for audit, the Auditor-General is to continue to be the auditor of the company and every subsidiary of the company until that audit has been completed.
- (5) In this section, **public energy company** means an energy company in which a controlling interest is held by any local authority or local authorities, or any approved person or approved persons, or any combination of 1 or more local authorities and 1 or more approved persons.

Consumer and community trusts

The Electricity Industry Act 2010 places similar financial constraints on trusts:

Subpart 2—Financial statements of customer and community trusts

99 Customer and community trusts must prepare and submit for audit financial statements

The trustees of a customer trust and the trustees of a community trust must, within 4 months after the end of each financial year of the trust,—

- (a) prepare financial statements in accordance with generally accepted accounting practice (within the meaning of [section 8](#) of the Financial Reporting Act 2013) in relation to the trust for that financial year; and
- (b) submit those financial statements to an auditor for audit.

100 Publication of audited financial statements

- (1) The trustees of a customer trust and the trustees of a community trust must make publicly available the financial statements referred to in [section 99](#) and the auditor's report on those financial statements.
- (2) The trustees must also notify the fact that copies of the documents referred to in subsection (1) are so available (and where) by advertisement in the news section of 2 separate editions of each newspaper that is widely read by customers of the customer trust or by persons in the community of the community trust (as the case requires).

101 Auditor of trusts

- (1) The trustees of a community trust and the trustees of a customer trust must, in each financial year, hold an annual meeting of beneficiaries at which the beneficiaries appoint an auditor to hold office from the conclusion of that meeting until the conclusion of the next annual meeting of beneficiaries.
- (2) The trustees may fill any casual vacancy in the office of auditor by appointing an auditor to hold office until the conclusion of the next annual meeting of beneficiaries (but, while the vacancy remains, the surviving or continuing auditor, if any, may continue to act as auditor).
- (3) The fees and expenses of the auditor must be fixed—
 - (a) at the annual meeting of beneficiaries or in the way the beneficiaries determine at the meeting, if the auditor is appointed at the annual meeting;
 - (b) by the trustees, if the auditor is appointed by the trustees.

- (4) An auditor of a customer trust or community trust—
 - (a) must be a qualified auditor (within the meaning of [section 35](#) of the Financial Reporting Act 2013) and, in selecting an auditor, the beneficiaries may seek the advice of the Auditor-General:
 - (b) must not be a trustee, a director, an employee, or an agent of the trust or of any distributor owned by the trust, or be otherwise disqualified from being an auditor under [section 36\(4\)\(b\) and \(d\)](#) of the Financial Reporting Act 2013.
- (5) See [sections 37 to 39](#) of the Financial Reporting Act 2013 (which provide for the appointment of a partnership and access to information in relation to a customer trust or community trust).
- (6) In addition, [sections 207B](#) and [207T to 207W](#) of the Companies Act 1993 apply in relation to the auditor.
- (7) Those sections of the [Companies Act 1993](#) apply as if references to a company were to a trust, references to a director were to a trustee, references to a board were to the trustees, references to shareholders were to beneficiaries, references to a subsidiary were to a distributor owned by the trust and the distributor's subsidiaries, and all other necessary modifications were made.

102 Procedures for annual meeting to appoint auditor

- (1) The trustees must give no less than 14 days' notice of the annual meeting of beneficiaries to appoint an auditor in the news section of 2 separate editions of each newspaper that is widely read by customers of the customer trust or by persons in the community of the community trust (as the case requires).
- (2) Every beneficiary has 1 vote.
- (3) The quorum for the annual meeting is 20 beneficiaries.
- (4) No business may be transacted at the annual meeting if a quorum is not present.

103 Auditor-General to be auditor if no other auditor appointed

- (1) If no auditor is appointed in accordance with [section 101\(1\)](#) or a casual vacancy in the office of auditor is not filled within 1 month after the vacancy occurring in accordance with section 101(2), the Auditor-General must be the auditor of a customer trust or community trust.
- (2) The trustees of a customer trust or community trust must, within 5 working days after subsection (1) becoming applicable, give written notice to the Auditor-General of this fact.
- (3) If the Auditor-General becomes the auditor of a trust, the sections and Parts of the [Public Audit Act 2001](#) listed in [section 19](#) of that Act apply to the trust, until

an auditor is appointed at an annual meeting of beneficiaries, as if references in those sections to a public entity were references to the trust and with any other necessary modifications.

104 Offences, enforcement, and application of sections 99 to 103

- (1) The trustees of a customer trust and the trustees of a community trust must comply with [sections 99 to 103](#), rather than [section 46A](#) of the Energy Companies Act 1992.
- (2) Every trustee commits an offence and is liable on conviction to a fine not exceeding \$200,000 who, without lawful justification or excuse, knowingly acts in breach of, or fails to comply in any respect with, any provision of [sections 99 to 103](#).
- (3) Except as provided in subsection (1), nothing in [sections 99 to 103](#) limits any other enactment or rule of law concerning the maintenance and auditing of the financial statements of a trust.
- (4) For the purpose of enforcing [sections 99 to 103](#) and any regulations made under [section 114](#), the Authority's monitoring, investigation, and enforcement powers in [Part 2](#) apply to trustees of customer trusts and trustees of consumer trusts as if those trustees were industry participants.

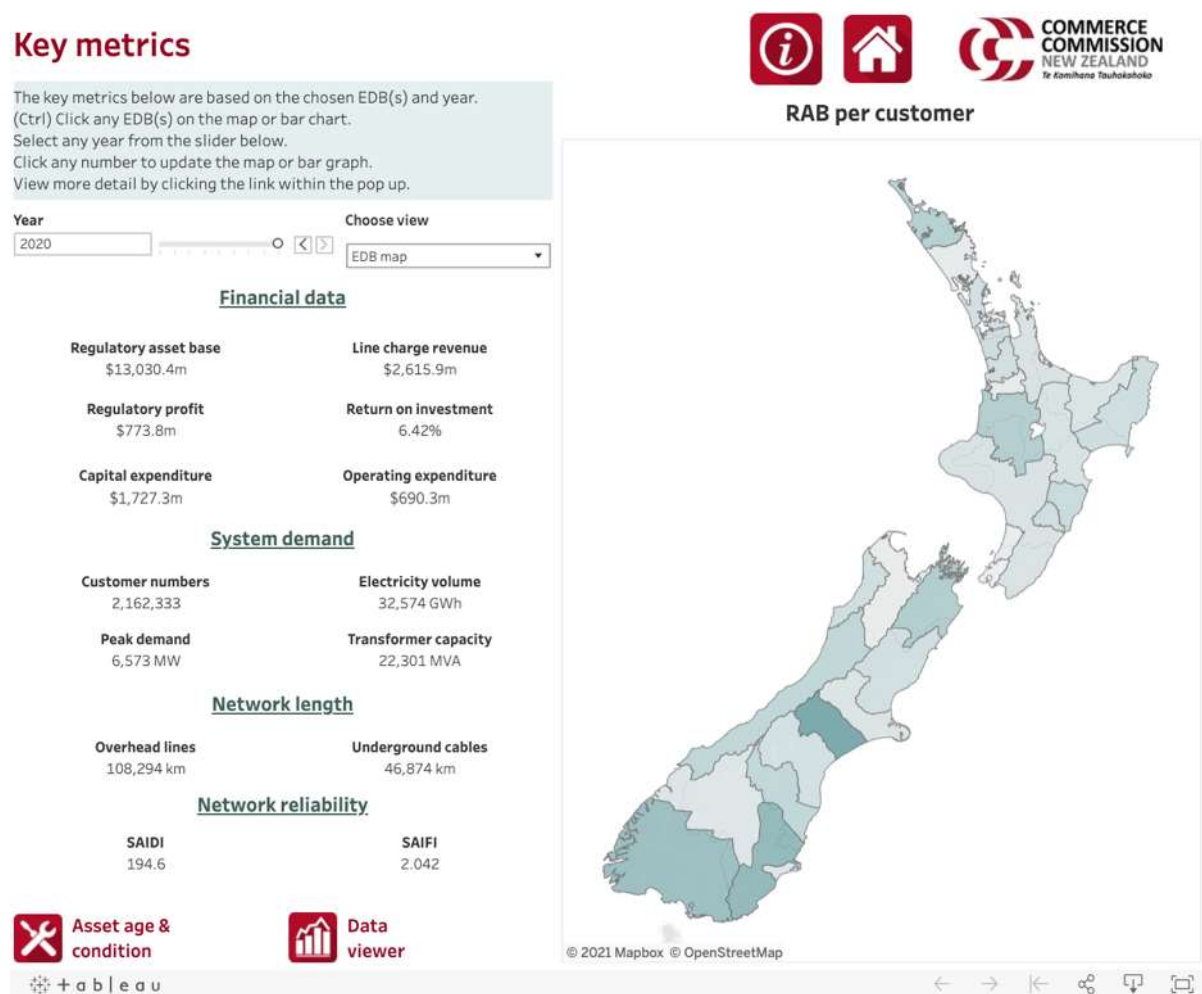
APPENDIX 6

The Commerce Commission's Tableau tool for benchmark comparisons of EDBs

Tableau can be accessed online from the Commerce Commission's site [HERE](#)

You can get an overview of each company's performance (and of the industry as a whole) by clicking the relevant area.

The following is a static print-out only. Use the on-line tool at the site above to view the different data types of information for each company. First click the company on the ComCom's map at the above site:



APPENDIX 7

Electricity industry acronyms and jargon

Trustees will encounter a bewildering array of terms associated with their companies' activities, regulatory controls and financial oversight. The following list is far from exhaustive but includes most of the more common ones.

Common Electricity Industry Definitions

The following list of definitions is adapted from a wide range produced by bodies such as the Electricity Authority, Wikipedia, etc.

Act – usually refers to:
Trusts Act 2019, or
Electricity Industry Act 2010, or
Commerce Act 1986

AER
Australian Energy Regulator

Amp (Ampere)
A primary measure of electrical current. As an analogy, think of the Ampage of a power supply as the rate of flow, whereas the Voltage is the amount of pressure behind that flow.

Ancillary services
As well as providing electricity, the wholesale electricity market provides 'ancillary services' that help maintain the quality of electricity supply black start, over-frequency reserve, frequency-keeping reserve, instantaneous reserve and voltage support.
These are all purchased or obtained by the 'system Operator' (currently a part of Transpower).

Asset Management Plan (AMP)
The Commerce Commission requires each electricity distributor to publish and regularly update an AMP covering its forward asset investment and asset management programme.

AUFLS
Automatic under-frequency load shedding. Transpower requires all distributors to have layers of customers available that can be cut off automatically if the 'frequency' of power supply falls below a range set periodically around the ideal target of 50 Hz.
Most AUFLS support involves turning off successive blocs of domestic consumers (i.e. supply to commercial and industrial consumers is supported at the expense of domestics).

Benmore
Benmore power station injects electricity at the southern end of the HVDC, and half-hourly prices at the Benmore node generally reflect the half-hourly prices

across the South Island. Benmore is one of the three key wholesale pricing reference nodes, along with Haywards and Otahuhu.

Beta factor

The beta factor is a key element in assessing the relative exposure of assets/investments to market risk. See *‘The Part 4 regulatory regime’ above in this manual.*

A beta of 1 indicates that a stock or investment faces the normal level of risk in the market it operates in. A lower beta (say 0.7) means that it faces less risk – e.g. it has a monopoly advantage – while a higher beta (say 1.2) means that it faces above average risk.

Black start

Some generators are contracted to provide ‘black start’ capability, meaning they can restart their generation plant with no electrical input if the system has blacked out. In an extreme power outage, black start capacity is needed to power up other grid-linked generators.

CAIDI

Customer average interruption duration index - See SAIDI.

CAPM

Capital asset pricing model

Clearing manager

An electricity market service provider (currently the New Zealand Stock Exchange) responsible for monitoring prudential security requirements and invoicing and settling wholesale electricity and ancillary service payments.

Code of practice

The codes of practice are those parts of the Electricity Authority’s Code that cover the accuracy of metering installations, requirements for approved test houses, requirements of metering installations, data-logger requirements, requirements for data administrators and profile administration.

Code

Electricity Industry Participation Code 2010.

COMIT

The internet-based system that provides pricing and trading information for the New Zealand electricity market. COMIT is available by subscription from the provider, the New Zealand Stock Exchange (NZX).

COMIT free to air

The internet site that provides a snapshot of the information contained on COMIT, including prices, demand and hydrology. Freely accessible at electricityinfo.co.nz

Constraint

A constraint occurs when a transmission line (or lines) reaches its maximum carrying capacity. When this occurs, the regions on either side of the constraint

are considered 'islands' in price terms. One 'island' cannot supply any more electricity to the other, meaning demand has to be met by local generation or by local load reductions.

CPI

Consumer Price Index.

CPP – Customised Price Path

The Commerce Act provides for a regulated electricity distributor to apply for a 'Customised price path' when it is facing exceptional circumstances (such as a need for major new investments) that it believes would not be adequately funded through the one-size-fits-all Part 4 price regulated path applying normally. See 'The Part 4 regulatory regime' above in this manual.

Commerce Commission (ComCom)

The regulator responsible for setting the price and quality limits of 'regulated' electricity distributors, under Part 4 of the Commerce Act. The ComCom also requires all electricity distributors to disclose detailed information on their activities through 'Information disclosure' rules.

Customer switching

Since the introduction of full retail competition to the New Zealand electricity market on 1 April 1999, customers have been able to choose their electricity supplier. Statistics are available on the number of customers who switch supplier and are published each month.

Demand-side

The consumer side of the electricity market, where individuals, companies, aggregators and others can shift their consumption in response to price signals and invest in alternatives to grid-based supply

Direct consumer

A consumer that purchases electricity from the wholesale (spot) market for its own consumption or a consumer with a grid connection, for example, a large industrial user.

Distributor

A company that owns or operates the power lines that transport electricity on local low voltage networks. This term can be used interchangeably with 'distribution company', 'electricity distribution company' (EDB) 'lines company' and 'network company'.

Domestic consumer

Users of electricity for personal, domestic or household use. This does not include users who purchase electricity for resupply (who are then retailers) or for use in production or manufacture.

DPP

Default price path

EDB

Electricity distribution business. All trust-owned lines companies are EDBs.

Electricity Authority

The primary electricity industry regulator, based in Wellington. The EA oversees the electricity market, transmission pricing and a wide range of electricity supply activities. It is becoming increasingly involved in distribution pricing structures, access and technology issues.

The EA has quasi-regulatory powers to impose requirements on all electricity industry players through its 'Code', a complex document subject to ongoing extension and review.

The Board of the Electricity Authority is made up of a chairperson and four to six members who have been recommended for appointment by the Minister of Energy and Resources. Funding of the EA is provided via a levy on the various levels of electricity industry participant. In broad terms, generators and purchasers/retailers each pay about 1/3rd of the levy, while distributors and Transpower pay the remaining 1/3rd.

Electricity Industry Act 2010

The primary Act that regulates the New Zealand electricity industry, and under which the Electricity Authority operates.

Electricity Networks Association (ENA)

The organisation that represents the interests of the electricity lines companies.

Embedded generation

A person that owns or operates generating units that inject electricity into a local or embedded network rather than into the national grid.

Exempt Companies, exempt EDBs

Electricity distributors that are not subject to the Commerce Commission's price/quality controls because they meet strict requirements on consumer/community ownership via trusts. (All EDBs are subject to information disclosure however.)

Based on the ComCom's assessment of statutory declarations and trust deeds, the following EDBs are exempt from price-quality regulation:

Buller Electricity Ltd
Counties Power Ltd
Electra Ltd
MainPower NZ Ltd
Marlborough Lines Ltd
Network Waitaki Ltd
Northpower Ltd
Scanpower Ltd
The Power Company Ltd
Waipa Networks Ltd
WEL Networks Ltd
Westpower Ltd

EMI

The Electricity Authority's *Electricity market information*
website: www.emi.ea.govt.nz

EV

Electric vehicle

Frequency

The frequency (the number of cycles per second) of the New Zealand grid is normally maintained at 50 hertz (Hz). Essentially the frequency is the rate that all grid-connected generators move to in order to maintain constant power quality from second-to-second. A new generator connecting to the grid will find its unit's rate of rotation moving to the common frequency level.

Frequency keeping

Frequency keeping refers to the process used to keep the frequency of the grid within its normal band. Frequency keeping power stations are used to increase or decrease generation within a set band to ensure that supply equals demand on a second-by-second basis.

FTR - financial transmission rights

A financial risk management product that protects against price risks arising from transmission losses and constraints.

GAAP

Generally accepted accounting practice.

GIP - grid injection point

A point of connection where electricity flows into the national grid from generating stations. See GXP below.

Grid

The high voltage electricity network, provided by State-owned enterprise Transpower, that transmits electricity over more than 12,000km of transmission lines throughout New Zealand from generators to distributors and major industrial users.

Grid owner

The State-owned enterprise Transpower, the owner of the high voltage transmission grid, also referred to as the national grid.

GWh - gigawatt hour

One gigawatt hour is equal to one million kilowatt hours. New Zealand's annual demand is approximately 40,000 GWh.

GXP - grid exit point

A point of connection where electricity flows out of the national grid to local networks or direct consumers. There are around 175 GXPs, with most distributors receiving supply through 2 or more.

Haywards

The location on the national grid at which the HVDC link is connected to the North Island. Prices at the Haywards node, located in the Hutt Valley, give a

good indication of prices across the lower half of the North Island. Haywards is one of the three key wholesale pricing reference nodes, the others being Benmore and Otahuhu.

Hedge contract

A financial risk management product or contract for sale and purchase of electricity that protects against price risks associated with the spot price of electricity. It sets a price at which a buyer will purchase a specific quantity of electricity at a specified node for a set period. The buyer pays this price regardless of whether the market price is higher or lower than the set price. Hedge contracts are also known as contracts for differences (CFDs).

Hedge market

A market through which hedge contracts are bought and sold. A hedge contract is a financial risk management product or contract for sale and purchase of electricity that shifts the price risks associated with the spot price of electricity. For example, a common hedge contract is a contract for differences (CFDs). CFDs set a price at which a buyer will purchase a specific quantity of electricity at a specified node for a set period. The buyer of the CFD pays this price regardless of whether the spot market price is higher or lower than the set price.

HVDC - high voltage direct current

The HVDC link is the high voltage transmission cable that transports electricity in both directions between the North and South Islands, including across the Cook Strait Cable.

ICP - Installation Control Point

An ICP is a physical point of connection on a local network or an embedded network. Each ICP is the point nominated by a distributor where a retailer will be deemed to supply electricity to a consumer. Each ICP is assigned an 'ICP identifier', which is an individual customer's reference number on power bills.

IM

Input methodology (the Commerce Commission sets and periodically revises 'IMs' for price control regulation)

Information disclosure

Under Part 4 of the Commerce Act, all (price controlled and non-price controlled) electricity distributors are required to disclose a great deal of data annually on the operations of their businesses. This includes data on pricing, future expenditure forecasts, outages and interruptions, and financial statements. A primary objective of the information disclosure regime is to better inform consumers and analysts about the efficiency of individual EDBs.

Instantaneous reserve

Generation capacity and interruptible load that is made available to be used in the event of a sudden failure of a generating or transmission facility in order to maintain system frequency at 50 Hertz.

Instantaneous reserve is procured based on the size of the single largest contingent event that could occur during a particular trading period. Generators offer instantaneous reserves at the same time as they make energy offers.

Fast instantaneous reserve (FIR) is available within six seconds and must be able to operate for one minute. Sustained instantaneous reserve (SIR) is available within 60 seconds and must be available for 15 minutes.

Intermittent generation

Generation for which the source is intermittent and not easily predicted, for example, wind or wave generation.

Interruptible load

A type of instantaneous reserve that is provided by load that can be quickly disconnected, for example, hot water heating.

IPAG

The Electricity Authority's Innovation and Participation Advisory Group

IRIS

Incremental rolling incentive scheme

kVA

Kilovolt Ampere. kVAs (sometimes called 'apparent power') are the measure of actual electric power in a system, i.e. kVs minus inefficiencies in that system. Mainly, those 'inefficiencies' are caused by the magnetic field of a connected motor (including a generator) and some devices holding back the 'AMPs' or current of a system.

The measure of inefficiency in an electrical system is the '*power factor*', which is expressed as a number between 0.1 and 1.0 (a completely efficient system would have a power factor of 1, while most major industrial loads – and generators – have a power factor of 0.8).

kW. 1 kilowatt = 1000 Watts. (See 'Watt'.)

kWh - kilowatt hour

A kilowatt hour is also known as a unit of electricity and is the basis of retail sales and reconciliation of electricity in the market.

Levy

(See 'Electricity Authority' above). The charge on the electricity industry that funds the Authority.

Lines company

A company that owns the lines which transport electricity on local low-voltage networks. They are also called electricity distribution companies (EDBs) or distributors.

Local network

The lines and substations used by distributors to transport electricity from grid exit points (GXPs) to points of connection with consumers.

Losses, line losses

As electricity travels through the national grid and through distribution networks, a proportion of energy is lost as heat due to the resistance in the lines. The greater the distance the electricity travels, the closer the line is to its capacity, and the lower the voltage of the line, the higher the losses are.

Low User Fixed Charge Regulations

The Electricity (Low Fixed Charge Tariff Option for Domestic Consumers) Regulations were introduced in 2004 to give domestic users the option of paying a minimum rate for their distributor's line services, if they met certain criteria (as an approximate guide, consumers who are using less than the average domestic quantity annually are entitled to opt for a daily line charge of 15 cents).

MAR

Market-to-asset ratio

Market operation service provider

There are eight market operation service providers engaged in the operation of the electricity market. The Electricity Authority contracts with other parties to provide the following main services:

- system operator
- reconciliation manager
- information system provider
- clearing manager
- FTR manager
- pricing manager
- registry
- extended reserve manager

MBIE

Ministry of Business, Innovation and Employment. MBIE is the policy adviser to Ministers on energy matters. MBIE also oversees (on behalf of the Minister of Energy and Resources) the Electricity Authority.

MDAG

The Electricity Authority's Market Development Advisory Group

MEUG - Major Electricity Users' Group

The industry lobby group representing major electricity users (the largest of which are supplied direct through the Transpower grid, rather than through a distributor), such as the aluminium smelter.

MUoSA

Model use-of-system agreement. This takes the form of 'default use of system agreements' that the Electricity Authority is able to impose on distributors if they do not provide ones that it is satisfied with.

MW - Megawatt

1 million Watts (a Watt = 1 Volt x 1 Amp). The capability of a generator to supply electricity is usually expressed in MW, e.g. the Clyde Dam has a capacity of 464 MW. Similarly, larger 'loads' – such as a pulp mill or a

suburb— are often expressed in MW. As an example, a town might have a peak load of around 200 MW, and an average load of perhaps 160 MW.

MWh - megawatt hour

A megawatt hour is equal to 1,000 kilowatt hours. Megawatt hours are the metering standard unit for the wholesale market.

National grid

The transmission network owned by State-owned enterprise Transpower that transports high voltage electricity from the major power stations to the local distribution networks and direct-connected consumers, operated by lines companies.

Network

The national grid, a local network or an embedded network.

NZX

The New Zealand stock exchange.

Offer

An offer to sell a quantity of electricity at a specified price in the wholesale electricity market. Wholesale electricity ‘offers’ are ‘stacked’ from lowest to highest, with the actual price to all generators needed to meet supply in each period being the offer price from the most expensive generator needed in that period.

Ohm

The primary measure of electrical resistance in a circuit (the opposite of the ‘conductance’ of the circuit). An analogy can be drawn with ‘friction’.

Otahuhu

Prices at the Otahuhu node are used as an indicator of prices in the upper North Island. Otahuhu is one of the three wholesale pricing key reference nodes, the others being Haywards and Benmore.

Over-frequency reserve

An ancillary service that automatically reduces the level of injection from a generating set to stop an unplanned rise in the frequency.

Part 4

The part of the Commerce Act that deals specifically with rules and regulations governing pricing, quality and information disclosure by electricity distributors (and other monopolistic businesses).

Participant

A person, or a person belonging to a class of persons, identified in section 7 of the Electricity Industry Act 2010 as being a participant in the electricity industry. These include generators, Transpower, distributors, retailers, other lines owners, consumers directly connected to the national grid, buyers of electricity from the clearing manager and service providers.

Power factor

The measure of inefficiency in an electrical supply system. See 'kVA'.

Pricing manager

The market operation service provider (currently the New Zealand Stock Exchange, NZX) contracted by the Authority to calculate and publish final prices.

Profiling/profiles

Profiling allows retailers to estimate how much electricity any consumer will use in each half hour by providing a typical consumption 'shape'.

Prudential security

Under wholesale market rules, electricity can be consumed up to 57 days before payment for it is due. As a result, each purchaser is required to provide prudential security sufficient to cover this period, most commonly in the form of cash or a letter of credit, to cover the risk of not paying for this electricity on the due date. This ensures that generators are paid, even if a purchaser defaults. To ensure that sufficient security is held, the clearing manager monitors current and projected exposure on a daily basis using bids, cleared offers and final prices.

RAB – Regulatory Asset Base

The Commerce Commission, as regulator, sets the RAB of each distributor in accordance with a formula based on depreciated investments in assets. Price controls are based around providing a set rate of return on the RAB of each distributor.

RAG

The Electricity Authority's Retail Advisory Group.

Real-time (5-minute) price

The price of wholesale electricity calculated for every five-minute period through each day.

Reconciliation

The process of matching the electricity supplied to customers by individual retailers with actual demand at a grid exit point.

The New Zealand Stock Exchange is contracted by the Electricity Authority to undertake the 'reconciliation manager' function and take responsibility for reconciling metering data against a register of contracts and passing the data to participants.

Reference nodes

The three reference nodes are Benmore, Haywards and Otahuhu. Wholesale prices vary throughout the country by half hour, depending on the grid configuration at the time, so the prices at these nodes are considered indicative of electricity prices for the South Island, the lower North Island and the upper North Island respectively.

Registry

The database that identifies every point of electricity connection using an installation control point (ICP) reference, enabling energy flows between retailers to be reconciled. The registry also informs retailers when a customer switches supplier.

Reserve

Spare generating capacity or load reductions used to recover frequency immediately following a sudden generation or transmission line outage.

Retailer

A company that sells electricity to customers.

ROI

Return on investment.

SAIDI, SAIFI and CAIDI

These are the Commerce Commission's principal measures of a distributor's power supply quality:

SAIDI – System Average Interruption Duration Index

SAIFI – System Average Interruption Frequency Index

CAIDI – Customer Average Duration Interruption Index

Section 54Q

The section of the Commerce Act that states:

54Q *Energy efficiency*

The Commission must promote incentives, and must avoid imposing disincentives, for suppliers of electricity lines services to invest in energy efficiency and demand side management, and to reduce energy losses, when applying this Part in relation to electricity lines services.

SCADA - supervisory control and data acquisition

The systems used by networks to collect and display information on how their system is operating on a moment-by-moment basis.

Settlement

Settlement occurs on the 20th day of the month after wholesale electricity market trading. The clearing manager operates a clearing house, paying generators in full once all monies are received in cleared funds from purchasers.

Spot market

The buying and selling of wholesale electricity is done via a 'pool' for each half-hour for each grid point of connection, where electricity generators offer electricity to the market and retailers bid to buy electricity. This market is called the spot or physical wholesale market.

Spot price

The half-hour price of wholesale ('spot') market electricity published by the pricing manager.

Statement of Corporate Intent, SCI

An annual agreement between each trust-owned EDB and its trust. See **Appendix 3** above.

SRC

The Electricity Authority's Security and Reliability Council

SDFG

The Electricity Authority's Standing Data Formats Group

SPSTG

The Electricity Authority's Settlement and Prudential Security Technical Group

STG

The Electricity Authority's Switch Technical Group

SWER

Single wire earth return. This is a relatively low-cost power distribution system developed in New Zealand during the 1920s and still used to supply remote areas in some parts of the country. It relies on a series of connections to earth, in place of a second neutral 'return' wire in a circuit.

System operator

The system operator (currently Transpower) is the market operation service provider responsible for scheduling and dispatching electricity in a manner that avoids fluctuations in frequency or disruption of supply.

TAMRP

Tax-adjusted market risk premium

TPM

Transmission pricing methodology. The Electricity Authority is responsible for establishing and reviewing the TPM.

Transpower

The State-owned enterprise that owns the high voltage transmission network (the national grid) and acts as system operator.

Trusts Act 2019

The primary legislation applying to all trusts. See 'Trusts Act 2019' in **Contents**.

UOSA - use of system agreement

Agreements that cover retailers' arrangements with distributors for local distribution services.

These can be '*interposed*' or '*conveyance*' agreements. In interposed ones (the most usual), the retailer 'buys' distribution services from the distributor and sells its delivered electricity to the consumer. In conveyance ones the retailer simply sells electricity to the consumer, while the distributor contracts separately with the consumer to sell distribution services.

Utilities Disputes Ltd

Utilities Disputes Ltd (originally the Electricity complaints Commission) is a separate organisation from the Electricity Authority. It provides consumers with a free and independent dispute resolution service for complaints about their electricity lines or retail company, provided that company is a member. See www.utilitiesdisputes.co.nz

UTS

Undesirable trading situation. A UTS arises when there is a threat to orderly trading on the wholesale market or settlement that cannot otherwise be resolved satisfactorily under the Electricity Authority's Code.

VoLL

Value of lost load. Regulators, in particular, focus on VoLL to (for example) calculate the economic cost of power outages.

Volt

The measure of "electrical potential" (think of it, simplistically, as the 'pressure' difference between the input and output ends of an electrical circuit). The usual analogy for voltage is with water pressure in a hydraulic pipe, determining the rate of flow of the water.

WACC

The 'weighted average cost of capital'. In the Commerce Commission's regulatory regime, the WACC for all electricity distributors is set periodically to determine the allowed maximum return on investment for regulated companies. See 'Part 2' of this manual above for a discussion on how the WACC is set.

WAG

The Electricity Authority's [former](#) Wholesale Advisory Group.

Watt

A primary measure of electrical power. $1 \text{ Watt} = 1 \text{ Volt} \times 1 \text{ Amp}$.

Electricity conversion factors & equivalents

Joules, Petajoules, etc [1 Joule = 0.000948 BTU (9.48×10^{-4}), 1 BTU = 1055.06 Joules]

A joule is a tiny amount of energy, a Gigajoule is about what you carry around in a near-full car petrol tank, and a Petajoule is about what one of the coastal oil tankers carries around.

1 Joule	=	0.00000027778 kWh	=	0.2388	International calories
1 Gigajoule	=	277.778 kWh	=	0.00027778 GWh	
1 Petajoule	=	277,780,000 kWh	=	277.778 GWh	
	=	947,800 million btu	=	23,880 tonnes oil equiv. (toe)	

Confused? Think of a Petajoule as about 20,000 tonnes of oil (say 40,000 tonnes of coal), and a Gigajoule as about 33 litres of petrol. The hierarchy is:

kilo	=	1000	(1 kilojoule = 1000 Joules)			
mega	=	1,000,000		=	1×10^6	= 1 E6 (or 1 E+6)
giga	=	1,000,000,000		=	1×10^9	= 1 E9
tera	=	1,000,000,000,000		=	1×10^{12}	= 1 E12
peta	=	1,000,000,000,000,000		=	1×10^{15}	= 1 E15

Exponential numbering is just a short way of dealing with a lot of zeros: for example, 4 PJ is equal to

4 E15 joules. To cope with a lot of zeros after a decimal point, a “-” is used: 0.00004 becomes 4 E-5.

Electricity [1 kWh = 0.0036 GJ, 1 GJ = 277.78 kWh, 1 GWh = 0.0036 PJ]

	Joules		Wh		kWh		Million Joules
	1	=	1.E+00	=	2.7778 E-4	=	0.0000002778
Kilo	1,000	=	1.E+03	=	0.27778	=	0.00027778
Mega	1,000,000	=	1.E+06	=	277.78	=	0.277788
Giga	1,000,000,000	=	1.E+09	=	277,780	=	277.78
Tera	1,000,000,000,000	=	1.E+12	=	277,780,000	=	277,780
Peta	1,000,000,000,000,000	=	1.E+15	=	2.78 E11	=	277,780,000

The “unit” that electricity is usually priced in is the **kilowatt hour** (kWh), although in the wholesale market the price is now often expressed in \$/megawatt rather than in cents per kWh. A selling price of \$30 per MW reported in the wholesale market normally means that the price in a given half hour is \$30 per MWh, or 3 cents per kWh. A kWh is a surprisingly large amount of energy (enough to lift a 1 tonne weight 1200 metres in an hour, ignoring friction).

Up to 8000 litres of water (8 tonnes) is used at a hydro station to generate 1 kWh, although the quantity of water needed varies with the head of the station. Boiling a 1 litre jug takes about 0.12 kWh. A 100 kW car engine is a 134 horsepower one. When using kWh remember you are starting from 10^3 Wh (1 GWh is 10^6 kWh but 10^9 Wh). Keeping ten 100 Watt light bulbs burning for an hour uses 1 kWh.

Annual **electricity consumption** data is often expressed in gigawatt hours. New Zealand will consume about 40,000 GWh (144 PJ) of electricity in 2020. This will require **gross generation** of about 44,000 GWh (158 PJ), as transmission and distribution **losses** prior to consumption will average about 10%.

Generation **capacity** is usually expressed in megawatts. New Zealand's biggest power station is Manapouri, which has a rated capacity of 850 MW at present. Annual output from Manapouri could be around 3,720 GWh, derived as follows:

$$850 \text{ MW} \times 8760 \text{ hours in the year} \times 50\% = 3,720,000 \text{ MWh} = 3,720 \text{ GWh}$$

Here the 50% is the **load factor** for the year, which is the average annual load on the facility. Confusion sometimes occurs between load factor and “availability factor”: a station such as Manapouri may be available to run for 90% of the year, but may never exceed a load factor of 50%, due to externalities such as water inflow limits, transmission constraints, and so forth. (Total NZ generation capacity in 2019 = about 9,500 MW, generating 43 TWh = Load Factor of 57.6% [$43,000,000 / (7,860 \times 9,500) = 0.576$]. This doesn't mean we have 44.4% spare capacity, it means that you need about 2MW of installed capacity to average 1 MW of productive capacity from a mainly hydro system over a full year, due mainly to fluctuations in fuel supply.

Electricity quantities are expressed in TWh, GWh, MWh and KWh, depending on the scale of supply. For example, NZ consumes around 40 TWh annually, power is priced in the wholesale market in MWh, and in the retail market it is supplied in KWh.

The capacity of generation plant is usually expressed in MW (i.e. when its running, the output is the MW of the plant x the number of hours it's generating, in MWh)

Power reaches a normal domestic consumer at 230 to 240 **volts** and 40 **amps** (a volt is the intensity of force of the electricity, while an amp is the rate of flow of the electricity). The actual quantity of electricity an appliance or light uses is measured in **Watts** (or volts x amps, adjusted via a geometric calculation). In the NZ electricity industry the average house needs a power supply of 9,200 Watts.

The electrical energy consumed by a 1,000 watt (1 kilowatt) appliance in an hour is 1 kilowatt hour (kWh). A kilowatt hour is also known as a unit of electricity and is the unit in which retail sales of electricity are measured.

APPENDIX 8

About ETNZ

ETNZ – the Energy Trusts Association of New Zealand Inc. – is the national organization for the energy trusts that, on behalf of consumers and communities, own electricity distribution businesses throughout New Zealand.

It is administered by an **Executive Committee** that is elected each year by its trust members, on a ‘1 vote/1 trust’ basis. It is funded by a levy on members.

ETNZ’s Objectives

- (a) To assist in the governance and administration of our member trusts;
- (b) To promote, foster, develop and support the trustees of our members;
- (c) To collaborate with other organisations to further these objectives; and
- (d) To carry out such other activities that the Executive Committee considers important to achieve these objectives.

What we do

ETNZ Conferences provide a forum for trustees to share knowledge and to hear from key stakeholders, regulators and policymakers who are influencing the value of trust assets. Normally we arrange two major conferences, one around late April or early May and another in late September or early November.

We liaise with and sometimes engage external advisers to assist members on issues relevant to them all. These experts can range from credible economic or commercial experts capable of influencing major government policy decisions, through to very specialized advisors on issues such as trust law.

Our on-line newsletter, *Trust Matters*, is emailed to members as topical developments occur, usually about bi-monthly.

We consult with and make submissions to Government, regulators and other relevant agencies on relevant topics. To the extent possible we liaise with members in making these submissions.

Our website at www.etnz.org.nz (make sure you put ‘.org’, not ‘.co’) contains further information on ETNZ and our activities. **Make sure that you have a password to access the Members section.**

Contact us

ETNZ operates to a fairly tight budget, with just two part-time contractors: a Secretary and an Executive Officer, both of whom support the Executive Committee.

Our address:
Energy Trusts of New Zealand Inc
P.O. Box 61
Orewa 0946

‘Phone 027 451 7699 (Joy Stevens, Secretary) – Joy retires in May 2022
and contact details for her successor will be circulated then.
0274 57 5758 (Alan Jenkins, Executive Officer)

Email joy@etnz.org.nz – note that this email will be updated from May
2022

Rules of ETNZ

The Rules of ETNZ can be viewed on the ETNZ site at

<https://etnz.org.nz/rules-and-guidelines/>

APPENDIX 9

Important Current Issues

This is a temporary appendix covering any key issues that trustees should be aware of when the current version of the Trustee's Manual is released.

1. Electricity Industry Amendment Bill 2021

As covered in various sections of this manual, a Bill amending the primary Act governing the electricity industry is due to be enacted during 2022.

Some of the key amendments made to the Act are as follows.

Interpretation

Clause 5 inserts a number of definitions into the Act including the definition of “small business consumer” which means a consumer that is not a domestic consumer and:

- that is in a class specified in regulations made under section 113A; or
- if no such regulations have been made, that consumes less than 40 MWh of electricity per year.

Meaning of involved in

Part 2 of the Act is concerned with electricity industry governance. Section 7 (in Part 2) states who are considered to be “industry participants” for the purposes of the Act. An industry participant includes (among others):

- a generator
- Transpower
- a distributor
- a retailer
- any other person who owns lines.

Clause 6 inserts a new section 6A into Part 1 of the Act (preliminary provisions) which provides for the meaning of “involved in”. A person is “involved in” an industry participant if the person:

- carries on a business as an industry participant, either alone or together with its associates and either on its own or another's behalf; or
- exceeds the 10% threshold in respect of a business that is an industry participant; or
- has material influence over a business that is an industry participant.

Exemption from obligation to comply with Code

Section 11 of the Act currently provides for the criteria for when an industry participant need not comply with the Code or specific provisions of the Code.

Clause 8 of the bill replaces section 11 of the Act. According to the explanatory note to the bill: [\[2\]](#)

The main substantive changes are —

- *to the circumstances under which the Authority may grant an individual exemption to an industry participant. The change is that one of the proposed conditions is that the Authority must be satisfied that exempting the participant would better achieve the Authority's objectives than requiring compliance. This replaces the existing condition that the Authority be satisfied that exempting the participant will reduce overall administration and compliance costs;*
- *to allow the Authority to grant an individual exemption subject to terms or conditions that it considers necessary.*

Objective of Authority

Clause 9 of the bill amends section 15 of the Act which outlines the objective of the Authority. Clause 9 inserts an additional objective of the Authority which is to protect the interests of domestic consumers and small business consumers in relation to the supply of electricity to those consumers.

Clause 9 further provides that this additional objective applies only to the Authority's activities in relation to the dealings of industry participants with domestic consumers and small business consumers.

Functions of the Authority

Clause 10 amends section 16 of the Act which is concerned with the functions of the Authority. Clause 10 inserts a new function which is to undertake measures aimed at protecting the interests of domestic consumers and small business consumers in relation to the supply of electricity to those consumers.

Small Electricity Consumers Agency

Clause 11 of the bill inserts new sections 22A and 22B which provide for a new Small Electricity Consumers Agency.

Proposed new section 22A provides that the Minister may establish a Small Electricity Consumer Agency (the agency) by approving one or more persons to perform the function of the agency (a person includes any instrument of the Crown (for example, a public service agency, as that term is defined in section 5 of the [Public Service Act 2020](#)).

Proposed new section 22B provides for the agency's function which is to represent and advocate for the interests of domestic consumers and small business consumers in the electricity industry. This may be carried out by, for example:

- promoting the interests of domestic consumers and small business consumers to relevant public service agencies and Crown entities; and
- providing evidence-based advocacy on behalf of domestic consumers and small business consumers, whether in response to policy proposals or on its own initiative.

Content of Code

Section 32 of the Act concerns the content of the Code. According to the explanatory note to the bill, the main changes are as follows: [\[3\]](#)

- *new section 32(1) has been updated to reflect the additional objective of the Authority inserted by clause 9 (primarily by the addition of new paragraph (d)):*
- *under new section 32(2)(a) and (3), the Code will be able to impose obligations on a person who is not an industry participant (or a person acting on behalf of an industry participant) for the purposes of restricting relationships between 2 classes of industry participants, where those relationships may not otherwise be at arm ' s length (this reflects the shift of provisions previously in Part 3 of the Act to the Code):*
- *section 32(2)(b) has been updated to clarify in what circumstances the Code can regulate things that are also regulated (or authorised to be regulated) by the Commerce Commission:*
- *the content of existing section 32(3), which relates to the ability of the Code to incorporate documents by reference, has been removed, consistent with the Legislation Act 2019.*

The proposed new section 32 provides (among other things) that the Code may contain any provisions that are consistent with the objectives of the Authority and are necessary or desirable to promote any or all of the following:

- competition in the electricity industry
- the reliable supply of electricity to consumers
- the efficient operation of the electricity industry
- the protection of the interests of domestic consumers and small business consumers in relation to the supply of electricity to those consumers
- the performance by the Authority of its functions
- any other matter specifically referred to in this Act as a matter for inclusion in the Code.

Proposed section 32(4) provides that the Code may contain provisions that do any of the following:

- set quality or information requirements for Transpower or one or more distributors in relation to the terms and conditions for access to transmission or distribution networks
- set pricing methodologies for Transpower or one or more distributors.

Distribution agreements

Clause 19 provides for new sections 44A to 44F.

Proposed new section 44A concerns distribution agreements and provides, among other things, that, without limiting section 32, the Code may require a distributor and one or more other industry participants to enter into one or more agreements for connection to, and use of, the distributor's network (a distribution agreement).

Minister may amend the Code to include specified matters

Proposed new section 44B provides that the Minister may amend the Code by including provisions for any matter specified in section 44B(2) if the Minister:

- considers that the Code's provisions for the specified matter are not satisfactory; and
- is satisfied that the amendment will further the Authority's objectives in section 15.

Proposed new section 44B(2) provides for the specified matters and includes (among others):

- requirements for retailers to process consumer requests for information about their electricity consumer in a timely way
- limitations on retailer saves and win-backs
- requirements for distributors to offer retailers standard terms for access to their networks.

Separation of distribution from certain generation

Clause 24 of the bill replaces subpart 1 of Part 3 of the Act which is concerned with separation of distribution from certain generation.

Proposed new section 72 provides that the purpose of the Part is to prohibit a person who is involved in a distributor from being involved in a generator where that may create incentives and opportunities to inhibit competition in the electricity industry.

2. Parliamentary review of Energy Trusts

The Justice Select Committee's report on its *Inquiry into the 2019 Local Elections and Liquor Licensing Trust Elections, and Recent Energy Trust Elections* was released in July 2021. The Committee's views and recommendations relating to energy trusts are set out in full below:

Energy trusts

One of this inquiry's terms of reference was to examine the law and administrative procedures for the conduct of elections for energy trusts held since 2016. Energy trusts were set up to own local electricity distribution businesses in New Zealand. There are over 20 energy trusts. Their beneficiaries are electricity consumers. Each energy trust is governed by the terms of its trust deed.

Payouts to beneficiaries

Some energy trusts pay dividends to their beneficiaries according to their trust deeds. Auckland's Entrust, for example, owns 75 percent of the electricity lines company Vector Limited. Each year, it collects a dividend from Vector's profits which it shares with its beneficiaries. The amount varies depending on profits, and can be several hundred dollars for each electricity consumer. Some energy trusts distribute the dividends through credits on consumers' power bills.

Energy trust elections

Trustees are elected by electricity consumers under the terms of the trust's trust deed. Some trust deeds require elections to be conducted in accordance with relevant provisions of the Local Electoral Act; however, these are not elections conducted under that legislation. Elections are supervised by each trust's returning officer. Trust deeds can only be changed by order of the High Court. While energy trusts are not local elections in terms of statutory law, they borrow from the mana of the local

electoral framework. Moreover, they involve local constituents choosing how significant public assets are governed.

Energy Trusts of New Zealand believes that turnout of between 13 and 30 percent represents a “reasonably high level of customer satisfaction”. It considers that energy trust elections are of limited interest to the public because they focus on local issues about electricity delivery and performance.

We asked Entrust about the timing of its payouts and elections. We learnt that payouts are based on the end of the financial year, on 30 June. Entrust receives its dividend from Vector in late August. It takes about a month to calculate and pay beneficiaries their dividends, so payments are made in about late September. As for its elections, Entrust’s trust deed requires elections to be held in October every three years. Entrust told us that making a change to the trust deed would require a court process.

Payouts should not be made in election periods

While we acknowledge the differing views on this issue and make no findings in respect of the conduct of any particular election, we are concerned that the timing of payouts generally could affect perceptions of the integrity of elections. We believe that dividends should not be paid within a certain period of an energy trust election. In particular, payouts made just prior to an energy trust election could be seen as influencing voters in favour of the existing board.

Even if their intentions are innocent, energy trusts risk being seen as inappropriately trying to influence voters. One submitter noted their concern with the timing of payouts. They told us that when raising this concern with the relevant trust, they were told that payouts of dividends were part of business as usual and not related to the election.

We also are concerned that, as smaller-scale elections of limited interest to the public, energy trust elections are vulnerable to other integrity risks. As well as the issue we noted above, of the payout period advantaging incumbent candidates, we agree with a submitter who commented that limited information about energy trust candidates means that voters may make uninformed decisions. The submitter also noted that it is easy for special interest groups to gain election to energy trusts, and recommended that term limits be introduced.

Amending a trust deed would require an application to the High Court. While we are concerned about the potential for the timing of payouts to affect how beneficiaries vote, we consider that we have limited mechanisms to influence how energy trust elections should be conducted within established frameworks. We note too that similar concerns have been raised in Parliament before, in the petition of Leilani Tamu and 44 others, reported on by the Justice and Electoral Committee in 2016.

We recommend that the Government give consideration to the legislative framework within which energy trusts operate, with a particular focus on whether it is appropriate for their elections to be governed by trust deed, and how greater public control and oversight of energy trust elections could be achieved.

We also strongly encourage energy trusts to proactively address voters’ concerns by considering the arrangements in their trust deeds to ensure there is little room for perceptions of improbity to arise.

Recommendation We recommend that the Government give consideration to the legislative framework within which energy trusts operate, with a particular focus on whether it is appropriate for their elections to be governed by trust deed, and how greater public control and oversight of energy trust elections could be achieved.

APPENDIX 10

Contents and links for Trusts Act 2019 - Version as at 28 October 2021

Note 4 at the end of this version provides a list of the amendments included in it.

This Act is administered by the Ministry of Justice.

[1 Title](#)

[2 Commencement](#)

Part 1 **General provisions**

[3 Purpose](#)

[4 Principles](#)

[Application, and relationship of Act with trust terms, common law and equity, and other enactments](#)

[6 Overview of this Act](#)

[7 Interpretation of Act](#)

[8 Inherent jurisdiction of court not affected](#)

[9 Definitions](#)

[10 Transitional, savings, and related provisions](#)

[11 Act binds the Crown](#)

Part 2 **Express trusts**

[12 Meaning of express trust](#)

[13 Characteristics of express trust](#)

[14 Sole trustee cannot be sole beneficiary](#)

[15 Creation of express trust](#)

[16 Maximum duration of trust](#)

[17 Application of maximum duration rule to resettlements](#)

[18 Accumulation of income by trust](#)

[19 Distribution of trust property on expiry of trust](#)

[20 Age of majority](#)

Part 3 **Trustees' duties and information obligations**

Subpart 1—Duties of trustee

[21 Guiding principle in performing duties](#)

Mandatory duties

[22 Mandatory duties](#)

[23 Duty to know terms of trust](#)

[24 Duty to act in accordance with terms of trust](#)

[25 Duty to act honestly and in good faith](#)

[26 Duty to act for benefit of beneficiaries or to further permitted purpose of trust](#)

27 Duty to exercise powers for proper purpose

Default duties

28 Default duties

29 General duty of care

30 Duty to invest prudently

31 Duty not to exercise power for own benefit

32 Duty to consider exercise of power

33 Duty not to bind or commit trustees to future exercise of discretion

34 Duty to avoid conflict of interest

35 Duty of impartiality

36 Duty not to profit

37 Duty to act for no reward

38 Duty to act unanimously

39 Adviser must alert settlor to modification or exclusion of default duty

Subpart 2—Exemption and indemnity clauses

40 Restriction on trustee exemption clauses

41 Restriction on trustee indemnity clauses

42 Invalidity of exemption clause or indemnity clause

43 Adviser must alert settlor to liability exclusion or indemnity clause

44 Court consideration of gross negligence

Subpart 3—Trustees' obligations to keep and give trust information

Documents to be kept by trustees

45 Trustee must keep core documents

46 Keeping documents where there is more than 1 trustee

47 Documents must be kept for duration of trusteeship

48 Trustee must pass on documents

Giving information to beneficiaries

49 Definitions for purposes of sections 50 to 55

50 Purpose and application of sections 51 to 55

51 Presumption that trustee must notify basic trust information

52 Presumption that trustee must give information on request

53 Procedure for deciding whether presumption applies

54 Procedure when trustee decides to give no information

55 Beneficiary may be required to pay cost of giving information

Part 4

Trustees' powers and indemnities

Subpart 1—Powers of trustee

56 General powers of trustee

57 Status of provisions on specific powers of trustee

Investment powers

58 Trustee has power to invest

59 Matters which trustee may consider in exercising power to invest

Power to determine treatment of returns and accounts

60 Power to determine whether return on investment is income or capital

61 Apportionment of receipts and outgoings between income and capital

Powers to apply trust property for beneficiary's welfare

62 Trustee's power to pay or apply income for child beneficiary's welfare

63 Trustee's powers with respect to income of child beneficiary

64 Trustee's power to pay or apply capital for beneficiary's welfare

65 Trustee may impose conditions on payment for beneficiary's welfare

Trustee not liable for certain losses in relation to amounts paid or applied for
66 beneficiary's welfare

Exercise of trustee powers and functions by others

67 Trustee's power to appoint others to exercise or perform certain powers or functions

68 Trustee's duties to keep appointments under review and to fulfil general duty of care

69 Trustee's liability for acts of appointee limited

70 Trustee's power to delegate powers and functions in specified circumstances

71 Notice of delegation of trustee's powers and functions

72 Trustee's liability for acts of delegate limited

73 Application to Public Trust to consent to become delegate

Special trust advisers

74 Role and appointment of special trust advisers

75 Reliance on special trust adviser's advice

76 Remuneration of special trust advisers

Other powers and rights of trustee

77 Application of insurance money for loss or damage of trust property

78 Trustee's power to adjust interests in trust property of portfolio investment entity

Trustee's liability limited where notice given to distribute trust property without regard to
79 unknown claims

Protection of purchasers and mortgagees dealing with trustees

80 Protection of purchasers and mortgagees dealing with trustees

Subpart 2—Trustees' indemnities

81 Trustee's liability for expenses and liabilities incurred, and trustee's right to indemnity

82 Indemnification of trustee with agreement of beneficiaries where indemnity impaired

83 Power of court to approve indemnification

84 Power of court to waive requirement of consent to indemnification

85 Ranking of trust property

86 Creditor's limited claim to trust property through trustee's indemnity

- [87 Trustee's lien on insurance money for premiums](#)
- [88 Trustee's indemnity for rent, covenant, or agreement under lease](#)
- [89 Protection of trustee in handing over personal property to life tenant](#)
- [90 Protection of trustee in handing over personal property to child](#)
- [91 Protection relating to notice when person trustee of more than 1 trust](#)

Part 5 **Appointment and discharge of trustees**

Power to remove or to appoint trustee

- [92 Who may remove trustee and appoint replacement](#)
- [93 Person with power to remove or appoint trustee may apply to court for directions](#)
- [94 Duty to exercise power to remove or appoint trustee honestly and for proper purpose](#)
- [95 Application to review exercise of power to remove or to appoint trustee](#)

Appointment of trustee

- [96 Who may be appointed as trustee](#)
- [97 Statutory trustee may be sole trustee](#)
- [98 How trustee is appointed](#)
- [99 How trustee accepts or rejects appointment](#)
- [100 Acts of trustee not invalidated by defect in appointment](#)

Retirement of trustee

- [101 How trustee retires](#)

Death of trustee

- [102 Devolution of powers on death of trustee](#)

Removal of trustee

- [103 How trustee is removed](#)
- [104 Compulsory removal of trustee](#)
- [105 Optional removal of trustee](#)
- [106 Notice of decision to remove](#)
- [107 Effect of notice](#)
- [108 Removal where notice cannot be given](#)
- [109 Application to prevent removal](#)
- [110 Procedure on trustee's application to prevent removal](#)
- [111 Court may make order preventing removal](#)
- [112 Court may make order for removal](#)

Replacement of trustee

- [113 How trustee is replaced](#)
- [114 Court may appoint or replace trustee](#)
- [115 Replacing sole trustee with multiple trustees](#)

Divesting and vesting of trust property

- [116 Divesting and vesting of trust property on change of trustees](#)

- [117Requirements to notify, register, or record divesting and vesting of trust property](#)
- [118Requirement to assist in transfer of trust property](#)
- [119Protection in relation to notifying, registering, or recording transfer of trust property](#)
- [120Departing trustee must be given certain documents](#)

Part 6

Termination and variation of trusts

- [121Termination of trust by unanimous consent of beneficiaries](#)
- [122Variation or resettlement of trust by unanimous consent of beneficiaries](#)
- [123Beneficiary's right to share of trust property](#)
- [124Power of court to approve termination, variation, or resettlement of trust](#)
 - [Power of court to waive requirement of consent to termination, variation, or resettlement](#)
- [125of trust](#)

Part 7

Court powers and dispute resolution

- [126Court may review trustee's act, omission, or decision](#)
- [127Procedure for court's review of trustee's act, omission, or decision](#)
- [128Court may take into account investment strategy in action for breach of trust](#)
- [129Court may set off gains and losses arising from investment](#)
- [130Power of court to vary or extend trustees' powers in relation to property](#)
- [131Court may relieve trustee from personal liability](#)
- [132Court may make beneficiary indemnify trustee for breach of trust](#)
- [133Trustee may apply to court for directions](#)
- [134Protection of trustee while acting under direction of court](#)
- [135Trustee may apply to court to bar claims](#)
- [136Trustee may apply to court to allow distribution of missing beneficiaries' shares](#)
- [137Trustee may sue self in different capacity](#)
- [138Court may appoint receiver for trust](#)
- [139Court may order payment of remuneration to trustee](#)
- [140Court may charge costs on trust property](#)

Jurisdiction of Family Court

- [141Jurisdiction of Family Court](#)

Alternative dispute resolution

- [142Definitions for purposes of sections 143 to 148](#)
- [143Power of trustee to refer matter to alternative dispute resolution process](#)
 - [ADR process for internal matter if trust has beneficiaries who are unascertained or lack](#)
- [144capacity](#)
- [145Power of court to order ADR process for internal matter](#)
 - [Trustee may give undertakings for purposes of ADR settlement or arbitration agreement](#)
- [146and any arbitral award](#)

[Trustee's liability in relation to ADR settlement or arbitration agreement and any arbitral award limited](#)

[148Application of Arbitration Act 1996](#)

Part 8 **Miscellaneous provisions**

Transfer to the Crown

[149Transfer to the Crown of non-distributable trust property](#)

[150Financial products transferred to the Crown](#)

[151Administration by the Crown of transferred property](#)

[152Public notice of property transferred to the Crown](#)

Investigation of condition and accounts of certain trust property

[153Application to Public Trust for investigation of condition and accounts of trust property](#)

[154Appointment of investigator by Public Trust](#)

[155How investigator is to conduct and report on investigation](#)

[156Costs of investigation borne by trustees](#)

[157Application to court to determine who bears costs of investigation](#)

[158Application to court to cease investigation](#)

Life tenant to have powers of trustee in certain cases

[159Life tenant to have powers of trustee in certain cases](#)

Transitional regulations

[160Regulations providing for transitional matters](#)

Consequential amendments and repeals

[161Consequential amendments](#)

[162Repeals](#)

Part 9 **Amendments to other Acts**

Subpart 1—Amendments to Arbitration Act 1996

[163Amendments to Arbitration Act 1996](#)

[164New section 10A inserted \(Arbitration of trust matters\)](#)

[10A](#) [Arbitration of trust matters](#)

Subpart 2—Amendments to Financial Markets Conduct Act 2013

[165Amendments to Financial Markets Conduct Act 2013](#)

[166New section 110A and cross-heading inserted](#)

Application of Trusts Act 2019

[110A](#) [Application of Trusts Act 2019](#)

[167Section 112 amended \(General duties applying in exercise of supervisor's functions\)](#)

[168Section 143 amended \(General duties applying in exercise of manager's functions\)](#)

[169Section 153 amended \(General duties applying in exercise of supervisor's functions\)](#)

[170New section 155A and cross-heading inserted](#)

Application of Trusts Act 2019

[155A Application of Trusts Act 2019](#)

[171Section 548 amended \(Other regulations\)](#)

[Section 550 amended \(Procedural requirements for regulations relating to exemptions, exclusions, and definitions\)](#)

[173Section 556 amended \(FMA may grant exemptions\)](#)

[174Section 557 amended \(Restriction on FMA's exemption power\)](#)

[175Schedule 3 amended](#)

[Subpart 3—Amendments to Financial Advisers Act 2008](#)

[176Amendments to Financial Advisers Act 2008](#)

[177New section 77TA and cross-heading inserted](#)

[Application of Trusts Act 2019](#)

[77TA Application of Trusts Act 2019](#)

[178Section 154 amended \(General regulations\)](#)

[Subpart 4—Amendment to Financial Markets Authority Act 2011](#)

[179Amendment to Financial Markets Authority Act 2011](#)

[180Schedule 1 amended](#)

[Subpart 5—Amendments to Financial Services Legislation Amendment Act 2019](#)

[181Amendments to Financial Services Legislation Amendment Act 2019](#)

[182Section 29 amended \(New subparts 5A and 5B of Part 6 inserted\)](#)

[Application of Trusts Act 2019](#)

[431ZJ Application of Trusts Act 2019](#)

[Subpart 6—Amendment to Retirement Villages Act 2003](#)

[183Amendment to Retirement Villages Act 2003](#)

[184New section 105A inserted \(Regulations exempting from provisions of Trusts Act 2019\)](#)

[105A Regulations exempting from provisions of Trusts Act 2019](#)

[Schedule 1](#)

[Transitional, savings, and related provisions](#)

[Schedule 2](#)

[Provisions that apply except as modified or excluded in accordance with section 5\(4\)](#)

[Schedule 3](#)

[Specified commercial trusts](#)

[Schedule 4](#)

[Amendments consequential on repeal of Trustee Act 1956](#)

[Schedule 5](#)

[Amendments consequential on repeal of Perpetuities Act 1964 and abolition of rule against perpetuities](#)

[Notes](#)