



# **GUIDELINES**

## **FOR CPCT TRUSTEES**

**MARCH 2017 edition**

## Contents

	Page No
Introduction	3
Eligibility of persons to be Trustees	4
Election or Appointment?	5
Job Description	6
Declaration of Trust	7
The Fiduciary Nature of Trusteeship	8
Summary of 9 Principles a Trustee must bear in mind	9
The Special Requirements of which a Trustee needs to be aware	
1. Become Familiar with the terms of the Trust and bring the Trust	10
Property under control	
2. Obey the terms of the Trust	10
3. Pay the correct beneficiaries the correct amount at the correct time	10
4. Exercise the appropriate standard of care when carrying out duties	11
5. To account	11
6. To administer the Trust personally	11
7. To avoid conflict of duty and interest	12
8. To act without remuneration	13
9. To invest	13
Breach of Trust	13
Meetings	14
Trust Records and Minutes	15
Statement of Corporate Intent	16
Consumers' Rights	17
Rights and Obligations of Shareholders	18
Power of Attorney	19
Proxy Voting	20
Confidentiality Agreement	22
Ownership Review	23
Appendix 1 – Insolvency Act 1967 – Section 111	24
Appendix 2 – The Companies Act 1993 – Sections 151, 382, 383, 385	25
Appendix 3 – The Protection of Personal & Property Rights Act 1988	32
– Sections 30 & 31	
Appendix 4 – The Crimes Act 1961 – Sections 2(1) and Part 10	35
Appendix 5 – The Trustee Act 1956 – Excerpts	37
Appendix 6 – A sample Insurance Question and Declaration form	39
Appendix 7 – Excerpts from The Electricity Amendment Act 2001	41
The Financial Reporting Act 1993	
The Energy Companies Act 1992	
Appendix 8 – Trust Records and Minutes	42
Appendix 9 – A more Detailed Analysis of Shareholders' Powers, Rights &	44
Obligations	
Appendix 10 – Beneficiary Guidelines	49

## INTRODUCTION

In May 1993, as a result of various Government directives and legislation, a new company came into existence for the purpose of receiving the assets of the Franklin Electric Power Board (established in 1924).

The new company was titled Counties Power Limited – a name it has retained.

The company's main business was and still is that of supplying a network of electricity lines throughout the Franklin District and part of the Papakura District. (More information on the company can be found on its web site [www.countiespower.com](http://www.countiespower.com)).

The ownership of this company was settled on men and women who accepted the responsibilities of being Trustees of the Counties Power Trust – later resettled as the Counties Power Consumer Trust. (More information on the Trust can be found on its web site [www.countiespowertrust.org.nz](http://www.countiespowertrust.org.nz)).

At all times the affairs of the Trust and all Trustee powers, duties and resolutions are governed by a Deed of Trust.

As an attempt to recognize the depth of the responsibilities carried by the Trustees, this booklet is intended for the guidance of both current Trustees and those persons aspiring to the future office of Trustee in the Counties Power Consumer Trust.

Although it contains legal references, it is not a legal document and at no time is either it or any of its contents to be used as such.

While this document has attempted to consider many issues a Trustee might face in the discharge of his or her duties, it is neither complete in its topics nor exhaustive in the consideration of those topics.

Gail Riddell  
Secretary to the Counties Power Consumer Trust

Monday, March 13, 2017

With acknowledgement to articles and memorandums and published books by James Wadham, Peter O'Brien, Mark Cassidy, Simpson Grierson, Roger Pitchforth "MEETINGS Practice and Procedure in New Zealand" 3<sup>rd</sup> edition 1999, The STEP and the NZ Law Societies for use of their Seminar Notes, Brookers for extracts from their electronic Library, and the New Zealand Government Legislation Web site.

## ELIGIBILITY TO BE A TRUSTEE

The Trust Deed contains strict requirements which have the effect of limiting the eligibility of persons wishing to be a Trustee of Counties Power Consumer Trust. (CPCT).

***[The Trust Deed is not reproduced in this booklet – it is available as a separate document.]***

The following classes of person is neither eligible for election nor appointment as a Trustee:-

- (a) a bankrupt who has not obtained a final order of discharge or whose order of discharge has been suspended for a term not yet expired, or is subject to a condition not fulfilled, or to any order under Section 111 of the Insolvency Act 1967;  
[See Appendix 1]
- (b) a person who has been convicted of any offence punishable by a term of imprisonment of two or more years unless that person has obtained a pardon or has served the sentence or otherwise suffered the sentence imposed upon that person;
- (c) a person who has been sentenced to imprisonment for any offence unless that person has obtained a pardon or has served the sentence;
- (d) a person to whom an order made under Section 151 of the Companies Act 1993 applies;  
[See Appendix 2]
- (e) a person who is mentally disordered within the meaning of the Mental Health Act 1969;
- (f) a person who is subject to a property order made under Section 30 or Section 31 of the Protection of Personal and Property Rights Act 1989;  
[See Appendix 3]
- (g) a person who is not ordinarily resident in the District;
- (h) a person who is not ordinarily a Consumer of the Company;
- (i) a person who is a Director of the Company;
- (j) a person who is not a parliamentary elector for the purposes of the Electoral Act 1993;
- (k) a person who is the Returning Officer; or
- (l) a person who is an employee of the Company.

Having signed a declaration that he or she fits none of these descriptions, the potential Trustee must also be nominated and seconded by two persons who are both Consumers at the time of the nomination.

## ELECTION OR APPOINTMENT?

CPCT is managed by 5 elected Trustees, although this can drop to 4 if there is a sudden vacancy. Two of the longest serving members must retire every second year. The reasoning behind this method is to ensure that there is always a continuity of Trustees and the Trust is unlikely to be placed in the position of having all new Trustees at the same time.

The Deed allows for only one method for taking up the position as a Trustee in CPCT. This is by public election.

The last public election was held in August 2015 with Christine Rupp and Ganges Singh being re-elected unopposed.

An example of how the eligibility and the timing of the election process works is as follows.

1. In 1999, Gail Dowle was due to face an internal ballot with a fellow Trustee as to whether it was her turn to face a public election or that of her fellow Trustee.
2. If she lost she would have been required to face a public election that year.
3. Alternatively, if she won, her fellow Trustee would have faced the election and she would have been required to face an election two years later – in 2001.
4. However, in 1998 she became ineligible to be a Trustee through removal from the Counties Power area and on her resignation, Christine Rupp took her place. (At that time, appointments were used as an alternative method to that of only public elections – discontinued in recent years.)
5. Having taken Gail Dowle's place, in 1999 it was Christine Rupp who faced the internal ballot. Christine Rupp won. That meant, in order for her to remain a Trustee, not only did she have to be nominated, but she also had to be successful at the next public election – in 2001.

### Trustees of the past:

Bob Arvidson  
Paul Brown  
Paul Muir  
Gail Dowle  
Alan McIntyre  
Helen Russell  
David Walter  
Ganges Singh

### Trustees as at March 2017

Don Thomson  
Alan Eyes  
  
Christine Rupp  
  
Phil Beston

## JOB DESCRIPTION

Just as the rules governing the election of the Trustees are found within the Trust Deed, so too are the powers of the Trustee and his/her duties.

James Wadham commented in an address to a meeting of Trustees "...The distinction between duties and powers ... is that duties are imperative – they compel or prohibit certain action; whilst powers are facultative – they enable action, but leave the person in whom the power is vested with the discretion as to whether and when to act..."

Without limiting the meaning, a simple job description of a Trustee is to hold (and look after) property (belonging to another) on behalf of beneficiaries of the Trust for a period of time.

So, who are the beneficiaries of CPCT?

They are defined in Clause I of the Trust Deed as Consumers of the Company.

Extract from the Trust Deed

**"Beneficiaries"** (hereinafter referred to as the "Consumer" or "Consumers") means persons who, at any appropriate date designated by the Trustees from time to time are named in the records of the Company and/or any Electricity Supply Business as persons whose premises are connected to the Company's lines network within the District and who are liable (whether alone or jointly or with any other person) for payments to any Electricity Supply Business for electricity conveyed in relation to those lines. It is acknowledged that an Electricity Supply Business shall not be deemed to be a "Beneficiary" except to the extent that it is itself a consumer of such electricity as opposed to a seller of such electricity;

**"Company"** means Counties Power Limited and includes any successor company or any company arising out of any reconstruction, amalgamation or merger of the Company;

Therefore, a simplified job description of a CPCT Trustee could be:-

**"...while he or she holds the shares in Counties Power Limited (the property of the Trust) on behalf of the consumers (the beneficiaries of the Trust), he or she must ensure that the value of the company grows (the property is 'looked after')..."**

Note that a Declaration of Trust must be signed. (This is reproduced on the next page.)

## DECLARATION OF TRUST

On being elected as a Trustee, a share transfer from the previous Trustee to the incoming Trustee will occur. In order to ensure that the shares (and any property and profits arising from the holding of those shares) are held in trust on behalf of the Consumers, each Trustee is required to sign a declaration of Trust.

This document is reproduced here:

**THIS** Declaration of Trust is made this \_\_\_\_\_ day of \_\_\_\_\_ 2017  
by ..... of ..... (“Shareholder”)

**WHEREAS**

- A.** The Counties Power Consumer Trust (“Consumer Trust”) was established pursuant to a deed of trust dated the 14<sup>th</sup> day of September 1995 (“Consumer Trust Deed”) for the purpose of holding shares in Counties Power Limited, a company incorporated in accordance with the Energy Companies Act 1992 (“Company”).
  - B.** ..... retired as a trustee of the Consumer Trust on .....
  - C.** ..... previously held Three Million (3,000,000) fully paid ordinary shares of \$1.00 in the capital of the Company (“Shares”) and other assets of the Consumer Trust (“Trust Fund”) in the capacity of trustee of the Consumer Trust.
  - D.** Pursuant to the Consumer Trust Deed and declarations of trust signed by ..... dated 14 September 1995 and ..... the shares in the capital of the Company which he held have been transferred to the Shareholder.
  - E.** The Shareholder is a trustee of the Consumer Trust and wishes to record his holding of the shares.
- I, ..... of ..... declare as follows:
- 1.** **THAT** I hold the shares and the Trust Fund as the nominee of and on behalf of the Consumer Trust and I have no property or interest in the Shares or the Trust Fund whatsoever.
  - 2.** **THAT** I will deal with and dispose of the Shares and the Trust Fund and any profits arising from the same and exercise all voting rights conferred on me as the owner of the Shares and any other share allotted to me or subscribed for by me, for and on behalf of the Consumer Trust in accordance with any resolution made by the trustees for the time being under the Consumer Trust Deed (“Trustees”) and I agree to waive in favour of the Consumer Trust all dividends and profits payable to me as the holder of the Shares and the Trust Fund.
  - 3.** **BY** this declaration I irrevocably appoint the Trustees or any of them as my attorney to deal with the Shares and the Trust Fund and any profits arising from the same and any of them may sign in my name or otherwise any transfer or other instrument relating to the Shares or the Trust Fund in accordance with any resolution made by the Trustees in accordance with the Consumer Trust Deed and I agree that if I cease to be a trustee I will immediately transfer the Shares and the Trust Fund as directed by the remaining trustees.

**SIGNED** by .....

in the presence of: \_\_\_\_\_

Witness: \_\_\_\_\_

Address: \_\_\_\_\_

Occupation: \_\_\_\_\_

## THE FIDUCIARY NATURE OF TRUSTEESHIP

On taking up office a Trustee becomes a fiduciary with all the obligations from common law, statute or deed imposed.

### *Fiduciary*

1) n. from the Latin *fiducia*, meaning "trust,"

a person (or certain types of commercial entities such as a bank for example) who has the power and obligation to act for another (often called the beneficiary) under circumstances which require total trust, good faith and honesty.

The most common is a trustee of a trust, but fiduciaries can include business advisers, attorneys, guardians, administrators of estates, real estate agents, bankers, sharebrokers, or anyone who undertakes to assist someone who places complete confidence and trust in that person or company.

Characteristically, the fiduciary has greater knowledge and expertise about the matters being handled. A fiduciary is held to a standard of conduct and trust above that of a stranger or of a casual business person.

He or she must avoid situations which involve "self-dealing" and/or "conflicts of interest" in which the potential benefit to the fiduciary (trustee) is in conflict with what is best for the person who trusts him or her (beneficiary).

Additionally, a Trustee must display prudence and use diligence and care in the management of the Trust and its Fund.

*"...The Supreme Court of Massachusetts stated in 1830 that all that can be required of a trustee is that he conduct himself faithfully and exercise sound discretion and observe how men of prudence, discretion and intelligence manage their own affairs – not in regard to speculation, but in regard to the permanent disposition of their funds, considering the probable income as well as the probable safety of the capital to be invested..."*

*Prudent [L. prudens, -entis, contr. from providens: cf. F. prudent. See Provident.]*

1. Sagacious in adapting means to ends; circumspect in action, or in determining any line of conduct; practically wise; judicious; careful; discreet; sensible; -- opposed to rash; as, a prudent man; dictated or directed by prudence or wise forethought; evincing prudence; as, prudent behavior. "Moses established a grave and **prudent** law." Milton.

2. Frugal; economical; not extravagant; as, a prudent woman; prudent expenditure of money.

Mark Cassidy commented in an address to a meeting of Trustees "...For the inexperienced Trustee there is often a basic misunderstanding between the powers that the Trustees may have in respect of the Trust assets and the duties that they must observe and perform...to be able to do something doesn't make it prudent to actually do it. The Trustees should consciously and carefully consider the action they may be asked to take..."



## **SUMMARY OF THE SPECIAL REQUIREMENTS OF A TRUSTEE**

Once a Trustee has been elected, he/she must

1. become familiar with the terms of the Trust and bring the Trust property under his/her control.
2. obey the terms of the Trust.
3. pay the correct beneficiaries the correct amount at the correct time.
4. exercise the appropriate standard of care when carrying out his/her duties.
5. account to the beneficiaries.
6. administer the Trust personally.
7. avoid conflict of duty and interest (includes taking profits).
8. act without remuneration.
9. invest the Trust Fund.

In the words of Mark Cassidy (a Trust & Estate Planning Manager of the Guardian Trust, Wellington), "...a Trustee's role is an active one and not a passive one..."

These principles are not exhaustive and they are meant to act as guidelines to both the current Trustees and those persons who aspire to the office of Trustee of CPCT.

Each principle listed above is expanded and briefly discussed on the pages 10 through 13.

## THE SPECIAL REQUIREMENTS OF A TRUSTEE

### 1. Become familiar with the terms of the Trust and bring the Trust property under his or her control

- a Trustee's duties commence from the conclusion of the Annual General Meeting following his/her election.

#### a) failure by an incoming Trustee to:-

- 1) make himself/herself aware of events leading to the present, and
- 2) familiarise himself/herself with the deed, and
- 3) ensure property is properly transferred to him/her

**exposes himself/herself to liability for breach of duty.**

### 2. Obey the terms of the Trust

Trustees must strictly obey the terms of the Trust.

The only exceptions from this duty are:-

- 1) where all the beneficiaries agree, or
- 2) where the instructions in the Trust Deed cannot be carried out, or
- 3) where deviation from the Deed is sanctioned in Court.

Failure by a Trustee to, for example:-

- 1) participate, or
- 2) remain as a Trustee when his or her resignation would enable other Trustees to be in breach, or
- 3) where discretion allows a majority decision and a dissenting Trustee refuses to sign, that dissenting Trustee may be in breach UNLESS the dissenting Trustee believes the action taken by the majority is in breach of the Deed.

will expose himself/herself to liability for breach of duty.

### 3. Pay the correct beneficiaries the correct amount at the correct time

Generally Trustees must act with perfect impartiality as between beneficiaries of the Trust.

**But**

Clause 5.2 and 5.3 of the CPCT Deed allows the Trustees the power to either accumulate or distribute the net annual income in such proportions as they think proper.

Payments in kind or cash are allowed to any number (or exclusion) of beneficiaries and no beneficiary can call such distribution of income into question.

***NB Trustees need to differentiate between the accumulated income of the Trust and the corpus of the Trust because the CPCT Deed requires that the corpus of the Trust Fund is to be distributed under a different set of instructions.***

## THE SPECIAL REQUIREMENTS OF A TRUSTEE continued

### 4. Exercise the appropriate standard of care when carrying out his/her duties

There are a number of specific duties which have developed out of this standard, including the following examples: -

- a) the duty to realise debts owing to the Trust as speedily as possible,
- b) the duty to have property valued properly by an independent valuer (prior to purchasing),
- c) the duty not to leave trust funds in the sole control of a Co-Trustee or unnecessarily long in the hands of an agent.

**Failure to exercise these duties of care will result in a Trustee exposing himself/herself to liability for breach of duty.**

### 5. To account

This is a fundamental duty of the office of Trustee and is a necessary incident of the Trustees' obligation to deal with Trust property for the benefit of the beneficiaries.

(If this were NOT a requirement of a Trustee, neither the beneficiaries nor the Court would have a right to timely information).

Clauses 10 and 11 of the CPCT Deed set out the requirements and the procedures for the provision of information to its beneficiaries and its frequency.

In addition, the Trust must also adhere to the requirements of the Electricity Act 1992 (as amended), the Financial Reporting Act 1993 and the Energy Companies Act 1992.

*[The appropriate sections of these Acts are reproduced in Appendix 7].*

### 6. To administer the Trust personally.

This duty is sometimes described as being manifested in three ways:

#### i) **Trustees must not permit a fettering of their discretion.**

This means that Trustees must not agree in advance how they will exercise their powers or discretions at some time in the future, for how can they predict their view of the needs of the beneficiaries at that future point? They must remain free to consider the matters at the time consideration is required.

To so agree is a breach of trust.

#### ii) **Trustees must act unanimously.**

Where more than one Trustee is required/appointed to a Trust, it is because their combination of skills is assumed to be superior. The CPCT Deed allows for "majority" decisions in many instances, but for others, the decision must be unanimous.

**THE SPECIAL REQUIREMENTS OF A TRUSTEE** continued

Examples of the different types of decisions:

- a. alteration to the Deed (except Clause 13) can occur provided the majority of Trustees are in favour.
- b. alteration to the Rules in Schedule I can occur only if the decision is unanimous.

*Note that the CPCT deed allows for certain powers to be exercised alone – by way of example, Clause 9.2 offers the powers set out in Schedule II of the Deed.*

**iii) Trustees must not delegate their powers and duties.**

This is not to be confused with the appointment of an agent. Delegates would be able to perform all the duties of a Trustee, exercise their discretions etc, whereas agents simply carry out the decisions that the Trustees have taken and implement discretions exercised.

The general rule is that Trustees have a duty not to delegate any of their duties or authorities unless the Trust Deed expressly allows delegation, or delegation is for reasons of necessity or business, or the delegation is permitted under the Trustee Act 1956.

As regards to CPCT, Rule 21 of Schedule I and Rule I of Schedule II of the Deed, with reference to s31 of the Trustee Act 1956, allows a Trustee to delegate. This delegation is effected by the Trustee concerned executing a Power of Attorney and is done for the following reasons:-

- to an approved person where the Trustee concerned may be absent (or expects to be absent from time to time) from New Zealand, or
- to an approved person where the Trustee concerned is temporarily incapable or expects that from time to time that a physical infirmity will prevent the performance of his or her duties as a Trustee, or
- to a committee of Trustees or other persons specifically appointed for that purpose.

*[The relevant sections of the Trustee Act 1956 are set out in Appendix 5]*

**7. To avoid conflict of duty and interest (includes taking profits).**

Except for reimbursement, provided it is allowed by the Trust Deed, a Trustee must not make any sort of profit out of the Trust either directly or indirectly.

There is a great deal of case law in this area and the following examples are mere indications of what might constitute making a profit:-

- using Trust property in his or her own business,
- receiving bribes or secret commissions for exercising (or refraining from exercising) his or her power,
- obtaining remunerative employment with a 3<sup>rd</sup> party by virtue of his or her position as a Trustee or by use of the Trust property,
- if he or she starts up a business for his own benefit in competition with a business he or she carries on for the benefit of the Trust.

**If a Trustee makes any sort of profit out of the Trust, he or she must pay it to the Trust.**

## THE SPECIAL REQUIREMENTS OF A TRUSTEE *continued*

### 8. To act without remuneration.

The prima facie position is that a Trustee must act gratuitously.

However, if a right to remuneration can be demonstrated and that the remuneration claimed is shown to be reasonable, there is nothing illegal or improper in a Trustee being paid for his/her services.

Clauses 5.1 and 12 of the CPCT Deed both directs and entitles the Trustees to reasonable remuneration having regard to their duties and responsibilities and authorises payment of both remuneration and reimbursing expenses to be payable to Trustees each financial year.

In accordance with the Trust Deed, the amount(s) to be paid to the Trustees is set at the Annual General Meeting. It is current practice for the amounts (less 33% withholding tax) to be paid monthly by Direct Credit to each Trustee's bank account.

### 9. To invest

The duty to invest exists even if there is no direction within the Trust instrument to invest – it is the fundamental role of the Trustee.

The standards of care required as being applicable to the manner in which those investments must be made include exercising the care, diligence and skill that a prudent person of business would exercise in managing the affairs of others.

*[See Appendix 5 for section 13B Trustee Act 1956]*

While a higher standard of care will normally apply if a Trustee's profession, employment or business is (or includes) acting as a Trustee or investing money on behalf of others, Clause 9.4 of the CPCT Deed specifically excludes this requirement of a higher standard of care.

Additionally, usually Trust investments ought to be diversified, but this requirement is also excluded by the CPCT Deed (Clause 9.5). This is to allow the Trustees to continue to hold the shares in Counties Power Limited without being required to sell/diversify the Trust Fund.

## BREACH OF TRUST

If a Trustee breaches any of his/her duties, he/she will be liable for breach of Trust.

A beneficiary may bring an action requiring the Trustee to make up the loss caused to the Trust by the breach.

Clause 18 of the Trust Deed limits a Trustee's liability to losses caused by their own dishonesty or willful acts or omissions known by that Trustee to be in breach of Trust.

*[Appendix 6 is a sample declaration form from an Insurance Company.]*

### Question

What happens if a Trustee becomes an unacceptable risk to the Insurance Company?

### Answer

The Insurance Company has the right to refuse to insure that Trustee.

## MEETINGS

### A. Annual Meeting of Beneficiaries

Legislation requires that an Annual Meeting of Beneficiaries must also take place. At this meeting, the beneficiaries appoint the auditor and fix the audit fees. This is the only time during the meeting that they are entitled to vote.

When considering the business of the Annual Trustee Meeting, at first glance it appears as though there are two opportunities for appointing an auditor. But the legislation takes precedence and the Trustees only exercise the function of appointing an auditor if there is a vacancy during the year or the beneficiaries do not appoint one.

The required quorum is 20 beneficiaries and this meeting is open to the public.

For practical purposes, this meeting and the Trustees' meetings are combined.

### B. Annual Meeting of Trustees

The Deed requires an Annual General Meeting of Trustees to occur by the end of August in each year. Whilst beneficiaries are entitled to attend, they have no powers to vote on any matter, but any statements made by a beneficiary at this meeting, shall be recorded.

The business of the Trustees' Annual Meeting is to:-

- receive the annual reports,
- receive the financial accounts
- appoint the Auditor
- set the remuneration of the Trustees, and
- any other special business of which the Secretary has received a minimum notice of 28 days.

### C. Conferences

The Trust is a member of the Electricity Trusts of New Zealand Inc (ETNZ) and there are conferences usually held on a biannual basis in either Wellington or another region. This is an overnight conference and both travel and accommodation are paid on behalf of any attending delegates. Only members of ETNZ and certain invited persons are eligible to attend.

### D. Other Meetings

The Deed allows the Trustees the freedom to meet at such times and places as they agree in order to dispatch the business of the Trust. Currently, Trustees generally meet once a month (sometimes Tuesday or Wednesday or Thursday) in the office of the Trust around mid afternoon. Such meetings are not open to the public.

Whilst other meetings are arranged on an 'as required' basis, a quorum (3) of Trustees discussing an item on a street corner does not constitute a meeting unless all attending Trustees agree to waive notice of that meeting and minutes are both taken and confirmed.

Currently, Trustees also take part in an annual Counties Power Director/Trustee Workshop along with Quarterly meetings (at which time the Company presents its quarterly progress report to the Trustees).

All Trustees who attend these meetings are reimbursed for the mileage and receive a meeting fee – currently 72 cents per kilometer and \$200 per meeting.

## TRUST RECORDS & MINUTES

The minutes are the main record and evidence of the proceedings of meetings of the Trustees. It is the responsibility of each and every Trustee (not just the Chair) to ensure that proper records are kept and that they are correct. Each Trustee has a duty to keep a full record of his or her actions as a Trustee. These records must be proper, faithful and accurate. The Trust records establish whether a Trustee has obeyed the terms of the Trust Deed and fulfilled their duties to preserve the Trust property.

Equally important is the necessity to record the way in which decisions are made by the Trustees. It has been noted that the Courts place importance on the decision making process<sup>1</sup>. While the Trustees are not obliged to give reasons as to why they have made certain decisions<sup>2</sup> it is clear that they need to be able to demonstrate how they have made their decisions and, that they have made each decision in the best interest of the beneficiaries.

From a practical viewpoint, the CPCT Trust engages the services of a Secretary to maintain these records. These records must be kept for the lifetime of the Trust (potentially 80 years).

Records to be kept by the Trustees:-

1. copy of the Trust Deed (this includes all the documents which contain the terms of the Trust), and
2. minute Book, and
3. schedule of Trust property which should be updated annually, and
4. financial Accounts including a cash book recording all cash transactions, and
5. information file(s).

To enable the minutes to be confirmed, they are circulated to Trustees prior to the following meeting. On receipt, if a Trustee disagrees with that which is in the minutes, it is courtesy if that Trustee conveys this to the preparer. At the meeting, they are then taken as read. Any corrections are made and the motion is “That the minutes be taken as read (and corrected) and confirmed.”

Or

“That the minutes be taken as a true and correct record.”

While it is usual for such a motion to be moved and seconded by persons who were present at the meeting, it is not necessary as it is the MEETING which determines their accuracy. The MOVING and the SECONDING ensure the matter is placed before the meeting. Discussion is confined to the accuracy of the minutes – the current meeting cannot change history.

The minutes are not an accepted record until they have been confirmed and signed.

Trustees must be prepared for the eventuality that the minutes can be required for use in legal proceedings (The right of Discovery). See Appendix 8 for a list of parties who may have access for these reasons.

### Matters that must be minuted

1. Upon every appointment, reappointment, retirement or cessation of office of any Trustee	Trust Deed Rule 3.3 Schedule I
2. Disclosure of the nature of a material interest in any contract, arrangement or dealing with the Trust.	Trust Deed Rule 14.1 Schedule I
3. All proceedings of Trustees	Trust Deed Rule 15.1 Schedule I
4. All proceedings at meetings by telephone	Trust Deed Rule 17.2 Schedule I
5. Motions and Resolutions <b>A motion:</b> <i>A mover and a seconder puts a proposition to the meeting which becomes a resolution if passed.</i> <b>A resolution:</b> <i>This is the formal expression of the decision made as a result of the motion being passed.</i>	These are the formal records of the Trustee's decisions.

<sup>1</sup> Re Abacus (CI0 Ltd, Grupo Torras SA v Al Saba & Ors 6 ITELR 368

<sup>2</sup> Karger v Paul 1984

## STATEMENT OF CORPORATE INTENT

The current Statement of Corporate Intent ("SCI") is found on the CPCT website [www.countiespowertrust.org.nz](http://www.countiespowertrust.org.nz) with an outline at Schedule IV of the Trust Deed and at Clause 28 of the Constitution of the Company.

Its requirement originated in section 39 of the Energy Companies Act 1992. The original details have been modified over time but the essence of the information the document holds remains similar to that of the original requirements. That is, while the Trust holds at least 50% of the Shares in the Company, the Company (including any subsidiaries) is to provide information to the Trust in respect of 3 future accounting years covering topics such as:

- a. the Company's objectives,
- b. the nature, scope and activities being undertaken,
- c. the ratio of the Shareholder Funds to total assets (including definitions of those terms),
- d. the accounting policies being used,
- e. performance targets and other measures to enable the performance of the Company to be judged in relation to its objectives, and so on.

### Modification of SCI

**The Board** of the Company may modify the SCI provided they have given written notice to the Trust and considered any written response from the Trust.

**The Trust**, at the Company's Annual Meeting, may require the Board to modify the SCI but only in regard to certain provisions as specified in the SCI. In addition, prior to that requirement being placed on the Directors, the Trust (whilst at a general meeting) are required to both consult with the Board and have due regard to the statutory requirements that the company must:-

- a. operate as a successful business, and
- b. pay regard to ensuring the efficient use of energy, and
- c. provide the shareholders with certain reports containing specified information within given timeframes.

Clause 10.9 of the Deed requires the SCI to be amongst the Annual Reports to be made available to the Consumers. While it is the Company who must provide this to the consumers, in practice the Trust take the responsibility to so do and include it with their Annual Financial Accounts.



## CONSUMERS' RIGHTS

*[Note the definition of a beneficiary (also called a consumer) found on page 6 of this booklet.]*

The Trust has drawn up a set of guidelines for its beneficiaries to recognise the rights that consumers of Counties Power Consumer Trust have for receiving information from the Trust.

Amongst other things, these guidelines set out the process for both the Trust and its beneficiaries to follow if a beneficiary requires information from the Trust.

Should the Trustees decide not to allow the release of the requested information and the beneficiary chooses to take the matter further, the guidelines provide for a review of the Trust's decision. In other words, the guidelines are intended to ensure that clear and transparent procedures are in place to enable consumers to have access to trust information and access to a complaints process if they are unhappy.

These guidelines have met the Minister of Energy's expectations in the promotion of accountability of CPCT to its consumers.

The full guidelines are reprinted at the back of this booklet in Appendix 10.

## SHAREHOLDERS' RIGHTS AND OBLIGATIONS

Between them, the five Trustees of CPCT hold 100% of the shares in Counties Power Limited. That is, CPCT is the only shareholder of the Company.

Clause 10.10 of the Trust Deed states that the Trustees shall “act as a diligent shareholder and exercise the rights of shareholders for the benefit of the Consumers considered as a whole having due regard to the objective of the Company to be a successful business”.

Each Trustee needs to understand what it means: -

- to be a shareholder, and
- to be diligent, and
- to have and to exercise shareholder rights, and
- to have shareholder obligations.

Set out below is a brief summary of these aspects.

*[more detailed pages giving greater depth to some of these topics are found in Appendix 8].*

### The Meaning of ‘Shareholder’?

Section 96 of the Companies Act 1993 (the “Act”) defines a shareholder as a person whose name is entered (or whose name is entitled to be entered) in the company’s share register as the current holder of one or more shares.<sup>3</sup>

Although shareholders are the “proprietors” of the company, they do not own the company’s property<sup>4</sup>. Shareholders provide capital for the company to use in its undertakings and it is the capital which is owned by the shareholders.

### The Meaning of ‘Diligent’

The Collins dictionary describes diligent as “...careful and persevering in carrying out duties...”

### The Rights of Shareholders<sup>5</sup>

Section 125 of the Act entitles shareholders to:-

- receive distributions,
- attend meetings of shareholders,
- exercise the rights or receive benefits under the Act or the constitution.

### The Obligations of Shareholders

- a) To have regard for the powers reserved for shareholders. These include:-
  - (i) appoint and remove directors,
  - (ii) adopt, alter or revoke a constitution,
  - (iii) approve a major transaction,
  - (iv) approve an amalgamation,
  - (v) place a company into liquidation,
  - (vi) alter shareholder rights.
- b) discharge their powers by voting.

---

Note

1925] AC 619 (HL)

## POWER OF ATTORNEY

Rule 21 (Delegation) of the Trust Deed invokes section 31 of the Trustee Act.

Paraphrased, section 31 provides for a Power of Attorney to be executed as a deed to enable the powers and authorities of an individual Trustee to be vested in another person **but only while one of the following conditions exists:-**

- (a) a trustee is planning an absence from New Zealand, or
- (b) a trustee is expecting to be absent from NZ from time to time, or
- (c) a trustee being (or is expecting to be) temporarily physically incapable, or
- (d) a trustee expecting to be temporarily physical incapable from time to time.

Therefore, given the possibility of (b) and the plausibility of (d), a Trustee would be prudent to execute such a deed which would need to be securely held by the Secretary for use if one of the above conditions exist. That power ceases to have effect if the condition does not exist.

**Rule 21 of the Deed restricts the choice of the person to whom power is delegated.**

- (1) the person must be approved by the other Trustees.
- (2) that person must be eligible for appointment in terms of the Deed. (For example, they would have to be a resident of the district, a consumer of the company and so on.)


**The following is an Example of a Power of Attorney Deed in use by CPCT**

THIS DEED is made the	day of	2009
<p>I, ..... of ..... District in New Zealand <b>IN EXERCISE</b> of the powers contained in section 31 of the Trustee Act 1956 <b>HEREBY DELEGATE</b> to .....</p> <p>or .....</p> <p>("the Delegatee") during my absences from New Zealand and during any periods of temporary physical incapacity the exercise and execution of all the trusts, powers and discretions for the time being vested in me as a trustee of the Counties Power Consumer Trust, a trust established by deed dated 14 September 1995 ("the Trust") and <b>I APPOINT</b> the Delegatee to be my attorney during such periods to act for me in my name and on my behalf in all matters connected with the affairs of the Trust and in all matters in which the Trust may be interested as I could if personally present at the Delegatee's absolute discretion <b>BUT</b> if there shall for the time being be only two trustees of the Trust comprising myself and the Delegatee then as regards the Trust this deed shall be construed as if the name of the Delegatee had been omitted from these presents.</p> <p><b>IN WITNESS OF WHICH</b> these presents have been executed on the date specified above.</p> <p><b>SIGNED</b> by &lt;&lt;TRUSTEE NAME &gt;&gt; _____</p> <p>In the presence of:</p> <p>_____ Signature of Witness:</p> <p>_____ Name of Witness:</p> <p>_____ Address of Witness:</p> <p>_____ Occupation of Witness:</p>		

## CPCT Trustees

# Being a **PROXY VOTING** on COMPANY MATTERS

For completion, Clause 12.7 of the constitution is reproduced here.

- 

March 2017

CPCT Trustees

I/we  
Of**PROXY VOTING Continued**

appoint \_\_\_\_\_ of \_\_\_\_\_  
 or failing him/her \_\_\_\_\_ of \_\_\_\_\_  
 as my/our proxy to vote for me/us on my/our behalf at the \_\_\_\_\_  
 12.7.7 **Proxy Form (Two-way Voting)** Where it is desired to afford shareholders  
 an opportunity of voting for or against a resolution, the instrument appointing  
 held at \_\_\_\_\_ on \_\_\_\_\_  
 a proxy shall be in the following form or a form as near thereto as  
 circumstances admit: \_\_\_\_\_  
 and at any adjournment thereof.

I/We direct my/our proxy to vote in the following manner

12.7.8 **Validity of Proxy Votes:** A vote given in accordance with the terms of an  
 instrument of proxy shall be valid notwithstanding the previous death or  
 insanity of the appointer or revocation of the proxy or revocation of the  
**Resolutions** authority under which the proxy was executed, or the transfer of any share in  
**Against** respect of which the proxy is given, if no intimation in writing of such death,  
 insanity, revocation or transfer has been received by the Company before the  
 1. start of the meeting or adjourned meeting at which the proxy is used.

2.

Signed this \_\_\_\_\_ day of \_\_\_\_\_

[Usual signature(s)]

## CONFIDENTIALITY AGREEMENT

From time to time a Trustee will become privy to receiving sensitive information relating to the Company. As a measure of protection for the Company, each Trustee is required to sign an undertaking not to disclose information relating to the Company.

This document is reproduced here:

### CONFIDENTIALITY UNDERTAKING

TO: Counties Power Limited

I ....., of .....being a Trustee of the COUNTIES POWER CONSUMER TRUST hereby agree not to disclose (except to professional advisors of the Trust) information disclosed to me or my co-trustees, touching or concerning the business of Counties Power Limited and which has been disclosed by Counties Power Limited for the purpose of enabling me and my fellow Trustees to fulfil my duties as a Trustee of Counties Power Consumer Trust. Any information so received will not be used by me in any way prejudicial to Counties Power Limited. This undertaking is not however applicable to information which is required by statute, regulation or other legal requirement to be disclosed by Counties Power Limited (such as the Statement of Corporate Intent or published Financial Statements) or which is already within the public domain.

SIGNED by the said ..... )  
a Trustee of Counties Power )  
Consumer Trust in the presence of: )

Witness Signature: \_\_\_\_\_

Witness Occupation: \_\_\_\_\_

Date:            /            /2009

## OWNERSHIP REVIEW

The Trust Deed provides for regular reviews of the ownership of the Trust Fund.

The details contained within the Trust Deed means that at intervals of no greater than 10 years the Trustees must prepare a report considering proposals and available options for the future ownership of the shares of Counties Power Limited.

To paraphrase the Deed's requirements of the Trustees, the review must include the following items:-

1. an analysis of the performance of the Trust to the date of the report together with a summary of the advantages and disadvantages of trust ownership and the benefits or otherwise of such ownership to Consumers.
2. an analysis of other ownership options including, without limitation, share and other asset distribution to Consumers, sale of the shares and other assets to the public, sale of shares and other assets to institutional investors, compared with retention of the Trust.
3. a comparison of the Company's performance with the performance of other companies engaged in energy distribution and / or trading.
4. the conclusion of the Trustees as to the most appropriate form of ownership together with an indication of whether the conclusions are unanimous and, if the decision is not unanimous, a summary of the dissenting Trustees.
5. the matters contained within paragraphs (a), (b), (c) and (d) of clause 14.6 of the Trust Deed if a distribution of shares and other assets is recommended.
6. a statement of the view of the Directors of the Company together with an indication whether the conclusions are unanimous, and if the decision is not unanimous, a summary of the dissenting Directors.
7. a statement as to whether the Trustees have had regard to any views expressed by the public with respect to ownership.
8. a summary of the professional advice, if any, obtained in respect of the preparation of the report.
9. a statement of the extent to which any proposals require a modification of the Company's SCI.
10. Perform Consumer Consultative process.
11. Present final report.
12. Prepare item '5' if required (the Distribution Plan).

The most recent review was signed off on 30 January 2014 with the decision that the Trust should retain 100% ownership in the Company. The next review must therefore take place by January 2024.

## Appendix 1

Extract from THE INSOLVENCY ACT 1967

### PART 10 - DISCHARGE

#### **111. Court may order bankrupt not to engage in business after discharge**

(1) Without restricting the provisions of section 110 of this Act, the Court, when granting the order of discharge or at any earlier time, may make an order prohibiting the bankrupt after his discharge from doing all or any of the following things without the leave of the Court:

- (a) Entering into or carrying on any business or class of business either alone or in partnership with any person:
- (b) Being engaged in the management or control of any business carried on by or on behalf of, or being in the employ of, any of the following persons, namely, the bankrupt's wife or husband, a lineal ancestor or descendant of the bankrupt, the wife or husband of such an ancestor or descendant, a brother of the bankrupt, the wife of such a brother, a sister of the bankrupt, and the husband of such a sister:
- (c) Acting as a director or taking part directly or indirectly in the management of any company or class of company.
- (d) Repealed

(2) Any such prohibition may be for a specified period or without any time limit.

(3) The Court may at any time cancel or vary any such order.



## Appendix 2

Extract from THE COMPANIES ACT 1993

### 151. Qualifications of directors—

(1) A natural person who is not disqualified by subsection (2) of this section may be appointed as a director of a company.

(2) The following persons are disqualified from being appointed or holding office as a director of a company:

(a) A person who is under 18 years of age:

(b) A person who is an undischarged bankrupt:

[(ba) A person who would, but for the repeal of section 188A or section 189 or section 189A of the Companies Act 1955, be prohibited from being a director or promoter of, or being concerned or taking part in the management of, a company within the meaning of that Act:]

(c) A person who is prohibited from being a director or promoter of or being concerned or taking part in the management of a company under section 199K or section 199L of the Companies Act 1955 or who would be so prohibited but for the repeal of that Act:

(d) A person who is prohibited from being an officer or promoter of or being concerned or taking part in the management of a company under section 199N of the Companies Act 1955 or who would be so prohibited but for the repeal of that Act:

(e) A person who is prohibited from being a director or promoter of or being concerned or taking part in the management of a company under section 382 or section 383 or section 385 of this Act:

(f) A person who is subject to a property order made under section 30 or section 31 of the Protection of Personal and Property Rights Act 1988:

(g) In relation to any particular company, a person who does not comply with any qualifications for directors contained in the constitution of that company.

(3) A person that is not a natural person cannot be a director of a company.

(4) A person who is disqualified from being a director but who acts as a director is a director for the purposes of a provision of this Act that imposes a duty or an obligation on a director of a company.

### **382. Persons prohibited from managing companies—**

(1) Where—

(a) A person has been convicted on indictment of any offence in connection with the promotion, formation, or management of a company; or

(b) A person has been convicted of an offence under any of sections 377 to 380 of this Act or of any crime involving dishonesty as defined in section 2(1) of the Crimes Act 1961; or

(c) A judgment has been obtained in an action under Part 1 of the Securities [Markets] Act 1988 against a person as an insider (within the meaning of that Part of that Act),—

that person shall not, during the period of 5 years after the conviction or the judgment, be a director or promoter of, or in any way, whether directly or indirectly, be concerned or take part in the management of, a company, unless that person first obtains the leave of the Court which may be given on such terms and conditions as the Court thinks fit.

(2) A person intending to apply for the leave of the Court under this section shall give to the Registrar not less than 10 days' notice of that person's intention to apply.

(3) The Registrar, and such other persons as the Court thinks fit, may attend and be heard at the hearing of any application under this section.

- (5) In this section, the term "company" includes an overseas company that carries on business in New Zealand.

### 383. Court may disqualify directors —

- (1) Where—

- (a) A person has been convicted on indictment of an offence in connection with the promotion, formation, or management of a company, or has been convicted of a crime involving dishonesty as defined in section 2(1) of the Crimes Act 1961; or
- (b) A person has committed an offence for which the person is liable (whether convicted or not) under this Part of this Act; or
- (c) A person has, while a director of a company and whether convicted or not,—
  - (i) Persistently failed to comply with this Act, the Companies Act 1955, or the Securities Act 1978 or, where the company has failed to so comply, persistently failed to take all reasonable steps to obtain such compliance; or
  - (ii) Been guilty of fraud in relation to the company or of a breach of duty to the company or a shareholder; or
  - (iii) Acted in a reckless or incompetent manner in the performance of his or her duties as director; or
- (d) A judgment has been obtained in an action under Part 1 of the Securities [Markets] Amendment Act 1988 against a person as an insider (within the meaning of that Part of that Act); or
- (e) A person has become of unsound mind,—

the Court may make an order that the person must not, without the leave of the Court, be a director or promoter of, or in any way, whether directly or indirectly, be concerned or take part in the management of, a company for such period not exceeding 10 years as may be specified in the order.

- (2) A person intending to apply for an order under this section must give not less than 10 days'

notice of that intention to the person against whom the order is sought, and on the hearing of the application the last-mentioned person may appear and give evidence or call witnesses.

(3) An application for an order under this section may be made by the Registrar, the Official Assignee, or by the liquidator of the company, or by a person who is, or has been, a shareholder or creditor of the company; and on the hearing of—

(a) An application for an order under this section by the Registrar or the Official Assignee or the liquidator; or

(b) An application for leave under this section by a person against whom an order has been made on the application of the Registrar, the Official Assignee, or the liquidator,—

the Registrar, Official Assignee, or liquidator must appear and call the attention of the Court to any matters which seem to him or her to be relevant, and may give evidence or call witnesses.

(4) An order may be made under this section even though the person concerned may be criminally liable in respect of the matters on the ground of which the order is to be made.

(5) The Registrar of the Court must, as soon as practicable after the making of an order under this section, give notice to the Registrar that the order has been made and the Registrar must give notice in the *Gazette* of the name of the person against whom the order is made.

(6) Every person who acts in contravention of an order under this section commits an offence and is liable on conviction to the penalties set out in section 373(4) of this Act.

(7) In this section, "company" includes an overseas company.

**Appendix 2** Continued**385. Registrar may prohibit persons from managing companies—**

(1) This section applies in relation to a company—

(a) That has been put into liquidation because of its inability to pay its debts as and when they became due:

(b) That has ceased to carry on business because of its inability to pay its debts as and when they became due:

(c) In respect of which execution is returned unsatisfied in whole or in part:

(d) In respect of the property of which a receiver, or a receiver and manager, has been appointed by a court or pursuant to the powers contained in an instrument, whether or not the appointment has been terminated:

(e) In respect of which, or the property of which, a person has been appointed as a receiver and manager, or a judicial manager, or a statutory manager, or as a manager, or to exercise control, under or pursuant to any enactment, whether or not the appointment has been terminated:

(f) That has entered into a compromise or arrangement with its creditors.

(2) This section also applies in relation to a company the liquidation of which has been completed whether or not the company has been removed from the New Zealand register.

(3) The Registrar may, by notice in writing given to a person, prohibit that person from being a director or promoter of a company, or being concerned in, or taking part, whether directly or indirectly, in the management of, a company during such period not exceeding 5 years after the date of the notice as is specified in the notice. Every notice shall be published in the *Gazette*.

**Appendix 2** Continued

(4) The power conferred by subsection (3) of this section may be exercised in relation to—

(a) Any person who the Registrar is satisfied was, within a period of 5 years before a notice was given to that person under subsection (5) of this section (whether that period commenced before or after the commencement of this section), a director of, or concerned in, or a person who took part in, the management of, a company in relation to which this section applies if the Registrar is also satisfied that the manner in which the affairs of it were managed was wholly or partly responsible for the company being a company in relation to which this section applies; or

(b) Any person who the Registrar is satisfied was, within a period of 5 years before a notice was given to that person under subsection (5) of this section (whether that period commenced before or after the commencement of this section), a director of, or concerned in, or a person who took part in, the management of, 2 or more companies to which this section applies, unless that person satisfies the Registrar—

(i) That the manner in which the affairs of all, or all but one, of those companies were managed was not wholly or partly responsible for them being companies in relation to which this section applies; or

(ii) That it would not be just or equitable for the power to be exercised.

[(5) The Registrar must not exercise the power conferred by subsection (3) unless—

(a) not less than 10 working days' notice of the fact that the Registrar intends to consider the exercise of it is given to the person; and

(b) the Registrar considers any representations made by the person.]

(6) No person to whom a notice under subsection (3) of this section applies shall be a director or promoter of a company, or be concerned or take part (whether directly or indirectly) in the management of a company.

(7) Where a person to whom the Registrar has issued a notice under subsection (3) of this section appeals against the issue of the notice under this Act or otherwise seeks judicial review of the notice, the notice remains in full force and effect pending the determination of the appeal or review, as the case may be.

**Appendix 2** Continued

(8) The Registrar may, by notice in writing to a person to whom a notice under subsection (3) of this section has been given,—

(a) Revoke that notice; or

(b) Exempt that person from the notice in relation to a specified company or companies.

Every such notice shall be published in the *Gazette*.

(9) Every person to whom a notice under subsection (3) of this section is given who fails to comply with the notice commits an offence and is liable on conviction to the penalties set out in section 373(4) of this Act.

(10) In this section, “company” includes an overseas company that carries on business in New Zealand.

## Appendix 3

Extract from THE PROTECTION OF PERSONAL AND PROPERTY RIGHTS ACT 1988

### 30. Temporary orders—

(1) Where a Court is satisfied—

(a) That an application for the exercise of its jurisdiction under this Part of this Act has been made or is to be made in relation to any person; and

(b) That there are reasonable grounds for believing that that person may be a person in relation to whom a Court has jurisdiction under this Part of this Act in accordance with section 25 of this Act; and

(c) That it is in the best interests of that person that urgent provision be made for the protection of his or her property or any part of it pending the final determination of the application for the exercise of the Court's jurisdiction,—

the Court may make a temporary order under this section.

(2) A temporary order may be made on the application of any person specified in section 26 of this Act.

(3) It shall not be necessary to serve a copy of an application for a temporary order on the person in respect of whom the order is sought, nor shall that person be entitled to attend, or be heard, or call or cross-examine witnesses in respect of the application, unless the Court otherwise orders.

(4) Nothing in sections 66 to 73 of this Act shall apply in respect of an application for a temporary order under this section.



**Appendix 3** Continued

(5) If a Court makes a temporary order, it shall appoint as temporary manager such fit and proper person (being a person who would be eligible for appointment as manager under section 31 of this Act) to take possession and control of the property of the person in respect of whom the order is made, or such of that person's property as may be specified in the order.

(6) Where a Court decides to make a temporary order, sections 16, 31, 35 to 53, and 57 of this Act shall apply with any necessary modifications.

(7) No temporary order made pursuant to this section shall continue in force for more than 3 months after the date on which it is made.

(8) A temporary order made pursuant to this section may be varied, discharged, or enforced in the same manner as if it were a final order of a Family Court.

**31. Appointment of manager—**

(1) Subject to the succeeding provisions of this section [and to sections 31A and 31B of this Act], on an application for the exercise of a Court's jurisdiction under this Part of this Act, the Court may make an order appointing one or more suitable persons (whether or not the person or persons proposed in the application) to act as manager of the property, or any specified part of the property, of the person in respect of whom the application is made.

(2) Where the Court appoints 2 or more managers, their responsibility shall be jointly held, unless the Court orders otherwise.

(3) No person under the age of 20 years, and no body corporate other than a trustee corporation, shall be appointed a manager under this section.

(4) Where the person in respect of whom the application for the exercise of the Court's jurisdiction is made is a patient or resident of a hospital, home, or other institution, the superintendent, licensee, supervisor, or other person in charge of the hospital, home, or other institution shall not be appointed a manager under this section.

### Appendix 3 Continued

(5) The Court shall not appoint any person a manager under this section unless it is satisfied—

(a) That the proposed appointee is capable of carrying out the duties of a manager in a satisfactory manner, having regard to the needs of the person in respect of whom the application is made, and the relationship between that person and the proposed appointee; and

(b) That the proposed appointee will act in the best interests of the person in respect of whom the application is made; and

(c) The proposed appointee consents to the appointment.

(6) In determining whom to appoint as manager under this section, a Court shall take into account any likely conflict between the interests of the proposed appointee and those of the person in respect of whom the application is made.

(7) So far as is practicable in the circumstances, a Court shall ascertain the wishes of the person in respect of whom the application is made when determining whom to appoint as manager under this section.

(8) In any order made under this section, the Court shall specify a date, being not later than 3 years after the date of the order, by which the manager is required to apply to the Court for a review of the order.

## Appendix 4

### Extract from THE CRIMES ACT 1961

#### 2. Interpretation—

**["crime involving dishonesty"** means any crime described in Part 10 except the crimes described in sections 267 to 272.]

*NB. This is a huge area, therefore only the headings are reproduced here – with the exception of section 229 specifically directed towards Trustees.*

#### 219. Theft or stealing property—

#### 220. Theft by person in special relationship—

#### 221. Theft of animals by killing—

#### 222. Theft by spouse—

#### 223. Punishment of theft—

#### 224. Power of search for goods stolen—

#### 225. Power to search vehicles—

#### 226. Conversion of vehicle or other conveyance—

#### 227. Possession of instrument for conversion—

#### 228. Dishonestly taking or using document—

#### 229. Criminal breach of trust—

(1) Every one is guilty of a criminal breach of trust who, as a trustee of any trust, dishonestly and contrary to the terms of that trust, converts anything to any use not authorised by the trust.

(2) Every trustee who commits a criminal breach of trust is liable for imprisonment for a term not exceeding 7 years.

#### 230. Taking, obtaining, or copying trade secrets—

#### 231. Burglary—

#### 232. Aggravated Burglary—

#### 233. Being disguised in possession of an instrument for burglary—

#### 234. Robbery—

#### 235. Aggravated robbery—

#### 236. Assault with intent to rob—

#### 237. Blackmail—

#### 238. Punishment for blackmail—

**Appendix 4** Continued

- 239. Demanding with intent to steal—
- 240. Obtaining by deception or causing loss by deception—
- 241. Punishment for section 240—
- 242. False statement by promoter—
- 243. Money laundering—
- 244. A defence for Section 243—
- 245. Section 243 does not apply to certain acts committed outside NZ—
- 246. Receiving—
- 247. Punishment of receiving—
- 248. Interpretation of Sections 249 & 250—
- 249. Accessing computer system for dishonest purpose—
- 250. Damaging or interfering with computer system—
- 251. Making, selling, or distributing or possessing software for committing crime—
- 252. Accessing computer system without authorisation—
- 253 & 254. Qualified exemptions for SIS & Government Communications Security Bureau—
- 255 Interpretation of sections of sections 256 & 263—
- 256. Forgery —
- 257. Using forged documents —
- 258. Altering, concealing, destroying or reproducing documents with intent to deceive —
- 259. Using altered or reproduced document with intent to deceive—
- 260. False accounting—
- 261. Counterfeiting Public Seals—
- 262. Counterfeiting corporate seals—
- 263. Possessing forged bank notes—
- 264. Possesses paper or implements for forgery—
- 265. Imitating authorised or customary marks—
- 266. Offences involving coinage—
- 267. to 272 Not applicable

## Appendix 5

Extract from THE TRUSTEE ACT 1956

### s31 Power to delegate trusts

[(1) a trustee who –

- a. Is for the time being out of New Zealand or is about to depart therefrom; or
- b. Expects that he may be absent from New Zealand from time to time during the administration of the trust; or
- c. Is or maybe about to become temporarily incapable, by reason of physical infirmity, of performing all his duties as a trustee; or
- d. Expects that he may be from time to time temporarily incapable, by reason of physical infirmity, or performing all his duties as a trustee, -

may, notwithstanding any rule of law or equity to the contrary, by power of attorney executed as a deed, delegate to any person the execution or exercise, during any period for which the trustee may be absent from New Zealand or incapable of performing all his duties as a trustee, of all or any trusts, powers, authorities and discretions vested in him as such trustee, whether alone or jointly with any other person or persons.

Provided that a person being the only other co-trustee and not being a trustee corporation shall not be appointed to be an attorney under this subsection.]

(2) Where any such delegation has been duly made to and accepted by any person and is for the time being in operation, that person shall have, within the scope of the delegation, the same trusts, powers, authorities, discretions, liabilities and responsibilities as he would if he were then the trustee.

(3) In any proceedings brought by any person beneficially interested under the trust against the donor of a power of attorney given under this section in respect of any act or default of the donee of the power it shall be a defence for the donor to prove that the donee was appointed by him in good faith and without negligence.

(4) All jurisdiction and powers of any Court shall apply to the donee of the power of attorney in the same manner, so far as respects the execution of the trust or the administration of the estate to which the power of attorney relates, as if the donee were acting in relation to the trust or estate in the same capacity as the donor of the power.

(5) The power of attorney shall not come into operation unless and until the donor is out of New Zealand or is incapable of performing all his duties as a trustee and [unless the deed otherwise provides] shall be deemed to be revoked by his return or by his recovery of that capacity, as the case may be.

(6) In favour of any person dealing with the donee of a power of attorney given under this section, any act done or instrument executed by the donee shall, notwithstanding that the power has never come into operation or has been revoked, whether by the Act of the donor of the power or by operation of law, be as valid and effectual as if the power had come into operation and remained unrevoked at the time when the act was done or the instrument executed, unless that person had at that time actual notice that the power had never come into operation or of the revocation of the power.

(7) A statutory declaration by the donee of a power of attorney relating to any trust or estate that the power has come into operation, or that in any transaction the donee is acting in the execution of the trust or the administration of the estate, shall in favour of a person dealing with the donee of the power be conclusive evidence of that fact.

(8) The fact that it appears from any power of attorney given under this section, or from any evidence required for the purposes of any power of attorney or otherwise, that in any transaction the donee of the power is acting in the execution of a trust shall not be deemed for any purpose to affect any person dealing in good faith with the donee with any notice of the trust.

(9) For the purpose of executing or exercising the trusts, powers, authorities and discretions delegated to him the donee may exercise any of the powers, authorities and discretions conferred on the donor as trustee by statute or by the instrument creating the trust, except the power of delegation conferred by this section.

**Appendix 5** Continued**[13B. Duty of trustee to invest prudently—**

Subject to sections 13C and 13D of this Act, a trustee exercising any power of investment shall exercise the care, diligence, and skill that a prudent person of business would exercise in managing the affairs of others.]

**[13C. Duty of certain persons to exercise special skill—**

Subject to section 13D of this Act, where a trustee's profession, employment, or business is or includes acting as a trustee or investing money on behalf of others, the trustee, in exercising any power of investment, shall exercise the care, diligence, and skill that a prudent person engaged in that profession, employment, or business would exercise in managing the affairs of others.]

**[13D. Provisions in trust instrument relating to duty of investing trustees—**

(1) The duty imposed on a trustee by section 13B or section 13C of this Act shall apply to a trustee if and so far only as a contrary intention is not expressed in the instrument, if any, creating the trust or any Act, and shall have effect subject to the terms of that instrument or Act.

(2) Any rules and principles of law relating to any provision in an instrument that purports to exempt or limit the liability of a trustee in respect of any breach of trust, or to indemnify a trustee in respect of any breach of trust, shall remain in force and apply in respect of any provision in a trust instrument that expresses a contrary intention for the purposes of subsection (1) of this section.]

The words in the square brackets were substituted/inserted by an amendment in 1974

## Appendix 6

### *Example of Questions and Declaration on an Individual's form for Trustee's Liability Insurance*

Questions 1, 2 & 3 should be answered with respect to your capacity as Trustee of the Trust

1. Has there been or is there now pending a civil or criminal proceeding against any proposed insured Trustee in their capacity as a Trustee of this Trust or any other trust?

Yes ☐

No ☐

If Yes, please provide details

2. Are you aware of any circumstance or incident which may give rise to a claim against any proposed Trustee in respect of the risks to which the Proposal for this insurance relates?

Yes ☐

No ☐

If Yes, please provide details

3. Are you aware of any circumstance or incident which has resulted or may result in an official investigation, examination, inquiry or other proceeding being ordered or commissioned by an official body in connection with the affairs of the Trust?

Yes ☐

No ☐

If Yes, please provide details

### DECLARATION

- (a) I declare that:

- i. All answers and statements given in this Declaration Form are correct and complete in every respect and no material information has been withheld.
- ii. This Declaration Form may be relied upon by the person completing the Trustees' Liability Insurance Proposal Form which may form part of and be incorporated into the contract of insurance now being applied for.

- (b) I understand:

- i. That the Insurer requires this information (which will be retained by the Insurer and the insurance broker) in order to decide whether to accept the Proposal Form for Trustees Liability Insurance.
- ii. That the insurance will not be in force until the proposal form has been accepted and cover has been confirmed by the Insurer, Through the insurance broker.
- iii. The Insurer is to be advised of any material alteration to the above facts whether occurring before or after completion of this insurance contract.
- iv. In accordance with the Insurance Reform Act 1977, a policy may be avoided (treated as if it never existed) if any statement made in the proposal or other document at completion, reinstatement or renewal is substantially incorrect and material or if you fail to disclose any material fact. A material fact is one which may influence a prudent Insurer in deciding whether or not to insure you, and if so, at what terms and conditions and for what premium.

- (c) PURSUANT TO THE PRIVACY ACT 1993 the following is brought to your attention:

**Appendix 6** continued

- i. This Declaration collects personal information about you.
- ii. The information is collected to evaluate the insurance you seek.
- iii. The intended recipient of the information is the person completing the Trustee Liability Insurance Proposal Forms and the information may be relied upon by that person in completing the Proposal Form.
- iv. The Proposal Form is being collected and held by [ "The Insurance Broker"] and your insurer.
- v. The collection of this information is required pursuant to the common law duty to disclose all material facts relevant to the insurance sought and is mandatory.
- vi. The failure to provide this information may result in application for the insurance being declined, or the insurance being void from the beginning.
- vii. You have rights to and correction of this information subject to the provisions of the Privacy Act 1993.



## Appendix 7

### Extracts from certain statutes

#### The Electricity Amendment Act 2001

##### 158A. Community and customer trusts to prepare audited financial statements—

The trustees of a community trust and the trustees of a customer 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 3 of the Financial Reporting Act 1993, applied as if trusts were reporting entities) with respect to the affairs of the trust for that financial year; and
- b. submit those financial statements to an auditor for audit; and
- c. make available to the public in accordance with section 158B those audited financial statements and the auditor's report on those financial statements.]

##### 158B. Publication of audited financial statements—

(1) The trustees of a community trust and the trustees of a customer trust must make the documents referred to in section 158A(c) available to the public by making copies of them available—

- a. for inspection at every office of the trust or at any other place specified in the notification under subsection (2) (during ordinary office hours) free of charge; and
- b. for purchase at a reasonable price.

(2) The trustees must also notify the fact that copies 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).]

#### The Financial Reporting Act 1993

**3. Meaning of "generally accepted accounting practice"**—For the purposes of this Act, financial statements and group financial statements comply with generally accepted accounting practice only if those statements comply with—Applicable financial reporting standards; and in relation to matters for which no provision is made in applicable financial reporting standards and that are not subject to any applicable rule of law, accounting policies that—Are appropriate to the circumstances of the reporting entity; and have authoritative support within the accounting profession in New Zealand

#### The Energy Companies Act 1992

##### 46A. Auditing of approved persons—

(1) While an approved person holds equity securities in an energy company,—

- a. The approved person shall cause to be kept proper accounts relating to the equity securities so held; and
- b. The approved person shall, within 5 months after the end of each financial year of the approved person, cause to be prepared, with respect to the affairs of the approved person as they relate to those equity securities, a yearly [[statement of financial position]], a [[statement of financial performance]], and a statement of cash flows, together with such other statements of account as may be necessary to give a true and fair view of the financial position of the approved person as it relates to those equity securities; and
- c. As soon as practicable after the preparation of the yearly [[statement of financial position]], [[statement of financial performance]], and statements in accordance with paragraph (b) of this subsection, the approved person shall submit them to an auditor for audit; and
- d. The approved person shall make available to the public—
  - (i) The auditor's report prepared under paragraph (c) of this subsection; and
  - (ii) The [[statement of financial position]] and account to which the report relates,—
 and section 85 of this Act shall apply accordingly with all necessary modifications.

(2) In this section, the term "auditor" means a person who is qualified for appointment as auditor of a company under the Companies Act 1955.

(3) Nothing in this section limits any other enactment or rule of law relating to the maintenance and auditing of the accounts of an approved person.]

## Appendix 8

### TRUST RECORDS & MINUTES

#### Access to Trust Records

- (a) access by Beneficiaries
- (b) access by Plaintiffs during the Litigation Process (Discovery)
- (c) access by the Commerce Commission
- (d) access by the Police
- (e) access by the Inland Revenue Department
- (f) access by the Serious Fraud Office
- (g) access by Advisors

#### (a) Access by Beneficiaries

A Trustee has a duty to

- disclose Trust records to beneficiaries if requested, and
- have the records in a form that is ready to be inspected, and
- be clear and forthright in any disclosures.

This duty allows beneficiaries (or their solicitors) to inspect the accounts, minutes and other records relating to the Trust and to take copies of these documents. The person who wishes to inspect these documents must pay the expenses of the provision of the copies etc.

Trustees must also give beneficiaries the proper information as to the investment of the Trust Fund.

At first glance, The *Guidelines for Access to Information by Beneficiaries* lay down the criteria for CPCT Beneficiaries to access Trust information. Contained within Para 6.3 & 6.4 the Trustees may withhold information where there is **a good reason to so do** and it falls into certain categories such as protecting the privacy of a natural person. [The full *Guidelines for ....Beneficiaries* can be found in Appendix 10.]

This begs the question as to the definition of 'a good reason' for a decision to withhold requested information'.

Consultation with Peter O'Brien along with the consideration of the principles of the Duties of a Trustee leads the writer to the conclusion that even if the Trustees believe they have 'a good reason', that reason might not be sufficient to satisfy the Reviewer (should the matter be taken that far by the Beneficiary.) However, even if the Reviewer recommends such information be disclosed to the beneficiary, the Trustees are not forced to comply with that recommendation. [Para 9.3 of the Guidelines]

Any ancillary documentation in the form of reports, correspondence or other items would need to be considered individually in terms of the *Guidelines for ... Beneficiaries*. There is a very clear process set out in the Guidelines however it must be recognised that the final arbiter as to whether a beneficiary has a right to any specific item is the Supreme Court. "Courts can refuse disclosure if it is considered to be in the best interest of the beneficiaries (*Rouse & Ors 100F Aust Trustees Limited (1999)*)" (Mark Cassidy ICANZ seminar February 10, 2004). As to what documents must be made available to beneficiaries is still somewhat unclear. It must firstly be established what are "Trust Documents" and secondly what "Trust Documents" must be disclosed.

Mark Cassidy provided the following comments that "...all documents brought into existence for the purposes of the trust are Trust documents and they are the property of beneficiaries..."

Most trust documents are subject to discovery in court proceedings and whether or not they are ordered to be disclosed appears to be based upon 'What is in the best interest of beneficiaries'.

At a Mini Conference of the Society of Trust and Estate Practitioners (STEP) on September 28 2004 Mark Cassidy, the Trust and Estate Planning Manager for Guardian Trust, made the following comment in his paper *The Trustee's Role, All Care and Responsibility*:

"The recent Royal Court of Jersey case last year of *Re Abacus (CI)Limited, Grupo Torras SA v Al Saba & ors 6/TEL R 368* clearly demonstrates the importance the Courts attach to the decision making process and in particular the file notes and records of decisions made by the Trustees. In that case a large part of the 200 page judgment was taken up in a microscopic examination of the file notes and decisions made by the company's officers. Although it is now clearly established that the Trustees are not obliged to give reasons as why they have made certain decisions (*Karger v Paul 1984*) it is equally clear the Trustees need to demonstrate how they have made their decisions and that each decision has been made in the best interests of the beneficiaries."

## Appendix 8 Continued

### TRUST RECORDS & MINUTES Continued

In the same paper Mark Cassidy listed regular communication with beneficiaries as a necessary part in the administration of a trust. He quoted from Nicholas Jacobs (Partner Lawrence Graham of London) in his paper *Trusts Beneficiaries Rights* delivered to the Misplaced Trust Conference in October 2002

“...proper flow of information between the Trustees and the beneficiaries will minimise the opportunity of misunderstanding and disputes. Trustees should wherever possible volunteer trust information to beneficiaries by copying accounts and investment reports and so on. If beneficiaries are left in ignorance then it is natural for them to start worrying. They will wonder whether the trust fund has been invested properly, whether the trustees are competent and whether the distribution policy is correct. By keeping the beneficiaries fully informed as to investments and trust property they will reduce the scope for misunderstanding and promote a culture of openness and trust.”

#### **Conclusion**

The Trust beneficiaries appear to have access to all Trust Information (although it must be remembered that ‘Trust Documents’ have not been clarified at law) provided due process is followed to procure such access. The Trustees may have a good (and documented) reason to wish to hold certain ‘delicate’ information back and while the reviewer may recommend disclosure, the Trustees are not forced to follow that recommendation. In spite of this, it would be prudent for Trustees to avoid withholding information from a beneficiary.

#### **(b) Access by Plaintiffs during the Litigation Process (Discovery)**

If a plaintiff brings a claim against the Trust, the usual rules of the discovery procedure will apply to Trust records.

Discovery is a process by which each party to legal proceedings is required to produce a list of documents that are relevant to the matter in question in the proceedings. Once litigation is contemplated against the Trust by the beneficiaries, the Trustees may not destroy any document or any notes that they have already made. There are certain documents which are privileged and need not be disclosed, but if the document is discoverable but contains confidential or commercially sensitive information, the Court has a variety of methods from which to choose to protect that information.

If Trustees are concerned that their personal records (or minutes of meetings) may end up being discovered, they should not make them. However, a Trustee’s own records could actually be helpful in certain types of litigation. If, for example, a consumer is making a claim against a Trustee for breach of their duty the Trustee’s personal notes may provide evidence that the Trustee was acting within the scope of their powers.

#### **(c) Access by the Commerce Commission**

The Commerce Commission has the power to obtain a warrant and search the place named in that warrant for the purpose of ascertaining whether a person has engaged in conduct which is a breach of the Commerce Act 1986. Trustees could be required to help the person executing the warrant if requested.

#### **(d) Access by the Police**

If the Police have reasonable grounds to believe that evidence is in existence that an offence has been committed, they may obtain a search warrant. This will enable them to seize any document in the building or premises (including the minutes of Trustee meetings).

#### **(e) Access by the Inland Revenue Department**

The IRD has the power to access any book or document of the Trust if it considers it necessary or relevant to the collection of any tax or duty or any other function conferred on the Commissioner.

#### **(f) Access by the Serious Fraud Office**

The SFO has the power to require Trustees to produce for inspection any documents which the Director has reason to believe may be relevant to any suspected case of serious or complex fraud.

#### **(g) Access by Advisors**

If advisors are used by Trustees to carry out certain functions (eg to audit accounts), then the Trustees must give them all the information they require to achieve this. This will include access to minutes of Trustee meetings.

## Appendix 9

### More Detailed analysis of SHAREHOLDERS RIGHTS AND OBLIGATIONS

The following few pages are devoted to exploring various aspects summarised on page 18.

#### Right to Dividends

Generally, shareholders are entitled to an equal share of any dividend declared by the company (ss 36(1)(b) and 53 of the Companies Act 1993 (the "Act"), and an equal share of the surplus assets of the company (if any) at the time of liquidation, following satisfaction of all preferential claims and payment of the company's creditors (ss 36(1)(c) and 313 of the Act).

*Clause 4 of the Deed sets out the purpose and objects of the Trust. For example, it is the Trust which receives dividends and not the Trustee in whose name the shares are held. This is further confirmed by each Trustee signing a Declaration of Trust, stating that he/she has no property or interest in shares or Trust Fund.*

*See page 7 for a copy of the TRUST DECLARATION*

To have powers, there must be information and the shareholders must have access to that information

#### 1. Disclosure to Shareholders

Section 96 of the Act defines a shareholder as a person whose name is entered or whose name is entitled to be entered) in the company's share register as the current holder of one or more shares.

The 1993 Act relies largely upon shareholder enforcement for breach of duties owed to shareholders as equity owners. If the enforcement provisions of the Act are to be effective, then shareholders require access to information.

The company records required to be available for shareholder inspection include [section 189 of the Act]:-

- (a) the constitution of the Company
- (b) minutes of all meetings and resolutions of shareholders within the last 7 years,
- (c) an interests register,
- (d) minutes of all meetings and resolutions of directors and directors' committees within the last 7 years,
- (e) certificates given by directors under this Act within the last 7 years,
- (f) the full names and addresses of the current directors,
- (g) copies of all written communications to all shareholders during the last 7 years, including annual reports...
- (h) copies of all financial statements for the last 7 completed accounting periods of the company,
- (i) the accounting records required by section 194 of this Act for the current accounting period and the last 7 completed accounting periods of the company. [Section 194 lists the type of records that would be needed to prepare accurate financial statements and enable those statements to be properly audited.]
- (j) The share register".

#### 2. Shareholder Rights of Inspection and to Request Information

In addition to the disclosure required by the Act, per section 216, shareholders are entitled to:-

- **inspect and copy company records** of
  - (a) the minutes of shareholder meetings
  - (b) communications to shareholders for the past 10 years
  - (c) certificates required of directors under the Act
  - (d) the interests register of the company
- **request (in writing), information held by the company.** This information can be withheld for sufficient reason although the only statutory suggestion of sufficient reason is prejudice to the "commercial" interests of the company or a third party, or an assessment that the request is "frivolous or vexatious". In the event of a refusal, application can be made to the court to review the reasonableness of the refusal [section 178].
- **apply for authorisation** for any proper person to inspect and take copies of the records of the company or for an audit of the company accounts. [section 179]

#### 3. Right to Restrain Proposed Action

Shareholders can enforce the constitution, the Act of the Financial Reporting Act 1993 by application for a Court order restraining proposed action which is in breach of those provisions [section 164].

## Appendix 9 continued

### SHAREHOLDERS RIGHTS AND OBLIGATIONS Continued

#### 4. Right to Require Compliance

The Court, on application of a shareholder where satisfied that it is “just and equitable to do so”, has power to require a director or a board to take any action required by the constitution, the Act of the Financial Reporting Act 1993...[sections 170 and 172]<sup>6</sup>

#### 5. Buy-out Rights

Buy-out rights are triggered:-

- where a shareholder dissents to the change of the company constitution, to a “major transaction” [defined in section 129(2)], to a merger [section 110] or
- where the company proposes to take action approved by special resolution affecting rights attached to the shares [section 11] etc

#### Shareholder Powers<sup>7</sup>

Section 104 provides that powers reserved to shareholders of a company may be exercised only:-

- (a) at an annual meeting of shareholders (s 120);
- (b) at a special meeting of shareholders (s 121); or
- (c) by a resolution in lieu of a meeting (s 122).

#### Powers reserved to shareholders by the Act are the powers to:

- (a) appoint and remove directors;
- (b) adopt, alter, or revoke a constitution;
- (c) approve a major transaction;
- (d) approve an amalgamation;
- (e) place the company into liquidation; and
- (f) alter shareholder rights.

Section 105 provides that powers reserved to shareholders may be exercised by ordinary resolution (a resolution that is approved by a simple majority of the votes of those shareholders entitled to vote and voting on the question).

#### Powers exercised by special resolution

- (1) Notwithstanding the constitution of a company, when shareholders exercise a power to—
  - (a) adopt a constitution or, if it has one, alter or revoke the company's constitution;
  - (b) approve a major transaction;
  - (c) approve an amalgamation of the company under section 221 of this Act;
  - (d) put the company into liquidation,—
 the power must be exercised by special resolution.
- (2) A special resolution pursuant to paragraph (a) or paragraph (b) or paragraph (c) of subsection (1) of this section can be rescinded only by a special resolution.
- (3) A special resolution pursuant to paragraph (d) of subsection (1) of this section cannot be rescinded in any circumstances.

The constitution cannot provide that certain powers, which according to the Act are to be exercised by special resolution, can be exercised in any other manner. Such decisions made by special resolution (except a decision to put a company into liquidation) can be rescinded only by special resolution; otherwise the company remains bound by them. A special resolution putting a company into liquidation cannot be rescinded.

<sup>6</sup> Sian notes that these sections are potentially powerful tools to enable a minority to seek Court direction of the management of a company.

<sup>7</sup> Certain excerpts in this section are taken from straight from an electronic version of “Company Law” by Brookers.

## Appendix 9 continued

### SHAREHOLDERS RIGHTS AND OBLIGATIONS Continued

Decisions that (under the Act) must be made by special resolution of shareholders are decisions to:-

- (a) adopt, alter, or revoke the company's constitution;
- (b) approve a major transaction;
- (c) approve an amalgamation of the company under s 221; and
- (d) put the company into liquidation.

These decisions directly affect the interests of shareholders. To protect these interests, the Act enables shareholders to participate in the decision-making process. Further, a super majority is required to ensure greater involvement by minority shareholders.

The constitution of a company can require other powers to be exercised, or decisions to be made, by special resolution.

#### Power to Manage the company

The basic position under the Act (which can be altered by the company's constitution), is that the board has the power to manage the company, subject to control by shareholders in situations where their proprietary interests are affected (s 128(1)). The board is given this power by the Act, rather than by delegation at a general meeting of shareholders or under the constitution.

As a general rule, management powers vested in the board under the Act can be exercised by shareholders only if those powers are given to shareholders in the constitution, or by way of board delegation (with the board retaining responsibility for the exercise of power or a supervisory role (s 130)).

**This is not the case with CPCT – at no stage may a Trustee be deemed to be a director or part of the management of the Company. Clause 8.1 of The Trust Deed is very specific “...the Trustees shall have no power, authority or discretion to participate in the management or operation of the Company...”**

The Act reserves a number of powers to shareholders and provides checks and remedies to prevent directors misusing or exceeding their powers.

- (1) The Act reserves to the shareholders the power to make decisions with respect to certain fundamental matters. These are matters that might affect the proprietary interest of shareholders in the company. The shareholders have the power to appoint or remove directors and auditors by ordinary resolution, and their approval by special resolution is required for:-
  - (i) adoption or alteration of the constitution;
  - (ii) major transactions;
  - (iii) amalgamations; and
  - (iv) proposals that the company be put into liquidation.

The Law Commission (in Law Commission, *Company Law: Reform and Restatement*, report no 9, Wellington, 1989, pp 50-51) commenting on the draft Companies Act, stated:

“The greater the role for the general meeting and management of the company, the greater the need to develop a concept of fiduciary duty owed by the majority to the minority. This is a developing area of law which, carried too far, may undermine the concept of the share as property and may make company decision-making and enforcement of obligation procedurally complex. It is for reasons such as this that the standard constitution entrusts the management of the company to the directors and reserves shareholders' decision-making for matters which directly impact upon their property interests. In exercising their votes on these property matters, shareholders are entitled to act in their own self-interest because they are not exercising powers entrusted to them for the benefit of others (the basis of the fiduciary duties imposed upon directors).”

As noted above, the constitution may extend the management powers of shareholders (s 128(3)). However, shareholders exercising such extended powers will be deemed directors under s 126, and will be subject to the directors' duties in ss 131-138 when doing so.

## Appendix 9 continued

### SHAREHOLDERS RIGHTS AND OBLIGATIONS Continued

- (2) The Act contains important shareholder checks on director management and is designed to ensure these checks are not restricted. Shareholders may exercise control over director management by:
- (a) voting to remove directors and appointing new directors (s 153);
  - (b) using the general meeting as a forum for questioning and passing resolutions on management (s 109);
  - (c) voting as part of an interest group against the company taking any action altering the rights attached to their shares (s 117);
  - (d) voting against a major transaction (s 129);
  - (e) altering the constitution (s 32);
  - (f) voting against matters of fundamental change or the variation of class rights and requiring the company to buy their shares (ss 110 and 118);
  - (g) applying to the Court for the inspection of company records (s 178);
  - (h) applying to the Court to enforce breaches of the Act or constitution (ss 164-173);
  - (i) holding directors liable for any breaches of duty owed directly to them as shareholders (s 169), or bringing a derivative action in the name of the company to enforce duties owed to the company; and
  - (j) seeking relief from the Court where they are being unfairly treated, even though there has not been a breach of the Act or constitution (s 174).

#### **Act provides for majority control**

The Act generally confirms the principle of majority control by:-

- (a) requiring only an ordinary resolution of shareholders to remove or appoint directors (with the consequence that the majority shareholder(s) will control the composition of the board);
- (b) providing for management powers to be exercised by the board;
- (c) providing that, except for certain fundamental matters (see CA106.02), shareholders exercise their powers by ordinary resolution (that is, a simple majority); and
- (d) providing for the board of directors to exercise its powers by majority vote (s 160 and cl 5(3) Schedule 3).

The company's constitution may alter this basic position to give additional power to minority shareholders. For example, the constitution could:-

- (a) specify matters in addition to those specified in s 106 requiring approval by special resolution, such as:-
  - (i) appointment and removal of directors;
  - (ii) issue of shares; or
  - (iii) making of distributions;
- (b) increase the majority required to pass a special resolution so as to give greater minority shareholders a "veto" right;
- (c) create specific or enhanced voting rights for some matters (for example a right for different classes of shareholders to appoint a certain number of directors) by creating a separate class of shares for minority shareholders;
- (d) give directors appointed by minority shareholder(s) extra voting power in relation to certain matters or require a "super" majority for certain board decisions;
- (e) give to the shareholders management powers that are normally held by directors and require exercise of those powers to be by a special majority; or
- (f) extend the statutory definition of a major transaction to make a wider range of transactions subject to approval of a super majority.

## Appendix 9 continued

### SHAREHOLDERS RIGHTS AND OBLIGATIONS Continued

#### Shareholder Obligations

Is there an obligation to exercise the voting rights of the shareholder?

Before the 1993 Act came into force, shareholders, when voting on an alteration to the Articles of a company, had to exercise the right of voting for the benefit of the company as a whole. Case Law also indicated the Courts did not look favourably on majority shareholders abusing their voting powers especially if the minority shareholder was disadvantaged.

With the advent of the 1993 Act, it is unclear as to whether these principles still apply. Because of the following points, they cannot be completely ruled out:-

1. the Act is not a code. (Had it been a code the implication is that if a duty is not stated in it, that duty is excluded.)
2. the Act does not contain a section which had been proposed by the Law Commission<sup>8</sup>. The proposed section stated that shareholders, when exercising the powers referred to section 106<sup>9</sup> owed no duty to the company or any other person and did not incur any liability in respect of any voting rights to which that shareholder was entitled.

Although the Act contains express rights and remedies available to minority shareholders, (which could support the argument that provided shareholders do not exercise the management powers of directors, shareholders are now free to vote in their own interests and are not obliged to consider the interests of the company or minority shareholders), a 1997 court case suggests otherwise. In *MacFarlane v Barlow (1997) 8 NZCLC 261,470*, the Court granted minority shareholders leave to bring proceedings against directors for breach of duty in relation to payment of excessive salaries even though the salaries had been approved by the majority of shareholders.

When dealing with any matters pertaining to the Company, at all times the Trustee shareholder must be diligent in adhering to the Deed which governs his/her actions on behalf of the Trust.

#### Limited Liability

Section 97 provides that a shareholder is not liable for an obligation of the company by reason only of being a shareholder unless the constitution provides that the liability is unlimited.

Except where otherwise provided in the constitution of the company, liability is limited to:

- (a) unpaid amounts on shares;
- (b) liability specified in the constitution;
- (c) liability a shareholder incurs as a deemed director; and
- (d) liability under section 56<sup>10</sup> to repay distributions.

<sup>8</sup> s 80 of the draft Companies Act in Law Commission, *Company Law Reform: Transition and Revision*, report no 16, Wellington 1990.

<sup>9</sup> Special Resolutions requiring constitution alteration, approving a major transaction, an amalgamation approval, liquidating the company.

<sup>10</sup> A distribution to a shareholder when a company cannot satisfy a solvency test immediately after the distribution, may be recovered from the shareholder unless special situations apply.



## Appendix 10

### GUIDELINES FOR BENEFICIARIES

1. **Definitions**
- 1.1 “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 (with out without the aid of some other equipment) of being produced.
- 1.2 “Trust” means either a “community trust” and/or “customer trust” as those terms are defined in the Electricity Act 1992 and specifically includes Counties Power Consumer Trust.
- 1.3 “Trust Information” means information regarding the affairs of a Trust..
2. **Purpose**
- 2.1 The purpose of these Guidelines is to:
  - (a) Promote the accountability of Trusts to their beneficiaries;
  - (b) Provide a process for dealing with requests for access to Trust Information by beneficiaries;
3. **Status**
- 3.1 The trustees of a Trust are at all times obliged to comply with their obligations under the relevant trust deed, the Trustee Act 1956, the Electricity Act 1992, the common law and any other applicable rule of law.
- 3.2 These Guidelines are subject to the obligations of the trustees described in paragraph 3.1.
4. **Commencement Date**
- 4.1 These Guidelines shall apply to Counties Power Consumer Trust from the date on which they are formally adopted and/or approved by Counties Power Consumer Trust.
5. **Meetings of Beneficiaries**
- 5.1 Pursuant to section 158C of the Electricity Act 1992 the Trust is obliged to hold an annual meeting of beneficiaries at which time:
  - (a) The beneficiaries will appoint an auditor to hold office from the conclusion of that meeting until the conclusion of the next annual meeting of beneficiaries; and
  - (b) The beneficiaries will be allowed a reasonable opportunity to question, discuss or comment upon the management of the Trust.
- 5.2 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.
6. **Disclosure of Trust Information**
- 6.1 The Trust undertakes to make Trust Information available to beneficiaries in accordance with their obligations under the law and pursuant to these Guidelines.
- 6.2 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) These Guidelines.
- 6.3 Beneficiaries may request disclosure of Trust Information other than that referred to in clause 6.1.
- 6.4 Information requested under clause 6.3 may be withheld by the Trust where there is good reason to do so including in the following circumstances:
  - (a) To protect the privacy of a natural person, including that of deceased natural persons; or
  - (b) Where the making available of the information would or would be likely to prejudice the commercial position of the person who supplied or is the subject of the information; or
  - (c) Where the disclosure of the information would or would be likely to prejudice the commercial position of any other person, whether or not that person supplied the information to the Trust; or
  - (d) To protect information which is otherwise subject to an obligation of confidence;

## Appendix 10 Continued

### GUIDELINES FOR BENEFICIARIES Continued

- (e) Where the information is required to be withheld in order to enable the Trust, or any entity in which the Trust has any form of investment, to carry out, without prejudice or disadvantage, commercial activities or negotiations; or
  - (f) Where the disclosure of the information would or would be likely to prejudice the commercial position of the Trust or any entity in which the Trust has any form of investment; or
  - (g) To prevent the disclosure or use of the information for improper gain or improper advantage; or
  - (h) To maintain legal professional privilege including litigation privilege; or
  - (i) To protect information relating to the exercise by the trustees of any discretionary power, subject to any contrary principle of law; or
  - (j) Where the request for information is frivolous or vexatious.
  - (k) Where the information requested is not Trust Information.
- 6.5 Where a request under these Guidelines relates to information described in clause 6.3 the Trust, if it is satisfied that the interests protected by that information would be likely to be prejudiced by the disclosure of the existence or non-existence of such information, may give notice in writing to the beneficiary that it neither confirms nor denies the existence or non-existence of that information.
- 7. Procedure**
- 7.1 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.
- 7.2 Before the Trust is required to respond to a request the beneficiary must 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.
- 7.3 Once the Trust is satisfied of the beneficiary's status it shall as soon as is practicable, and no longer than 15 working days after receipt of the request for Trust Information, decide whether the request is to be granted.
- 7.4 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 paragraph 6.5 above, if the request is declined in whole or in part the Trust will provide the beneficiary with reasons for the refusal.
- 7.5 The Trust may fix reasonable charges in respect of the collection and provision of Trust Information and may require payment of those charges before any information is provided to the beneficiary.
- 7.6 The Trust shall inform the beneficiary in writing of his or her right to seek a review under these Guidelines of the refusal by the Trust to provide any Trust Information requested.
- 7.7 The beneficiary shall advise the Trust in writing of a request for a review of the Trust's decision. A beneficiary's request for a review shall be without prejudice to any other rights which the beneficiary may have in respect of the Trust's decision.
- 8. Reviewer**
- 8.1 The decisions of the Trust under clause 7 above shall be subject to review pursuant to these Guidelines by a Reviewer appointed by either the President of the District Law Society within which the Trust is situated, or by the President of the New Zealand Law Society.
- 8.2 Upon receipt of written notice from a beneficiary requesting a review of the decision of the Trust, the Trust shall initiate the appointment process in paragraph 8.1.
- 8.3 The Trust shall notify the beneficiary of the identity and contact details of the Reviewer once appointed.
- 9. Review Process**
- 9.1 The Reviewer shall investigate a complaint referred for review and may act as a conciliator in relation to the complaint.
- 9.2 The Reviewer shall conduct and conclude the investigation with due expedition and no later than 60 working days after receipt of the complaint. Within that time the Reviewer shall give the beneficiary and the Trust the opportunity to provide written submissions.

## Appendix 10 Continued

### GUIDELINES FOR BENEFICIARIES Continued

- 9.3 At the conclusion of the investigation the Reviewer shall issue a written opinion concerning the complaint. In the written opinion the Reviewer may, among other things:
- (a) Recommend to the Trust that the whole or any part of the information requested by the beneficiary be provided to the beneficiary;
  - (b) Uphold the Trust's decision not to disclose the information on the grounds advanced by the Trust, or on other grounds identified by the Reviewer which are consistent with the provisions of these Guidelines;
  - (c) Without limiting the above, the Reviewer may decide to recommend that the information not be disclosed to the beneficiary if the Reviewer considers that:
    - (i) The length of time that has elapsed between the date when the complaint arose and the date when the complaint was made is such that actions or recommendations in respect of the complaint are no longer practicable or desirable; or
    - (ii) The subject matter of the complaint is trivial; or
    - (iii) The complaint is frivolous or vexatious or is not made in good faith.
  - (d) The Reviewer shall deliver a copy of the opinion to the Secretary of the Energy Trusts of New Zealand Inc.
- 9.4 The Trust shall not be required to carry out any recommendations made by the Reviewer pursuant to paragraph 9.3(a).
- 9.5 The Reviewer shall be entitled to charge the Trust the reasonable costs incurred in respect of the investigation and the opinion.
10. **Monitoring of Compliance with Guidelines**
- 10.1 The Trust in its annual report shall report on the operation of the Guidelines during the financial year including:
- (a) The number of requests for information received;
  - (b) The costs incurred to process those requests and any recoveries made;
  - (c) The number of Trust decisions which were subject to review;
  - (d) A summary of the outcome of those reviews; and
  - (e) The costs incurred in respect of those reviews.
- 10.2 The Trust acknowledges that the auditor appointed by the beneficiaries at the annual meeting shall audit the Trust's records in relation to the information disclosed in the annual report concerning the operation of the Guidelines. The Trust shall advise the auditor that this requirement is to form part of the auditor's duties.
11. **Review of Guidelines**
- 11.1 These Guidelines shall be reviewed by Trusts no later than 2 years after their adoption and every three to five years thereafter with no more than five-year intervals between each review.
- 11.2 The reviews conducted pursuant to clause 11.2 shall be undertaken in consultation with trustees, beneficiaries and other interest groups.
12. **Energy Trusts of New Zealand Inc**
- 12.1 The Energy Trusts of New Zealand Inc shall at its discretion:
- (a) Consult with Trusts in respect of the content of these Guidelines
  - (b) Encourage all Trusts to adopt these Guidelines;
  - (c) May, in its discretion, make recommendations to any Trust concerning the review of the Guidelines.
  - (d) Receive the opinions of the Reviewer(s) and circulate those opinions to all member Trusts.
  - (e) Provide access to and copies of Reviewers' opinions to other Reviewers appointed by any member Trust
  - (f) Produce and publish an annual report on the opinions of the Reviewer(s) in the previous year, a copy of which shall be provided to the Minister of Energy.
13. **Publicity**
- 13.1 A Trust shall publicise its adoption of these Guidelines in a suitable manner to inform the beneficiaries of such adoption, and of how they can obtain or inspect a copy of these Guidelines, including publication through newsletters, websites and at annual meetings of beneficiaries.