

To Paul Jones, Watercare Services Limited

31 July 2019

From Bill Loutit and Bronwen Norrie

Subject Waima Biodiversity Trust – Board/Trustee Duties & Other Controls/Protections under the Draft Trust Deed

Introduction and summary

1. A draft Deed of Trust (**Draft Trust Deed**) was lodged as Appendix R with the application for a replacement water treatment plant and reservoirs project in Huia. This Draft Trust Deed sets out the terms of the Waima Biodiversity Trust (**Trust**), in accordance with the proposed conditions of consent.
2. At a recent meeting, Auckland Council's (**Council**) ecological compensation expert, Mr Graham Usher, raised some questions in relation to the structure and operation of the Trust, namely:
 - (a) What mechanisms are included in the Draft Trust Deed to ensure that Trust funds are not squandered (i.e. spent on the Trustees, consultants, etc.)?
 - (b) What stops the board of Trustees (**Board**) from collapsing or failing?
3. In summary, our response to these questions is as follows:
 - (a) The terms set out in the Draft Trust Deed include a number of mechanisms to ensure that the Board and the Trustees are aware of their core duties, must act in the best interests of the Trust at all times, and are subject to reporting and accountability requirements and external oversight.
 - (b) There are also specific terms relating to the Trust operating exclusively to advance its charitable purposes and not for private profit, managing and avoiding conflicts of interest, and substantive and procedural requirements in relation to major transactions, remuneration of Trustees and other matters.
 - (c) These terms buttress the general trust law duties applicable to the Board and the Trustees, and substantially mitigate the risk of Trust funds being squandered or the Board collapsing or failing. The terms also maximise the prospects of identifying and addressing any such risk if it were to arise.
 - (d) The Trust is also expected to be registered with the Companies Office, Inland Revenue and Charities Services, and would be subject to the jurisdiction and inquiry powers of the Attorney General (as protector of charities) and Charities Services (under the Charities Act 2005) and the jurisdiction of the Courts.
 - (e) If necessary or appropriate, such authorities, and also the Settlor, any other Stakeholder, or any member of the public, could initiate action in relation to the conduct and position of the Board, the Trustees and the Trust.
4. The relevant terms set out in the Draft Trust Deed are discussed in further detail below.

What mechanisms are included in the Draft Trust Deed to ensure that Trust funds are not squandered?

5. In the following paragraphs, we identify the key terms set out in the Draft Trust Deed relevant to ensuring that funds are spent on advancing the charitable purposes of the Trust and are not squandered.

Trust to operate for charitable purposes and not for private profit

6. The Draft Trust Deed provides that the Board must hold and administer the Trust Fund for the Trust's charitable purposes set out in clause 4.2, and also expressly provides that the activities of the Trust must not be carried on for the private profit of any person and the consideration provided for any supply of goods or services must not be more than fair market value for the relevant supply.¹
7. These charitable purpose and not-for-profit constraints cannot be varied, and apply not only in relation to the operation of the Trust but also in relation to any resettlement or winding up proposal.²

Role and duties of the Board and the Trustees

8. The role of the Board and each Trustee is to act in the best interests of the Trust in relation to the advancement of the Trust's charitable purposes as set out in clause 4.2. The Board will have overall control of, and responsibility for, the Trust fund and the administration of the Trust, and the affairs of the Trust will be managed by, or under the direction or supervision of, the Board.³
9. The Board and each Trustee must exercise their powers and discretions (including the power to invest any part of the Trust fund) for the advancement of charitable purposes (as set out in clause 4.2) and in accordance with the prudent person standard.⁴
10. No delegation of the Board's powers or discretions will release the Trustees from their responsibilities in relation to the Trust.⁵
11. Board decisions must also generally be approved by more than 50% of the total number of Trustees,⁶ and in relation to significant matters (e.g. major transactions) a 75% threshold applies.⁷

Composition of the Board and disqualification criteria

12. The Draft Trust Deed provides for there to be not less than seven and not more than nine Trustees,⁸ and for those Trustees to include, in particular:
 - (a) stakeholder representation;⁹ and

1 Waima Biodiversity Trust - Draft Trust Deed at cl 4 and 7 [*Draft Trust Deed*].

2 Draft Trust Deed at cls 18.2, 19.2 and 20.4.

3 Draft Trust Deed at cl 5.1.

4 Draft Trust Deed at cls 5.4 and 16.1.

5 Draft Trust Deed at cl 5.6.3.

6 Draft Trust Deed at cl 12.1.5.

7 Draft Trust Deed at cls 10.2.3, 9.1, 18.1, 19.1 and 20.2.

8 Draft Trust Deed at cl 10.1.

9 Draft Trust Deed at cl 10.2.2.

- (b) an appropriately qualified Trustee responsible for overseeing the Trust's financial reporting.¹⁰
13. To ensure that the Trustees (and also Officers) meet basic 'good character' requirements, the Draft Trust Deed also incorporates and expands upon the disqualification criteria for officers of charitable entities under the Charities Act 2005.¹¹

External oversight by Settlor, Council and other Stakeholders

14. The Draft Trust Deed facilitates external oversight of the Board and the Trustees, by the Settlor (initially Watercare), the Council and other Stakeholders. Relevant terms include:
- (a) The composition of the Board, which includes provision for Stakeholder representation (including appointment of Settlor and Council nominees).¹²
- (b) Provisions relating to the Board's relationship with the Settlor and with identified Stakeholders.¹³
- (c) Requirements for Settlor approval (and generally also Board special resolution approval) of significant matters, including Board removal of any Trustee, major transactions, remuneration of any Trustee, variation of the Trust's terms, and any resettlement or winding up.¹⁴
- (d) Settlor access to Trust records, including conflict of interest and general records.¹⁵
- (e) Provision for the Trust's annual strategies and reports (including its financial statements) to be provided to the Settlor, the Council and other Stakeholders.¹⁶

Approval of major transactions and other significant matters

15. The Board must not enter into any major transaction unless it is both approved by a special resolution (resolution of the Board passed at a meeting of the Board by a number of Trustees that equals or exceeds 75% of the total number of Trustees for the time being or by a written resolution under clause 12.2.2) and approved by the Settlor in writing.¹⁷
16. Similar provisions apply in relation to other various other significant matters, namely Board removal of any Trustee, major transactions, remuneration of any Trustee, variation of the Trust's terms, and any resettlement or winding up.¹⁸

Managing and avoiding Trustee/Officer conflicts of interest

17. If an officer or Trustee is interested in a transaction he/she must disclose the interest to the Board and the Board must keep a record of the interest.¹⁹

10 Draft Trust Deed at cl 10.2.2(b).

11 Draft Trust Deed at cl 10.3.

12 Draft Trust Deed at cl 10.2.

13 Draft Trust Deed at cl 6.

14 Draft Trust Deed at cls 10.2.3, 9.1, 15.2, 18.1, 19.1 and 20.2.

15 Draft Trust Deed at cls 11.2.2 and 14.1.

16 Draft Trust Deed at cls 13.1 and 13.3.

17 Draft Trust Deed at cl 9.1.

18 Draft Trust Deed at cls 10.2.3, 9.1, 15.2, 18.1, 19.1 and 20.2.

19 Draft Trust Deed at cl 11.2.

18. The officer or Trustee's involvement in the transaction that he/she is interested in is limited, in particular by preventing their involvement in deliberations and voting in relation to the transaction.²⁰
19. If a Trustee is interested in a transaction and the Board is unable to establish a quorum and/or decide on a resolution, the Board must either change its composition or authorise independent Trustees or independent advice to determine the Board's position on the transaction.²¹
20. The definition of "interested" is broad and includes direct/indirect financial interest and any other material personal interest in relation to a transaction.²²

Annual reporting and accountability requirements

21. The Board must prepare annual strategies, financial statements and reports, and must ensure that the annual financial statements are:
 - (a) prepared accurately with the required information;
 - (b) independently reviewed or audited; and
 - (c) recorded and filed with any relevant authority (e.g. Charities Services under the Charities Act 2005).²³
22. The Board must also prepare an annual report on the Trust's activities, which must include a copy of the financial statements for that financial year.²⁴
23. As noted, there is also provision for the Trust's annual strategies and reports (including its financial statements) to be provided to the Settlor, the Council and other Stakeholders.

Requirements relating to record-keeping and financial matters

24. The Board must ensure that full and accurate financial and other records are kept and maintained in respect of the Trust, and the Trustees and also the Settlor are entitled to inspect these records.²⁵
25. Specific requirements also apply in relation to financial matters, namely:
 - (a) any actions regarding any Trust bank account must be signed or endorsed by a person acting under the written authority of the Board;²⁶ and
 - (b) the Board must ensure that there are appropriate procedures in place in relation to the Board's receipt, administration and expenditure of Trust funds.²⁷

20 Draft Trust Deed at cl 11.3.

21 Draft Trust Deed at cl 11.4.

22 Draft Trust Deed at cl 11.5.

23 Draft Trust Deed at cl 13.2.

24 Draft Trust Deed at cl 13.3.

25 Draft Trust Deed at cl 14.1.

26 Draft Trust Deed at cl 14.2.1.

27 Draft Trust Deed at cl 14.2.2.

Remuneration and reimbursement

26. Strict terms apply in relation to remuneration for services provided, and reimbursement of expenses properly incurred, by the Trustees and other remuneration (i.e. payment for professional, business or trade services) under clause 15 of the Draft Trust Deed, as follows:
- (a) Any remuneration for acting as a Trustee must be reasonable having regard to the Trustee's duties and responsibilities, and the services provided by the Trustee.²⁸
 - (b) The amount of any such remuneration, and any professional remuneration, must not exceed fair market value for the services provided.²⁹
 - (c) The Settlor must approve in writing the amount and/or the rate(s) of any such remuneration, and the circumstances in which the remuneration is provided.³⁰
 - (d) If the relevant remuneration is a benefit or advantage in respect of which clause 7.3 applies (which relates to ensuring that any business income derived by the Trust is tax-exempt), neither the Trustee receiving the remuneration nor any person associated with the Trustee may directly/indirectly determine or materially influence the nature or amount of the remuneration or the circumstances in which it is to be provided.³¹
 - (e) A Trustee is entitled to be indemnified against and reimbursed for expenses if they are properly incurred by the Trustee in connection with the Trust, including travel and other expenses.³²

What stops the Board from collapsing or failing?

27. The key terms set out in the Draft Trust Deed that have been identified above are also relevant in relation to substantially mitigating any risk of the Board collapsing or failing, as well as enabling any such risk to be identified and addressed.
28. If the Board and the Trustees fulfil their role and comply with their duties as set out in the Draft Trust Deed, as outlined above, the risk of any Board 'collapse' or 'failure' once the Trust has been established should be extremely low. The involvement and oversight of the Settlor, the Council and other Stakeholders, and the Trust's expected registrations and oversight by various authorities, also provide additional protection in this regard.
29. In exceptional circumstances, the assistance of the Attorney-General, Charities Services and/or the Courts could also be sought to prevent or address any such 'collapse' or 'failure'.
30. Subject to appropriate protections (e.g. charitable purpose and non-for-profit constraints, Board special resolution and Settlor approval requirements), the Draft Trust Deed also provides flexibility for the Trust to adapt to changing circumstances, if necessary or expedient. This includes provision for variation of the Trust's terms, resettlement of Trust funds and, if appropriate, an orderly winding up of the Trust.³³

28 Draft Trust Deed at cl 15.1.1.

29 Draft Trust Deed at cl 15.2.1.

30 Draft Trust Deed at cl 15.2.2.

31 Draft Trust Deed at cl 15.2.3.

32 Draft Trust Deed at cl 15.3.

33 Draft Trust Deed at cls 18, 19 and 20.