

5 March 2018

Committee Secretariat
Justice Committee
Parliament Buildings
Wellington 6160

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Submission to the Justice Committee on Trusts Bill (290-1)

Entrust is a consumer trust which owns 75.1% of the shares in Vector Limited. Entrust was created as part of the reform of the energy industry under the Electricity Companies Act 1992 which vested the undertakings of former power boards into new energy companies. The Trust Deed creating Entrust was executed in 1993 pursuant to an Establishment Plan approved by the relevant Minister at the time.

Entrust previously made submissions to the Law Commission during its consultation process on trust law reform, and to the Ministry of Justice on the Exposure Draft of the Trusts Bill.

Entrust makes two submissions to the current draft of the Trusts Bill.

Clause 122 - Power of court to vary or extend trustees' powers

In Entrust's submission to the Ministry of Justice, it focused on the Court's power to vary the terms of a trust deed for the proper management of the trust property.

By way of background, the Trust Deed of Entrust explicitly authorises the variation of the deed by the High Court of New Zealand. From time to time, it has applied to the Court to vary provisions of the Trust Deed pursuant to sections 64 and 66 of the Trustee Act 1956.

Clause 113 of the Exposure Draft provided a power of the Court to vary or extend trustees' powers "*in relation to a property transaction or a class of property transactions*" if the Court considers it "*necessary for the proper management of the property.*" Entrust submitted that the scope of the power should not be limited by reference to property transactions, and that the threshold for invoking the application of the provision was too high. It recommended that a new clause be inserted without the reference to property transactions, and for the Court to exercise its power of variation when it is "*desirable for proper management of the trust property, or to maintain or enhance the purposes of the trust*".

Entrust expresses support for the incorporation of these recommendations under clause 122 of the current draft Bill, which provides:

122 Power of court to vary or extend trustees' powers in relation to property

- (1) *The court may vary or extend the powers of the trustees of a trust if—*
- (a) *the court considers that the variation or extension is necessary or desirable for the proper management of the trust property; and*
 - (b) *the variation or extension does not alter a beneficiary's interest under the trust; and*
 - (c) *the variation or extension does not involve a power to distribute trust property to a beneficiary.*

In Entrust's view, clause 122(1)(c) may have the unintended effect of limiting the Court's jurisdiction to vary or extend the powers of the trustees when the variation relates to an administrative provision of the trust deed which, for example, governs the timing and/or manner of distributions to beneficiaries, even when the variation or extension sought is procedural or administrative in nature.¹

It is recommended that clause 122 be amended with the following changes:

122 Power of court to vary or extend trustees' powers ~~in relation to~~ property

- (1) *The court may vary or extend the powers of the trustees of a trust if:*
- (a) *the court considers that the variation or extension is necessary or desirable for the proper management of the trust property; and*
 - (b) *the variation or extension does not **[materially]** alter **[or affect]** a beneficiary's interest under the trust; and*
 - (c) *the variation or extension does not **[relate to]** a power to distribute trust property to a beneficiary **[unless the proposed variation or extension is procedural or administrative in nature].***

The proposed additions are in bold typed and set out in square brackets.

Jurisdiction of the High Court

The second submission relates to the High Court's jurisdiction under the Trusts Bill. Clause 9 of the Bill defines "court" exclusively as "the High Court." During the first reading of the Bill, the Hon Christopher Finlayson (now Shadow Attorney-General) referred to this definition and invited the Select Committee to consider if any court other than the High Court should have jurisdiction.

Entrust has previously opposed the Law Commission's recommendation for the District Court to have concurrent jurisdiction with the High Court on trust matters within the limit of its equitable jurisdiction.

¹ See for example *Buczowski v the Attorney-General* (2010) 3 NZTR 20-045, Auckland HC, CIV 2010-404-002966, 15 September 2010, Lang J.

In its submissions to the Law Commission, Entrust noted that the types of issues which it brings to the High Court, such as variations of the Trust Deed, applications for directions or issues of interpretation, cannot easily have a monetary value attributed to them. To date the supervisory jurisdiction of the High Court has served Entrust's beneficiaries very well. The District Courts already have more limited experience than the High Court in matters within the civil jurisdiction. That lack of experience is even more pronounced in trust matters. Entrust can see no benefit to its beneficiaries from the expansion of the District Courts' role in trust matters. Entrust maintains this opposition and supports the retention of the High Court's exclusive jurisdiction as set out in the Bill.

Yours faithfully

ENTRUST

A handwritten signature in black ink, appearing to read 'H Keir', is positioned below the printed name.

Helen Keir
Chief Operating Officer