

# ACPNS LEGAL CASE REPORTS SERIES

This series compiles short summaries of significant cases involving charitable, philanthropic, nonprofit and social enterprise organisations in Australia and overseas.



## Re Tauranga Energy Consumer Trust [2021] NZHC 3469

High Court of New Zealand, Doogue J, 16 December 2021

Application to confirm restructure of a trust and winding up of a charitable trust.

**Key words:** Charitable Trust, New Zealand, Electricity Distribution, Winding Up, Restructure

1. Tauranga Energy Consumer Trust (TECT) was established in 1993, as part of the electricity reforms under the Energy Companies Act 1992 (NZ) (ECA).
2. The reforms under ECA privatised the electricity supply authorities, replacing them with public companies, in an effort to introduce competition to the electricity market.
3. After consultation with the public and consumers TECT was initially established to hold a substantial shareholding in an energy producer (Transpower) for the benefit of current and future electricity consumers in the area, via rebates to the original and subsequent consumers and financial support for local initiatives, facilities and events.
4. In 2002 TECT settled the 2002 Charitable Trust, which according to the current trustees was to record a broad community object as part of the TECT Trustees' distributive powers. Others claimed the rationale behind creating the 2002 Charitable Trust was not to broaden the focus of TECT for wider community benefit. Rather, they say it was created for tax efficiency reasons.
5. Approximately 80 per cent of TECT's distributions go towards 47,000 consumers via a rebate, with the remaining 20 per cent being paid out through grants and donations to community organisations being generated from \$1.1 billion in assets. TECT held 26.8 per cent of Trustpower's shares (\$690 million in value), and \$456 million was held in diversified investments and other assets.
6. In 2021 Trustpower announced the sale of its retail business, which meant that the vast majority of consumers in terms of the Trust Deed would cease to be consumers. TECT's very substantial asset base would then be held for only approximately 150 commercial and industrial consumers.
7. The trustees of TECT proposed to amend the TECT deed so that:

- TECT would exist for the sole purpose of paying rebates to existing consumers under the TECT Deed (and not to any new customers) for up to 30 years;
  - A new charitable trust would be established, which would be the primary vehicle to hold and manage TECT's assets and benefit the local community; and
  - The 2002 charitable trust would be wound up.
8. The TECT Deed set out an extensive consultation process for any alterations. This was conducted and considered by the trustees, and then they approved a set of amendments that were subject to approval by the Court.
9. The Court appointed independent counsel to assist the Court to provide relevant information and arguments in opposition to the directions sought by the trustees. It was not her role to act for the beneficiaries.
10. The Attorney-General also was an interested party who made a submission to the Court.
11. There was widespread consumer and public opposition to the proposal. The objections centred around a shift from consumer rebates to charitable purposes benefitting various regional projects, a perceived conflict of interest of the trustees, and that the continuing of the rebate for 30 years unfairly disadvantaged older beneficiaries who were not likely to receive the rebate for the entire period.
12. It was claimed that the trustees did not have the power to restructure TECT and the 2002 Charitable Trust in the manner proposed, and that the consultation process was inadequate, with the trustees not properly taking account of all necessary considerations.
13. The Court found:
- the purposes and objects of TECT were an amalgam of direct benefits to consumers (e.g. the rebate) and benefits to non-consumers through the carrying out of projects or other community initiatives so long as they will, in the opinion of the current trustees, benefit consumers;
  - the variation to the 2002 charitable trust deed to facilitate the winding up of the trust was within the express power of the trustees;
  - the proposed TECT Restructure was consistent with TECT's purpose, context and objectives and the trustees' decisions to implement the Proposed TECT Restructure were lawful and proper;
  - the trustees did adhere to the terms of the TECT Deed and consumers had more than adequate information available to them to enable them to make intelligent and useful responses to the proposals;
  - the trustees, while not required to consult about the charitable trust winding up, did so;
  - the trustees' decision-making process was robust, assisted by various advisers and they considered all the consumer submissions and feedback over an extended period and over a number of meetings;
  - both the TECT restructure and the 2002 Charitable Trust windup were proper and lawful.

## IMPLICATIONS



The Courts can assist trustees in the performance of their responsibilities in relation to trusts for appropriate matters, and if the trustees follow that advice, they will not be liable further in law.

It is critical that trustees follow the processes set down in the trust deed, and if there is any significant doubt about the meaning of the trust deed, seek the guidance of the Court.

## VIEW THE CASE



This case may be viewed at <http://www.nzlii.org/cgi-bin/sinodisp/nz/cases/NZHC/2021/3469.html>

Read more notable cases in [The Australian Nonprofit Sector Legal and Accounting Almanac series](#).

**Author:** McGregor-Lowndes, Myles & Hannah, Frances M.

**Email:** [acpns@qut.edu.au](mailto:acpns@qut.edu.au)

**Date of creation:** July 2022

**Number of case:** 2022-101

**Disclaimer:** The material included in this document is produced by QUT's [Australian Centre for Philanthropy and Nonprofit Studies](#) (ACPNS) with contribution from some authors outside QUT. It is designed and intended to provide general information in summary form for general informational purposes only. The material may not apply to all jurisdictions. The contents do not constitute legal advice, are not intended to be a substitute for legal advice and should not be relied upon as such. You should seek legal advice or other professional advice in relation to any particular matters you or your organisation may have.

**Commons licence:**

[This work is licenced under a Creative Attribution 4.0 International licence \(CC BY 4.0\).](#)