

SUBMISSION TO ROYAL COMMISSION OF INQUIRY ON AUCKLAND GOVERNANCE

INTRODUCTION

1. This is a submission by the Auckland Energy Consumer Trust (“**AECT**”) to the Royal Commission of Inquiry on Auckland Governance (“**the Commission**”).
2. This submission addresses the following issues:
 - (a) Background information on AECT;
 - (b) The implications for AECT of any amalgamation or other reform of Auckland’s territorial authorities;
 - (c) The history of dealings between AECT and Auckland’s territorial authorities since AECT’s establishment; and
 - (d) The history of claims, and current stance taken, by the Auckland City Council (“**ACC**”), Manukau City Council (“**MCC**”) and Papakura District Council (“**PDC**”) (also referred to collectively in this submission as **the Councils**) to ownership of AECT’s assets.
3. AECT understands that Vector Limited intends to make a separate submission in response to the Commission’s request for information on the delivery of electricity and gas into Auckland. Accordingly, those issues are not addressed in this submission.
4. AECT wishes to be heard in support of this submission, as indicated on the attached submission form.

5. The Councils have previously claimed ownership of AECT's assets and media reports surrounding the Commission initially indicated that the Councils would endeavour to use the Commission as a forum to re-litigate those claims. AECT has accordingly discussed the inquiry with the Councils prior to lodging this submission.
6. AECT now understands that ACC and MCC will not raise the issue of ownership of AECT's assets in their submissions. PDC's submission to the Commission says that the Councils' shares in AECT should be transferred to a regional investment body, such as Auckland Regional Holdings.¹ We understand that PDC does not intend its proposal to require law reform and an amendment of the AECT Deed, but the submission is unclear on its face.
7. If AECT is adversely affected by any submissions on that, or a similar, issue by PDC, or any other person, it may be required to respond in the interests of its beneficiaries. For this reason, AECT wishes to reserve the right to make a further written submission after 22 April 2008:
 - (a) If it is necessary to respond to any matters affecting AECT raised in other submissions; and/or
 - (b) To provide the Royal Commission with AECT's views on other matters of relevance, where that would assist the Commission.
8. Further, given the possibility that other parties may use their written or oral submissions to the Commission to challenge AECT's interests, AECT also wishes to reserve the right to apply for interested party status under s 4A(1) of the Commissions of Inquiry Act and/or to apply for an opportunity to respond under section 4A(2) of that Act. AECT will determine whether to make such an application once it has had an opportunity to consider the other parties' submissions to the Commission.

¹ Paragraph 7.8 (page 44) of Papakura District Council's submission.

SUMMARY

9. AECT was established to own the assets of the former Auckland Electric Power Board (“**AEPB**”). These assets currently consist of a 75.1% shareholding in Vector Limited, worth approximately \$1.45 billion at current share values.
10. AECT holds these assets in trust for the energy consumers living within the former AEPB boundaries (i.e. in Auckland, Manukau and Papakura) until 2073, at which point they will pass to the local government body or bodies functioning within the boundaries of the former AEPB. If no such body or bodies exist, the assets will pass to the Crown.
11. The Councils have no other interest in the assets of the AECT, and have no legal right or power to participate in the performance of AECT’s obligations under the Trust Deed.
12. The reform, amalgamation or even abolition of local government arrangements in Auckland is expressly provided for in AECT’s Trust Deed and would have no effect on AECT or its beneficiaries. AECT’s beneficiaries, including its capital beneficiaries, are defined by geographic location.
13. On this basis, any amalgamation would result in the current interests of the Councils under the Trust Deed passing to the new amalgamated local government body by operation of the Trust Deed. There would be no need for statutory reform or amendment of the Trust Deed.

BACKGROUND – ABOUT AECT

14. The AECT is a trust established by the **AEPB** pursuant to the Energy Companies Act 1992 (“**Act**”) for the purpose of owning the assets of the AEPB. Its Trustees are elected by energy consumers living within the boundaries of the former AEPB in Auckland, Manukau, and Papakura. It has two classes of beneficiaries: income beneficiaries (energy consumers within the AEPB’s boundaries) who are entitled to annual distributions; and capital beneficiaries (territorial authorities within the AEPB’s boundaries), who stand to acquire the assets of the trust on termination of the Trust Deed in 2073. Under clause 2.3 of

the Trust Deed, Trustees are entitled to prefer the interests of the income beneficiaries over those of capital beneficiaries when exercising any discretion.

15. Prior to the termination of the Trust Deed in 2073, the Councils have no right to participate in the business, governance or management of AECT beyond their interest as income beneficiaries. Under clause 2.2(h) of the Schedule to the Trust Deed, members and officers of the Councils are not eligible for appointment as Trustees.
16. A copy of the AECT Trust Deed is annexed to this submission.
17. AECT's main asset is its 75.1% shareholding in Vector Limited, which now owns electricity, gas and telecommunications networks throughout the Auckland region and beyond. Vector is a publicly listed company and its remaining shares are held by other private shareholders.

IMPLICATIONS FOR AECT OF ANY AMALGAMATION OR OTHER REFORM OF AUCKLAND'S TERRITORIAL AUTHORITIES

18. The Chairman of the Commission, the Hon Peter Salmon QC, has invited AECT to make a submission as to the implications of any local government re-organisation or amalgamation in terms of the Trust Deed and the different classes of beneficiaries.

The Trust Deed

19. The Trust Deed anticipates the possibility that local government amalgamations may occur during the term of the AECT, and provides for that possibility in a manner which does not disadvantage the interests of income beneficiaries or future local authorities.
20. The operative clauses of the Trust Deed are as follows:

2.1 Declaration of Trust

The Settlers direct and declare, and the Trustees declare and acknowledge, that the Trustees shall stand possessed of the Trust Fund upon the trusts, and with and subject to the powers and discretions, contained in, or to be implied from, this Deed.

2.3 Income Trust to be Preferred

Where in the Deed the Trustees are required or empowered to exercise any discretion, the Trustees shall be entitled to prefer the interest of Consumers over the interests of Capital Beneficiaries....

3. TRUSTS OF INCOME UNTIL TERMINATION DATE

3.1 Trusts and Powers

The Trustees shall stand possessed of the income arising from the Trust Fund upon the following trusts and with and subject to the powers contained in this clause 3.1...

4. TRUSTS OF CAPITAL

Trusts on and after Termination Date

With effect from the Termination Date, the Trustees shall stand possessed of the corpus of the Trust Fund, upon trust to pay, apply, or appropriate the same to **the Capital Beneficiaries** and, if more than one Capital Beneficiary, then in such proportion as the number of Consumers having *points of connection* within the district or boundaries of that Capital Beneficiary bears to the total number of Consumers within the District. **Provided that if, at the Termination Date, there shall be no Local Authorities having within their districts or boundaries any part of the District, the Trustees shall stand possessed of the corpus of the Trust Fund, upon trust to pay, apply, or appropriate the same to the Crown.**

[emphasis added]

21. “Capital Beneficiaries are defined in the Trust Deed at clause 1.1 as:

... those Local Authorities which, **as at the Termination Date**, shall have within their districts or boundaries any part of the District.

[emphasis added]

22. “Local Authorities” is defined in the Trust Deed as meaning:

The Auckland City Council, the Manukau City Council, and the Papakura District Council, **and/or any successor of the same which shall have the responsibility of carrying out the primary local government functions discharged as at the date hereof by those Councils.**

[emphasis added]

23. “District” is defined as:

..., the area over which the Board [the AEPB] at the time of the vesting of the Board’s undertaking in the Company, was authorised to supply electricity pursuant to the licence granted to the Board under section 20, Electricity Act 1968.

24. Under clause 1.3 of the Trust Deed, the termination date is 2073, being the maximum perpetuity period provided for under section 6 of the Perpetuities Act 1964.

25. The following conclusions arise from these provisions:
- (a) The income beneficiaries are Vector customers located in the old AEPB District comprising Auckland City, Manukau City and parts of Papakura District;
 - (b) Because the identity of income beneficiaries is defined geographically, by reference to the boundaries of the AEPB, they are unaffected by any changes to Auckland's local government arrangements, including the abolition or amalgamation of the Councils; and
 - (c) The identity of the capital beneficiaries is also determined by reference to the same geographical boundaries;
 - (d) The actual identity of the capital beneficiaries will not be capable of determination until 2073. If the Councils remain in existence and retain their current local government functions, they will become the capital beneficiaries. Otherwise, AECT's assets will pass to whichever body or organisation is charged with those responsibilities in 2073, or (if no such body or bodies exist), the Crown;
 - (e) The Trust Deed therefore clearly anticipates that Auckland's government arrangements may be significantly reformed during the term of the Trust Deed, and makes arrangements for this to happen;
 - (f) The Councils' prospective interests as capital beneficiaries of the AECT **may therefore be transferred to a new local government entity or entities without any need for empowering legislation or amendment to the Trust Deed;**
 - (g) On this basis, AECT submits it is more accurate to describe the Councils as **potential** capital beneficiaries, rather than **actual** capital beneficiaries.

Early Termination

26. Under clause 14.1 of the Trust Deed, the termination date can be brought forward by unanimous resolution of the Trustees only in extraordinary

circumstances, that is, where it becomes “*impracticable or impossible to perform the trusts of income*”.

27. The income of the AECT is derived from Vector dividends, and distributions are effected pursuant to the relevant provisions of the Trust Deed. AECT submits that there is no reason why it should become impossible or impracticable for it to continue to perform this function for the foreseeable future. It is therefore very difficult to anticipate any circumstances in which it would become necessary for the Trustees to terminate the Trust Deed before 2073 under clause 14.1 of the Trust Deed. It follows that the only way in which early termination of AECT could be accomplished would be by legislation. .
28. We note paragraph 62 of the Call for Submissions where the Commission has identified the type of regional or local issue which it considers to be outside of the scope of its Terms of Reference, such as harbour crossings or public transport. AECT submits that the terms of its Trust Deed fall within the same category. If the need arises, AECT will wish to make further submissions on the scope of the terms of reference.

HISTORICAL CONTEXT

29. We set out below the historical context for the creation of AECT, as any potential submissions concerning the ownership of AECT’s assets must be considered against this background.
30. The control and ownership of electricity infrastructure has not formed part of Auckland’s local government arrangements for more than 80 years. As noted above, the predecessor to AECT and Vector was the AEPB. The AEPB was formed under the Auckland Electric Power Board Act 1921-22 with an initial debt capital raised to enable the purchase of the electricity undertakings of the predecessor of Auckland City Council and of some 14 other local authorities, or public bodies, in the Auckland area. The Councils and their predecessors therefore sold their electricity distribution infrastructure to the AEPB at the time of its formation, and have had no role to play in the ownership or management of Auckland’s electricity distribution infrastructure since then.

31. It follows that the Councils have no current legal interest in AECT's assets, beyond the prospect conferred on them as potential future capital beneficiaries under the Trust.

The Energy Companies Act 1992

32. The AEPB, as the "establishing authority" under the Act, had a mandatory obligation to prepare an establishment plan providing for the transfer of its electricity undertaking to an energy company. This company was Mercury Energy Limited, part of which later became Vector. The Act required that the establishment plan be approved by the Minister of Energy.
33. AECT's purpose, as set out in the establishment plan, was to hold shares in Mercury and to distribute the dividend income to consumer beneficiaries. The Councils did not have any ownership interest in the AEPB. Funding for the AEPB had been provided by consumers. Under the Trust Deed set up by the AEPB establishment plan and approved by the Minister in accordance with the requirements of the Act, the Councils cannot receive capital during the 80 year term of the AECT (being the maximum perpetuity period permitted under section 6 of the Perpetuities Act 1964) unless AECT is brought to an earlier termination by its Trustees or otherwise. This reflects the decision made by the AEPB, and approved by the Minister, that the Councils should not become owners of Mercury/Vector.
34. AEPB was required to consult publicly before submitting its establishment plan. During the consultation process, the Councils strongly opposed the proposed establishment plan. Notwithstanding a major public campaign by the Councils, and submissions made to the AEPB, and significant changes made to the draft establishment plan, the AEPB resisted the submission that there should be territorial authority ownership.

Subsequent litigation

35. In 1993 the Councils took judicial review proceedings² seeking to quash, on a range of grounds, the establishment plan which had been prepared by the AEPB and approved by the Minister under that Act. The Councils were not successful on any of their grounds.
36. Since 1998 the Councils have initiated several other proceedings arising from the restructuring of the electricity industry in Auckland.³
37. The first substantive proceeding⁴ related to the legality of certain shares issued by Vector and questioned the appointment and actions of certain directors of Vector. Justice Paterson made the following findings:

[14] The evidence in this case discloses that there has been since 1 October 1993, in varying degrees, tension between the three main parties. At times, there has been tension between the board of Vector and the Trustees. These proceedings show that there is still tension between the Councils and both Vector and the Trustees. **The considerable sums of money which the Councils have committed themselves to spend in both this and previous litigation illustrates that they see far more at stake than the subject matter of the present proceedings...**

[15] ... It was suggested in this Court before Williams J in *Auckland City Council v Auckland Electricity Power Board* supra, that **the potential to secure a huge asset/income base for no consideration underlay the Council's attitude at the time and that litigation.** It may still be the underlying factor.

[Emphasis added]

38. Of particular importance, Paterson J held:

[37] I am not persuaded that beneficiaries in the position in which the Councils find themselves in this case can establish standing because of an alleged illegality in the structure of a company in which the Trust has its major investment.

[42] ... The Trust did not consult to the extent requested by the Councils but **there is no legal obligation on a trustee to consult with beneficiaries which have through both the Mayors and their solicitors stated positions which are based on a misconception of the Councils' rights.** As stated in a citation from Ford and Lee noted in para 31 above, "where a trustee is in a legal relationship with a third party, the beneficiary will rarely if ever figure in the relationship or have locus standi to intervene". **The**

² *Auckland City Council v Auckland Electric Power Board & Ors* (Unreported, High Court, Auckland CP26/93, 16 August 1993, Williams J).

³ *Manukau City Council v Lawson* [2001] 1 NZLR 599; *Manukau City Council v Lawson* HC Auckland, CP 210/SW99, 20 December 1999, Paterson J. *Manukau City Council v Lawson* HC Auckland, CP400/98, 30 June 2000, Williams J. *Manukau City Council v Lawson* HC Auckland, CP210-SW99, 25 May 1999, Morris J.

⁴ *Manukau City Council v Lawson* HC Auckland, CP 210/SW99, 20 December 1999.

Establishment Plan in this case may have had consequences which the Councils and others consider to be unfortunate. They are, however, the consequences of a plan which was approved by the appropriate Minister and which survived judicial review. The structure is now in place and cannot be altered by the Councils' consistent Court attacks on it.

...
 [61] It follows from my findings that there are no circumstances which would permit the Councils as residual beneficiaries of the Trust to bring an action on behalf of the Trustees based on an alleged breach of Trust...

[Emphasis added]

39. Paterson J concluded that the Councils had no standing to intervene on behalf of AECT and bring a claim against either Vector or the directors.
40. In the last proceedings the Councils sought orders relating to dividends paid by Vector to AECT.⁵ The Councils failed on all their causes of action. The Court held that AECT had no duty to prevent Vector paying a dividend from capital, nor did it have a duty to account to the Councils for any portion of a dividend paid from capital.
41. It follows that the Councils have been unable to establish that they have any legal right or interest in AECT (beyond their interest as income beneficiaries) prior to its termination in 2073.
42. AECT was initially concerned that the Councils were intending to bring AECT within the Commission's Terms of Reference, directly or indirectly. Specifically, it appeared that the Councils intended to invite the Commission to make recommendations that AECT be wound up early and its assets be transferred to a council-owned holding company. This understanding is based on the Councils' previous attempts to obtain ownership of AECT's assets, statements in the media, information on the Councils' websites (including draft submissions to the Commission) and documents released to AECT under the Local Government Official Information and Meetings Act 1987.
43. AECT considers that its functions, ownership of Vector, the terms of its Trust Deed, the Energy Companies Act 1992, and issues affecting energy trusts generally, are not matters within the Commission's terms of reference.

⁵ *Manukau City Council v Lawson* [2001] 1 NZLR 599.

44. AECT has discussed its views with ACC and MCC, who we understand have removed all references to AECT from their submissions.
45. AECT understands that PDC's submission to the Commission retains a reference to the Councils' ownership of AECT being transferred to an investment entity such as Auckland Regional Holdings. As outlined above, the Councils have no legal interest in the trust until it is wound up in 2073. AECT does not consider PDC's submission to be directed at any immediate change to ownership of the Trust's assets, but the submission is unclear on its face.
46. Thus, AECT wishes to reserve its right to respond to any submissions made on this issue, or otherwise, detrimentally affecting AECT.