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The Trustees  
Trust Tairāwhiti  
50 The Esplanade  
Shed Three, Floor 1  
Gisborne 4010

From: Jarrod Walker  
Direct: +64 9 357 9098  
Mobile: +64 21 986 744  
Email: jarrod.walker@chapmantripp.com  
Ref: 100481231/9415831.1

### **Eastland Network Limited**

- 1 You have requested that we confirm our opinion in respect of a potential sale by Eastland Group of the business and assets of Eastland Network Limited (formerly Eastland Energy Limited). We outline our views below.
- 2 We acknowledge your intention to release this opinion publicly and confirm our consent to that. Beneficiaries should however take their own legal advice in respect of the matters expressed herein, should they wish. We note that our engagement is with the Trustees of Trust Tairāwhiti and we have no solicitor client relationship with any beneficiary of the Trust.
- 3 This opinion is predicated on the basis of a potential sale of the business and assets of Eastland Network Limited, rather than a sale of the shares in that entity. The conclusions in this opinion do not differ in any material respect as between the two options. In any event we have noted the consequences of a share sale proceeding, below at certain relevant points.

#### **Trust Deed power of sale**

- 4 The trust deed envisages that the Trust is the direct shareholder in Eastland Network (as was originally the case when the Trust was settled). Eastland Network has a specific place in the trust deed as a consequence, being defined as the "Company" (albeit that that definition has by subsequent variation been expanded to include other companies in the Eastland Group group of companies, on which we comment below).
- 5 Clause 17 expressly authorises the Trustees to sell some or all of the shares in Eastland Network. Such a sale can take place by way of IPO or private sale, or a combination of methods. Further, clause 27.1 of the trust deed contains a more general power to sell Trust assets, now reflecting the general broad powers of trustees at law (section 56 of the Trusts Act 2019).<sup>1</sup>
- 6 It is clear therefore that the Trustees would possess the express power to sell the shares in Eastland Network, if they held them directly. They do not of course but these provisions and the history of the Trust are instructive in considering the question as to whether the Trustees therefore have the power to approve or concur

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<sup>1</sup> Of less direct relevance but nevertheless illustrative, clause 9.3(iv) clearly indicates that upon settlement of the Trust, it was not envisaged that the Trustees would be required to hold the shares in Eastland Network for all time.



with the sale of the shares in Eastland Network by Eastland Group as proposed by the Eastland Group directors, or (as is more likely) to approve or concur with the sale of the business and assets of Eastland Network by the Group.

- 7 Our view is that this is clearly the case. The general powers of the Trustees at law (section 56 of the Trusts Act), coupled with the express powers in the trust deed to act in respect of subsidiary companies (clause 27.23), give the Trustees the requisite express powers, especially when read in the light of the express provisions above regarding the sale of shares in Eastland Network.
- 8 It follows that in our view the provisions of the trust deed relating to the potential sale of the shares in Eastland Network, including the fetters expressed therein, such as consultation obligations, should be read as applying to any transaction that has the same economic effect, such as a sale of the business and assets of Eastland Network by that company itself. We understand that this is the expectation of the Trustees and the Group in any event.

**Consideration of “proper purpose” and other Trustee duties**

- 9 When exercising trustee powers, trustees must of course act in accordance with their fiduciary duties. It is not enough that trustees possess an express power to act, the carrying out of that action must be for a proper purpose and for the benefit of beneficiaries (key amongst the mandatory and default duties imposed upon trustees, including the Trustees of Trust Tairāwhiti, by the deed and by law). Failing that, the act will be outside their powers, and amount to a breach of Trust.
- 10 In the present context, this would require the Trustees, considering a sale of Eastland Network and its business, to consider a variety of factors such as:
  - 10.1 the price which can be achieved and the other terms of the sale (including warranties and indemnities);
  - 10.2 the benefit to Eastland Group of the sale and the consequential benefit to the Trust and its capital and income beneficiaries of the sale;
  - 10.3 any detriments to the Group, Trust and beneficiaries of the sale; and
  - 10.4 the use to which the sale proceeds may be put.
- 11 These are matters which to our knowledge the Trustees have been addressing and discussing with Eastland Group’s directors. Based on our involvement to date, we see no issue of concern that the Trustees have failed to take into account relevant factors, or have taken into account irrelevant factors.
- 12 We have considered whether there is anything inherent in these assets which alters the otherwise standard analysis described above:
  - 12.1 Put another way, the guiding principle (mandated by section 21 of the Trusts Act) when performing their fiduciary duties is that trustees must have regard to the context and objectives of the trust in respect of which they act. This raises a question which we are aware has been discussed in at least one



Trustee meeting at which we were present, i.e. the issue as to whether the fact that the business and assets of Eastland Network are of significant day to day relevance to the Tairāwhiti community gives them some special place in the asset base of the Trust such that they cannot, notwithstanding the express powers above, be sold. This in essence is simply another way of considering the “proper purpose” aspect of the proposed exercise of Trustee powers, described above.

- 12.2 To illustrate the point by way of an extreme example, if the Trustees knew that a purchaser of the business would degrade the assets to such an extent that power supply in the region becomes unreliable, they may be criticised for having sold the assets notwithstanding a high sale price.
- 12.3 In our view the answer is negative. Of key relevance here is the point noted above, that the trust deed itself clearly envisages and authorises the sale of Eastland Network (or, as noted, its assets). Trust Tairāwhiti was not established with a purpose of holding the assets of Eastland Network – or any other infrastructure assets in the region – in perpetuity. If it had been, the trust deed would have mandated that. In fact, the reverse is clear.
- 12.4 That is not to say that the Trustees should have no regard to the importance of the assets in the Tairāwhiti community. It could be a relevant factor, for example, influencing the Trustees to authorise acceptance of an offer which is not the highest numerical figure, that the selected purchaser is likely to operate the assets for greater benefit of the community into the future. But, this is simply one factor which should be considered, as part of the “context and objective” of the trust and the sale process, and not a determinative factor in and of itself.

### **References in the trust deed to the “Company”**

- 13 We have considered whether any of the references to “Company” in the trust deed (as originally drafted, i.e. references to Eastland Network) prevent the proposed transaction or otherwise impact on paths open to the Trustees.

#### 13.1 “Beneficiary” definition:

- (a) With respect to the definition of Beneficiary (and in particular paragraph (v) thereof) we do not see that as the case, based on the proposed sale being an asset sale. To the extent that references to “Company” in this definition are to be read as referring to Eastland Network (and here, they cannot reasonably be read as anything else), they will simply be irrelevant after the sale has taken place, and more so if the entity is later wound up. Paragraph (v) of the definition includes a natural person domiciled in the District, or any person (natural or otherwise) conducting business in the District:

Who, on a date which is 30 days prior to the date of distribution to or for the benefit of that person of any payment pursuant to this Deed, is listed in the records of the Company as a person connected to the Company's electricity distribution system.



- (b) If the assets of Eastland Network are sold then that company simply will not have an electricity distribution system and there will be no persons connected to it. There will simply be no beneficiaries under this head. That does not, in our view, create an issue for the Trust given the breadth of the remaining limbs of the definition of Beneficiary.<sup>2</sup> The provision could remain in the deed without undue concern, or it could be removed as part of an amendment process (specifically targeted or otherwise).
- (c) A slightly different result would occur if the sale proceeded by way of share sale. The Company (Eastland Network) would then still be in existence, albeit under the control of a third party. However even if Eastland Network then grew to have customers *outside* of the District, those persons would not by virtue of being customers of (the sold) Eastland Network be entitled to beneficiary status under the Trust, due to the opening wording of the "Beneficiary" definition, requiring them to be domiciled in the District or undertaking business there.

### 13.2 Purpose of the Trust:

- (a) Clause 5.1.2(a) of the trust deed specifically refers to the Company (also in a way which cannot reasonably be read as any entity other than Eastland Network). For reference, that clause provides that a purpose of the Trust is:

To provide for the beneficiaries in such manner as the Trustees shall from time to time decide including, without limiting the generality of the foregoing:

- (a) Paying for or subsidising the installation or maintenance of electricity reticulation or the supply of electricity in areas of the district where the Trustees, after taking such advice as they think fit and having regard to the cost of supplying power to those areas, are of the opinion that the provision of those services by the Company will not provide an acceptable commercial return to the Company except at a cost to the consumer of that electricity that is excessive having regard to the cost to the majority of consumers who are connected to the Company's electricity distribution system and who have similar load profiles.

Clauses 6.1.5(b), (c) and (d) then flow from or relate to this provision.

- (b) Despite the specificity of references to Eastland Network in these provisions, these provisions do not change our views on the ability of the Trustees to approve the sale of Eastland Network or its business, and nor do they make the trust deed inoperable in any way after the sale. These provisions will simply be irrelevant, and can be removed from the deed at a convenient time (but amendment is not required under any urgency, for the trust deed to continue to be operable). The

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<sup>2</sup> However, if you believe we are not aware of a factor which you see as relevant to this discussion, please let us know and we will further discuss this with you.



reference to the Company (i.e. Eastland Network) in clause 5.1.2(a) is an *inclusive* reference, guiding the Trustees but not restricting them. The key operative words of clause 5.1.2 in the opening phrase thereof, continue to apply irrespective of the redundancy of paragraph (a) in the event of a sale of Eastland Network.

- (c) The same analysis applies in our view to clauses 6.1.5 (b) to (d).

### 13.3 Other references:

- (a) Other references to “the Company” in the deed will continue to apply, by way of the extended definition of the word to include the Eastland Group companies generally, to those companies. There would be a technical issue that, if the shares in Eastland Network are sold, the deed would still apparently refer in these references to that entity, but this does not appear material to us and is unlikely in practice to cause an issue.
- (b) Amendment, to remove references to the Eastland Network, would be the way forward if in fact any such references was regarded as troublesome, although it must be borne in mind that various provisions (relevantly clauses 5, 6 and 7) cannot be amended due to the restrictive nature of the variation power in clause 7.1. Potentially, a Court order may be able to be obtained (this would require further analysis) if there was a clear wish to amend these clauses notwithstanding this restriction, but as noted above we are of the view that there is no specific or pressing need for such amendment, from a legal perspective.<sup>3</sup>

### **Engagement**

14 You have requested our comments on the engagement and consultation obligations to which the Trustees are subject, when considering a proposed sale of the business and assets of Eastland Network (or other similar assets) by Eastland Group.<sup>4</sup>

15 As you know, there are extensive and detailed consultation requirements imposed on the Trust in the Trust Deed with respect to the Gisborne District Council, generally. These include:

15.1 Clause 7: Requirement to consult with Council prior to exercise of the power to vary the Trust Deed.

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<sup>3</sup> There is a separate issue as to whether the Trustees wish to permit to subsist the situation where the Trust is operating with a trust deed which is – in this respect – clearly out of date, and requires readers to adopt a “fair large and liberal” interpretation of the wording to ignore the (then) out of date references to Eastland Network.

<sup>4</sup> Consistent with your practice, we have referred to “engagement” in this section of this memorandum. For the avoidance of doubt, the term “consultation” could also be used as we see the two terms as interchangeable in this context. We have referred to “consultation” where that is the term used in the trust deed.



- 15.2 Clause 16.7: Requirement to deliver Statement of Intent to Council not later than one month prior to end of the financial year.
- 15.3 Clause 16.8: Requirement to deliver budget estimates to Council.
- 15.4 Clause 16.4: Requirement to consult with Council should the Trust wish to modify its SOI after adoption.
- 15.5 Clause 16.9: Requirement to consult with Council prior to the AGM as to content of SOI.
- 15.6 Clauses 23.5 and 23.6: Relating to the procedure to be applied when consulting with Council pursuant to the Trust Deed.
- 16 However, the Council has no decision-making powers in respect of Trust assets and no approval or veto right in respect of a transaction such as the proposed sale. Trustees are (we understand) engaging with Council in respect of the proposed sale, as commented on further below, but this does not amount to an approval right on the part of Council.
- 17 The trust deed requires that the Trustees must consult with the directors of Eastland Network and Eastland Group in respect of a sale of the business and assets of Eastland Network, by virtue of the express provisions in clause 17 of the Trust Deed. Here, it is the directors of Eastland Group who have proposed to the Trustees the sale of the assets and business of Eastland Network. In any event, there have been extensive discussions between the Trustees and the Eastland Group directors with respect to the proposed sale and those discussions are continuing.
- 18 There are no express engagement obligations imposed on Trustees with respect to Trust beneficiaries (i.e. the wider Tairāwhiti community and stakeholders). However, the question as to whether to engage with beneficiaries, and the nature of that engagement, must be considered in light of the basic role of trustees of a trust. A core duty incumbent on trustees of any trust is to act for the benefit of the beneficiaries of that trust, in accordance with the terms of the trust itself.<sup>5</sup> In acting as trustee, and in particular in exercising any trustee powers, the trustees must have regard to the context and objectives of the trust.<sup>6</sup> Arguably, a trustee cannot fulfil these duties properly if he or she does not have an understanding of:
- 18.1 the broad range of circumstances and needs applicable to the beneficiaries of the trust; and
- 18.2 the wishes of the beneficiaries in respect of the proposed exercise of powers.
- 19 Accordingly, we recommend that the Trustees do undertake engagement in respect of the proposed sale. We confirm this is despite the fact that there is no express engagement obligation (i.e. outside the SOI and Annual Report processes and other

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<sup>5</sup> Section 26(a) Trusts Act

<sup>6</sup> Section 21 Trusts Act



processes noted above) in the Trust Deed. We see engagement as consistent with the Trustees' duty to act in the best interests of the Beneficiaries.

- 20 All this is as we have discussed with you previously, and we understand that our views in this respect are shared by the Trustees and the Trust's management. We understand that the Trustees are currently embarked on a process of engagement with key stakeholders and the community generally. We recommend that this continue, and evolve as the process of exploring a potential sale of the Eastland Network assets also continues to evolve.
- 21 By way of specific comment on the engagement process:
- 21.1 Engagement does not serve any purpose if it is vague and ambiguous. In our view a meaningful process of engagement requires the development of a preferred scenario, in respect of which the engagement would then proceed. It need not be the *only* potential scenario, and the Trustees must not close their minds to other scenarios and outcomes. However it is consistent with the Trustees' governance role that they proactively decide upon a *preferred* option, and engage / consult on that option. In the course of that engagement, it can be expected that discussion of alternatives previously considered and new) may arise, and Trustees should give their views (subject to commercial sensitivities) as to why those alternatives have not been preferred in deliberations to date, and give due consideration to all comments received in respect of those, and new, alternatives, and those alternatives themselves.
- 21.2 Typically the process of engagement would entail a combination of:
- (a) a public information campaign comprising announcements via websites, newspapers, mail outs (electronically and by hand) and public information meetings;
  - (b) a process by which Trust beneficiaries (broadly, the Tairāwhiti community) could submit their feedback in writing (over the internet or by mail / hand) and verbally if they wished (separate, and later in time, from the public information meetings); and
  - (c) a suggested timeframe for Trustees to consider the responses and make any findings from the engagement public.
- These are general principles. The exact nature of the process though will depend on local requirements and ought to be developed taking into account the requirements of the Trust and its community.
- 21.3 As part of the process the Trustees should consider specific engagement with important stakeholder groups and their representatives in the Tairāwhiti community. It is not for us of course to advise who those persons or groups are, and we understand that you as a Trustee group already have significant relationships with various stakeholder groups. Key principles of such engagement should be (we expect):



- (a) Recognition of such groups as representatives of the people who make up those organisations, and the importance of engagement directly with the organisations and their leaders and spokespersons as a result.
- (b) Development of a timing protocol whereby no one group (majority or otherwise) is given precedence, i.e. to the extent possible there is equality of engagement taking into account timing and content.

21.4 By engagement we do not refer to a vote – we are not recommending a referendum, informal or otherwise. While a vote on different options *could* be undertaken, it arguably clouds the engagement process. In any event, even if the Trustees did decide to incorporate some form of vote into the engagement process, that vote cannot be binding on the Trustees. The Trustees must not fetter their decision-making powers in that manner – it is up to the Trustees to make the decisions (to give up their decision-making power in favour of a vote would in our view be an improper delegation of trustee duties, and challengeable in and of itself).

**Other considerations generally**

22 You have asked us to note what other considerations we believe the Trustees should be mindful of at this stage of the proposed sale process (noting that no final decision has been made to sell the Eastland Network assets). We recommend that the Trustees consider the following, further (as they, with Trust management, have been doing):

- 22.1 the current notional capital and income allocations made by the Trust;
- 22.2 whether any amount derived by Eastland Group, and any amount returned to the Trust, as a consequence of the proposed sale would be capital or income for Trust law purposes, and how that determination may adjust the current notional capital and income allocations undertaken by the Trust; and
- 22.3 the proposed use to which any amount derived by Eastland Group, and any amount returned to the Trust, will be put and how (in respect of the latter) that may impact the investment strategy and distribution policy of the Trust.

We trust this is helpful.

Yours faithfully

Jarrod Walker  
Partner