



Trusts Relationships Policy (2003)

Minute Number: 947/03

That the revised Trusts Relationship Policy attached as Appendix “B” be adopted.

TRUST RELATIONSHIPS POLICY

1.0 Introduction

This Trust Relationships Policy has been developed to primarily provide a basis for standardising Council's practice in relation to the formation of trusts and also to provide a basis for standardising Council's practice in relation to having an ongoing relationship with trusts. The scope of the policy is limited to trusts where Council has or is intending to have a significant relationship with.

It should be noted that this Policy on trusts sits beneath a wider set of policies that Council uses when determining how it might form relationships with other entities, such as Crown agencies, other local authorities, businesses, in-house service delivery units and the public generally. Moreover, the Policy also sits alongside other policies Council has developed that guide its relationships with some of these entities, such as contractors who provide goods or services (e.g. through Council's Contracts Manual), in-house service delivery units (e.g. through Service Level Agreements) and other local authorities (e.g. through regional CCO's); and the policy on the appointment of directors required by section 57 of the Local Government Act 2002 ("the LGA'02").

This Policy should also be read in conjunction with a report to the Strategic Management Committee (20 March 2001, Minute No. 388/01).

This Policy assumes that Council has, in forming a trust or establishing an ongoing relationship with a trust, decided that a trust is the best vehicle to achieve Council's objectives. In making this decision about whether or not a trust is the best vehicle to achieve Council's objectives, it is expected that Council will have considered the following issues:

- Whether and to what extent the trust contributes to community outcomes;
- Whether the trust contributes to building community capacity or empowers the community;
- Whether any other trust or organisation exists that performs similar functions to those being considered;
- Whether the trust is able to source funding independent of Council;
- Whether the trust is (or is to be) of charitable status;
- Whether the trust is able to advocate on behalf of its interests independent of Council;
- Whether Council is comfortable with the prospect of having less control over an activity;
- Whether the trust is able to appoint skilled people as trustees;
- Whether the trustees have the contacts, energy and skills to achieve the desired community goals;
- Whether it is appropriate to consult with the community prior to forming, or establishing an ongoing relationship, with a trust;
- Whether any of the proposed activities of the trust are significant activities of Council;
- Whether the benefits and costs of establishing a trust or having an ongoing relationship with a trust have been fully analysed and carefully evaluated against other service delivery options in terms of the present and future social, economic, environmental and cultural well-being of the district;
- The impact on the Council's capacity to meet present and future needs in relation to its statutory responsibilities;
- Whether the activity of the trust is able to be ongoing and sustained; and
- How the trust will contribute to the Council's overall aims and outcomes.

2.0 Definition of Significant Relationship

For the purposes of this Policy, a trust has a "significant relationship" with Council where one or more of the following factors exist:

- Council has the right to appoint and/or remove 50% or more of the trustees, either alone or in conjunction with another party.
- Council has control, directly or indirectly, of 50% or more of the votes at any meeting of the members of the controlling body of the trust.
- Council has a contractual arrangement with the trust the value of which equals or exceeds \$100,000 in any one instance, or cumulatively over any financial year.
- Council has settled on the trust or provided a grant to the trust of a sum equal to or exceeding \$100,000.
- Council has settled on the trust any asset, whether land or other property, to a value equal to or exceeding \$100,000.
- Council has loaned to the trust a sum equal or exceeding \$100,000; or acts as guarantor for such a loan.
- Council is entitled to the assets of the trust on winding up; or the Council has power to wind up the trust and receive any economic benefit on that winding up.
- Council is entitled to receipt of an economic benefit from the trust the value of which equals or exceeds \$100,000 in any one instance, or cumulatively over any financial year.

3.0 Policy

A trust is a dynamic and flexible vehicle that can be used to achieve a number of results. It should be noted that this Policy seeks to avoid establishing a rigid set of rules that might limit the flexible uses of trusts and their effectiveness. Instead, this Policy highlights a set of issues that Council should consider when creating a trust or developing an ongoing relationship with a trust.

3.1 The Role and Purpose of the Trust

When Council considers the formation of a trust or establishes an ongoing relationship with a trust, it must ensure that the role and purpose of the trust is clearly documented in the Trust Deed, Contract and/or Relationship/Partnering Charter. The role and purpose of the trust should accord with Council's wider strategies and policies (e.g. Council's policies on Education and/or the Treaty of Waitangi).

3.2 Accountability of the Trust

Trusts typically have limited direct accountability to the community and, potentially, their activities are removed from public scrutiny.

When considering the formation of a trust or establishing an ongoing relationship with a trust, Council should ensure that the trust's relationship with, and accountability to, Council and the trust's relationship with, and accountability to, the community is clearly documented in the Trust Deed, Contract and/or Relationship/Partnering Charter. In addition, consideration should be given to which community, or part of the community, is to benefit from the trust. The minimum level of suggested accountability is for the trust to provide an operational and financial report to Council at least annually, and the Trust Deed and financial reports be available for public inspection.

A trust which is also a council controlled organisation (CCO) under the provisions of the LGA'02 will require a statement of intent, and will be subject to the monitoring and reporting provisions set down in that Act. Council will consider whether its objectives can best be met by creating a trust that will constitute a CCO.

3.3 The Use of Ratepayers' Funds

When considering the formation of a trust or establishing an ongoing relationship with a trust, Council should consider the prospect of the trust applying for ongoing funding from Council, noting that if Council priorities change, the trust may be left without funding.

When considering any option for a trust to provide a significant service to Council, Council must comply with the provisions of the LGA'02 and its own Delegations with regard to seeking tenders for any significant matter.

When considering the formation of a trust or establishing an ongoing relationship with a trust, Council should consider carefully what assets (if any) are being transferred to the trust (including real and personal property) and any respective responsibilities for the employment of staff. If the trust is to be a CCO the provisions of Schedule 9 of the LGA'02 will apply.

When considering the formation of a trust or establishing an ongoing relationship with a trust Council should consider how specific the Trust Deed should be about how and if the trust; can borrow funds, dispose of capital, distribute income and provide guarantees. Council should also consider if the Trust Deed should require the trust to maintain, or endeavour to maintain, a specified capital reserve. These issues are particularly important if significant assets are transferred to the trust by Council or if the trust requires significant long term funding from Council.

When considering the formation of a trust or establishing an ongoing relationship with a trust, Council should, in most situations where ratepayers' funds are being provided to the trust, use a Contract. In situations where the trust is providing a good or service to Council then a Contract must be used.

3.4 *Openness and Community Involvement in Decision Making*

When considering the formation of a trust or establishing an ongoing relationship with a trust, Council should consider:

- The ability of the community to access information on the operation of the trust (this aspect may need to be covered in the Trust Deed, Contract and/or Relationship/Partnering Charter);
- Whether the trust should consult with the community regarding the provision of services (this aspect may need to be covered in the Trust Deed, Contract and/or Relationship/Partnering Charter);
- Whether surveys and other community-based monitoring of the trust should be used (this aspect may need to be covered in the Trust Deed, Contract and/or Relationship/Partnering Charter or provided by an independent third party); and
- Whether the trust should be established as a CCO in order to enhance the community access to information.

When considering any administrative arrangements in relation to the above it should be noted that these can in some circumstances inhibit the trusts ability to perform its other functions.

3.5 *Effective Trustees*

The appointment of trustees will be subject to the Council's policy on the appointment of directors. Subject to that policy and to the extent not inconsistent with it, the following additional provisions apply to the appointment of trustees to a trust.

When considering the formation of a trust or establishing an ongoing relationship with a trust, Council should consider:

- Whether and how Council controls the appointment of trustees in the Trust Deed. In situations where Council controls the appointment of trustees, the Trust Deed should make it clear how this power is to be exercised. Each trust should be considered separately. In each case, it must be established if the trust:
 - may operate with the intention of making a profit; or
 - if Council has a significant interest in the trust; or
 - if the trust is a public entity; andThen separately balance the desire for control with good governance best practice.
- Whether and how trustees can be removed, noting that two common options include removal by the remaining trustees or by the party who appointed them. The power of

removal should be clearly drafted and generally only exercisable on the basis of some form of incapacity to act or fulfil the role of trustee.

- Developing clear descriptions of the skills and competencies for the roles of trustee and using a transparent and systematic appointment process.
- Whether the potential trustees are aware of their duties, roles and the risks involved. Noting that, provided trustees act reasonably and responsibly, any personal liability is only likely to be for losses that arise through their wilful default, negligence or dishonesty.
- Whether trustees should be remunerated for their work; or only for work done in a professional capacity; or not remunerated at all.

3.6 *The Appointment of Elected Members as Trustees*

When considering the formation of a trust or establishing an ongoing relationship with a trust with which Council has a significant relationship, Elected Members and Council Officers should only in exceptional circumstances be a trustee.

3.7 *The set-up, administration and wind-up costs of trusts*

When considering the formation of a trust or establishing an ongoing relationship with a trust, Council should consider the typically significant set-up, administration and wind-up costs (both financial and officer time) of a trust. Council should, as appropriate, take professional advice regarding the set-up, administration and wind-up of the trust prior to its formation and on an ongoing basis. Council should consider carefully any provisions that should be made with regard to the assets of a trust in the event of a trust being wound up. Council should also consider if any provisions should be made requiring that the wind-up cost of a trust be met from the trust fund before the residual assets of the trust are distributed.

3.8 *Taxation*

When considering the formation of a trust or establishing an ongoing relationship with a trust, Council should consider the desired tax status of the trust at the outset. Charitable and tax exempt status is not automatic and requires approval from Inland Revenue ideally prior to the formation of the trust. Furthermore, charitable status and tax exempt status can be removed if the trust is administered inappropriately. Professional advice regarding the steps to be taken to obtain the desired tax status should, as appropriate, be taken prior to the formation of the trust and on an ongoing basis.

When considering the formation of a trust or establishing an ongoing relationship with a trust, Council should endeavour to have the balance date of a trust that aligns with Council's balance date.

3.9 *The Legal Framework*

When Council considers the formation of a trust or establishes an ongoing relationship with a trust, Council should ensure consideration has been given to the following:

3.9.1 **The Trust Deed**

(which is the document that forms the trust and is the trust's operational rulebook)

The Trust Deed should include or clarify:

- The name of the trust and the names of the initial trustees are clearly stated on the cover page;
- The role, purpose and objectives of the trust;
- The mechanism for appointing and removing trustees (options include, but are not limited to, vesting these powers in: the Mayor; Council; Committee Chairs; the City Manager; Committees; Electoral Colleges; external groups; external individuals; the trust itself; or combinations of them);
- The ability of the trust to distribute capital and income;
- The mechanism for winding up the trust and the distribution of any assets;

- The mechanism for varying the trust (noting that, generally, variations should only be allowed if, they are not in conflict with the trust objects, do not affect the trust's charitable status, are approved by the IRD and, in some cases, are approved by Council. In addition, consideration needs to be given to prohibiting any variation to a Trust Deed of the clauses relating to specified objects of the trust, the appointment of Trustees, Trustees' powers, restrictions on benefits from the Trust and remuneration of Trustees, financial statements and annual reports, public meetings, and variation of the Trust Deed);
- Whether the trust is charitable or tax exempt;
- Is the contribution made by Council to be recognised in the media or in a brand;
- The nature of the relationship the trust will have with Council and the community (e.g. should the trust report directly to the community and/or report to Council and/or have a publicly notified Annual General Meeting);
- Whether the objectives of the trust should be widely or narrowly construed (noting that the flexibility or tightness of the deed has a transactional cost for the trust); and
- The trust has a balance date that aligns with Council's balance date.

3.9.2 **A Contract**

(which is the document that describes any good or services that the trust may provide for Council):

The Contract should include or clarify:

- The services to be provided by the trust;
- To whom the trust will provide services to (Council, the community);
- How the performance of the trust will be measured;
- Is the contribution made by Council to be recognised in the media or in a brand;
- How the trust will be made accountable for its actions; and
- The relationship that the trust will have with Council and the community.

Note: (i) That in situations where one document can achieve the same outcome as two, then one document should be favoured.

(ii) Where the trust is a CCO the contract may be a statutory requirement under section 61 of the LGA'02.

3.9.3 **A Relationship/Partnering Charter**

(for recording any high level non-contractual relationships between the trust and Council):

- Shared visions between the trust and Council that are not legally binding and more of a statement of intent

In completing the documentation, Council should consider the requirement for trustees to act independently of Council, noting that at times Council and the trust may have divergent views and goals.