



# Report

Date: 8 November 2016

Security Level: IN CONFIDENCE

To: Hon Anne Tolley, Minister for Social Development

*This document may contain legal advice and be legally privileged. It should not be disclosed on an information request, without further legal advice.*

## Alignment Project: Treatment of energy trust dividend payments for benefit purposes

### Purpose of the report

- 1 In 2001, the *Debt Repayment (Energy Trusts) Programme* (the Programme) was created to ensure that power trust dividends (from the three trusts operating in the early 2000s) would not reduce clients' benefit payments. The rationale was that the ad hoc and unpredictable nature of these payments makes it unreasonable to expect beneficiaries to anticipate them and adjust their finances accordingly.
- 2 It was intended the Programme be a temporary measure only, until regulations could be made to exempt energy trust dividends. In 2003, specific regulation-making powers related to income exemptions were inserted into the *Social Security Act 1964* (the Act), but regulations exempting energy trust dividends were not progressed.<sup>1</sup>
- 3 Under the Programme, a dividend should be treated as income and charged against benefit and MSD pays the resulting debt. MSD has never made payments under the Programme. Instead, to avoid additional operational costs, MSD established a practice of simply disregarding all energy trust dividends from income tests for benefits. This achieves the same outcome as the Programme intends. Over time, the practice has spread to include dividends paid by all energy trusts. Section 9(2)(h)  
Section 9(2)(h) Legal professional privilege
- 4 MSD recommends that you amend the *Social Security (Income and Cash Asset Exemption) Regulations 2011* so that energy trust dividends are exempt from income tests for benefit, for 12 months. This change does not require any additional funding, as the cost is already being incurred, and could be in place by the end of the year.
- 5 MSD will continue to exempt these payments, while you consider this paper.

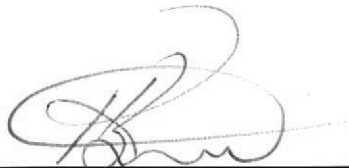
### Recommended actions

It is recommended that you:

- 1 **Note** that the *Debt Repayment (Energy Trusts) Programme* was established in 2001 to ensure benefits are not affected by dividend payments from three specific energy trusts, using a specifically prescribed administrative process (charge the dividend as income against a benefit, create a client debt, pay the debt through the Programme)  
**Yes / No**

<sup>1</sup> Other categories of exemptions now exist in the *Social Security (Income and Cash Assets Exemptions) Regulations 2011*.

- 2 **Note** that the Programme was a temporary measure until exempting regulations could be established, and then expanded to include dividend payments from other energy trusts, but these regulations were never progressed  
**Yes / No**
- 3 **Note** that the Ministry's current practice is to simply disregard all energy trust dividends from income tests for benefits for 12 months, a practice which is not supported by legislation  
**Yes / No**
- 4 **Agree** that energy trust dividends should be exempted from income tests for benefits, given that their ad hoc and unpredictable nature makes it unreasonable to expect beneficiaries to anticipate them and adjust their finances accordingly  
**Agree / Disagree**
- 5 **Agree** that the Ministry provide you with a draft Cabinet Social Policy Committee paper recommending an amendment to the *Social Security (Income and Cash Asset Exemption) Regulations 2011* to exempt energy trust dividends from income tests for benefits for 12 months  
**Agree / Disagree**
- 6 **Note**, subject to your agreement to the recommendation above, the Ministry will retain the current practice of exempting energy trust dividends from income tests for benefits for 12 months  
**Yes / No**
- 7 **Note** that MSD will not retrospectively review the clients affected by our practice  
**Yes / No**
- 8 **Agree** to send a copy of the report to the Associate Minister for Social Development.  
**Agree / Disagree**




---

Ruth Bound  
Deputy Chief Executive  
Service Delivery

8/11/2016

---

Date

---

Hon Anne Tolley  
Minister for Social Development

---

Date

## **The Debt Repayment (Energy Trusts) Programme was established so benefits were not reduced by energy trust dividend payments**

- 6 In 2000, after the 1990s electricity industry reforms, several energy trusts were established and started paying their consumers dividends. The dividends are income for the purpose of social security payments, under s3(1) of the Act.
- 7 In 2001, the Programme was created to ensure clients receiving energy trust dividends from three trusts operating in the early 2000s would not have their benefit or New Zealand Superannuation payments reduced.<sup>2</sup>
- 8 The Programme grants special assistance to clear any MSD debt that clients incur, due to the dividends being treated as income.

## **Our current policy and practice is to disregard all energy trust dividends when assessing a client's income for benefit purposes**

- 9 The Programme requires dividends to be treated as income and charged against the benefit, and that any MSD debt created is to be paid by the Programme. At establishment, no operational guidelines or IT changes were put in place and communication of the Programme to case managers was limited to two brief memos in March 2001, which set out the correct legal administration of the payment.
- 10 A practice examination has revealed that the Programme has never been administered as intended. Instead, in anticipation of income exemption regulations being made, a workaround practice has been used, whereby the energy trust dividends are simply disregarded for income purposes.
- 11 In addition, MSD disregard *all* dividends paid by energy trusts for income purposes (not just the dividends from the three energy trusts listed in the Programme).
- 12 Note that, some people still earn insufficient income to reach their abatement free threshold (\$80 or \$100 depending on benefit type) - or are not receiving income-tested benefits - so their benefits are not impacted and no debt is incurred.
- 13 At present, there are still no operational policy or practice guidelines on the treatment of energy trust dividends. Instead, staff are simply advised by Helpline to ignore any energy trust dividends and make a note on the client record.

## **Unless covered by the Programme, the law states that all energy trust dividends should be treated as income for benefits**

- 14 Section 9(2)(h) Legal professional privilege
- 15 The Programme was established on 10 March 2001 to pay off any debts created by including energy trust dividends, from three specified energy trusts<sup>4</sup>, as income.
- 16 It was intended that the Programme be an interim measure only and dividends would be exempted by regulation from the definition of income as soon as regulation-making powers for income exemption regulations were available (planned for 2002).
  - The original Programme covered the period up to 30 June 2001.
  - An amendment, made on 10 April 2002, removed the "30 June 2001" date, making the programme open ended. A sunset provision was also added on 10 April 2002, so the programme would expire if related regulations came into force.
- 17 In 2003, regulation-making powers for income exemptions were inserted into the Act in 2003, through the *Social Security (Personal Development and Employment)*

<sup>2</sup> Section 9(2)(h) Legal professional privilege

<sup>3</sup>

<sup>4</sup> Auckland Energy Consumer Trust, Mainenergy trust and Waipa Networks Trust.

*Amendment Act 2002.*<sup>5</sup> However, there have been no changes to the Programme since 2002 and no regulations for energy trust dividends have been progressed.

## **It was originally intended that all energy trusts dividends be exempt from income tests for benefits**

- 18 The policy intent of the Programme was to ensure that clients receiving energy trust dividends could keep these one-off payments without any impact on their benefits.
- 19 It was also intended that the Programme be expanded as other energy trusts were established and started paying dividends to consumers and moved into regulations.<sup>6</sup> However, there have been no changes to the Programme since the 2002, and no wider exempting regulations for energy trust dividends have been progressed.
- 20 However, as anticipated, there has been an increase in the number of energy trusts operating. There is even an industry group now for energy trusts, which advocates for 22 energy trusts operating within New Zealand.<sup>7</sup>
- 21 Some energy trusts provide dividend payments (depending on performance) which are not taxable for individual income tax purposes (others may only provide rebates or discounts on a power bill). Dividend amounts vary by company and year. Nine trusts paid dividends in the year to 31 March 2015, ranging from \$46.44 to \$425.<sup>8</sup>
- 22 If you agree with the original policy intent, an amendment can be made to the *Social Security (Income and Cash Asset Exemption) Regulations 2011* to exempt energy trust dividends from income tests for benefits for 12 months.

## **Current practice will be retained while you consider this paper**

### *Legal advice on risk of current practice*

23 Section 9(2)(h) Legal professional privilege

24

25

### *Client impacts*

- 26 MSD is unable to estimate how many clients receive energy trust dividends. MSD does not hold information about beneficiaries' power companies, or reliable information on any energy trust dividends they may receive.

### *Practice change to align with legislation*

- 27 A practice change would involve treating energy trust dividends as income and charging them against the benefit, and repaying any client debt created by dividends from any of the three organisations specified in the Programme.
- 28 However, a practice change would incur an additional burden on frontline staff. Apart from the extra calculations that would be required (which could lead to errors), the

<sup>5</sup> Other categories of exemptions now exist in the *Social Security (Income and Cash Assets Exemptions) Regulations 2011*.

<sup>6</sup> Refer SEQ Min (01) 2/3, 'Treatment of Dividend payments from Power Distribution Trusts for Social Security Purposes'.

<sup>7</sup> Energy Trusts New Zealand is the national organisation for 22 energy trusts, including the three energy trusts listed in the Programme (of which Auckland Energy Consumer Trust now operates as Entrust).

<sup>8</sup> MBIE, 'Line company discount and energy trust distribution analysis 2015'.

<sup>9</sup> Section 9(2)(h) Legal professional privilege

process for writing off debts involves consideration of a number of factors, extra paperwork and managerial approval. There would also be no advantage for the client.

- 29 Given the original policy intent to regulate to exempt all energy trust dividends and the costs of a more precise administration, MSD recommends you consider amending the *Social Security (Income and Cash Asset Exemption) Regulations 2011* to exempt all energy trusts dividends from income tests for financial assistance for 12 months.
- 30 If you accept our recommendation, MSD will accept the risk of continuing with the current practice, in anticipation of the amendment being made to the *Social Security (Income and Cash Asset Exemption) Regulations 2011*.
- 31 If you do not support the original policy intent and decline to amend the regulations:
- MSD can make a practice change to specifically adhere to the administration of the Programme in regard to energy trust dividends from the three specified energy trusts only, and/or
  - you could make changes to the Programme, to vary, extend, or reduce its effect.

## **We will not review our previous decisions to disregard energy trust dividend payments**

### *Legal advice*

32 Section 9(2)(h) Legal professional privilege

33

### *Client impact assessment*

- 34 MSD is unable to estimate how many clients may have received energy trust dividends, but some clients' energy trust dividends have been disregarded and have not impacted on their assistance.

### *Approach*

- 35 MSD does not propose to review any previous MSD decisions to disregard energy trust dividends. Again, this would penalise individual beneficiaries and MSD would not be able to recover debts as they were the result of MSD error.

Alignment ref: 2015/28

Report ref: REP/16/8/1000

EDRMS ref: A9061244