

RADICH✶LAW

BARRISTERS AND SOLICITORS

DATE: 25 July 2022
TO: Te Rūnanga a Rangitāne o Wairau Trust
FROM: Miriam Radich
RE: **TRUST DEED REVIEW**

Introduction

1. You have asked us to review Rangitāne's two Deeds of Trust and to provide advice and recommendations on any amendments which may be required on account of:
 - (a) The passage of time between each of the Deeds having previously been approved by Rangitāne's membership; and
 - (b) Changes to the law arising from, particularly, the commencement of the Trusts Act 2019.
2. The two Deeds of Trust we have reviewed are the deed establishing the Te Rūnanga a Rangitāne o Wairau Trust dated 13 November 2006 (**Charitable Trust**) and the Trust Deed establishing the Rangitāne o Wairau Settlement Trust dated 25 August 2010 (**Settlement Trust**).
3. We have reviewed the two Deeds of Trust in terms of 1(a) and (b) above and, in so doing, have also reviewed the limited number of the "second generation" of various other iwi trust deeds in New Zealand. By second generation, we mean those trust deeds which have been amended following the historical Treaty settlements which required Crown approval to governance structures. As you will recall, before any settlement of historical grievances was able to be effected, the Crown had to be satisfied that the claimant iwi had appropriate "post-settlement governance structures" in place. Our advice, therefore, includes some comments and suggestions from the review of other iwi trust deeds which have been amended post-settlement. There is not a great number of iwi trust deeds which have undergone any significant amendments post-settlement because of the high thresholds required to approve such amendments. To the extent that there are, however, relevant amendments which have been made post-settlement by other iwi we have included a reference to those amendments later in this memorandum.
4. We have also considered the Terms of Reference Rangitāne sent to its members and considered, particularly, the issues which were identified on page 2/4 as being issues the members may wish to consider. We have briefly discussed with Corey the feedback received to date and we understand that on the whole members consider that, to the extent possible, there should be consistency between the two Deeds, both in form and substance. At the moment, there is inconsistency in certain key areas and we have identified those in the table which we attached hereto as Schedule A.

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5. In amending the Deeds of Trust now, there is no requirement for Crown approval but there is a requirement that a high threshold of iwi members approve the amendments, in relation to the Charitable Trust at least. The provisions for amending the two Deed are not the same. Those provisions are as follows:
- The Charitable Trust requires approval of changes to a Trust Deed by 75 percent of the members entitled to vote and present in person or proxy at an AGM. This is a special resolution.
 - The Settlement Trust Deed can be amended by members passing an ordinary resolution (a simple majority) at an AGM. This is among the provisions in respect of which we consider there should be consistency.

Assumptions

6. We have assumed that Rangitāne will want to maintain the key elements of the existing Trust structures, being:
- (a) The continuation of the Charitable Trust as the primary operating arm of Rangitāne's parent organisations;
 - (b) The continuation of the Settlement Trust to hold certain cultural redress;
 - (c) The continuation of the corporate trustee structure to act as Rangitāne's legal land title owner.
 - (d) The continuation of the arrangement that the persons elected as "trustees" will act as trustees for each of the Charitable Trust and the Settlement Trust, and will control the corporate trustee.
7. We have assumed that Rangitāne will want to correct obvious errors and omissions in the Trust Deeds, such errors and omissions being identified below.
8. We have assumed that Rangitāne will want to amend existing provisions which have not been operationally practical or feasible or which have introduced elements of subjectivity into processes which ought to be objective (which provisions we identify below).
9. We have assumed that you will want us to identify any areas where the Deeds do not currently reflect the outcomes sought by the Review Objectives.
10. On the basis of these assumptions, we have at the conclusion of this Memorandum, provided some advice about possible amendments to the Deeds of Trust and have set out the process for effecting those amendments.
11. Before we deal with the specifics, we wish to raise the issue of incorporation and registration of the Charitable Trust. The Charitable Trust has operated as a charitable trust but has not registered as a charity or incorporated as a board under Part 2 of the Charitable Trusts Act 1957 (CTA). This means that there is no official imprimatur of the Charitable Trust's Deed of Trust as being effective for charitable purposes. It also means that the Charitable Trust does not have the protection of limited liability afforded by incorporation. It is commonplace for charitable trusts settled by iwi to be incorporated under the CTA. It appears to us from our review of the advice

provided to the Establishment Trustees at the time that there was no consideration of this issue. This is a separate issue from amendments to the Deeds of Trust and one in respect of Trustees may wish to separately consider if there is consensus that there is benefit in changing the status quo.

Errors and Omissions

Settlement Trust

12. There are some errors and omissions in the Deed of Trust for the Settlement Trust. Those include:
 - (a) The inchoate and incomprehensible text at Part C of the Introduction.
 - (b) The references to the "debenture" structure as being intended at the time of settlement and following settlement.
 - (c) The inclusion of defined terms within the Trust Terms which are not then used in the content of the Deed of Trust, including the provisions in the Trust Terms relating to tikanga and whāngai.
13. There is also, in terms of the Trust Terms, an inconsistency between the Settlement Trust and the Charitable Trust as to Members of Rangitāne o Wairau which causes the potential identity of beneficiaries of each Trust to be different. In the Settlement Trust, a member of Rangitāne must be an individual who descends from a Primary Ancestor of Rangitāne o Wairau. The term Primary Ancestor of Rangitāne o Wairau is defined in the Settlement Trusts Deed of Trust as being:
 - (a) An individual who exercised customary rights by virtue of being descended from any of the individuals referred to in Schedule 1; and
 - (b) Exercised customary rights predominantly in the Rangitāne Area of Interest at any time after 6 February 1840.
14. As you will see, in order to be a beneficiary and a Member of Rangitāne for purposes of the Settlement Trust an individual must descend from someone who exercised customary rights in the Rangitāne Area of Interest and be a descendant of the tīpuha identified in Schedule 1. There is no requirement in the Deed of Trust of the Charitable Trust that an individual descends from someone who had exercised customary rights in the Rangitāne Area of Interest in order to qualify as a Member. As we understand it, in practice, this requirement of the Settlement Trust has not been applied and membership is based on whakapapa and not the exercise of customary rights. We suggest, therefore, that the membership requirements for the Charitable Trust be incorporated into the Settlement Trust and the reference to the exercise of customary rights be removed.
15. There are other minor amendments which need to be made to ensure that definitions in both Deeds for mechanical processes (such as notice details and information requests) are consistent.

Charitable Trust

16. The provisions for the election of Trustees in the Charitable Trust carry through to the Settlement Trust. We note the provisions of Clause 4.3 of the Deed of Trust for the Charitable Trust. This requires the seven (7) Trustees to comprise of:

- (a) One (1) representative from the Kāpara Te Hau electoral division;
- (b) One (1) representative from the Wairau electoral division;
- (c) One (1) representative from the Kaituna electoral division;
- (d) Two (2) representatives from the Tōtaranui electoral division; and
- (e) Two (2) representatives from the Taurahere electoral division.

We understand this “proportional representation” is now historical and, in these circumstances, we suggest it be removed.

17. At the back of the Charitable Trust’s Deed of Trust, are amendments to the Deed which were purportedly made “[f]ollowing a ballot of the membership of Te Rūnanga a Rangitāne o Wairau Te Trust at the Annual General Meeting of the Trust held at Blenheim on 22 August 2010” and which are recorded as being “approved” by the Trustees. These amendments were the subject of challenge before the High Court in the 2017 election processes because of the alleged effect of the new Clause 4.3(c). Clause 4.3(c) provides that a person who seeks to be elected as a Trustee is only eligible if “in the reasonable opinion of a majority of the existing Trustees [the nominee] [has] the skills and capacity to meet the minimum requirements of a Trustee as set out in paragraphs 4 and 5 of Schedule 1.
18. It was on the basis of this purported amendment that the Trustees in 2017 determined that certain candidates were “ineligible” to stand as Trustees.
19. As we understand it, from 2017 the Trustees have not vetted nominees for trustee positions. To clean this matter up, we suggest that the 2010 amendments be removed from the Deed of Trust so that the Trustees do not have the right or the obligation to vet candidates for election.

Comparison of Charitable Trust and Settlement Trust

20. In undertaking our review of both Trust Deeds, we have compared each provision of each of the Deeds and have made various comments to bring those provisions up to date or to make the provisions consistent with each other.
21. We have recorded our observations and comments in a table which we attach hereto at Schedule A. As you will see there are matters of detail in the table which you and we ought to work through and consider so that the issues can be refined and put to the Trustees as recommendations.

Additions to the Trust Deed

22. As well as comparing the existing Trust Deeds and reviewing the existing terms, we have considered whether there ought to be additional provisions within the Deeds to comply with or to better reflect the provisions of the Trusts Act 2019.
23. For the most part, our recommendations in this respect relate to the provision of information to beneficiaries and to Trustees’ limitation of liability and indemnities. In attachment “B” we have included a revised indemnity which provides better assurance to Trustees.

Removal of Boiler Plate in Charitable Trust Deed

24. There is a large volume of text in the Charitable Trust Deed which the Crown required to be included before the various post-settlement governance entities were established to ensure that those entities would be established consistent with the Māori Fisheries Act 2004 and the Māori Commercial Aquaculture Claims Settlement Act 2004.
25. Most of this text sets out the requirements for entities which at that time, in 2006, were yet to be established. Those entities have now been established and there is no need for the significant volume of this text to remain in the Trust Deed. Clause 8 of the Charitable Trust's Deed could easily be replaced with a simple provision to the effect that:

Fisheries and Aquaculture Legislation

The Trust is the Mandated Iwi Organisation of Rangitāne o Wairau for purposes of the Māori Fisheries Act 2004 and is the Iwi Aquaculture Organisation for purposes of the Māori Commercial Aquaculture Claims Settlement Act 2004. The Trust has held these responsibilities since 2006 and has established Asset Holding Companies and other entities which are constituted and operate in terms of the provisions of the Māori Fisheries Act 2004 and the Māori Commercial Aquaculture Claims Settlement Act 2004.

The Trustees are responsible for ensuring that the Trust and its subsidiaries comply all times, constitutionally and operationally, with the provisions of the Māori Fisheries Act 2004 and the Māori Commercial Aquaculture Claims Settlement Act 2004 as those provisions may be amended from time to time. In practical terms, this means that the Trust may not undertake commercial fisheries activities or commercial aquaculture activities itself and that any such commercial activities must be carried out by properly constituted subsidiary entities.

Trusts Act 2019

26. In large part, the Trusts Act 2019 codifies in statute various common law duties and principles which have applied to the operation of Trusts but which have not been expressed in one piece of legislation. There is a series of default duties and obligations on Trustees which will now apply unless they are specifically excluded as part of a validly passed amendment to the Trust.

Default Trustees' Duties

27. The default Trustee Duties are:

Exercise reasonable care and skill in administering the trust	Invest prudently
Act impartially between beneficiaries	Not exercise power for own benefit
Act for no reward (this doesn't prevent legitimate expenses or reimbursements)	Not make a profit from being a trustee
Avoid conflicts of interest	Act unanimously with the other trustees
Regularly and actively consider whether trustees should be exercising their powers	Not bind or commit trustees to the future exercise or non-exercise of their powers

28. Our advice in relation to each of these is as follows:

(a) **Exercise reasonable care and skill.**

Unlikely to amend but needs to tie in with insurance and indemnity provisions.

(b) **Act impartially between beneficiaries.**

Suggest amending this to clarify that this does not require equal treatment as there may be education and other grants which are member specific.

(c) **Act for no reward.**

This has already been addressed in the existing Trust Deeds to make it clear that Trustees can be remunerated for services provided as a Trustee.

(d) **Avoid conflicts of interest.**

This has already been addressed in the existing Trust Deeds, to require disclosure of interests and recusal from decisions where a Trustee may be interested.

(e) **Regularly and actively consider whether trustees should be exercising their powers.**

Unlikely to amend.

(f) **Not to exercise power for own benefit.**

Unlikely to amend this.

(g) **Invest prudently.**

Suggest amending so that the investments must be made consistent with the purposes of the Trust. There may be investments which are made for broader purposes than simply increasing financial returns and suggest that the Trust Deed is clear that prudence includes any investment which is made in good faith for the benefit of Rangitāne o Wairau and consistent with the purposes/Kaupapa of the Trust.

(h) **Not to bind or commit trustees to the future exercise or non-exercise of their powers.**

No need to amend this.

(i) **Act unanimously with other trustees.**

The existing provisions of both Trusts permit decisions to be made by a simple majority of Trustees if a quorum is present (i.e. 4/7 is a quorum and 3/7 would be the majority). Consider and discuss.

(j) **Not make a profit from being a trustee.**

The Trust Deeds already contain provisions about this, at 4.20 of the Charitable Trust Deed and 4.15 of the Settlement Trust Deed.

Indemnification

29. As a matter of principle, Trustees are able to be indemnified for any missteps they make in carrying out their Trustee functions. This excludes actions which are grossly negligent or dishonest. We have suggested an amendment to the indemnification provisions which gives greater protection to the Trustees. In circumstances where the Trustees are acting for the greater good, we consider it is an obligation of the Trust to commit to arranging insurance and providing ongoing and robust indemnities to the Trustees. An example of comparable Trustee indemnification provisions is Schedule B.

Conclusion

30. We hope that this document is sufficient for present purposes. In terms of process, we consider that you and we ought to meet and settle on what we consider need to be the recommendations put to Trustees in final form or at least with options for their consideration. There may be issues we have identified which you consider need not be addressed and there may be other issues which have emerged during Rangitāne's membership review which we have not considered.
31. Following the identification of issues which are going to be put to members for approval and amendments, the next step would be to prepare two revised trust deeds reflecting the final set of changes proposed by the Trustees.

Kind regards

Yours sincerely



Miriam Radich

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Schedule A

Comparison of Key Provisions of Trust Deeds
Te Rūnanga a Rangitāne o Wairau Trust (13 November 2006) ("CT")
Rangitāne o Wairau Settlement Trust (25 August 2010) ("ST")

Clause	Charitable Trust	Settlement Trust	Comment
Introduction	Focus on Fisheries and Aquaculture legislation.	This section is a bit of a mess. See for example (c). Identification of ST as "the post settlement governance entity" for Rangitāne o Wairau (RoW) for purposes of the settlement of its historical Treaty grievances with the Crown.	Suggest that both be re-drafted and the CT's functions be expressed in broader terms with less focus in the Fisheries and Aquaculture legislation – that the CT is effectively the overall operating entity for RoW and responsible for representing RoW in all relevant contexts. Suggest that the function of the ST as a holding entity for cultural redress properties be clearly identified.
Trust Terms Interpretation	<p>A number of definitions in this section which are not used in the body of the Deed relating particularly to Fisheries and Aquaculture legislation (e.g., Te Kawai Taumata), Settlement Cash Assets.</p> <p>Note: Definition of <i>Members of Rangitāne o Wairau</i> persons who affiliate to Rangitāne o Wairau through descent from a primary ancestor of Rangitāne o Wairau and also includes Whangai who do not descend from a primary ancestor of RoW.</p> <p>Major Transaction not defined in the Trust Terms section but in the body of the Deed.</p>	<p>Fewer defined terms but more substantive problems with those defined terms that there are. For example, the definition of "primary ancestor" is problematic with its reference to the requirement to have exercised customary rights in the RoW area of interest after 1840.</p> <p>Defined terms include Major Transaction and Significant Transaction. Term Significant Transaction does not appear in CT Deed. Any transaction involving 30 percent or more of the ST's assets must be the subject of reporting and discussion at a general meeting.</p>	<p>Suggest that key definitions be the same including:</p> <ul style="list-style-type: none"> • Registered Member. • Primary Ancestor. • Major Transaction. <p>Suggest that term Significant Transaction be removed from the ST Deed and focus be on the nature of the asset (for example, Ngāti Porou uses the term "Heritage Asset." May not be necessary given the limited nature of the assets the ST will hold.</p>
Kaupapa / Purposes	Clearly identifies charitable purposes and then has a whole lot of text about the Fisheries and Aquaculture legislation.	<p>Expressed in very general terms, being to:</p> <p>(a) Receive, hold, manage and administer;</p> <p>(b) Transfer within the Iwi Group; and</p> <p>(c) Make distributions to Members of RoW in accordance with 4(h).</p>	Suggest consideration being more explicit about the respective purposes of the two trusts. In relation to the CT, suggest removing unnecessary focus on Fisheries and Aquaculture legislation.
Strategic Governance	A clause requiring the Trust to exercise strategic governance over fisheries and aquaculture assets is a requirement of the Fisheries and Aquaculture legislation. However, in the CT Deed, this clause is very long, detailed and contains repetition and redundancy.	The ST contains the Strategic Governance provision when it does not need to as it is not the MIO for purposes of the Fisheries and Aquaculture legislation. The Strategic Governance provision of the ST Deed is better than the CT.	Suggest delete Strategic Governance from ST and replace the CT's Strategic Governance provision with the ST's Strategic Governance provision.

<p>Appointment and Powers of Trustees and Management of the Trust</p>	<p>Note reference to Caretaker Trustees as being those who signed the Trust Deed.</p> <p>Clause 4.3 requires the Trustees to be from five "electoral divisions." Understand this is historical so should be removed.</p> <p>Criteria for Appointment:</p> <ul style="list-style-type: none"> a) Adult Member of RoW. b) Not be disqualified by 4.5(d) – (f) (unsound mind, bankrupt or convicted of dishonesty offence). c) Meet minimum requirements of paras. 4 and Schedule 1. <p>N.B Purported Amendment in 2010 – "in the reasonable opinion of a majority of the existing Trustees, have the skills and capacity to meet the minimum requirements of a Trustee as set out in paras. 4 – 5. Refer to comments in cover memorandum.</p>	<p>Note reference to First Trustees as being the Caretaker Trustees.</p> <p>Process for electing trustees and criteria and eligibility for election follow the CT. Number of trustees must be "up to seven."</p>	<p>Reference to Caretaker Trustees and First Trustees are now unnecessary, redundant and can be removed.</p> <p>Remove Clause 4.3 – assume there is no need for any geographical spread for trustees?</p> <p>It is unusual for Trust Deeds to have subjective criteria for election as a trustee of the kind specified in Schedule 1. The most common criteria are objective, for example:</p> <p>To be elected an Elected Representative must:</p> <ul style="list-style-type: none"> (a) as at the closing date for nominations in the relevant election, be recorded in the Register as registered within the area in which he or she is standing for election; (b) Not: <ul style="list-style-type: none"> (i) be bankrupt, or have within the last 5 years been adjudged bankrupt; (ii) have ever been convicted of an offence involving dishonesty as defined in section 2(1) of the Crimes Act 1961, or an offence under section 373(4) of the Companies Act 1993 (unless that person is an eligible individual for the purposes of the Criminal Records (Clean Slate) Act 2004); (iii) be or have ever been disqualified from being a director of a company registered under the Companies Act 1955 or the Companies Act 1993; (iv) be or ever have been removed as a trustee of a trust by order of Court on the grounds on breach of trust, lack of competence or failure to carry out the duties of a trustee satisfactorily; (v) be physically or mentally incapacitated to the extent that he or she is unable to perform the duties of an Elected Representative; (vi) be subject to a property order made under section 30 or 31 of the Protection of Personal Property Rights Act 1988; (vii) have been convicted in the last 10 years of an offence punishable by more than 3 years imprisonment (unless that person is an eligible individual for the purposes of the Criminal Records (Clean Slate) Act 2004) or (viii) have been removed from the office of Elected Representative in accordance with rule [no.] within the last 3 years.
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			Suggest that purported amendment in 2010 be removed and all subjective criteria be removed so that (a) existing trustees do not have the ability to vet candidates for election and (b) whether a candidate meets the criteria is yes or no with room for subjective evaluation.
Cessation of Office	All standard but note for discussion 4.5(a) "A trustee shall cease to be a trustee if he or she has been in office for more than three years since his or her election." Provisions wordy and cumbersome and could be refined in form but keep the substance.	ST Deed incorporates the cessation of office provisions from CT so any changes to CT will flow through to ST.	Discuss 4.5(a) and whether it is worth simplifying language of provision as a whole or best to leave as is.
Powers of Trustees	Boiler plate and standard but very wordy. Could be expressed 1000 times better.	Different from CT.	Consider whether there should be symmetry between the two trusts' powers (probably yes).
Management of the Trust	Note Clause 4.9(a) "The Trustees shall have the absolute management and entire control of the Trust Fund." Consider whether this should be expressed as being subject to any lawful delegations . . . Trustees have power to employ. Again, consider whether this is subject to any lawful delegations. Note also Clause 4.9(d) – engagement of contractors and terms on which engagement is effective. Is this followed in practice? If not suggest removing so that is more appropriately a function of GM.	Same as CT.	Consider whether these provisions in both deeds should be amended to reflect the fact that management of the Trusts are largely carried out by employees, including the GM on the basis of appropriate delegations.
Meetings of the Trustees	Must have a minimum of four meetings a year. Voting by simple majority of those present, Chairperson does not have casting vote in the event of a deadlock, quorum is 4 trustees. Fifteen working days' notice required of a meeting.	Some provisions are different from CT. No minimum number of meetings and specific provision in 4.5(b) that "The Trust's meetings will be separate to meetings of the Charitable Trust." Quorum of 4 and voting by simple majority.	Consider whether ST meeting and CT meetings should be at same time and place. Review quorum and voting requirements.
Chairperson, Deputy and Secretary	Trustees shall elect one Trustee to act as CP and one as Deputy	Same as CT.	Amend to provide flexibility and clarity regarding Co-Chair.
Delegation of Powers	Delegation to employees are limited to a delegation to the "Chief Executive Officer."	Same as CT.	Consider whether delegation to employees needs to be broader and whether term Chief Executive Officer is the appropriate term for Corey's role.
Accounts and Audit	These provisions are very important but as expressed are permissive, lacking in detail and skinny.	Same as CT.	Compare with other current "account and audit" provisions of other iwi trusts.

Reliance on Advice	Three categories of person on whom reliance is able to be placed – employee of the Trust, a professional adviser and a committee of Trustees. Consider whether needs to include or connect to BOD of subsidiaries or advisers to subsidiaries.	Same as CT.	Need to consider whether this provision could better be included in a broader section within the Trust Deed about indemnities, insurance etc. Compare with other iwi provisions.
Disclosure of Interest	Review these provisions against current best iwi models.	Review these provisions against current best iwi models.	Because such a significant issue need to review these provisions against current best practice and ensure that these provisions are being observed as they currently stand and are future proof.
Register of Members	All looks OK but discuss Clause 5.9 (it shall not be necessary to be a registered member in order to receive benefits from the Trust for purposes of Clause 3.1.) Discuss also deregistration.	Same as CT.	Consider legality of provision that registration is unnecessary to receive charitable distributions. Also suggest have a better process regarding deregistration, with less discretion on Trustees and at a minimum a requirement that the person being deregistered is given the opportunity to be heard and to provide additional information before any decision is made.
Voting Procedure	Review list of transactions which in Clause 6.1(a) require approval by "not less than 75 percent of the Adult Members of Rangitāne who are entitled to vote and actually cast a vote." Consider whether these matters should be defined as a Major Transaction and consider the threshold in the Trust Deed relative to Fisheries and Aquaculture legislation.	Different from CT. Defined terms are Major Transaction and Significant Transaction.	Consider why there is a difference between the two trusts and whether one is preferable to the other. Consider again why would retain significant transaction for ST.

Schedule B**Indemnification, Liability and Insurance**

- 1.0. The Trustees are entitled to be and hereby are indemnified to the fullest extent permitted by law from and against any claim by any person for any action or inaction undertaken or not undertaken by the Trustees, individually and collectively, in their capacity as Trustees. While the Trustees will make all reasonable endeavours to meet their obligations under the Trust Deed, they will not be liable for any actual or alleged failure to meet those or any other obligations unless such actual or alleged failure is on account of dishonesty or gross negligence.
- 1.1. The Trustees are permitted to obtain insurance at the Trust's cost to protect them for any liability arising from the performance of their obligations as a Trustee. To the extent that insurance cover is not available, the Trustees are indemnified from the costs of any claim, including its defence and any liability which may be found to exist, from the assets of the Trust.