

Proposed amendments to Trust Deed to update Trustee duties and procedures, honour tikanga and further recognise Māoritanga, and to enable distributions to overseas-based beneficiaries

At the 2024 Annual General Meeting, the Trustees are seeking approval from beneficiaries to approve a resolution amending the Trust Deed in three areas:

- Trustee duties and procedure;
- Māoritanga and tikanga Māori; and
- Distributions to overseas-based beneficiaries.

The resolutions containing the proposed amendments are appended to/at pages 4 and 5 of the Annual Report and a marked-up version of the Trust Deed identifying all the proposed amendments is available to download off the NRAIT website www.nrait.co.nz.

The proposed amendments are also summarised below.

Trustee duties and procedural amendments

The amendments include proposed changes to default duties on Trustees introduced by the Trusts Act 2019 (**Act**), which came into effect on 30 January 2021. The Act has replaced the Trustee Act 1956 and creates a basic practice of trust administration. The Act defines both mandatory and default duties for trustees.

The mandatory duties are set out in sections 22 – 27 of the Act and must be performed by all Trustees. They may not be modified or excluded by the terms of the trust. Trustees must:

- a. know the terms of the trust (s23);
- b. act in accordance with the terms of the trust (s24);
- c. act honestly and in good faith (s25);
- d. hold or deal with trust property and otherwise act to further the permitted purpose of the trust and in accordance with the terms of the trust (s26); and
- e. exercise their powers for proper purpose (s27).

Sections 29 – 38 of the Act set out the default trustee duties, which must be performed by all Trustees unless modified or excluded by the terms of the Trust Deed. Trustees recommend that these default duties are adopted, amended or excluded (as applicable), and thus form part of the Trust Deed as follows:

- a. **General duty of care (s29):** It is recommended this duty should not be modified and accepted as is.
- b. **Duty to invest prudently (s30):** As the Trust holds most of its assets in two asset types (property/land and investments), some may consider that this is not a diversified/risk balanced asset portfolio and there is a risk the duty is or will be breached. It is recommended the Trust Deed is amended to exclude this duty and allow greater flexibility on how the Trust's assets are managed and invested.
- c. **Duty not to exercise power for own benefit (s31):** It is recommended this duty is modified so that it only applies where clause 8 of the Trust Deed does not apply.

- d. **Duty to consider exercise of power (s32):** It is recommended this duty should not be modified and accepted as is.
- e. **Duty not to bind or commit trustees to future exercise of discretion (s33):** It is recommended this duty should not be modified and accepted as is.
- f. **Duty to avoid conflict of interest (s34):** If this duty is not excluded, there is a risk that Trustees who are beneficiaries should not vote on any decision that affects beneficiaries. This would be unworkable, as all the current Trustees are beneficiaries. It is recommended this duty is excluded from the Trust Deed on the basis that clause 8 of the Trust Deed already sufficiently deals with conflict-of-interest situations.
- g. **Duty of impartiality (s35):** It is recommended this duty should not be modified and accepted as is.
- h. **Duty not to profit (s36) and duty to act for no reward (s37):** There is a risk that payments to Trustees under clauses 8 and 15 of the Trust Deed could breach these duties. It is recommended this duty is modified so that it does not apply to payments to Trustees under clause 8 and clause 15 but does apply in all other situations.
- i. **Duty to act unanimously (s38):** This duty is already excluded from the Trust Deed as the Trust Deed permits Trustee **decisions** to be made by majority decision, as per clause 13(a) of the Trust Deed.

In addition, Trustees recommend the following other amendments relating to the Trusts Act and procedural matters:

- a. **Disputes:** It is recommended a provision is included that requires Trustees to have regard to the principles of tikanga when determining any disputes relating to the operation of the Trust.
- b. **Trustee Liability:** It is recommended a provision is included that excludes Trustee liability except where Trustees have acted dishonestly, with wilful misconduct or gross negligence. This is reasonably common, especially where the Trust holds assets. The liability provision does not go beyond the boundaries of the limitations in the Act.
- c. **Age of trusteeship:** It is recommended an age of trusteeship clause is included in the Trust Deed, setting the age of trustees (and, by proxy, board members) as being either 18 years of age or older, in order to align with the voting rights granted to beneficiaries.
- d. **Electronic holding of meetings:** It is recommended the Trust Deed is amended to allow electronic means of meeting, such as video conference to reflect current context. For the same reason, it is recommended the Trust Deed is amended to allow for electronic signing of resolutions and notices (clause 13(g)) and electronic record-keeping of proceedings of members (clause 13(h)).

Māoritanga and tikanga Māori

The Act is silent as to whether Trustees are required to take into account and apply tikanga Māori as they administer a trust and carry out their duties under the Act. However, the Act does not prevent Trustees from taking into account and applying the principles of tikanga Māori where it is consistent with the requirements in the Act.

Trustees recommend that the Trust Deed is amended to honour tikanga Māori by requiring Trustees to take into account and apply, as far as possible, the principles of tikanga Māori in administering the Trust and carrying out their duties under the Trust Deed and the Act.

Further, clause 3 of the Trust Deed currently requires Trustees to promote Māoritanga but it is recommended the Trust Deed include further references to Māoritanga to ensure Trustees exercise their powers and duties in accordance with Māoritanga.

Distributions allowed to overseas-based beneficiaries

Clauses 3 and 4 of the Trust Deed include the phrase “in New Zealand” in relation to the Trust’s objectives and powers. This phrase may be considered to restrict the Trustees from exercising their powers for the benefit of beneficiaries who have moved overseas.

Some beneficiaries live overseas at various stages for a number of reasons and the Trustees would like to provide benefits to them in accordance with the purpose of the Empowering Act and Trust Deed.

Power to make amendments

The power to amend the Trust Deed is set out in clause 18 of the Trust Deed. Clause 18 allows the Trust Deed to be altered or added to at any meeting of the beneficiaries, provided:

- a. the change is not inconsistent with section 61 of the Charitable Trusts Act 1957; and
- b. has been approved through a special general meeting by three-quarters of the voting beneficiaries present.

The resolution for voting is in accordance with clause 18 of the Trust Deed.