

Report of the Independent Advisor, David Gray
(Principal, Kia Tū Rangatira Ai Consulting)

to

Ngāti Pūkenga

concerning the

Review of Trust Deed

May 2018



Review of Trust Deed

Report by David Gray, independent facilitator

A. Introduction

In accordance with clause 26 of the trust deed of Te Tāwharau o Ngāti Pūkenga Trust (“Te Tāwharau”), I was asked to facilitate a review of the trust deed. I recently wrote a report to the trustees summarising the review process and setting out my recommendations for change. (If you would like a copy of that report, please ask one of the trustees or contact the office of Te Tāwharau.)

The trustees accepted the recommendations in my report, with one or two minor changes. The purpose of this second report is to explain the proposed changes to Ngāti Pūkenga. The changes must, of course, be approved by a special resolution of Ngāti Pūkenga before they can come into effect.

B. Recommendations

These are the recommendations I made, as they were adopted by the trustees, and which Ngāti Pūkenga is now being asked to vote on:

1. that the distinction between ‘trustee’ and ‘alternate trustee’ be eliminated;
2. that the total number of trustees be eight;
3. that the term of a trustee’s appointment be four years;
4. that the overall tenure of a trustee be limited to two consecutive terms of four years;
5. that kāinga be given the right to appoint the two trustees for the kāinga, with the proviso that the electoral process to determine the appointees needs to be robust, fair, transparent and participatory;
6. that the electoral processes for the two kāinga trustee appointments be staggered, with the election for one appointment to be held two years after the election for the other;
7. that the trustees be given the right, after consultation with the relevant kāinga, to fill a casual vacancy by appointment if there is one year or less to run in the natural term of the trustee whose departure created the vacancy; and
8. that matters be determined by the trustees on the basis of one vote per kāinga.
9. that any reference to ‘Establishment Trustees’ or ‘Establishment Period’ (both of which are now redundant) be removed from the trust deed;

10. that the requirement to establish a subsidiary called 'Ngāti Pūkenga Development Limited' be removed from the trust deed;
11. that the requirement for a review within five years be rolled over and extended to ten years, and included in the revised trust deed; and
12. that the trustees be given the power to remove one of their number in exceptional circumstances.

C. Explanations

Following is an explanation for why each of the recommendations was made.

1. *That the distinction between 'trustee' and 'alternate trustee' be eliminated.*

At the four kāinga hui that were held to discuss the review of the trust deed, there was strong support for getting rid of the distinction between full trustees and alternate trustees. It was agreed that the work which an alternate trustee has to do is just the same as what a full trustee has to do, so it doesn't make sense not to give them a voice at the table.

2. *That the total number of trustees be eight.*

There was also support at the kāinga hui for having eight full trustees (two from each kāinga). It was felt that a larger number (say, 12) would start to become too big to manage, and a smaller number (say, four) would risk creating problems with having a quorum for meetings, as all four of the trustees would always have to be available.

3. *That the term of a trustee's appointment be four years.*

One of the improvements the present trustees are keen to see is overlapping terms for trustees—in other words, setting things up so that a kāinga couldn't lose both of its trustees at the same election, thus losing all of the accumulated experience of the two trustees at the same time (see recommendation 6 below). Extending the term of a trustee's appointment from three years to four, combined with the change to staggered elections, means that Te Tāwharau only needs to hold an election process every second year.

4. *That the overall tenure of a trustee be limited to two consecutive terms of four years.*

It is best practice with governance appointments to have an overall limit on the length of time a person can serve on a particular board. For example, the New Zealand Shareholders Association recommends that directors of public companies serve no more than three terms, or nine years. The trustees have opted for a limit of eight years (i.e. two terms of four years). However, recognising the difficulty that some kāinga might have in finding suitable candidates, the trustees have also decided that a trustee who is disqualified by this requirement can stand again after two years.

5. *That kāinga be given the right to appoint the two trustees for the kāinga, with the proviso that the electoral process to determine the appointees needs to be robust, fair, transparent and participatory.*

The trustees are recommending that the power to appoint trustees be given to the kāinga. They believe this is more consistent with the tikanga of Ngāti Pūkenga. However, they have placed some safeguards in the wording of this provision in the trust deed. Firstly, the kāinga are required to ensure that the process they use to appoint trustees is simple, fair and transparent. Secondly, the process must be designed to maximise the participation of the adult registered members of the kāinga. Thirdly, the process must be administered by someone who is not a member of Ngāti Pūkenga. Finally, the process must include an appeal mechanism. Te Tāwharau is also required to give each kāinga whatever support the kāinga reasonably requires to run its electoral process.

6. *That the electoral processes for the two kāinga trustee appointments be staggered, with the election for one appointment to be held two years after the election for the other.*

As described above, the trustees believe it is a good idea to prevent the situation where both trustees from a particular kāinga leave office at the same time. This recommendation will ensure that there is always an overlap of two years (all other things being equal) between trustees.

7. *That the trustees be given the right, after consultation with the relevant kāinga, to fill a casual vacancy by appointment if there is one year or less to run in the natural term of the trustee whose departure created the vacancy.*

When a trustee leaves office for some reason before their four-year term is up, this is called a 'casual vacancy.' Normally, a casual vacancy will be filled by the kāinga to which the departing trustee affiliates, in accordance with that kāinga's electoral process. However, if the trustee leaves within a year or less of the end of their term, this recommendation means that the remaining trustees have the power, in consultation with the kāinga, to make a fill-in appointment until the next election. This power saves the kāinga from having to go through a full election process when there could be as little as two or three months to go before a scheduled election.

8. *That matters be determined by the trustees on the basis of one vote per kāinga.*

Another change which the trustees are recommending to respect the tikanga of Ngāti Pūkenga is to make it clear in the trust deed that decisions made by Te Tāwharau are based on one kāinga, one vote. The two trustees from each kāinga are thus required to get their heads together and decide how they will exercise the kāinga's vote, and it prevents the situation where one trustee from a kāinga votes one way on an issue and the other trustee from the same kāinga votes another way.

9. *That any reference to 'Establishment Trustees' or 'Establishment Period' (both of which are now redundant) be removed from the trust deed.*

This recommendation is really just a tidying-up of the trust deed. The original deed referred to 'establishment trustees' and 'establishment period' because it applied to the very beginning of Te Tāwharau. However, now that the organisation has been up and running for some time, these parts of the trust deed are now redundant, so the trustees are recommending that they be removed.

10. *That the requirement to establish a subsidiary called 'Ngāti Pūkenga Development Limited' be removed from the trust deed.*

As it is presently worded, the trust deed requires the trustees to set up a subsidiary called 'Ngāti Pūkenga Development Limited' (although the deed does not put a timeframe on this). The trustees would prefer to remove this mandatory requirement, as they do not see a need for such a subsidiary at this stage and they are unsure if it will ever be needed. Even if the obligation is removed, however, the trustees will still have the power to set up such a subsidiary if they want to at some future date.

11. *That the requirement for a review within five years be rolled over and extended to ten years, and included in the revised trust deed.*

The present review of the trust deed has been carried out because of a requirement in the original trust deed. The trustees think it is a good idea to roll over this requirement, but to extend the period within which the review must be carried out to ten years from the date of the revised trust deed.

12. *That the trustees be given the power to remove one of their number in exceptional circumstances.*

At present, the trustees do not have the power to remove one of their fellow trustees if that trustee begins to act in a way that threatens to seriously harm the interests of Ngāti Pūkenga, so they are recommending that this power be included in the revised trust deed. The conditions under which this power can be exercised are very limited: the circumstances must be exceptional, the behaviour of the trustee must be threatening to bring Te Tāwharau into serious disrepute or to block the achievement of its objectives; all seven of the remaining trustees must vote unanimously to remove the trustee; each of the trustees making the decision must be satisfied that doing so is what a fair and reasonable trustee would do in the circumstances; and the decision and the reasons for it must be notified to Ngāti Pūkenga straight away. It is highly unlikely that the power will ever be used, but the trustees would prefer it to be included in the revised trust deed as an insurance policy.

D. Revised trust deed

The recommendations described above are reflected in the draft revised trust deed attached to this report. The main changes in the revised deed are highlighted in [blue font](#).

E. Conclusion

As the independent advisor to the review process, I am satisfied that Te Tāwharau has followed a robust process to arrive at the recommendations described in this report. I am also satisfied that the recommendations have the potential to improve the operations of Te Tāwharau, especially by better reflecting the tikanga of the iwi through the empowerment of the kāinga and by removing some of the prescriptiveness in the existing trust deed.

I therefore recommend to Ngāti Pūkenga that the recommendations be adopted.
