

Deed of Variation of Trust
Deed – Estuary Arts
Charitable Trust

DRAFT

Date:

Parties

- (1) Anatole Casimir John Bogatski, Gail Pamela Reichert, Holly Clara Aymes, Michelle Velma Impey, Michael Ray Irwin, Philip William Crow and Yvonne Angela Rose Copeland (**the Trustees**)

Introduction

- A. The Trustees are the trustees of the Estuary Arts Charitable Trust under a Trust Deed creating the Trust dated 11 July 2006 **and subsequent variations of the Trust Deed.**
- B. The Trustees have resolved to rewrite the existing Trust Deed dated **19 March 2014 pursuant to the power in clause 17 of the existing Trust Deed.**
- C. The signatories to this Trust Deed will be the current Estuary Arts Charitable Trust Trustees.

Agreement

1. TE INGOA / NAME

- 1.1 The name of the Trust is Estuary Arts Charitable Trust, hereafter called 'the Trust'.

2. WHAKAMĀRAMATANGA / DEFINITIONS

- 2.1 In this deed unless the context otherwise requires:

AGM means Annual General Meeting

Board means the Trustees of the Trust.

Member means a member of the Trust that has paid their membership fees for the current financial year.

SGM means Special General Meeting

Trust Fund means any real or personal property owned or held by the Board on the trusts of this deed from time to time.

- 2.2 In this deed unless the context otherwise requires:

(a) A reference to a person includes any other entity or association recognised by law and vice versa.

(b) Words referring to the singular include the plural and vice versa.

(c) Clause headings are for reference only.

(d) References to statutory provisions will be construed as references to those provisions as amended or re-enacted or as their application is modified by other provisions from time to time.

(e) Any obligation not to do anything is deemed to include any obligation not to suffer, permit or cause that thing to be done.

3. MĀTĀPONO / PRINCIPLES

3.1 The Trust is committed, in attaining its purposes, to honour the principles of the Treaty of Waitangi, recognising the views and expectations of Tangata Whenua.

Our principles: We aim to be a visionary, welcoming, positive, successful, respectful, collaborative and transparent organisation and to maintain the highest standards of professionalism and integrity.

Our Vision: The Estuary Arts Centre as a creative artistic hub, belonging to and valued by the community, to enrich the lives of people of all ages and abilities, involving and engaging them in arts appreciation and creative opportunities and experiences.

4. WHĀINGA / PURPOSE

The purposes of the Trust are as follows:

- 4.1 To manage and hold property and facilities that the Trust may own or lease for the purpose of an Arts Centre with a focus on visual arts.
- 4.2 To operate an Arts Centre for the community to enrich the individual and community life of the Hibiscus Coast region of Auckland, by involving people of all ages and ethnicities in today's visual arts through Arts Education, curated exhibitions and the promotion of our local Artists.
- 4.3 To further the arts and Arts Centre for the use of the wider community and to receive and apply for grants in furtherance of this object.

~~4.4 To further the arts and Arts Centre for the use of the wider community and to receive and apply for grants in furtherance of this object.~~

5. NGA MAHI KI AOTEAROA ANAKE / ACTIVITIES LIMITED TO AOTEAROA/NEW ZEALAND

5.1 The activities of the Trust will be limited to Aotearoa/New Zealand.

6. TARI / REGISTERED OFFICE

6.1 The registered office of the Trust will be in such place in the Hibiscus Coast of Auckland, New Zealand as the Board of Trustees may determine.

7. MEMBERSHIP

Membership of the Estuary Arts Charitable Trust is a core function and as such is defined as:

- 7.1 Any person or family household who agrees with the vision, purposes and principles of the Trust may, subject to the Board's approval, become a member of the Trust by application in writing and upon payment of a subscription (if any) the membership fees for the current financial year.
- 7.2 Any approved membership shall extend from the 1st of July until the 30th of June of the following year.
- 7.3 Every Member is entitled to a single vote each at the AGM. However, where there is more than one Member in a family household, only one adult of that family household will be entitled to a single vote.

Commented [AL1]: This appears to be a repeat of the previous clause

Commented [AL2]: Removed these words to keep the definitions consistent

Commented [AL3]: Please let me know if this does not accurately capture the intention as discussed – my understanding was that there is only one vote per household.

7.4 Members may resign at any time.

7.5 Membership is forfeited if a subscription a Member's membership fees for the current financial year remain outstanding for six (6) months from the date it is due from the date they are due.

Commented [AL4]: Reworded slightly to keep terms relating to fees consistent

7.6 The Board may, in its absolute discretion, terminate the membership of any Member whom it considers is not acting in the best interests of the Trust. Any Member so affected shall receive written notification of at least seven (7) days prior to the holding of a Board meeting at which termination of that Board Member's membership shall be discussed.

Commented [AL5]: I think the word 'Board' should be removed here as the clause seems to be dealing with general members, rather than trustees/board members?

The affected Member shall have the right to present his or her case with or without an advocate and/or witnesses, either in person or in writing. The consensus decision of the Board members present at this meeting shall be notified in writing to the affected Member.

7.7 The Trust shall maintain a register of all financial Members.

7.8 Membership of the Trust shall not be less than ten (10) persons.

8. GENERAL MEETINGS

8.1 An Annual General Meeting (AGM) AGM is to be called within three (3) months of the end of each financial year.

8.2 Notice of a General meeting an AGM or SGM shall be given not less than twenty-eight (28) days prior to the date on which it is held, by public notice in an appropriate public forum and by individual notification to Members with decision making rights.

8.3 The notice of the AGM meeting is to include a request for any matters a Member may wish to be considered at the AGM. Such items are to be received by the Secretary no later than fourteen (14) days prior to the AGM.

8.4 The agenda for the AGM is to be circulated to Members no later than seven (7) days prior to the AGM and shall include the consideration of the Annual Report, the presentation and acceptance of the Annual Accounts and Balance Sheet, the selection of officers and such other business as may be brought forward by the membership subject to clause 8.3.

8.5 When the need arises, a Special General Meeting an SGM of the Members may be called by the Board or requested by not less than five (5) financial Members. Notice of the meeting shall be given in accordance with clause 8.2 and shall include the purpose for which the meeting is called.

8.6 A quorum for a Special General Meeting an SGM shall consist of not less than five (5) financial Members in addition to three (3) Trustees (or 50% of the financial membership, whichever is the least).

8.7 Minutes are to be kept of all general meetings AGMs and SGMs.

9. TE RUNANGA WHAKAHAERE / THE BOARD OF TRUSTEES

9.1 The name of the Board of Trustees will be Estuary Arts Charitable Trust Board, hereafter called referred to in this Trust Deed as 'the Board'.

9.2 The Board will comprise of no less than three (3) Trustees and no more than seven (7) Trustees.

9.3 Trustees are to be elected by the Members at an Annual General Meeting (AGM) AGM or appointed as allowed under clause 9.6.

- 9.4 Nomination for a position as a Trustee shall be by way of notice of nomination by a Member in writing endorsed with the consent of the nominee and given to the Secretary not less than 24 hours before the time fixed for the AGM. If there are insufficient nominations to fill the vacant Trustee positions, oral nominations may be received at the AGM provided that no Member shall be elected who has not consented to being nominated.
- 9.5 A minimum of three (3) Trustees and a maximum of four (4) Trustees shall be elected by the membership of the Trust.
- 9.6 The Board may ~~co-opt~~ appoint up to a further four (4) members as Trustees subject to clause 9.2, to provide skills and attributes that are not already on the Board. ~~Co-opted Trustees appointed by the Board~~ have full voting rights on the Board.
- 9.7 At least two (2) Trustees are to be from the creative industries or supportive of the Arts.
- 9.8 The term of office for each Trustee is three (3) years. Trustees shall be eligible for re-election up to a total of two (2) consecutive terms (six years). This limit may be extended in exceptional circumstances.
- 9.9 All Trustees must stand down for one (1) year after completing a six (6) year term before becoming eligible for re-election, except as allowed under clause 9.8.
- 9.10 ~~Co-opted~~ The term of office for Trustees appointed by the Board pursuant to clause 9.6 shall last for one (1) year or until the next AGM, whichever is the sooner. ~~The co-opted member(s). A Trustee appointed by the Board pursuant to clause 9.6 can be co-opted appointed as a Trustee by the Board~~ for a further year or can stand for selection at the AGM in the normal way.
- 9.11 The period of ~~co-opted~~ Trusteeship following appointment under clauses 9.6 and 9.10 shall not be taken into account when calculating consecutive years of service as a Trustee in terms of clause 9.8.
- 9.12 To ensure continuity, where possible, the Board will attempt to ensure that no more than half of the Trustees stand down at each election.
- 9.13 A person will immediately cease to be Trustee when she or he:
- (a) Resigns in writing;
 - (b) Dies;
 - (c) Is an employee, spouse, de-facto partner, or close relative of any employee of the Trust;
 - (d) Is dismissed under the provisions of this Trust Deed;
 - (e) Is declared bankrupt;
 - (f) Is found to be a mentally disordered person within the meaning of the Mental Health (Compulsory Assessment and Treatment) Act 1992 or subsequent enactment;
 - (g) Is prohibited from being an officer of an incorporated society or a director or taking part in the management of an incorporated or unincorporated body under the Companies Act 1993, the Securities Act 1978, the Securities Markets Act 1988, or the Takeovers Act 1993 (or their successors);
 - (h) Is subject to a property order made under the Protection of Personal and Property Rights Act 1988.

- 9.14 Subject to clause 9.2 the Board will have the power to fill any **casual Trustee** vacancy that arises.
- 9.15 The Board may continue to act notwithstanding any **Trustee** vacancy, but if **their number the number of Trustees** is reduced below the minimum number **of members** as stated in clause 9.2, the continuing Trustee(s) may act for the purpose of increasing the number of Trustees to that minimum but for no other purpose.
- 9.16 The Board may, by a motion decided by a two-thirds (2/3) majority of votes, terminate a person's position as a Trustee, if it believes that such action is in the best interests of the Trust.
- 9.17 The Board **Trustees** will elect from among themselves a Chairperson and Treasurer. A Secretary may be appointed from among **themselves the Board** or from the **Trust** Members. Election of office-bearers will be held at the first meeting of the Board following an AGM and whenever a vacancy occurs.

10. NGA HUI O TE RUNANGA WHAKAHAERE / MEETINGS OF THE BOARD

The procedure for Board meetings will be as follows:

- 10.1 A quorum will be at least half of the Trustees.
- 10.2 If a Trustee, including an office-bearer as a member of the Board, does not attend three (3) consecutive meetings of the Board without leave of absence, that Trustee or **member-office-bearer** may, at the discretion and on decision of the Board, be removed as a Trustee **or member of the board**, and/or from any office of the Trust which she or he holds.
- 10.3 All motions put to the Board will, if possible, be decided by consensus. In the event that a consensus cannot be reached then a decision will be made by a majority vote by show of hands, unless otherwise determined by the Board.
- 10.4 If the voting is tied, the Chairperson shall have the casting vote.
- 10.5 In the absence of the Chairperson, the Board will elect a person to chair the meeting from among the Trustees present.
- 10.6 The Board will meet at least six (6) times every financial year. Meetings may be held in person or by any other means of communicating as decided on by the Board from time to time. The Secretary will ensure that all members of the Board are notified of the meeting, either verbally or in writing.
- 10.7 The Secretary will ensure that a record of minutes is maintained which is available to any Member of the Trust and which, for each meeting of the Board, records:
- The names of those present;
 - Decisions made by the Board; and
 - Any other matters discussed at the meeting.

11. TAKETAKE / POWERS OF THE BOARD

In addition to the powers provided by the general law of New Zealand or contained in the Charitable Trusts Act 1957, the powers which the Board may exercise in order to carry out its charitable purposes are as follows:

- 11.1 To use the funds of the Trust as the Board thinks necessary or expedient in payment of the costs and expenses of the Trust;

- 11.2 To purchase, take on, lease or in exchange or hire or otherwise, acquire any real or personal property and any rights or privileges which the Board thinks necessary or expedient in order to attain the purposes of the Trust and to sell, exchange, let, bail or lease, with or without option of purchase or, in any other manner, dispose of such property, rights or privileges;
- 11.3 To invest surplus funds in any way permitted by law for the investment of Charitable Trust funds and upon such terms as the Board thinks fit;
- 11.4 To borrow or raise money from time to time with or without security and upon such terms as to priority or otherwise as the Board thinks fit;
- 11.5 To employ professional advisors, agents, officers and staff, according to principles of good employment and the Employment Relations Act 2000 or any subsequent enactment;
- 11.6 To instate any operating policies that the Board deems necessary to ensure the efficient and practical administration of the Trust;
- 11.7 To bind or commit Trustees to a future exercise or non-exercise of discretion;
- 11.8 To do all things as may from time to time be necessary or desirable to enable the Board to give effect to and attain the charitable purposes of the Trust.

Commented [AL6]: Added this clause to reference the ability to instate external policies that assist with the administration of the Trust.

Commented [AL7]: This provision excludes the default duty that applies under the Trusts Act that prevents trustees from binding trustees to a future exercise of discretion, as discussed.

12. KO NGA RAWA HEI PAINGA MO TE IWI / INCOME, BENEFIT OR ADVANTAGE TO BE APPLIED TO CHARITABLE PURPOSES

- 12.1 Any income, benefit or advantage will be applied to the charitable purposes of the Trust.
- 12.2 No Trustee or Members of the Trust or any person associated with a Trustee shall participate in or materially influence any decision made by the Trustees in respect of any payment to or on behalf of that Trustee or associated person of any income, benefit or advantage whatsoever. Any such income paid shall be reasonable and relative to that which would be paid in an arm's length transaction (being the open market value).
- 12.3 The provision and effect of this clause shall not be removed from this Trust Deed and shall be implied into any document replacing this Trust Deed.

13. TURU TAKETAKE / POWER TO DELEGATE

- 13.1 The Board may from time to time appoint any committee and may delegate any of its powers and duties to any such committee or to any person. The committee or person may without confirmation by the Board exercise or perform the delegated powers or duties in the same way and with the same effect as the Board could itself have done.
- 13.2 Any committee or person to whom the Board has delegated powers or duties will be bound by the terms of the Trust and any terms or conditions of the delegation set by the Board.
- 13.3 The Board will be able to revoke such delegation at will, and no such delegation will prevent the exercise of any power or the performance of any duty by the Board.
- 13.4 It will not be necessary for any person who is appointed to be a member of any such committee, or to whom such delegation is made, to be a Trustee.

14. PŪTEA / FINANCIAL ARRANGEMENTS

- 14.1 The financial year of the Trust will be from 1 July to 30 June of each year.

At the first meeting of the Board in each financial year, the Board will consider and decide by resolution the following:

- (a) How money will be received by the Trust;
- (b) Who will be entitled to produce receipts;
- (c) What bank accounts will operate for the ensuing year, including the purposes of and access to accounts; and
- ~~(d) Who will be allowed to authorise the production of cheques and the names of cheque signatories; and~~
- (e) The policy concerning the investment of money by the Trust, including what type of investment will be permitted.

14.2 The Treasurer will ensure that true and accurate accounts are kept of all monies received and expended by the Trust.

14.3 The Board may arrange for the accounts of the Trust for that financial year to be reviewed or audited by an accountant appointed for that purpose.

~~14.4 The Board may institute a policy relating to the financial arrangements of the Trust and amend that policy from time to time as the Board sees fit.~~

15. TE TOHE TAKETAKE /COMMON SEAL

15.1 The Common Seal of the Board will be kept in the custody and control of the Secretary, or such other officer appointed by the Board.

~~15.2 When required, the Common Seal will be affixed to any document following a resolution of the Board and will be signed by the Chairperson (or a Trustee acting as the Chair) and one other Trustee appointed by the Board.~~

15.3 The Board may institute a policy relating to the requirements for contracting and signing on behalf of the Board and amend that policy from time to time as the Board sees fit.

16. TAKAWAENGA / MEDIATION & ARBITRATION

16.1 Any dispute arising out of or relating to this Trust Deed may be referred to mediation, a dispute resolution process in which an independent mediator facilitates negotiation between parties. Mediation may be initiated by either party writing to the other party and identifying the dispute that is being suggested for mediation. The other party will either agree to proceed with mediation or agree to attend a preliminary meeting with the mediator to discuss whether mediation would be helpful in the circumstances. The parties will agree on a suitable person to act as mediator or will ask the Arbitrators' and Mediators' Institute of New Zealand Inc. to appoint a mediator. The mediation will be in accordance with the Mediation Protocol of the Arbitrators' and Mediators' institute of New Zealand Inc.

16.2 The mediation shall be terminated by:

- (a) The signing of a settlement agreement by the parties; or
- (b) Notice to the parties by the mediator, after consultation with the parties, to the effect that further efforts at mediation are no longer justified; or
- (c) Notice by one or more of the parties to the mediation to the effect that further efforts at mediation are no longer justified; or
- (d) The expiry of sixty (60) working days from the mediator's appointment, unless the parties expressly consent to an extension of this period.

Commented [AL8]: We have added this clause to be clear that a separate policy relating to the financial arrangements of the Trust is permitted.

Commented [AL9]: We have deleted this provision and substituted for 15.3 below, that provides the Board may institute a policy relating to signing documents. However, we do note that it is a legal requirements to have a common seal under section 13 of the Charitable Trusts Act.

16.3 If the mediation should be terminated as provided in 16.2(b), 16.2(c) or 16.2(d) any dispute or difference arising out of or in connection with this Trust Deed, including any question regarding its existence, validity or termination, shall be referred to and finally resolved by arbitration in New Zealand in accordance with New Zealand law and the current Arbitration Protocol of the Arbitrators' and Mediators' Institute of New Zealand Inc. The arbitration shall be by one arbitrator to be agreed upon by the parties and if they should fail to agree within twenty-one (21) days, then an arbitrator to be appointed by the President of the Arbitrators' and Mediators' Institute of New Zealand Inc.

17. TAUNAHA / TRUSTEE LIABILITY

It is declared that:

- 17.1 ~~The Trustees are chargeable respectively only in respect of the money and securities they actually receive, or which, but for their own acts, omissions, neglects, or defaults they would have received, notwithstanding their signing any receipt for the sake of conformity; and~~
- 17.2 ~~They~~ The Trustees are each answerable and responsible respectively only for their own acts, receipts, omissions, neglects and defaults and not for those of each other, or of any banker, broker, auctioneers, or other person with, whom, or into whose hands, any Trust money or security is properly deposited or has come;
- 17.3 No Trustees shall be liable personally for the maintenance, repair, or insurance of any charges on such property;
- 17.4 No Trustees hereof shall be liable for any loss arising from any cause whatsoever including a breach of the duties imposed by ~~Section 13B and/or Section 13C Trustees Act 1956 as enacted by the Trustee Amendment Act 1988~~ Section 30 of the Trusts Act 2019 (or any statutory replacement or equivalent) unless such loss is attributable to their own dishonesty, wilful misconduct or gross negligence.
- ~~(a) To his or her own dishonesty; or~~
- ~~(b) To the willful commission by him or her of an act known by him/her to be a breach of this Trust Deed. In pursuant to Section 13D of the Trustees Act 1956 it is intended by this clause that the duties imposed by Section 13B and 13C of the Trustees Act 1956 shall not apply to any Trustee hereof.~~
- 17.5 No Trustees shall be bound to take any proceedings against a co-Trustee for any breach or alleged breach of Trust committed by that co-Trustee.
- 17.6 Notwithstanding the procedure or otherwise of retaining assets in the Trust Fund, no Trustee shall be liable for any loss suffered by the Trust Fund by reason of the Trustees retaining any asset forming part of the Trust Fund.
- 17.7 The Trustees shall ~~from time to time and~~ at all times be indemnified by and out of the Trust property from and against all costs, charges, losses, damages, and expenses sustained or incurred by them or in or about the execution and discharge of their office or in or about any claim, demand, action, proceeding or defence at law or in equity in which they may be joined as a party, ~~subject to the terms of clause 17.4.~~

Commented [AL10]: Looking at this provision again (following our discussion on this clause), this is an extraction from section 38 of the Trustee Act 1956 that no longer applies. The section dealt with implied indemnities for trustees which is now covered in the new Act, and also below at clause 17.7.

18. ALTERATION OF DEED

This Trust Deed may be altered, added to, rescinded or otherwise amended by a resolution passed by a two-thirds majority at ~~a general meeting of members (AGM or SGM)~~ an AGM or SGM, provided that no such amendment shall:

18.1 Deduct from the charitable nature of the Trust or result in the distribution of its assets on winding up or dissolution for any purpose that is not exclusively charitable nor give power to extend the Trusts operations beyond New Zealand; or

18.2 Be made to clauses 4, 5, 12 or 19 unless it is first approved in writing by the Department of Inland Revenue.

19. TE TUKU TOENGA RAWA / DISPOSITION OF SURPLUS ASSETS

19.1 On the winding up of the Trust, or on its dissolution by the Registrar, all surplus assets, after the payment of costs, debts and liabilities will be given to other charitable organisation(s) within New Zealand as the Board will decide. If the Trust is unable to make such a decision, the surplus assets will be disposed of in accordance with the directions of the High Court pursuant to Section 27 of the Charitable Trusts Act 1957 or subsequent enactment.

Execution
