

Registration decision: Clutha Development Trust (CLU45653)

Executive Summary

1. The Charities Registration Board (**the Board**) has determined to decline the application for registration of Clutha Development Trust (**the Trust**) under the Charities Act 2005 (**the Act**).¹
2. The Trust has applied for registration on the basis that it has the following charitable purposes:
 - relief of poverty; and
 - promotion of community and economic development in a disadvantaged area by supporting a strong economy, and business and employment opportunities.
3. The Board has determined that the Trust is not qualified to be registered as a charitable entity under the Act.² While some of the Trust's purposes may be charitable, the Board considers that the Trust's primary purpose is to promote economic development in an area which is not disadvantaged.
4. On authority of the High Court in *Canterbury Development Corporation*³ (**CDC**), the Trust's purpose is outside the scope of charity. The Trust's activities to promote this purpose confer private benefits to individuals and businesses and these benefits are not the means by which the Trust provides a public benefit recognised in law.
5. The Board's reasons are organised as follows:
 - A. Background
 - B. Legal Framework for Registration Decision
 - C. The Charities Registration Board's Analysis
 - D. Section 5(3)
 - E. Determination

¹ This decision is made under section 19 of the Charities Act 2005 ("the Act").

² The essential requirements for registration are set out in section 13 of the Act.

³ *Canterbury Development Corporation* [2010] 2 NZLR 707 ("CDC").

Background

6. The Trust was incorporated under the Charitable Trusts Act 1957 on 2 October 2012.
7. The Trust's purposes are set out in clause 4 of the Trust Deed. This clause states:

4. Objectives

The charitable purposes and objectives of the Trust are as follows:

- (i) To promote the economic, social and physical wellbeing of the residents of the Clutha District through the support of business and employment opportunities in all enterprises
 - (ii) To plan, manage and promote activities and programmes that enhance the wellbeing of the people and enterprises of the Clutha District.
 - (iii) To encourage and promote broad-based active participation in the Trust's programmes by the residents of the Clutha District, irrespective of age, ability, ethnicity or gender.
 - (iv) To advocate on behalf of the people and enterprises of the District, to represent their interests, and to ensure those interests are considered by third parties that can affect their interests.
 - (v) To provide a leadership role, information and technology transfer, and education in supporting enterprises and the community.
 - (vi) To be the peak body for enterprises and the community in facilitating discussion and change.
 - (vii) To promote and facilitate workplace education in all enterprises and their employees or volunteers.
 - (viii) To promote and develop active on-site working relationships with the membership where appropriate and required.
 - (ix) To encourage new businesses or enterprises to establish in the Clutha District to broaden the district's economic and employment base.
8. Clause 2 provides the following definitions:
 - 2.3 "**Clutha District**" means the geographical area which is regarded to be the Clutha District
 - 2.5 "**business**" includes all primary production
 - 2.8 "**Primary Production**" means pastoral and arable agriculture, horticulture, forestry, commercial fishing and aquaculture
 - 2.9 "**Enterprise**" means any organisation involved in providing a community benefit and includes primary and service industries, manufacturing, retail, tourism, hospitality and not-for-profit organisations
 9. On 13 November 2012 the Trust applied for registration under the Act.

10. In January 2012, the Department of Internal Affairs - Charities Services (**Charities Services**) completed an initial review of the application and contacted the Trust for further information about the background to the establishment of the Trust and the Trust's proposed activities. On 24 February 2013, the Trust provided information (detailed below in paragraphs 12 to 13).
11. There followed a period of further correspondence between the Trust and Charities Services comprising:
- a notice to the Trust dated 26 March 2013 that the application may be declined because the Trust was not exclusively charitable in particular: (i) the Trust's purposes to promote community and economic development in an area that is not deprived was outside the scope of charity; (ii) the Trust's activities conferred private benefits that were more than ancillary; and (iii) the Trust had advocacy purposes outside the scope of charity;⁴
 - a letter from the Trust dated 27 May 2013 submitting that it was charitable⁵ and providing further information; and
 - an email to the Trust dated 11 July 2013 advising the Trust that Charities Services continued to consider that the Trust's economic development purposes were not charitable as the Clutha District is not disadvantaged and that the Trust confers private benefit that is more than ancillary. Further, this email notified the Trust that it did not relieve poverty in a way recognised in law. The Trust was given until 29 August 2013 to provide further information/evidence to support its submissions before a final decision was made. The Trust has provided no further response.
12. In the course of correspondence, the Trust provided information that:
- A working party with representatives from the Clutha District Council (**the Council**), Enterprise Clutha, Clutha Agricultural Development Board and the Clutha District Development Board

⁴ The Trust's advocacy purpose is in clauses 4(iv). The Trust was notified that this purposes is outside the scope of charity as it indicates that a purpose of the Trust is to influence policy at the local and central level (authorities referred to in Charities Services notice include *McGovern v Attorney General* [1982] 1 Ch 321 at 339 ("*McGovern*"); *Bowman v Secular Society Ltd* [1917] AC 406 (HL); *Molloy v Commissioners of Inland Revenue* [1981] 1 NZLR 688 ("*Molloy*"); *Greenpeace* [2012] NZCA 533 ("*Greenpeace, CA*"); and *In re Draco Foundation (NZ) Charitable Trust* HC WN CIV 2010-485-1275 [3 February 2011] ("*Draco*") at [54]). The Board notes that the Trust (in its letter of 27 May 2013) expressed that it would be willing to amend clause 4(iv). Although the change has not yet been formally made, this decision paper is made on the presumption that adequate changes would have been made to address this issue if this was the only non-charitable purpose preventing registration of the Trust. Therefore, advocacy purposes are not discussed further. However, for completeness, the Board notes that it considers that these advocacy purposes are outside the scope of charity.

⁵ Refer to paragraph 14 below for details of the Trust's submissions.

was contracted by the Council to discuss the delivery of programmes and services. The working party developed a report "District Development – Future Directions"⁶ recommending to the Council that it separate its economic development functions from its community development functions. The economic development functions were to be taken over by a non-Council organisation.

- As a result, the Trust was established. The Trust was a merger of Enterprise Clutha and the Clutha District Development Board. These entities will cease operating and their functions are to be taken over by the Trust. Contracts and agreements currently sitting with Enterprise Clutha will be transferred to the Trust. The Clutha Agricultural Development Board⁷ will continue to operate a separate entity.
- In its report, the working party identified economic development activities for the Clutha District. These include workforce development, enabling business, agribusiness and industry, supporting existing businesses, education and training, supporting/advocating for new business start-ups, attracting and encouraging new enterprise developments and destination marketing/tourism.⁸
- The Trust has a service level agreement with the Council to deliver economic development activities in the Clutha District.
- The services and programmes of the Trust will be available to all individuals, businesses, communities and enterprises in the Clutha District. They cover business support to the primary production sector, business support to small and medium enterprises, destination marketing and workforce development.
- The Trust plans to have four full time paid positions; a Destination Marketing Manager; a Trust Co-ordinator and two business development advisors (one focused on small to medium enterprises and one focussed on agribusiness).⁹
- A main project that the Trust has taken over from Enterprise Clutha is to develop a business database.
- The Trust will deliver education in the primary production sector, promote employment opportunities in the sector and organise environmental projects.
- The Trust will support infrastructure through programmes and projects that will provide employment opportunities and attract people and enterprises to the District.

⁶ Provided by the Trust in its email of 24 February 2013.

⁷ The Clutha Agricultural Development Board is a registered charitable entity (registration number CC24080).

⁸ Refer to "District Development – Future Directions" at page 6.

⁹ Refer Page 4 of the Trust's minutes for its meeting of 28 September 2012.

- The Trust will provide education opportunities to young people and support a young enterprise scheme in schools.
 - The Trust will work on district and regional initiatives including providing communities with access to government services and digital literacy.
13. The Trust also provided its draft Action Development Plan for 2013-2014. This provides more detailed information about the key areas the Trust aims to cover, its activities and how it will measure success. This plan provides:
- **Primary Production Support and Development:** The Trust aims to develop relationships with businesses in the primary sector, support the primary production sector, support industry collaboration, develop a partnership with Telford (a division of Lincoln University), identify short courses and work experience opportunities, monitor and assess developments and issues that affect the sector and provide advocacy on issues affecting the primary sector.
 - **Business support and development:** The Trust intends to work with enterprises to identify and promote opportunities, products and resources that will add value and lead to economic growth and employment opportunities. This will include having a skilled workforce, business training, best practice models to encourage growth, providing advocacy for the sector, business mentoring, providing a “tool-box” of resources for businesses and enterprises and supporting new business development. Activities under this aim include assisting local business to expand to create new jobs, assisting with maintaining operations, retaining existing jobs and supporting and advocating for new business start-up. They will measure their success using a number of measures including the number of businesses assisted, the establishment of a communications plan for business contacts, number of jobs created and number of start-ups assisted. The Trust also intends to develop the business opportunities offered by bike and walking trail projects by having a co-ordinated approach to marketing.
 - **Destination Marketing:** It aims to provide visitors with reasons to visit the region through a range of marketing initiatives. They also aim to support the development of tourism activities.
 - **Workforce development:** The Trust intends to support a skilled workforce and create successful employment opportunities including youth retention/employment opportunities, identifying workplace demands, entrepreneurship and business partnerships, career services for example interview skills workshops and careers expo.

- **Regional Strategies and Initiatives:** The Trust aims to work on strategies with key stakeholders relating to the district's infrastructure for example developing a broadband network and business/community partnerships etc.

14. The Trust also provided submissions responding to Charities Services notice. These submissions included:

- A submission that a strong economy provides for the District's economic wellbeing and also supports the cultural, social and environmental wellbeing of the Clutha District.
- A submission that the Clutha District is considered rurally disadvantaged. The Clutha District has an aging population and that the District faces challenges in workforce development and sustainability.¹⁰ The Trust submitted that statistics from the 2006 Census show that the Clutha District is behind national averages.¹¹
- A submission that the Trust's work in promoting economic development by supporting businesses and employment opportunities will help alleviate poverty in the District and will have a flow-on effect to every aspect of life.
- A submission that the Trust provides benefits to the community by promoting community and economic development that will alleviate poverty and by up-skilling residents.
- A submission that the goal of the Trust is not to enrich particular individuals or organisations within the Clutha District but instead to bring up the community as a whole. This is achieved by encouraging others to provide local people with better and meaningful jobs.
- A submission that similar entities are currently registered under the Act.

B. Legal Framework for Registration Decision

15. Section 13 of the Act sets out the essential requirements for registration. Under section 13(1)(a) of the Act, a trust qualifies for registration if it is a trust of a kind in relation to which an amount of income is derived by the trustees in trust for

¹⁰ In its letter of 27 May 2013, the Trust refers to a Business Confidence Survey conducted by Enterprise Clutha every six months. The Trust submits that this survey has shown that businesses are facing an increasing challenge to find and retain staff, particularly those who have a need for specialised skilled labour.

¹¹ Refer to pages 2 and 3 of the Trust's letter dated 27 May 2013 where the Trust provides statistics on formal qualifications, annual income, cellphone access, school decile ratings, Ministry of Education funding for early childhood centres and the Clutha District's Deprivation average rating (this rating is discussed in more detail in paragraph 54 below).

charitable purposes. This criterion is not met unless the income is derived for exclusively charitable purposes.¹²

16. Section 5(1) of the Act defines charitable purpose as including every charitable purpose “whether it relates to the relief of poverty, the advancement of education or religion, or any other matter beneficial to the community”. This statutory definition adopts the well-established fourfold classification of charitable purpose at general law.¹³ The general law on the content of the fourth head of charity is of particular relevance to this application for registration, and is discussed in more detail below.
17. To be charitable a purpose must: (i) provide a benefit recognised in law; (ii) to the public.¹⁴ As to the first part, a purpose to relieve poverty, advance education or advance religion is assumed to provide a benefit recognised in law unless the contrary is shown.¹⁵ No such assumption applies for purposes falling under the fourth head of charity (any other matter beneficial to the community). For purposes in this category it is necessary to establish positively that the purpose provides a benefit of the kind recognised in this area of law.¹⁶ The assessment of whether a purpose provides a benefit focuses on the clearly identifiable consequences of the undertaking – benefits that are nebulous and remote, or simply ‘hoped for’ are excluded.¹⁷

¹² See *McGovern* at 340. In New Zealand, see *Canterbury Orchestra Trust v Smitham* [1978] 1 NZLR 787 at 794-796; *Molloy* at 691. See also the assumption evident in the provision at section 5(3) and (4) of the Act, that a trust will not be disqualified from registration because it has *ancillary* non-charitable purpose.

¹³ This statutory definition adopts the general law classification of charitable purposes in *Commissioner for Special Purposes of Income Tax v Pemsel* [1891] AC 531 extracted from the preamble to the *Statute of Charitable Uses 1601* (43 Elizabeth 1 c 4) and previous common law: *Greenpeace, CA* at [42]; *Re Education New Zealand Trust* (2010) 24 NZTC 24,354 (“*Education New Zealand Trust*”) at [13]; *Draco* at [11].

¹⁴ Authorities include: *Oppenheimer v Tobacco Securities Trust Co Ltd* [1951] AC 297; *Verge v Somerville* [1924] AC 496; *Dingle v Turner* [1972] AC 601. See also: *New Zealand Society of Accountants v Commissioner of Inland Revenue* [1986] 1 NZLR 147 (“*Accountants*”) at 152-155; *Latimer v Commissioner of Inland Revenue* [2002] 3 NZLR 195 (“*Latimer, CA*”) at [32]; *Travis Trust v Charities Commission* (2009) 24 NZTC 23,273 (HC) (“*Travis Trust*”) at [54], [55]; *Queenstown Lakes Community Housing Trust* HC WN CIV 2010-485-1818, 24 June 2011 (“*QLCHT*”) at [30]; *Education New Zealand Trust* at [23].

¹⁵ See for example: *Molloy* at 695 (Somers J). See also *Re New Zealand Computer Society Inc.* HC WN CIV-2010285-924 [28 February 2011] (“*Computer Society*”) at [14]: “This does not mean, however, that existence of public benefit is a foregone conclusion. Rather, ‘the question whether a gift is or may be operative for the public benefit is a question to be answered by the Court forming an opinion upon the evidence before it’.”

¹⁶ See for example: *D V Bryant Trust Board v Hamilton City Council* [1997] 3 NZLR 342 at 350 (Hammond J); *CDC* at [45].

¹⁷ See discussion in *Latimer, CA* at [32] - [37]. The courts have held that the downstream benefits of an entity’s activities do not serve to characterise the purpose of the entity: see *Accountants* at 153 (the “generalised concept of benefit” identified with the public satisfaction of knowing that the fund is there to safeguard and protect clients’ interests is too “nebulous and remote” to characterise the purpose of the fund); *Travis Trust* at [30] – [35] (holding that where the express purpose was to “support the New Zealand racing industry by the anonymous sponsor a group race known as the Travis Stakes”, the

18. As to the second part, the direct benefit of the entity's purposes must flow to the public or a sufficient sector of the public. Any private benefits arising from an entity's activities must only be a means of achieving an ultimate public benefit and therefore be ancillary or incidental to it.¹⁸
19. Section 5(3) of the Act provides that the inclusion of a non-charitable purpose will not preclude registration if it is merely ancillary to a charitable purpose. Pursuant to section 5(4) of the Act, a non-charitable purpose is ancillary if the non-charitable purpose is:
 - (a) ancillary, secondary, subordinate, or incidental to a charitable purpose of the trust, society or institution; and
 - (b) not an independent purpose of the trust, society or institution.
20. It is clear that determining whether a non-charitable purpose is ancillary includes a qualitative assessment of whether it is a means to advance the charitable purpose.¹⁹ It also involves a quantitative assessment, focusing on the relative significance of the purpose as a proportion of the entity's overall endeavour.²⁰

Relevance of entity's activities in registration decision-making

21. Sections 18(3)(a)(i) and (ii) of the Act mandate that activities be taken into consideration when determining whether an entity qualifies for registration under the Act.²¹ The courts have confirmed that consideration of activities is a mandatory aspect of decision-making under the Act.²²
22. Activities are not to be elevated to purposes, but reference to activities may assist, for example, to make a finding about:

purpose was to support that single group race and not to support the racing industry or racing public as a whole). See to the same effect *QLCHT* at [68] – [76] (held that the purpose of the Trust was to provide housing for individuals not to advance the overall welfare of the community by enabling workers to stay in the area); *CDC* at [67] (primary purpose is the assistance of individual businesses and the 'hope and belief' that the success of those businesses would increase the economic wellbeing of the Canterbury region does not establish public benefit as a primary purpose); *Re The Grand Lodge of Antient Free and Accepted Masons in New Zealand* [2011] 1 NZLR 277 (HC) ("*Grand Lodge*") at [59] – [60] (the purpose is to improve the character of members of a closed group, the public benefit in this is 'too remote').

¹⁸ See for example *Institution of Professional Engineers New Zealand Inc v Commissioner of Inland Revenue* [1992] 1 NZLR 570 ("*Professional Engineers*") at 578; *Computer Society* at [42]; *Education New Zealand Trust* at [23]; *QLCHT* at [68] – [76]; *CDC* at [67]. Compare: *Commissioners of Inland Revenue v Oldham Training and Enterprise Council* (1996) STC 1218 ("*Oldham*"); *Travel Just v Canada (Revenue Agency)* 2006 FCA 343, [2007] 1 CTC 294.

¹⁹ For recent judicial comment on the qualitative test see *Greenpeace, CA* at [62], [83] – [91].

²⁰ The quantitative requirement was applied by the High Court in *Re Greenpeace of New Zealand Incorporated* HC WN CIV 2010-485-829 [6 May 2011] ("*Greenpeace, HC*") at [68]; *Computer Society* at [16]; *Education New Zealand Trust* at [43]-[44]; *Grand Lodge* at [49]-[51]. The Board notes the Court of Appeal's observation in *Greenpeace, CA* at [92], including footnote 95.

²¹ See also section 50(2)(a) of the Act.

²² *Greenpeace, CA* at [48] and [51]. See also the approach taken in the High Court in *CDC* at [29], [32], [44], [45] - [57], [67], [84] - [92]; *QLCHT* at [57] - [67]; *Grand Lodge* at [59], [71]; *Computer Society* at [35] – [39], [60] and [68]; *Greenpeace HC* at [75].

- the meaning of stated purposes that are capable of more than one interpretation;²³
- whether the entity is acting for an unstated non-charitable purpose;²⁴
- whether the entity's purposes are providing benefit to the public;²⁵ and
- whether a non-charitable purpose is within the savings provision at section 5(3) of the Act.²⁶

Characterisation of an entity's purposes

23. Once an entity's purposes are established as a matter of fact, the question whether they are charitable is a question of law.²⁷ The Board is bound to apply the law as declared by the courts and legislature, and adopted by the Act.
24. Determining whether an entity's purposes are charitable involves an objective characterisation, and a declaration in an entity's rules document that the entity's purposes are charitable in law will not be determinative.²⁸ Similarly, the subjective intentions of the individuals involved in a charity do not establish its charitable status.²⁹

²³ See *Professional Engineers* at 575 (Tipping J).

²⁴ *Inland Revenue Commissioners v City of Glasgow Police Athletic Association* [1953] AC 380 ("*Glasgow Police Athletic Association*"); compare *Commissioner of Taxation of the Commonwealth of Australia v Word Investments Limited* [2005] HCA 55 at [25] (Gummow, Hayne, Heydon and Crennan JJ).

²⁵ See for example *Glasgow Police Athletic Association*; CDC at [29], [32], [44], [45] - [57], [67], [84] - [92]; *QLCHT* at [57] - [67]; *Grand Lodge* at [59], [71]; *Computer Society* at [35] - [39], [60] and [68].

²⁶ See for example *Greenpeace, CA* at [40], [48], [87] - [92], [99] and [102], [103]. Earlier authorities to same effect include *Molloy* at 693 and the authorities cited there.

²⁷ *Molloy* at 693.

²⁸ *M K Hunt Foundation Ltd v Commissioner of Inland Revenue* [1961] NZLR 405 at 407; CDC at [56].

²⁹ *Dal Pont* at [13.18], and see also the discussion at [2.8] - [2.11]. See for example *Latimer v Commissioner of Inland Revenue* [2004] 3 NZLR 157 at 168 (PC) ("whether the purposes of the trust are charitable does not depend on the subjective intentions or motives of the settlor, but on the legal effect of the language he has used. The question is not, what was the settlor's purpose in establishing the trust? But, what are the purposes for which trust money may be applied?"); *Molloy* at 693; *Keren Kayemeth Le Jisroel Ltd v Inland Revenue Commissioners* [1932] AC 650 at 657 (Lord Tomlin), 661 (Lord Macmillan); *Oldham* at 251 (Lightman J).

C. The Charities Registration Board's Analysis

25. Viewed holistically, clauses 4(i) to (ix) of the Trust Deed establish an economic development purpose. The Board considers that the Trust's primary purpose is to promote economic development to an area which is not disadvantaged. This purpose is outside the scope of charity. Further, the Trust's activities to promote this purpose confer private benefits to individuals and businesses which are not shown to be the means by which economic development of the Clutha District is achieved.

C.1. Identification of the Trust's purposes

Trust's main purpose is economic development

26. The Board considers that the Trust's primary purpose is an economic development purpose which is outside the scope of charity.
27. The Trust's stated purposes include purposes to:
- '...promote the economic, social and physical wellbeing of the residents of the Clutha District through the support of business and employment opportunities in all enterprises.'³⁰
 - '...plan, manage and promote activities and programmes that enhance the wellbeing of the people and enterprises of the Clutha District.'³¹
 - '...provide a leadership role...in supporting enterprises and the community.'³²
 - '...encourage new businesses or enterprises to establish in the Clutha District to broaden the district's economic and employment base.'³³
 - "...to be the peak body for enterprises and the community.'³⁴
28. The definition of enterprise in clause 2.9³⁵ means that the Trust is able to support primary and service industries, manufacturing, retail, tourism, hospitality and not-for-profit organisations. The Trust has advised that its services will be available to all businesses and enterprises in the region.
29. The Trust's current and proposed activities are to deliver a number of specific services in the Clutha District with the overall vision "to grow and sustain a strong

³⁰ Clause 4(i).

³¹ Clause 4(ii).

³² Clause 4(v).

³³ Clause 4(ix).

³⁴ Clause 4(vi).

³⁵ Refer to paragraph 8 above.

economy for the Clutha District”³⁶ including destination marketing, working with enterprises and offering assistance to businesses (business planning, market research, one on one advice to start ups etc).³⁷

30. The Trust has acknowledged that its purposes include promoting economic development for the Clutha District.³⁸
31. In light of the above, the Board considers that the Trust has a primary purpose to promote economic development for the Clutha District.

Other incidental purposes

32. The Board acknowledges that, viewed severally, clause 4 arguably establishes some purposes that are distinct from the Trust’s economic development purposes. For example, the Trust’s purposes could be seen as including purposes to promote agriculture,³⁹ provide education,⁴⁰ and provide a community meeting place⁴¹ which may be charitable. However, these are not the focus of the Trust.

C.2. Characterisation of Trust’s Economic Development Purpose

33. The Trust has submitted that its economic development purpose is charitable under relief of poverty and the fourth head of charity. The Board considers that the Trust’s economic development purposes are very similar to the economic development purposes in *CDC* and the decision of the High Court in that case is determinative both in relation to the relief of poverty and the fourth head of charity.

Relief of Poverty

34. The Trust has submitted that by promoting economic development by supporting businesses and employment opportunities it is helping to alleviate poverty in the

³⁶ Clutha Development Trust – Action Development Plan 2013-2014 provided in email of 5 March 2013 from Linda Moore.

³⁷ Refer to paragraphs 12 and 13 above. The Board also notes that the Trust in a media releases Dated 2 October 2012 available online at www.cluthacountry.co.nz/news/43/CLUTHA-DEVELOPMENT-TRUST-INA has stated that the Trust “will work closely with the Clutha District Council to drive economic development in the Clutha District across a wide range of activities”. The Trust wishes to “drive further development and innovation in existing business channels and to explore new business opportunities” and strengthen opportunities in the Clutha District including agribusiness and tourism.

³⁸ Refer to Trust’s letter dated 27 May 2013 at page 1.

³⁹ Refer for example to definition of “business” in clause 2.5 and “Primary Production” in clause 2.8; the Trust’s aim in clause 4(ix) to encourage businesses; and the Trust’s activities relating to education of the primary sector and awareness on water and land use issues for that sector.

⁴⁰ Refer for example to the Trust’s activities aimed at providing education to youth (the Clutha Careers Expo for school students and education on CV content and interview skills).

⁴¹ In its letter of 27 May 2013, the Trust advised it aimed to provide the community with a facility for public use.

Clutha District. The Board has therefore considered whether the Trust's purposes and activities relating to employment can be seen as relieving poverty.

35. The Trust's purposes and activities relating to employment are very similar to the purposes and activities in *CDC*.⁴² Both the Trust and *CDC* intend to assist new businesses⁴³ and assist individual businesses in the hope they grow. Support given to businesses includes marketing and management support services in the hope that the community will be advantaged by improving economic activity.⁴⁴
36. In *CDC*⁴⁵ the corporation had argued that it created jobs in two ways: (i) where there is a chain of employment, the creation of a new job results in movement of employed persons thus leaving employment for the unemployed; and (ii) the creation of skilled jobs creates the need for service jobs thus providing jobs for the unemployed. Young J confirmed that to be charitable there must be a direct focus on the unemployed.⁴⁶ He accepted that the unemployed could be one of the ultimate beneficiaries of *CDC* but determined that "the possibility of helping someone who is unemployed is too remote for it to qualify as the charitable purpose of relief of poverty".⁴⁷ Young J rejected the claim that relief of poverty was a charitable purpose of *CDC* and determined that, in that case, the creation of jobs through economic development was best considered under the fourth head of charity.⁴⁸
37. In determining that *CDC* did not relieve poverty, the Court considered both the terms of the constitution and the activities. In that case the Court noted that only

⁴² Refer to paragraph 7 above for the Trust's stated purposes; refer to *CDC* at [14] for *CDC*'s stated purposes; also refer to part C.3. of this decision for discussion of the similarities.

⁴³ Refer to footnote 42 above and *CDC* at [44]

⁴⁴ Refer to footnote 42 above and *CDC* at [53]

⁴⁵ *CDC* at [27]. The Board also notes that the *CDC* decision is consistent with previous decisions. The Courts have held that relieving unemployment can be charitable under the relief of poverty (see for example *Re Central Employment Bureau for Women and Students' Careers Association Incorporated* [1942] 1 All ER 232. *Oldham, CDC* [26]) but any assistance must be directed to a charitable need. (see for example *Joseph Rowntree Memorial Trust Housing Association v Attorney-Genera* [1983] 1 All ER 288 and *Oldham*). In particular, Lightman J in *Oldham* applied similar reasoning to Young J in *CDC* when he wrote at [249] "So far as the object of *Oldham TEC* is to set up in trade or business the unemployed and enable them to stand on their own feet, that is charitable as a trust for the improvement of the conditions of life of those "going short" in respect of employment and providing a fresh start in life for those in need of it, and accordingly for the relief of poverty."

⁴⁶ *CDC* at [26]. See also Young J's comments at [91] where he states: "The capital grant or equipment or payment to a new business, where the business is started by someone who is unemployed, and not by someone who has quit employment to start their own businesses, can be charitable. Secondly, where the payment is to an existing commercial business it must be to take on additional staff from unemployed persons before it can be considered charitable. This illustrates the type of direct focus on the unemployed which might be required to relieve poverty and thereby ensure the organisation is charitable. Also with the promotion of economic development, the focus must be directly on the promotion of public development as the primary object."

⁴⁷ *CDC* at [30].

⁴⁸ *CDC* at [31].

one of CDC's purposes dealt with unemployment⁴⁹ and stated that none of CDC's activities focused directly on the creation of employment for the unemployed.⁵⁰

38. The Board is bound by the Court's decision in *CDC*. The Board notes that only clause 4(i) of the Trust's purposes refers to employment and that none of the Trust's purposes deal with unemployment or poverty. The Trust's purposes instead are focused on economic development in the general sense. Further, as above in paragraph 35 its activities are very similar to those of *CDC*. The Board also notes that while the Trust's draft Action Development Plan mentions an aim to create new jobs, this aim is not focused on creating new jobs for people who are currently unemployed. Instead, the Trust has advised that its services and programmes will be available to all individuals, businesses, communities and enterprises in the Clutha District. The Board therefore considers that like *CDC*, the Trust's activities are not focused directly on the creation of employment for the unemployed. For these reasons, we do not consider that the Trust's purposes are charitable under relief of poverty.
39. In light of the similarities between the Trust and *CDC*, the Board considers it appropriate to assess the Trust's employment purposes and activities under the fourth head of charity.

Economic development purposes and the fourth head of charity

40. Courts have recognised that economic development of a community can be a charitable purpose under "other matters beneficial to the community". In New Zealand, High Court authorities including *Re Tennant*⁵¹ *CDC* and *Queenstown Lakes Community Housing Trust (QLCHT)*⁵² establish that this charitable purpose is restricted to situations where the area/region is in particular need.⁵³ Factors to be taken into account when judging whether an area is disadvantaged include the relative deprivation of the area.⁵⁴ Further, benefits to individual businesses must be ancillary to public benefit.
41. In *Re Tennant*, the High Court of New Zealand decided that a bequest made in the 1920s to provide a church, school, public hall and creamery in Gordonton was a charitable bequest. When considering whether the creamery was

⁴⁹ Clauses 2.2(a) of *CDC*'s rules stated that in furtherance of the Company's primary purposes the Company could pursue a purpose to "The expansion of employment by the creation of employment for the unemployed, the retention of employment for those persons whose employment may be in jeopardy and the creation and expansion of jobs for all persons". In *CDC* at [29] the Court found that the first part of this clause was the only purpose dealing with unemployment. The Board notes that clause 4.1(a) of *CDC*'s rules had a stated purpose to relieve poverty.

⁵⁰ *CDC* at [29].

⁵¹ *Re Tennant* [1996] 2 NZLR 633 ("*Re Tennant*").

⁵² *QLCHT*.

⁵³ *Re Tennant* and *CDC*.

⁵⁴ See *Re Tennant* and *Tasmanian Electronic Commerce Centre Pty Ltd v Commissioner of Taxation* [2005] FCA 439 ("*TECC*").

charitable the Court took into account the overall purposes and stated the settlor “was attempting to achieve for a small new rural community what would then have been central to the life of that community... he was endeavouring to confer an economic and social benefit on that particular community for the public weal.”⁵⁵ Hammond J did note that he was not prepared to say that there would not be cases which would fall on the other side of the line because of private profit making of some kind.⁵⁶

42. In *CDC*, the Corporation argued that the application of *Re Tennant* and an Australian case approving a charitable economic development purpose, *Tasmanian Electronic Commerce Centre v Commissioner of Taxation (TECC)*⁵⁷ should not be restricted to impoverished or underdeveloped communities. However, Young J determined that the Corporation’s contention must fail because “no such claim of deprivation is made with respect to Canterbury or Christchurch”.⁵⁸
43. In *CDC* the High Court considered and approved *Re Tennant* and *TECC* and held that a company established to develop the economy of Canterbury was not charitable. Ronald Young J stated that “[w]hat must be kept in mind is that the charitable purpose of benefit to the community is a community benefit to assuage need... In [*Re Tennant*] there was a small deprived rural community... in [*TECC*] a state of Australia was (relatively) economically disadvantaged”.⁵⁹
44. Young J also approved the approach in the English case of *Commissioners of Inland Revenue v Oldham Training and Enterprise Council*⁶⁰ and stated:

Any public benefit therefore from CDC’s purpose and operations is in my view too remote to establish CDC as a charity. Public benefit is not the primary purpose of CDC’s objects or operation. Its primary purpose is the assistance of individual businesses [...] the public benefit is hoped for but ancillary. In the same way the general economic lift for the Canterbury region from CDC’s

⁵⁵ *Re Tennant* at 640.

⁵⁶ *Re Tennant* at 640.

⁵⁷ In *TECC* the court considered Tasmania’s relative economic disadvantage, its small population and long distances from markets and raw materials when judging that a purpose to develop the island’s economy in general is a charitable purpose. The Appeal Court limited the expansion of economic development as charitable under the fourth head as being beneficial to the community to areas which “are economically disadvantaged, or put more bluntly, poor, compared with the rest of the nation” [59].

⁵⁸ *CDC* at [43].

⁵⁹ *CDC* at [42]-[43].

⁶⁰ In *Oldham* at 251 the Court considered that Oldham TEC’s purpose to promote trade, commerce and enterprise and support services for new businesses would enable Oldham TEC to promote the interests of individuals and provide benefits to them. The Court considered that this disqualified Oldham TEC from qualifying for charitable status regardless of the motives of beneficial consequences to employment. The Court held that any benefits to the community conferred by such activities were too remote. Oldham TEC’s activities provided for a cash allowance to those thinking of starting up a business. This was specially aimed at people who had been unemployed for at least six weeks and were starting a business which would have the potential to employ other people. Further, the training was specifically targeted at assisting young people into work and lowering the level of unemployment. Even so, the Court found that Oldham TEC did not qualify for charitable status.

work is the hoped for result of helping individual businesses. It is remote from the purpose and operation of CDC. Public benefit is not at the core of CDC's operation.⁶¹

45. In *QLHCT*, MacKenzie J approved the approach to analysis of economic development purposes in *CDC*.⁶²
46. The Board also notes that in the case of *Travel Just v Canada (Canada Revenue Agency)*,⁶³ the Canadian Federal Court of Appeal considered that the entity would not meet the requirement of the public benefit test because it would benefit individuals as the Trust was able to promote commercial activity with a strong flavour of private benefit.⁶⁴
47. The Board considers that, based on the New Zealand cases, general economic development purposes for a community will only be charitable if: (i) the economic development is focused on an area that is disadvantaged; and (ii) any benefits to individual businesses are incidental to the economic development benefit to the public.

Economic development as a public benefit without charitable need

48. The Board is aware of commentary that the High Court approach in *CDC* is too narrow and that the courts should recognise that economic development is a public benefit irrespective of whether an area is in "need".⁶⁵ The Board also notes that the Australian courts have arguably recognised the wider principles.⁶⁶
49. However, a wider approach is not open to the Board given the clear authority of *CDC*, approved in *QLCHT* and consistent with *Re Tennant*. Further, even if a public benefit in economic development was recognised by New Zealand courts, it would still be necessary to show that private benefits are incidental. *CDC* shows that this requires proof that activities are focused on by economic outcomes for the public benefit not simply done in the hope that economic uplift will follow.⁶⁷ The Board considers that the Trust has not established that its

⁶¹ *CDC* at [67].

⁶² *CDC* at [56]

⁶³ *Travel Just v Canada (Canada Revenue Agency)* 2006 FCA 343 [2007] 1 CTC 294 ("*Travel Just*").

⁶⁴ *Travel Just*, at [9].

⁶⁵ See for example Mark von Dadelszen "Economic development charitable?" *NZLawyer online* (9 May 2013).

⁶⁶ Refer footnote 57 above regarding *TECC*. Also, in *Commissioner of Taxation v The Triton Foundation* [2005] FCA 1319 ("*Triton*"), a company formed to promote a culture of entrepreneurship for the ultimate benefit of Australian society by providing services free of charge to investors was held to be charitable. The Board notes that *Triton* case represents the farthest any court has gone in accepting economic development as a charitable purpose (Refer to Juliet Chevalier-Watts "Economic Development and Charitable Status" [2010] NZLJ 266 at 270).

⁶⁷ Refer paragraph 44 above. The Board also acknowledges that economic development purposes governments sometimes heavily invest in such development programmes and projects. However, the Board notes that government funding for economic development is not enough to establish that an entity is providing a recognised public benefit for the fourth head analysis. In *TECC* at [63] citing *Attorney-*

activities are focused on economic outcomes for the public benefit (discussed further below in paragraphs 55 to 61).

Summary of legal position in relation to economic development

50. For every economic development purpose, the public benefit must be established as matter of law. The Board considers that general economic development purposes for a community will only be charitable if: (i) the economic development is focused on an area that is disadvantaged; and (ii) any benefits to individual businesses are incidental to the economic development benefit to the public.

C.3. Assessment of Whether the Trust's Economic Development Purpose is Charitable at Law

51. The Trust has acknowledged that it has an economic development purpose. The Trust has submitted that a strong economy provides for economic wellbeing, and also supports the social, cultural and environmental wellbeing of the district. The Trust has submitted that the Clutha District is rurally disadvantaged. The Trust has further submitted that the Trust's activities do not confer a private benefit that is more than ancillary.
52. The Board considers that the Trust's economic development purpose is not charitable at law because: (i) the Clutha District is not disadvantaged and so the economic development does not confer a public benefit that falls within the scope of charity in New Zealand law; and in any event, (ii) the purpose confers private benefits that are not the means by which a public benefit is achieved.⁶⁸

Clutha District is not disadvantaged

53. As above, an area must be disadvantaged for general economic development to be charitable at law. The Board notes MacKenzie J's comments in *QLCHT* that: (i) there is no "bright line" definition of poverty; (ii) there is no single fixed criteria of what constitutes poverty; (iii) median income may be a useful aid but is not itself a test; and (iv) the question is a fact specific one where decision makers are to be guided by the general propositions which the case law establishes.⁶⁹ Although these comments relate to relief of poverty rather than the fourth head of charity, the Board considers that they are also relevant when assessing whether an area is economically disadvantaged. There is no "bright line" test.

General v McCarthy (1886) 12 VLR 535. Keerey J took the view that public funding was not sufficient to decide that essentially for that reason an entity was an institution of public utility, but he acknowledged that it was certainly relevant as it was in that particular case. Similar considerations were invoked in *Triton* at [31]. Also see *CDC* where Young J notes at [10] that the corporation receives yearly grants from the Christchurch City Council and other government funds for its work but then does not seem to consider this to be a relevant factor when assessing the public and private benefits.

⁶⁸ Refer to paragraph 18 above.

⁶⁹ *QLCHT* at [40]

54. The Board acknowledges that areas within the Clutha District may have varying levels of deprivation. However, we consider that as a whole, the Clutha District is not disadvantaged in a way recognised in law. The Board notes that in the 2006 Census, the Clutha District has areas behind national averages for some variables.⁷⁰ However, in other results Clutha is ahead of national averages.⁷¹ Overall, the Board does not consider that the Clutha District is economically disadvantaged compared to the rest of the nation. The Board notes that the Clutha District has an Index of Deprivation average rating of 4.46.⁷² Where 1 is least deprived and 10 most deprived. By way of comparison the Board notes that based on the same 2006 Census information, the Canterbury region has a deprivation level of 4.8 (indicating that Canterbury was more deprived than the Clutha District). Although deprivation scores were not mentioned in the CDC case, the Board considers this a useful comparison as the rating is indicative of the deprivation at the time the CDC decision was made and the Court determined that CDC's economic development of the Canterbury region was not a charitable purpose.

Trust's economic development purpose provides private benefits rather than a public benefit recognised in law

55. While the courts recognise a public benefit for economic development in a disadvantaged area, no such recognition exists for areas which are not disadvantaged. The Board has therefore considered whether other factors permit a conclusion that the Trust provides a public benefit recognised in law.

⁷⁰ Refer to page 3 of the Trust's letter dated 27 May 2013.

⁷¹ 2006 Census results – available online at www.stats.govt.nz. The unemployment rate is 2.3% for the Clutha District, compared with 5.1% for all of New Zealand. In the Clutha District 56% of households in private occupied dwellings own the dwelling, compared to 54.5% for New Zealand as a whole. The Board notes that the median income for the Clutha District is \$23,300, only slightly below the median income for all of New Zealand (\$24,400). The Board also notes that the Trust in a media release has stated that the "Clutha District has weathered the global economic recession relatively well" (available online at www.cluthacountry.co.nz/news/43/CLUTHA-DEVELOPMENT-TRUST-INA). Further, the average decline rating for schools in the district is 6 (Refer to the Trust's letter of 27 May 2013. The Ministry of Education provides that "Decile 1 schools are the 10% of schools with the highest proportion of students from low socio-economic communities, whereas decile 10 schools are the 10% of schools with the lowest proportion of these students." Each decile rating contains an equal number of schools. (<http://www.minedu.govt.nz/NZEducation/EducationPolicies/Schools/SchoolOperations/Resourcing/ResourcingHandbook/Chapter1/DecileRatings.aspx>). Therefore, an average decile rating of 6 means that on average the schools the Clutha District are in the top half of decile ratings for New Zealand.

⁷² Refer to the Trust's letter of 27 May 2013. The rating is based on the 2006 Census information and is available online at on the Ministry of Health website <http://www.health.govt.nz/publication/nzdep2006-index-deprivation> (please note that the deprivation index is not a Ministry of Health publication. It is prepared by the Department of Public Health, University of Otago, Wellington). A rating of 1 is least deprived, 10 is most deprived. The scale is an ordinal scale rather than interval scale and divides New Zealand into tenths. For example, a value of 10 indicates that an area is in the most deprived 10% of New Zealand's areas and a value of 1 indicates the area is in the least deprived 10% of areas in New Zealand. The index shows relative deprivation rather than absolute deprivation (ie no matter what the overall status of New Zealand's economy, there will always be 10% of the population in areas with a deprivation score of 10).

56. The Board notes the Trust's submissions that a strong economy will not only provide for the Clutha District's economic wellbeing but will also support the social, cultural and environmental wellbeing of the Clutha District.
57. As above in paragraph 17, the assessment of whether a purpose provides a benefit focuses on the clearly identifiable consequences of the undertaking – benefits that are nebulous and remote, or simply 'hoped for' are excluded. Further, the Board is bound by the authority in *CDC*. In *CDC* the Court held that any public benefit from *CDC*'s purpose and operations were too remote to establish *CDC* as a charity. The public benefit was hoped for but ancillary as it was not at the core of *CDC*'s operation.⁷³
58. The Trust has not provided evidence to show that its economic development purpose provides a public benefit other than stating that there will be flow on benefits of a strong economy. The Board also notes that the Trust has the support of the Council. However, this factor is not determinative in assessing public benefit and in *CDC* was not considered as a relevant factor.⁷⁴ Therefore, applying the authority of *CDC*,⁷⁵ the Board does not consider that a public benefit recognised in law has been established.
59. Further, the Board considers that, like in *CDC*, the core of the Trust's operation provides private benefits to businesses. Many of the Trust's activities to promote economic development focus on providing direct support to businesses and enterprises.⁷⁶ The Trust measures its success based on the number of jobs created and businesses assisted.⁷⁷ These benefits are to individuals rather than the general public.
60. The Board has considered the Trust's submission that the Trust's goal is not to provide private benefit but instead to focus on the general economic wellbeing of the region. The Board notes that similar submissions were made by *CDC* to the High Court. In that case the intent was not determinative. Further, subjective intentions are not sufficient to establish charitable status.⁷⁸
61. To summarise, the Board does not consider that the Trust's economic development purposes confer a public benefit recognised in law. Further, the Trust confers private benefits which are not shown to be the means by which economic development of the Clutha District is achieved.

⁷³ Refer paragraph 44 above.

⁷⁴ Refer to footnote 67 above.

⁷⁵ Approved of in *QLCHT*.

⁷⁶ For example, as above in paragraphs 12 and 13, the Trust provides mentoring and support to businesses and enterprises and employs a Destination Marketing Manager and two business development advisors.

⁷⁷ Refer to Trust's draft Action Development Plan.

⁷⁸ Refer to paragraph 24 above.

Summary of assessment of Trust's purposes

62. The Board considers that the Trust's economic development purpose is not charitable at law because: (i) the Clutha District is not disadvantaged and so the economic development does not confer a public benefit that falls within the scope of charity in New Zealand law; and (ii) in any event, the purpose confers private benefits that are not the means by which a public benefit is achieved.

D. Section 5(3)

63. The Board considers that the Trust's non-charitable purpose does not come within the savings provision at section 5(3) of the Act. The Trust's purpose to promote economic development is the predominant and pervasive purpose of the Trust and cannot be regarded as ancillary within the meaning of sections 5(3) and (4) of the Act.

E. Determination

64. The Board has determined that the Trust is not qualified to be registered as a charitable entity under the Act. While some of the Trust's purposes may be charitable, the Board considers that the Trust's primary purpose is to promote economic development in an area which is not disadvantaged. On authority of the High Court in *CDC*, the Trust's purpose is outside the scope of charity. The Trust's activities to promote this purpose confer private benefits to individuals and businesses and these benefits are not the means by which the Trust provides a public benefit recognised in law.

For the above reasons, the Board declines the Trust's application for registration as a charitable entity.

Signed for and on behalf of the Board

.....
Roger Holmes Miller

24th OCTOBER 2013
.....
Date