

## Deregistration decision: Hawera Cinema 2 Trust (CC31074)

### Executive Summary

1. The Charities Registration Board (the Board) has determined that the Hawera Cinema 2 Trust (the Trust) no longer qualifies for registration as a charitable entity and that it is in the public interest that it be removed from the Charities Register.<sup>1</sup>
2. The Board considers that the Trust no longer qualifies for registration as it does not have exclusively charitable purposes. The Board has considered the Trust's rules document in light of its activities, information in its annual returns and submissions. The Board considers that the Trust's current dominant purpose is to provide a movie cinema for entertainment. Entertainment purposes are outside the scope of charity. This purpose is the focus of the Trust and is not ancillary to any valid charitable purpose of the Trust.
3. The Board is satisfied that it is in the public interest that the Trust be removed from the Charities Register.<sup>2</sup> The purposes of the Charities Act 2005 (the Act) include purposes to promote public trust and confidence in the charitable sector, and the effective use of charitable resources.<sup>3</sup> The Board considers that it would not promote these purposes if an entity that no longer qualifies for registration were allowed to remain on the Charities Register.
4. The Trust has submitted that it is established to advance education, for the relief of poverty, and to be beneficial to the community by enhancing the district and sponsoring charitable organisations and other community organisations.
5. The Board's reasons appear below, organised under the following headings:
  - A. Background
  - B. Legal Framework for Deregistration
  - C. Charities Registration Board's analysis

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<sup>1</sup> That is, the register established under section 21 of the Charities Act 2005 and published at <http://www.charities.govt.nz>.

<sup>2</sup> Section 32(1)(a) of the Charities Act 2005 provides, 'The Board may direct that an entity be removed from the register if – (a) the entity is not, or is no longer, qualified for registration as a charitable entity.' Section 35(1) further provides that, if an objection to removal is received, the Board must not proceed with the removal unless satisfied that it is in the public interest to proceed with the removal.

<sup>3</sup> See section 3(a) and (b) of the Charities Act 2005.

- C.1. The Trust's Activity to Provide a Movie Cinema
- C.2. The Trust's Purpose to Provide Entertainment
- C.3. Educational Purposes and the Trust
- C.4. Relief of Poverty and the Trust
- C.5. Provision of Facilities and the Trust
- C.6. Community Wellbeing and the Trust
- D. Section 5(3) of the Act
- E. Public Interest
- F. Determination

## A. Background

6. The Trust was established by deed on 24 April 2007.

7. The Trust's stated purposes at clause 3 of the deed are:

**3.1 Exclusively Charitable Objects and Purposes:** *The Trustees stand possessed of the Trust Fund on trust to pay or apply so much of the capital income of the Trust Fund as the Trustees think fit for or towards any one or more of the following exclusively charitable objects and purposes, which are declared to be the objects and purposes of the Trust, namely:*

**3.1.1 First Object:** *To provide for the continuation of a cinema facility in Hawera so as to advance the promotion of the interest in the arts generally, cultural and education within the population of all of the citizens of South Taranaki.*

**3.1.2 Second Object:** *To promote, advance and provide for the citizens of South Taranaki a venue for cultural, social, educational, religious and community activities and for the purpose of insuring the on going liability of the cinema to provide a venue for Orchestral or vocal concerts, recitals, drama and repertory, Grand Opera and Light Opera, Ballet, Musical shows, pop concerts and jazz festivals and all other forms of entertainment of any kind whatsoever, Conferences, meetings and lectures of all kinds, Art Exhibitions, trade and industrial displays, scientific education and other displays.*

**3.1.3 Incidental Matters:** *all things incidental to the charitable objects and purposes described in clauses 3.1.1 and 3.1.2.*

**3.2 Objects and Purposes Independent:** *The Trustees are empowered to carry out any one or more of the objects or purposes of the Trust independently of any other object or purpose of the Trust.*

8. The Trust applied for registration under the Act in June 2008, and was registered effective 30 June 2008.
9. The Trust has filed annual returns, as required under the Act, for its financial years ending 31 March 2009, 2010, 2011 and 2012. The Trust also maintains a website and facebook page that document its activities.<sup>4</sup>
10. On 23 April 2013, after reviewing the purposes and activities of the Trust, Charities Services sent a notice of intention to remove the Trust from the Charities Register, on the ground that its primary purpose is the provision of entertainment which is outside the scope of charity.
11. On 25 June 2013, the Trust submitted a written objection to the notice of intention to remove, attaching letters from organisations that have held events at the cinema or been sponsored by the cinema. On 3 July 2013, the Trust submitted further information in support of its objection to the notice of intention to remove.
12. In its letter of 3 July 2013 the Trust outlined its purpose. The letter stated:

*The cinema is an important and much appreciated entertainment facility and social hub in the local community particularly for our young people. It's a place where the elderly can be entertained in a safe environment. It's an appropriate form of entertainment for Mums and Dads to bring their children therefore encouraging family outings. It is one of the few entertainment facilities that isn't alcohol focused where youth can meet up with their mates and enjoy a movie.*

*A significant portion of South Taranaki families are from the lower socioeconomic sector of society. They simply can't afford to travel outside the region to enjoy watching movies on the big screen. Families with low socioeconomic status often have inadequate or limited access to community resources that promote and support children's and families social development. Hawera Cinema 2 has a safe family friendly environment that has become an important gathering place for the community.*

*The Cinema also plays a very important role in the community by way of sponsorship and support for other community groups. We do this by offering our complex for either reward days or fundraisers for non profit organisations or community initiatives. The most recent was a fundraiser for Alzheimer's which was held on the 6th June. We also issue cinema vouchers to sports clubs, school galas and other community groups to use as rewards or prizes for fundraisers. In the 12/13 financial year over 200 movie vouchers were distributed to local community groups. This sponsorship benefits the wider community.*

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<http://www.haweracinema.co.nz/> [accessed 12/4/2013];  
<http://www.facebook.com/#!/HaweraCinema?fref=ts> [accessed 15/4/2013].

13. The letter also contained submissions on specific activities of the Trust which include: a gala screening for the local film “Tatarakihi: The Children of Parihaka”, the Met Opera Series, National Theatre Live, Watties Cans Film Festival, Christchurch Earthquake can appeal, Big Brother Big Sister programme, Idea Services Movie Madness, private screenings for the elderly and rest home residents, participation in a youth holiday programme and providing sponsorship for local sports groups.

## **B. Legal Framework for Deregistration**

14. Section 50 of the Act provides that the chief executive of Charities Services may examine and inquire into any registered charitable entity, including into its activities and proposed activities, and its nature, objects and purposes.

15. Section 32(1)(a) of the Act provides that the Board may direct that an entity be removed from the register if the entity is not, or is no longer, qualified for registration as a charitable entity, provided that the entity has been given notice under section 33. Under section 35(1)(a) of the Act, if an objection to the removal of an entity from the register is received, the Board may proceed with the removal if it is satisfied that it is in the public interest to proceed with the removal and at least one ground for removal has been satisfied.

16. The power under section 32(1)(a) is to be exercised on the grounds set out in sections 32 and 35, and for the purposes of the Act as set out in section 3.<sup>5</sup>

17. The essential requirements for registration as a charitable entity are set out in section 13 of the Act. Under section 13(1)(a) 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 charitable purposes. This criterion is not met unless the income is derived for exclusively charitable purposes.<sup>6</sup>

18. 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

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<sup>5</sup> *Greenpeace of New Zealand Incorporated* [2012] NZCA 533 (“*Greenpeace, CA*”) at [34], [37], [38].

<sup>6</sup> See *McGovern v Attorney-General* [1982] 1 Ch 321 (“*McGovern*”) at 340. In New Zealand, see *Canterbury Orchestra Trust v Smitham* [1978] 1 NZLR 787 (“*Smitham*”) at 794-796; *Molloy v Commissioner of Inland Revenue* [1981] 1 NZLR 688 (“*Molloy*”) at 691. See also the assumption evident in section 5(3) and (4) of the Act, that a trust will not be disqualified from registration because it has *ancillary* non-charitable purpose.

definition adopts the well-established fourfold classification of charitable purpose at general law.<sup>7</sup>

19. To be charitable at law a purpose must be for the public benefit.<sup>8</sup> Public benefit must be expressly shown where the claimed purpose is under the fourth head of charity “any other benefit to the community”.<sup>9</sup> Further, in every case, the benefit of the entity’s purposes must flow to the public or a sufficient sector of the public.<sup>10</sup> If a purpose is to benefit a private group, the consequential downstream benefits to the public will not suffice.<sup>11</sup>

20. 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*

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<sup>7</sup> This statutory definition adopts the general law classification of charitable purposes as stated in *Commissioner for Special Purposes of Income Tax v Pemsel* [1891] AC 531. See: *Greenpeace, CA* at [42]; *In Re Education New Zealand Trust* HC Wellington CIV-2009-485-2301, 29 June 2010 (“*Education New Zealand Trust*”) at [13]; *In re Draco Foundation (NZ) Charitable Trust* HC WN CIV 2010-485-1275 [3 February 2011] at [11].

<sup>8</sup> 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 (“*Queenstown Lakes*”) at [30]; *Education New Zealand Trust* at [23].

<sup>9</sup> *Canterbury Development Corporation v Charities Commission* HC WN CIV 2009-485-2133, 18 March 2010 (“*CDC*”) at [45].

<sup>10</sup> 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 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 *Queenstown Lakes* 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).

<sup>11</sup> See for example *Institution of Professional Engineers New Zealand Inc v Commissioner of Inland Revenue* [1992] 1 NZLR 570 (“*Professional Engineers*”) at 578; *Re New Zealand Computer Society Inc* HC WN CIV-2010-485-924 [28 February 2011] (“*Computer Society*”) at [42]; *Education New Zealand Trust* at [23]; *Queenstown Lakes* 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.

(b) not an independent purpose of the trust, society or institution.

21. 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.<sup>12</sup> It also involves a quantitative assessment, focusing on the relative significance of the purpose as a proportion of the entity's overall endeavour.<sup>13</sup>

**Relevance of an entity's activities in registration decision-making**

22. Section 18(3)(a)(i) and (ii) of the Act provide that the activities of an entity must be taken into consideration when determining whether that entity qualifies for registration under the Act.<sup>14</sup> The courts have confirmed that consideration of activities is a mandatory aspect of decision-making under the Act.<sup>15</sup> Section 13 of the Act focuses attention on the purposes for which an entity is *at present* established.<sup>16</sup> This focus is justified in the broader scheme of the Act<sup>17</sup> and the fiscal consequences of registration under the Act.<sup>18</sup>

23. Activities are not to be elevated to purposes,<sup>19</sup> but reference to activities may assist, for example, to make a finding about:

- the meaning of stated purposes that are capable of more than one interpretation,<sup>20</sup>
- whether the entity is acting for an unstated non-charitable purpose,<sup>21</sup>

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<sup>12</sup> For recent judicial comment on the qualitative test see *Greenpeace, CA* at [62], [83] – [91].

<sup>13</sup> 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] at [68]; *Computer Society* at [16]; *Education New Zealand Trust* at [43]-[44]; *Re The Grand Lodge of Antient Free and Accepted Masons in New Zealand* [2011] 1 NZLR 277 (HC) (“*Grand Lodge*”) at [49]-[51]. The Board notes the Court of Appeal’s observation in *Greenpeace, CA* at [92] including footnote 95.

<sup>14</sup> See also section 50(2)(a) of the Charities Act 2005.

<sup>15</sup> *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]; *Queenstown Lakes* at [57] - [67]; *Grand Lodge* at [59], [71]; *Computer Society* at [35] – [39], [60] and [68]; *Greenpeace HC* at [75].

<sup>16</sup> *Greenpeace CA* at [40]. See to the same effect *Institution of Mechanical Engineers v Cane* [1961] AC 696 (HL) at 723; *Guaranty Trust Company of Canada v Minister of National Revenue* [1967] SCR 133 at 144; *Commissioner of Taxation of the Commonwealth of Australia v Word Investments Limited* [2008] HCA 55 (“*Word Investments*”) at [25] – [26] (Gummow, Hayne, Heydon and Crennan JJ) and [173] – [174] (Kirby J, dissenting); *Cronulla Sutherland Leagues Club Ltd v Commissioner of Taxation* (1990) 23 FCR 82 at 89.

<sup>17</sup> Including the statutory functions set out in section 10 of the Act, “promote public trust and confidence in the charitable sector” and “encourage and promote the effective use of charitable resources”.

<sup>18</sup> Compare *Greenpeace, CA* at [34]. While the statutory criteria for eligibility for fiscal privileges are in tax legislation administered by Inland Revenue, one of the benefits of registration is that it qualifies entities to be eligible for tax exemption on charitable grounds.

<sup>19</sup> See: *McGovern* at 340 and 343; *Latimer v Commissioner of Inland Revenue* [2004] 3 NZLR 157 (“*Latimer, PC*”) at [36]. Compare *Public Trustee v Attorney-General* (1997) 42 NSWLR 600 at 616; *Vancouver Society of Immigrant and Visible Minority Women v the Minister of National Revenue* [1999] 1 SCR 10 (“*Vancouver Society*”).

<sup>20</sup> See *Professional Engineers* at 575 (Tipping J).

- whether the entity's purposes are providing benefit to the public;<sup>22</sup> and
- whether a non-charitable purpose is ancillary within the section 5(3) of the Act.<sup>23</sup>

24. Further, it is well established that the charitable status of an entity is determined by construing its objects and powers in context as a whole, rather than construing objects and powers individually.<sup>24</sup>

**Characterisation of an entity's purposes**

25. Once an entity's purposes are established as a matter of fact, the question whether they are charitable is a question of law.<sup>25</sup> The Board is bound to apply the law as declared by the courts and legislature, and adopted by the Act.

26. 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.<sup>26</sup> Similarly, the subjective intentions of the individuals involved in a charity do not establish its charitable status.<sup>27</sup>

<sup>21</sup> *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).

<sup>22</sup> See for example *Glasgow Police Athletic Association*; *CDC* at [29], [32], [44], [45] - [57], [67], [84] - [92]; *Queenstown Lakes* at [57] - [67]; *Grand Lodge* at [59], [71]; *Computer Society* at [35] - [39], [60] and [68].

<sup>23</sup> 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.

<sup>24</sup> Gino Dal Pont, *Law of Charity in Australia and New Zealand* (2<sup>nd</sup> ed., LexisNexis Butterworths, Australia, 2010) ("*Dal Pont*") at [13.17]. For example, in *Travis Trust* at [30] - [35], [58], Joseph Williams J determined that a purpose to "support the New Zealand racing industry by the anonymous sponsor of a group race known as the Travis Stakes" was not charitable. His Honour rejected a submission that the purpose was to benefit the racing industry. Despite the opening words of the purpose clause, his Honour held that the purpose was to support a single group race. See to the same effect: *Glasgow Police Athletic Association* (where machinery provisions in the association's rules were taken into account to identify the purposes of the Association); *Professional Engineers* (where Tipping J looked to the rules as a whole to resolve the uncertainty in the way in which the primary object was stated).

<sup>25</sup> *Molloy* at 693.

<sup>26</sup> *M K Hunt Foundation Ltd v Commissioner of Inland Revenue* [1961] NZLR 405 at 407; *CDC* at [56].

<sup>27</sup> G E Dal Pont *Law of Charity* (LexisNexis Butterworth, Australia, 2010) 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; *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).

27. The fourth head of charity, described in section 5 of the Act as “any other matter beneficial to the public” has a specific meaning in law.<sup>28</sup> It is not intended to indicate that all purposes that provide public utility qualify as charitable. In order to qualify as charitable under this head, the purpose must be both for the benefit of the community and beneficial in a way that the law regards as charitable. More particularly, the purpose must be within the spirit and intendment of the purposes set out in the Preamble to the Charitable Uses Act 1601 (the Statute of Elizabeth I).<sup>29</sup>

28. This two stage test for charitable purposes ‘beneficial to the community’ (requiring that a purpose be both beneficial to the community and within the spirit and intendment of the Preamble) is well-established in law.<sup>30</sup> Over the years, the courts have recognised many new charitable purposes that are substantially similar to those listed in the Statute of Elizabeth I, acknowledging that what is accepted as a charitable purpose must change to reflect current social and economic circumstances.<sup>31</sup>

### C. Charities Registration Board’s Analysis

29. The Trust has submitted that it is established to advance education, for the relief of poverty, and to be beneficial to the community by enhancing the district and through sponsoring charitable organisations and other community organisations. The Board has considered whether the Trust has these purposes, and has also considered whether the Trust has a charitable purpose of providing a benefit to the community as a public provider of facilities under section 61A of the Charitable Trusts Act 1957 (CTA). The Board has taken into consideration the Trust’s stated purposes, information about the Trust’s activities,<sup>32</sup> information

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<sup>28</sup> See generally Gino Dal Pont, *Charity Law in Australia and New Zealand* (2<sup>nd</sup> ed., Lexis Nexis Butterworths, 2010) at [11.3] – [11.8].

<sup>29</sup> *Statute of Charitable Uses 1601* (43 Elizabeth 1 c 4)

<sup>30</sup> Refer *Queenstown Lakes* at [48]; see also *Latimer, CA* at 208-209; *Travis Trust* at [20] (Joseph Williams J); *Accountants* at 157 (Somers J); *Re Tennant* [1996] 2 NZLR 633 at 638). This is consistent with the approach taken in other jurisdictions, see for example *Re Jones* [1907] SALR 190 at 201; *Williams Trustees v Inland Revenue Commissioners* [1947] AC 447 at 455 (“*Williams Trustee*”); *Scottish Burial Reform and Cremation Society v Glasgow Corporation* [1968] AC 138 at 146-148, 15; *Brisbane City Council v Attorney-General for Queensland* [1979] AC 411 at 422 (PC); *Incorporated Council of Law Reporting (QLD) v Federal Commissioner of Taxation* (1971) 125 CLR 659 at 667, 669; *Royal National Agricultural and Industrial Association v Chester* (1974) 48 ALJR 304 at 305.

<sup>31</sup> See for example the courts recognition of the provision of free internet: *Vancouver Regional FreeNet Association v MNR* [1996] 3 FC 880, 137 DLR (4<sup>th</sup>) 206, [1996] 3 CTC 1; (1996) 50 DTC 6440 and environmental protection: *Centrepoint Community Growth Trust* [2000] 2 NZLR 325.

<sup>32</sup> Reference to activities is a mandatory feature of decision-making under the Act (see e.g. discussion in *Greenpeace, CA* at [48], [51]), and activities information will assist to establish an entity’s purposes where the stated purposes are open to more than one interpretation (see e.g. *Professional Engineers* at 575 (Tipping J); *Glasgow Police Athletic Association* at 751-752).



provided in the Trust's annual returns, the relevant case law and the Trust's submissions.

30. The Board considers that the Trust no longer qualifies for registration under section 13(1)(a) of the Act for five reasons. First, the Board considers that the Trust's main purpose is to provide entertainment for the community of Hawera as an end in itself. The courts have held that the provision of recreation, hospitality and entertainment is not charitable unless it advances another charitable purpose. Secondly, the Board considers that the Trust does not advance education as the Trust's movie screenings do not meet the threshold requirement to advance education. Thirdly, the Board considers that the Trust does not relieve poverty as the provision of a movie cinema does not relieve a charitable need. Fourthly, the Board considers that the Trust does not meet the requirements to be charitable as a public provider of facilities. Lastly, the Board considers that the Trust's community development aims are not charitable.

### **C.1. The Trust's Activity to Provide a Movie Cinema**

31. The Trust's primary activity is operating a movie cinema. The Trust's website<sup>33</sup> and facebook page<sup>34</sup> refer to "Hawera Cinemas the affordable BIG screen experience" and have no indication of any activities other than the screening of movies. The Trust's annual returns clearly indicate that the main activity of the Trust is running a movie cinema.<sup>35</sup>
32. The Trust's operation of the Hawera cinema is authorised under its stated purpose at clause 3.1.1 provides that the Trust's first object is to provide "for the continuation of a cinema facility in Hawera so as to advance the promotion of the interests in the arts generally, cultural and education".
33. Predominately the Trust's screenings are commercial new release movies. The Trust's website and its submissions of 3 July 2013 state that the "core purpose of the cinema is to provide quality entertainment for the South Taranaki community and visitors to the region based on movies".<sup>36</sup> The Trust's annual returns and its website show that it operates a cinema candy bar. Further, the Trust's website<sup>37</sup> and facebook page<sup>38</sup> indicate a focus on commercial movies. For example, the

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<sup>33</sup> <http://www.haweracinema.co.nz/> [accessed 2/8/2013].

<sup>34</sup> <http://www.facebook.com/#!/HaweraCinema?fref=ts> [accessed 2/8/2013].

<sup>35</sup> Hawera Cinema Trust Trend Statement for the year ended 31 March 2012, shows Income for years 2009, 2010, 2011 and 2012 listed under the headings: Box Office Receipts, Candy Bar Income, Screen Advertising, Time Out, Other Income, South Taranaki District Council and Interest Received. Operating Expenses listed under the headings: Purchases, Film Hire, Wages & Salaries, Advertising, Electricity, Rents and Other Expenses.

<sup>36</sup> <http://www.haweracinema.co.nz/page-our-cinema.php> [accessed 2/8/2013].

<sup>37</sup> <http://www.haweracinema.co.nz/> [accessed 12/4/2013].

<sup>38</sup> <http://www.facebook.com/#!/HaweraCinema?fref=ts> [accessed 15/4/2013].

website states that the movies being shown<sup>39</sup> by the Trust include: Despicable Me 2, The Lone Ranger, Monsters University, Pacific Rim, Private Peaceful, The Audience and The Internship.<sup>40</sup>

## **C.2. The Trust's Purpose to Provide Entertainment**

34. As above, the Trust's main activity is operating a movie cinema screening commercial new release movies. This activity is permitted by the Trust's stated purposes. Taking into account the information about the Trust's activities, we consider that viewed holistically, the dominant purpose of the Trust is to provide a movie cinema for entertainment.
35. Courts have held that sporting, entertainment and social activities are not charitable in their own right. In *Travis Trust v Charities Commission (Travis Trust)*,<sup>41</sup> Williams J made the following comments concerning sport, leisure and entertainment:<sup>42</sup>

*In the area of sport and leisure, the general principle appears to be that sport, leisure and entertainment for its own sake is not charitable but that where these purposes are expressed to be and are in fact the means by which other valid charitable purposes will be achieved, they will be held to be charitable.*

36. The decision in *Travis Trust* is consistent with previous decisions.<sup>43</sup> For example the House of Lords in *Inland Revenue Commissioners v Baddeley* determined that the provision of entertainment and amusement per se were inconsistent with accepted notions of charity.<sup>44</sup>
37. We do not consider that the Trust's purpose to provide a movie cinema for entertainment is a means by which other valid charitable purposes will be achieved. It is therefore not a charitable purpose.

## **C.3. Educational Purposes and the Trust**

38. The Trust's stated purposes include a purpose for the cinema to be used in the interests of arts, culture and education (refer clause 3.1.1) and the Trust has submitted that it has advanced educational purposes through the screening of *Tatarakihi: The Children of Parihaka*,<sup>45</sup> the Met Opera Series<sup>46</sup> and the National

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<sup>39</sup> As of 31/7/2013.

<sup>40</sup> [http://www.haweracinema.co.nz/session\\_times.php](http://www.haweracinema.co.nz/session_times.php) [accessed 31/7/2013].

<sup>41</sup> *Travis Trust*.

<sup>42</sup> *Travis Trust* at 23,281.

<sup>43</sup> Refer also to *Williams Trustees and Glasgow Police Athletic Association*.

<sup>44</sup> *Inland Revenue Commissioners v Baddeley* [1955] AC 572 ("*Baddeley*").

<sup>45</sup> A local film highlighting a local history.

<sup>46</sup> Films of the Metropolitan Opera.

Theatre Live.<sup>47</sup> We have therefore considered whether the Trust could be considered charitable under “advancement of education”.

39. In order for a purpose to advance education, it must provide some form of education and ensure that learning is advanced. The modern concept of “education” covers formal education, training, and research in specific areas of study and expertise. It can also include less formal education in the development of individual capabilities, competencies, skills, and understanding, as long as there is a balanced and systematic process of instruction, training, and practice.<sup>48</sup> Further, in order to advance education, learning must be passed on to a broad section of the public.<sup>49</sup>
40. In some circumstances performances can be charitable as advancement of education.<sup>50</sup> The first case to look upon aesthetic education in a favourable light was *Royal Choral Society v Commissioners of Inland Revenue*.<sup>51</sup>
41. This was supported in New Zealand through the decision in *Canterbury Orchestra Trust v Smitham*,<sup>52</sup> where the encouragement of the performance of orchestral compositions and concert works was held to be charitable. The opinion of Woodhouse J in this case suggests that the range of musical styles that can be called educational is broad.<sup>53</sup>
42. The Board considers that the screening of *Tatarakihi: The Children of Parihaka* may meet the threshold required to be educational as advancement of education, particularly as the film makers were available to the audience to discuss the film. The Met Opera series and the National Theatre Live screenings may also meet the test for educational performance as these allow the public access to stage plays and opera productions. However, these activities are not the focus of the Trust.
43. The Board notes that the purposes of the Trust include to “...advance the promotion of the interest in the arts generally, cultural and education...” and to provide a venue for “Orchestral or vocal concerts, recitals, drama and repertory, Grand Opera and Light Opera, Ballet, Musical shows, pop concerts and jazz

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<sup>47</sup> An initiative to broadcast London’s National Theatre stage productions to cinemas.

<sup>48</sup> *Re Mariette* [1915] 2 Ch 284. See also *Chesterman v Federal Commissioner of Taxation* (1923) 32 CLR 362; *Lloyd v Federal Commissioner of Taxation* (1955) 93 CLR 645; *Chartered Insurance Institute v London Corporation* [1957] 1 WLR 867; *Flynn v Mamarika* (1996) 130 FLR 218.

<sup>49</sup> See *CDC and Computer Society*.

<sup>50</sup> See for example *Royal Choral Society v Commissioners of Inland Revenue* [1943] 2 All ER (“*Royal Choral Society*”) at 101; *Smitham*; *O’Sullivan v English Folk Dance and Song Society* [1955] 1 WLR 907 and *Re Delius* [1957] Ch 299.

<sup>51</sup> *Royal Choral Society*.

<sup>52</sup> *Smitham*.

<sup>53</sup> *Smitham* at 806.

festivals...” There is no evidence that the Trust is undertaking activities to advance these purposes.

44. The Board does not consider that movie screenings of commercial movies (as described in paragraph 33 above) meet the threshold required to be educational in a way that is charitable at law.<sup>54</sup> The screenings of movies is not a targeted attempt at educating others. The genre of movies shown at the cinema could not be considered educational under aesthetic education and are simply for entertainment. The Board also notes that the Trust has provided no submissions to show how these commercial films advance education.

#### **C.4. Relief of Poverty and the Trust**

45. The Trust has submitted that it provides relief of poverty, sickness and disability by taking part in the Watties Cans Film Festival, Big Brother Big Sister Programme, Idea Services Movie Madness (IHC) Programme and private screenings for the elderly and rest home residents.<sup>55</sup>
46. In order to be charitable under relief of poverty, a purpose must be directed at people who are poor, in need, aged, or suffering genuine hardship and it must provide relief.<sup>56</sup> “Poverty” is interpreted broadly in law and a person does not have to be destitute to qualify as “poor”.<sup>57</sup> People who are in need, aged, or who are suffering genuine financial hardship from a temporary or long-term change in their circumstances are likely to qualify for assistance. Generally, this will include anyone who does not have access to the normal things of life that most people take for granted.<sup>58</sup> To provide “relief”, the people who would benefit should have

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<sup>54</sup> *Vancouver Society* (1999) 169 DLR (4<sup>th</sup>) 34 (SCC). Judge Iacobucci “To my mind, the threshold criterion for an educational activity must be some legitimate, targeted attempt at educating others, whether through formal or informal instruction, training, plans of self-study, or otherwise”.

<sup>55</sup> The Trust’s letter dated 3 July 2013 provides information about these activities including:

- Watties Cans Film Festival: an annual event where people donate a can of food in return for a ticket to a movie. The cans are then donated to The Salvation Army.
- Christchurch Earthquake: A one-off event in 2011 following a similar structure to the Watties Can Film Festival where cans were collected and sent to the Christchurch City Mission.
- Big Brother Big Sister: A mentoring programme which pairs young people with mentors. The Trust’s role in this programme is allowing young people in the programme to attend the movies for free.
- Idea Services Movie Madness: Works with Idea Services to provides free movies to people with intellectual disability to help people with intellectual disabilities feel a part of their local community.
- Private screenings for the elderly and rest home residents.

<sup>56</sup> *DV Bryant Trust Board v Hamilton City Council* [1997] 3 NZLR 342 (“*DV Bryant*”).

<sup>57</sup> *Re Bethel* (1971) 17 DLR (3d) 652 (Ont. CA); affirmed sub nom *Jones v Executive Officers of T Eaton & Co Ltd* (1973) 35 DLR (3d) 97 (SCC) referred to in *DV Bryant*. See also *Re Pettit* [1988] 2 NZLR 513 (“*Re Pettit*”).

<sup>58</sup> *Baddeley*, applied in *re Pettit* and *Re Centrepoint Community Growth Trust* [2000] 2 NZLR 325.

an identifiable need arising from their condition that requires alleviating and these people should have difficulty in alleviating that need from their own resources.<sup>59</sup>

47. It is accepted that those lacking the resources to obtain what is necessary for a modest standard of living may be accepted as suffering poverty. However, not all gifts for people from lower socioeconomic sectors of society are charitable; the gifts must be directed to the relief of needs caused by this status.<sup>60</sup> Examples which have been found to be charitable under relief of poverty include distribution of food, fuel and clothing, soup kitchens<sup>61</sup> and nursing homes or societies.<sup>62</sup>
48. The Board recognises that some of the events held by the Trust may relieve a charitable need, for example the collection of food tins for the Salvation Army and the Christchurch City Mission. Further, the Idea Services Movie Madness, Big Brother Big Sister and rest home screenings programmes may assist with social inclusion and provide a public benefit. However, these activities are not the focus of the Trust and are insufficient to allow a conclusion that the Trust is exclusively charitable.
49. The Board notes the Trust's submission that many families in South Taranaki are from the lower socioeconomic sector of society and cannot afford to travel outside the region to view films at a movie cinema. The courts have however held that not all people from a lower socioeconomic society will be in charitable need.<sup>63</sup> Further, the Trust does not specifically target people in need. Lastly, the Board does not consider that the provision of entertainment can be seen as providing relief of poverty.<sup>64</sup>

### **C.5. Provision of Facilities and the Trust**

50. The Trust's stated purposes include a purpose to provide a cinema facility<sup>65</sup> and the provision of a venue for concerts, recitals, festivals etc.<sup>66</sup> The Trust has submitted that it provides an entertainment and social facility for the community

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<sup>59</sup> *Joseph Rowntree Memorial Trust Housing Association Ltd v Attorney-General* [1983] Ch 159; [1983] 1 All ER 288. See also *DV Bryant*.

<sup>60</sup> *City of Hawthorn v Victorian Welfare Association* [1970] VR 205 ("*City of Hawthorn*") at 208-209.

<sup>61</sup> *Biscoe v Jackson* (1887) 35 Ch D 460.

<sup>62</sup> *Re Clarke* [1923] 2 Ch 407; *IRC v Peebleshire Nursing Association* [1927] SC 215.

<sup>63</sup> In *Queenstown Lakes* at [40], McKenzie J wrote that there "is no single fixed criterion of what constitutes poverty for the purposes of charity, and the law must be flexible to address new categories of need as they emerge [...] In the fact-specific inquiry, reference to the median income may be a useful aid, but it is not a test in itself".

<sup>64</sup> We note that the provision of entertainment to people in charitable need does not preclude an entity from being charitable if its main object is charitable (*City of Hawthorn* at 209-210, per Smith J). For example, this was the case where a trust provided for extra comforts for nurses at Christmas (*Re Bernstein's Will Trusts* (1971) 115 So Jo 808.) or for patients in paying beds at hospitals (*Re Adams* [1968] Ch 80).

<sup>65</sup> Refer clause 3.1.1 of the Trust Deed.

<sup>66</sup> Refer clause 3.1.2 of the Trust Deed.

and that this facility provides a public benefit (through reducing youth offending, providing a community facility for those that cannot afford to travel outside the region, providing a safe family friendly environment and supporting other community groups). We have therefore considered whether the Trust could be considered charitable under section 61A CTA.

51. Section 61A CTA provides that it is a charitable purpose to provide facilities “for recreation or other leisure-time occupation ... in the interests of social welfare.” Section 61A(1) is expressed to be “subject to the provisions of this section” and “[p]rovided that nothing in this section shall be taken to derogate from the principle that a trust or institution to be charitable must be for the public benefit”. Section 61A(2) and (3) read:

- (2) *The requirement of subsection (1) of this section that the facilities are provided in the interests of social welfare shall not be treated as satisfied unless —*
  - (a) *The facilities are provided with the purpose of improving the conditions of life for the persons for whom the facilities are primarily intended; and*
  - (b) *Either—*
    - (i) *Those persons have need of such facilities as aforesaid by reason of their youth, age, infirmity, disablement, poverty, race, occupation, or social or economic circumstances; or*
    - (ii) *The facilities are to be available to the members of the public at large or to the male or female members of the public at large.*
- (3) *Without restricting the generality of the foregoing provisions of this section it is hereby declared that, subject to the said requirement, subsection (1) of this section applies to the provision of facilities at public halls, community centres, and women's institutes, and to the provision and maintenance of grounds and buildings to be used for purposes of recreation or leisure-time occupation, and extends to the provision of facilities for those purposes by the organising of any activity.*

52. There are four requirements that must be established before an entity will be deemed to be charitable under section 61A CTA, namely:

- the entity must be providing a “facility”;
- the facility must be for “recreation or other leisure time occupation”;
- the facility must be provided in the interests of “social welfare”; and
- the entity must provide a public benefit.

53. In terms of the requirement that the facility be provided “in the interests of social welfare”, section 61A(2) does not provide an exhaustive definition of the term “social welfare” but rather lists the essential elements that must be present if a facility is to meet the requirement of being in the interests of social welfare.<sup>67</sup> We consider that in order for a facility to be provided “in the interests of social welfare”, it must meet the criteria in section 61A CTA and:

- the facility must meet a need of the community which, as a matter of social ethics, ought to be met in the attainment of some acceptable standard of living; *and*
- the organisation providing the facility must be altruistic in nature.<sup>68</sup>

54. First, the Board accepts that the Trust is providing a facility. However we do not consider that the cinema is “for recreation or other leisure time occupation”. The Board considers that the purpose must be to provide for public recreation in a general sense, i.e. to provide a physical facility that is open to the public for a range of recreational uses – typical examples are public parks and playing fields. New Zealand courts have held that the provision of grounds and stadiums as a community asset to host a range of sporting and cultural events in the region falls within section 61A.<sup>69</sup> However, if an entity has a purpose to provide a facility for a specific activity or class of users, the courts do not characterise the purpose as a purpose to provide for recreation, but rather considers the purpose as one to promote those activities.<sup>70</sup> The Board considers that with movie screenings every day, apart from Thursdays,<sup>71</sup> the Trust is not providing a facility for general recreational purposes. The primary purpose of the Trust is running a cinema for entertainment through movie screenings.

55. Secondly, the Board does not consider that the cinema is provided in the interests of social welfare. The provision of entertainment or social contact to the general public will not meet a need which, as a matter of social ethics, ought to

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<sup>67</sup> J Warburton, D Morris and N.F. Riddle, *Tudor on Charities* (9<sup>th</sup> Edition Sweet & Maxwell, London 2003) and *Commissioner of Valuation v Lugan Borough Council* [1968] NI 104.

<sup>68</sup> Refer to paragraph 55 and Dr Donald Poirier *Charity Law in New Zealand* June 2013) at paragraph 18.2.2.3 available online at [www.charities.govt.nz](http://www.charities.govt.nz) (“Poirier”).

<sup>69</sup> See for example *Commissioner of Inland Revenue v Wellington Regional Stadium Trust* [2006] 1 NZLR 617 at [73]-[78] (Wellington Regional Stadium Trust, required by legislation to operate “a multi-purpose sporting and cultural venue”).

<sup>70</sup> *Re Cumming* [1951] NZLR 498 at 501 (a stated purpose to provide a meeting space for farmers and educational societies was not a general recreational purpose); *Re Chapman* High Court, Napier, CP 89/87, 17 October 1989, at 17, and see discussion of usage of the park at 15 (parkland vested in public ownership by statute, provided under lease to Hawkes Bay Rugby Union for the rugby season on condition it is made available during season to other users; parkland also used for cricket, athletic sports, cycling sports and public functions).

<sup>71</sup> <http://www.haweracinema.co.nz/> [accessed 12/4/2013],

be met in the attainment of some acceptable standard of living.<sup>72</sup> The Board notes that the Charities Commission of England and Wales' interpretation of a statutory provision in the same terms as section 61A provides<sup>73</sup>:

*This involves providing facilities which ought to be provided as a matter of social obligation, because if they are not people's conditions of life will be inadequate. 'Adequacy' for this purpose should be assessed by reference to the reasonable needs of the community as a whole in respect of social contact, mental stimulation and physical exercise.*

56. As above in section C.2, we consider that the dominant purpose of the Trust is to provide a movie cinema facility for entertainment. The Board does not consider that the provision of a movie cinema for Hawera meets the social welfare test or that a provision of a movie cinema for entertainment is a social obligation of a community.

57. To summarise, the Board does not consider that the Trust is charitable under section 61A CTA. While the Trust provides a facility, the facility is not for "recreation or other leisure time occupation" in the general sense as it is primarily for one purpose (the provision of movies for entertainment). Further, the facility is not provided in the interests of social welfare.

## **C.6. Community Wellbeing and the Trust**

58. The Trust has submitted that it aims to create a sense of community and enhance wellbeing in the local community through the cinema by providing an "entertainment facility and social hub in the local community" and "enhancing the district as an attractive place to live, work and visit".<sup>74</sup> In this sense they are beneficial to the community and are of public utility.

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<sup>72</sup> Poirier at paragraph 18.2.3; Also see for example Registration Decision: Balloons Over Waikato Charitable Trust, 3 February 2010 published <http://www.charities.govt.nz/the-register/registration-decisions/>.

<sup>73</sup> Charities Commission for England and Wales, *The Recreational Charities Act 1958* <http://www.charity-commission.gov.uk/Publications/rr4.aspx#a4> [accessed 23 September 2013], at [A15] – [A17].

<sup>74</sup> "In March 2007 the South Taranaki District Council (the Council) purchased the Hawera Cinema 2 (the Cinema) complex for \$1 million to keep the facility operating. The Council of the day did this because it considered the Cinema was a significant community asset, important in terms of enhancing the district as an attractive place to live, work and visit." South Taranaki District Council Public Consultation Options for Hawera Cinema 2, 6 September 2011 – 6 October 2011 [http://www.southtaranaki.com/uploaded\\_files/Consultation/Cinema-consultation-statement-of-proposal-final.pdf](http://www.southtaranaki.com/uploaded_files/Consultation/Cinema-consultation-statement-of-proposal-final.pdf) [accessed 12/4/2013]

*"The cinema is an important and much appreciated entertainment facility and social hub in the local community particularly for our young people. It's a place where the elderly can be entertained in a safe environment. It's an appropriate form of entertainment for Mums and Dads to bring their children therefore encouraging family outings. It is one of the few entertainment facilities that isn't alcohol focused where youth can meet up with their mates and enjoy a movie."*



59. However, the Trust cannot be registered under the Act unless it is established for purposes that are charitable in law. The position in New Zealand law is that bringing a community together or advancing the welfare of a community are not exclusively charitable purposes.<sup>75</sup> We therefore do not consider that the Trust's aims to create a sense of community and enhance wellbeing are charitable.

#### **D. Section 5(3) of the Act**

60. The Board is satisfied that the Trust's purpose to provide entertainment is both an independent purpose and the primary purpose of the Trust (see above at section C.2). This purpose is so pervasive and predominant it cannot realistically be considered ancillary to any valid charitable purpose of the Trust. The Trust's non charitable purpose is therefore not 'ancillary' within the provision of section 5(3) of the Act.

#### **E. Public Interest**

61. Section 35(1) of the Act states that the Board must not proceed with the removal of an entity from the register unless the Board is satisfied that it is in the public interest to do so.

62. Section 10(h) of the Act obliges the chief executive to monitor charitable entities and their activities to ensure that they continue to be qualified for registration as charitable entities. The purposes of the Act include, in section 3(a), to promote public trust and confidence in the charitable sector. The Board considers that public trust and confidence in registered charitable entities would not be maintained if entities which did not meet the essential requirements for registration remained on the register.

63. Accordingly, the Board considers that it is in the public interest to remove the Trust from the register, as this will maintain public trust and confidence in the charitable sector.

#### **F. Determination**

64. The Board determines that the Trust is no longer qualified for registration as a charitable entity because it does not have exclusively charitable purposes as

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*"In a small provincial town such as Hawera the Cinema provides one of the few forms of entertainment for youth therefor fostering a positive environment within the community."* [Letter from the Trust 3 July 2013].

<sup>75</sup>

The courts have held that the moral, social and physical social wellbeing of the community "is a laudable object of benevolence and philanthropy, but its ambit is too wide to include only purposes which the law regards as charitable" *Baddeley* at 589.

required by section 13(1)(a) of the Act. The Board considers that the Trust's main purpose is to provide a movie cinema for entertainment. The Trust's non-charitable purpose is not ancillary within section 5(3) of the Act.

65. As the Trust has an independent (non-ancillary) non-charitable purpose, it does not meet registration requirements and it is in the public interest to proceed with the Trust's removal from the Charities Register. The grounds for removal under section 32(1)(a) of the Act are satisfied in relation to the Trust.

66. The decision of the Board is therefore to remove the Trust from the register, pursuant to section 31 of the Act, with effect from 30 October 2013.

**For the above reasons, the Board determines to deregister the Trust as a charitable entity by removing the Trust from the Register.**

Signed for and on behalf of the Board

.....  
Roger Holmes Miller

30<sup>th</sup> SEPTEMBER 2013  
.....  
Date