

Deregistration decision: New Zealand Affordable Art Trust (CC28710)

Executive Summary

1. The Charities Registration Board (the Board) has determined that the New Zealand Affordable Art Trust (the Trust) no longer qualifies for registration as a charitable entity and it is in the public interest that it be removed from the Charities Register.¹
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 its submissions. The Board considers that the Trust's primary purpose is to promote the private interests of artists. This purpose is outside the scope of charity as it confers private benefits on artists which are more than incidental to any charitable purpose. Further, the Trust has a purpose to facilitate private ownership of art works which confers private benefits on individuals.
3. The Board is satisfied that it is in the public interest that the Trust be removed from the Charities Register.² The purposes of the Charities Act 2005 (the Act) include purposes to promote public trust and confidence in the charitable sector, and to encourage and promote the effective use of charitable resources.³ 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 its purpose to benefit artists is a charitable purpose. The Trust has also submitted that it has charitable purposes to promote art, promote education in art and relieve poverty. These submissions and the Board's consideration of these are in paragraphs 16 to 105 of this decision.
5. The Board's reasons are organised as follows:
 - A. Background
 - B. Legal Framework for Deregistration
 - C. Charities Registration Board's Analysis

¹ The register established under section 21 of the Charities Act 2005 (the Act) and published at <http://www.charities.govt.nz>.

² Section 32(1)(a) of the Act 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.

³ See section 3(a) and (b) of the Act.

- D. Section 5(3) of the Act
- E. Trust's Other Submissions
- F. Public Interest
- G. Determination

A. Background

6. The Trust was established by deed on 1 April 2004 and was incorporated under the Charitable Trusts Act 1957 (CTA) on 4 August 2004.

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

The objects for which the Trust are established are, to the extent that they are a charitable purpose within New Zealand as follows:

- 7.1 to facilitate, promote, educate and foster support for new, emerging and existing NZ artists and to contribute to Wellington regions [sic] reputation as New Zealand cultural Capital for the benefit of the people of the Wellington region by:
 - encouraging and assisting in the establishment, retention and development of new, emerging and existing artists
 - promoting and educating Wellingtonians and others about the Arts and Wellingtons [sic] position as cultural capital
 - facilitating viable commercial opportunities for artists
 - any other means as the trustees think fit
- 7.2 to solicit and raise funds and carry out such activities as are necessary or conducive for carrying out and giving effect to the objects of the trust
- 7.3 working with local, regional and central government and other organisations within the Wellington region to achieve the trust's objects
- 7.4 to co-operate with any other person or persons, body, service, institution, company, corporation, club, society, statutory body or government department in order to facilitate promote, achieve, support or maintain the trust's objects
- 7.5 generally to do all acts, matters and things that the trustees consider may advance the objects of the trust.

8. The Trust applied for registration under the Act 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 December 2008, 2009, 2010, 2011 and 2012.

10. The Trust also maintains a website and facebook page that document its activities.⁴
11. On 11 September 2012, Charities Services received a referral from Inland Revenue raising concerns about potential private benefits. Charities Services commenced a review of the Trust and, on 13 November 2012, wrote to the Trust under section 51 of the Act to advise the Trust that its operation was being reviewed. Charities Services' letter required the Trust to provide information about its activities. A response was due by 12 December 2012. No response was received and Charities Services sent a further notice on 8 January 2013 under section 51 of the Act requiring the Trust to supply the information previously requested.
12. On 25 January 2013, the Trust provided the requested information. The information provided is discussed in more detail in parts C and E of this decision.
13. On 2 April 2013, after reviewing the Trust's stated purposes and activities, Charities Services sent a notice of intention to remove the Trust from the Charities Register on the grounds that the Trust's primary purpose is a non-charitable purpose to provide assistance to artists. The notice advised the Trust that this purpose and the activities to further this purpose confer private benefits to artists which are more than incidental.
14. The Trust (via its solicitor) submitted a written objection to the notice of intention to remove on 27 May 2013. The Trust's submissions are discussed in parts B to E of this decision. The Trust also provided an affidavit from one of the trustees who is also the chief executive of the settlor trust (the Affidavit). As part of its objection, the Trust proposed to amend the stated purpose at clause 7.1 of the Trust Deed to read:
 - 7.1 to facilitate, promote, educate and foster support for new, emerging and existing NZ artists for the benefit of the people of the Wellington region by:
 - encouraging and assisting in the establishment, retention and development of new, emerging and existing artists
 - promoting and educating the people of teh [sic] Wellington region about the arts
 - any other means as the trustees think fit
15. On 31 July 2013, Charities Services wrote to the Trust and advised that, after considering the submissions, they remained of the view that the Trust is not qualified for continued registration as a charitable entity under the Act. The Trust was given the opportunity to provide any further submissions or information they wished to be considered before a final decision was made. The Trust provided

⁴ <http://artshow.co.nz/> and <https://www.facebook.com/nz.artshow>.

further submissions on 16 September 2013 (discussed in parts B to E of this decision).

B. Legal Framework for Deregistration

16. Section 50 of the Act provides that the chief executive may examine and inquire into any registered charitable entity, including into its activities and proposed activities, and its nature, objects and purposes.
17. 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 in section 32(1) has been satisfied.
18. 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 3.⁵
19. 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.⁶
20. 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.⁷
21. 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.⁸ It is not intended to indicate that all purposes that provide public utility qualify as charitable. In order

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

⁶ 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.

⁷ 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].

⁸ See generally Gino Dal Pont, *Charity Law in Australia and New Zealand* (2nd ed., Lexis Nexis Butterworths, 2010) at [11.3] – [11.8].

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).⁹

22. 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.¹⁰ 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.¹¹
23. The Trust has submitted that there is a presumption in favour of charitable purposes.¹² The presumption recognised in Court of Appeal judgments¹³ is a presumption that a purpose which: (i) provides an established benefit; (ii) to a section of the public, is a charitable purpose in law. It is a doctrinal tool, used to determine whether a purpose that provides a benefit to a section of the public falls within the fourth head of charity, “any other matter beneficial to the community” (section 5(1) of the Act). Where a purpose provides insufficient public benefits then the presumption cannot apply. Further, the presumption can be rebutted (for example if a purpose confers private benefits that are more than incidental).

⁹ *Statute of Charitable Uses 1601* (43 Elizabeth 1 c 4)

¹⁰ Refer *Queenstown Lakes Community Housing Trust* HC WN CIV-2010-485-1818 [24 June 2011] (“*Queenstown Lakes*”) at [48]; see also *Latimer v Commissioner of Inland Revenue* [2002] 3 NZLR 195 (“*Latimer, CA*”) at 208-209; *Travis Trust v Charities Commission* (2009) 24 NZTC 23,273 (“*Travis Trust*”) at [20] (Joseph Williams J); *New Zealand Society of Accountants v Commissioners of Inland Revenue* [1986] 1 NZLR 147 (“*Accountants*”) at 157 (Somers J); *Re Tennant* [1996] 2 NZLR 633 at 638 (“*Re Tennant*”). 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; *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.

¹¹ See for example the courts recognition of the provision of free internet: *Vancouver Regional FreeNet Association v MNR* [1996] 3 FC 880, 137 DLR (4th) 206, [1996] 3 CTC 1; (1996) 50 DTC 6440 and environmental protection: *Centrepont Community Growth Trust* [2000] 2 NZLR 325.

¹² Refer to the Trust’s letter dated 27 May at paragraph 26.

¹³ *Greenpeace, CA* at [43], [72], [81]. These comments follow apparent adoption of the presumption by a majority of the Court of Appeal *Commissioner of Inland Revenue of Medical Council of New Zealand* [1997] 2 NZLR 297 (“*Medical Council, CA*”) at 310 (McKay J), 320-21 (Thomas J) (Keith J agreeing on this point); but see *Latimer, CA* at [39] (finding it unnecessary to decide whether, as might appear, all of the majority in *Medical Council, CA* adopted the presumption). See also *The Plumbers, Gasfitters and Drainlayers Board* [2013] NZHC 1986 at [22], [56].

24. To be charitable at law a purpose must be for the public benefit.¹⁴ Public benefit must be expressly shown where the claimed purpose is under the fourth head of charity “any other benefit to the community”.¹⁵ Further, in every case, the benefit of the entity’s purposes must flow to the public or a sufficient sector of the public.¹⁶ This public benefit requirement has three elements:
- purposes must be directed to a public benefit of a kind recognised by the law;
 - the effect should not be harmful or contrary to public policy; and
 - any private benefits must be a means of achieving the ultimate public benefit and ancillary or incidental to that public benefit.¹⁷

If a purpose is to benefit a private group, the consequential downstream benefits to the public will not suffice.¹⁸

25. 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:

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: *Accountants* at 152-155; (“*Latimer, CA*”) at [32]; *Travis Trust* at [54], [55]; *Queenstown Lakes* at [30]; *Education New Zealand Trust* at [23].

¹⁵ *Canterbury Development Corporation v Charities Commission* HC WN CIV 2009-485-2133, 18 March 2010 (“*CDC*”) at [45].

¹⁶ 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] (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] (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] (the 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).

¹⁷ The Act section 5(3) and 5(4); See e.g. *D.V. Bryant Trust Board v Hamilton City Council* [1977] 3 NZLR 342 at 347-348; *Education New Zealand Trust*. Refer also to *Institution of Professional Engineers New Zealand Incorporated v Commissioner of Inland Revenue* [1992] 1 NZLR 570 (“*Professional Engineers*”) at 582¹⁷, where Tipping J stated “what the respondents must show in the circumstances of this case is that so viewed objectively, the association is established for a public purpose and that the private benefits to members are unsought consequences of the pursuit of the public purpose and can therefore be disregarded as incidental. That is a view which I cannot take. The private benefits to members are essential”.

¹⁸ See for example *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.

- (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.

26. 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 includes a quantitative assessment, focusing on the relative significance of the purpose as a proportion of the entity's overall endeavour.²⁰

Relevance of an entity's activities in decision-making

27. The Trust has submitted that:

- Charities Services have placed excessive focus on the Trust's activities rather than its stated purposes and given insufficient consideration of how the purposes of the Trust have been reflected in the distributions made by the Trust.
- It was not Parliament's intention that entities cease to be charitable simply because they carry on a mix of charitable and non-charitable activities.
- The essential requirements for registration in section 13 do not refer to activities.

28. Section 50(2) permits the chief executive to examine and inquire into the activities and proposed activities when reviewing charitable entities.²¹ Section 53 permits the chief executive to provide information to any person in order to permit that person to carry out their functions under the Act (this would include the Board).²²

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]; *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.

²¹ The Courts have also confirmed that consideration of activities is a mandatory aspect of decision-making under the Act. Refer *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].

²² See also section 18(3)(a)(i) and (ii) of the Act. We note that the Trust has submitted that section 18(3) mandates the chief executive of the department, not the Board, to consider activities. While we acknowledge that section 18(3) refers to the chief executive rather than the Board, we note that section 19 provides that after considering the application the chief executive must recommend to the Board that it either grant or decline the application. The Court of Appeal in *Greenpeace CA* at [51] stated that in this context the requirement that the Board be "satisfied" or "not satisfied" under section 19 that an entity is qualified for registration means that the Board will need to obtain sufficient proof or information from the chief executive to be assured one way or

29. While activities are not to be elevated to purposes,²³ 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;²⁴
 - whether the entity is acting for an unstated non-charitable purpose;²⁵
 - whether the entity's purposes are providing benefit to the public;²⁶ and
 - whether a non-charitable purpose is ancillary within section 5(3) of the Act.²⁷
30. In light of the above, we consider there is a statutory mandate supported by case law for the Board to consider an entity's current and proposed activities when determining whether it remains qualified for registration. In determining qualification for registration under the Act, substance must prevail over form, and an entity cannot qualify for registration, even if its stated purposes are exclusively charitable, if its activities belie its stated charitable purposes.²⁸

Characterisation of an entity's purposes

31. Once an entity's purposes are established as a matter of fact, the question whether they are charitable is a question of law.²⁹ The Board is bound to apply the law as declared by the courts and legislature, and adopted by the Act.
32. 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.³⁰ Similarly, the

another. We consider that this "sufficient proof" requirement permits the Board to consider activities.

²³ 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.

²⁴ See *Professional Engineers* at 575 (Tipping J).

²⁵ *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).

²⁶ 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].

²⁷ 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.

²⁸ G E Dal Pont *Law of Charity* (LexisNexis Butterworth, Australia, 2010) at [2.12], [13.19], [13.20].

²⁹ *Molloy* at 693.

³⁰ *M K Hunt Foundation Ltd v Commissioner of Inland Revenue* [1961] NZLR 405 at 407; *CDC* at [56]. *Commissioners of Inland Revenue v White*, (1980) 55 TC 651 ("*CIR v White*") at 653

subjective intentions of the individuals involved in a charity do not establish its charitable status.³¹

C. Charities Registration Board's Analysis

33. The Board considers that the Trust's primary purpose is to promote the private interests of artists. This purpose is outside the scope of charity as it confers private benefits on artists which are more than incidental to any charitable purpose. Further, the Trust has a purpose to facilitate private ownership of art works which confers private benefits on individuals.

C.1. Identification of the Trust's purposes

Trust's primary purpose is to promote the private interests of artists

34. The Board considers that the Trust's primary purpose is to promote the private interests of artists by providing them with support and assistance.
35. The Trust's current stated purposes include facilitating, promoting, educating and fostering support for new, emerging and existing New Zealand artists by encouraging and assisting with the establishment, retention and development of new emerging and existing artists and facilitating viable commercial opportunities for artists.³²
36. While the Trust has proposed an amendment to its stated purposes, the proposed amendment continues to include a purpose to provide support for new, emerging and existing artists for the benefit of the people in the Wellington region by encouraging and assisting in the establishment, retention and development of new, emerging and existing artists.³³
37. The Trust has accepted³⁴ that its key purpose is as set out in clause 7.1 and has stated that the language of clause 7.1 "emphasises the facilitating, promoting, educating and fostering of support for new, emerging and existing NZ artists".³⁵
38. The Trust's primary activity is running the annual New Zealand Art Show ("the Art Show") and this will be the on-going activity of the Trust.³⁶ The Art Show

³¹ 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, PC* 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).

³² Clause 7.1 of the Trust Deed (refer paragraph 7 above).

³³ Trust's letter dated 27 May 2013 at paragraph 27.

³⁴ Trust's letter dated 27 May 2013 at paragraph 5.

³⁵ Trust's letter dated 27 May 2013 at paragraph 10.

³⁶ Trust's letter dated 25 January 2013, section 1.

provides artists with the opportunity to showcase and sell their work. The Art Show also includes an online gallery for artists to exhibit and sell their work.³⁷

39. In its letter of 25 January 2013, the Trust advised:

- The Art Show “provides a platform for new and emerging artists to showcase and sell their work to a large audience. Each year over 3,500 artworks are exhibited and all artworks are for sale”.
- The Art Show offers artists low commission rates, affordable application fees, awards and scholarship programs, ongoing advice and support, an outlet to showcase their work, free advertising and promotion and assistance to become self-sustainable.
- They charge “a low commission rate to the artists at 15% - 20% - compared to 30% - 60% charged by dealer galleries; this is a huge draw card to artists; not only to new and emerging artists but to those that have established careers. This allows the artists to price their work affordably and in turn, attracts the public.”
- Since 2004 over 12,000 artworks have been sold.
- The Trust has “returned over \$6,000,000 back into the pockets of artists” and that many artists are now full time practitioners as a direct result of the show, some are exhibiting at an internal level and some have gone on to receive major awards.
- To operate and manage the Art Show costs approximately \$460,000 each year.³⁸

40. The Trust’s website provides further information on the Art Show including:³⁹

- The terms and conditions for the 2013 include “All artwork must be for sale.”
- The artists will receive payment for all artwork sold (less commission possible GST and possible courier expenses).

41. The Affidavit states that the Art Show “provides benefits to artists in enabling them to display their art and to sell it. The displaying of art is difficult to achieve

³⁷ www.artshow.co.nz/gallery [accessed 27 February 2013]: “Artshow.co.nz showcases an impressive array of artworks in a variety of styles and media and it’s a great place to find original New Zealand art. It’s also the perfect place for artists to exhibit their art to the world: with guaranteed traffic to the site and a concerted promotional campaign it’s incredible value for money”.

³⁸ The Board notes that in 2011 total expenditure of \$480,996 and 2010 total expenditure \$436,790. [refer the Annual Return’s filed by the Trust for the years ending 31 December 2010 and 2011].

³⁹ <http://artshow.co.nz> [accessed 27 Feb 2013]. Refer to paragraph 2 Appendix 1 of Charities Services’ letter dated 2 April 2013 for further extracts of the Trust’s website regarding the Art Show.

for new artists.”⁴⁰ The Art Show report⁴¹ for the 2012 show states that in that show over 1,700 art works were sold equating to over \$1.1 million in art sales during the year with “85% of that being returned to participating artists”. There were over 400 artists showcasing their work with prices from \$15 to \$5,000. Over the nine years of the Trust’s operation over \$7 million worth of art was sold - 85% of that was returned to artists. A focus of the 2012 Art Show was to raise attendance and “increase art sales”. The Board notes that the Trust’s website⁴² has updated figures following the 2013 Art Show that in the ten years of operating over \$8 million worth of art was sold with around \$7 million being returned to artists and the Trust awarded almost \$60,000 to promising emerging artists.

42. The 2009 Art Show report⁴³ states that the “Trust is committed to serving the best interests of artists, over business gains, and as such seeks to maintain minimal costs and maximum support to the artists to assist in their endeavours and development”.
43. In addition to the Art Show, the Trust also provides on-going support to artists, grants to artists, awards and scholarships.⁴⁴ The Trust also runs an art gallery (number 5 studio) where art work is displayed and sold.⁴⁵ The Trust has taken its Art Show concept outside of the Wellington area by hosting a Taste of Affordable Art Show in Masterton.⁴⁶
44. The Trust’s information on the Charities Register⁴⁷ (provided by the Trust) states that the Trust’s main activity is to “promote & foster new and emerging artists” and its main beneficiary is “emerging NZ artists”.⁴⁸

⁴⁰ The Affidavit dated 24 May 2013 at paragraph 12.

⁴¹ Attached as annexures FHR-0033 to FHR-0041 of the Affidavit.

⁴² <http://artshow.co.nz/NZ+Art+Show+Update+August+2013> [accessed 4 November 2013].

⁴³ Attached as annexures FHR-006 to FHR-0017 of the Affidavit.

⁴⁴ Refer for example to the Trust’s letter of 25 January 2013 where the Trust has advised that:

- In 2011 they offered a \$15,000 artist grant to allow an artist to focus on his art full time for six months, along with a studio space and artistic and business mentoring. During this period, the recipient completed works, sold over \$30,000 worth of art and at the completion was sent to New York to liaise with dealer galleries.
- They facilitate a wine label award where an artist is given the opportunity to work with a sponsor to develop an art series wine label and the artist receives a portion of all wine sales (up to \$12,000).
- They have an annual Signature Piece Award of \$5,000.
- They make four emerging arts awards through Universities and Polytechnics by donating \$3,000 to each of four schools.

⁴⁵ Refer for example to the Trust’s facebook page advising of art work and jewellery for sale at the number 5 studio - <https://www.facebook.com/nz.artshow> [accessed 27 February 2013].

⁴⁶ Refer paragraph 11 of the Affidavit.

⁴⁷ www.register.charities.govt.nz/CharitiesRegister/.

⁴⁸ The Board also notes that the annual return forms completed by the Trust ask the Trust to advise Charities Services of any changes to its activities and beneficiaries. In the annual returns provided the Trust has not advised on any changes to this information.

45. In light of the above, the Board considers that the Trust has a primary purpose to promote the private interests of artists by providing them with support and assistance to sell their art work.

Trust's purposes include facilitating individuals to purchase and own art works

46. We note that the Trust has advised that they offer low entry fees for the public and provide opportunity for the public to purchase art at affordable prices⁴⁹
47. The Affidavit⁵⁰ states that it is an “aspiration is for all New Zealand households to own an original work of art”. The Community Trust of Wellington’s (the Settlor Trust) report dated February 2004⁵¹ provides that the “objective of the Show is to demystify the art world for the ordinary person and offer them a chance to buy original artwork...”
48. We therefore consider that the Trust also has a purpose to facilitate individuals to purchase and own art works.

Other incidental purposes

49. The Board acknowledges that the proposed amended purpose clause 7.1 refers to supporting artists “for the benefit of the general public in the Wellington region” and that the Art Show allows the general public to view art works while paying low entry fees. The Trust has submitted that this assists with educating the public about fine arts.⁵² The Board also notes that the Trust provides some opportunities for school children to be involved in producing art for the Art Show and they provide some scholarships to tertiary institutions.⁵³
50. The Trust therefore may have a purpose to advance education in the arts for the general public. However, this is not the main focus of the Trust.⁵⁴
51. The Board also notes that the Trust appears to hold an annual event to raise funds for the Wellington’s Children’s Hospital. For example, the 2009 Art Show report details a special event raising \$5000 for this purpose. While this special event can be seen as advancing charitable purposes, this is not the focus of the Trust.

⁴⁹ Refer to Trust’s letter of 25 January 2013. Also refer to the Art Show reports annexed to the Affidavit -for example the 2009 report states that the Art Show “showcases art as is the perfect place to “learn, discover, appreciate and buy the art you love and can afford”.

⁵⁰ The Affidavit at paragraph 13.

⁵¹ Attached as annexures FHR-002 to FHR-005 of the Affidavit.

⁵² Refer for example to paragraph 13 of the Affidavit.

⁵³ For example, the Trust donates \$3,000 to each of Massey, Canterbury and Auckland Universities and Otago Polytechnic per year (refer to the Trust’s letter dated 25 January 2013).

⁵⁴ For example, the Trust donates \$12,000 towards tertiary education scholarships each year. This can be compared to the approximate cost of running the annual Art show of \$460,000 (refer to paragraph 39 above).

C.2. Characterisation and assessment of the Trust's purposes

52. The Board considers that the Trust's primary purpose is to promote the private interests of artists. This purpose is outside the scope of charity as it confers private benefits on artists which are more than incidental to any charitable purpose. Further, the Trust has a purpose to facilitate private ownership of art works which confers private benefits on individuals.

Relief of poverty

53. The Trust has submitted that "as a general proposition, most artists do not have substantial incomes and might be characterised as poor persons. On this basis, the support of artists is consistent with the first head of charity [relief of poverty]"⁵⁵. We have therefore considered whether the Trust has a purpose to relieve poverty.
54. While some artists may not have substantial incomes, this does not mean that every artist will be in charitable need such that an art show to assist artists to sell their own work could be seen as relieving poverty.⁵⁶
55. The Board notes that the Trust assists artists without any focus on poverty. Art work is selected for the Art Show through a selection process where the main criteria the selection panel look for are⁵⁷ originality⁵⁸, technique⁵⁹, development⁶⁰, professionalism⁶¹ and affordability⁶². The relative wealth or poverty of artists is not a factor and the online application form completed by artists does not request information about this.
56. We therefore consider the Trust does not have a purpose to relieve poverty as recognised by charities law.

⁵⁵ Trust's letter dated 16 September 2013 at paragraph 3.

⁵⁶ Refer for example to *Queenstown Lakes* at [40] where 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". That entity was deregistered because it does not restrict its activities to the poor.

⁵⁷ Refer for example to <http://artshow.co.nz/Guide+For+Artists> [accessed 17 January 2014].

⁵⁸ "Is the art original? Does it have a rare quality?" (<http://artshow.co.nz/Guide+For+Artists> [accessed 17 January 2014]).

⁵⁹ "Is the technique refined? Is there evidence of sophisticated art practices?" (<http://artshow.co.nz/Guide+For+Artists> [accessed 17 January 2014]).

⁶⁰ "Is there evidence of development of style and technique?" (<http://artshow.co.nz/Guide+For+Artists> [accessed 17 January 2014]).

⁶¹ "Is it well presented? Has the artist gone to great lengths to ensure a professional and polished finish?" (<http://artshow.co.nz/Guide+For+Artists> [accessed 17 January 2014]).

⁶² "Taking into consideration the artist's history, is the price within a reasonable range? Or is it overpriced?" (<http://artshow.co.nz/Guide+For+Artists> [accessed 17 January 2014]).

Promotion of education in the arts

57. The advancement of education in the arts is a charitable purpose. Education in the arts may be advanced through formal educational activities, but also by advancement of aesthetic education by presenting works of high merit.⁶³ The courts have held that a purpose to foster, promote and increase public interest in the arts is a charitable purpose to advance aesthetic education.⁶⁴ Activities that may advance aesthetic education include holding public exhibitions of works of art or craftsmanship and preservation of works of good craftsmanship.⁶⁵ The essential requirement is that there is an overriding purpose to educate, as distinct from facilitating the participation of a limited number of individuals in the arts for their private entertainment.⁶⁶
58. The Trust has submitted that they advance education in the arts by showcasing art to the general public at the Art Show. As above, the Board acknowledges that the Trust's exhibition of art works at the Art Show may advance education in the arts for the general public. However, this is not the focus of the Trust.

Support of tradespersons and the fourth head of charity – legal framework

59. The Trust has submitted⁶⁷ that the support of artists is charitable. It submits that the Statute of Elizabeth mentions the support of tradesmen and that in modern society artists are tradesmen therefore support of artists is charitable.
60. While the Statute of Elizabeth lists a charitable purpose of providing "aid and help of young tradesmen, handicraftsmen and persons decayed", this does not mean that support of any artist will be charitable. The case law (discussed in paragraphs 24 and 61 to 67 of this decision) supports the position that for all charitable entities, private benefits must be incidental to a charitable public benefit unless the individuals are in charitable need.

Promotion of art and the fourth head of charity – legal framework

61. The promotion of the arts in general for the benefit of the public is a public purpose of a charitable nature within the fourth head of charity.⁶⁸ In *Crystal Palace Trustees v Minister of Town and Country Planning* a body of trustees was entrusted with the control and management of Crystal Palace and park as a

⁶³ *Royal Choral Society v Inland Revenue Commissioners* [1943] 2 All ER 101; *Associated Artists Limited v Commissioners of Inland Revenue* [1956] 1 WLR 752 ("*Associated Artists*") at 759; *Smitham* at 795; *CIR v White* at 655.

⁶⁴ *Associated Artists*. See also *CIR v White* holding that a purpose to foster, promote and increase the interest of the public in craftsmanship was a valid educational purpose.

⁶⁵ *Re Cranstoun* [1932] 1 Ch 537.

⁶⁶ *Smitham* at 795; see also *Re Ogden* (1909) 25 TLR 383.

⁶⁷ Trust's letter dated 16 September 2013 at paragraph 3.

⁶⁸ *In re Town and Country Planning Act 1947, Crystal Palace Trustees v Minister of Town and Country Planning* [1951] 1 Ch 132 ("*Crystal Palace*") at 140, 142.

public place for education and recreation, and for the promotion of industry, commerce and art. Danckwerts J stated:⁶⁹

... it seems to me that the intention of the Act in including in the objects the promotion of industry, commerce and art, is the benefit of the public, that is, the community, and is not the furtherance of the interests of individuals engaging in trade or industry or commerce by the trustees.

62. The courts have held that the promotion of the arts in general for the public benefit is distinguished from the promotion of the private interests of individuals engaged in the arts. In *Commissioners of Inland Revenue v White*, it was held that the entity's purpose to "promote any charitable purpose which will encourage the exercise and maintain the standards of crafts both ancient and modern, preserve and improve craftsmanship and foster, promote and increase the interest of the public therein" was charitable. However, in that case, Fox J also held:⁷⁰

the promotion or advancement of industry (including a particular industry such as agriculture) or of commerce is a charitable object provided that the purpose is the advancement of the benefit of the public at large and not merely the promotion of the interest of those engaged in the manufacture and sale of their particular products. The charitable nature of the object of promoting a particular industry depends upon the existence of a benefit to the public from the promotion of the object.

63. In its letter of 27 May 2013,⁷¹ the Trust appears to accept that the promotion of the interests of artists is not a charitable purpose when they state that the "proposition [that promotion of the interests of artists for their private benefit is not a valid charitable purposes] can be accepted but there appear to be few if any judicial statements that confirm that proposition in clear terms".⁷²
64. The Trust has submitted⁷³ that many cases regarding private benefits relate to industry and businesses rather than artists. The Trust has submitted that this is significant and the promotion of industry and commerce with benefits accruing to business entities having now been emphatically held to be not satisfying the public benefit is different to assisting artists where many artists are in poverty.⁷⁴
65. However, as above in paragraph 24, case law establishes that an essential attribute of a charity is that it is not concerned with the conferment of private advantage or benefit. We note the general case law that provides, to be

⁶⁹ *Crystal Palace* at 142.

⁷⁰ *CIR v White* at 659.

⁷¹ At paragraph 16.

⁷² We note that the Trust's acceptance of this proposition seems to contradict the Trust's submission regarding support of tradesperson's discussed above in paragraphs 59 to 60.

⁷³ Refer to paragraph 19 of the Trust's letter dated 27 May 2013.

⁷⁴ See for example the Trust's submission at paragraphs 14 and 15 of its letter of 27 May 2013 regarding *Crystal Palace*.

acceptable, any private benefits arising from a charity's activities must be ancillary or incidental to the pursuit of valid charitable purposes for the public benefit.⁷⁵ It has been observed that resolution of this question calls for a "situation specific analysis of the relative relationship between public and private benefits".⁷⁶ The courts have held that the conferral of some private benefit is acceptable in some cases, including where the private benefit is an *inevitable* outcome or a by-product of realising a charitable purpose,⁷⁷ or the private benefit is merely *incidental*.⁷⁸

66. We also note the position taken by the Charity Commission of England and Wales that enhancing the reputation of a person or organisation can be a personal benefit (for example an individual whose work is promoted by a charity might benefit from having their profile raised).⁷⁹
67. In light of the above, the promotion of the interests of a small group of individual artists, and/or the promotion of the interests of individuals involved in trade and commerce in the arts is not a charitable purpose. Where an entity seeking registration undertakes an activity that confers private benefits on artists, the entity must show that the private benefit is incidental to the carrying out of an object to promote the arts for the public benefit.⁸⁰

Trust's purposes confer private benefits to artists which are more than incidental to a charitable purpose

68. We consider that the Trust's activities generate private benefits to artists. The benefits provided to artists are significant (refer to paragraphs 34 to 45 above). For example:

⁷⁵ See *Oldham* at 251 (holding the Council did not qualify for charitable status because its purposes conferred freedom to provide private benefits on individual enterprises); *Education New Zealand Trust* at [35]-[46] (holding that the Trust's promotion of education industry was not exclusively charitable where 30% of the industry comprises education providers operating in a commercial context); *CDC* at [45]-[67] (holding that it was a central purpose of the Corporation to promote individual businesses to make them more profitable); *Queenstown Lakes* at p[51]-[68] (holding the Trust's purposes conferred a non-ancillary private benefit of assistance in meeting housing costs on private individuals).

⁷⁶ *Education New Zealand Trust* at [44].

⁷⁷ See for example, *Tasmanian Electronic Commerce Centre Pty Ltd v Commissioner of Taxation* [2005] FCA 439 at [56].

⁷⁸ See for example *Re Tennant* at 639 - 640.

⁷⁹ <http://www.charitycommission.gov.uk/detailed-guidance/charitable-purposes-and-public-benefit/examples-of-personal-benefit/> [accessed 4 November 2013].

⁸⁰ In *CIR v White*, the entity's principal projects were to convert two buildings for use as workshops for craftspersons. The stated purposes of the entity were to promote education in craftsmanship and the evidence showed that the activities at the workshops included setting up a public library and collection of tools available to the public, exhibitions of works of craftsmanship, and school visits to the workshops as well as apprenticeships in the individual workshops. There was also evidence that commercial pressures on landholdings in the area were such that it would be beyond the means of individual craftspersons to obtain workshop space in the area. The court held that there was a clear public benefit in avoiding the extinction or erosion of the crafts if suitable premises could not be obtained.

- In the ten years of the Trust's operations, over \$7 million has been returned to artists;
- Artists are given the opportunity to showcase their work and thus increase their public profile;
- The Trust provides artists the opportunity to sell their work paying low commission rates and application fees through the Art Show and the online gallery;
- The Trust provides grants to artists to allow them to focus on their art which they are then able to sell for a private benefit;
- The Trust provides ongoing support and mentoring;
- "[M]any artists [who have been supported by the Trust] are now full time practitioners as a direct result of the show".⁸¹

69. The Trust has submitted that the Trust restricts the amount a single artist can benefit through limiting the number of art works that a person can exhibit in any one year to five works (except for a few artists who are permitted to have more art works on a "Single Artist Wall") and by having a maximum sale price of \$5,000.⁸²
70. The Board does not consider that these restrictions are sufficient to allow a conclusion that private benefits are incidental to a charitable public benefit. The benefits conferred are to artists as individuals rather than the general public and are therefore private benefits. While a number of artists may benefit from the Trust's operations, the benefits to each artist are significant.
71. The Trust has submitted that it is only through supporting artists that it is possible to support and promote the arts and education in the arts.⁸³ However, we consider that the private benefits to the artists advanced by the Trust's activities are not ancillary to the Trust's charitable purposes. First, we do not consider that it is inevitable that the artists should receive such significant benefits from the Trust's pursuit of its charitable purposes.
72. Second, we do not consider that the benefit to the artists is an incidental consequence of the Trust's pursuit of its purposes. On the information provided, the Trust's activities are focused on providing assistance and benefits to artists.
73. Third, we consider that on the information provided by the Trust, the private benefits to artists are unlikely to be qualitatively or quantitatively ancillary to the public benefit provided by the Trust's activities. The Trust provides below market commission rates and has a focus on selling art work and providing benefits to artists.

⁸¹ Trust's letter dated 25 January 2013 at paragraph 6.

⁸² Refer for example to paragraph 18 of the Trust's May 2013 letter.

⁸³ Trust's letter dated 16 September 2013 at paragraph 3.

74. In our view, the private benefits conferred on artists by the Trust's activities are not incidental to a charitable purpose and disqualify the Trust from charitable status.

Trust's purposes confer private benefits to other individuals which are more than incidental to a charitable purpose

75. In addition to the Trust conferring private benefits to artists, we consider that the Trust also provides private benefits to other individuals which are more than incidental. The Trust provides opportunities for individuals to purchase art for their own private use and enjoyment.

76. As above in paragraph 57, the facilitation of participation of a limited number of individuals in the arts for their private entertainment is not a charitable purpose.

77. We acknowledge that the New Zealand Art Show provides the general public with the opportunity to view art work. However, a focus of the Art Show is to assist individuals to own art work. We note for example that the Affidavit states that the Trust provides benefits to the arts "by effectively educating members of the public about how to acquire art" and aspires for all New Zealand households to own an original work of art.⁸⁴

78. We consider that providing individuals with the opportunity to acquire art for their own personal use facilitates a limited number of individuals (the individuals who purchase from the show) in acquiring art for their own private enjoyment. This confers a private benefit on the owners of the art.

Summary of the assessment of the Trust's purposes

79. The Board considers that the Trust's primary purpose is to promote the private interests of artists. This purpose is outside the scope of charity as it confers private benefits on artists which are more than incidental to any charitable purpose. Further, the Trust has a purpose to facilitate private ownership of art works which confers private benefits on individuals.

D. Section 5(3) of the Act

80. As above, we consider that the Trust's primary purpose is to promote the private interests of artists. This purpose is the focus of the Trust and is a significant proportion of the Trust's endeavour such that it is an independent purpose. It cannot be seen as ancillary to any charitable purpose.

⁸⁴ At paragraph 13.

E. Trust's Other Submissions

Trust's submission that the art show generates profits for distributions

81. The Trust has submitted that running the Art Show is simply an activity that generates profit which is then used for distributions. The Trust has also requested that we consider its purposes in light of the distributions made by way of scholarships and awards.⁸⁵
82. The Board accepts that the Trust makes some distributions that advance charitable purposes.⁸⁶ However, these are not significant as a proportion of the Trust's overall endeavour.⁸⁷ The focus of the Trust's endeavour (being the Art Show) provides significant private benefits to artists.
83. We note that many of the distributions made by the Trust do not advance charitable purposes (for example the awards and artists grants are a form of private benefits to the artists). Therefore, even if the Art Show could be seen as a fundraising activity to support distributions, the type of distributions would likely disqualify the Trust for registration.
84. We also note that the Trust spends approximately \$460,000 a year running the Art Show. When the Trust was asked about what disbursements they make for charitable purposes, the Trust advised that "much [sic] of the charitable purposes are advice and support to artists and low commission rates; funds are not disbursed for these purposes but advice and support is provided".⁸⁸ Therefore, the Trust appears to acknowledge that the Art Show is not simply a profit-making activity.

Trust's submissions regarding the Community Trusts Act 1999

85. The Settlor Trust is a community trust established under the Community Trusts Act 1999 (Community Trusts Act). The Trust has submitted that it is important that any consideration of the Trust's charitable status be based on recognition that the Settlor Trust is itself a charitable entity by virtue of the Community Trust Act (particularly section 12(2) of the Community Trusts Act).
86. Section 12 of the Community Trusts Act states:

Purposes of community trust

(1) Property vested in, or belonging to, a community trust must be –

(a) held on trust to be applied for charitable, cultural, philanthropic, recreational, and other purposes; and

⁸⁵ Trust's letter dated 27 May 2013 at paragraph 22.

⁸⁶ For example its scholarships through universities and the charity fundraising evening.

⁸⁷ Refer to paragraph 50 above.

⁸⁸ Trust's letter of 25 January 2013

(b) applied for purposes that are beneficial to the community principally in the area or region of the trust.

(2) The purposes of a community trust are deemed to be charitable for the purposes of the application to a community trust of any enactment or rule of law.

87. While section 12(2) of the Community Trusts Act deems the purposes of the Settlor Trust to be charitable “for the purposes of the application to a community trust of any enactment or rule of law”, this section relates to whether the Settlor Trust’s purposes are deemed charitable. It is not sufficient to deem every trust settled by the Settlor Trust to be charitable. The Trust is a separate legal entity and its purposes must be considered in relation to the Charities Act.

Trust’s submission regarding the introduction of clause 7

88. The introduction of clause 7 refers to the purposes being purposes to the extent they are charitable at law. The Trust has submitted that the effect of this is that any non-charitable parts of clauses 7.1 to 7.5 are excluded from being purpose.

89. The Board acknowledges that the introduction to the purpose clause 7 states that the objects of the Trust in that clause are objects of the Trust “to the extent that they are a charitable purpose within New Zealand”. This clause therefore purports to limit the Trust to exclusively charitable purposes. However, the Courts do not accept that clauses that purporting to limit purposes to only charitable pursuits are sufficient to determine that an entity is exclusively charitable.⁸⁹

90. We therefore consider that the introduction to clause 7 is not sufficient to permit a conclusion that the Trust’s purposes are restricted to charitable purposes. As above, we consider that the Trust’s primary purpose is a non-charitable purpose.

Trust’s submissions regarding charitable intentions and s61B CTA

91. The Trust has submitted⁹⁰ that section 61B CTA is applicable due to:

- the fact the Settlor Trust is charitable under the Community Trusts Act;
- the charitable intentions of the Settlor Trust;
- non-charitable activities are not relevant when considering a purpose clause in relation to section 61B;
- the consequences of failing to apply section 61B need to be considered by the Board; and
- a presumption in favour of charitable purposes.⁹¹

⁸⁹ Refer to paragraph 32 above

⁹⁰ Refer to the Trust’s letters dated 27 May 2013 at paragraphs 25 to 26 and dated 16 September 2013 at paragraphs 4 to 9.

92. Section 61B CTA provides:

61B Inclusion of non-charitable and invalid purposes not to invalidate a trust

- (1) In this section the term imperfect trust provision means any trust under which some non-charitable and invalid as well as some charitable purpose or purposes is or are or could be deemed to be included in any of the purposes to or for which an application of the trust property or any part thereof is by the trust directed or allowed; and includes any provision declaring the objects for which property is to be held or applied, and so describing those objects that, consistently with the terms of the provision, the property could be used exclusively for charitable purposes, but could nevertheless (if the law permitted and the property was not used as aforesaid) be used for purposes which are non-charitable and invalid.
- (2) No trust shall be held to be invalid by reason that the trust property is to be held or applied in accordance with an imperfect trust provision.
- (3) Every trust under which property is to be held or applied in accordance with an imperfect trust provision shall be construed and given effect to in the same manner in all respects as if—
 - (a) the trust property could be used exclusively for charitable purposes; and
 - (b) no holding or application of the trust property or any part thereof to or for any such non-charitable and invalid purpose had been or could be deemed to have been so directed or allowed...

93. The Trust has submitted that charitable intentions are relevant regarding any application of section 61B CTA.⁹² The Trust has submitted that a number of factors indicate charitable intentions:

- Recital A of the Trust Deed refers to the intention of the Settlor Trust to establish a charitable trust;
- The underlying intention of the Settlor Trust was of a charitable nature;⁹³
- The introduction to clause 7 indicates the intention that non-charitable purposes are not to be included; and
- Clause 4.1 of the Trust Deed refers to the Trust being charitable.

⁹¹ This presumption is discussed in paragraph 23 above. The presumption is not that a purpose is charitable; instead it is a tool that can be used to determine whether a purpose with public benefit is within the spirit and intendment of the Statue of Elizabeth.

⁹² The Trust also submits that charitable intentions are consistent with section 12(2) of the Community Trust Act 1999.

⁹³ Refer to the Affidavit at paragraph 6.

94. The Trust has submitted that the case of *Re Beckbessinger*⁹⁴ supports an emphasis is on the words of the gift when considering section 61B CTA and that the key test is that the testator (or settlor) “must be shown to have had a substantially charitable mind but to have fallen foul of the law of uncertainty by including either actually or potentially a non-charitable element or purpose”.⁹⁵
95. We have considered whether section 61B CTA could be applicable for the Trust. As discussed above in paragraph 32, the settlor’s intentions are not determinative. We note that in *Canterbury Development Corporation v Charities Commission*⁹⁶, the High Court stated that this “blue pencil” provision potentially allows the deletion of certain provisions in a Trust Deed to leave only charitable purposes.⁹⁷ In that case, the High Court found that the organisations had a mixture of charitable and non-charitable purposes. The organisations were complex businesses with sophisticated structures and focus and that it was simply not possible to delete significant portions of each organisation’s purpose and be confident that there could be coherent structure and function left.⁹⁸ In rejecting a claim that section 61B CTA was applicable to the organisations, the Judge stated that a significant portion of the organisation’s objects and purposes were non-charitable and that the deletions required “would mark a fundamental change to the functioning or operative part of CDC and would leave it without direction of focus”.⁹⁹ In reaching the conclusion that a significant portion of the objects and purposes were non-charitable the Judge took into consideration the activities of the organisation.¹⁰⁰
96. In *Re Beckbessinger* Tipping J specified the requirements that must be present in a Trust before the non-charitable purposes could be “blue pencilled” out under this provision. Tipping J analysed previous New Zealand decisions¹⁰¹ and stated that the relevant test should be as follows:

In the case of designated and identifiable organisations it may well be necessary to have evidence as to whether or not they are charitable to determine the flavour of the gift. The court cannot in my judgment say, [...] that because a gift might be applied for charitable purposes, s 61B can be used to save it. The testator must be shown to have a substantially charitable

⁹⁴ *Re Beckbessinger* [1993] 2 NZLR 362 (“*Beckbessinger*”) at 376 (Tipping J).

⁹⁵ Trust’s letter dated 16 September 2013 at paragraph 7.

⁹⁶ *CDC*.

⁹⁷ *CDC* at [54]. We note that the Trust has submitted (refer to the Trust’s letter of 16 September 2013 at paragraph 5) that referring to s61B CTA as the “blue pencil” provision is incorrect. However, based on the *CDC* decision, we consider this to be appropriate.

⁹⁸ *CDC* at [99].

⁹⁹ *CDC* at [102].

¹⁰⁰ We note the Trust’s submissions that a consideration of activities is not appropriate when considering intentions and s61B CTA (refer for example to Trust’s letter dated 16 September 2013 at paragraph 9). We consider that *CDC* supports that activities are a relevant consideration.

¹⁰¹ *Re Ashton* (deceased) [1955] NZLR 192; *Re White* [1963] NZLR 788; *Smitham* and *Re Howey* [1991] 2NZLR 16. In *Re Howey* the Court of Appeal wrote that “in our view the trust for a sanctuary is not itself charitable, it discloses no general charitable intention nor has it any, let alone a substantial, charitable content.”

mind but to have fallen foul of the law of uncertainty by including either actually or potentially a non-charitable element or purpose.¹⁰²

97. Viewed objectively, taking into account the Trust's stated purposes and its activities, we could not consider that the Settlor Trust has a "substantially charitable mind", therefore the remedy in section 61B CTA is not available for the Trust. The stated purposes show a focus on providing benefits to artists and this was the Settlor Trust's objective in establishing the Trust.¹⁰³ The Trust's activities support a determination that this is the focus.

Other art exhibitions

98. The Trust has commented that many art exhibitions and galleries have work for sale.¹⁰⁴
99. However, the Board must take a case by case approach considering the specific wording of each entity's rules document and the activities. For every entity the Board considers whether any private benefits are incidental to a charitable purpose. An entity can be deregistered if it no longer qualifies for registration.¹⁰⁵ Therefore, the fact that there may art galleries currently on the register is not determinative into an assessment into the Trust's eligibility for registration.

F. Public Interest

100. Section 35(1) of the Act states that, where an objection to a notice of intention to remove is received, 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.
101. 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 and, in section 3(b) to promote the effective use of charitable resources. 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. Further, the Board considers that it would not promote the effective use of charitable resources for non-qualifying entities to remain on the register.

¹⁰² *Beckbessinger* at 376.

¹⁰³ The Affidavit at paragraph 12 and annexure FHR-001.

¹⁰⁴ The Affidavit paragraphs 14 to 17.

¹⁰⁵ Sections 31 and 32 of the Act.

102. 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.

G. Determination

103. 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 required by section 13(1)(a) of the Act. The Board considers that the Trust's primary purpose is to promote the private interests of artists. This purpose is outside the scope of charity as it confers private benefits on artists which are more than incidental to any charitable purpose. Further, the Trust has a purpose to facilitate private ownership of art works which confers private benefits on individuals.

104. As the Trust has non-charitable purposes which are more than ancillary to any charitable purpose and confers significant private benefits, 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.

105. The decision of the Board is therefore to remove the Trust from the register, pursuant to section 31 of the Act, with effect from 27 March 2014.

106. 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



.....
Caren Ranghi

.....
27 February 2014