

Deregistration decision: Southern Cross Charitable Trust (CC24144)

Executive Summary

1. The Charities Registration Board (**the Board**) has determined that a person associated with the Southern Cross Charitable Trust (**the Trust**) has engaged in serious wrongdoing in connection with the Trust. The Board also considers that the Trust is no longer qualified for registration as a charitable entity under the Charities Act 2005 (**the Act**) and that it is in the public interest that it be removed from the Charities Register.¹
2. The Trust has submitted that it continues to qualify for registration and that it is established for charitable purposes to promote youth development in New Zealand, and that it would not serve the public interest to remove the Trust from the Charities Register.
3. The Board considers that a person associated with the Trust has engaged in serious wrongdoing through failing to meet his fiduciary duties to the Trust and breaching the rules of the Trust. The Board has considered the Trust's activities, information in its annual returns, and its submissions. The Board considers the decisions of the Trust associated with related parties constitute a course of conduct that is grossly negligent and that constitutes gross mismanagement. Further, the Board considers that the Trust no longer qualifies for registration as it does not have exclusively charitable purposes, as the Trust has an independent purpose to advance the private pecuniary profit of the trustees through conferring private benefits to related parties.²
4. The Board is satisfied that it is in the public interest that the Trust be removed from the Charities Register. The purposes of 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. The Board considers that it would not promote these purposes if an entity that no longer qualifies for registration and has its position further compromised by an officer who has engaged in serious wrongdoing in connection with the entity, was allowed to remain on the Charities Register.
5. The Board's reasons are organised as follows:
 - A. Background
 - B. Summary of Trust's activities and relationships

¹ This decision is made under section 19 of the Charities Act 2005 [the Act].

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

- C. Legal Framework for Registration Decision
- D. The Charities Registration Board's Analysis
- E. Public interest
- F. Determination

A. Background

6. The Trust was established by deed on 1 February 1993 (**the Trust Deed**). The trustees incorporated as a board under the Charitable Trusts Act 1957 (**the CTA**) on 10 May 1993.
7. The Trust's purposes, as set out in clause 2 of the Trust Deed, are as follows:
 - 2.1. *To take children who are on the dole or on the streets and put them through an outward bound type course which course will basically be an extending or wider extending nature than the current Outward Bound course.*
 - 2.2. *To provide training and work habits for the future and in carrying out the philosophy behind the name of the Trust in that a Kiwi can do anything, the trust will be directed on a Christian basis and the teaching of humanity and patriotism will be vital ingredients.*
 - 2.3. *To provide needs which may be medical, educational, counselling or any other basic need which the trustee may feel the community require but not forgetting that the original concept is to encourage and inspire people to be mighty Kiwi's [sic].*
 - 2.4. *To provide Centres all over New Zealand with the intention that the Kiwi Kan Centres will be built by the young people themselves with teaching and support by the individuals and groups from each community where the Centre will be built.*
 - 2.5. *To carry on any other objects which may be capable of being conveniently carried on in connection with the above objects or calculated directly or indirectly to advance the objects of the Board or any of them.*
8. The Trust Deed also restricts the powers of the trustees in certain circumstances at clause 4.5 and 16.1:
 - 4.5. *No part of the income or property of the Board shall be paid or transferred directly or indirectly by way of profit to any Board member provided that nothing herein contained shall preclude any reasonable payments to any trustee Board member or employee for services rendered or for goods supplied or by way of interest on moneys borrowed from or by way of rent for premises let or leased to the Board by any Board member, trustee or associated person and provided further that where any such interest is payable or charged to any Board member, trustee or associated person then such interest shall be at current market rates...*
 - 16.1. *Notwithstanding anything to the contrary contained or implied in the rules, in relation to any business carried on by the Trust, no payments shall be made to any person:*

a. who is a member or an officer of the Trust, or

b. where that person and that member or officer are associated persons (as that term is defined in the Income Tax Act 1976) for work done or services rendered in connection with any such business nor shall, in the carrying on of any such business, any benefit or advantage (whether or not convertible into money) or any income of any of the kinds referred to in section 65(2) of the Income Tax Act 1976 be afforded to, or received, gained, achieved, or derived by any such person where that person is able, by virtue of that capacity as member or officer of associated person, in any way (whether directly or indirectly) to determine, or to materially influence in any way the determination of, the nature or the amount of that payment, benefit or advantage or that income or the circumstances in which it is or is to be so received, gained, achieved, afforded or derived'.

9. The Trust applied for registration under the Act and was registered effective 9 May 2008.
10. The Trust has filed returns, as required under section 41 of the Act, for its financial years ending 31 March 2009, 2010 and 2011, but has failed to file returns for the years ending 31 March 2012 and 2013. The information obtained by the Charities Services group of the Department of Internal Affairs (**Charities Services**) in the course of its investigations shows that the Trust has previously been involved in running, and making donations to youth educational events.
11. On 23 July 2012, Charities Services commenced an investigation into the activities of the trustee of the Trust, due to concerns regarding “charitable purpose” and potential “serious wrongdoing”.
12. On 12 December 2012, Charities Services wrote to the Trust under section 51 of the Act requiring the Trust to provide information about its activities and related party transactions.
13. There followed a period of correspondence between Charities Services and the Trust where the Trust provided information on its activities and submissions.
14. On 24 July 2013, Charities Services interviewed Robert Wickham, the sole director of the trustee company. Robert Wickham is also the sole shareholder of the trustee company.
15. Following the interview there was further correspondence between the Trust and Charities Services. On 3 March 2014, Charities Services sent the Trust a notice of its intention to remove the Trust from the Charities Register and provided the Trust with information on steps it could take to remain on the Charities Register.

16. On 5 May 2014, the Trust provided submissions contesting the removal (as discussed in part D of this decision) and advised that the relevant parties did not have the resources to take the recommended remedial steps that would allow the Trust to remain on the Charities Register.
17. On 22 May 2014, Charities Services sent a further notice of intention to remove the Trust from the Charities Register. No further objections were received from the Trust.
18. On 18 November 2014, a revised notice of intention to remove was sent to the Trust so as to give the Trust a final opportunity to respond to the Charities Services assessments of the facts and law in line with the requirements of natural justice. Once again no further objections were received from the Trust.

B. Summary of Trust's activities and relationships

19. The Board has reviewed the information obtained by Charities Services in the course of its investigation. The investigation supports the following summary of the Trust's activities and relationships.
20. Since formation in 1993, the Trust has been engaged in significant charitable activity, including running the Kiwi Can programme, and a number of smaller charitable projects. In 2008, the Kiwi Can programme was taken over by a different charitable entity and the Trust no longer has any involvement. Since registration with the Charities Services, the entity's charitable activity has only been \$11,392 in donations.³
21. The Trust has one trustee, the Southern Cross Trustee Limited ("the Company"). Robert Wickham is the current sole director and shareholder of the Company.
22. The Trust raised funds through charging interest on loans to investment projects in which Robert Wickham had an interest. For each project a new company was set up and a new trust was settled by Robert Wickham⁴. Robert Wickham was also the trustee and director/shareholder of each trust and company respectively. Robert Wickham had a controlling interest in both the trusts and the companies formed. A total of 45 Trusts and Companies set up in this manner engaged in monetary transactions with the Trust during the period of registration. Robert Wickham established himself in a position of influence controlling the assets of the Trust even at times when he was not the director of the corporate trustee. The Trust had no conflict of interest policy, and Robert Wickham made decisions to invest in, make loans to and borrow from, the entities he may have had a pecuniary interest in.

³ Annual returns for the years ending 31 March 2009 (\$8,633); 31 March 2010 (\$2,461); and 31 March 2011(\$298).

⁴ Stated by Robert Wickham in his interview of 24 July 2013 and list obtained from the companies office website.

23. The volume of funds transferred between the two parties (i.e. to and from) was high in proportion to the Trust's overall turnover.⁵ Of the funds received between 2005 and 2010 by the Trust from the related entities (estimated at \$30.49M) by way of beneficiary income and loans, around \$25.7M (\$8.7M during period of registration) was loaned back to the related entities and approximately \$34.5M still remains outstanding in loans and unpaid interest.⁶
24. The Trust's purpose for the loans was to help improve the performance of the related parties' businesses with the objective of using a part of the profit for the Trust's charitable purposes.⁷
25. The Trust does not have accurate records for all transactions.⁸ From the information the Trust did provide, Charities Services made the following assessments:⁹
- The related parties provided no security to the Trust in the case of default, in any of the transactions.¹⁰
 - In the case of the Whangape Trust and Waiotahi Beach Trust standard Inland Revenue interest rates were used which did not take into account the risk borne by the Trust due to the absence of adequate security and would therefore be considered to be below market rates for borrowings of similar risk.¹¹
 - In the case of the Southern Cross Air Ambulance and Daffodil Trust no interest had been charged on loans advanced.¹² In the latter case the interest had not be charged because it had not been demanded by the Trust.¹³
 - During the period of 2007 to 2009, the Trust made losses of \$778,125 on its investments with related parties.¹⁴
26. In response to the option to remain registered, the Trust indicated the related parties were unable to repay the loans owed to the Trust, and one of the debtors was now in liquidation.¹⁵

⁵ Volume of related party transaction (to and fro movement) and total revenue between 2007 and 2010 was 2007-(\$15.67M,\$3.95M),2008-(\$8.68M,2.31M),2009-(\$7.27M,\$2.07M), 2010-(\$1.48M,\$2.72M).

⁶ Review of bank statements of the Trust for the period 2005 to 2010; Annual return of the year ending 31 March 2011.

⁷ Stated by Robert Wickham in his interview of 24 July 2013.

⁸ Out of several related party transactions (45 different related parties) Charities Services identified in its investigation, the Trust provided contracts on only three, in the Trust's response dated 18 October 2013.

⁹ Refer to the Trust's response dated 18 October 2013.

¹⁰ Refer to the Trust's response dated 18 October 2013.

¹¹ Refer to the Trust's response dated 18 October 2013; for Whangape Trust only for the 2010 year, for Waiotahu Beach Trust for the period 2007 to 2011.

¹² Refer to the Trust's response dated 18 October 2013;

¹³ Refer to the Trust's response dated 18 October 2013.

¹⁴ Financial report for the year ending 2007, 2008 and 2009.

C. Legal Framework for Registration Decision

C.1 Deregistration

27. 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.
28. Section 32(1) of the Act provides that the Board may direct that an entity be removed from the register on a number of grounds, including (a) if the entity is not, or is no longer, qualified for registration as a charitable entity, and (e) if the entity has engaged in serious wrongdoing or any person has engaged in serious wrongdoing in connection with the entity, provided that the entity has been given notice under section 33 of the Act. 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.
29. 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 3.¹⁶

C.2 Serious wrongdoing

30. Section 10 of the Act sets out the functions of Charities Services, which includes monitoring charitable entities and their activities to ensure they remain qualified for registration, and inquiring into conduct amounting to serious wrongdoing in connection with charitable entities. This confirms Charities Services role in monitoring registered charitable entities and their activities to ensure the appropriate use of their tax exemptions.¹⁷
31. Section 4(1) of the Act does not define serious wrongdoing exhaustively, but includes “any serious wrongdoing of the following types”:
 - (a) An unlawful or a corrupt use of the funds or resources of the entity; or
 - (b) An act, omission, or course of conduct that constitutes a serious risk to the public interest in the orderly and appropriate conduct of the affairs of the entity; or
 - (c) An act, omission, or course of conduct that constitutes an offence;
 - (d) An act, omission, or course of conduct by a person that is oppressive, improperly discriminatory, or grossly negligent, or that constitutes gross mismanagement.

¹⁵ Whangape Trust (owing \$1.9M to the Trust); Refer to Trust’s response dated 18 October 2013.

¹⁶ *Greenpeace of New Zealand Incorporated* [2012] NZCA 533 (“*Greenpeace, CA*”) at [34], [37], [38].

¹⁷ *Greenpeace, CA* at [38].

32. Isolated breaches of the law or other wrongdoing will not always be sufficient to justify deregistration.¹⁸ Whether wrongdoing is sufficiently serious to justify deregistration is a matter of fact and degree, and depends on certain factors including:
- (1) the nature and seriousness of the activity;
 - (2) whether the activity is attributable to the entity because it was expressly or impliedly authorised, subsequently ratified or condoned, or impliedly endorsed by a failure to discourage members from continuing with it;
 - (3) whether the entity had processes in place to prevent the activity or has since put processes in place to prevent the activity occurring again;
 - (4) whether the activity was inadvertent or intentional; and
 - (5) whether the activity was a single occurrence or part of a pattern of behaviour.¹⁹
33. Other relevant, but not determinative, considerations in assessing whether a charitable entity or persons associated with an entity have engaged in serious wrongdoing include:
- (1) The extent the acts, omissions or course of conduct could impact or have impacted on trust and confidence in the charitable sector;²⁰
 - (2) Whether persons associated with the entity have abided by their duties in relation to the entity prescribed in case law and statute;²¹ and
 - (3) Whether the entity and persons associated with the entity have abided by the legal rules of the entity.

C.3 Charitable purpose

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

¹⁸ In relation to illegal activities: *Greenpeace of New Zealand Incorporated* [2014] NZSC 105 (“*Greenpeace, SC*”) at [111];

¹⁹ This approach applies the New Zealand Court of Appeal’s approach to illegal activities to serious wrongdoing: *Greenpeace, CA* at [97].

²⁰ The purpose of the Act at section (3)(a) is to promote public trust and confidence in the charitable sector.

²¹ For example: director’s duties under the Companies Act 1993, sections 131 to 138A; and the fiduciary duties of trustees to a charitable trust; see K Lord, “Charitable Trusts: A Guide to the Formation and Administration” in D Breaden et al (eds.), *Law of Trusts (New Zealand)* (LexisNexis, New Zealand, 2014) at [8.14].

charitable purposes. This criterion is not met unless the income is derived for exclusively charitable purposes.²²

35. 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.²³
36. To be charitable a purpose must advance a public benefit at law.²⁴ That public benefit must also be within the spirit of the cases based on the Statute of Charitable Uses Act 1601 (**the Preamble**).²⁵
37. First, the purpose must provide a benefit to the public or a sufficient section of the public. The assessment of whether a purpose provides a benefit focuses on the clearly identifiable consequences of the undertaking—benefits that are nebulous and remote, or simply ‘hoped for’, are excluded.²⁶ If a purpose is to benefit a private group, the consequential downstream benefits to the public will not

²² 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 at 794-796; *Molloy v Commissioner of Inland Revenue* [1981] 1 NZLR 688 (“*Molloy*”) at 691. See also the assumption evident in the provision at section 5(3) and (4) of the Act that a trust will not be disqualified from registration because it has *ancillary* non-charitable purpose.

²³ This statutory definition adopts the general law classification of charitable purposes in *Commissioner for Special Purposes of Income Tax v Pemsel* [1891] AC 531 extracted from the preamble to the *Statute of Charitable Uses 1601* (43 Elizabeth 1 c 4) (“The Statue of Elizabeth”) and previous common law: *Greenpeace*, SC at [12],[15] and [17]; *Re Education New Zealand Trust* (2010) 24 NZTC 24,354 (“*Education New Zealand Trust*”) at [13]; *In re Draco Foundation (NZ) Charitable Trust* HC WN CIV 2010-485-1275 [3 February 2011] at [11].

²⁴ *Greenpeace*, SC at [27].

²⁵ Also known as The Statue of Elizabeth.

²⁶ See discussion in *Latimer v Commissioner of Inland Revenue* [2002] 3 NZLR 195 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 *New Zealand Society of Accountants v Commissioners of Inland Revenue* [1986] 1 NZLR 147 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 v Charities Commission* (2009) 24 NZTC 23,273 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 Community Housing Trust* HC WN CIV-2010-485-1818 [24 June 2011] (“*QLCHT*”) at [68] – [76] (held that the purpose of the Trust was to provide housing for individuals not to advance the overall welfare of the community by enabling workers to stay in the area); *CDC* at [67] (primary purpose is the assistance of individual businesses and the ‘hope and belief’ that the success of those businesses would increase the economic wellbeing of the Canterbury region does not establish public benefit as a primary purpose); *Re The Grand Lodge of Antient Free and Accepted Masons in New Zealand* [2011] 1 NZLR 277 (HC) (“*Grand Lodge*”) at [59] – [60] (the purpose is to improve the character of members of a closed group, the public benefit in this is ‘too remote’).

suffice.²⁷ Any private benefits arising from an entity's activities must be a means of achieving an ultimate public benefit only and therefore be ancillary or incidental to it.²⁸

38. If public benefit has been established, the second part of the test is whether the public benefit is within the spirit of the Preamble.²⁹ The Board is bound to apply the law as declared by the courts. Purposes that relieve poverty, advance education, and advance religion are all treated as being within the spirit of the Preamble.³⁰ For purposes under the fourth head, "any other matter beneficial to the community," this part of the test is to be considered by analogy to previous cases or by reference to legislation.³¹
39. Finally, section 5(3) of the Act provides that the inclusion of a non-charitable purpose will not preclude registration if it is merely ancillary to a charitable purpose. Pursuant to section 5(4) of the Act, a non-charitable purpose is ancillary if the non-charitable purpose is:
- (a) ancillary, secondary, subordinate, or incidental to a charitable purpose of the trust, society or institution; and
 - (b) not an independent purpose of the trust, society or institution.
40. Determining whether a non-charitable purpose is ancillary includes a qualitative assessment of whether it is a means to advance the charitable purpose.³² It also involves a quantitative assessment, focusing on the relative significance of the purpose as a proportion of the entity's overall endeavour.³³

C.4 Relevance of entity's activities in decision-making

41. Section 50(2) permits examination and inquiry into the activities of registered charitable entities. Activities must be taken into consideration when determining whether an entity qualifies for registration under the Act. The courts have

²⁷ 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]; *QLCHT* at [68]–[76]; *CDC* at [67]. Compare: *Commissioners of Inland Revenue v Oldham Training and Enterprise Council* (1996) STC 1218 ("Oldham"); *Travel Just v Canada (Revenue Agency)* 2006 FCA 343, [2007] 1 CTC 294 ("Travel Just").

²⁸ See for example *Professional Engineers* at 578; *Computer Society* at [42]; *Education New Zealand Trust* at [23]; *QLCHT* at [68]–[76]; *CDC* at [67]. Compare *Oldham*; *Travel Just*.

²⁹ *Greenpeace*, SC at [18] and [27-31].

³⁰ *Greenpeace*, SC at [27].

³¹ *Greenpeace*, SC at [18] and [27-31].

³² For recent judicial comment on the qualitative test see *Greenpeace*, CA at [62], [83]–[91].

³³ The quantitative requirement was applied by the High Court in *Re Greenpeace of New Zealand Incorporated* HC WN CIV 2010-485-829 [6 May 2011] ("*Greenpeace, HC*") at [68]; *Computer Society* at [16]; *Education New Zealand Trust* at [43]-[44]; *Grand Lodge* at [49]-[51]. The Board notes the Court of Appeal's observation in *Greenpeace*, CA at [92], including footnote 95.

confirmed that consideration of activities is a mandatory aspect of decision-making under the Act.³⁴

42. In assessing whether the entity has engaged in serious wrongdoing, or any person has engaged in serious wrongdoing in connection with the entity, the main focus is on the activities of the entity. However activities are also relevant in the assessment of the entity's purposes.
43. While activities are not to be elevated to purposes,³⁵ 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;³⁶
 - whether the entity is acting for an inferred or unstated non-charitable purpose;³⁷
 - whether the entity's purposes are providing benefit to the public;³⁸ and
 - whether a non-charitable purpose is within the savings provision at section 5(3) of the Act.³⁹
44. 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.⁴⁰

C.5 Characterisation of an entity's purposes

45. Once an entity's purposes are established as a matter of fact, the question whether they are charitable is a question of law.⁴¹ The Board is bound to apply the law as declared by the courts and legislature, and adopted by the Act.

³⁴ *Greenpeace* SC at [14], See also the approach taken in the High Court in *CDC* at [29], [32], [44], [45] - [57], [67], [84] - [92]; *QLCHT* at [57] - [67]; *Grand Lodge* at [59], [71]; *Computer Society* at [35] - [39], [60] and [68]; *Greenpeace, HC* at [75].

³⁵ 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*").

³⁶ See *Professional Engineers* at 575 (Tipping J).

³⁷ *Greenpeace* SC at [14] "The purposes of an entity may be expressed in its statement of objects or may be inferred from the activities it undertakes, as s 18(3) of the Charities Act now makes clear". Refer also to *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).

³⁸ See for example *Glasgow Police Athletic Association*; *CDC* at [29], [32], [44], [45] - [57], [67], [84] - [92]; *QLCHT* at [57] - [67]; *Grand Lodge* at [59], [71]; *Computer Society* at [35] - [39], [60] and [68].

³⁹ 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.

⁴⁰ G E Dal Pont *Law of Charity* (LexisNexis Butterworth, Australia, 2010) ("*Dal Pont*") at [2.12], [13.19], [13.20].

46. 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.⁴² Similarly, the subjective intentions of the individuals involved in a charity do not establish its charitable status.⁴³

D. The Charities Registration Board's Analysis

47. The Board has reviewed the information obtained by Charities Services in the course of the investigation, and considers that it shows a pattern of the actions mentioned in the Act's definition of serious wrongdoing. Specifically, the Board considers the decisions of Robert Wickham (as director of the Company), and the Company (as trustee of the Trust), to engage in related party transactions were grossly negligent and constituted gross mismanagement under the Act.
48. The Board considers the decisions to offer loans at interest lower than market rates to related parties was not for the benefit of the Trust. The consequent losses made by the Trust and its lack of liquid assets to pursue the Trust's charitable purposes, demonstrates that decisions were not made in the best interests of the Trust.
49. The Board considers that Robert Wickham used Trust Funds for the benefit of related parties, and in doing so, breached his duty to the Company, the Company's duties as trustee to the Trust and the conflict of interest provisions in the Trust Deed. The Board considers that these actions are sufficient to establish that the person has engaged in serious wrongdoing.
50. Further, the Board considers the Trust does not qualify for registration, as the benefits to related parties constitute a non-charitable independent purpose of the Trust.

D.1. Serious wrongdoing

D.1.1 Failure to meet responsibilities of being a Trustee and Director

51. The Board considers the related party transactions demonstrate the Company did not meet its responsibilities as a trustee, and that Robert Wickham as director

⁴¹ *Molloy* at 693.

⁴² *M K Hunt Foundation Ltd v Commissioner of Inland Revenue* [1961] NZLR 405 at 407; *CDC* at [56].

⁴³ *Dal Pont* at [13.18], and see also the discussion at [2.8] – [2.11]. See for example *Latimer, PC* "whether the purposes of the trust are charitable does not depend on the subjective intentions or motives of the settlor, but on the legal effect of the language he has used. The question is not, what was the settlor's purpose in establishing the trust? But, what are the purposes for which trust money may be applied?"; *Molloy* at 693; *Keren Kayemeth Le Jisroel Ltd v Inland Revenue Commissioners* [1932] AC 650 at 657 (Lord Tomlin), 661 (Lord Macmillan); *Oldham* at 251 (Lightman J).

of the Company failed to meet his responsibilities as a director under the Companies Act 1993. Specifically, as a director of the Company, Robert Wickham approved investments to benefit the related parties, which either ended in losses or returns at below market rates.⁴⁴ The Board considers these investments were not prudent, taking into account the relevant factors prescribed by case law and statute, and constitute a breach of the duty of loyalty to the Trust.

Who owed the fiduciary duty to the Trust

52. The Board notes that although Robert Wickham was not always the director of the Company, Robert Wickham has been the sole director for most of the Trust's existence and during the periods he was not a director, he still retained control over the investment decisions of the Trust. Under section 126(1)(b)(i) of the Companies Act 1993, a person may be deemed to be a director when they are in a position to influence the decisions of the director of a company.⁴⁵
53. The Board considers Robert Wickham has a fiduciary duty of loyalty to the Trust, as effective director of the Company, that was not extinguished during the periods of time other directors were appointed.⁴⁶

Breach of duty to invest property prudently

54. Section 13B of the Trustee Act 1956 requires trustees investing trust property to exercise the care, diligence and skill that a prudent person of business would exercise in managing the affairs of others. Although the court may extend a margin of tolerance where trustees possess relevant business experience, this is a fiduciary duty and thus carries a higher duty than an ordinary business person managing their own affairs.⁴⁷
55. The Board does not consider the related party transaction's interest was set in a manner to ensure that at least market value was paid, taking into account the lack of security on the loans.⁴⁸ The losses incurred by the Trust over the three years 2007 to 2009, and the related parties inability to pay back the loans⁴⁹ is

⁴⁴ See para 24 above.

⁴⁵ A director may include a person in accordance with whose directions or instructions a person occupying the position of director may be required or is accustomed to act. In other words a person may be deemed to be a director when they are in a position to influence the decisions of the director of a company: *Companies Act 1993*, section 126.

⁴⁶ The Board does not consider this is a matter of lifting the corporate veil, rather is a matter of proper interpretation of the Trust Deed and section 126(1)(b)(i) of the *Companies Act 1993*; following the approach of the Court of Appeal in *Spencer v Spencer* [2014] 1 NZLR 190 at [94]; see also the assessment of the controlling force of the Trust in *Bridgcorl Ltd (in receivership and in liq) v Nielsen* [2013] NZHC 1848.

⁴⁷ *Re Estate of PJH White* (High Court New Plymouth, CIV-2003-443-24).

⁴⁸ See above at para 24.

⁴⁹ Email of 05 May 2014.

further evidence of the unreasonable risk the Trust assumed while providing a benefit to the related parties.

Breach of duty as to act in best interest of Company

56. Section 131 of the Companies Act provides that a director when exercising powers or performing duties must act in good faith and in what the director believes to be the best interests of the company. The Board considers this requires the director to not agree, or cause or allow, the business of the trustee company to be carried on in a manner likely to create substantial risk of serious loss to the Trust.
57. The lack of security on loans and consequent losses on some investments to the Trust confirms Robert Wickham took significant risks with Trust assets, for the benefit of related parties. The Board considers in doing so, he put the interests of the related parties ahead of the interests of the Trust, and did not act in the best interest of the Trust.
58. The Board considers Robert Wickham in his position as director of the Company, dealt with the Trust's property for the interest of the related parties, rather than for the benefit of the Trust, and thus neglected his fiduciary duties as a director of the Company.

Breach of duty of loyalty to the Trust

59. It is an established position of equity that a person in a fiduciary position is not allowed to put himself or herself in a position where his or her interest and duty conflict.⁵⁰ The test is whether the reasonable person, taking into account the relevant facts and circumstances of the specific case, would think there is a real, sensible possibility of conflict.⁵¹ Although a trustee may be employed by the Trust if expressly permitted by the deed to do so, the courts will enforce the fiduciary duty of trustees not to profit and will construe such charging clauses strictly against trustees seeking to rely on them.⁵²
60. Where a debt is owed to a trust, trustees are under an obligation to at least consider whether the debt can be recovered.⁵³ The onus of proof is on the trustee to establish why a debt has not been called.⁵⁴ The Trust has demonstrated the related parties inability to pay back the loans at present. However it cannot account for the intervening period where the Trust continued to incur investment losses for the benefit of the related parties and did not take reasonable steps to recover the debt from the related parties.

⁵⁰ *Bray v Ford* [1896] AC 44; see *Collinge v Kyd* [2005] 1 NZLR 847.

⁵¹ *Boardman v Phipps* [1966] 3 All ER 712 (HL).

⁵² *Spencer v Spencer* [2014] 1 NZLR 190 at [90-91].

⁵³ *Spencer v Spencer* [2014] 1 NZLR 190 at [70]

⁵⁴ *Spencer v Spencer* [2014] 1 NZLR 190 at [56].

61. The Board considers Robert Wickham breached the fundamental duty to act in the best interest of the Trust, and instead acted for the benefit of the related parties.
62. The Board considers the breaches of duties by Robert Wickham as director of the Company, and the Company as trustee of the Trust constitute gross negligence and gross mismanagement of the Trust's funds, and thus qualifies as serious wrongdoing under the Act.

D.1.2 Failure to follow the Trust's rules

63. The Board considers there has been a failure of the Company as trustee of the Trust and Robert Wickham as director of the Company to operate in accordance with the Trust Deed. Despite the deed providing that any person in a position of influence should not influence the payment of any income to a related party, the Board is of the view that Robert Wickham used his position of influence to benefit related parties.
64. As already noted, the Trust offered loans at a level below market expectation for transactions of similar nature to the related parties.
65. As director and deemed director of the Company, Robert Wickham, was restricted from influencing the Trust, in relation to transactions with entities he had an interest in, while he held that position of influence as defined in clause 16.1.⁵⁵
66. Robert Wickham influenced decisions in relation to entities he had an interest in, and thus contravened the terms of clause 16.1 of the trust deed. In addition, as the related parties benefited from the interest rates being below market rates, he also contravened the terms of clause 4.5 of the trust deed.⁵⁶

D.1.3 The Trust's other submissions

67. The Trust submitted Robert Wickham did not perceive a conflict of interest in his interactions with the Trust.⁵⁷ The Board does not consider he could be said to reasonably hold this position, given the strong connection between Robert Wickham and the related parties.⁵⁸ Thus, the Board does not accept the contention of the Trust that Robert Wickham was not aware of the conflict, and considers he acted in knowledge of his conflict.
68. Further, in responding to Charities Services' questions, the Trust indicated the accountant Richard Spicer was responsible for "direct[ing] the trust's finances."⁵⁹

⁵⁵ See para 8 above.

⁵⁶ See para 7 above.

⁵⁷ Response to S51 notice, received by email on 8 Feb 2013.

⁵⁸ See para 21 above.

⁵⁹ Trust's letter of 26 March 2013.

In the interview, however Robert Wickham confirmed he was involved in all decision making regarding the projects the Trust invested in.⁶⁰

69. Making unsecured loans on the recommendation of an independent, appropriately qualified person will not itself give rise to a breach of Trust.⁶¹ However trustees will be held responsible for any negligence in choosing agents, fixing and enforcing the terms on which they were engaged, and taking reasonable steps to require action to remedy breaches.⁶²
70. Section 138 of the Companies Act permits a director to rely on a professional advisors expertise, however this does not relieve the director from the obligation to check on the competence of a delegate.⁶³ In any case, Robert Wickham has confirmed he was involved in all stages in the decision making.
71. As addressed above, the Board does not consider as director of the Company, Robert Wickham took appropriate steps to ensure the related party transactions were reasonable, and thus breached his duty of loyalty to the Company and Trust.
72. The Trust has submitted it intends to adopt more appropriate practices in the future,⁶⁴ however the Board does not consider this is determinative in this case. The Board considers the investments in related parties constitute a pattern of behaviour, rather than an isolated occurrence. Further, the loans to related parties remain the most significant asset of the Trust and the related parties do not have the capacity to pay them back.⁶⁵

D.1.4 Summary

73. The Board considers that the Company and Robert Wickham have engaged in serious wrongdoing in connection with the Trust by:
 - a. Acting in breach of its/his duties as trustee and director in a way that is grossly negligent and constitutes gross mismanagement; and
 - b. Acting in breach of the Trust Deed by influencing transactions that provided benefit to related parties.
74. The Board does not consider Robert Wickham was justified in relying on the advice of Richard Spicer and did not take adequate steps to ensure any investments in the related parties were reasonable and at arms length.

⁶⁰ Stated by Robert Wickham in his interview of 24 July 2013.

⁶¹ Section 13N of the Trustee Act 1957.

⁶² *Steel v Wellcome Custodian Trustees Ltd* [1988] 1 WLR 167.

⁶³ *R v Graham* [2012] NZHC 265 at [34].

⁶⁴ Letter of 9 May 2014.

⁶⁵ See above para 16,22 and 25.

75. The Board considers the scale, length of time and nature of the wrongdoing, and the failure to make restitution⁶⁶ is sufficiently serious to justify deregistration.

D.2. Charitable purpose

76. Further, the Board considers that the Trust does not qualify for registration, because it has an unstated non-charitable purpose to operate for the benefit of related parties.

77. The case-law supports the proposition that, while activities are not elevated to purposes, an entity's activities may demonstrate that it is operating for an unstated purpose.⁶⁷

78. As above, the Board considers that the activities of the Company and Robert Wickham in making loans to related parties confer significant private benefits on these parties. These activities are a significant portion of the Trust's activity such that it is an independent purpose of the Trust.

79. It is common for a charitable entity to invest to raise funds, and this will not usually confer private benefits. However as the loans were unsecured and were issued on terms that were better than the then market rates, and later resulted in losses to the Trust, the Board considers the beneficiary of the activity was the related parties. Post registration the Trust's only contribution to its charitable activity has been donations of \$11,392.⁶⁸ The Trust's submissions regarding a substantial contribution to the Kiwi Can programme were not considered relevant, as this had taken place prior to registration, and thus did not detract from the private benefits provided during the period of registration.

80. The Trust's purpose to benefit the related parties is a non-charitable purpose. The conferral of private pecuniary profit is not a valid charitable purpose.⁶⁹

⁶⁶ See above para 26.

⁶⁷ *Greenpeace, SC* at [14].

⁶⁸ See para 19 above.

⁶⁹ See for example: *Inland Revenue Commissioner v Glasgow Police Athletic Association* [1953] AC 380 ("*Glasgow Police Athletic Association*") at 396 (holding that the Association was not charitable because the association had a purpose to provide recreation to its members that was not merely incidental to the charitable purpose, promotion of efficiency of the police force); *IRC v Oldham Training and Enterprise Council* (1996) 69 TC 231 ("*Oldham*") at 251 (holding that the Council did not qualify for charitable status because its purposes conferred freedom to provide private benefits on individual for-private-profit enterprises); *Institution of Professional Engineers New Zealand Inc v Commissioner of Inland Revenue* [1992] 1 NZLR 570 ("*IPENZ*") at 578 – 580 and 583 (holding that the Institution's provision of professional benefits to members was not incidental to advancement of education for the public benefit); *Education New Zealand Trust* at [35] – [46] (holding that Trust's marketing of New Zealand education providers was not exclusively charitable where 30% of the providers operated for-private-profit); *Canterbury Development Corporation v Charities Commission* HC WN CIV 2009-485-2133, 18 March 2010 ("*CDC*") at [45] – [67] (holding that it was a central purpose of the Corporation to promote individual businesses to make them more profitable, and this was not incidental to advancing a charitable

81. Further, the Trust's non-charitable purpose to promote private benefits constitutes a significant proportion of the Trust's overall endeavour.⁷⁰ This purpose is a pervasive purpose of the Trust that cannot realistically be considered ancillary, subordinate or incidental to the Trust's charitable purposes.⁷¹
82. The Board considers that the Trust's non-charitable purpose to provide private benefits do not come within the savings provision at section 5(3) of the Act.

E. Public interest

83. 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.
84. The Trust has submitted that deregistration will prevent it achieving its charitable purposes, noting the genuine need for those services in the community.⁷²
85. Section 10(h) and (i) 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, and inquire into conduct that constitutes serious wrongdoing in connection with a charitable entity. 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 do not meet the essential requirements for registration and are involved in serious wrongdoing remain on the register.
86. Further, the Board considers the Trust has not demonstrated its ongoing capacity to achieve its charitable purposes, and remains limited by its transactions with the related parties as the Trust failed to meet the restitution option provided by Charities Services.
87. 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 and promote the effective use of charitable resources.

purpose); *New Zealand Computer Society Inc v Charities Commission* HC WN CIV 2010-485-924, 28 February 2011 ("*Computer Society*") at [68] (holding that the Society's provision of professional benefits to members was not incidental to advancement of information technology as a discipline for public benefit); *Queenstown Lakes* at [51] - [68] (holding that the Trust's purpose conferred a private benefit (assistance in meeting housing costs) on individuals, other than as a means to advance a charitable purpose). For further recognition of the principle, see *The Plumbers, Gasfitters and Drainlayers Board* [2013] NZHC 1986 ("*Plumbers*") at [49]-[53].

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See above para 22.

Under Section 5(3) and (4) of the Act.

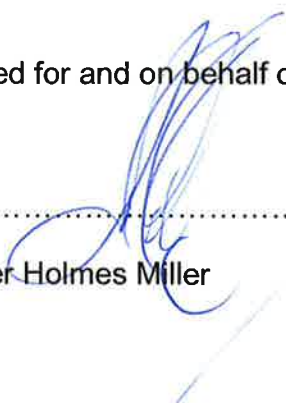
The Trust's email of 9 May 2014.

F. Determination

- 88. The Board determines that person(s) in connection with the Trust have engaged in serious wrongdoing as defined by section 4 of the Act. The grounds for removal under section 32(1)(e) of the Act are satisfied in relation to the Trust.
- 89. In addition, the Board determines that the Trust 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 has an independent unstated non-charitable purpose to promote the private interests of the related parties. The scale and the length of time for which the benefits were provided to the related parties suggests that the benefits were more than incidental and therefore could not be exempted under section 5(3) of the Act. The grounds for removal under section 32(1)(a) of the Act are satisfied in relation to the Trust.
- 90. The Board considers it is in the public interest to deregister the Trust.
- 91. The decision of the Board is therefore to remove the Trust from the register, pursuant to section 31 of the Act, with effect from 09 May 2015.

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


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Roger Holmes Miller

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Date