

Registration decision: Ashburton Enterprise Agency

The facts

1. The Ashburton Enterprise Agency (the Applicant) was established as a trust on 29 November 1994. The trustees were incorporated as a board under the Charitable Trusts Act 1957 on 7 December 1994.
2. The Applicant applied to the Charities Commission (the Commission) for registration as a charitable entity under the Charities Act 2005 (the Act) on 26 June 2008.
3. Appendix "A" of the Applicant's Trust Deed sets out the purposes of the trust, as follows:

"(1) OBJECTS AND PURPOSES

- *TO provide opportunities for the development of all types of private business enterprises in Mid-Canterbury by all lawful means including but not limited to*
 - (a) *promoting the establishment and/or development of new and existing businesses by providing*
 - *Education/Information services*
 - *Financial/Management programmes*
 - *Employment/Enterprise programmes*
 - *Resources, including financial resources by way of loans and grants*
 - (b) *Promoting Ashburton as a District favourable to the establishment or extension of businesses.*
 - (c) *Providing special additional programmes for those who are not business-wise with emphasis on the unemployed, beneficiaries and minority groups.*
- *TO seek accept and receive donations subsidies grants endowments gifts legacies loans and bequests either in money or in kind or partly in money and partly in kind for all or any of the purposes and objects of the Board and to carry out any specified trust attaching or relating to the same to the intent that donations grants etcetera made to the Board may be made for some purposes within the general objects of the Board specified in particular cases by the donor or donors, and lender or lenders.*
- *TO carry on any other object which may seem to the Board 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."*

4. The Commission analysed the application for registration and on 24 February 2009, sent the Applicant a notice advising that its application may be declined on the basis that its purposes were non-charitable.
5. On 5 June 2009, the Applicant, through its solicitor, responded to the notice submitting:
 - “the main and primary objects and purposes of the Trust [are] to benefit the community through economic development by way of promoting and developing new and existing businesses in the Mid-Canterbury region through a number of activities and programmes, and promoting Ashburton as a District favourable to the establishment or extension of businesses. The aim is to increase jobs, that is, reduce unemployment, increase income, promote and improve education and health.”
 - “Some main activities of the Trust include, promoting education by funding an employment website, establishing new programmes at the Polytechnic and local High School, running a Youth brokering programme, looking at steps to address the shortage of Health Practitioners in the region [in particular General Practitioners] and promoting agriculture. The Trust is also looking to develop an Agricultural training centre.”
 - “Any benefit from the objects and purposes of the Trust to a third party, such as business owners, is secondary to the main and paramount benefit to the community.”

The issues

6. The Commission must consider whether the Applicant meets all of the essential requirements for registration under the Act. In this case, the key issue for consideration is whether the Applicant is a trust of a kind in relation to which an amount of income is derived by the trustees in trust for charitable purposes, as required by section 13(1)(a) of the Act. In particular,
 - (a) whether the Applicant's purposes fall within the definition of charitable purpose in section 5(1) of the Act, and
 - (b) if any of the Applicant's purposes are non-charitable, whether those purposes are ancillary to a charitable purpose.

The law on charitable purpose

7. Under section 13(1)(a) of the Act, a trust qualifies for registration if it is of a kind in relation to which an amount of income is derived by the trustees in trust for charitable purposes.
8. In order to be a valid trust at law, a trust that is for charitable purposes must be exclusively charitable or it will be void for uncertainty.
9. 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, the advancement of religion, or any other matter beneficial to the community. In addition, to be charitable at law, a purpose must be for the public benefit.¹ This means that the purpose must be directed at benefiting the public or a sufficient section of the public.

10. Section 5(3) of the Act provides that any non-charitable purpose must be ancillary to a charitable purpose.
11. In considering an application for registration, section 18(3)(a) of the Act requires the Commission to have regard to:
 - (i) *the activities of the entity at the time at which the application was made; and*
 - (ii) *the proposed activities of the entity; and*
 - (iii) *any other information that it considers is relevant; ...*

Charities Commission's analysis

12. Clause 1(c) of the Trust Deed states that the Board holds "the Trust Fund and any income therefrom upon the trusts and limitations declared in this Deed and for the Objects and Purposes with Powers and Authorities set forth in Appendix "A" and shall administer the Trust Fund in accordance with the Rules appearing in Appendix "B".
13. The Commission has analysed the objects and purposes set out in Appendix "A" and considers that the Applicant's primary purpose is to "provide opportunities for the development of all types of private business enterprises in Mid-Canterbury", as set out in clause 1(a). The Applicant will do this through the activities outlined in clauses 1(a), 1(b) and 1(c). The Commission has therefore assessed whether the Applicant's primary purpose is charitable, and whether the activities support a charitable purpose. The Commission considers that the statements listed after clause 1(c) of Appendix "A" are powers or ancillary.
14. The Commission does not consider that the Applicant's purpose and the activities it undertakes will advance religion. Accordingly, they have been assessed in terms of "the relief of poverty", "advancement of education" and "other matters beneficial to the community".
15. Firstly, however, the Commission has considered the effect of clause 10 of the Trust Deed.

Effect of clause appearing to limit purposes

16. Clause 10 of the Trust Deed provides:

"the objects and/or purposes of this Trust are or shall be charitable and shall be deemed not to include or extend to any matter or thing which is or shall be held or determined to be non charitable and the objects and purposes and powers and authorities of the Board and the Rules contained in Appendix A and B respectively shall be restricted accordingly."

¹ See *Latimer v Commissioner of Inland Revenue* [2002] 3 NZLR 195.

17. In *McGovern v Attorney-General*², Slade J considered a similar clause that appeared to restrict the powers of the trustee to objects which were charitable according to the law of the United Kingdom. He concluded that the trusts could not be regarded as charitable and that the proviso could not enable the trusts declared by the deed to escape total invalidity.
18. The Commission does not consider that the inclusion of clause 10 provides conclusive evidence that the purposes that follow are in fact charitable. Before the Commission can register an applicant as a charitable entity, it must be satisfied that the entity meets all of the essential elements of registration set out in section 13 of the Act.

Relief of poverty

19. To be charitable under the relief of poverty, a purpose must be directed at people who are poor, in need, aged, or suffering genuine hardship, and provide relief.
20. The Commission considers that the activities in clause 1(c) may be charitable under the relief of poverty as this is aimed primarily at those who are in need, for example, the unemployed, beneficiaries and minority groups.
21. The purposes set out in clause 1, and the activities set out in clauses 1(a) and (b), however, are not aimed at relieving people in need and are therefore not charitable under the relief of poverty.

Advancement of education

22. In order for a purpose to advance education, it must provide some form of education and ensure that learning is passed on to others.
23. Activities such as establishing polytechnic and high school programmes, running a youth brokering programme, and developing an agricultural training centre are likely to be educational in nature. The activities undertaken by the Applicant under clause 1(c) are therefore likely to be charitable in terms of advancing education.
24. Activities undertaken by the Applicant under clause 1(a), however, are unlikely to amount to advancing education following the Court's decision in *Commissioners of Inland Revenue v Oldham Training and Enterprise Council*. In that case, the Court held:

[T]he second main object, namely promoting trade, commerce and enterprise, and the ancillary object, of providing support services and advice to and for new businesses, on any fair reading must extend to enabling Oldham TEC to promote the interests of individuals engaged in trade, commerce or enterprise and provide benefits and services to them ... Such efforts on the part of Oldham TEC may be intended to make the recipients more profitable and thereby, or otherwise, to improve

² [1982] 1 Ch 321, 343-344, 353.

*employment prospects in Oldham. But the existence of these objects, in so far as they confer freedom to provide such private benefits regardless of the motive or the likely beneficial consequences for employment, must disqualify Oldham TEC from having charitable status. The benefits to the community conferred by such activities are too remote [Emphasis added].*³

25. The activity set out in clause 1(b) appears to involve advertising or promoting a particular point of view, which is unlikely to amount to advancing information of educational value.

Other matters beneficial to the community

26. In order for a purpose to qualify as “any other matter beneficial to the community”, the purpose must be beneficial to the community and be within the spirit and intentment of the purposes set out in the Preamble to the Statute of Charitable Uses 1601 (Statute of Elizabeth).⁴

27. Not all organisations that have purposes that benefit the community will be charitable. The purposes must benefit the community in a way that the law regards as charitable. According to *Charity Law in Australia and New Zealand*:

*“ . . . it is not all objects of public utility that are charitable, for many things of public utility may be strictly matters of private right, although the public may indirectly receive a benefit from them.’ Nor are essentially economic or commercial objects within the spirit of the Preamble.”*⁵

28. The Commission does not consider that the Applicant’s stated purpose of providing “opportunities for the development of all types of private business” is within the spirit and intent of the preamble to the Statute of Elizabeth by being analogous to the purposes listed in the Preamble.

29. In addition, in order for a purpose to be regarded as “beneficial to the community”, the benefits must be to the community rather than to private individuals. Any private benefits arising from the Applicant’s activities must only be a means of achieving an ultimate public benefit and therefore be ancillary or incidental to it. It will not be a public benefit if the private benefits are an end in themselves.⁶ In addition, proof that public benefit will

³ 69 TC 231, 251.

⁴ *Re Jones* [1907] SALR 190, 201; *Williams Trustees v Inland Revenue Commissioners* [1947] AC 447, 455; *Scottish Burial Reform and Cremation Society v Glasgow Corporation* [1968] AC 138, 146-48; *Incorporated Council of Law Reporting (QLD) v Federal Commissioner of Taxation* (1971) 125 CLR 659, 667, 669; *Royal National Agricultural and Industrial Association v Chester* (1974) 48 ALJR 304, 305; *New Zealand Society of Accountants v Commissioner of Inland Revenue* [1986] 1 NZLR 147, 157; *Re Tennant* [1996] 2 NZLR 633, 638.

⁵ Gino Dal Pont, 2000, Oxford University Press, p 178; citing *Nightingale v Goulburn* (1847) 5 Hare 484, 490 and *Re Davis (deceased)* [1965] WAR 25, 28.

⁶ *Commissioners of Inland Revenue v Oldham Training and Enterprise Council* 69 TC 231; *Travel Just v Canada Revenue Agency* 2006 FCA 343 [2007] 1 CTC 294.

necessarily flow from each of the stated purposes is required, not merely a belief that it will or may occur.⁷

30. In its letter of 5 June 2009, the Applicant correctly identified that the promotion of industry and commerce has been found to be charitable under the fourth head. In support of this view, it has referred to *Inland Revenue Commissioners v Yorkshire Agricultural Society*,⁸ and *Commissioner of Inland Revenue v White and others and Attorney-General*.⁹

31. In *Inland Revenue Commissioners v Yorkshire Agricultural Society*, the improvement of agriculture was held to be charitable where it was for the benefit of the public at large. However, the promotion of agriculture for private profit or benefit will not be charitable.

32. In *Hadaway v Hadaway*, the court held:

*"The promotion of agriculture is a charitable purpose, because through it there is a benefit, direct or indirect, to the community at large: between a loan to an individual planter and any benefit to the community the gulf is too wide. If there is through it any indirect benefit to the community, it is too speculative."*¹⁰

33. In *Commissioners of Inland Revenue v White and Others and Attorney General* 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 stated:

*"The three cases which I have last mentioned seem to me to establish that 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."* [Emphasis added]¹¹

34. In that case, the court found that the purposes of the Association were capable of providing a public benefit and that any private benefit of individual craftsmen was not an object of the Association.

35. The Commission has also considered whether *Crystal Palace Trustees v Minister of Town and Country Planning*¹² and *Re Tennant*¹³ could assist the Applicant.

⁷ *Gilmour v Coats* (1949) AC 26; *Re Blyth* [1997] 2 Qd R 567, 582; *DV Bryant Trust Board v Hamilton City Council* [1997] 3 NZLR 342, 350.

⁸ [1928] 1 KB 611.

⁹ (1980) 55 TC 651.

¹⁰ [1955] 1 WLR 16, 20 (PC).

¹¹ (1980) 55 TC 651, 659-660.

¹² [1951] 1 Ch 132.

¹³ [1996] 2 NZLR 633.

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

*"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."*¹⁴

37. *Re Tennant* relates to a rural community and the provision of a creamery. In that case, the court applied other cases that had held agriculture generally to be charitable such as *Inland Revenue Commissioners v Yorkshire Agricultural Society*. Hammond J stated:

*"Obviously each case will turn on its own facts. I would not be prepared to say that there may not be cases which would fall on the other side of the line because of private profit making of some kind. But here the settlor was attempting to achieve for a **small new rural community** what would then have been central to the life of that community: a cluster complex of a school, public hall, church and creamery."* [Emphasis added]¹⁵

38. The Commission considers that the above cases are authority for the proposition that where economic development purposes are aimed at meeting specific community needs, these purposes may be charitable. However, in order for the promotion of industry and commerce generally to be charitable it must be for public benefit and not for the benefit of private individuals.

39. The Commission does not consider that the Ashburton area is an area which is in need of assistance because:

- the unemployment rate in this area is considerably lower than the rest of the country (2.2% compared with 5.1% for all of New Zealand); and
- the median income is the same as the rest of the country (\$24,400 compared with \$24,400 for all of New Zealand).¹⁶

40. The Commission has considered the Applicant's submission that any benefit from the objects and purposes of the Trust to a third party, such as business owners, is secondary to the main and paramount benefit to the community. However, given the clear wording of clause 1, "to provide opportunities for the development of all types of private business", the Commission does not consider that the private benefits to the current and future business owners in the Ashburton region can be considered ancillary to a public benefit.

¹⁴ [1951] 1 Ch 132,142.

¹⁵ [1996] 2 NZLR 633, 640.

¹⁶ <http://www.stats.govt.nz/census/census-outputs/quickstats/snapshotplace2.htm?id=2000063&tab=PopulationDwellings&type=ta&ParentID=>

41. In *Commissioners of Inland Revenue v Oldham Training and Enterprise Council* the court decided that the public requirement was not met because:

“...the existence of these objects, in so far as they confer freedom to provide such private benefits, regardless of the motive or the likely beneficial consequences for employment, must disqualify Oldham TEC from having charitable status. The benefits to the community conferred by such activities are too remote.”¹⁷

42. The Commission considers that the Applicant's purpose and activities provide private benefits to the current and future business owners in the Ashburton region, without regard to the consequences for employment or the Ashburton region. Any benefits conferred on the remainder of the community are too remote.

Conclusion

43. The Commission concludes that the activities undertaken under clause 1(c) of Appendix “A” may be charitable, but that the main purpose stated in clause 1 and the activities undertaken under clauses 1(a) and 1(b) are not charitable and do not provide sufficient public benefit.

Section 61B of the Charitable Trusts Act

44. In order to be a valid trust at law, a trust for charitable purposes must be exclusively charitable or it will be void for uncertainty. Section 61B of the Charitable Trusts Act 1957 however, can operate in two situations to “save” a trust that has both charitable and “non-charitable and invalid” purposes.
45. The first is where the entity's **stated purposes** include charitable and non-charitable purposes (in which case the non-charitable purposes may be “blue pencilled out”). The second is where the stated purposes are capable of both a charitable and a non-charitable **interpretation** and the primary thrust of the gift is considered to be charitable (in which case the purposes could be deemed to apply only in terms of the charitable interpretation).¹⁸
46. For the reasons set out above, the Commission considers that the Applicant's purpose, set out in clauses 1 of Appendix “A” of the Trust Deed is a non-charitable purpose. As there are no additional charitable purposes, it is not possible to “blue-pencil out” the non-charitable purposes to leave a charitable purpose.
47. In *Re Beckbessinger*, Tipping J held:

“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 have been applied for charitable purposes, s 61B can be used to save it. The testator must be shown to have had a substantially charitable mind but to have fallen foul of the law of uncertainty

¹⁷ 69 TC 231, 251.

¹⁸ *Re Ashton (deceased)* [1955] NZLR 192, 197; *Re Beckbessinger* [1993] 2 NZLR 362, 373.

*by including either actually or potentially a non-charitable element or purpose.*¹⁹

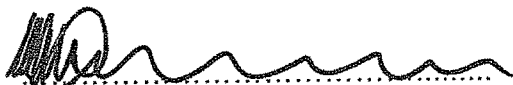
48. The Commission has analysed the wording of the Applicant's main purpose clause and information provided by the Applicant about its activities (as directed by section 18 of the Act). The Commission does not consider that these provide evidence of "a substantially charitable mind" with an intention to create a charitable trust but which was not conveyed by the drafting. Notwithstanding the inclusion of the words in clause 10 "the objects and/or purposes of this Trust are or shall be charitable and shall be deemed not to include or extend to any matter or thing which is or shall be held or determined to be non charitable", the Commission does not consider that the purposes indicate an intention to create a substantially charitable trust.
49. On these bases, the Commission considers that the Applicant's purpose is not substantially charitable and therefore section 61B of the Charitable Trusts Act cannot operate to validate the trust.

Charities Commission's determination

50. The finding of the Commission is that the Applicant has failed to meet an essential requirement for registration as a charitable entity in that the Applicant is not a trust of a kind in relation to which an amount of income is derived by the trustees in trust for charitable purposes, as required by section 13(1)(a) of the Act.

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

Signed for and on behalf of the Charities Commission



Trevor Garrett
Chief Executive

24/8/09
Date