

Registration Decision: CITWATCH Charitable Society Incorporated

The facts

1. CITWATCH Charitable Society Incorporated (“the Applicant”) was incorporated as a board under the *Charitable Trusts Act 1957* on 21 January 2003. The entity applied for registration with the Charities Commission (“the Commission”) on 20 June 2008.
2. The Applicant’s purposes are set out in clause 3 of its rules:
 - 3 *The purposes of the society are as follows:*
 - (a) *To gather information of a public interest and to distribute and display this information on an Internet website and any other medium, and in doing so to*
 - (1) *Provide information to allow the community to make informed decisions and to form informed opinions on matters of public interest;*
 - (2) *Promote the general welfare of the community through education on issues of public interest;*
 - (3) *Enhance democracy through the dissemination of information on issues of public interest;*
 - (4) *Assist in the protection of the environment through the dissemination of information on issues of public interest.*
 - (b) *The society shall be secular and shall not be aligned to any political party.*
 - (c) *Notwithstanding anything in this deed the objects shall always be confined to purposes within New Zealand which are charitable according to the laws of New Zealand*
3. On 2 February 2009, the Commission sent the Applicant a notice that may lead to decline stating that the Applicant did not meet the requirements for the **trustees of a trust** under section 13(1)(a) of the *Charities Act 2005* (“the Act”). The basis for this view was that the Applicant’s website¹ appeared to be providing information that was opinion-based and lacking in objectivity, and therefore this was unlikely to be a charitable purpose.
4. On 1 September 2009, the Applicant responded making the following submissions:
 - *The primary task of CITWATCH ... is to provide a free website to display information of a public interest and that the website is open to the public to make contributions. Further, the information is to be*

¹ <http://www.citwatch.org.nz>.

displayed in an orderly manner, it is to be within the law and have an irreproachable moral standard.

- *The people and organisations from the general public who provide the content of the CITWATCH website have opinions and all such material must have a named author and contact address.*
- *A subsidiary CITWATCH objective is to display information which is easily accessed and navigated and is brief in order to enhance educational possibilities for the public.*
- *Although some of the material on CITWATCH currently only concerns the local Hastings area, ... systems need to be trialled on a small sample before being implemented over a larger area. However the administrative problems rate payers have encountered with Hastings area council administration are common across the country.*
- *CITWATCH is being developed to provide a free educational forum where the public can exchange opinions and accumulate knowledge on subjects which will contribute to the advancement of society.*
- *Its intention is to display philosophies, political positions, concepts and general information in a manner that helps the public form their own conclusions.*
- *By assembling varying viewpoints in an orderly manner for comparison rational conclusions are more likely to be derived.*
- *All matters in connection with the human condition have a political component, the air we breathe, the practice of religion and freedom of speech for example are all governed by politics.*
- *We maintain that all the material on the CITWATCH website is objective ... we do not consider it is the Charities Commission's place to make subjective decisions on what it considers is, or is not objective, since that is tantamount to censorship. ... Even at the present time society has not reached a general state of enlightenment, as the recent world financial collapse demonstrates. Thinking people predicted financial collapse due to cavalier financial institutions but the 'establishment' trampled the wisdom of the minority under foot.*

5. The Registration and Monitoring Committee considered the Applicant's application at its meeting on 30 November 2009. The Committee recommended that a letter be sent to the Applicant asking for evidence that a trust had been established and stating that if no documentation was provided, the Commission would proceed on the basis that the Applicant was a society incorporated under the *Charitable Trusts Act 1957*.
6. A second notice that may lead to a decline was sent to the Applicant on 15 December 2009 stating that the Applicant did not meet the requirements for a **society or institution** under section 13(1)(b) of the Act because it did not have charitable purposes. The Applicant was invited to provide evidence to indicate that it was in fact a trust.

7. The Applicant responded on 31 May 2010. It did not offer any evidence that was a trust, but made the following submissions:

CITWATCH is operated by volunteers for the benefit of the whole community, no financial rewards are generated by its members and none are contemplated as in accordance with CITWATCH's constitution. Hence, CITWATCH certainly comes within the commonly accepted understanding of the word charity. ...

CITWATCH activities:

- (1) *CITWATCH is used to present ideas in an orderly manner to facilitate learning. These ideas will traverse the whole range of matters encompassing human thought, philosophy, religion, conservation and the application of democracy for example.*
- (2) *CITWATCH is used by activist groups who write to public or private bodies, (at this stage mostly public bodies, e.g. city councils) to discuss governance issues which concern the public. A major psychological factor is at play which encourages the generation of carefully considered and composed responses from publicly accountable bodies when they know their responses will be published on a website for the public to view.*
- (3) *CITWATCH is also used as a directory for other activist organisations – there is a brief explanation of the organisations' activities and its contact details are shown.*
- (4) *CITWATCH provides an email service whereby its administrator assists with communication between individuals and organisations as a result of the general flow of enquiries precipitated by the activities of CITWATCH.*

All of the above activities provide a public benefit. ...

Essentially, CITWATCH acts as the eyes and ears of the local councils. Some of our members belong to other groups such as U3A (University of the Third Age) where citizens concerns are aired in discussion groups and complaints can be referred to CITWATCH for action. ...

Gaining knowledge is part of the teaching process and people can be self-taught. Most accomplished artists are self-taught, Rembrandt was mostly self-taught. ... Intelligent people know how to hunt around for themselves to learn and that is where the internet is an astounding technology allowing people to find information quickly. CITWATCH's aim is to present information in a way that is easily absorbed. ...

CITWATCH'S purposes:

... CITWATCH is not a charity in the sense of providing 'soup kitchens', (metaphorically speaking). CITWATCH activities and philosophy are based on the dissemination of knowledge. Since knowledge is the key ingredient in liberating and empowering people to maintain themselves and to further the beneficial interests of society. "Soup kitchens' are a last resort, CITWATCH's view is that much can be done to relieve poverty before a last resort is necessary.

Building a church and recruiting followers for prayer and the singing of hymns is a form of advancement of religion. However the fundamental

ingredient for the advancement of religion is to enquire into the beliefs of a religion and to put them to the test of rationality and truth. Christianity is riddled, according to some observers and devotees, with irrational notions and these notions have been debated since the birth of Christianity. CITWATCH is advancing religion by helping society define religious beliefs.

Advancement of education:

The study of all subjects has educational value. It is totally subjective for someone or some organisation to say what is or what is not of educational value. It is not the Commission's place to dictate what is of education value. It is for the public or individual to decide what is of educational value.

... opinion is a material part of education, indeed it is education.

... To quote an act from the early 17th century has no relevance to modern conditions. The law in the 17th century was patronising and was used by the wealthy ruling class to control the mass of people, just as religion has been used for political control.

... Precedent has its place in law but the slavish pursuit of precedent produces iniquitous outcomes and slows the advancement of a fair and informed society.

... It is our understanding that the Charities Act 2005 was passed to disenfranchise organisations that were in reality commercial organisations. CITWATCH clearly does not come into that category ... CITWATCH is in its formative years and is developing methods and models that can be replicated elsewhere by others. Size of a charitable organisation should not be a factor. ...

8. Attached to the Applicant's submission was a letter to the Hastings District Council from an organisation calling itself CitAct and two letters to Citizens Action from the Hastings District Council. All three letters referred to uneven surfaces on footpaths in Havelock North.

The issues

9. The Commission must first consider whether the Applicant is a trust or a society. Secondly, the Committee must consider whether the Applicant meets all of the essential requirements for registration under the Act.

The law on charitable purposes

10. Section 13(1) of the Act states:

An entity qualifies for registration as a charitable entity if,—

- (a) in the case of the trustees of a trust, the trust is of a kind in relation to which an amount of income is derived by the trustees in trust for charitable purposes; and*
- (b) in the case of a society or an institution, the society or institution—*

- (i) *is established and maintained exclusively for charitable purposes; and*
- (ii) *is not carried on for the private pecuniary profit of any individual; and*
- (c) *the entity has a name that complies with section 15; and*
- (d) *all of the officers of the entity are qualified to be officers of a charitable entity under section 16.*

11. In order for a purpose to be charitable it must fall within one of the four charitable purposes set out in section 5(1) of the Act and it must provide a public benefit. Section 5(1) of the Act states:

... charitable purpose includes 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.

12. In the assessment of charitable purpose, section 18(3)(a) of the Act requires the Commission to have regard to the applicant's activities at the time the application is made, the applicant's proposed activities, and any other information that the Commission considers relevant.

Commission's analysis

Is the Applicant a trust or a society?

13. The Applicant has been incorporated as a board under the *Charitable Trusts Act 1957*. Sections 7 and 8 of the *Charitable Trusts Act 1957* permit both the trustees of trusts and societies to apply to the Registrar to be incorporated as a board:

7 Trustees may apply for incorporation

- (1) *The trustees of any trust which is exclusively or principally for charitable purposes may apply to the Registrar in accordance with this Part of this Act for the incorporation of the trustees as a Board under this Part of this Act.*
- (2) *No such application shall be made by any trustees if the trustees are already incorporated under any other Act or otherwise, and no such application shall be made by the trustees for the general purposes of any society—*
 - (a) *If the society is itself incorporated under this Part of this Act or under any other Act or otherwise:*
 - (b) *Unless they are authorised to do so by the society.*
- (3) *Every such application for incorporation shall be in form 1 in Schedule 2 to this Act, or to the like effect, and shall be signed by a majority of the trustees.*

8 **Society may apply for incorporation**

- (1) *Any society which exists exclusively or principally for charitable purposes may apply to the Registrar in accordance with this Part of this Act for the incorporation of the society as a Board under this Part of this Act.*
- (2) *No such application shall be made by any society—*
 - (a) *If the society is already incorporated under any other Act or otherwise:*
 - (b) *If the trustees for the general purposes of the society are themselves incorporated under this Part of this Act or any other Act or otherwise:*
 - (c) *Unless the application is authorised by the society.*
- (3) *Every such application for incorporation shall be in form 2 of Schedule 2 to this Act, or to the like effect, and shall be signed by not less than 5 members of the society or by a majority of the trustees of the society.*

14. In *J H Tamihere & Ors v E Taumaunu & Ors*,² Heath J made a distinction between **trusts** incorporated as a board under section 7 of the *Charitable Trusts Act 1957* and **societies** incorporated under section 8 of the *Charitable Trusts Act 1957*. A trust incorporated under section 7 does not have members. It “is not in law an organisation structured along democratic lines, nor is it susceptible to democratic processes.”³ On the other hand, a society incorporated under section 8 has members. It “is an organisation structured along democratic lines, and is susceptible to democratic processes”.⁴
15. The Commission notes that the Applicant indicated on its application form that it was a trust and its rules document is described as a deed of trust.
16. However:
 - The Applicant’s name is “CITWATCH Charitable **Society** Incorporated”
 - The rules document refers to a wish to establish a charitable **society** (Recital A)
 - The interpretation section and clauses 2, 4, 6, 8, 9, 10, 13, 14, 15, 16 relate to membership of the society. For example, clause 4.2 provides that “any person seeking membership for the Society shall make application in writing in the form prescribed by the Society at Annual General Meeting”, section 16 provides for the expulsion of members of the Society, and section 17 provides for the alteration of the rules of the

² HC AK CIV 2005-404-6958 [21 December 2005] at para 33. See also Mark von Dadelszen, *Law of Societies in New Zealand*, 2nd Ed, Wellington, LexisNexis, 2009 at 257, para 13.1.3.

³ *J H Tamihere & Ors v E Taumaunu & Ors*, HC AK CIV 2005-404-6958 [21 December 2005] at para 33.

⁴ *J H Tamihere & Ors v E Taumaunu & Ors*, HC AK CIV 2005-404-6958 [21 December 2005] at para 33.

society to be by a resolution passed by a "unanimous vote at a general meeting".

- Board members are elected for a term of one year, rather than appointed to the indefinite position of trustee.

17. The Commission wrote to the Applicant on 15 December 2009 indicating that it considered the Applicant to be a society incorporated under the *Charitable Trusts Act 1957*. The Applicant was invited to provide evidence to indicate that it was in fact a trust, but the Applicant has not provided any evidence to indicate this.
18. For the reasons listed above the Commission concludes that the Applicant is a **society** incorporated as a board under the *Charitable Trusts Act 1957*.

Does the Applicant have exclusively charitable purposes?

19. The Commission has considered whether the Applicant's purposes in clause 3(a) could be charitable under the relief of poverty, the advancement of education, the advancement of religion, or other matters beneficial to the community. Firstly, however, the Commission has considered the effect of clause 3(c).

20. Clause 3(c) of the Applicant's rules states:

Notwithstanding anything in this deed the objects shall always be confined to purposes within New Zealand which are charitable according to the laws of New Zealand.

21. This raises the question of whether such a clause precludes purposes and activities that are not in fact charitable.

22. In *M K Hunt Foundation Ltd v Commissioner of Inland Revenue*,⁵ Hardie Boys J cited with approval the comments Lawrence LJ made in *Keren Kayemeth le Jisroel Ltd v Commissioners of Inland Revenue*.⁶ In that case, the statute there under consideration contained the phrase 'for charitable purposes only', and Lawrence LJ said in the Court of Appeal that "it is not enough that the purposes described in the memorandum should include charitable purposes. The memorandum must be confined to those purposes".⁷ Hardie Boys J further wrote that

*... in so holding, Lawrence L.J. makes it clear in his judgment that he had in mind, not merely the phrase 'charitable purposes only', but also the cases which show that non-charitable objects will prevent recognition of the body in question as a charitable trust.*⁸

⁵ [1961] NZLR 405 at 407.

⁶ [1932] 2 KB 465.

⁷ [1931] 2 KB 465 at 481.

⁸ [1961] NZLR 405 at 408.

23. In *Commissioner of Inland Revenue v White*,⁹ the Court considered limitations in the constitution of the Clerkenwell Green Association. The court noted that the constitution showed a clear intention that this object was exclusively charitable but went on to say:

*The charitable intention, clear as it is, is not conclusive in establishing charitable status, however, because clause 2(b) limits the field in which the charitable intention is to be effectuated. If the objects specified in clause 2(b) are of such a nature that there is not charitable purpose which will assist their achievement, then there is no charitable purposes within the specified field and the Association would not be entitled to registration as a charity. In other words, the mere insertion of the word "charitable" in clause 2(b) is not by itself enough to establish that the objects of the Association are charitable.*¹⁰

24. Finally, in *Canterbury Development Corporation v Charities Commission*,¹¹ Young J stated that "the mere fact that the constitution says that CDC's objects are charitable does not make CDC charitable although such a declaration is relevant in assessing whether they are".¹² The judge went on to say that "in the end the objects and operation of the organisations either support a charitable purpose or they do not."¹³ He concluded that they did not support a charitable purpose.
25. The Commission does not consider that the inclusion of clause 3(c) provides conclusive evidence that the preceding purposes are in fact charitable. Before it can register an applicant as a charitable entity, the Commission must be certain that the applicant meets all the essential elements of registration set out in section 13 of the Act.

Relief of poverty

26. 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.
27. "Poverty" is interpreted broadly in law and a person does not have to be destitute to qualify as "poor".¹⁴ People who are in need, aged, or who are suffering genuine financial hardship from a temporary or long-term change in their circumstances are likely to qualify for assistance. Generally, this will include anyone who does not have access to the normal things of life which most people take for granted.¹⁵

⁹ (1980) 55 TC 651.

¹⁰ (1980) 55 TC 651 at 653.

¹¹ HC WN CIV 2009-485-2133 [18 March 2010].

¹² HC WN CIV 2009-485-2133 [18 March 2010] at para 56.

¹³ HC WN CIV 2009-485-2133 [18 March 2010] at para 56.

¹⁴ *Re Bethel* (1971) 17 DLR (3d) 652 (Ont. CA); affirmed sub nom *Jones v Executive Officers of T Eaton & Co Ltd* (1973) 35 DLR (3d) 97 (SCC) referred to in *D V Bryant Trust Board v Hamilton City Council* [1997] 3 NZLR 342. See also *Re Pettit* [1988] 2 NZLR 513.

¹⁵ *Inland Revenue Commissioners v Baddeley* [1955] AC 572; [1955] 1 All ER 525, applied in *Re Pettit* [1988] 2 NZLR 513 and *Re Centrepoint Community Growth Trust* [2000] 2 NZLR 325 at 343.

28. To provide “relief”, the people who would benefit should have an identifiable need arising from their condition that requires alleviating and these people should have difficulty in alleviating that need from their own resources.¹⁶
29. Purposes that provide basic necessities, such as shelter, amenities and transport, where the beneficiaries of these necessities are recognised as being in need of them, have been upheld as charitable under the relief of poverty.¹⁷
30. In *Inland Revenue Commissioners v Baddeley*,¹⁸ Lord Reid had to respond to arguments on the part of the appellant that its purposes were charitable for the relief of poverty. He wrote:

I agree that poverty does not mean destitution and that the relief of poverty can go a good deal farther than supplying the bare necessities of life, but it cannot extend to supplying everything that one would like people to have for their own good. [...] The word ‘poverty’ is sometimes loosely or metaphorically used to mean lack of some thing other than money, but no one could say ‘relief of the poor’ if he meant to include relief of disabled people irrespective of their means.¹⁹

31. Jean Warburton has written that “where the intention to relieve poverty is not expressed, but there is a sufficient element of public benefit, the intention may be inferred from the nature or amount of the gift being such as to show that only poor persons would need it”.²⁰ Moreover, the Court will invalidate a gift the purpose of which extends beyond the relief of poverty.²¹
32. The Applicant’s purposes in clause 3(a) are:

To gather information of a public interest and to distribute and display this information on an Internet website and any other medium, and in doing so to

- (1) *Provide information to allow the community to make informed decisions and to form informed opinions on matters of public interest;*
- (2) *Promote the general welfare of the community through education on issues of public interest;*
- (3) *Enhance democracy through the dissemination of information on issues of public interest;*
- (4) *Assist in the protection of the environment through the dissemination of information on issues of public interest.*

¹⁶ *Joseph Rowntree Memorial Trust Housing Association Ltd v Attorney-General* [1983] Ch 159; [1983] 1 All ER 288. See also *D V Bryant Trust Board v Hamilton City Council* [1997] 3 NZLR 342.

¹⁷ *Flynn v Mamarika* (1996) 130 FLR 218 at 227-228 per Martin CJ.

¹⁸ [1955] AC 572 (HL).

¹⁹ [1955] AC 572 at 604, 607.

²⁰ *Tudor on Charities*, 9th ed, London, Sweet & Maxwell, 2003 at 38, para 2-010.

²¹ *Re Gwyon* [1930] 1 Ch 255; *Re Pieper (deceased)* [1951] VLR 42 at 44 per Smith J and *Re Blyth* [1997] 2 Qd R 567 at 581 per Thomas J.

33. In its letter dated 31 May 2010, the Applicant stated:

CITWATCH is not a charity in the sense of providing 'soup kitchens' (metaphorically speaking). CITWATCH activities and philosophy are based on the dissemination of knowledge. Since knowledge is the key ingredient in liberating and empowering people to maintain themselves and to further the beneficial interests of society. [sic] 'Soup kitchens' are a last resort, CITWATCH'S view is that much can be done to relieve poverty before a last resort is necessary . . .

CITWATCH can easily apply other categories to the work it does, for example, 'relief of the aged, impotent and poor people' covers the analysis CITWATCH plans to do on the inadequate state of New Zealand's rest homes and retirement villages.

34. The Commission does not consider that the purposes expressed in clause 3(a) show an intention to relieve poverty and the Applicant has not provided evidence that its activities will relieve poverty.

Advancement of religion

35. To advance religion, a purpose must:

- be for the benefit of a religion; and
- ensure a religious faith is passed on to others.

36. The relevant indicia of a religion was described by the High Court of Australia in *Church of New Faith v Commissioner of Pay-Roll Tax*:

The criteria of religion are twofold: first, belief in a supernatural Being, Thing or Principle; and second, the acceptance of canons of conduct in order to give effect to that belief, though canons of conduct which offend against ordinary laws are outside the area of any immunity, privilege or right conferred on the grounds of religion. Those criteria may vary in their comparative importance, and there may be a different intensity of belief or acceptance of canons of conduct among religions or among the adherents to a religion. The tenets of a religion may give primacy to one particular belief or to one particular canon of conduct. Variations in emphasis may distinguish one religion from other religions, but they are irrelevant to the determination of an individual's or group's freedom to profess and exercise the religion of his, or their, choices.²²

37. To "advance" religion, the faith must be passed on to others by promoting it, spreading its message or taking positive steps to sustain and increase the religious belief.

38. In *Centrepoint Community Growth Trust v CIR*,²³ the Court held that the trust was charitable as a religious organisation, applying the criteria described in the *Church of New Faith* case. In that case, Tompkins J cited

²² [1982-1983] 154 CLR 120 at 136, which was accepted and applied in New Zealand in *Centrepoint Community Growth Trust v Commissioner of Inland Revenue* [1985] 1 NZLR 673 at 695-697 per Tompkins J.

²³ [1985] 1 NZLR 673.

with approval the decision by Dillon J in *Barralet v Attorney General*²⁴ where it was stated:

*Religion as I see it, is concerned with man's relations with God, and ethics are concerned with man's relations with man. The two are not the same, and are not made the same by sincere inquiry into the question, what is God? If reason leads people not to accept Christianity or any known religion, but they do believe in the excellence of quality such as truth, beauty and love, or believed in the Platonic concept of the ideal, their beliefs may be to them the equivalent of a religion, but viewed objectively they are not religion.*²⁵

39. In its submission dated 31 May 2010, the Applicant stated:

Building a church and recruiting followers for prayer and the signing of hymns is a form of advancement of religion. However the fundamental ingredient for the advancement of religion is to enquire into the beliefs of a religion and to put them to the test of rationality and truth. Christianity is riddled, according to some observers and devotees, with irrational notions and these notions have been debated since the birth of Christianity. CITWATCH is advancing religion by helping society define religious beliefs.

40. The Commission does not consider that the purposes expressed in clause 3(a) show an intention to advance religion and the Applicant has not provided evidence that its activities will advance religion. At best, the Applicant's comments support the view that it is advancing ethical or philosophical questioning about religion, which as outlined above the Court in *Centrepont Community Growth Trust v CIR*,²⁶ distinguished from the advancement of religion.

Advancement of education

41. In order to advance education a purpose must provide some form of education and ensure that learning is advanced. Education does not include advertisements for particular goods or services, promotion of a particular point of view, or the study of subjects that have no educational value.²⁷

42. In *Re Shaw (deceased)*,²⁸ the Court held that "there is no element of teaching or education combined with this [increase of public knowledge] nor does the propaganda element in the trusts tend to more than to persuade the public that the adoption of the new script would be "a good thing", and that, in my view, is not education".²⁹

²⁴ [1980] 3 All ER 918.

²⁵ [1980] 3 All ER 918 at 924 cited in *Centrepont Community Growth Trust v CIR* [1985] 1 NZLR 673 at 693.

²⁶ [1985] 1 NZLR 673.

²⁷ *In re Shaw (deceased)* [1957] 1 WLR 729; as interpreted in *Re Hopkins' Will Trusts* [1965] 1 Ch 669. See also *Re Collier* [1998] 1 NZLR 81.

²⁸ [1957] 1 WLR 729.

²⁹ [1957] 1 WLR 729 at 738.

43. Similar results were arrived at in *Re Hopkins' Will Trusts*³⁰ in which there was a bequest to the Francis Bacon Society Inc for the purposes of 'finding the Bacon-Shakespeare manuscripts'. Wilberforce J wrote that in order to qualify as educational research:

*Research must either be of educational value to the researcher or must be so directed as to lead to something which will pass into the store of educational material, or so as to improve the sum of communicable knowledge in an area which education may cover – education in this last context extending to the formation of literary taste and appreciation.*³¹

44. In *Re Elmore (deceased)*,³² the testator's manuscripts were held to be literally of no merit or educational value. That decision followed *Re Pinion (deceased)*,³³ in which case Harman LJ thought there to be "no useful object to be served in foisting upon the public this mass of junk" at issue in that case.

45. In New Zealand in *Re Collier (deceased)*,³⁴ Hammond J set out the test for determining whether the dissemination of information qualified as charitable under the head of advancement of education:

*It must first confer a public benefit, in that it somehow assists with the training of the mind, or the advancement of research. Second, propaganda or cause under the guise of education will not suffice. Third, the work must reach some minimal standard. For instance, in Re Elmore [1968] VR 390 the testator's manuscripts were held to be literally of no merit or educational value.*³⁵

46. In *Re Collier*, Hammond J held that the bequest in question (for publication of a book) did not qualify as charitable under the test:

*In my view, the minimal threshold test is not met. There is no educative value, or public utility in the 'book'. Further, it is no more than an attempt to perpetuate a private view held by Mrs Collier.*³⁶

47. In *Vancouver Society of Immigrant and Visible Minority Women v MNR*,³⁷ Iacobucci J wrote:

*So long as information or training is provided in a structured manner and for a genuinely educational purpose – that is, to advance the knowledge and abilities of the recipients – and not solely to promote a particular point of view or political orientation, it may properly be viewed as falling within the advancement of education.*³⁸

³⁰ [1965] 1 Ch 669.
³¹ [1965] Ch 669 at 680.
³² [1968] VR 390.
³³ [1965] 1 Ch 85 at 107.
³⁴ [1998] 1 NZLR 81.
³⁵ [1998] 1 NZLR 81 at 91-92.
³⁶ [1998] 1 NZLR 81 at 92.
³⁷ [1999] 169 D.L.R (4th) 34.
³⁸ [1999] 169 D.L.R (4th) 34 at 113.

48. Guidelines on the advancement of education and public benefit produced by the Regulator for charities in England and Wales, the Charity Commission, state:

An organisation advancing education must provide positive, objective and informed evidence of educational merit or value where it is not clear. ... A modern example might be a 'wiki' site which might contain information about historical events but, if this information is not verified in any way, it would not be accepted as having educational merit or value without positive evidence. ...

Mere blogging comprised of ... uninformed opinion, on the other hand, is not likely to be of educational merit or value, where neither the subject matter nor the process is of educational merit or value.

If the process is so unstructured that whether or not education is in fact delivered is a matter of chance, it will not be of educational merit or value.³⁹

49. The purposes set out in clause 3(a)(1) and (2) of the Applicant's trust deed are:

To gather information of a public interest and to distribute and display this information on an Internet website and any other medium, and in doing so to

- (1) Provide information to allow the community to make informed decisions and to form informed opinions on matters of public interest;*
- (2) Promote the general welfare of the community through education on issues of public interest;*

50. In its letter of 1 September 2009, the Applicant states that its primary task "is to provide a free website to display information of a public interest and that the website is open to the public to make contributions. ... CITWATCH is being developed to provide a free educational forum where the public can exchange opinions." This information must be displayed in an orderly manner, be within the law, have an irreproachable moral standard, have a named author and contact address, and be brief.

51. In its letter of 31 May 2010, the Applicant states:

Concerning your comment, 'The commission does not consider that providing a website where people can express their opinions will necessary amount to advancing education'. We respectfully point out that all education is based on opinion. In philosophy the principal (sic) is soundly established that nothing is certain. The concept of 'certainty' was established in quantum physics early last century where scientists came to the conclusion that there is no certainty in any scientific proposition and that a measure of tolerance must be applied to all ideas, be it science, philosophy, religion or any other intellectual discipline. Hence opinion is a material part of education, indeed it is education.

52. In applying the case law cited above, the Commission does not consider that simply providing a website where people can express their opinions will necessarily amount to advancing education. The Commission therefore does not consider that the purposes in clauses 3(a)(1) and (2) are charitable under the advancement of education.

Other matters beneficial to the community

53. In order for a purpose to qualify as “any other matter beneficial to the community”, the purpose must be beneficial to the community and 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)⁴⁰, which are:
- relief of aged, impotent, and poor people
 - maintenance of sick and maimed soldiers and mariners
 - schools of learning
 - free schools and scholars in universities
 - repair of bridges, ports, havens, causeways, churches, sea banks, and highways
 - education and preferment of orphans
 - relief, stock or maintenance of houses of correction
 - marriage of poor maids
 - supportation, aid and help of young tradesmen, handicraftsmen, and persons decayed
 - relief or redemption of prisoners or captives and
 - aid or ease of any poor inhabitants concerning payment of fifteens, setting out of soldiers and other taxes.

54. In *Travis Trust v Charities Commission*⁴¹, Williams J noted that

... regard must be had to the particular words of the preamble and, it has now long been held, any cases in which purposes have been found to be within the spirit and intendment of the preamble by analogy.

55. Furthermore, not all organisations that have purposes that benefit the community will be charitable. In *Williams Trustees v Inland Revenue Commissioners*,⁴² Lord Simonds wrote:

*The second is that the classification of charity in its legal sense into four principal divisions by Lord Macnaughten in *Income Tax Commissioners v Pense* [1891] A.C. 531 at 583 must always be read subject to the qualification appearing in the judgement of Lindley L.J. in *In re Macduff* [1896] 2 Ch, 451 at 466: “**Now Sir Samuel Romilly did not mean, and I am certain Lord Macnaughten did not mean to say that every***

⁴⁰ *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 146-48; *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; *New Zealand Society of Accountants v Commissioner of Inland Revenue* [1986] 1 NZLR 147 at 157; *Re Tennant* [1996] 2 NZLR 633 at 638.

⁴¹ HC WN CIV-2008-485-1689, [3 December 2008] (Joseph Williams J.) at para. 20.

⁴² [1947] AC 447 at 455. (Applied by Kennedy J *In re Cumming* [1951] NZLR 498).

object of public general utility must necessarily be a charity. Some may be and some may not be.” This observation has been expanded by Lord Cave L.C. in this House in these words: **“Lord Macnaghten did not mean that all trusts for purposes beneficial to the community are charitable, but that there were certain beneficial trusts which fell within that category: and accordingly to argue that because a trust is for a purposes beneficial to the community it is therefore a charitable trust is to turn round his sentence and to give it a different meaning. So here, it is not enough to say that the trust in question is for public purposes beneficial to the community or for the public welfare: you must also show it to be a charitable trust.** See Attorney-General v National Provincial & Union Bank of England [1924] A.C. 262, 265.⁴³ [Emphasis added]

56. The purpose stated in clause 3(a) is:

To gather information of a public interest and to distribute and display this information on an Internet website and any other medium.

57. The leading case in relation to provision of internet services is *Vancouver Regional FreeNet Association v Minister of National Revenue*.⁴⁴ In this case, the appellant was a non-profit organisation which provided free public access to the “information highway”, including the Internet. The remaining purposes encouraged the proliferation of the service amongst computer users throughout Canada, and the development of resources accessible on the FreeNet.

58. The majority of the Canadian Federal Court of Appeal considered that such purposes were charitable because they were similar to “the repair of bridges, ports, causeways and highways” mentioned in the Statute of Elizabeth. Hugessen, J A wrote, “that is in my view, as much a charitable purpose in the time of the second Elizabeth as was the provision of access by more conventional highways in the time of the first Queen of that name”.⁴⁵ Earlier he wrote:

*While I do not want to insist unduly on the analogy to the information highway, there is absolutely no doubt in my mind that the provision of free access to information and to a means by which citizens can communicate with one another on whatever subject they may please is a type of purpose similar to those which have been held to be charitable; it is within the spirit and intendment of the preamble to the Statute of Elizabeth.*⁴⁶

59. The dissenting judge said that he might have concluded differently “had the record revealed that the Association was to operate solely as a ‘public access point’ giving users access to a restricted range of public interest services”⁴⁷ His main objection was not with the “information highway” analogy, but because “the appellant does not undertake in its constitution to

⁴³ [1947] AC 447 at 455.

⁴⁴ (1996) 137 DLR (4th) 206.

⁴⁵ (1996) 137 DLR (4th) 206 at 215.

⁴⁶ (1996) 137 DLR (4th) 206 at 214.

⁴⁷ (1996) 137 DLR (4th) 206 at 222.

limit the provision of services to those displaying a clearly public, or charitable nature”.⁴⁸

60. In *Tudor on Charities*⁴⁹ Jean Warburton writes, “the provision of free community access to the Internet has been held charitable by analogy” citing the *FreeNet* case. The *FreeNet* case has also been cited in New Zealand by Priestley J in *Clarke v Hill and Granger*.⁵⁰

61. The Commission notes that the Applicant does not appear to be providing free access to the Internet (as in the *FreeNet* case). Instead, the Applicant is providing a website where the public can post comments, in common with many other websites which allow the public to post their comments.

62. The purpose set out in clause 3(a)(3) is to:

enhance democracy through the dissemination of information on issues of public interest.

63. In *Tudor on Charities*, Jean Warburton, citing the Charity Commission in England and Wales, indicates that a trust promoting good citizenship could fall under the fourth head of charity⁵¹. Although advancing democracy is not given as an example of “promoting good citizenship”, it is possible that promoting democracy could fall into that broad sub-category. The author however includes the following caveat:

*The acceptance of the wider purpose ... as charitable does not mean, however, that the usual limitations can be ignored and, for example, any educational material must have educational value and not be propagandist. Similarly, the limitation on political purposes applies.*⁵²

64. There is only one entry on the Applicant’s website under the category “Democracy”, which contains 16 brief sentences relating to democracy. In its letter of 31 May 2010, however, the Applicant has stated that it is “advancing democracy by developing techniques to make democracy more effective”.

65. The Commission does not consider that there is any evidence that democracy is being enhanced by allowing people to post their comments and links to other organisations on the Applicant’s website. In addition, as indicated above, the Commission does not consider that the content of the Applicant’s website is limited to material that has educational value.

66. The purpose in clause 3(a)(4) is to:

Assist in the protection of the environment through the dissemination of information on issues of public interest.

⁴⁸ (1996) 137 DLR (4th) 206 at 223.

⁴⁹ *Tudor on Charities*, 9th ed., London, Sweet & Maxwell, 2003 at 101 2-074.

⁵⁰ High Court, Auckland CP68-SD99 NZCLD [2 February 2001] (Priestley J).

⁵¹ *Tudor on Charities*, 9th ed., London, Sweet & Maxwell, 2003 at 126-127, 2-105.

⁵² *Tudor on Charities*, 9th ed., London, Sweet & Maxwell, 2003 at 127, 2-106.

67. Protection of the environment has been considered to be charitable in a number of cases including *Re Verral*,⁵³ *Scott v National Trust for Places of Historic Interest or Natural Beauty*,⁵⁴ and *Re Centrepoint Community Growth Trust*.⁵⁵
68. The Applicant's website contains three information categories that could fall under the protection of the environment:
- the eight entries under "Gardening" relate to activities that gardeners should undertake at various times of the year
 - the four entries under "Health" provide links to GE Free New Zealand, Greenpeace, the Biodynamic Organic Education Trust, and Powerwatch (relating to cancer and electro-stress or electro-pollution)
 - the three entries under "Environment" provide links to GE Free Hawke's Bay, GE Free New Zealand, Greenpeace, and Powerwatch.
69. The Commission considers that displaying the information listed above may promote the views of the named organisations which may result in protection of the environment. This purpose could therefore be considered charitable under "any other matter beneficial to the community".

Public benefit?

70. Since *Bowman v Secular Society Ltd*,⁵⁶ courts have consistently held that a trust or a society for the attainment of political objects is not charitable, not necessarily because it is invalid, but because the courts have no means of judging whether a proposed change in the law will or will not be for the public benefit and therefore cannot say that a gift to secure the change is a charitable gift.
71. In *McGovern v Attorney General*,⁵⁷ Slade J held that a trust whose main objects is to secure the alteration of the law would not be regarded as charitable because the court had no adequate means of judging whether a proposed change in the laws would or would not be for the public benefit. He further held that if a principal purpose of the trust was to reverse government policy or particular administrative decisions of governmental authorities it would not be charitable.
72. In *Charity Law in Australia and New Zealand*, Gino Dal Pont wrote that "there is authority to the effect that advocating or promoting the maintenance of the present law is a political purpose".⁵⁸
73. In *Molloy v Commissioner of Inland Revenue*,⁵⁹ the New Zealand Court of Appeal held that an organisation with a main object of preserving the

⁵³ [1916] 1 Ch 100 at 114-116.

⁵⁴ [1998] 2 All ER 705 at 710.

⁵⁵ [2000] 2 NZLR 325.

⁵⁶ [1917] AC 406.

⁵⁷ [1982] 1 Ch 321 at 338-340.

⁵⁸ Gino Dal Pont, *Charity Law in Australia and New Zealand*, London, Oxford University Press at 205.

⁵⁹ [1981] 1 NZLR 688.

integrity of the existing law on abortion against alteration, was not a charitable society. Delivering the judgement for the Court, Somers J wrote:

... reason suggests that on an issue of a public and very controversial character, as in the case of abortion, both those who advocate a change in the law and those who vigorously oppose it are engaged in carrying out political objects in the relevant sense. The law, statutory or otherwise, is not static ... The inability of the court to judge whether a change in the law will or will not be for the public benefit - must be as applicable to the maintenance of an existing provision as to its change. In neither case has the Court the means of judging the public benefit.⁶⁰

74. In *Public Trustee v Attorney-General of New South Wales*,⁶¹ Santow J summarised the state of the law concerning "political" purposes. He wrote that an organisation "whose main purpose is directed to altering the law or government policy, as distinct possibly from a trust to encourage law reform generally, cannot be saved from being political by appeal to the public interest".⁶² In that case, although the judge took a very progressive view of "advocacy", he nevertheless struck down as non-charitable clauses purporting to change the law discriminating against Aboriginal people.
75. In *Re Collier (deceased)*,⁶³ Hammond J considered that there are three different categories of political trust which have been impugned in the case law. The first category is "that charitable trusts to change the law itself are invalid". The second category, trusts to support a political party, are rejected because "it is thought undesirable for the advantages of charity to be conferred on trusts which overtly "secure ... a certain line ... of political administration and policy". The third category of prohibited political trust is that for the perpetual advocacy of a particular point of view or propaganda trust. This is because the Court has no means of judging whether or not a proposed change in the law will or will not be for the public benefit, and therefore cannot say that a gift to secure the change is a charitable gift.
76. Hammond J criticized these decisions, especially in light of section 13 (freedom of thought, conscience, and religion) and section 14 (freedom of expression) of the *New Zealand Bill of Rights Act 1990*. Nevertheless, he wrote:

I have considerable sympathy for that viewpoint which holds that a Court does not have to enter into the debate at all, hence the inability of the Court to resolve the merits is irrelevant [...] In this Court at least, there is no warrant to change these well established principles – which rest on decisions of the highest authority – even though admirable objectives too often fall foul of them.⁶⁴

⁶⁰ [1981] 1 NZLR 688 at 695-696.

⁶¹ (1997) 42 NSWLR 600.

⁶² (1997) 42 NSWLR 600 at 619.

⁶³ [1998] 1 NZLR 81 at 89-90.

⁶⁴ [1998] 1 NZLR 81 at 90.

77. In *Victorian Women Lawyers' Association Inc v Commissioner of Taxation*,⁶⁵ the court made the following obiter comments about political purposes:

In Public Trustee v Attorney General (NSW) (1997) 42 NSWLR 600 at 602, Santow J observed of the High Court decision in Royal North Shore Hospital of Sydney v Attorney General (NSW) 1938 60 CLR 396 at 426:

The High Court's formulation suggests that a trust may survive in Australia as charitable where the object is to introduce new law consistent with the way the law is tending.

In his paper in the Australian Bar Review, Santow J also observed that a trust which has an undoubtedly charitable object does not lose its charitable status simply because it also has an object of changing the law or reversing policy (at 248):

the question is always whether that political object precludes the trust satisfying the public benefit requirements.⁶⁶

78. Finally, the Federal Court of Australia has recently held that an entity whose purposes and activities were aimed at influencing government to ensure foreign aid was delivered in a particular manner, did not have exclusively charitable purposes because of its political purposes.⁶⁷
79. Although clause 3(b) of the Applicant's trust deed provides that "The society shall be secular and shall not be aligned to any political party", this does not prevent it from having a purpose of securing or opposing a change in the law or the policy or decisions of central or local government. In fact, the Applicant's website states:

CITWATCH (which is a registered trade name) is a voluntary organisation the aim of which is to network activists who have an interest in enhancing the human condition. . . .

CITWATCH Aims

- *To enhance democracy and pursue fairness.*
- *To mobilise people with experience and integrity.*
- *To assist in the definition of the civilised society.*
- *To share knowledge and avoid duplication.*
- *To assemble facts and look for truth.*
- *To assist in the protection of the environment.*
- *To develop a network of spokespeople – CITWATCH is not to become associated with particular individuals.*⁶⁸

80. In its letter dated 31 May 2010, the Applicant states that its website is designed to be used by activists:

(1) CITWATCH is used to present ideas in an orderly manner to facilitate learning. These ideas will traverse the whole range of matters

⁶⁵ [2008] 170 FCR 318 (Federal Court of Australia).

⁶⁶ [2008] 170 FCR 318 at 348.

⁶⁷ *Commissioner of Taxation v Aid/Watch Incorporated* [2009] FCAFC 128.

⁶⁸ <http://www.citwatch.org.nz/foundingdoc.html>.

encompassing human thought, philosophy, religion, conservation and the application of democracy for example.

- (2) CITWATCH is **used by activist groups** who write to public or private bodies (at this stage mostly public bodies, e.g. city councils) to discuss governance issues which concern the public. A major psychological factor is at play which encourages the generation of carefully considered and composed responses from publicly accountable bodies when they know their responses will be published on a website for the public to view.
- (3) CITWATCH is also **used as a directory for other activist organisations** – there is a brief explanation of the organisation's activities and its contact details are shown.
- (4) CITWATCH provides an email service whereby its administrator assists with communication between individuals and organisations as a result of the general flow of enquiries precipitated by the activities of CITWATCH. [Emphasis added]

81. The Applicant's website contains the following information categories:

- the only entry under "Other Organisations" is a link to Campaign Against Foreign Control of Aotearoa (CAFCA) an organisation which advocates for the adoption of laws to limit foreign control of land or New Zealand assets
- the two entries under "GST" both provide links to the Grey Power campaign against GST on council rates, stating "GST added to the total of Council Rates is iniquitous and must be removed"
- 10 of the 11 entries under "Local Government" are letters written to either the Hastings District Council or the Hawkes' Bay District Health Board by CitAct (Citizens Action) expressing dissatisfaction.

82. Of the 60 entries on the Applicant's website, at least 28 are either opinions or campaigns to change national laws or local body regulations. The Commission therefore considers that a main purpose of the Applicant is to advocate for changes in the law or the policy or decisions of central or local government. According to the jurisprudence cited above, such a purpose cannot be considered to provide public benefit.

Exclusively charitable

83. Section 13(1)(b) of the *Charities Act 2005* provides that a society can only be registered with the Commission if "is established and maintained exclusively for charitable purposes".

84. This is consistent with the statement made in *Molloy v. Commissioner of Inland Revenue*⁶⁹ that in order for an entity to be registered, it must have exclusively charitable purposes and the presence of but one main purpose that is not charitable prevents the entity from being registered as a charity.

⁶⁹ [1981] 1 NZLR 688 at 691.

Applicant's submission

85. In its letter of 31 May 2010, the Applicant has stated:

You have quoted legal cases that took place before the internet existed, or was in its infancy, so clearly opinions expressed then cannot be applied to a medium (the internet) that people at that time did not understand. ...

To quote an act from the early 17th century has no relevance to modern conditions. ...

Precedent has its place in law but the slavish pursuit of precedent produces iniquitous outcomes and slows the advancement of a fair and informed society.

86. The Commission considers that the purposes set out in the Preamble to the Statute of Elizabeth are still relevant and applicable to charities law in New Zealand. These purposes have been referred to constantly in relation to charities law over the past 400 years – most recently earlier this year in *Canterbury Development Corporation v Charities Commission*⁷⁰.

87. Courts have indicated that any changes to charities law should be made with caution. Thus, in *D V Bryant Trust Board v Hamilton City Council*⁷¹ Hammond J stated:

It would be unfortunate if charities law were to stand still: this body of law must keep abreast of changing institutions and societal values. And, it is to New Zealand institutions and values that regard should be had. This is not, of course, to say that "new" heads of charity will be allowed to spring up overnight without close scrutiny; rather (adapting some pertinent words from the preface to the Book of Common Prayer) courts should, in appropriate cases, be prepared to entertain adjustments "to things once advisedly established". That philosophy of necessity mandates a cautious approach, and one which will usually proceed by analogy; but neither does it set its face against change to what is considered to be charitable in law.

88. In *Re Tennant*,⁷² Hammond J of the New Zealand High Court, has noted that it has to "be recalled that charitable trusts are an exception to the usual revenue and other law. Because of this privileged position charities must meet strict legal requirements".⁷³

89. The Supreme Court of Canada upheld in *AYSA Amateur Youth Soccer Association v Canada (Revenue Agency)*⁷⁴ what had been written by Iacobucci J eight years earlier where he emphasized that there are limits to the law reform that may be undertaken by the courts, citing *R v Salituro*:⁷⁵

⁷⁰ HC WN CIV-2009-485-2133, [18 March 2010] (Ronald Young J) para 40.

⁷¹ [1997] 3 NZLR 342 at 348 (HC).

⁷² [1996] 2 NZLR 633.

⁷³ [1996] 2 NZLR 633 at 637.

⁷⁴ (2007) 287 DLR (4th) 4.

⁷⁵ [1991] 3 SCR 654.

Judges can and should adapt the common law to reflect the changing social, moral and economic fabric of the country. Judges should not be quick to perpetuate rules whose social foundation has long since disappeared. Nonetheless, there are significant constraints on the power of the judiciary to change the law. As McLachlin J. indicated in Watkins, supra, in a constitutional democracy such as ours it is the legislature and not the courts which has the major responsibility for law reform; and for any changes to the law which may have complex ramifications, however necessary or desirable such changes may be, they should be left to the legislature. The judiciary should confine itself to those incremental changes which are necessary to keep the common law in step with the dynamic and evolving fabric of our society. [Emphasis added by the Supreme Court].⁷⁶

90. In its letter of the 31 May 2010 the Applicant stated:

CITWATCH is operated by volunteers for the benefit of the whole community, no financial rewards are generated by its members and none are contemplated as in accordance with CITWATCH's constitution. Hence, CITWATCH certainly comes within the commonly accepted understanding of the word charity

91. The Commission points out that "not-for-profit" status is quite different to "charitable status". There are approximately 97,000 "not-for-profit" organisations in New Zealand, but only 25,000 of them have so far sought and been granted registration under the Charities Act.

Conclusion

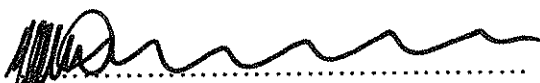
92. The Commission concludes that while the purpose set out in clause 3(a)(4) may be charitable, the Applicant's purposes in clauses 3(a)(1), (2), and (3) are non-charitable purposes which are not ancillary to a charitable purpose.

Commission's determination

93. The Commission determines that the Applicant has failed to meet an essential requirement for registration as a charitable entity in that the Applicant is not a society or institution established and maintained exclusively for charitable purposes, as required by section 13(1)(b)(i) of the *Charities Act 2005*.

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

22/7/10

Date