

## Registration decision: The Island Bay Enhancement Trust (ISL34145)

### The facts

1. The Island Bay Enhancement Trust ("the Applicant") was created by a deed of trust dated 14 March 1994 and incorporated as a board under the *Charitable Trusts Act 1957* on 8 April 1994. The Applicant applied to the Charities Commission ("the Commission") for registration as a charitable entity on 31 May 2011.
2. Clause 2 of the Applicant's rules document sets out the purposes of the Applicant as:

*THE Trust shall hold the Trust property upon trust for the establishing, promotion, conduct, and furtherance of all or any of the following objects within New Zealand.*

*(a) To endeavour to protect, conserve and enhance the beauty of Island Bay and district and the wellbeing of the land and people belonging thereto, and to foster, encourage and promote the continuance, expansion and enhancement of the cultural, artistic and social life of Island Bay and district and the upholding of the traditions thereof.*

*(b) To promote, foster, encourage and assist study, training, education and research of all kinds in Island Bay and district and/or relating to Island Bay and district or which may bring enjoyment, entertainment, benefit or advantage to Island Bay and district and/or the people thereof.*

*(c) To arrange, hold, commission, foster, sponsor, conduct, procure or otherwise provide or make possible the provision of courses, lectures, lessons, study sessions, training sessions, seminars, workshops, experiments, performances, demonstrations, exhibitions, festivals, competitions and other activities or projects relating to or involving arts, crafts, sciences, architecture, archaeology, drama, history, literature, music and other intellectual, cultural and community concerns, objectives, interests and activities.*

*(d) To arrange, plan, organise, conduct, carry on, or participate in practical schemes, projects, activities, measures and programmes for or relating to the protection, enhancement, conservation or improvement of Island Bay and district and the communities and institutions therein.*

*(e) To support, encourage, subsidise, co-operate with or collaborate with other bodies, groups or individuals engaged in such activities as the foregoing or activities similar to or compatible with them.*

*(f) To raise and/or disburse funds for the abovementioned objectives, in whatever manner may to the Trust seem fit, proper and appropriate.*

*(g) To award scholarships, bursaries, prizes, and other incentives or benefits intended to stimulate, encourage or recognise study, research, effort or achievement in matters relating to the arts and culture or the community.*

*(h) To undertake, pursue, engage in and otherwise be involved in or concerned with all or any of the foregoing objects or similar or analogous charitable objects in relation to, affecting, or concerned with Island Bay and district.*

*(i) To carry on any other charitable objects which may seem to the Trust capable of being conveniently carried on in connection with the abovementioned objects of the Trust or calculated directly or indirectly to advance the same.*

3. The application was analysed and on 18 August 2011, the Commission sent a letter requesting further information regarding the activities of the Applicant carried out under clause 2.
4. On 11 September 2011, the Applicant responded with further information, stating:

*Island Bay Enhancement Trust – Additional Information*

*Activities – the only activity the Trust carries out is to organise the annual Island Bay community festival. This takes place over 7-9 days in February each year and has run continuously for the last 27 years.*

*Details on the 2011 festival are still available online at <http://festival.islandbay.net.nz/>*

*and some historical information on the trust occupies the lower 2/3rds of the “history” page at*

*<http://festival.islandbay.net.nz/who-is/>*

*The Trustees are all volunteers and receive no remuneration for their duties. They oversee the organisation of the festival, with the actual work being carried out by contracted managers and /or a pool of volunteers.*

***Financial information*** – *all payments are by cheque and require two signatures so two trustees must be aware of, and sign off on, the payments. At the end of each festival, accounts must be prepared and presented to the Trustees for approval.*

*The accounts for the 2010 and 2011 are provided separately. The accounts are prepared on a festival by festival basis, so although we have a technical year end of June transactions will be included in the accounts for the festival to which they relate. The Trustees have approved this approach, and that is why there is a slight difference between the end of 2010 and the beginning of 2011.*

*The Trustees have also modified the audited accounts requirement. Instead, the Treasurer is required to account for all transactions to the*

*other trustees and provide appropriate supporting documentation. This change is however contingent on the festival staying around, or under, its current size.*

*The Trust does not hold any assets as such. Generally, we aim to spend all money received in a year on that year's festival. However as the festival has become larger and more complicated this aim has become more difficult, and we are now trying to maintain a small working surplus from year to year so expenses can be paid as necessary during the months before each festival.*

*As you will have noticed, the Trust Deed is ancient, and dates back to the original establishment of the Trust. We are working on updating it, and can take any requirements for changes that the Commission may have into account.*

5. On 21 September 2011, the Commission sent the Applicant a notice that may lead to a decline on the basis that its purposes were not exclusively charitable because a main purpose of the Applicant is to provide entertainment.
6. In a letter dated 1 November 2011, the Applicant provided an initial response to the notice that may lead to a decline, stating:

*We disagree with your view that the main purpose of the Trust is "to provide entertainment", and are currently working on providing more information in support of our case. According we wish to amend our application. Some of our initial comments are included with this letter, although please note they are still being finalised. I understand you will agree a date for us to formally submit them by.*

7. The Applicant's letter of 1 November 2011 was accompanied by the following information:

*Additional Comments*

*The purpose of the Trust is to provide a framework within which a community based festival can be organised each year. This is perhaps best summed up in an extract from our mission statement –*

*The Island Bay Festival is organised to inspire, educate and enrich the lives of the residents of Island Bay and surrounding communities. The Island Bay Enhancement Trust (IBET) takes great pride in coordinating the Island Bay Festival, an annual event celebrating the talent and diversity of the local neighbourhood and Wellington in General. The 9-day summer festival involves a broad cross section of the local community, with up to 15,000 people attending the various events in past years. The organisation seeks to enhance the cultural richness of Wellington, by presenting an annual Festival in an exceptionally beautiful location, with a rich history in arts: Island Bay.*

*The Enhancement Trust's aim is to reach everyone in the community by presenting a broad range of events targeting*

*different groups such as age groups, ethnic groups, interest groups and organisations, religious groups, business groups etc., e.g. a children's art exhibition, the trolley derby competition and bands in the park attract youngsters, while the garden tours and open homes cater to the older segment of our population.*

*While it is true that some parts of our festival include entertainment, many parts do not. The mix of events offered as part of the festival varies from year to year, based on a number of factors – including things like the levels of community interest and feedback, the funding we have available, the popularity and cost of an event and our ability to find someone to organise it.*

*The most recent festival had some 45 different free activities – covering all of educational, recreational, sports, entertainment. IBET itself had no involvement with most of these. The local community organised them, ran them, and supported them. We merely provide a community based and supportive framework in which this could happen.*

*The Day in The Bay event comprised a number of different types of activities, including religious, educational, entertainment. The Trust role was limited to ensuring the event happens. We can obtain funding for it, and we can obtain income from it which is then used to support other less popular and minority interest events.*

*The Trust has no profit motive and accumulates no assets. All money received is put back into the current and future festivals. The Trustees and a majority of the festival workers are volunteers. We are well aware our accounts showed a surplus from the 2011 festival. This was both unexpected and unplanned for, and will be used to provide a bigger and better festival in 2012.*

*The festival is a celebration of community. Its about building links, strengthening bonds. Every aspect of the festival is about community. We have community involvement in organising both the festival and individual events, we want community participation in the various festival events. What these events are is almost irrelevant to us so long as the community wants them.*

*We want to enhance living in our suburb – hence the word Enhancement in our name. We want every person, every group, every business in the suburb to be involved. In some respects the organisation of the festival matters far more than the festival itself, which is simply the end -product of a lengthy and time-consuming process taking most of the year (contrasted with the 9 days of actual festival).*

*The high levels of participation and community interest tell us we're doing something right. And that the community value and want these festivals to continue.*

*In terms of your legislation we contend that our purpose is "organising an activity" ie. an annual suburban festival. This fits within "is another matter beneficial to the community" as the festival is clearly a facility provided in the interests of social welfare, and with a resulting public benefit.*

8. In a letter dated 15 December 2011, the Applicant provided a final response to the notice that may lead to a decline, stating:

***Additional Information***

***Purpose and Operation of the Trust***

*The purpose of the Trust is to provide a framework within which community based activities can be organised each year. Although our principal activity has been the annual Island Bay Festival, we also act as an umbrella organization for Ribble St Orchard and Southside market (which have yet to be included in the Trust's goals and objectives). Although the comments that follow primarily relate to the Festival, the one overall purpose of all of these activities is community building.*

*The Festival is perhaps best summed up in an extract from our mission statement –*

*The Island Bay Festival is organised to inspire, educate and enrich the lives of the residents of Island Bay and surrounding communities. The Island Bay Enhancement Trust (IBET) takes great pride in coordinating the Island Bay Festival, an annual event celebrating the talent and diversity of the local neighbourhood and Wellington in General. The 9-day summer festival involves a broad cross section of the local community, with up to 15,000 people attending the various events in past years. The organisation seeks to enhance the cultural richness of Wellington, by presenting an annual Festival in an exceptionally beautiful location, with a rich history in arts: Island Bay.*

*The Enhancement Trust's aim is to reach everyone in the community by presenting a broad range of events targeting different groups such as age groups, ethnic groups, interest groups and organisations, religious groups, business groups etc., e.g. a children's art exhibition, the trolley derby competition and bands in the park attract youngsters, while the garden tours and open homes cater to the older segment of our population.*

*This mission is reinforced in the Trust's organisational goals, which have most recently been stated as being:*

- 1. To facilitate community groups in planning events to showcase their work within the Island Bay Community.*
- 2. To attract people from all sectors of our community to participate in the festival – recognising the needs of older citizens and our ethnic communities in particular.*
- 3. To continue to promote the growth of the suburb's artistic community by engaging young people in the arts and providing a forum for them to display their work.*
- 3. To publicise the festival in the most effective and cost effective ways possible.*

4. *To recognise the history of the suburb through organising/facilitating events that contain an historical aspect.*
5. *To provide an organisational framework which is easily accessed and understood by community groups and new Trust members.*
6. *To encourage members of our community to participate in physical activity.*
7. *To encourage awareness of the needs of the local environment.*
8. *To access funding to provide an opportunity to purchase those items/services necessary to safely and successfully run the core events of the festival: i.e.*
  - *The Day in the Bay (including the Blessing of the Boats)*
  - *The Ribble St Races,*
  - *The Festival Parade and Variety Show.*

*The Wellington City Council, our major partner for the festival requires that the event will include the following components:*

- \_ Support and participation from community groups.*
- \_ Positive relationships with all stakeholders.*

*Our primary joint objective (with WCC) for the festival is to enhance the reputation of and bring financial and social benefits to the City of Wellington. This is of course rather wider than our objectives, but we must still maintain a focus at that higher level.*

*The role of the trust is primarily one of funding and administering. The festival runs for 9 days, while our funding and oversight activity runs all year (and in fact probably takes longer than the total activities on offer). Although we maintain an overview of the various events provided in each festival, the detail is not our responsibility. That is up to our contracted administrator(s) and the local community. The activities and events in each festival are suggested, offered, and provided by the local community.*

*The festival programme changes considerably each year, depending on what local community groups and individuals are prepared to organise or otherwise contribute. Central events such as the Blessing of the Boats will normally occur each year, but once again it is entirely up to community representatives to organise. We merely provide a programme within which it can fit.*

*The only considerations for the trust are the expenses, and whether or not a particular event/activity will attract sufficient attendees to satisfy our funders and/or target a particular demographic in the community.*

*We are responsible for establishing a broad budget which we think the Trust will be able to fund. In setting this we give consideration to what potential funders may require, and the local community may be prepared*

*to support. Each festival needs some key drawcards to attract crowds, and without these we would not be able to fund less popular activities.*

*Within the restrictions of our funding, each year we try to ensure the festival contains something to attract every single member of the local community. As our estimated attendance figures have been increasing every year, we must be doing something right.*

*We contend that the purpose of the Trust is far wider than the simple provision of entertainment. Yes some of the activities that result from our operation do contain elements of entertainment, but they also contain religious, sporting, educational and historical components amongst others. The Trust has no direct influence over this mix. The activities are organised and managed by the community, for the community, and we merely facilitate their doing so.*

### **Charitable Purpose**

*We believe the purpose of the Trust comes under "is another matter beneficial to the community". The relevant section of your fact sheet allows for the organising of activities with a public benefit.*

*We are clearly responsible for the organising of activities, and we provide a clear public benefit. The festival is available to all who wish to participate, be it as organisers, participants or simple attendees ie, the entire local community.*

*There are over 3000 households within our suburban area. Last year the Festival attracted between 8-10,000 people during its 9 day period. We clearly provide something of benefit to our entire suburb, as well as further afield.*

*We believe our activities result in the building of community spirit and pride and help bring together disparate segments of society. Over the years much of our funding has been granted simply because of the festival contribution to building a strong and vibrant local community. The WCC objective stated previously is a perfect example of this.*

*Our name "Island Bay Enhancement Trust" also demonstrates this. Our purpose is simply to enhance living in our local community.*

9. The press release regarding the Island Bay Festival from the Scoop website states:

*The highlight of the festival has traditionally been A Day in the Bay, and this year's event won't disappoint. A Day in the Bay is on from 10am – 6pm on Sunday 13 February and encompasses loads of festivities including a bustling street market, arts and crafts, the Big Dig, Blessing of the Boats, fair rides, children's entertainment and performances from some of Wellington's top bands - The Aviators, Nudge, Bebe Deluxe, and the Good Words. The day is held in conjunction with the local Italian community who will be showcasing a mini festival of their own. Roads in the area around the Island Bay beach and Shorland Park will be closed to traffic for the duration of the event. Parking will be available at the Owhiro Bay end of the Esplanade for a gold coin donation.*

*New events this year include a Mayoral Dog Walk, Seniors Soap Making class, Strong Man Competition, a night of Sea Shanties and Southern Shipwreck Stories and a Baby Disco especially for under 5's. There will be plenty of outdoor summer action on offer with sandcastle, soccer and bowling competitions, yoga on the beach and a swim from the island. Also look out for the 5k run/walk that will take you up into the hills to experience the gorgeous views of the ocean and the Island Bay community. Or unleash your creative side and learn the craft of mural making out of masking tape, take part in the Big Chalk Up or attend to an evening of poetry around the theme of the Pacific Ocean.<sup>1</sup>*

## The issues

10. The issue the Commission must consider is whether the Applicant meets all of the essential requirements for registration under the *Charities Act 2005* ("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.

## The law on charitable purposes

11. Section 13 of the Charities Act sets out the essential requirements for registration. Under section 13(1)(a) of the Act, a trust must be of a kind in relation to which an amount of income is derived by the trustees in trust for charitable purposes.
12. 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.<sup>2</sup> This means that the purpose must be directed at benefiting the public or a sufficient section of the public.
13. Courts have held that in order to be charitable, an entity must have exclusively charitable purposes. Thus, in *McGovern v Attorney General*,<sup>3</sup> Slade J states:

*The third requirement for a valid charitable trust is that each and every object or purpose designated must be of a charitable nature. Otherwise, there are no means of discriminating what part of the trust property is intended for charitable purposes and what part for non-charitable purposes, and the uncertainty in this respect invalidates the whole trust.*

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<sup>1</sup> <http://www.scoop.co.nz/stories/AK1102/S00130/come-party-in-the-bay-island-bay-festival-2011.htm>

<sup>2</sup> See *Latimer v Commissioner of Inland Revenue* [2002] 3 NZLR 195.

<sup>3</sup> [1982] 1 Ch. 321, 341. (See also *Molloy v Commissioner of Inland Revenue* [1981] 1 NZLR 688 at 691.



14. In relation to non-charitable purposes carried on by an entity, section 5(3) of the Act provides that any non-charitable purpose that is merely ancillary to a charitable purpose will not prevent an entity from qualifying for charitable status.
15. In considering an application, section 18(3)(a) of the *Charities Act 2005* 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.*
16. Courts have also held that the activities of an entity must be considered in relation to its purposes in order to conclude whether it is, in fact, carrying out exclusively charitable purposes.<sup>4</sup>

### **Charities Commission's analysis**

17. The Commission has analysed the purposes set out in clause 2 of the Applicant's rules, information supplied by the Applicant, other information that is publicly available about the activities of the Applicant, and the relevant case law.
18. The Applicant's purposes set out in clause 2 and the activities it undertakes do not indicate an intention to relieve poverty. Although the Applicant has provided information to show that some religious activities have been undertaken, advancement of religion does not appear to be a primary purpose. The Commission notes that no reference is made to religion in the Applicant's purpose clauses. Accordingly, the Applicant's purposes and activities have been considered in relation to the advancement of education and "other matters beneficial to the community". Firstly, however, it is necessary to consider the effect of wording in the Applicant's trust deed.

#### Effect of clauses purporting to limit purposes

19. Clause 1 states that the Trustees "have created a fund for charitable purposes".
20. Clauses 2(h) and (i) state:

*(h) To undertake, pursue, engage in and otherwise be involved in or concerned with all or any of the foregoing objects or similar or*

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<sup>4</sup> See *Attorney-General v Ross* [1986] 1 WLR 252 at 263; *CIR v Oldham Training Enterprises* (1996) STC 1218 at 241; *Vancouver Society of Immigrant and Visible Minority Women v MNR*, [1999] 1 SCR 10 at para 194; *Federal Commissioner of Taxation v Word Investments Ltd* (2008) 236 CLR 204 at 175; *Canterbury Development Corporation v Charities Commission* HC WN CIV 2009-485-2133 [18 March 2010] at para 29.

*analogous charitable objects in relation to, affecting, or concerned with Island Bay and district.*

*(i) To carry on any other charitable objects which may seem to the Trust capable of being conveniently carried on in connection with the abovementioned objects of the Trust or calculated directly or indirectly to advance the same.*

21. In *Commissioners of Inland Revenue v White and Others and Attorney General*,<sup>5</sup> 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.*<sup>6</sup>

22. Finally, in *Canterbury Development Corporation v Charities Commission*,<sup>7</sup> Young J wrote "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."<sup>8</sup> The judge went on to say, "...in the end, the objects and operation of the organisations either support a charitable purpose or they do not."<sup>9</sup> In that case, he concluded that they did not support a charitable purpose.
23. For these reasons, the Commission does not consider that the inclusion of the wording in the above clauses provides conclusive evidence that the Applicant's purposes are in fact exclusively charitable.<sup>10</sup>

#### Advancement of education

24. In order for a purpose to advance education, it must provide some form of education and ensure that learning is advanced. The modern concept of "education" covers formal education, training and research in specific areas of study and expertise. It can also include less formal education in the development of individual capabilities, competencies, skills, and understanding, as long as there is a balanced, and systematic process of

<sup>5</sup> (1980) 55 TC 651.

<sup>6</sup> (1980) 55 TC 651, 653.

<sup>7</sup> HC WN CIV 2009-485-2133 [18 March 2010].

<sup>8</sup> HC WN CIV 2009-485-2133 [18 March 2010], para 56.

<sup>9</sup> HC WN CIV 2009-485-2133 [18 March 2010], para 56.

<sup>10</sup> See also *M K Hunt Foundation Ltd v Commissioner of Inland Revenue* [1961] NZLR 405, 408.

instruction, training, and practice.<sup>11</sup> In order to advance education, learning must be passed on to others. In addition, it must reach some minimal standard, so that there is some educative value to the material being taught.<sup>12</sup>

25. Education does not include advertisements for particular goods or services or promotion of a particular point of view.<sup>13</sup> If research is being conducted, it must be carried out in an objective and impartial way and the useful results made available, or accessible to the public.

#### 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 provide benefit to a sufficient section of 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):<sup>14</sup>

- 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.<sup>15</sup>

#### *Sufficient section of the community*

27. The Commission notes that clause 2 of the Applicant’s rules document provides that its objects are intended to benefit Island Bay and its community.

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<sup>11</sup> *Re Mariette* [1915] 2 Ch 284. See also *Chesterman v Federal Commissioner of Taxation* (1923) 32 CLR 362; *Lloyd v Federal Commissioner of Taxation* (1955) 93 CLR 645; *Chartered Insurance Institute v London Corporation* [1957] 1 WLR 867; *Flynn v Mamarika* (1996) 130 FLR 218.

<sup>12</sup> *Re Collier (deceased)* [1998] 1 NZLR 81, 91-92.

<sup>13</sup> *In re Shaw (deceased)* [1957] 1 WLR 729; as interpreted in *Re Hopkins’ Will Trusts* [1964] 3 All ER 46. See also *Re Collier* [1998] 1 NZLR 81.

<sup>14</sup> *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.

<sup>15</sup> 43 Elizabeth I c. 4.

28. The Commission considers that the Island Bay community is a sufficient section of the community for the Applicant's purposes to be of public benefit, as long as they are of a charitable nature.

*Are the purposes of a charitable nature?*

29. Not all organisations with purposes that benefit the community will be charitable. The purposes must benefit the community in a way that the law regards as charitable. In *Queenstown Lakes Community Housing Trust* MacKenzie J stated:

*Not every purpose beneficial to the community will be charitable under this head. Lord Simons in Williams Trustees v Inland Revenue Commissioners, noted two propositions which must be borne in mind. The first is that the purpose must be within the spirit and intendment of the preamble to the Statute of Elizabeth I. The second is that Lord Macnaghten's fourfold classification in Pemsel's case must be read subject to the qualifications that it does not mean that every object of public general utility must necessarily be charity. He concluded that the purpose must be both for the benefit of the community and beneficial in a way which the law regards as charitable. The somewhat circular requirement that to be charitable, a purpose must be beneficial in a way which the law regards as charitable, reflects and restates the requirement that the purpose must be within the spirit and intendment of the preamble.<sup>16</sup>*

30. In *Travis Trust v Charities Commission*, Joseph Williams J noted:

*...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.<sup>17</sup>*

31. Over the years, the courts have recognised many new charitable purposes that are substantially similar to those listed in the Statute of Elizabeth, acknowledging that what is accepted as a charitable purpose must change to reflect current social and economic circumstances.

### Analysis of the Applicant's purposes and activities

#### *Stated purposes*

32. The Commission considers that the purposes in clause 2 are broadly stated, and allow the inclusion of non-charitable purposes.
33. In particular, the Commission considers that the following phrases in bold would allow the Applicant to undertake non-charitable purposes:

*2. The Trust shall hold the Trust property upon trust for the establishing, promotion, conduct, and furtherance of all or any of the following objects within New Zealand.*

<sup>16</sup> HC WN CIV-2010-485-1818 [24 June 2011] at para 48.

<sup>17</sup> (2009) 24 NZTC 23,273 at para 20.

(a) *To endeavour to protect, conserve and enhance the beauty of Island Bay and district and **the wellbeing of the land and people belonging thereto, and to foster, encourage and promote the continuance, expansion and enhancement of the cultural, artistic and social life of Island Bay and district and the upholding of the traditions thereof.***

(b) *To promote, foster, encourage and assist study, training, education and research of all kinds in Island Bay and district and/or relating to Island Bay and district or **which may bring enjoyment, entertainment, benefit or advantage to Island Bay and district and/or the people thereof.***

(c) *To arrange, hold, commission, foster, sponsor, conduct, procure or otherwise provide or make possible the provision of courses, lectures, lessons, study sessions, training sessions, seminars, workshops, **experiments, performances, demonstrations, exhibitions, festivals, competitions and other activities or projects relating to or involving arts, crafts, sciences, architecture, archaeology, drama, history, literature, music and other intellectual, cultural and community concerns, objectives, interests and activities.***

(d) *To arrange, plan, organise, conduct, carry on, or participate in practical schemes, projects, activities, measures and programmes for or relating to the protection, enhancement, conservation or improvement of Island Bay and district and the communities and institutions therein. [Emphasis added]*

34. Clause 2(a) refers to “the wellbeing of the land and the people belonging thereto”. In *Inland Revenue Commissioners v Baddeley*, a trust that included among its objects “the promotion of the social wellbeing of a community” was found not to be exclusively charitable. In his judgment, Viscount Simonds stated:

*The moral, social and physical well-being of the community or any part of it is a laudable object of benevolence and philanthropy, but its ambit is far too wide to include only purposes which the law regards as charitable.<sup>18</sup>*

35. Clause 2(a) refers to “cultural, artistic and social life”, and clause 2(c) refers to “cultural and community concerns, objectives, interests and activities”. As set out in *Baddeley*, “social” purposes are not considered charitable by the courts. Cultural development can be charitable if subjects of educative value are presented to the public in a balanced and systematic process of instruction, training, and practice. However, the purposes are not limited to this type of instruction. “Community concerns” is too broad a term to be limited to purposes that have been held by the courts to be charitable.
36. Clause 2(b) refers to purposes “which may bring enjoyment, entertainment, benefit or advantage to Island Bay”. As set out above, not all purposes that benefit the community will be charitable. The purposes must benefit the community in a way that the law regards as charitable. For the same reason, clause 2(d) is not exclusively charitable.

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<sup>18</sup> [1955] AC 572 at 589.

“Entertainment” is analysed below in relation to the activities of the Applicant.

37. Clause 2(c) allows the entity to provide musical performances. The Commission notes that not all musical performances would meet the criteria for advancement of education.

#### *Activities*

38. In the response of 1 November 2011, the Applicant stated that the “purpose of the Trust is to provide a framework within which a community based festival can be organised each year.”
39. The Commission considers that activities such as craft workshops and community preparedness afternoon for seniors are likely to advance education, and that activities such as soccer, yoga and the swim and walk/run promote health.

#### *Recreation and entertainment*

40. In *Williams Trustees v Inland Revenue Commissioners*, the Court held that a trust intending to promote the moral, social, spiritual and educational welfare of Welsh people in London by a variety of means, including the establishment of a social centre where regular dances and other social activities were held, lacked the requisite charitable character. Lord Normand held:

*While certain features of the Institute conformed to the idea of charity they were not so dominating nor was the general character of the Institute such, as effectively to distinguish it from an ordinary social club.*<sup>19</sup>

41. In *Inland Revenue Commissioners v Baddeley*, Lord Reid stated:

*It is well settled that the provision of entertainment or amusement is not by itself a charitable purpose; but if the dominant purpose of the trust is charitable in character the fact that recreation is provided as an adjunct to that purpose does not destroy the charitable character of the trust.*<sup>20</sup>

42. In *Travis Trust v Charities Commission*, Joseph Williams J considered the law regarding when sport and leisure activities will be deemed charitable. He stated:

*The cases then seem to establish some workable first principles. The first, the class of charitable purposes does indeed evolve over time and the Courts (including those in New Zealand) have shown a willingness to develop new categories of charitable purpose and to develop or extend established ones. In the area of sport and leisure, the general principle appears to be that sport, leisure and entertainment for its own sake is not charitable but where these purposes are expressed to be*

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<sup>19</sup> [1947] AC 447 at 460.

<sup>20</sup> [1955] AC 572 at 600.

*and are in fact the means by which other valid charitable purposes will be achieved, they will be held to be charitable. The deeper purpose of the gift or trust can include not just any of the three original Pemsel heads but also any other purpose held by subsequent cases or in accordance with sound principle to be within the spirit and intendment of the Statute of Elizabeth.<sup>21</sup>*

43. The recreational and entertainment activities organised by the Applicant include the Festival Parade and Variety Show, the Picnic in the Park, the Ribble St Races, fair rides, “performances from some of Wellington’s top bands”, and a magic show.<sup>22</sup>
44. The Commission considers that these activities run through the festival are primarily aimed at recreation and entertainment, and that any link to any underlying, deeper purpose that may be charitable is too tenuous to be recognised in this case.

#### *Business involvement*

45. The Applicant has stated that the aim is to present a “broad range of events targeting different groups” including “business groups”, and that the Applicant wants “every business in the suburb to be involved”.
46. The press release regarding the Island Bay Festival from the Scoop website states:

*The highlight of the festival has traditionally been A Day in the Bay, and this year’s event won’t disappoint. A Day in the Bay is on from 10am – 6pm on Sunday 13 February and encompasses loads of festivities including a bustling street market...*

47. It is unclear what events will be targeted at business groups. However, promotion of business and economic development has been held by the courts to be a non-charitable purpose.<sup>23</sup> The festival street market allows private pecuniary profit to be gained by the stallholders. The Applicant has also stated that it organises the Southside Market (a local weekly farmers, seafood and craft market).<sup>24</sup>

#### Applicant’s submissions

##### *Responsibility for activities*

48. In the initial response letter of 1 November 2011, it was stated:

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<sup>21</sup> (2009) 24 NZTC 23,273 at para 52.

<sup>22</sup> <http://www.scoop.co.nz/stories/CU1202/S00071/come-party-in-the-bay-island-bay-festival-2012.htm>

<sup>23</sup> *CIR v Oldham Training Enterprises* (1996) STC 1218; *Canterbury Development Corporation v Charities Commission* HC WN CIV 2009-485-2133 [18 March 2010]

<sup>24</sup> Letter of 15 December 2011. See also <http://transitiontowns.org.nz/pipermail/wellington-south.food/2010-December/000021.html>.

*The most recent festival had some 45 different free activities – covering all of educational, recreational, sports, entertainment. IBET itself had no involvement with most of these. The local community organised them, ran them, and supported them. We merely provide a community based and supportive framework in which this could happen.*

...

*We have community involvement in organising both the festival and individual events, we want community participation in the various festival events. **What these events are is almost irrelevant to us so long as the community wants them.** [Emphasis added]*

49. In the response letter of 15 December 2011, it was stated:

*The role of the trust is primarily one of funding and administering. The festival runs for 9 days, while our funding and oversight activity runs all year (and in fact probably takes longer than the total activities on offer). **Although we maintain an overview of the various events provided in each festival, the detail is not our responsibility. That is up to our contracted administrator(s) and the local community. The activities and events in each festival are suggested, offered, and provided by the local community.***

*The festival programme changes considerably each year, depending on what local community groups and individuals are prepared to organise or otherwise contribute. Central events such as the Blessing of the Boats will normally occur each year, but once again it is entirely up to community representatives to organise. We merely provide a programme within which it can fit.*

***The only considerations for the trust are the expenses, and whether or not a particular event/activity will attract sufficient attendees to satisfy our funders and/or target a particular demographic in the community.***

...

*We contend that the purpose of the Trust is far wider than the simple provision of entertainment. Yes some of the activities that result from our operation do contain elements of entertainment, but they also contain religious, sporting, educational and historical components amongst others. **The Trust has no direct influence over this mix. The activities are organised and managed by the community, for the community, and we merely facilitate their doing so.** [Emphasis added]*

50. Although the Applicant itself may not be organising all activities, it is promoting these activities through the running and promotion of the festival.
51. Further, if the Applicant does not have direct influence over the mix of activities, it cannot limit the activities carried out through the running of the festival to those that further charitable purposes. The Commission notes that the Applicant also states in the 15 December 2011 response, “[w]e are clearly responsible for the organising of activities”.

*Benefit to the community*



52. In the letter of 15 December 2011, it was stated:

*We believe the purpose of the Trust comes under "is another matter beneficial to the community". The relevant section of your fact sheet allows for the organising of activities with a public benefit.*

*We are clearly responsible for the organising of activities, and we provide a clear public benefit. The festival is available to all who wish to participate, be it as organisers, participants or simple attendees ie, the entire local community.*

*There are over 3000 households within our suburban area. Last year the Festival attracted between 8-10,000 people during its 9 day period. We clearly provide something of benefit to our entire suburb, as well as further afield.*

*We believe our activities result in the building of community spirit and pride and help bring together disparate segments of society. Over the years much of our funding has been granted simply because of the festival contribution to building a strong and vibrant local community. The WCC objective stated previously is a perfect example of this.*

*Our name "Island Bay Enhancement Trust" also demonstrates this. Our purpose is simply to enhance living in our local community.*

53. In summary, the Applicant submits that providing the entertainment and recreational activities are beneficial to the community as they bring the community together. The Commission accepts that these activities bring the community together.
54. However, in accordance with the case law cited above, the Commission does not consider that bringing a community together by providing entertainment and recreational events is beneficial to that community in a manner that is charitable at law.

### Conclusion

55. The Commission concludes that the Applicant's purposes set out in clause 2 of its rules and its activities are non-charitable for the reasons stated above.

### Section 61B of the Charitable Trusts Act 1957

56. 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.
57. 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).<sup>25</sup>

58. 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 by including either actually or potentially a non-charitable element or purpose."*<sup>26</sup>

59. The Commission has analysed the wording of the Trust's purposes, surrounding context, and activities (as directed by section 18 of the *Charities Act 2005*). 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.

60. On this basis, the Commission considers that the Trust's purposes are not substantially charitable and therefore section 61B of the *Charitable Trusts Act 1957* cannot operate to validate the trust.

### Charities Commission's determination

61. The finding of the Commission is that the Applicant has failed to meet an essential requirement for registration as a charitable entity in that it 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

19/6/12

Date

<sup>25</sup> *Re Beckbessinger* [1993] 2 NZLR 362, 373.

<sup>26</sup> *Re Beckbessinger* [1993] 2 NZLR 362, 376.