

Registration decision: Facilities Management Association of New Zealand Incorporated

The facts

1. Facilities Management Association of New Zealand Incorporated (the Applicant) was incorporated under the Incorporated Societies Act 1908 on 22 October 2008.
2. The Applicant applied to the Charities Commission (the Commission) for registration as a charitable entity under the Charities Act 2005 (the Act) on 9 February 2009.
3. The Applicant's purposes are set out in clause 3.1 of its Constitution:

3.1 The objects of the Association shall be;

3.1.1 To promote the concept of facilities management as a recognised management profession and to recognise the collective influence of facilities on human conduct, productivity and organisational goals.

3.1.2 To encourage membership in and support of the activities of the Association and to act as a representative body for the furtherance of the profession of facilities management with other interested bodies and organisations.

3.1.3 To promote a high level of professional practice in facilities management and affiliated disciplines through the establishment and maintenance of a code of professional ethics.

3.1.4 To encourage and support programmes for continued educational development and career advancement within the profession.

3.1.5 To provide a resource for sharing of facilities management related information and to provide a forum for discussion of related issues within the profession."

4. The Commission analysed the application for registration and on 20 May 2009, sent the Applicant a notice advising that its application may be declined on the basis that the purposes set out in clauses 3.1.1 to 3.1.5 indicated an intention to provide support and benefits to people involved in the profession of facilities management, which were not charitable purposes.
5. On 1 July 2009, the Applicant responded to the notice, submitting the following:
 - *"[A]ny commercial or business benefit to members would be of a minor ancillary nature arising predominantly from education of the public in reliance on members conforming to a code of ethics."*

- *"The primary purpose of the Association is advancement of education of the public in the need for proper and reliable management of facilities in general and the benefits of, and requirement for, good health and sustainability in the built environment, which includes all facilities accessible to or used by the public."*
- *"...the Association's aims include: -*
 1. *Promoting improved health within buildings*
 2. *Promoting sustainable building management and use*
 3. *Promoting clarity on building related regulatory matters"*
- *"Since its formation the Association has sought and obtained sponsorship to enable it to provide seminars accessible to the public for educational aspects of facilities management and workplace environment. ... Any member of the public with an interest in facilities management is able to attend."*
- *"The Association's membership is drawn from a wide sector of the public encompassing any person who has an interest in further education in the area of facilities management"*
- *"The Association is charitable in its objects both in place and on-going in:-*
 - 1 *The advancement of education of the public at large on the benefits in terms of health, sustainability, environmental impact, and an ability to recognise the collective influence of facilities on human conduct, productivity and organisational goals*
 - 2 *The advancement of health and safety in the built environment by increasing public awareness and by liaison and advocacy with national and international bodies with influence in these areas*
 - 3 *The advancement of environmental protection and improvement by increasing public enlightenment on the consequential effects of alteration to their physical habitat*
 - 4 *To advancement of education of its members by acceptance of a wide range of participation and development in a continuing programme to facilitate a better understanding of the control of facilities and resources"*
- *"The public benefit applies predominantly to the public at large in the educational programmes and the ability to rely on members bound by a code of ethics and a continuing educational development. Benefits to members are consequential and ancillary."*

The issues

6. The Commission must consider whether the Applicant meets all of the essential requirements for registration under the Act. In this case, the key issue for consideration is whether the Applicant is a society or institution established and maintained exclusively for charitable purposes, as required by section 13(1)(b)(i) of the Act. In particular, whether all of the Applicant's purposes fall within the definition of charitable purpose in section 5(1) of the Act, and if there are any non-charitable purposes, whether these are ancillary to a charitable purpose.

The law on charitable purpose

7. Under section 13(1)(b)(i) of the Act, to be registered as a charitable entity, a society or institution must be established and maintained for exclusively charitable purposes.
8. Section 5(1) of the Act defines "charitable purpose" as including every charitable purpose, whether it relates to the relief of poverty, the advancement of education, the advancement of religion, or any other matter beneficial to the community. In addition, to be charitable at law, a purpose must be for the public benefit.¹ This means that the purpose must be directed at benefiting the public or a sufficient section of the public.
9. Section 5(3) of the Act provides that any non-charitable purpose must be ancillary to a charitable purpose.
10. In considering an application, section 18(3)(a) of the Act requires the Commission to have regard to the activities of the entity at the time the application was made, the proposed activities of the entity, and any other information that the Commission considers relevant.

Relevant cases

11. There have been a number of Courts decisions involving professional bodies.
12. In *Royal College of Nursing v. St Marylebone Borough Council*,² the English Court of Appeal had to decide whether or not the College of Nursing was charitable. The objects were to promote the science and art of nursing and the better education and training of nurses, and to promote the advances of nursing as a profession. The Court of Appeal, affirming the decision of the divisional court, held that both purposes were charitable because they were directed to the advancement of nursing for the relief of the sick. It was held that although the advancement of nursing as a profession might advance the professional interests of nurses in a trade union sense, this was incidental, and that the college did not cease to be a charity because, incidentally, and in order to carry out the charitable objects, it was both necessary and desirable to confer special benefits to the members.
13. In *Re Mason*,³ the Supreme Court considered that, while the objects of the Auckland District Law Society were entirely wholesome and likely to lead to the ultimate benefit of the public, they fell short of making the society a charity. In that case, the court made a distinction between charitable institutions whose main object was the advancement of education which provided a clear public benefit and non-charitable institutions whose main object was the protection and advantage of those practising in a particular profession. McMullin J cited examples of charitable institutions, such as an

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

² [1959] 1 WLR 1077, [1959] 3 All ER 663.

³ [1971] NZLR 714, 721.

institute of pathology⁴ and a college of nursing,⁵ and examples of non-charitable institutions, such as an insurance institute⁶ and a society of writers.⁷ Promotion of charitable purpose must be its predominant object and any benefits to individual members of non-charitable character which result from its activities must be of a subsidiary or incidental character.⁸

14. In *Institution of Professional Engineers New Zealand Inc v Commissioner of Inland Revenue*,⁹ the High Court held that although the advancement of the science of engineering was beneficial to the general public, a significant and non-incidental function of the institution was to act as a professional organisation for the benefit of engineers, therefore it could not be said that the institution was established exclusively for charitable purposes.
15. In *Commissioner of Inland Revenue v Medical Council of New Zealand*,¹⁰ the Court of Appeal considered that the principal function of the Medical Council was the registration of medical practitioners. It held that the purpose of this registration was for the protection of the public in respect of the quality of medical and surgical services and clearly fell within the broad category of purposes beneficial to the community. Any benefits to practitioners were incidental and consequential therefore the council was an institution established exclusively for charitable purposes.
16. In *Tudor on Charities*,¹¹ the authors noted that the United Kingdom Charity Commissioners have for some time accepted the New Zealand approach adopted by the Court of Appeal in *Medical Council of New Zealand* case. However the authors also noted:

“... an institution whose main object is in the protection and advantage of those practising a particular profession is not a charity even though the carrying out of the main object results in benefit to the community. Because of this problem, several established charities have formed separate non-charitable bodies for negotiating purposes to preserve the charitable status of the original institutions. For example, the College of radiographers is a charitable institution which promotes radiography and the Society of Radiographers is a non-charitable body which negotiates on behalf of its members.”¹²

17. In *Commissioners of Inland Revenue v Oldham Training and Enterprise Council*,¹³ the Court held that promoting the interests of individuals engaged in trade, commerce or enterprise and providing benefits and services to them conferred private benefits on those individuals, regardless of any

⁴ *Royal College of Surgeons of England v National Provincial Bank* [1952] AC 631; [1952] 1 All ER 984.

⁵ *Royal College of Nursing v St Marylebone Corporation* [1959] 1 WLR 1077; [1959] 3 All ER 663.

⁶ *Chartered Insurance Institute v Corporation of London* [1957] 1 WLR 867.

⁷ *Society of Writers to Her Majesty's Signet v Commissioners of Inland Revenue* (1886) 2 TC 257.

⁹ *Inland Revenue Commissioners v City of Glasgow Police Athletic Association* [1953] AC 380 [1992] 1 NZLR 570.

¹⁰ [1997] 2 NZLR 297.

¹¹ *Tudor on Charities*, 9th Edition, London, Sweet & Maxwell, 2003, para 2-083, p. 108.

¹² *Tudor on Charities*, 9th Edition, London, Sweet & Maxwell, 2003, para 2-083, p. 71.

¹³ [1996] STC 1218.

public benefit. The remoteness of any public benefit disqualified the Council from having charitable status.

Charities Commission's analysis

18. The Commission considers that the Applicant's purposes set out in clauses 3.1.1 to 3.1.5 do not indicate an intention to relieve poverty or advance religion. These purposes have therefore been considered in relation to the advancement of education and other matters beneficial to the community.

Advancement of education

19. In order for a purpose to advance education, it must provide some form of education and ensure that learning is advanced. Education does not include advertisements for particular goods or services or the promotion of a particular point of view.¹⁴
20. The Applicant, in its letter of 1 July 2009, advised that "[s]ince its formation the Association has sought and obtained sponsorship to enable it to provide seminars accessible to the public for educational aspects of facilities management and workplace environment".
21. The Commission considers that the purposes in clauses 3.1.4 and 3.1.5 could advance education and could therefore be charitable, if the information is available to the public and not only to the members.¹⁵
22. The Commission considers that promoting facilities management as a recognised management profession (clause 3.1.1) and acting as a representative body for the furtherance of the profession (clause 3.1.2) amount to promotion of a particular point of view. Such purposes will therefore not advance education.

Other matters beneficial to the community

23. In order for a purpose to qualify as "any other matter beneficial to the community", the purpose must be beneficial to the community and be within the spirit and intendment of the purposes set out in the Preamble to the Charitable Uses Act 1601 (the Statute of Elizabeth).¹⁶ The purposes set out in the Preamble are as follows:
- relief of aged, impotent, and poor people
 - maintenance of sick and maimed soldiers and mariners

¹⁴ *Re Collier* [1998] 1 NZLR 81 (See also *In re Shaw (deceased)* [1957] 1 WLR 729 and *Re Hopkins' Will Trusts* [1964] 3 All ER 46.)

¹⁵ *Re Mason (deceased)* [1971] NZLR 714, 721.

¹⁶ *Re Jones* [1907] SALR 190, 201; *Williams Trustees v Inland Revenue Commissioners* [1947] AC 447, 455; *Scottish Burial Reform and Cremation Society v Glasgow Corporation* [1968] AC 138, 146-48; *Incorporated Council of Law Reporting (QLD) v Federal Commissioner of Taxation* (1971) 125 CLR 659, 667, 669; *Royal National Agricultural and Industrial Association v Chester* (1974) 48 ALJR 304, 305; *New Zealand Society of Accountants v Commissioner of Inland Revenue* [1986] 1 NZLR 147, 157; *Re Tennant* [1996] 2 NZLR 633, 638.

- 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.

24. The Commission considers that the purposes in clauses 3.1.1, 3.1.2, and 3.1.3 are not purposes beneficial to the community, rather, the beneficiaries are the members of the profession of facilities management.

Public or private benefit?

25. The public benefit criterion necessarily requires that any private benefits arising from the Applicant's activities must only be a means of achieving an ultimate public benefit and therefore be ancillary or incidental to it. It will not be a public benefit if the private benefits are an end in themselves.¹⁷ In addition, proof that public benefit will necessarily flow from each of the stated purposes is required, not merely a belief that it will or may occur.¹⁸

26. In *Commissioners of Inland Revenue v Yorkshire Agricultural Society* the Court said:

*"There can be no doubt that a society formed for the purposes of merely benefiting its own members, though it may be to the public advantage that its members should be benefited by being educated ... or whatever the object may be, would not be for a charitable purpose, and if it were a substantial part of the object that it should benefit its members I should think that it would not be established for a charitable purpose only."*¹⁹

27. In *Institution of Professional Engineers New Zealand Incorporated v Commissioner of Inland Revenue* Tipping J stated:

"I consider that the following words of Lord Normand at page 396 in the Glasgow Police Association case are highly material:-

... what the respondents must show in the circumstances of this case is that so viewed objectively, the association is established for a public purpose and that the private benefits to members are

¹⁷ *Commissioners of Inland Revenue v Oldham Training and Enterprise Council* (1996) STC 1218; *Travel Just v Canada (Revenue Agency)* 2006 FCA 343, [2007] 1 CTC 294.

¹⁸ *Gilmour v Coats* (1949) AC 26; *Re Blyth* [1997] 2 Qd R 567, 582; *DV Bryant Trust Board v Hamilton City Council* [1997] 3 NZLR 342, 350.

¹⁹ [1928] 1 KB 611, 631.

unsought consequences of the pursuit of the public purpose and can therefore be disregarded as incidental. That is a view which I cannot take. The private benefits to members are essential.'

While there can be no doubt that there are distinct public benefits from the objects and functions of IPENZ it is my view, after careful consideration of both the oral and documentary evidence, that the private benefits cannot be disregarded as incidental.²⁰

28. In *General Nursing Council for England and Wales v St Marylebone Borough Council*²¹ the Court said an institution whose main object is the protection and advantage of those practising a particular profession is not a charity even though the carrying out of the main object results in benefit to the community. Given this decision, in order to preserve the charitable status of the original institutions, several established charities have formed separate non-charitable bodies primarily to promote the benefits of the members.
29. The leading New Zealand case in this regard is *Commissioner of Inland Revenue v Medical Council of New Zealand*.²² In that case, the Court of Appeal held that the principal function of the Medical Council was the registration of medical practitioners. The Court considered that the purpose of registration was to provide protection for the public in respect of the quality of medical and surgical services and that this clearly fell within the broad category of purposes beneficial to the community. Any benefits to practitioners were incidental and consequential therefore the council was an institution established exclusively for charitable purposes.
30. The Commission considers that the Applicant's purposes set out in clauses 3.1.1, 3.1.2, and 3.1.3 can be distinguished from the *Medical Council* case because they aim to promote the interests of the Applicant's members, rather than providing protection for the public.
31. Applying the test established by Tipping J in the *Institution of Professional Engineers New Zealand* case, the Commission considers that while some public benefits may arise from the purposes in clauses 3.1.1, 3.1.2, and 3.1.3, the private benefits arising from these purposes cannot be regarded as incidental.

Conclusion

32. The Commission concludes that the purposes set out in clauses 3.1.4 and 3.1.5 may be charitable, but that the purposes set out in clauses 3.1.1, 3.1.2 and 3.1.3 are non-charitable purposes which do not provide sufficient public benefit. The non-charitable purposes are not ancillary to the charitable purposes in clauses 3.1.4 and 3.1.5.

²⁰ [1992] 1 NZLR 570, 582.

²¹ [1959] AC.540.

²² [1997] 2 NZLR 297.

Applicant's submissions

33. The Applicant submitted, in its letter of 1 July 2009, that:

"The primary purpose of the Association is advancement of education of the public in the need for proper and reliable management of facilities in general and the benefits of, and requirement for, good health and sustainability in the built environment, which includes all facilities accessible to or used by the public ...

"[T]he Association's aims include: -

- 1. Promoting improved health within buildings*
- 2. Promoting sustainable building management and use*
- 3. Promoting clarity on building related regulatory matters"*

34. The listed aims could be considered to relieve poverty, be beneficial to the community, and advance education respectively, however, these aims are not reflected in the Applicant's stated purposes.


35. The Applicant is correct in its assumption that "being a 'professional association' does not per se prevent registration as a charitable entity." Each application for registration as a charitable entity is assessed on a case-by-case basis taking into account its particular circumstances.

Charities Commission's determination

36. The Commission therefore 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 for exclusively charitable purposes, as required by section 13(1)(b)(i) 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

19/10/09

Date