

Registration decision: Fashion Industry New Zealand Incorporated (FAS35370)

The facts

1. Fashion Industry New Zealand Incorporated (the Applicant) was incorporated as a board under the *Charitable Trusts Act 1957* on 15 August 2002.
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 October 2009.
3. The Applicant's purposes are set out in clause 4 of its deed of trust:
 4. ~~THE~~ Trustees shall hold the trust fund in perpetuity upon the following trusts:
 - (a) To improve the profile and to raise the awareness of the fashion industry in New Zealand.
 - (b) To educate and upskill the community in fashion in New Zealand.
 - (c) To be involved in the training of members of the fashion industry in New Zealand.
 - (d) To produce seminars addresses, demonstrations, exhibitions and to promote these and other means of educating the public in any and all aspects of the fashion industry in New Zealand.
 - (e) To publish or assist in the publication of information, materials and papers pertinent to the fashion industry in New Zealand, its effects, activity and history.
 - (f) To offer, provide or facilitate courses and training and to provide such other education as is consistent with the promotion of the fashion industry in New Zealand.
 - (g) To advance such other charitable purposes within New Zealand as the Trustees may determine.

In distributing any part of the capital or income of the trust fund in the implementation of the objects of the trust, the Trustees may pay any amount available for distribution to any organisation, club or body (whether incorporated or not but not one conducted for private profit) subject to any conditions which the Trustees may think fit to impose to ensure that the amount so paid is used for such specific purposes as the Trustees may direct, being purposes exclusively within the objects of the trust and the receipt of any such organisation, club or body acknowledging the conditions imposed shall be a sufficient discharge for the Trustees.

4. The Commission analysed the application and on 30 October 2009 sent the Applicant a notice advising that its application may be declined on the basis that the purposes set out in clause 4 do not indicate an intention to provide public benefit, rather they provide support and benefits to the members of the fashion industry.
5. On 26 February 2010, the Applicant responded to the notice, submitting the following:

"The charitable purpose of Fashion Industry New Zealand (FINZ) is to 'advance education'. While this purpose is not implicitly stated in the original Deed of Trust, it is clearly demonstrated in the organisation's ongoing activities, which are fundamentally focused on 'providing some form of education' and 'ensuring that learning is passed onto others'.

(i) The activities of the entity at the time at which the application was made

. . . FINZ delivered a range of seminars and workshops, which provided education and training aimed at 'developing capabilities, competencies, skills and understanding' in relation to 'the business of fashion'. Some of the topics included – profitability, sponsorship, export and intellectual property. . . .

FINZ hosted an educational industry lecture featuring Dr Otto von Busch, a fashion researcher from the University of Gothenburg in Sweden. . . .

FINZ is the founder and organiser of a national fashion education conference. Established in 2002, this annual two-day event is attended by fashion education providers throughout New Zealand, including heads of department, lecturers and tutors from all of the major universities and technical colleges. . . .

FINZ is the co-founder and organiser of an annual scholarship (established in 2008), which identifies New Zealand's most promising up-and-coming fashion exporter, and assists them in achieving international growth.

The prize package includes international freight to the value of \$10,000 from DHL Express. And, a personalised 12-month mentoring programme from FINZ, which encompasses industry, business and export education. . .

FINZ delivers ongoing informal mentoring, where the organisation's board members partner individuals and companies, providing one-on-one advice regarding industry, business and export matters, with the aim of 'developing their capabilities, competencies, skills and understanding'. . . .

FINZ is a 'supplier partner' of New Zealand Fashion Week. As such, the organisation is based onsite at the venue, hosting international buyers during the event, and has created an educational opportunity in this capacity.

FINZ works with the Whitecliffe College of Arts & Design to recruit a 20+ team of VIP minders – fashion students who act as local guides and assistants to international buyers. This activity is regarded as industry experience and has been incorporated into the Whitecliffe syllabus, with

students required to report on their learning from this 'behind the scenes' experience and understanding of 'the business of fashion'.

(ii) The proposed activities of the entity

. . . FINZ aims to redevelop its website – creating a hub (or online library) of fashion-related information and educational resources around industry, business and export topics. . . .

FINZ aims to introduce a tertiary student membership – the benefits of which are geared towards providing education on 'the business of fashion'.

. . .

FINZ aims to deliver nationwide training via a series of live, interactive webinars – which will subsequently be posted as educational resources on the FINZ website. . . . proposed topics include – developing & managing a PR strategy; costings, pricing & margins; terms of trade; analysing accounts & developing a financial plan; understanding the retail market; and key fashion export markets. . . .

FINZ is working with a pre-eminent fashion historian and curator to develop a series of historical lectures with an educational focus and widespread appeal. . . .

The Trust's Purpose

. . . Fashion Industry New Zealand (FINZ) does champion a particular industry. However, the organisation's mission statement expresses the primary purpose of 'seeing the fashion and apparel industry valued for its economic, creative and cultural contribution to New Zealand', which both implies and necessitates the provision of public benefit, be it direct or indirect. . . .

By advancing education, FINZ also works to improve the attributes of New Zealand's fashion-related businesses, brands, services and products, providing benefit to the public."

The issues

6. The Commission must consider whether the Applicant meets all of the essential requirements for registration under the Charities Act 2005. In this case, the key issue for consideration is whether the Applicant is a trust of a kind in relation to which an amount of income is derived by the trustees in trust for charitable purposes, as required by section 13(1)(a) of the Act. In particular, whether the Applicant's purposes fall within the definition of charitable purposes in section 5(1) of the Act.

The law on charitable purpose

7. Under section 13(1)(a) of the Charities Act, a trust qualifies for registration if it is of a kind in relation to which an amount of income is derived by the trustees in trust for charitable purposes.
8. 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 for registration, section 18(3)(a) of the Act requires the Commission to have regard to:
 - “(i) the activities of the entity at the time at which the application was made; and
 - (ii) the proposed activities of the entity; and
 - (iii) any other information that it considers is relevant; ...”

Charities Commission’s analysis

11. The Commission considers that the Applicant’s purpose set out in clause 4(g) is charitable by definition. The remaining purposes in clauses 4(a) to (f) do not indicate an intention to relieve poverty, advance religion, or provide other matters beneficial to the community. These purposes have therefore been considered in relation to the advancement of education.

Advancement of education

12. 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.²
13. 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 instruction, training, and practice.³ In order to advance education, learning must be passed on to others.
14. In *In Re Shaw (deceased)* the court held that “if the object be merely the increase of knowledge, that is not in itself a charitable object unless it be combined with teaching or education.”⁴

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

² *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.)

³ *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.)

⁴ [1957] 1 WLR 729. (See also *Re Hopkins’ Will Trusts* [1965] Ch 669, [1964] 3 All ER, [1964] 3 WLR 840; *Incorporated Council of Law Reporting for England and Wales v Attorney-General* [1972] Ch 73, [1971] 3 All ER 1029, [1971] 3 WLR 853; *McGovern v Attorney-General* [1982] 1 Ch 321, 352.)

15. The homepage of the Applicant's website states:

"Fashion Industry New Zealand (FINZ) is the voice of New Zealand's fashion sector and wider apparel industry. The not-for-profit organisation was founded 'by the industry' to provide representation and support 'for the industry'.

Our mission is to ensure the future growth and development of the fashion and apparel industry, and to see it valued for its economic, creative and cultural contribution to New Zealand."⁵

16. The Commission therefore considers that one of the Applicant's main purposes is "to improve the profile and to raise awareness of the fashion industry in New Zealand" set out in clause 4(a). This will involve the promotion of a particular point of view and such a purpose will not be charitable under the advancement of education.
17. The purposes in clauses 4(b), (e), and (f) will only amount to the advancement of education if they involve a balanced, and systematic process of instruction which is available to the public.⁶ Some of the Applicant's current activities, such as the national fashion education conference, indicate that it is assisting such a balanced and systematic process of instruction in universities and technical colleges.
18. Other activities (such as the seminars and workshops relating to the "business of fashion", the annual fashion export scholarship, and the informal mentoring providing one-on-one advice on industry, business and export matters), however, are unlikely to be charitable on the basis of the court's decision in *Canterbury Development Corporation v Charities Commission*. In that case, Ronald Young J held:

"Nor in my view is supporting businesses by providing assistance to their proprietors, in such aspects as financial management or marketing, the support or advancement of education or learning."⁷

19. Information provided by the Applicant indicates that while some charitable activities may be carried out under clauses 4(b), (e) and (f), a substantial number of non-charitable activities are also carried out under these clauses. The Commission does not therefore consider that these purposes indicate an intention to advance education in a manner which the courts consider to be charitable.
20. In *Re Mason*,⁸ the High 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 this 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

⁵ <http://www.finz.co.nz/index.php> (last accessed 15/04/2010).

⁶ *Re Mason (deceased)* [1971] NZLR 714, 721.

⁷ High Court, Wellington, 18 March 2010, CIV 2009-485-2133, para 33

⁸ [1971] NZLR 714, 721.

object, was the protection and advantage of those practising in a particular profession. McMullin J cited examples of charitable institutions which provided sufficient public benefit, such as an institute of pathology⁹ and a college of nursing,¹⁰ and examples of non-charitable institutions which provided private benefits for their members, such as an insurance institute¹¹ and a society of writers.¹² 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.¹³

21. The Commission considers that the purpose of “training . . . members of the fashion industry in New Zealand” in clause 4(c) will fall into the non-charitable category listed in *Re Mason* because the primary intention is to provide benefits for the fashion and apparel industries, rather than the general public.
22. The Commission considers that the purpose in clause 4(d) is likely to amount to advancing education for the benefit of the public, if it provides a balanced form of instruction.

Public or private benefit?

23. In order to be charitable a purpose must provide a public benefit. 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.¹⁴
24. The Courts have found the promotion of business and commerce to be charitable only when this is for the benefit of the public and not for the benefit of private individuals.
25. Thus, in *Inland Revenue Commissioners v Yorkshire Agricultural Society*,¹⁵ the improvement of agriculture was held to be charitable where it was for the benefit of the public at large. However, Lord Hanworth made it clear that the promotion of agriculture for private profit or benefit will not be charitable.
26. In *Crystal Palace Trustees v Minister of Town and Country Planning*, a body of trustees was entrusted with the control and management of Crystal Palace and park as a public place for education and recreation, and for the promotion of industry, commerce and art. Danckwerts J stated:

⁹ *Royal College of Surgeons of England v National Provincial Bank* [1952] AC 631; [1952] 1 All ER 984.

¹⁰ *Royal College of Nursing v St Marylebone Corporation* [1959] 1 WLR 1077; [1959] 3 All ER 663.

¹¹ *Chartered Insurance Institute v Corporation of London* [1957] 1 WLR.

¹² *Society of Writers to Her Majesty’s Signet v Commissioners of Inland Revenue* (1886) 2 TC 257.

¹³ *Inland Revenue Commissioners v City of Glasgow Police Athletic Association* [1953] AC380

¹⁴ *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.

¹⁵ [1928] 1 KB 611

*"it seems to me that the intention of the Act in including in the objects the promotion of industry, commerce and art, is the benefit of the public, that is, the community, and is not the furtherance of the interests of individuals engaging in trade or industry or commerce by the trustees."*¹⁶

27. In *Hadaway v Hadaway*, the Privy Council held that assisting persons carrying on a particular trade or business or profession would not be charitable unless there was a condition that this assistance could only be made for a purpose which was itself charitable. In that case, the court held that any eventual benefit to the community was too remote:

*"The promotion of agriculture is a charitable purpose, because through it there is a benefit, direct or indirect, to the community at large: between a loan to an individual planter and any benefit to the community the gulf is too wide. If there is through it any indirect benefit to the community, it is too speculative."*¹⁷

28. In *Commissioners of Inland Revenue v White and Others and Attorney General*, it was held that entity's purpose to "promote any charitable purpose which will encourage the exercise and maintain the standards of crafts both ancient and modern, preserve and improve craftsmanship and foster, promote and increase the interest of the public therein" was charitable. However, in that case, Fox J states:

*"The three cases which I have last mentioned seem to me to establish that the promotion or advancement of industry (including a particular industry such as agriculture) or of commerce is a charitable object **provided that the purpose is the advancement of the benefit of the public at large and not merely the promotion of the interest of those engaged in the manufacture and sale of their particular products. ...The charitable nature of the object of promoting a particular industry depends upon the existence of a benefit to the public from the promotion of the object.**"*¹⁸

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

30. In *Commissioners of Inland Revenue v Oldham Training and Enterprise Council*, the Court held:

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

¹⁶ [1951] 1 Ch 132, 142

¹⁷ [1955] 1 WLR 16, 20 (PC)

¹⁸ (1980) 55 TC 651, 659.

or otherwise, to improve employment prospects in Oldham. But the existence of these objects, in so far as they confer freedom to provide such private benefits regardless of the motive or the likely beneficial consequences for employment, must disqualify Oldham TEC from having charitable status. The benefits to the community conferred by such activities are too remote [Emphasis added].¹⁹

31. In *Commissioner of Taxation v Triton Foundation*,²⁰ the Federal Court of Australia held that a foundation set up to assist inventors provided sufficient public benefit. In reaching this conclusion, the court noted that the foundation's purposes were particularly directed at young people, but were also available to "any member of the community who had the desire or inclination to use them", and a number of the resulting inventions had been of benefit to the community.
32. In *Travel Just v Canada (Revenue Agency)*,²¹ the Canadian Federal Court of Appeal considered a case relating to an entity whose purposes were the creating of model tourism development projects and the production and dissemination of tourism information. The Court found that promoting commercial activity with a strong flavour of private benefit was not a purpose beneficial to the public and expressed doubt that the dissemination of information described in the second object would qualify as either publication of research or an educational purpose.
33. In *Canterbury Development v Charities Commission*, Ronald Young held:
- "The important point in this case is that CDC's assistance to business is not collateral to its purposes but central to it. The purposes of CDC's assistance to business is, as the constitution identifies, and the operation confirms, to make the businesses more profitable. CDC believes this assistance will, in turn, result in benefit to the Canterbury community. The **central focus however remains on increasing the profitability of businesses not public benefit.**"²²*
[emphasis added]
- ...
- "Any public benefit therefore from CDC's purpose and operation's is in my view too remote to establish CDC as a charity. Public purpose is not the primary purpose of CDC's objects or operation. Its primary purpose is the assistance of individual businesses. . . . **The public benefit is hoped for but ancillary. . . . It is remote from the purpose and operation of CDC.** Public benefit is not a the core of CDC's operation."²³* [Emphasis added]
34. In its letter of 26 February 2010, the Applicant has listed several different forms of business assistance which it provides, and it states:

¹⁹ (1996) 69 Tax Cases 231, 251

²⁰ (2005) 147 FCR 362

²¹ 2006 FCA 343 [2007] 1 C.T.C 294, 2007 D.T.C. 5012 (Eng.) 354 N.R. 360

²² *Canterbury Development v Charities Commission* HC WN CIV 2009-485-2133 [18 March 2010] para 60

²³ *Canterbury Development v Charities Commission* HC WN CIV 2009-485-2133 [18 March 2010] para 67

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By advancing education, FINZ also works to improve the attributes of New Zealand's fashion-related businesses, brands, services and products, providing benefit to the public.

35. After an analysis of the Applicant's purposes, its activities, and its website, the Commission considers that the purposes in clauses 4(a), (b), (c), (e), and (f) are intended to provide private benefits to individuals and businesses in the fashion and apparel industries. Any benefits conferred on the public will be too remote to render them charitable.

Conclusion

36. The Commission concludes that the purposes set out in clause 4(d) and (g) may be charitable, but that the purpose set out in clauses 4(a), (b), (c), (e) and (f) are non-charitable. In addition, private benefits arising from the Applicant's purposes and activities are not a means of achieving an ultimate public benefit. The private benefits are an end in themselves.

Section 61B of the Charitable Trusts Act 1957

37. 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.
38. The first is where the entity's **stated purposes** include both 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).²⁴
39. 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."²⁵

²⁴ *Re Beckbessinger* [1993] 2 NZLR 362, 373.

²⁵ *Re Beckbessinger* [1993] 2 NZLR 362, 376.

40. For the reasons given above, the Commission does not consider that there is evidence of "a substantially charitable mind" with an intention to create a charitable trust, but which was not conveyed by the drafting.
41. On this basis, the Commission therefore concludes that section 61B of the *Charitable Trusts Act 1957* cannot operate to validate the trust.

Charities Commission's determination

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

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

Signed for and on behalf of the Charities Commission



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Trevor Garrett
Chief Executive

20/4/10
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Date