

Registration decision: Film and Video Labelling Body Incorporated

Facts

The Applicant is a society incorporated under the Incorporated Societies Act 1908. The Applicant was incorporated in order to gain approval as a labelling body pursuant to section 72 of the FVPC Act. The Applicant has approval as a labelling body.

The Applicant applied to the Charities Commission ("the Commission") for registration as a charitable entity on 16 February 2007 on the basis that it was established for purposes beneficial to the community.

Under the FVPC Act the Applicant assigns a rating or description to a film that informs the public about the content of the film.

The Commission analysed the Applicant's registration application and on 22 February 2007 sent the Applicant a 'Notice that may lead to decline of registration' on the basis that the information supplied to the Commission did not indicate that the Applicant met the definition of charitable purpose in section 5(1) of the Charities Act.

On 18 April 2007 the Applicant sent the Commission a submission and other accompanying information, in support of its view that the Applicant was established for charitable purposes and that its charitable status should be approved.

After analysis of the submission and additional information, the Commission sent the Applicant a further 'Notice that may lead to decline of registration' dated 24 May 2007. The notice indicated that the Commission proposed to decline the Applicant's application for the following reasons:

- (1) That the Applicant's objects are to carry out a censorship function, and that this does not meet the legal test to be charitable, because it is not within the spirit and intendment of the Statute of Elizabeth;
- (2) That in relation to the provision in clause 3.3, to be 'a labelling body in relation to a wide range of media under any government or ministerial appointment', as there is no specific appointment referred to, and this could relate to appointments not yet established, it is not possible to assess the terms of such an appointment to determine whether it would be a charitable purpose; and
- (3) Clause 13 provides for remaining funds on winding up to be transferred to the Crown, or as the Crown directs. The Crown is not exclusively charitable, therefore the purposes of the Applicant are not exclusively charitable.

In a letter dated 15 August 2007 the Applicant made a further submission. The Commission analysed this further submission and this analysis resulted in the application being sent to the Board of the Commission for determination.

The issues

The issues that the Commission has to consider are:

- (1) whether the Applicant is established and maintained for exclusively charitable purposes, as required by section 13(1)(b)(i) of the Charities Act; and
- (2) whether the Applicant is carried on for the private pecuniary profit of any individual, (see section 13(b)(ii) of the Charities Act).

The law as to charitable purpose

Section 5 of the Charities Act defines 'charitable purpose' as including every charitable purpose relating to:

- the relief of poverty;
- the advancement of education;
- the advancement of religion; or
- any other matter beneficial to the community.

The Commission applies the common law test for charitable purpose to determine whether one or more of these purposes are present.

Under section 5(3) of the Charities Act and the decision of the High Court in *Institution of Professional Engineers New Zealand Incorporated v Commissioner of Inland Revenue*¹, to be established and maintained for charitable purposes all of an applicant's purposes must be charitable in nature, or the non-charitable purposes must be ancillary to a charitable purpose.

In the assessment of charitable purpose the law requires the Commission to consider:

- (a) the purposes of the Applicant described in its application;
 - (b) the purposes stated in the Applicant's constitution; and
 - (c) the activities of the Applicant.
- (section 18(3) of the Charities Act).

Commission's analysis of charitable purpose

The Commission has considered each of the Applicant's objects, both individually and collectively to assess its charitable purpose.

The Applicant's purposes, as set out in the objects section of its constitution dated 23 September 1994 are as follows:

¹ IPENZ V CIR [1992] 1 NZLR, 570

Object 3.1

3.1 To apply for and gain approval from the Minister pursuant to section 72 of the [FVPC] Act as the labelling body for the purposes of the [FVPC] Act;

The intent of this object is that the Applicant will apply for and become the official labelling body under the FVPC Act. This is what the Applicant has become.

If the labelling body is to be charitable, its purpose must be the same or analogous to a purpose already considered charitable either under statute or by the courts as being for a purpose beneficial to the community (the fourth head of charity). The fourth head of charity does not extend to all purposes that could be said to benefit the community, rather it is limited to those purposes that are within, or analogous to, the spirit and intendment of the preamble to the Statute of Elizabeth (The Charitable Uses Act 1601).

The decision in *Commissioner of Inland Revenue v Medical Council of New Zealand*² held that when determining whether the purposes of a statutory body are charitable, the focus is on the broad purposes that the legislature may have had in establishing the body, rather than on the objects and functions that the body was established to carry out under the statute, such as "To apply for and gain approval from the Minister pursuant to section 72 of the [FVPC] Act as the labelling body for the purposes of the [FVPC] Act."

The purpose of the FVPC Act is "...to consolidate and amend the law relating to the censoring of films, videos, books and other publications" and under section 3 for the labelling body to determine what is an objectionable publication and if it is likely to be injurious to the public good. The FVPC Act provides for the classification and labelling of films and the labelling body is to provide information to the public about the content of films and videos available to the public. The information that is provided relates to the degree to which the film or video may be said to have objectionable content.

It is accepted that the broad purpose of this legislation is to protect the public from material that is considered to be injurious. The Applicant has the function under the FVPC Act of assisting the broad purpose of the law by providing censorship information for the benefit of the public and it is considered that the purpose of protecting the public (and particularly young people) from exposure to potentially injurious material is within the spirit and intendment of the Preamble to the Statute of Elizabeth so as to make clause 3.1 charitable.

Object 3.2

3.2 To act as the labelling body pursuant to the Act;

The Applicant has advised the Commission that it has been acting as the labelling body under this Act.

² *CIR v Medical Council of NZ* [1997] 2 NZLR 297

After consideration of the broad purposes of the FVPC Act, and for the reasons set out above it is considered that object 3.2 is also charitable.

Object 3.3

- 3.3 To apply for appointment as an official labelling body or a similar body (by whatever name called) under a Ministerial or other governmental approval in respect of any media whatsoever, including any one or more of film, video, print, radio, television in all its forms, multimedia and any other medium (whether or not similar to any of the above and whether or not yet in existence);

While such an appointment could require the body to make decisions or carry out functions that were in the broad public interest, the exact nature and purpose of the appointment is not clear. The purpose of clause 3.3 is to be a labelling body in relation to a wide range of media for unspecified purposes under any government or ministerial appointment but there is no specific appointment referred to.

It is possible that the purpose refers to legislation or appointments that have not yet been established and it is not possible for the Commission to assess the terms of such an appointment to determine if it would be for a charitable purpose. This means that this object is a non-charitable purpose.

Object 3.4

- 3.4 To carry on any other lawful activity which:
- 3.4.1 is not for pecuniary gain in terms of sections 4 and 5 of the Incorporated Societies Act 1908; and
- 3.4.2 seems to the Society capable of being conveniently carried on in connection with, or in conjunction with, any of the activities contemplated in clauses 3.1 to 3.3;

This object refers to the Applicant carrying out lawful activities that are not for pecuniary gain; no mention is made of these activities being charitable in nature. This object contains purposes that are ancillary to objects 3.1 to 3.3 of the Applicant.

Object 3.5

- 3.5 To affiliate with any other national or international organisation it may from time to time determine (sic)desirable; and

This object contains purposes which could be considered to be ancillary to the earlier objects of the Applicant.

Object 3.6

- 3.6 To do such other things as may seem to the Society incidental or conducive to the attainment of one or more of the above objects, or which shall be incidental to the performance of any of the above functions, or the duties of any office referred to above.

This object is clearly ancillary, or incidental, to the earlier objects of the Applicant.

The Applicant's activities

The Applicant as the labelling body rates unrestricted films, cross rates unrestricted films that have been rated in Australia or the United Kingdom, and issues the labels to be affixed to films before they can be supplied to the public. These activities are not charitable.

Conclusions on charitable purpose

The Commission considers that the Applicant's objects 3.1 and 3.2 are charitable and that object 3.3 is not charitable in nature. The Commission considers that objects 3.4 to 3.6 are ancillary or incidental objects to the objects in clauses 3.1 to 3.3.

It is clear that the Applicant is not established or maintained for exclusively charitable purposes.

The law on private pecuniary profit

For an incorporated society to be charitable there must be no opportunity for private benefit or profit to an individual. The society's constitution must therefore provide for its remaining assets, after winding-up, to be applied to a charitable purpose.

Commission's analysis of private pecuniary profit

Clause 3.4.1 of the Applicant's constitution provides that the activities of the Applicant are not to be carried on "for pecuniary gain in terms of sections 4 and 5 of the Incorporated Societies Act 1908". This clause is satisfactory to the Commission in terms of section 13(1)(b)(ii) of the Charities Act.

The Applicant's winding up provision, clause 13, is of concern to the Commission because it provides that on winding up any remaining funds are to be transferred to the Crown or as the Crown directs. The effect of this is that the Crown could benefit from the winding up of the Applicant by receipt of assets.

A charitable entity is required to have a winding up clause that states that remaining assets on winding-up are to be directed to a charitable purpose or purposes, and the Crown is not of itself charitable³.


Charities Commission determination

The findings of the Charities Commission are that the Applicant has failed to meet two of the essential requirements for registration in that:

- (1) the Applicant is not established and maintained exclusively for charitable purposes under section 13(1)(b)(ii) of the Charities Act 2005 due to object 3.3 of its constitution; and
- (2) the Applicant could be carried out for the private pecuniary benefit of an individual (section 13(1)(b)(ii) of the Charities Act 2005) due to clause 13 of its constitution.

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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Sid Ashton - Chair

24/9/07
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Date

³ Latimer v CIR [2004] 3 NZLR 157