

Deregistration decision: First Home Ownership Trust

The facts

1. First Home Ownership Trust (the Trust) was established on 19 May 2008. The Trust was registered as a charitable entity under the Charities Act 2005 (the Act) by the Charities Commission (the Commission) on 17 March 2009, with registration backdated to 30 June 2008.
2. The Trust's purposes, as amended on 16 March 2009, are set out in clause 4 of the Trust Deed:

"4.1 The Trustees do hereby declare and acknowledge that they will hold the Trust Fund UPON TRUST to apply the capital as well as the income, from time to time arising therefrom (after paying and discharging all costs, charges and expenses) as the Trustees in their discretion think fit to or for the charitable purposes hereinafter set out PROVIDED HOWEVER that no income or capital shall be applied to any charitable purpose not coming within the meaning of the expression 'charitable purpose' or 'charitable purposes' as defined by and referred to in the Income Tax Act 1994 or in any amendment or replacement legislation.

4.2 The Trustees shall hold the Trust Fund UPON TRUST to use and employ the same, the capital as well as the income, from time to time arising therefrom as the Trustees shall in their absolute discretion think fit for the furtherance of the following charitable purposes:

(a) To witness to and implement the Gospel of Jesus Christ through both the relief of poverty and providing a benefit to the community by assisting needy young New Zealand resident families with the purchase of a new or newer energy efficient and ecologically friendly homes within New Zealand; through the provision of no or low interest loans.

(b) To aid child health and well being by providing a warm and dry living environment, subject to clause 4.2(a);

(c) To aid child health and well being by easing the financial burden of house ownership for young families subject to clause 4.2(a);

(d) To aid good family relationships by easing the financial burden of home ownership for young families subject to clause 4.2(a);

(e) To provide education in a family financial management to borrowers from the trust where appropriated.

4.3 Generally to do or perform all such acts matters or things as may be incidental or conducive to the attainment of any of the foregoing objects."

3. In August 2009, the Commission received information from the Crown Law Office regarding entities (including the Trust) which did not appear to be undertaking charitable purposes.
4. On the basis of that information, the Commission reviewed the Trust's website.¹ The website indicated that the Trust was promoting two loan schemes:

Scheme 1:

"If every New Zealander gives just a small amount, we will be able to offer interest free home loans for the purchase of new homes. We will set repayments at affordable levels after 5 years or so the borrower will repay the balance of the loan so we can lend it to the next first home buyer"

Scheme 2: (called the "One-in-a-million Kiwi Appeal")

"If one million Kiwis give just \$5 each, then we reach our target of five million dollars and start helping those struggling young families into their first homes.

As an incentive we will allow five families to "jump the queue" by giving away 5 interest free loans to qualifying families, 1 for each one million dollars we raise.

Entry into each draw is free and conditions apply. You can enter as many times as you like up to 1000 times. However we need donations before we can give away anything, so if you donate and enter, then you will receive 1 entry for each \$1 donated i.e. \$5 donated equals 5 entries ..."

5. The website stated in relation to Scheme 2, that **"[t]he prize is transferable, so even if you do not qualify, you can nominate one of your family or friends who I am sure would appreciate the offer."**
6. On 15 September 2009, the Commission sent the Trust a letter under section 50 of the Act, requesting further information about the Trust's loan schemes.
7. The Trust responded to the information request on 5 and 7 October 2009 stating that Scheme 2 was open to donors as well as non donors. In relation to the incentive for people to donate, the Trust advised:

"Really the only incentive is the same incentive that any person has to donate to a cause, whatever they personally see that incentive to be. In order to ensure that we comply with the definition of donation, we have tried to ensure that there is no tangible benefit attached to the donation, other than the convenience of not having to enter multiple entries one by one. We do not consider this a tangible benefit. Also hopefully entrants will realize that no winners are drawn until each one million dollar target is reached and will therefore make a donation in order to help us get there. The One-in-a-Million Kiwi Appeal is a means by which we hope to attract possible donors to our cause."

¹ <http://www.ourfirsthome.co.nz/terms.html>

8. In relation to loan repayment terms, the Trust stated:

"Loans will be repayable on demand and at commercial interest rates, but interest will be waived providing all loan conditions are met, i.e. repayments."

9. The Trust listed its borrowing criteria as:

1. *Applications to be made jointly by the partners in the family.*
2. *The Applicants must be New Zealand citizens or residents, 23 years of age and older.*
3. *No Applicants may have, or have had any interest in residential property, either directly or indirectly. (i.e. as a trustee of a property owning Trust, or a director or shareholder of a property owning company). **Applications will be considered where the applicant already owns a first home, providing all other criteria, including property criteria, are met, and where the property was purchased before opening date for loan applications to the Trust.***
4. *Applicants must have successfully completed a "Welcome Home First Steps" home ownership course. See www.hnzc.co.nz for course providers.*
5. *Applicants must be able to demonstrate a long term commitment to each other and to any dependants that they may have.*
6. *The applicants must be able to demonstrate that they will care for the property.*
7. *Preference may be given to applicants with dependant children.*
8. *The applicants must live in the house for the duration of the loan and provide proof of such to the Trustee as requested.*
9. *The applicants must be able to provide sufficient evidence that they can meet all family financial commitments including any future payments to the Trustee.*
10. *Applicants should be able to demonstrate good financial management abilities. Applicants who are unable to demonstrate this and who receive a loan from the Trust, must agree to participate in money management coaching (at no cost to themselves).*
[Emphasis added]

10. The Trust submitted that its purposes were charitable for the following reasons:

"First home buyers or aspiring first home buyers are typically young people with young families, often coping with student debt, and struggling to save sufficient money to place a deposit on a house. For them, a first home or rental property will typically be a cold and damp older home lacking in good insulation or efficient heating systems.

Coldness and dampness are typically associated with older homes and are a known health risk to children and adults.

Research suggests that financial stress and disagreements over money are one of the major causes of family relationship breakdown.

We feel that placing young families into newer, warmer and dryer homes under favourable economic circumstance is a perfect outworking of the

love of God because it will avoid the problems noted above therefore providing significant physical, financial and relationship health benefits.

This initiative will also have a positive affect not only for individual families as noted above, but will flow on right through New Zealand society, as acknowledged by Maryan Street, former Minister of Housing in the following quote 20 February 2008,

"Home ownership has significant social and economic benefits. It can promote greater family stability, improve connections within communities and create continuity of education. Home ownership also provides long-term security and a buffer against poverty before and after retirement." End quote."

11. On 2 November 2009, the Commission sent the Trust a notice of intention to remove from the register on the basis that the Trust did not appear to have charitable purposes.
12. The Commission received a response from the Trust on 26 November 2009 (dated 25 December 2009), stating that it did not have the time and money to contest the decision, but hoped the Commission would not deregister the Trust on the grounds that:
 - the website referring to the loan schemes had been taken down; and
 - registration had previously been granted.
13. The Trust also requested information on the process of voluntary deregistration. The Commission provided this information on 26 November 2009.
14. On 29 November 2009, the Trust advised:

"You have made it clear ... that based on the Trust rules the Trust qualifies for registration. You say however that based on our current activities we do not. It appears that in our enthusiasm we have strayed outside of our rules with our present activities. Surely if we stop all present activity then we are at square one again. It is only reasonable to expect that this would allow us to remain registered. We can then re-assess our policies, more accurately aligning them with the "rules", and in light of this review, with a view to re-starting the activities of the Trust on the right footing."
15. The responses from the Trust (dated 26 and 29 November 2009) were considered as part of the Trust's submission in response to the notice dated 2 November 2009. The Trust was given seven days to make any further submissions if it wished to do so.
16. On 2 December 2009, the Trust advised that it had no further submissions to make.

Issues

17. The Commission must consider whether the Trust is not, or is no longer, qualified for registration as a charitable entity under section 31(1)(a) of the Act. In this case, the key issue for consideration is whether the Trust 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 all of the Trust'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.

Law on charitable purpose and deregistration

18. Section 13 of the Act sets out the essential requirements for registration. Under 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.
19. 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.² This means that the purpose must be directed to benefiting the public or a sufficient section of the public.
20. 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.
21. Section 32(1)(a) of the Act provides that the Commission may remove an entity from the register if the entity is not, or is no longer, qualified for registration as a charitable entity.
22. When considering whether a registered charitable entity continues to qualify for charitable status, section 50(2) of the Act empowers the Commission to examine and enquire into matters including:
 - (a) *the activities and proposed activities of the charitable Trust or person;*
 - (b) *the nature, objects, and purposes of the charitable Trust;*
 - (c) *the management and administration of the charitable Trust;*
 - (d) *the results and outcomes achieved by the charitable Trust or person;*
 - (e) *the value, condition, management, and application of the property and income belonging to the charitable Trust or person."*
23. Under section 35(1)(a) of the Act, if an objection to the removal of an entity from the register is received, the Commission must not proceed with the removal unless it is satisfied that it is in the public interest to proceed with the removal and at least one ground for removal has been satisfied.

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

Charities Commission's analysis

24. In order to determine whether the Trust is of a kind in relation to which an amount of income is derived by the trustees in trust for charitable purposes, the Commission has considered the Trust's stated purposes, information provided by the Trust in its response to the notice of intention to remove from the register, information on the Trust's website, and the relevant case law.
25. The Commission considers that clause 4.2(a) is the Trust's primary purpose and the purposes set out in clauses 4.2(b) to (e) and 4.3 are ancillary to the purpose in clause 4.2(a).
26. The Commission considers that the Trust's purpose set out in clause 4.2(a) does not indicate an intention to advance religion or education. The purpose, though conducive to religion, does not advance religion per se.³ This purpose has therefore been considered in relation to the relief of poverty and other matters beneficial to the community. First, however, the Commission has considered the effect of clause 4.1 which purports to limit the Trust's purposes to only those that are charitable.

Effect of clause appearing to limit purposes

27. Clause 4.1 of the Trust's deed states:

"4.1 The Trustees do hereby declare and acknowledge that they will hold the Trust Fund UPON TRUST to apply the capital as well as the income, from time to time arising therefrom (after paying and discharging all costs, charges and expenses) as the Trustees in their discretion think fit to or for the charitable purposes hereinafter set out PROVIDED HOWEVER that no income or capital shall be applied to any charitable purpose not coming within the meaning of the expression 'charitable purpose' or 'charitable purposes' as defined by and referred to in the Income Tax Act 1994 or in any amendment or replacement legislation."

28. The Commission does not consider that the inclusion of the proviso in clause 4.1 provides conclusive evidence that the following purposes are in fact charitable. In order for an entity to remain registered, the entity must meet all of the essential criteria for registration set out in section 13 of the Act.

Relief of poverty

29. In order to be charitable under the relief of poverty, a purpose must be directed at people who are poor, in need, aged, or suffering genuine hardship and it must provide relief.⁴
30. "Poverty" is interpreted broadly in law and a person does not have to be destitute to qualify as "poor".⁵ People who are in need, aged,⁶ or who are

³ *In Re Lawlor* [1934] VLR 22.

⁴ *DV Bryant Trust Board v Hamilton City Council* [1997] 3 NZLR 342.

suffering genuine financial hardship from a temporary or long-term change in their circumstances are likely to qualify for assistance. Generally, this will include anyone who does not have access to the normal things of life which most people take for granted.⁷ To provide "relief", the people who would benefit should have an identifiable need arising from their condition that requires alleviating and these people should have difficulty in alleviating that need from their own resources.⁸

31. The Commission considers that the wording of clause 4.2(a) does not indicate an intention to benefit people who are in need, aged, or who are suffering genuine financial hardship from a temporary or long-term change in their circumstances. In addition, the information about qualifying borrowers on the Trust's website⁹ does not indicate an intention to benefit people who are suffering a particular hardship.
32. While the borrowing criteria states that preference may be given to applicants with dependant children, the Commission considers that this factor alone is not an indicator of particular need. In addition, the Commission notes that applicants may already own a first home (provided that other criteria are met and the property was purchased before the opening date for loan applications).
33. The Commission notes that the wording of clause 4.2(a) attempts to define relief of poverty according to the Gospel of Jesus. However, in analysing the concept of relief of poverty, the Commission is limited to applying only the Charities Act 2005 and the meaning attributed to "relief of poverty" by the Courts.¹⁰

Other matters beneficial to the community

34. 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)¹¹, which are as follows:

⁵ *Re Bethel* (1971) 17 DLR (3d) 652 (Ont: CA); affirmed sub nom *Jones v Executive Officers of T Eaton & Co Ltd* (1973) 35 DLR (3d) 97 (SCC) referred to in *D V Bryant Trust Board v Hamilton City Council* [1997] 3 NZLR 342. See also *re Pettit* [1988] 2 NZLR 513.

⁶ *D V Bryant Trust Board v Hamilton City Council* [1997] 3 NZLR 342.

⁷ *Inland Revenue Commissioners v Baddeley* [1955] AC 572; [1955] 1 All ER 525, applied in *re Pettit* [1988] 2 NZLR 513 and *Re Centrepoint Community Growth Trust* [2000] 2 NZLR 325.

⁸ *Joseph Rowntree Memorial Trust Housing Association Ltd v Attorney-General* [1983] Ch 159; [1983] 1 All ER 288. See also *D V Bryant Trust Board v Hamilton City Council* [1997] 3 NZLR 342.

⁹ <http://www.ourfirsthome.co.nz/about.php>

¹⁰ *Travis Trust v Charities Commission*, CIV-2008-485-1689, High Court Wellington, 3 December 2008 (Joseph Williams J).

¹¹ *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.

- 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.
35. When considering whether the Applicant's purposes are within the spirit and intendment of the Preamble to the Statute of Elizabeth, and in particular, the "supportation, aid and help of young tradesmen and handicraftsmen", it is necessary to consider the High Court of Justice's decision in *Commissioners of Inland Revenue v White*.¹²
36. In *White*, the Court considered that in a contemporary context the "supportation, aid and help of young tradesmen and handicraftsmen" would mean assistance for those people who perform an art, trade or profession requiring special skill or knowledge.
37. In addition, the specific words used in the Statute of Elizabeth, "young tradesmen and handicraftsmen and persons decayed", indicate that these people had particular disadvantages and would require assistance to overcome these disadvantages.
38. The Commission notes that the purpose in clause 4.2(a) is aimed at "young families" (according to the borrowing criteria: 23 years and older). It does not, however, identify an intention to benefit people by reason of their employment in a particular trade or people who suffer any particular disadvantage. The Commission considers that this purpose does not appear to be within the spirit and intendment of the Preamble to the Statute of Elizabeth and therefore concludes that clause 4.2(a) is not a charitable purpose under "other matters beneficial to the community."
39. The Commission also notes that the wording of clause 4.2(a) attempts to define 'providing a benefit to the community' according to the Gospel of Jesus. However, in analysing the concept of "other matters beneficial to the community", the Commission is limited to only applying the Charities Act 2005 and the meaning attributed to "other matters beneficial to the community" by the Courts.¹³

¹² (1982) 55 TC 651.

¹³ *Travis Trust v Charities Commission*, CIV-2008-485-1689, High Court Wellington, 3 December 2008 (Joseph Williams J).

Public benefit

40. The public benefit criterion necessarily requires that any private benefits arising from the Trust'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 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.¹⁵
41. In *Hadaway v Hadaway* Viscount Simonds found that the granting of loans to agricultural planters was not a charitable purpose because there were no restrictions in place to ensure the funds would be used for a charitable purpose. He stated:

"It appears ... to be impossible to regard as charitable a trust for the granting of loans at a low rate of interest to a class of persons carrying on a particular trade or business or profession, unless at least there is a condition that loans so made should be employed for a purpose which could itself be regarded as charitable.

*... 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 and remote to justify the attribution to it of a charitable purpose. It would be equally easy and equally wrong to regard as charitable a trust for the granting of loans on generous terms to any member of any other class which performs a useful function in the social or economic life of the country."*¹⁶

42. The Commission considers that the purpose in clause 4.2(a) will provide private benefits for the families who are able to receive assistance from the Trust and any benefits conferred on the remainder of the community will be too remote.

Conclusion

43. The Commission concludes that the purpose in clause 4.2(a) is a non-charitable purpose which will not provide sufficient public benefit.

Section 61B of the Charitable Trusts Act 1957

44. 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.
45. The first is where the entity's stated purposes include charitable and non-charitable purposes (in which case the non-charitable purposes may be

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 *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.

¹⁶ [1955] 1 WLR 16, 19-20.

"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).¹⁷

46. The Commission considers that the main purpose in clause 4.2(a) is not charitable for the reasons given above. If the purpose in clause 4.2(a) was "blue-pencilled" out, the entity would be left with no specific purposes. The Commission therefore concludes that the Applicant does not have substantially charitable purposes.

47. 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."¹⁸

48. The Commission has analysed the wording of the Trust's purposes, the surrounding context, and its activities (as required by the Charities Act). In spite of the proviso in clause 4.1, 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. The Commission does not consider that the purposes indicate an intention to create a substantially charitable trust.

49. On these bases, the Commission considers that the Applicant's purposes are not substantially charitable and therefore section 61B of the Charitable Trusts Act 1957 cannot operate to validate the trust.

Public interest

50. Section 10(1)(a) of the Charities Act obliges the Commission to promote public trust and confidence in the charitable sector. The Commission considers that public trust and confidence in registered charitable entities would not be maintained if entities which did not meet the essential requirements for registration remained on the register. This is particularly relevant for entities such as the Trust which seek funds from the public.

Charities Commission's determination

51. The Commission determines that the Trust is not, or is no longer, qualified for registration as a charitable entity because 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.

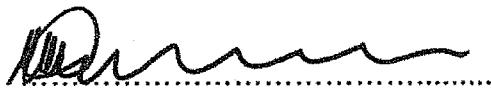
¹⁷ *Re Beckbessinger* [1993] 2 NZLR 362, 373.

¹⁸ *Re Beckbessinger* [1993] 2 NZLR 362, 376.

52. Under section 35(1) of the Act, the Commission is satisfied that it is in the public interest to proceed with the Trust's removal from the register and that one ground for removal from the register has been satisfied, that is, the Trust is not qualified for registration as a charitable entity.
53. The decision of the Commission is therefore to remove the Trust from the Register, pursuant to section 31 of the Act, with effect from 18 March 2010.

For the above reasons, the Commission determines to deregister the Trust as a charitable entity by removing the Trust from the Register.

Signed for and on behalf of the Charities Commission



Trevor Garrett
Chief Executive

18/3/10
Date