

## Registration Decision for Kaiapoi Promotion Association Incorporated (KAI21055)

### The Facts

1. Kaiapoi Promotion Association Incorporated was established as an incorporated society on 21 December 1972, under the name Kaiapoi Businessmens Association Incorporated. On 18 February 1992, the name was changed to its current form. The Applicant applied for registration with the Commission on 30 April 2008.
2. The Applicant's original objects are set out in clause 4 of the constitution received by the Commission on 30 April 2008:

#### 4. AIMS AND OBJECTS

*"The Association shall be an entirely non-party Organisation to promote and assist any movement for the advancement of the area of the Association's operations as defined in Clause 2 hereof and by United Public Action or by other means to secure the co-operation of town and country to that end and in particular but without limiting the generality of the foregoing declaration in any one or more or all of the following respects;*

- a. *In the promotion and furtherance of the interest of residents and businesses in the area.*
  - b. *In the exercise of practical interest in all matters connected with municipal and locally [sic] body enterprise within the area of the Association.*
  - c. *In the holding of whatever social activities within the area shall be deemed necessary by the association.*
  - d. *Generally in whatever direction the association may decide to take action for the advancement of the area."*
3. The Commission analysed the application, and on 13 January 2009 sent the Applicant a notice that may lead to decline on the basis that the Applicant's winding up clause was not sufficient to meet registration requirements. In addition, the Commission requested further information regarding the Applicant's activities.
  4. On 1 May 2009, the Commission received a rules amendment to the winding up clause (now sufficient to meet registration requirements), and aims and objects clause (clause 4), which read as follows:

#### 4. AIMS AND OBJECTS

*"The association shall be a non profit organisation to promote the interests of residents and organisations within the North Canterbury area by encouraging, whether in the urban or rural areas, activities likely to enhance social and cultural activities. And to promote and assist in the advancement of the area of the*

*Association's operations as defined in Clause 2 hereof and in particular but without limiting the generality of the foregoing declaration in any one or more or all of the following respects;*

- a. In the promotion and furtherance of the interest of residents and businesses in the area.*
- b. In the exercise of practical interest in all matters connected with municipal and locally [sic] body enterprise within the area of the Association.*
- c. In the holding of whatever social activities within the area shall be deemed necessary by the association.*
- d. Generally in whatever direction the association may decide to take action for the advancement of the area.*
- e. Such other charitable purposes as meet the objects of the Association."*

5. The Commission analysed the new rules, and on 14 May 2009 sent the Applicant a section 18 letter asking for more information regarding the activities carried out under clause 4.
6. As the Applicant did not respond to the section 18 letter, the Commission sent a notice that may lead to decline on 6 October 2009 on the basis that the Applicant had not provided sufficient evidence that the Association meets the definition of charitable purpose in the Charities Act.
7. On 20 November 2009, the Commission received a letter responding to the notice that may lead to decline. The activities listed in the letter included:
  - Organise and promote the McIntosh Shield (a sports competition).
  - Organise the "Welcome to Kaiapoi Expo".
  - Host the New Zealand Small Town Conference 2009.
  - Run the Kaiapoi Classic Duathlon and Multisport Race.
  - Organise the Kaiapoi River Carnival and Market Day.
  - Also organise a car rally every few years and concerts in the park.
  - Promote the town in monthly newsletters, comment in the media, advertise shopping hours in the town and make submissions to council on behalf of members and in the interests of Kaiapoi residents.

## **The issues**

8. 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 purposes and activities of the Applicant are charitable, as required by section 13(1)(b) of the Act, and 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 purposes**

9. In order for a purpose to be charitable, it must fall within one of the four charitable purposes set out in section 5(1) and provide a public benefit.
10. 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 or 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>1</sup> This means that the purpose must be directed at benefiting the public or a sufficient section of the public.
11. Section 5(3) of the Act provides that any non-charitable purpose must be ancillary to a charitable purpose.
12. In considering an application, 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.*

## **Charity Commission's analysis**

### Purposes

13. The Commission does not consider that the aims and purposes outlined in clause 4 are aimed at the relief of poverty or advancement of religion. Accordingly they have been considered under the advancement of education and "other matters beneficial to the community".

### *Advancement of education*

14. In order to advance education a purpose must:
  - provide some form of education, and
  - ensure learning is passed on to others.
15. The Commission acknowledges that the reference in clause 4 to enhancing cultural activities could constitute a charitable purpose, as promoting certain types of music, stage plays, or film may amount to advancing education.<sup>2</sup> However, there is no reference to any such charitable activities in the Applicant's response letter received 20 November 2009, except for promoting concerts in the park.

### *Other matters beneficial to the community*

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

<sup>2</sup> *Canterbury Orchestra Trust v Smitham* [1978] 1 NZLR 787 (CA).

16. In order for a purpose to qualify as “any other matter beneficial to the community”, the purpose must be beneficial to 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>3</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>4</sup>
17. Not all organisations that have purposes that benefit the community will be charitable. The purposes must benefit the community in a way that the law regards as charitable.<sup>5</sup> In *Williams Trustees v Inland Revenue Commissioners*<sup>6</sup> Lord Simons (citing Lindley LJ in *In Re Macduff*<sup>7</sup> and Lord Cave LC in *Attorney-General v National Provincial & Union Bank of England*<sup>8</sup>) held:

*“Now Sir Samuel Romilly did not mean, and I am certain Lord Macnaghten did not mean, to say that every object of public general utility must necessarily be a charity. Some may be and some may not be. . . .*

*Lord Macnaghten did not mean that all trusts for purposes beneficial to the community are charitable, but that there were certain beneficial trusts which fell within that category; and accordingly to argue that because a trust is for a purpose beneficial to the community it is therefore a charitable trust is to turn round his sentence and to give it a different meaning.. So here, it is not enough to say that the trust in question is for public purposes beneficial to the community or for the public welfare; you must also show it to be a charitable trust.”<sup>9</sup>*

<sup>3</sup> *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.

<sup>4</sup> *Charitable Uses Act 1601* 43 Elizabeth I c. 4.

<sup>5</sup> *In Re Cumming* [1951] NZLR 498, 501.

<sup>6</sup> [1947] UKHL 1 (21 March 1947). That case was heavily relied up and quoted by Kennedy J *In re Cumming* [1951] NZLR 498.

<sup>7</sup> [1896] 2 Ch 451, 466.

<sup>8</sup> [1924] AC 262, 265.

<sup>9</sup> *Williams Trustees v Inland Revenue Commissioners* [1947] AC 447, 455.

18. In *Travis Trust v Charities Commission*<sup>10</sup>, Williams J. noted that:

*“...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.”*

Economic development

19. In *Charity Law in Australia and New Zealand*, Gino Dal Pont confirms that purposes must benefit the community in a way that the law regards as charitable:

*“...it is not all objects of public utility that are charitable, ‘for many things of public utility may be strictly matters of private right, although the public may indirectly receive a benefit from them.’ **Nor are essentially economic or commercial objects within the spirit of the Preamble.**”*

<sup>11</sup> [Emphasis added]

20. Economic development of a geographical area was specifically considered by the courts in *Re Tennant*<sup>12</sup> and *Tasmanian Electronic Commerce Centre Pty Ltd v Commissioner of Taxation*.<sup>13</sup> In both of these cases, economic development was held to be charitable under “other matters beneficial to the community” because essential services were provided and the community was considered to be under a particular disadvantage.

21. In *Re Tennant* Hammond J stated:

*“Obviously, each case will turn on its own facts. I would not be prepared to say that there may not be cases which would fall on the other side of the line because of private profit making of some kind. But **here the settlor was attempting to achieve for a small new rural community what would then have been central to the life of that community: a cluster complex of a school, public hall, church and creamery.**”<sup>14</sup>*

[Emphasis added]

22. Similarly, in *Tasmanian Electronic Commerce Centre Pty Ltd v Commissioner of Taxation*, the Australian Federal Court of Appeal considered that providing internet and communications infrastructure for a disadvantaged area such as Tasmania was charitable. Heeney J stated:

*“As has been seen, the genesis of TECC was the provision of large amounts of Federal funding to assist ‘regional, rural and remote*

<sup>10</sup> CIV-2008-485-1689, High court, Wellington, 3 December 2008 (Joseph Williams J.) at para. 20.

<sup>11</sup> Gino Dal Pont, 2000, Oxford University Press, p 178; citing *Nightingale v Goulburn* (1847) 5 Hare 484, 490 and *Re Davis (deceased)* [1965] WAR 25, 28.

<sup>12</sup> [1996] 2 NZLR 633.

<sup>13</sup> (2005) FCA 439.

<sup>14</sup> [1996] 2 NZLR 633, 640.

*communities' a current euphemism for those parts of Australia which are economically disadvantaged or, put more bluntly, poor, compared with the rest of the nation . . . Tasmania is a particular case in point. The combination of small population and long distances from markets and raw materials meant that conventional manufacturing industry was always to be at a disadvantage.*"<sup>15</sup>

23. The Applicant has not shown that the area it is promoting is economically disadvantaged or poor compared with the rest of the nation.

24. Finally, the Commission has also considered clause 4 and 4(d) which read as follows

*"The association shall be a non profit organisation to promote the interests of residents and organisations within the North Canterbury area by encouraging, whether in the urban or rural areas, activities likely to enhance social and cultural activities. And to promote and assist in the advancement of the area of the Association's operations as defined in Clause 2 hereof and in particular but without limiting the generality of the foregoing declaration in any one or more or all of the following respects;*

*Generally in whatever direction the association may decide to take action for the advancement of the area.*

25. The Commission considers that these purposes are so broad that the Applicant would be allowed to get involved in activities that are not exclusively charitable in promoting the interest of residents and organisations (businesses in the area, as specified in clause 4(a)). The Commission has therefore concluded that the Applicant does not fall under cases that have considered economic development as charitable.

*Promotion of the interests of residents and businesses in the area*

26. Clause 4(a) of the Applicant's rules is for "the promotion and furtherance of the interest of residents and businesses in the area".

27. In a number of cases, courts have held that assisting persons carrying on a particular trade or business will not be charitable unless there is a condition that this assistance can only be made for a purpose which is itself charitable. See *Crystal Palace Trustees v Minister of Town and Country Planning*<sup>16</sup>; *Hadaway v Hadaway*<sup>17</sup>; and *Commissioners of Inland Revenue v White*<sup>18</sup>.

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<sup>15</sup> (2005) FCA 439 at paras 59-60.

<sup>16</sup> [1951] 1 Ch 132

<sup>17</sup> [1955] 1 WLR 16 (PC)

<sup>18</sup> [1982]

28. 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:

*"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."*<sup>19</sup> [Emphasis added]

29. The English Appeal Court decided in *Commissioners of Inland Revenue v Oldham Training and Enterprise Council*<sup>20</sup> that promotion of business interest was the main purpose and was not ancillary. The Court wrote:

*[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, 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."*<sup>21</sup>

30. Similarly, in *Travel Just v. Canada (Canada Revenue Agency)*,<sup>22</sup> the Canadian Federal Court of Appeal considered that the entity would not meet the requirement of the public benefit test because it would benefit individuals. It wrote at as follows:

*In addition, the creation and development of model tourism development projects with the characteristics described above could include the financing and operation of luxury holiday resorts in developing countries. Promoting commercial activity of this kind, with a strong flavor of private benefit, is not a purpose beneficial to the public which would make Travel Just eligible for a subvention from Canadians."*<sup>23</sup>

<sup>19</sup> [1951] 1 Ch 132, 142.

<sup>20</sup> (1996) 69 Tax Cases 231.

<sup>21</sup> (1996) 69 Tax Cases 231, 251.

<sup>22</sup> 2006 FCA 343 [2007] 1 CTC 294.

<sup>23</sup> 2006 FCA 343, [2007] 1 CTC 294 at para 9.

31. The Commission considers that promoting the interest of businesses is a main purpose and not an ancillary purpose and therefore considers that such a purpose is not charitable.

Other purposes

32. The Commission considers that the purposes outlined in clauses 4(b), (c) and 4(d) are too broad to be exclusively charitable, and consequently could allow the entity to engage in non-charitable activities.
33. In fact, the Applicant, in its letter dated 12 November 2009, stated that the Kaiapoi River Carnival & Market Day is their biggest event of the year, which involves a Santa Parade. Other activities which may not be charitable are "promoting the town in any way we can", funding a part time coordinator to provide monthly newsletters to membership, and "advertising Shopping Hours in the town".
34. Furthermore, the purpose outlined in clause 4(c) does not appear to be charitable. Courts have found that providing amusement, entertainment, or social activities for members of an entity are not primarily purposes which provide a public benefit.<sup>24</sup>
35. In the first case interpreting the *Charities Act 2005*, Williams J. made the following comments concerning sport, leisure and entertainment:
- "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 that where these purposes are expressed to be 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. In the areas of sport, the deeper purpose is usually health or education."*<sup>25</sup>
36. Finally, Courts have held that in order to obtain charitable status, an entity must have exclusively charitable purposes. The presence of but one non-charitable purpose has led Courts to decline charitable status to such entities.<sup>26</sup>
37. The Commission considers that clauses 4 (b), 4(c) and 4(d) are too broad and vague to be exclusively charitable. Consequently, the Commission does not consider that the Applicant meets the requirement of section 13(1)(b)(i) of the *Charities Act 2005*, which requires that an entity "is established and maintained exclusively for charitable purposes".

<sup>24</sup> *Royal Choral Society v Commissioners of Inland Revenue* [1943] 2 All ER 101

<sup>25</sup> *Travis Trust v Charities Commission*, CIV-2008-485-1689, High Court, Wellington, 3 December 2008

<sup>26</sup> *Molloy v. CIR* [1981]1 NZLR 688.



*Public or private benefit*

38. 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.<sup>27</sup> 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.<sup>28</sup>
39. In *Commissioners of Inland Revenue v. Oldham Training and Enterprise Council*,<sup>29</sup> the court decided that the public requirement was not met because:

*"...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."*

40. The Commission concludes that the purposes set out in clause 4 and the activities of the entity as shown in its response letter of 12 November 2009 could provide private benefits for business owners, and that these benefits would not be incidental to any public benefit that may flow from each of the stated purposes.

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<sup>27</sup> *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.

<sup>28</sup> *Gilmour v Coates* (1949) AC 26; see also Dal Pont, *Charity Law in Australia and New Zealand*, Oxford University Press, 2000 at 175 where he wrote:

*Whether the relevant criterion is defined as public benefit or beneficial to the community, the court does not assume or presume its existence as in the case of the other head of charity – the benefit in issue must be affirmatively proved or clear to the court. In other words, the word "beneficial" requires independent examination after the purposes and the beneficiaries have been ascertained.*

<sup>29</sup> (1996) 69 Tax Cases 231.

**Charities Commission's determination**

41. 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 established and maintained for exclusively charitable purposes, as required by section 13(1)(b) of the *Charities Act 2005*.

**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

6/1/10

Date