

## Registration decision: New Zealand Co-operatives Association Incorporated

### The facts

1. New Zealand Co-operatives Association Incorporated (the Applicant) was incorporated under the Incorporated Societies Act 1908 on 29 March 1984 under the name "The New Zealand Agricultural Co-operative Association Incorporated". The Applicant's name was changed to "New Zealand Co-operatives Association Incorporated" on 26 May 1997.
2. The Applicant applied to the Charities Commission (the Commission) for registration as a charitable entity under the Charities Act 2005 (the Act) on 18 April 2008.
3. Clause 2 of the Applicant's Rules defines "co-operative" as:

*"Co-operative' means a company, organisation or other entity whose principal purpose is supplying or being supplied by persons who are members or shareholders of that entity with goods or services or both in order to allow those persons with common interests to join together to derive benefits from their transactions with that entity during the course of their membership or while a shareholder."*

4. The Applicant's objects are set out in clause 3.1 of its Rules:

*"3.1 The objects for which the Association is established are:*

- (a) To encourage, promote and advance New Zealand Co-operatives;*
- (b) To act as a representative Association for those engaged as Co-operatives;*
- (c) To promote discussion and co-operation with decision-makers at all levels of Government designed to further the interests of the Co-operative movement;*
- (d) To provide services and expertise to those engaged in the Co-operative movement and to carry out research into all aspects of the movement;*
- (e) To collect, verify, and publish information relating to the Co-operative movement;"*

5. The Commission analysed the application for registration and on 16 January 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(a), 3.1(b) and 3.1(c) were not charitable purposes according to law. The notice also advised that clause 5 appeared to restrict benefits to the Applicant's members.

6. On 18 March 2009, the Applicant responded to the notice making the following submissions:

- *"In its original application, the Association states that the sectors it currently works in are economic development, employment and fund-raising. The main sector is economic development. We continue to consider that the Association's purposes fall within the fourth charitable purpose – another matter beneficial to the community. However, the Association also has a second charitable purpose – the advancement of education."* (para 24 of the Applicant's letter)
- *"The key reason cooperatives exist is to allow those persons with common interests to join together to derive benefits from their transactions. Because of the nature of their enterprises, many of those persons would be economically vulnerable if they were not part of a cooperative. Members of cooperatives are the modern day equivalent of 'young tradesmen and handicraftsmen' referred to in the Preamble to the Statute of Elizabeth. In carrying out its activities, the Association assists with their 'supportation, aid and help'. We consider that in doing so, the Association is carrying out a purpose that falls within the spirit and intent of the purposes listed in the Preamble as a matter beneficial to the community."* (para 30)
- *"The Association helps keep businesses, and the wealth they create, local, thereby supporting local economies; helps create more jobs which are less likely to leave the local area when the business is successful; helps to contribute to local community regeneration and supply chain development; and helps encourage all-round personal development, including entrepreneurial and business skills."* (para 39)
- *"By carrying out its two primary purposes – the promotion, encouragement and advancement of cooperatives and acting as a representative association for those engaged in cooperatives – the Association is able to carry out its charitable purposes in order to benefit both cooperatives (whether members of the Association or not) and the general public. In doing so, the Association clearly provides an identifiable public benefit. We consider that the Association's activities are benefiting an appreciable section of the public (51 members with over 300,000 members, as well as the many other cooperatives and mutuals which are not members of the Association). The reality is that the Association's benefits are available to anyone who needs them or who chooses to take advantage of them, i.e. any member of the public."* (para 40)

## **The issues**

7. 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:

- (i) 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; and

- (ii) whether the Applicant provides public benefit or whether it is established primarily for the benefit of its members.

### **The law on charitable purpose**

8. 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.
9. 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.<sup>1</sup> This means that the purpose must be directed at benefiting the public or a sufficient section of the public.
10. Section 5(3) of the Act provides that any non-charitable purpose must be ancillary to a charitable purpose.
11. 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; ..."*

### **Charities Commission's analysis**

12. The Commission considers that the Applicant's purposes, set out in clauses 3.1(a) to (e) do not indicate an intention to relieve poverty or advance religion. The purposes have therefore been considered in relation to advancement of education and "any other matter beneficial to the community".

#### Advancement of education

13. In order for a purpose to advance education, it must provide some form of education and ensure that learning is advanced.
14. The Applicant, in its letter of 18 March 2009, advised that "the training sessions, attendance at forums, results of research and newsletters are available to members of the Association, any cooperative that is not a member of the Association and members of the public, whether they belong to a cooperative or not."
15. The Commission considers that the purposes in clauses 3.1(d) and (e) could advance education and therefore be charitable if the information is available to the public and not only to the members.<sup>2</sup>

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

<sup>2</sup> *Re Mason (deceased)* [1971] NZLR 714, 721.

16. Education does not, however, include advertisements for particular goods or services, the study of subjects that have no educational value, or the promotion of a particular point of view.<sup>3</sup>
17. The Commission considers that the purposes in clause 3.1(a) to (c), encouraging, promoting and advancing New Zealand co-operatives; acting as a representative Association for those engaged in co-operatives; and promoting discussion and co-operation with decision-makers at all levels of Government in order to further the interests of the co-operative movement; do not amount to advancing education.

Other matters beneficial to the community

18. 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 intentment of the purposes set out in the Preamble to the Charitable Uses Act 1601 (the Statute of Elizabeth).<sup>4</sup>
19. The Applicant, in its letter of 18 March 2009, submitted that because of the nature of their enterprises, many people who join co-operatives would be economically vulnerable if they were not part of a cooperative. The Applicant also submitted that “members of cooperatives are the modern day equivalent of “the supportation, aid and help of young tradesmen and handicraftsman” referred to in the Preamble to the Statue of Elizabeth.
20. In *Commissioners of Inland Revenue v White*<sup>5</sup>, the court considered that in a contemporary context “the supportation, aid and help of young tradesmen and handicraftsman” would mean those people who perform an art, trade or profession requiring special skill or knowledge. In that case, the Applicant’s purposes involved encouraging the exercise and maintaining the standards of crafts both ancient and modern, preserving and improving craftsmanship and fostering, promoting and increasing public interest in such crafts. The tradesmen and handicraftsman in that instance included “ordinary glaziers and makers of stained glass, carpenters and cabinetmakers, bookbinders, jewellers, silversmiths, engravers, stone masons, clock makers and needle workers”.<sup>6</sup>
21. The Applicant advised that its members include entities such as PSIS Ltd, Fonterra Cooperative Group Ltd, Farmlands Trading Society Ltd, Pharmacy Wholesalers (Bay of Plenty) Ltd, and Orb Communications Ltd. The Commission has no evidence that the members who belong to such co-

<sup>3</sup> *In re Shaw (deceased)* [1957] 1 WLR 729; as interpreted in *Re Hopkins' Will Trusts* [1964] 3 All ER 46. See also *Re Collier* [1998] 1 NZLR 81.

<sup>4</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>5</sup> (1982) 55 TC 651.

<sup>6</sup> (1982) 55 TC 651, 654.

operatives are economically vulnerable or that they are restricted to those people who perform an art, trade, or profession requiring specialised skill or knowledge.

22. The Applicant also advised “by promoting the cooperative business model, the Association pursues community and economic development throughout New Zealand”. The Commission notes that charity law has generally not recognised economic development as a charitable purpose. Dal Pont, in *Charity Law in Australia and New Zealand*, states:

... 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 directly receive a benefit from them. **Nor are essentially economic or commercial objects within the spirit of the Preamble** [Emphasis added].<sup>7</sup>

23. In *Commissioners of Inland Revenue v White*<sup>8</sup> the court cited the established principle set out in *Hadaway v Hadaway*,<sup>9</sup> that assisting persons carrying on a particular trade or business or profession will not be charitable unless there is a condition that this assistance can only be made for a purpose which is itself charitable.

#### Public or private benefit?

24. As noted earlier, in order to be charitable, a purpose must be directed at benefiting the public or a sufficient section of the public. This 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>10</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>11</sup>
25. The Applicant submitted<sup>12</sup> that it provides benefits for voluntary bodies other than charities, that is, cooperatives and the general public. The Association provides public benefit by helping “keep businesses, and the wealth they create, local, thereby supporting local economies, helps create more jobs

<sup>7</sup> Melbourne, Oxford University Press, 2000, p178 citing *Nightingale v Goulburn* (1847) 5 Hare 484, 490 and *Re Davis (deceased)* [1965] WAR 25, 28.

<sup>8</sup> [1982]55 TC 651.

<sup>9</sup> [1955] 1 WLR 16 (PC). See also *Crystal Palace Trustees v Minister of Town and Country Planning* [1951] 1 Ch 132 and *Commissioners of Inland Revenue v Oldham Training and Enterprise Council* 69 TC 231.

<sup>10</sup> *Commissioners of Inland Revenue v Oldham Training and Enterprise Council* 69 TC 231; *Travel Just v Canada (Revenue Agency)* 2006 FCA 343; [2007] 1 CTC 294.

<sup>11</sup> *Gilmour v Coates* (1949) AC 26; see also Dal Pont, *Charity Law in Australia and New Zealand*, Oxford University Press, 2000, p175:

*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>12</sup> Applicant’s letter to the Commission dated 18 March 2009, paras 38 to 41.

which are less likely to leave the local area when the business is successful”.

26. In *Commissioners of Inland Revenue v Oldham Training and Enterprise Council* 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.”*<sup>13</sup>

27. The fact that “cooperatives are mutual businesses that ... return surplus revenues to members in proportion to their use of the cooperative [and] distribute surplus revenue to members”<sup>14</sup> shows that members are the main beneficiaries. In addition, revenue which is retained in a co-operative to give better service and lower costs to members in the future is no different from a company whose shareholders forgo dividends in a particular year in order to build up the business and reduce future costs.

28. Furthermore, the Applicant noted that:

*“there are 300 active cooperatives and mutuals in New Zealand with assets worth more than \$20bn and an annual turnover in the region of \$34bn. Representing more than 20% of New Zealand’s GDP, cooperatives perform well for their members”* [emphasis added].<sup>15</sup>

29. Courts have often held that mutual benefit arrangements “stamp the whole transaction as one having a personal character, money put up by a number of people, not for general benefit, but for their own individual benefit”.<sup>16</sup>

30. In *Inland Revenue Commissioners v Yorkshire Agricultural Society*<sup>17</sup>, Lord Atkin said:

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

31. These factors all indicate that the Applicant’s purposes in clauses 3.1(a), (b) and (c) do not provide sufficient public benefit.

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<sup>13</sup> 69 TC 231, 251.

<sup>14</sup> Applicant’s letter to the Commission dated 18 March 2009, para 7.

<sup>15</sup> Applicant’s letter to the Commission dated 18 March 2009, para 13.

<sup>16</sup> *Re Hobourn Aero Components Limited’s Air Raid Distress Fund* [1946] 1 Ch 194, 200. See also *Re Harris Scarfe Ltd* [1935] SASR 433.

<sup>17</sup> [1928] 1 KB 611, 631.

### Ancillary purpose

32. Section 5(3) of the Act provides that if an entity's purposes include a non-charitable purpose that is merely ancillary to a charitable purpose, the presence of that non-charitable purpose does not prevent the entity from qualifying for registration as a charitable entity.
33. Clause 3.1(c) provides for the Applicant to promote discussion and co-operation with decision-makers at all levels of government. The Applicant submitted that while this is a non-charitable purpose, it is ancillary to its two charitable purposes in clauses 3.1(a) and (b).
34. Courts have made a distinction between main purposes and means to attain these purposes. In *McGovern v Attorney-General*<sup>18</sup>, the court held that in considering the purposes of an entity, it must find its main purpose. It is the purpose in question that must be political; the mere fact that political means may be employed in furthering charitable objects does not necessarily render the gift or institution non-charitable. Similarly, in *Vancouver Society of Immigrant and Visible Minority Women v M.N.R.*<sup>19</sup>, the Supreme Court of Canada stated:

*"... although a particular purpose was not itself charitable, [if] it was incidental to another charitable purpose, [it] was therefore properly to be considered not as an end in itself, but as a means of fulfilment of another purpose, which had already been determined to be charitable. Viewed in this way, it did not vitiate the charitable character of the organisation".*

35. The Commission agrees that clause 3.1(c) is a non-charitable ancillary purpose.

### Conclusion

36. The Commission concludes that the purposes set out in clauses 3.1(d) and (e) are charitable, but that the purposes set out in clauses 3.1(a), (b) and (c) are non-charitable purposes which do not provide sufficient public benefit. The non-charitable purpose in clause 3.1(c) is ancillary, but the non-charitable purposes in clauses 3.1(a) and (b) are main purposes.

### **Charities Commission's determination**

37. 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 society or institution established and maintained for exclusively charitable purposes, as required by section 13(1)(b)(i) of the Act.

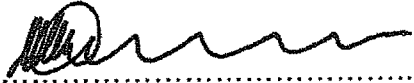
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<sup>18</sup> [1982] 1 Ch 321 at 340. See also *Public Trustee v Attorney-General* (1997) 42 NSWLR 600, 616.

<sup>19</sup> [1999] 1 SCR 10 at para 157, the Supreme Court of Canada approved the reasoning used by Ritchie J. in *Guaranty Trust of Canada v. M.N.R.* [1967] SCR 133.

**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

24/8/09

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Date