

Registration decision: North Canterbury Economic Development Trust

The facts

1. North Canterbury Economic Development Trust (the Applicant) was created by a deed of trust dated 27 June 2002. The Applicant was registered under the *Charitable Trusts Act 1957* on 12 August 2002. The Applicant applied for registration with the Commission on 13 November 2007.
2. The Applicant's objects are set out in clause 3 of the deed of trust:

3. *OBJECTS OF THE TRUST*

- 3.1 *The Objects of the Trust are to:*

- (a) *Cultivate economic initiatives and foster growth for the benefit of the North Canterbury Community*
- (b) *Promote the economic, environmental, cultural and social well being of the North Canterbury Community*
- (c) *Foster, develop and assist in the management of best practices and effective use of the resources of North Canterbury.*
- (d) *Promote and nurture community-based, sustainable economic growth through projects to benefit the people of North Canterbury Community*

- 3.2 *To achieve the Objects of the Trust, the Trust intends pursuing a variety of initiatives including (without limitation)*

- (a) *Identifying and supporting opportunities for innovation, entrepreneurship and business expansion in North Canterbury*
- (b) *Liaising with regional and central government agencies to create general economic benefit for the North Canterbury community*
- (c) *Developing population growth strategies for North Canterbury.*
- (d) *Fostering an active partnership with Te Runanga O Ngai Tahu and the Papatipu Runanga of Ngai Tahu Whanui as defined in the Te Runanga o Ngai Tahu Act 1996 with emphasis placed on seeking ongoing opportunities to give effect to the principles of the Treaty of Waitangi.*
- (e) *Fostering partnerships between local industry and local high schools, tertiary and vocational institutions to*

develop a regional industry matched education and skills training plan in North Canterbury

- (f) The development of employment initiatives designed to retain young and skilled people in North Canterbury, reduce unemployment, promote and attract new investment and to encourage existing business to remain and grow in North Canterbury*
 - (g) Marketing and promoting business opportunities in North Canterbury*
 - (h) The development of a brand that reflects the regions attributes and provides a beacon for new business development in North Canterbury.*
 - (i) Identifying and managing barriers to growth thus making North Canterbury a more “business friendly” environment*
 - (j) Encouraging research and development in the area of sustainable land use potential in North Canterbury*
 - (k) The development of a community-based data base to be used in generating a strategic plan for regional economic development in North Canterbury.*
 - (l) Such other means and strategies as found in the Trust’s strategic plan, and as the trustees think fit to carry on the Trust’s charitable purposes.*
- 3.3 The Trust will honour the principles of the Treaty of Waitangi and foster an active partnership with Te Runanga o Ngai Tahu and the Papatipu Runanga of Ngai Tahu Whanui as defined in the Te Rununga o Ngai Tahu Act 1996.*
- 3.4 The economic initiatives and growth strategies undertaken by the Trustees in co-operation with the Councils are to be undertaken in a North Canterbury context, that is to say, the Trust is to work together with the Councils and with other councils and trusts recognising the synergy gained by working together in the strength of numbers and togetherness.*
- 3.5 The objects of the Trust set out in clause 3 herein shall be construed as statement of corporate intent for the purposes of the Local Government Act 1974.*

3. Clauses 4.1 and 4.2 state:

- “4.1 The capital and income of the Trust Fund shall be applied by the Trustees for such of the Objects of the Trust as the Trustees may from time to time determine. The Trustees need not treat each of the Objects of the Trust equally.*
- 4.2 The capital and income of the Trust Fund shall be applied only within New Zealand to meet the Objectives fo the Trust. In no circumstances shall any part of the capital and income of the*

Trust Fund be applied outside New Zealand but the operation of this clause shall not prevent the Trust from investing in export industries which have a direct or indirect beneficial effect on North Canterbury and assist the Trust in meeting its objectives.”

4. The Commission analysed the application, and on 5 August 2008 sent the Applicant a notice that may lead to decline. The notice stated that the purposes in clauses 3.2(e), (j), (k) and clause 3.2(f) relating to reducing unemployment were likely to be charitable and clauses 3.2(d) and (l) were ancillary, but the purposes in the remaining clauses were non-charitable.
5. On 24 October 2008 the Applicant’s solicitor responded making the following submissions:
 - The Applicant is a council-controlled organisation pursuant to section 6 of the *Local Government Act 2002* and section YA 1 of the *Income Tax Act 2007*. The exemption from income tax for local and regional promotion bodies under section CW 40 of the *Income Tax Act* is not available for council-controlled organisations and therefore this exemption is not available to the Applicant. It is therefore imperative for the Applicant to be registered with the Commission in order to preserve its current tax exempt status.
 - Courts have held the promotion of industry and commerce to be charitable in cases such as *Pleasants v Attorney-General*,¹ *Commissioners of Inland Revenue v Yorkshire Agricultural Society*,² *Commissioners of Inland Revenue v White and others and Attorney-General*,³ *Construction Industry Training Board v Attorney-General*⁴ and *Crystal Palace Trustees v Minister of Town & Country Planning*.⁵
 - Each of the Applicant’s objectives in clause 3.1 is focused on benefitting the wider North Canterbury community and therefore the Applicant meets the public benefit test.
 - Clauses 3.2(a), (b), (g), (h) and (i) of the trust deed:

“are all targeted at the development of the North Canterbury region as a whole, with particular emphasis on:

 - *assisting and developing existing businesses in the region to ensure that the region retains its current employment opportunities; and*
 - *attracting new businesses to the region and developing these to prevent the region stagnating, leading to employment migration.”*

1 (1923) 39 TLR 675.
2 [1928] 1 KB 611.
3 (1996) 69 TC 231.
4 [1971] 1 WLR 1303
5 [1951] Ch 132.

- Clauses 3.2(c) and (k):

“are focused on ensuring that sufficient investment is made into building a considered development strategy, with the intention of protecting the environment at the same time as providing and maintaining sufficient public amenities for the community. These clauses support the other charitable objectives of the Trust”.

6. The Commission analysed the information provided by the Applicant and on 19 February 2009 sent the Applicant a second notice that may lead to a decline. The notice stated that the Applicant’s purpose set out in clause 3.1(c) and the purpose relating to environmental, cultural and social well-being set out in clause 3.1(b) were likely to be charitable, but the purposes set out in clauses 3.1(a) and (d) and the purpose relating to economic well-being in clause 3.1(b) were not necessarily charitable.
7. The notice also stated that the Commission had considered the initiatives listed in clause 3.2 of the trust deed and information about the Applicant’s activities on its website as required by section 18(3)(a) of the *Charities Act*. In particular:

“The trust’s website states:

‘Enterprise North Canterbury is the economic and business development agency for the North Canterbury region. One of our core objectives is to sustain and grow existing business and promote new business in the region.

If you currently own or operate a business in North Canterbury, or intend to start a business, we can assist you. We have access to information and assistance to help your business establish and prosper.’⁶

*A six-page brochure on the work of the trust identifies **two** of the five key areas of the trust as:*

- ‘to sustain and grow existing businesses, and promote new businesses . . .’
- ‘to promote North Canterbury as a local, domestic and international visitor destination’, stating that the trust:
‘works with:
 - tourism operators to help them to grow their business
 - creative arts businesses to help them to collaborate and grow
 - businesses to develop a North Canterbury Food and Wine Trail . . .’⁷

8. The Commission stated that this information indicated that a primary purpose of the Applicant was to generate increased income for private

⁶ <http://www.northcanterbury.co.nz/business-support/> (accessed 18/02/2009).

⁷ <http://www.northcanterbury.co.nz/downloads/Brochure.pdf> (accessed 18/02/2009).

business owners which was a non-charitable purpose. In the event that there was any benefit to the public, this would be too remote.

9. On 18 August 2009, the Applicant's solicitor responded making the following submissions:

- The references to the Applicant's charitable nature in the Trust Deed are sufficient in themselves to confirm that it was established to promote economic development in general in the North Canterbury region for the benefit of the local community, and that it was not established to promote the interests of particular businesses in North Canterbury.
- Part A of the Introduction to the trust deed states that the settlors wish to establish a **charitable trust** for promoting a co-ordinated approach to regional economic development throughout North Canterbury.
- Clause 11.2(a) requires any income, benefit or advantage to be applied to the charitable purposes of the Applicant and clause 11.2(d) prohibits any individual from receiving private pecuniary profit which would be contrary to the charitable purposes of the deed.
- Clause 15 states that provisions of the deed can only be revoked, varied or added to if this does not affect the Applicant's charitable status for tax purposes.
- To the extent that any individual businesses will receive a benefit as a result of the Applicant carrying out its purposes, any such benefit must be regarded as incidental or ancillary to the overriding purpose of benefit to the local community in general.
- The Applicant's situation can be distinguished from that set out in *Commissioners of Inland Revenue v Oldham Training and Enterprise Council*. In the *Oldham* case the judge was unable to find in the company's constitution a charitable limitation on the object of promoting the development of industry, commerce and enterprise. In the Applicant's case the objects in clause 3.1 are subject to a charitable limitation which is indicated by Part A of the Introduction, clauses 11.2(a), 11.2(d) and 15.
- The Applicant would be willing to insert the following clause into the trust deed in order to clarify that it carries out its purposes for the public benefit and that any benefit to individuals or businesses is merely incidental or ancillary:

"3A *The assets and surplus income of the Trust and any other benefit or advantage obtained by the Trust shall be held and applied to the objects in clause 3.1 to the extent to which such objects are charitable according to the law of New Zealand.*"

The issues

10. 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 purposes

11. 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.
12. 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.⁸ This means that the purpose must be directed at benefiting the public or a sufficient section of the public.
13. Section 5(3) of the Act provides that any non-charitable purpose must be ancillary to a charitable purpose.
14. 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; ..."*

Commission's analysis

Clause 3.1

15. The Commission considers that the Applicant's purposes set out in clause 3.1(c) and the purpose relating to environmental, cultural and social well-being set out in clause 3.1(b) are likely to be charitable under "other matters beneficial to the community". The remaining purposes set out in clauses 3.1(a) and (d) and the purpose relating to economic well-being set out in clause 3.1(b) do not indicate an intention to relieve poverty, advance religion or education, the Commission has therefore considered whether these purposes could be charitable under "other matters beneficial to the community".

⁸ See *Latimer v Commissioner of Inland Revenue* [2002] 3 NZLR 195.

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):⁹
- 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.¹⁰

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. According to *Charity Law in Australia and New Zealand*:

“ . . . 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.”¹¹

18. In cases such as *Re Tennant*¹² and *Tasmanian Electronic Commerce Centre Pty Ltd v Commissioner of Taxation*¹³ economic development of a community has been held to be charitable under “other matters beneficial to the community” where essential services are provided or where the community is under a particular disadvantage.

19. 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

⁹ *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.

¹⁰ *Charitable Uses Act 1601* 43 Elizabeth I c. 4.

¹¹ 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.

¹² [1996] 2 NZLR 633.

¹³ (2005) FCA 439.

*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.*¹⁴
[Emphasis added]

20. 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 communities’ a current euphemism for whose 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.”*¹⁵

21. The Commission notes that *North Canterbury Labour Market Overview*¹⁶ indicates that in 2006:
- Labour force participation in the Waimakariri and Hurunui districts was rising and both districts’ rates were higher than the regional or national rates (68.3% and 68.5% respectively)
 - Unemployment rates were declining in North Canterbury, and were significantly lower than the national unemployment rate.
22. The Applicant has not provided any evidence that it is either providing essential services or assisting an area that is under any particular disadvantage. The Commission therefore considers that the Applicant’s purposes set out in clauses 3.1(a) and (d) and the purpose relating to economic well-being in clause 3.1(b) are not within the spirit and intent of the preamble to the Statute of Elizabeth and therefore they are not charitable under the fourth head.

Clause 3.2

23. The Commission considers that clauses 3.2(d), (e), (k) and the purpose relating to reducing unemployment in clause 3.2(f) are likely to be ancillary to the Applicant’s charitable purposes set out in clause 3.1(b). Clause 3.2(j) is likely to be ancillary to the Applicant’s charitable purpose set out in clause 3.1(c).
24. The remaining clauses 3.2(a) to (c), (g) to (i) and the purpose in clause 3.2(f) relating to promoting and attracting new investment and encouraging existing businesses to remain in the area and grow,

¹⁴ [1996] 2 NZLR 633, 640.

¹⁵ (2005) FCA 439 at paras 59-60.

¹⁶ http://www.northcanterbury.co.nz/content/library/2008_North_Canterbury_Labour_Market_Overview.pdf (accessed 16/12/2009)

however, appear to be independent purposes which are not ancillary to any stated charitable purposes.

25. While ancillary purposes or powers do not have to be charitable in their own right, such clauses must still further the charitable purposes of the entity. Section 5(3) of the *Charities Act* states:

*“To avoid doubt, if the purposes of a trust, society, or an institution include a non-charitable purpose (for example, advocacy) that is merely **ancillary to a charitable purpose** of the trust, society, or institution, the presence of that non-charitable purpose does not prevent the trustees of the trust, the society, or the institution from qualifying for registration as a charitable entity.*

26. In *MK Hunt Foundation Ltd v Commissioner of Inland Revenue* the court held:

*“In examining the memorandum, one must of course, distinguish between objects and powers, and in that regard bear in mind Lord Tomlin’s statement in *Keren Kayemeth le Jisroel Ltd v Commissioners of Inland Revenue* [1932] A.C. 650; [1932] All ER Rep 971:*

‘I well appreciate the argument which says that if you once find that the main object is charitable you cannot destroy the charitable character of the main object, because the ancillary powers, which are incidental to it, are, some of them, in themselves, not charitable. That argument may indeed be well founded, but when the question is whether the primary object is itself charitable, it is legitimate, in reaching a conclusion upon that head, to consider the effect of the incidental powers, and it may well be that the incidental powers are such as to indicate or give some indication that the primary object is not itself charitable’ (ibid) 658; 977).

In the result he came to the view that the main object was not charitable. The statute there under consideration contained the phrase ‘for charitable purposes only’, and Lawrence L.J. had said in the Court of Appeal, [1931] 2 K.B. 465:

‘It is not enough that the purposes described in the memorandum should include charitable purposes. The memorandum must be confined to those purposes’ (ibid., 481).

In so holding, Lawrence L.J. makes it clear in his judgment that he had in mind, not merely the phrase ‘charitable purposes only’, but also the cases which show that non-charitable objects will prevent recognition of the body in question as a charitable trust.”¹⁷

27. Similarly in *Commissioner of Inland Revenue v Carey’s (Petone and Miramar) Ltd* Gresson P, stated:

“This aspect of the question before us seems to us to invoke similar (though not identical) considerations to those which exercised the mind

¹⁷ [1961] NZLR 405, 407-408.

of *Lord Greene in Royal Choral Society v Commissioners of Inland Revenue* [1943] 2 All ER 101 (though that was the case of the objects of a charitable institution, not the objects of a charitable trust). He said:

“It is true that you have to find the purpose of the alleged charitable establishment. It may very well be that a purpose which, on the face of it looks to be the real purpose, on close examination, is found not to be the real purpose. A body of persons may purport to set themselves up for educational purposes; but on a full examination of the facts, it may turn out that their purpose is nothing of the kind, and is one merely to provide entertainment or relaxation to others, or profit to themselves. In other words, the presence of the element of entertainment or pleasure may be either an inevitable concomitant of a charitable or educational purpose, or it may be the real fundamental purpose, and education may merely be a by-product. Whether a case falls within one class or the other is, no doubt, a question of fact, save and so far as it may depend on the construction of written documents’ (ibid., 106).

So in this case what must be decided is whether the real fundamental purpose of this trust is charitable.”¹⁸

28. In *Auckland Medical Aid Trust v Commissioner of Inland Revenue* Chilwell J stated “The law would resist finding a charitable purpose if a trust were dressed up within a cloak of charitable purposes that cloak being in fact used for non-charitable purposes.”¹⁹
29. For the reasons given in paragraphs 16 to 22 above the Commission does not consider that the purposes in clauses 3.2(a) to (c), (g) to (i) and the purpose in clause 3.2(f) relating to promoting and attracting new investment and encouraging existing businesses to remain in the area and grow, are charitable under “other matters beneficial to the community”.

Public or private benefit?

30. In addition, in order for a purpose to be regarded as “beneficial to the community”, the benefits must be to the community rather than to private individuals. 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.²⁰ 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.²¹

¹⁸ [1963] NZLR 450, 456.

¹⁹ [1979] 1 NZLR 382, 395.

²⁰ *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.

²¹ *Gilmour v Coats* (1949) AC 26; *Re Blyth* [1997] 2 Qd R 567, 582; *D V Bryant Trust Board v Hamilton City Council* [1997] 3 NZLR 342, 350.

31. In his letter of 24 October 2008 the Applicant's solicitor has correctly identified that courts have sometimes found the promotion of industry and commerce to be charitable under the fourth head. In support of this view, he has referred to *Commissioners of Inland Revenue v Yorkshire Agricultural Society*,²² *Crystal Palace Trustees v Minister of Town and Country Planning*,²³ *Construction Industry Training Board v Attorney-General*,²⁴ and *Commissioners of Inland Revenue v White and others and Attorney-General*.²⁵
32. The Commission has also considered the courts' decisions in *Hadaway v Hadaway*,²⁶ and *Commissioners of Inland Revenue v Oldham Training and Enterprise Council*.²⁷
33. In *Commissioners of Inland Revenue v Yorkshire Agricultural Society*,²⁸ the Court of Appeal held the improvement of agriculture 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.
34. 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 a 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."*²⁹ [Emphasis added]
35. 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:
- "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."*³⁰
36. In *Construction Industry Training Board v Attorney-General* the Court of Appeal held that providing industry training facilities resulted in a

22 [1928] 1 KB 611.
 23 [1951] 1 Ch 132.
 24 [1973] 1 Ch 173.
 25 (1982) 55 TC 651.
 26 [1955] 1 WLR 16.
 27 (1980) 55 TC 651.
 28 [1928] 1 KB 611.
 29 [1951] 1 Ch 132, 142.
 30 [1955] 1 WLR 16, 20 (PC).

significant benefit for the public and did not merely promote the interests of those engaged in the manufacture and sale of particular products.

37. In *Commissioners of Inland Revenue v White* the court held that demonstrating crafts which required a particular skill to the public was a charitable purpose. Fox J stated:

*“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.**”*³¹ [Emphasis added]

38. 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, 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.**”*³² [Emphasis added].

39. The Commission considers that clauses 3.1(a) and (d), 3.2(a) to (c), 3.2(g) to (i), the purpose relating to economic well-being in clause 3.1(b), and the purpose relating to promoting and attracting investment and encouraging existing businesses to remain in the area and grow in clause 3.2(f) are non-charitable purposes which will provide private benefits for business owners in the Canterbury region. Any benefits conferred on the remainder of the community will be too remote.

Applicant's submissions

40. In his letter of 24 October 2008 the Applicant's solicitor states that the Applicant was previously accepted as charitable by Inland Revenue and therefore enjoyed tax-exempt status.
41. The Commission points out that only those decisions made by Inland Revenue which are specified in section 13(2), in relation to trustees of a trust, and section 13(3), in relation to societies or institutions, of the

³¹ (1980) 55 TC 651, 659.

³² (1996) 69 Tax Cases 231, 251.

- Charities Act* are binding on the Commission. The Applicant has not provided any evidence that it meets the requirements of section 13(2) of the Act.
42. In the same letter the Applicant's solicitor states that it is imperative for the Applicant to be registered with the Commission because the exemption from income tax for local and regional promotion bodies contained in section CW 40 of the *Income Tax Act 2007*, is not available to the Applicant because it is a "council-controlled organisation".
 43. The Commission can only approve applications for registration which meet the essential criteria set out in section 13 of the *Charities Act*. It cannot approve applications on the basis that other tax exemptions are not available to an applicant.
 44. The Commission also notes that sections CW 41 and CW 42 of the *Income Tax Act*, which provide exemptions from income tax for business and non-business income for charities, do not appear to apply to most "council-controlled organisations" either. This may be a matter which the Applicant wishes to discuss directly with Inland Revenue.
 45. In his letter of 18 August 2009, the Applicant's solicitor has indicated that the Applicant would be willing to include a clause stating that the Applicant's assets, surplus income and any other benefit or advantage "shall be held and applied to the objects in clause 3.1 to the extent to which such objects are charitable according to the law of New Zealand".
 46. The Commission does not consider that the inclusion of such a clause would provide conclusive evidence that the Applicant's purposes in clauses 3.1 and 3.2 would in fact be charitable. Before it can register an applicant as a charitable entity, the Commission must be certain that the applicant meets all the essential elements of registration set out in section 13 of the *Charities Act*. In addition, section 18(3)(a) of the *Charities Act* requires the Commission to have regard to the current and future activities of an applicant for registration.

Section 61B of the *Charitable Trusts Act*

47. 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.
48. The first is where the entity's **stated purposes** include 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).³³

49. The Commission considers that the purposes set out in clauses 3.1(c), 3.2(d), (e), (j), (k), the purpose relating to environmental, cultural, and social well-being in clause 3.1(b), and the purpose relating to reducing unemployment in clause 3.2(f) may be charitable. The purposes in clauses 3.1(a), (d), 3.2(a) to (c), (g) to (i), the purpose relating to economic well-being in clause 3.1(b) and the purpose relating to promoting and attracting new investment and encouraging existing businesses to remain in the area and grow in clause 3.2(f) are non-charitable for the reasons given above. The Applicant appears to have more non-charitable purposes than charitable purposes and if the non-charitable purposes were “blue-pencilled out”, the Applicant would not be able to carry on its main purpose which is to encourage, promote and support the successful establishment and growth of business and investment within North Canterbury. The Commission therefore concludes that the Applicant does not have substantially charitable purposes.

50. 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.”³⁴

51. The Commission has analysed the wording of the Applicant’s purposes, surrounding context, and activities (as directed by section 18 of the *Charities Act*). The Commission does not consider that these provide 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.

52. 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.

Charity Commission’s determination

53. 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

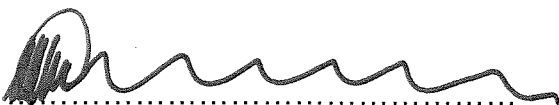
³³ *Re Beckbessinger* [1993] 2 NZLR 362, 373.

³⁴ *Re Beckbessinger* [1993] 2 NZLR 362, 376.

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



Trevor Garrett
Chief Executive

18/12/09

Date

