

## Deregistration decision: Octagon Market Trust

### The facts

1. Octagon Market Trust (the Trust) was incorporated as a board under the Charitable Trusts Act 1957 on 17 May 2004. The Trust was registered as a charitable entity under the Charities Act 2005 (the Act) by the Charities Commission (the Commission) on 10 December 2008, with registration backdated to 30 June 2008.

2. The Trust's purposes are set out in clause 4 of the Trust Deed:

*The purposes of the Trust are as follows:*

- (a) To operate a market in the Octagon in Dunedin which market shall be primarily for the sale of locally produced arts and crafts and which shall be run on a non-profit basis.*
- (b) To develop the Octagon Market as a vibrant centre of activity in the Octagon which will benefit the storeholders and makers of craft items as well as the general public of Dunedin and tourists.*
- (c) To maintain the items of plant required for the market and to raise sufficient funds to ensure that the plant and equipment can be maintained and replaced as necessary.*
- (d) To facilitate the hire and use of the plant and equipment by other groups within the Dunedin and Otago area to assist with recovering overhead costs.*
- (e) To assist local craftspeople by offering a venue for the sale of products and to provide a meeting place for the citizenry of Dunedin and to bring to the local citizens and visitors to the city a selection of the local art and craft products.*
- (f) To do all such other things as may be necessary to attain the above purposes.*

3. Information received by the Commission during its assessment of an entity with similar purposes led to the Commission's decision to review the Trust's eligibility for registration.

4. On 22 June 2009, the Commission sent the Trust a letter under section 50 of the Act, requesting the following information:

- Details of the current activities of the Trust, undertaken pursuant to clause 3 of the Trust Deed
- Who benefits from the activities of the Trust?
- What are the Trust's sources of income?
- The financial statements for the Trust for the last five years.

5. The Trust's solicitor responded to the information request on 31 July 2009 stating:

*"The Trust's current activities involve the running of the Octagon Market when weather permits.*

*Presently the Trust itself is the only beneficiary of the activities.*

*The sole financial sources for the Trust is the money received from the hiring out of stalls.*

*We do not currently have any financial statements for the Trust. ... I will forward it [the Trust's financial information] to you upon receipt "*

6. The Commission sent a reminder email to the Trust on 22 September 2009 regarding the Trust's financial statements. The Trust has not provided its financial statements, and has not filed its annual return, due on 31 October 2009.
7. On 20 November 2009, the Commission sent the Trust a notice of intention to remove the Trust from the register on the basis that it was not established and maintained for exclusively charitable purposes.
8. On 3 February 2010, the Trust's solicitor responded to the notice of intention to remove from the register making the following submissions:

*"It is correct that the primary purpose of the Trust is to provide a market place. As a result of providing the market place the Trust is able to provide numerous services that serve the public interest.*

*The Market Place is run primarily for the sale of locally produced arts and crafts. ... the market does not make a profit. ... it costs the Trust approximately \$700.00 per year to run. The majority of these costs are for the running of the truck which the market uses to transport the stalls.*

*Any other money made through sales at the market goes back into maintaining plant and for purchasing the raw materials which the crafts are made from. The benefit to the community is extensive. The market allows for local residents to have the opportunity to display their craft and allows them to continue working in their craft by giving them an outlet to sell their crafts and purchase more materials to continue their work.*

*The Market has become a mainstay of the Octagon and contributes towards the vibrancy of the city and allows tourists a place to come and sample the locally made items which they would otherwise not know exists. The market is especially beneficial for the community when cruise ships dock at Port Chalmers and tourists make their way into town to sample a piece of New Zealand and local culture.*

*Apart from benefitting the city by displaying local art and craft to tourists the market has become a meeting place for locals to come and adds to the character to what is a traditional city.*

*The Market is heavily involved with hiring and providing the use of its plant and equipment within the Otago area. Every year for the Mayor's*

*Breakfast, which operates as a fundraiser for local foodbanks, the Market provides its stalls for use, free of costs. ...*

*The Market provides the same service to the Alzheimer's Society for approximately half the cost of setting up and transporting the stalls. The same service is provided for the Chinese New Years celebrations for a cut rate price.*

*The Red Cross are charged for set up fees only.*

*The Dunedin City Council's New Year's celebrations are provided with stalls for no price ...*

*One of the regular stalls is provided to fundraising for the Para Olympics ...*

*Schools are only charged a set up fee therefore the Trust is only recuperating its costs for setting up the stalls and are making no profit, ...*

*The Market has a lot of exposure in Dunedin and is of a public nature. The stalls can be hired by all members of the public and if their purpose is charitable the Market only charges a nominal fee to cover their costs of setting up and transportation. The benefits of the Market are available to anybody who requests them. If the reason for hiring the stalls is not charitable the fees charged by the Market will more than cover their costs but this is a nominal fee that ensures that all members of the public are not excluded from using their services."*

## **The issues**

9. The Commission must consider whether the Trust is not, or is no longer, qualified for registration as a charitable entity under section 32(1)(a) of the Act. In this case, the key issue for consideration is 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, 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.

## **The law on charitable purpose and deregistration**

10. 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.
11. 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 to benefiting the public or a sufficient section of the public.

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

12. 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.
13. 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.
14. 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.

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

15. 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, and the relevant case law.
16. The Commission considers that the purposes in clauses 4(c) and (d) are ancillary. The remaining purposes in clauses 4(a), (b) and (e) do not indicate an intention to relieve poverty, or advance education or religion. They have therefore been considered in relation to "any other matter beneficial to the community".

### Other matters beneficial to the community

17. 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)<sup>2</sup>, which are as follows:
  - 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

<sup>2</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.

- 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>3</sup>

18. Not all organisations that have purposes that benefit the community will be charitable. In *Williams Trustees v Inland Revenue Commissioners*<sup>4</sup> Lord Simons (citing Lindley LJ in *In Re Macduff*<sup>5</sup> and Lord Cave LC in *Attorney-General v National Provincial & Union Bank of England*<sup>6</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.”*

19. In *Charity Law in Australia and New Zealand*<sup>7</sup> 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.”*

20. Joseph Williams J confirmed this approach in *Travis Trust v Charities Commission*<sup>8</sup>, holding 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.”*

<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> [1947] AC 447, 455. That case was heavily relied up and quoted by Kennedy J *In re Cumming* [1951] NZLR 498.

<sup>5</sup> [1896] 2 Ch 451, 466.

<sup>6</sup> [1924] AC 262, 265.

<sup>7</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>8</sup> CIV-2008-485-1689, High Court, Wellington, 3 December 2008 (Joseph Williams J.) at para. 20.

21. When considering whether the Trust'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's decision in *Commissioners of Inland Revenue v White*.<sup>9</sup>
22. In *White*, the court considered that in a contemporary context the "supportation, aid and help of young tradesmen and handicraftsmen" would mean those people who perform an art, trade or profession requiring special skill or knowledge. In that case, the entity'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.
23. While an indirect effect of the Trust's purposes in clauses 4(a), (b) and (e) may be to foster some public interest in crafts, the purposes do not appear to be restricted to the performance of an art, trade, or profession, which requires special skill or knowledge, nor do they specify that any particular standard of craftsmanship must be maintained for the benefit of the public.

#### Public or private benefit?

24. 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>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. Clause 4(b) states that one of the Trust's purposes is:

*"To develop the Octagon Market as a vibrant centre of activity in the Octagon which will benefit the storeholders and makers of craft items as well as the general public of Dunedin and tourists."*
26. While this clause indicates an intention to benefit the "general public of Dunedin", the Commission considers that the Trust exists mainly to advance the interests of the "storeholders" and makers of craft items who sell their products, and therefore does not provide a benefit to a sufficient sector of the public.

<sup>9</sup> (1982) 55 TC 651.

<sup>10</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>11</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.*

### Applicant's submissions

27. The Trust's solicitor, in his letter of 2 February 2010, has advised that the Trust is heavily involved with hiring and providing the use of its plant and equipment within the Otago area, and provides stalls for no fee, or a reduced fee, to charities.
28. The Commission considers that hiring out plant and equipment at a reduced rate to charities may be charitable, but notes that assisting charities is not a stated purpose of the Trust.

### Conclusion

29. The Commission concludes that the purposes set out in clauses 4(a), (b) and (e) are non-charitable purposes, which are not ancillary to any charitable purposes.

### Section 61B of the Charitable Trusts Act 1957

30. 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.
31. 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).<sup>12</sup>
32. 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."<sup>13</sup>*

33. The Commission has analysed the wording of the Trust's purposes, surrounding context, and activities (as directed by section 18 of the *Charities Act 2005*). 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.

<sup>12</sup> *Re Beckbessinger* [1993] 2 NZLR 362, 373.

<sup>13</sup> *Re Beckbessinger* [1993] 2 NZLR 362, 376.

34. On this basis, the Commission considers that the Trust's purposes are not substantially charitable and therefore section 61B of the Charitable Trusts Act 1957 cannot operate to validate the trust.

Public interest


35. 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**

36. 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.
37. 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.
38. The decision of the Commission is therefore to remove the Trust from the Register, pursuant to section 31 of the Act, with effect from 21 June 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

21/5/10  
.....  
Date