

## Registration Decision: Otago Heritage Bus Society Incorporated

### The facts

1. Otago Heritage Bus Society Incorporated (the Applicant) was incorporated under the *Incorporated Societies Act 1908* on 11 March 2011. The Applicant applied to the Charities Commission (the Commission) for registration as a charitable entity under the Charities Act 2005 (the Act) on 23 March 2011.
2. The Applicant's original purposes were set out in clause 5 of its rules:
  5. *The objects for which the Society is established are:*
    - (a) *To establish a heritage fleet of buses and preserve and maintain other modes of road transportation, the fleet of heritage buses will be based in Dunedin and available for use anywhere in New Zealand.*
    - (b) *To actively seek opportunities to work with other heritage organisations in the region to support each other's activities to enable an educational facility for the public of the region.*
    - (c) *To carry out such work as is necessary to restore, operate and maintain the fleet of buses to operational standards required by the New Zealand Government.*
    - (d) *To run such public excursions as may be deemed desirable by the Executive and its members or by the public by the ways and means as a hire.*
    - (e) *To undertake and execute any Trusts which may be lawfully undertake by the Society and may be conducive to its objects.*
    - (f) *To purchase, take on, lease, or in exchange, hire otherwise acquire any real or personal property and any rights or privileges which the Society may think necessary or convenient for the promotion of its objects and to construct, maintain and alter any buildings or erections necessary or convenient for the work of the Society.*
    - (g) *To invest the moneys of the Society not immediately required for its purposes in or upon such investments, securities or property as may be though fit.*
    - (h) *To undertake other ventures that are complementary to, and compatible with, other activities described in the foregoing objects.*

3. The Applicant's winding up clause was set out in clause 30 of its constitution:

*If for any reasons the Society dissolved, after satisfaction of all debts and liabilities, any property then remaining shall be given or transferred to such other Organisation, Society or Charitable Trust as the members in a General Meeting shall resolve is most likely to apply such property wholly or substantially towards the objects referred to in clause 5. Should this goal not be achieved, then another recognised charitable organisation shall be chosen.*

4. The Commission analysed the application for registration and on 18 April 2011 sent the Applicant a notice that may lead to decline. The notice stated that the Applicant's purposes were not exclusively charitable and on dissolution clause 30 would allow the transfer of assets to organisations that did not have charitable purposes; therefore the Applicant did not meet registration requirements.
5. The Applicant responded by email on 3 July 2011 with an amended rules document. The Applicant's amended purposes and activities were set out in clauses 5 and 6 of its constitution:

#### OBJECTS

5. *To establish a charitable organisation within New Zealand, for charitable purposes only, to:*
- (a) To foster an intelligent interest in road passenger transport*
  - (b) To disseminate information relating to road passenger transport*
  - (c) To preserve items and materials relating to the history of the road passenger transport industry.*
  - (d) To co-operate and associate with other charitable groups and organisation with complimentary aims and objectives.*
  - (e) Restore and maintain historic New Zealand items of road/passenger service*
  - (f) To own and operate passenger service vehicles for Society purposes.*

#### ACTIVITIES

6. *The Society shall engage in the following activities:*
- (a) The publication of such documents as the Executive see fit.*
  - (b) The arranging of such meetings, visits, tours and other occasions as will meet the objects as set out above.*
  - (c) The accumulation of sufficient funds, by any means decided upon by the Executive, to carry out the objects of the Society.*

6. The Applicant's amended winding up clause was set out in clause 31 of its constitution:

*If for any reasons the Society dissolved, after satisfaction of all debts and liabilities, any property then remaining shall be given or transferred to such other Registered Charitable Organisation, Registered Society or Registered Charitable Trust as the members in a General Meeting shall resolve is most likely to apply such property wholly or substantially towards the objects referred to in clause 5. Should this goal not be achievable, then another recognised charitable organisation shall be chosen.*

7. The Commission analysed the application for registration and on 4 July 2011 sent the Applicant a notice that may lead to decline stating that the Applicant's purposes were not exclusively charitable and clause 31 would allow the transfer of assets to organisations that did not have charitable purposes, therefore the Applicant did not meet registration requirements. The notice also referred to statements on the Applicant's website about the Applicant making a fleet of buses available for public excursions.
8. The Applicant responded by email on 8 July 2011 with a draft rules document. The Applicant's purposes and activities were set out in clauses 2 and 3 of its constitution:

**2. Objects:**

*To establish a charitable organisation within New Zealand, for charitable purposes only, to:*

- (a) To foster an intelligent interest in road passenger transport.*
- (b) To disseminate information relating to road passenger transport.*
- (c) To preserve items and materials relating to the history of the road passenger transport industry.*
- (d) To co-operate and associate with other groups and organisations with complimentary aims and objectives.*
- (e) Restore and maintain historic New Zealand items of road/passenger service.*
- (f) To own and operate passenger service vehicles for Society purposes.*

**3. Activities**

*The Society shall engage in the following activities.*

- (a) The publication of such documents as the committee see fit.*
- (b). The arranging of such meetings, visits, tours and other occasions, as will meet the objects as set out above.*
- (c) The accumulation of funds, by means decided upon by the Executive, to carry out the objects of the Society.*

9. The Applicant's winding up clause was set out in clause 19 of its draft rules:

*... If upon winding up, there remains, after the satisfaction of all the debts and liabilities of the Society any property whatsoever, the said property shall be applied in such of the following way or ways (and not otherwise) as the Special Meeting shall resolve.*

- (a). *By transfer to any registered charitable society, organisation or trust within New Zealand whose objectives shall include objects similar to those of the Society*
- (b). *By transfer or gift for such charitable purposes within New Zealand (including transfer to any registered Incorporated body established for charitable purposes) as the Special General Meeting shall resolve;*
- (c). *By transfer of gift to any local body for such charitable or educational purpose within in New Zealand as the Special General Meeting shall resolve and the local body shall agree to accept.*
- (d). *Upon compliance with section 24 of the Incorporated Societies Act, notice of such resolution must be sent to the Registrar of Incorporated Societies."*

10. The Applicant stated in its email dated 8 July 2011:

*As for regards to referring to our website, our marketing will be based on the final agreed documentation submitted to you, the New Zealand Government, the website you referred to in the letter was a draft page and content has not be decided upon, those pages have been blocked for general viewing and our marketing department has no draft web-pages available online. Content of the website will be discussed at an Executive Meeting to fall in line and support our activities and objectives outlined in the Constitution.*

11. On 27 July 2011, the Applicant sought feedback on the draft rules and requested an extension to the deadline for response in the notice of 4 July.
12. On 28 July 2011 the Commission responded, indicating that it still did not consider that the Applicant's purposes and activities showed that the Applicant was established and maintained for exclusively charitable purposes. The application was to be considered by the Registration and Monitoring Committee on 17 August 2011, and the Applicant was asked whether it would prefer to send in further submissions or await the outcome of the Committee meeting.
13. The Applicant responded on 28 July 2011 stating:

*As there are currently no further additions or amendments to put forward, we are keen for the Registration and Monitoring Committee to discuss the proposed amendments submitted via email on the 8th July.*

*Our only request is that should the Committee's decision be unfavourable, then the entity should have the right of appeal.*

## The issues

14. The Commission must consider whether the Applicant meets all of the essential requirements for registration under the *Charities Act 2005* ("the Act"). In this case, the key issue for consideration is whether the Applicant is an entity which is established and maintained exclusively for charitable purposes and is not carried out for the private pecuniary profit of any individual, as required by section 13(1)(b) of the Act. In particular, whether the Applicant's purposes fall within the definition of charitable purposes in section 5(1) of the Act and whether the purposes will provide a public benefit.

## The law on charitable purpose

15. Under section 13(1)(b) of the Act an entity must be established and maintained exclusively for charitable purposes and not carried on for the private pecuniary profit of any individual.
16. 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.
17. In *Vancouver Society of Immigration and Visible Minority Women v Minister of National Revenue*,<sup>2</sup> Gonthier J states:

*The first is the principle of exclusivity. To qualify as charitable, the purposes of an organisation or trust must be exclusively charitable...The primary reason for the exclusivity requirement is, as Slade J. observed in McGovern, supra, at p.340 that if charitable organizations were permitted to pursue a mixture of charitable and non-charitable purposes there could be no certainty that donations to them would be channelled to the pursuit of charitable purposes.*

18. In *Molloy v Commissioner of Inland Revenue*,<sup>3</sup> Somers J states:

*To be charitable in law...an expressed purpose upon its true construction must be limited or confined to charitable purposes only.*

19. Section 5(3) of the Act provides that any non-charitable purpose must be ancillary to a charitable purpose.

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

<sup>2</sup> (1999) 169 D.L.R. (4<sup>th</sup>) 34, 58.

<sup>3</sup> [1981] 1 NZLR 688, 691.

### The law regarding activities

20. 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.*
21. In *Canterbury Development Corporation v Charities Commission*,<sup>4</sup> Ronald Young J states:

*In considering whether the purpose of the CDC is the relief of the unemployed it is appropriate to consider both the terms of the constitution and the activities of CDC (s 18(3)).*

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

22. The Commission considers that the purposes outlined in amended clause 5B (draft clause 2B) may advance education and amended clause 5D (draft clause 2D) is a power rather than a purpose. Further, the Commission considers draft clause 19 would meet registration requirements in relation to distributions on dissolution.
23. The Commission considers that the remaining purposes outlined in amended clauses 5A, 5C to 5F (draft clauses 2A, 2C to 2F) do not indicate an intention to relieve poverty or advance religion. The Commission has therefore considered whether these purposes are charitable under the advancement of education or "any other matter beneficial to the community". First, however, the Commission has considered the effect of the introductory wording of amended clause 5 (draft clause 2).

### Effect of clause purporting to limit purposes

24. The introductory wording to amended clause 5 (draft clause 2) of the Applicant's constitution states:
- to establish a charitable organisation within New Zealand, for charitable purposes only.*
25. In *M K Hunt Foundation Ltd v Commissioner of Inland Revenue*,<sup>5</sup> Hardie Boys J cited with approval the comments Lawrence LJ made in *Keren Kayemeth le Jisroel Ltd v Commissioners of Inland Revenue*.<sup>6</sup>

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<sup>4</sup> HC WN CIV 2009-485-2133 [18 March 2010] at para 29.

<sup>5</sup> [1961] NZLR 405, 407.

<sup>6</sup> [1932] 2 KB 465.

In that case, the statute under consideration contained the phrase 'for charitable purposes only', and Lawrence LJ said in the Court of Appeal that "it is not enough that the purposes described in the memorandum should include charitable purposes. The memorandum must be confined to those purposes".<sup>7</sup> Hardie Boys J further wrote that:

*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.*<sup>8</sup>

26. In *Commissioners of Inland Revenue v White*,<sup>9</sup> the Court considered limitations in the constitution of the Clerkenwell Green Association. The court noted that the constitution showed a clear intention that this object was exclusively charitable but went on to say:

*The charitable intention, clear as it is, is not conclusive in establishing charitable status, however, because clause 2(b) limits the field in which the charitable intention is to be effectuated. If the objects specified in clause 2(b) are of such a nature that there is not charitable purpose which will assist their achievement, then there is no charitable purpose within the specified field and the Association would not be entitled to registration as a charity. In other words, the mere insertion of the word "charitable" in clause 2(b) is not by itself enough to establish that the objects of the Association are charitable.*<sup>10</sup>

27. Finally, in *Canterbury Development Corporation v Charities Commission*,<sup>11</sup> Ronald Young J wrote:

*... the mere fact that the constitution says that CDC's objects are charitable does not make CDC charitable although such a declaration is relevant in assessing whether they are. However as with Oldham TEC in the end, the objects and operation of the organisations either support a charitable purpose or they do not.*<sup>12</sup>

28. For these reasons, the Commission does not consider that the introductory wording of amended clause 5 (draft clause 2) of the constitution provides conclusive evidence that the Applicant's purposes are in fact charitable.

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<sup>7</sup> [1931] 2 KB 465, 481.

<sup>8</sup> [1961] NZLR 405, 408.

<sup>9</sup> (1980) 55 TC 651.

<sup>10</sup> (1980) 55 TC 651, 653.

<sup>11</sup> HC WN CIV 2009-485-2133 [18 March 2010].

<sup>12</sup> HC WN CIV 2009-485-2133 [18 March 2010] at para 56.

## Advancement of education

29. In order for a purpose to advance education, it must provide some form of education and ensure that learning is advanced. The modern concept of “education” covers formal education, training and research in specific areas of study and expertise. It can also include less formal education in the development of individual capabilities, competencies, skills, and understanding, as long as there is a balanced, and systematic process of instruction, training, and practice.<sup>13</sup> In order to advance education, learning must be passed on to others.
30. Education does not include advertisements for particular goods or services or promotion of a particular point of view.<sup>14</sup> If research is being conducted, it must be carried out in an objective and impartial way and the useful results made available, or accessible to the public.
31. In *Re Shaw (deceased)*,<sup>15</sup> the Court held that if the object were merely the increase of knowledge that is not in itself a charitable object unless it is combined with teaching or education.
32. In New Zealand, in *Re Collier (deceased)*,<sup>16</sup> Hammond J set out the test for determining whether the dissemination of information qualified as charitable under the head of advancement of education:

*It must first confer a public benefit, in that it somehow assists with the training of the mind, or the advancement of research. Second, propaganda or cause under the guise of education will not suffice. Third, the work must reach some minimal standard. For instance, in Re Elmore [1968] VR 390 the testator's manuscripts were held to be literally of no merit or educational value.<sup>17</sup>*

33. In *Re Collier*, the judge held that the bequest in question (for the publication of a book) did not qualify as charitable under the test:

*In my view, the minimal threshold test is not met. There is no educative value, or public utility in the 'book'. Further, it is no more than an attempt to perpetuate a private view held by Mrs Collier.<sup>18</sup>*

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<sup>13</sup> *Re Mariette* [1915] 2 Ch 284. See also *Chesterman v Federal Commissioner of Taxation* (1923) 32 CLR 362; *Lloyd v Federal Commissioner of Taxation* (1955) 93 CLR 645; *Chartered Insurance Institute v London Corporation* [1957] 1 WLR 867; *Flynn v Mamarika* (1996) 130 FLR 218.

<sup>14</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>15</sup> [1957] 1 WLR 729, 738.

<sup>16</sup> [1998] 1 NZLR 81.

<sup>17</sup> [1998] 1 NZLR 81, 91-92.

<sup>18</sup> *Ibid* at p 92.



34. In *Vancouver Society of Immigrant and Visible Minority Women v Minister of National Revenue*,<sup>19</sup> Iacobucci J held that the advancement of education included “information or training that is provided in a structured manner and for a genuinely educational purpose – that is, to advance the knowledge or abilities of the recipients” and “informal training initiatives, aimed at teaching necessary life skills or providing information toward a practical end.”<sup>20</sup> However, Iacobucci J went on to state:

*[T]he threshold criterion for an educational activity must be some legitimate targeted attempt at educating others whether through formal or informal instruction, training, plans of self-study or otherwise. Simply providing an opportunity for people to educate themselves such as by making available materials with which this might be accomplished but need not be, is not enough.*<sup>21</sup>

35. In *Re positive Action Against Pornography v Minister of National Revenue* the Canadian Supreme Court said:

*The organisation's activities consisted largely of presentation to the public of opinion and information about pornography. There was nothing in the record showing either formal training of the mind or the improvement of a useful branch of knowledge as a result of the organisation's activities.*<sup>22</sup>

36. In *Re Draco Foundation (NZ) Charitable Trust* when considering whether the appellant's website could be considered advancement of education Young J stated:

*... this 'plain language' material' cannot be considered to be for the advancement of education. This material does inform the reader but it is material widely available from a number of sources and does no more than provide the opportunity for a visitor to the site to read it for themselves . . . at best it is the provision of material for self study. The 'reader' can choose whether to access the material or not. This is not for the advancement of education.*<sup>23</sup>

37. Amended clauses 5A, 5C, 5E, and 5 F (draft clauses 2A, 2C, 2E and 2F) of the Applicant's rules state:

- A To foster an intelligent interest in road passenger transport
- C To preserve items and materials relating to road passenger transport
- E Restore and maintain historic New Zealand items of road/passenger service.
- F To own and operate passenger service vehicles for Society purposes

<sup>19</sup> [1999] 1 SCR 10; (1999) 169 DLR (4<sup>th</sup>) 34.

<sup>20</sup> [1999] 1 SCR 10 at para 169; (1999) 169 DLR (4<sup>th</sup>) 34 at 113.

<sup>21</sup> Ibid at para 171; (1999) 169 DLR 94<sup>th</sup>) 34 at p 114.

<sup>22</sup> 49 D.L.R (4<sup>th</sup>), 74 (HEU).

<sup>23</sup> CIV 2010-485-1275 [42]-[43].

38. The Commission is not satisfied that these purposes will advance education in a manner that is exclusively charitable according to the case law cited above. The Commission has therefore looked at the activities undertaken by the Applicant in furtherance of these purposes as required by section 18(3)(a) of the Act.

39. The "About" page on the Applicant's website states:

*The Otago Heritage Bus Society Inc exists to "foster an intelligent interest in road passenger transport" - in short we are "bus-nuts".*

**So what do we do?**

*First there was Dunedin's Last City owned Leyland Leopard - 194, and we are currently on the look out for further buses for our collection. So far we have leads for possible restoration projects for trolley buses, and many other different styles of Leyland's and other diesel powered buses that once represented Dunedin road passenger service.*

*Our current bus - Leyland Leopard 194 keeps those members of a more practically occupied mind busy – with restoration, operation and ongoing repairs and maintenance.*

*Others are more sedate in their passion, and collect information and photos of buses and coaches, documenting the make up of both the national fleet and individual operators. Its quite remarkable how fast things change when you look back, but don't notice at the time!*

*Both interest sections come together to ride buses, visit depots, and meet socially - often with guest speakers who can widen our knowledge of an industry which is vital to the efficient functioning of New Zealand's larger cities.*

**Where are we?**

*Currently we are on the look out for a permanent undercover home for our collection, currently we have one bus and hope to grow the fleet of heritage vehicles to one example of each significant era. We are currently only looking to store our one bus so we are able to make our Leyland Leopard roadworthy and kept safe from the outside elements.*

*Currently the Leyland Leopard is based in South Dunedin in a locked compound. Free viewing is by arrangement by clicking here*

*We meet together for General Meetings regularly and the dates of our meetings are usually displayed on this website on the left hand side or your can contact our Secretary here.*

*We encourage new members and general public to come along to our meetings and excursions.<sup>24</sup>*

*... 194 awaits its new life as part of a heritage fleet of buses with the Otago Heritage Bus Society Inc. as their first operational bus for public excursions, events functions and private charters.*

*Currently 194 is in the Citibus livery, but once funding becomes available 194 will be painted in an earlier colour scheme to commemorate Dunedin City Transport (DCT) and remind us that Dunedin City has had an affiliation with Leylands for over 80 years.<sup>25</sup>*

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[http://otagoheritagebus.co.nz/about\\_37.html](http://otagoheritagebus.co.nz/about_37.html) [accessed 20 July 2011].

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[http://otagoheritagebus.co.nz/page\\_24.html](http://otagoheritagebus.co.nz/page_24.html) [accessed 20 July 2011].

40. The activity set out in amended clause 6B (draft clause 3B) of the Applicant's rules states:

*The arranging of such meetings, visits, tours and other occasions, as will meet the objects as set out above.*

41. The Commission does not consider that allowing the Applicant's members to keep busy by restoring, repairing and maintaining a bus or indulging their interests in collecting information in relation to buses and coaches, riding buses, visiting depots and meeting socially will amount to the advancement of education. While the occasional guest speaker may advance the education of members, the other activities stated do not amount to a targeted attempt at providing education or information in a structured manner.
42. Further, the Commission does not consider that allowing 'free viewing by arrangement' of the Applicant's current bus to the general public can be considered advancement of education. This is because it does not amount to a targeted attempt at educating others or the provision of information in a structured manner. This activity relies on members of the public to request a viewing and seek information in order to be educated. Therefore, the Applicant has failed to show the entity provides either formal training of the mind or the improvement of a useful branch of knowledge.
43. Finally, the Commission does not consider that operating a passenger service vehicle, allowing members of the public to attend meetings, excursions, event functions and making a bus available as a private charter amounts to advancement of education. This is because these activities are not restricted to those that will train the mind or improve a useful branch of knowledge.
44. In light of the above, the Commission concludes that the Applicant's purposes outlined in amended clauses 5A, 5C, 5E, and 5F (draft clauses 2A, 2C, 2E and 2F) are not exclusively charitable under the advancement of education.

#### Other matters beneficial to the community

45. 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>26</sup> namely:

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<sup>26</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 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.

46. In *Travis Trust v Charities Commission*<sup>27</sup>, Joseph 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.*<sup>28</sup>

47. Furthermore, not all organisations which have purposes that benefit the community will be charitable. In *Queenstown Lakes Community Housing Trust*<sup>29</sup> Mackenzie J stated:

*Not every purpose beneficial to the community will be charitable under this head. Lord Simonds, in Williams Trustees v Inland Revenue Commissioners, noted two propositions which must be borne in mind. The first is that the purpose must be within the spirit and intendment of the preamble to the Statute of Elizabeth I. The Second is that Lord Macnaghten's fourfold classification in Pemsel's case must be read subject to the qualifications that it does not mean that every object of public general utility must necessarily be charity. He concluded that the purpose must be both for the benefit of the community and beneficial in a way which the law regards as charitable. The somewhat circular requirement that to be charitable, a purpose must be beneficial in a way which the law regards as charitable, reflects and restates the requirement that the purpose must be within the spirit and intendment of the preamble."*

48. Case law has determined that preservation can be charitable under "other matters beneficial to the community" when it involves the preservation of a locality,<sup>30</sup> such as a heritage building or land of special significance.<sup>31</sup>

<sup>27</sup> (2009) 24 NZTC 23,273 (Joseph William J).

<sup>28</sup> (2009) 24 NZTC 23,273 at pp. 23,276-77 at para 20.

<sup>29</sup> CIV 2010-485-1818 [48] High Court, Wellington Mackenzie J

<sup>30</sup> *Law of Charity* 1<sup>st</sup> edition, Lexis Nexis, Butterworth, 2010 at pp 260.

<sup>31</sup> *Re Verrall* [1916] 1 Ch 100, 114-116; *Scott v National Trust for Places of Historic Interest or Natural Beauty* [1998] 2 All ER 705, 710; *Re Cranstoun* [1932] 1 Ch 537, 545.

49. In *The Law and Practice Relating to Charities*<sup>32</sup> when considering the new charitable purposes under the Charities Act 2006 in England, Hubert Picarda provided the following definition:

*'Heritage' might be regarded as part of the country's local or national history and traditions which are passed down through successive generations, Advancing heritage includes charities for preservation of historic land and buildings...it might also include activities concerned with preserving or maintaining a particular tradition where the benefit to the public in preserving can be shown.*

50. The approach of the Charity Commission for England and Wales is set out in their guidance, "preservation and conservation" which states:

*Bodies set up for preservation and/or conservation purposes encompass a very wide and tremendously varied group. They include bodies set up for one or more of the following purposes:*

- (i) *the preservation of:*
- *a specified building or complex, sometimes including a garden or other land, of historic/architectural importance or a site where a building has been or where it remains can be seen;*
  - *historic buildings in general (building preservation trusts) and*
- (ii) *the conservation of:*
- *a particular animal, bird or other species or 'wildlife' in general;*
  - *a specific plant species, habitat or area of land, including areas of natural beauty and scientific interest;*
  - *flora, fauna and the environment generally ...*

**General requirements for charitable status for preservation and conservation Charities Commission**

- 4. We have concluded that in order to be charitable, organisations for preservation and conservation will need to demonstrate that:**

- (i) **they satisfy a criterion for merit, i.e.**
- *For preservation charities, there is independent expert evidence that the building or site is of sufficient historical or architectural interest*
  - *For species conservation charities, there is independent expert evidence that the species is worth of conservation*
  - *For charities for the conservation of the environment, there is independent expert evidence that the land or habitat is worthy of conservation.*

(i) **they are set up for the benefit of the public, i.e.**

- They are not used for non-charitable purposes, such as trading
- They provide sufficient public access, either by providing sufficient physical access or provide access by suitable alternative means
- Any private benefit to individuals are incidental and properly regulated . . .

**Preservation Charities**

*For organisations set up to preserve buildings, we are maintaining our current policy which reflects the position adopted by the courts, that is, to be charitable such organisations must be set up for the advancement of the education of the public.<sup>33</sup>*

51. Amended clauses 5C and 5E (draft clauses 2C and 2E) state:

- (c) *To preserve items and materials relating to road passenger transport*
- (e) *Restore and maintain historic New Zealand items of road/passenger service*

52. The Applicant's website states:

*Leyland Leopard 194 worked its entire life with Dunedin City Transport, later known as Citibus Limited. 194 entered service in July 1981 and made its last public run with Citibus Limited on 14 October 2010, which was a school route.*

*194 awaits its new life as part of a heritage fleet of buses with the Otago Heritage Bus Society Inc. as their first operational bus for public excursions, events functions and private charters.*

*Currently 194 is in the Citibus livery, but once funding becomes available 194 will be painted in an earlier colour scheme to commemorate Dunedin City Transport (DCT) and remind us that Dunedin City has had an affiliation with Leylands for over 80 years.<sup>34</sup>*

*First there was Dunedin's Last City owned Leyland Leopard - 194, and we are currently on the look out for further buses for our collection. So far we have leads for possible restoration projects for trolley buses, and many other different styles of Leyland's and other diesel powered buses that once represented Dunedin road passenger service....we have one bus and hope to grow the fleet of heritage vehicles to one example of each significant era.<sup>35</sup>*

<sup>33</sup> <http://www.charity-commission.gov.uk/library/guidance/rr9text.pdf> [accessed 21 July 2011].

<sup>34</sup> [http://otagoheritagebus.co.nz/page\\_24.html](http://otagoheritagebus.co.nz/page_24.html) [accessed 21 July 2011].

<sup>35</sup> [http://otagoheritagebus.co.nz/about\\_37.html](http://otagoheritagebus.co.nz/about_37.html) [accessed 21 July 2011].

53. In light of the above case law, the Commission considers that merely preserving a 30-year-old bus or other buses from significant eras, which does not advance education, is unlikely to be charitable under "other matters beneficial to the community". Therefore, the Commission does not consider that amended clauses 5C and 5E (draft clauses 2C and 2E) can be considered charitable under another benefit to the community.

#### Public benefit

54. 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>36</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>37</sup>

55. In *Commissioners of Inland Revenue v Yorkshire Agricultural Society* the Court said:

*There can be no doubt that a society formed for the purposes of merely benefiting its own members, though it may be to the public advantage that its members should be benefited by being educated ... or whatever the object may be, would not be for a charitable purpose, and if it were a substantial part of the object that it should benefit its members I should think that it would not be established for a charitable purpose only.*<sup>38</sup>

56. In *Institution of Professional Engineers New Zealand Incorporated v Commissioner of Inland Revenue*, Tipping J stated:

*"I consider that the following words of Lord Normand at page 396 in the Glasgow Police Association case are highly material:-*

*'... what the respondents must show in the circumstances of this case is that so viewed objectively, the association is established for a public purpose and that the private benefits to members are unsought consequences of the pursuit of the public purpose and can therefore be disregarded as incidental. That is a view which I cannot take. The private benefits to members are essential.'*

*While there can be no doubt that there are distinct public benefits from the objects and functions of IPENZ it is my view, after careful consideration of both the oral and documentary evidence, that the private benefits cannot be disregarded as incidental.*<sup>39</sup>

<sup>36</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>37</sup> *Gilmour v Coats* (1949) AC 26; *Re Blyth* [1997] 2 Qd R 567, 582; *DV Bryant Trust Board v Hamilton City Council* [1997] 3 NZLR 342, 350.

<sup>38</sup> [1928] 1 KB 611, 631.

<sup>39</sup> [1992] 1 NZLR 570, 582.

57. In *Law of Charity* Gino Dal Pont states:

*Since the earliest times the conferral of private benefits has been inconsistent with charity, focusing as it does on public benefit. Hence, an association that exists mainly to advance the interests of, or otherwise benefit its members is not charitable, even if carrying out its objects result in benefit to the community.*<sup>40</sup>

58. Amended clauses 5E, 5F and 6B (draft clauses 2E, 2F and 3B) state:

- (e). *Restore and maintain historic New Zealand items of road/passenger service.*
- (f) *To own and operate passenger service vehicles for Society purposes.*
- (b) *The arranging of such meetings, visits, tours and other occasions, as will meet the objects as set out above.*

59. The Applicant's website states:

***What does membership of the Otago Heritage Bus Society offer me?***

- *Regular Publications of the Society newsletter.*
- *Advance notice & preferential bookings on excursions operated by the Society.*
- *An opportunity to learn new skills and actively partake with the operations, restoration, maintenance with Dunedin's only dedicated heritage bus organisation.*
- *Opportunities arising from the Societies relationship with other heritage organisations.*<sup>41</sup>

60. The Applicant's website indicates that clauses 5E, 5F and 6B (draft clauses 2E, 2F and 3B) are undertaken in a way that provides benefits to members through allowing them to pursue their interest in maintaining and restoring vehicles and provides them with preferential booking for excursions operated by the Applicant.

61. In this instance, the Commission considers that the private benefits available to members are not a means of achieving an ultimate public benefit. Therefore, the private benefits cannot be disregarded as incidental to any wider public benefit.

Applicant's submissions

62. The Applicant stated in its email dated 8 July 2011:

*As for regards to referring to our website, our marketing will be based on the final agreed documentation submitted to you, the New Zealand Government, the website you referred to in the letter was a draft page and content has not be decided upon, those pages have been blocked for general viewing and our marketing department has no draft web-pages available online. Content of the website will be discussed at an Executive Meeting to fall in line and support our activities and objectives outlined in the Constitution.*

<sup>40</sup> Dal Pont, G E *Law of Charity* (2010) Lexis Nexis Butterworth, p326 [13.25].  
<sup>41</sup> [http://otagoheritagebus.co.nz/page\\_25.html](http://otagoheritagebus.co.nz/page_25.html) [accessed 21 July 2011].



63. The Commission has checked the information on the Applicant's website <http://otagoheritagebus.co.nz/> and this remains publicly viewable. Further, while the Applicant has stated that the content has not been decided upon, it has not denied that these are its activities. Therefore, the Commission considers the information on the Applicant's website is relevant to the Commission's determination.

#### Conclusion

64. The Commission concludes that while the purpose set out in amended clause 5B (draft clause 2B) may be charitable, the Applicant's purposes in amended clauses 5A, 5C, 5E and 5F (draft clauses 2A, 2C, 2E and 2F) are non-charitable purposes, which are not ancillary to the charitable purpose.

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

65. 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

16/8/11

.....  
Date