

Registration decision: Public Access New Zealand Incorporated

The facts

1. The trustees of Public Access New Zealand Incorporated (the Applicant) were incorporated as a board under the Charitable Trusts Act 1957 on 23 December 1992.
2. The Applicant applied to the Charities Commission (the Commission) for registration as a charitable entity under the Charities Act 2005 (the Act) on 9 August 2007.
3. Clause 1 of Appendix A of the Applicant's Trust Deed sets out the objectives and purposes of the Trust as follows:

"THE OBJECTS and purposes for which the Trust is established are as follows:

1. THE preservation and improvement of public access to public lands and waters and throughout the New Zealand countryside in general; and the retention in public ownership and control of all publicly owned lands and waters with value for public recreation and/or nature conservation, all inland and coastal waters, and recreational resources therein; and in furtherance of these objects:

- 1.1 To promote recognition of protection and enhancement of public recreational access as matters of national importance in law, official policy, and governmental practice.*
- 1.2 To promote public recognition of recreational, health, inspirational and other benefits derived to New Zealand of freely available recreational access for all.*
- 1.3 To monitor, research, and advocate public ownership and management over resources suited for public recreational use.*
- 1.4 To research the origin and status of public access rights, privileges, and public ownership and management over publicly held lands and waters, and to disseminate and publish the results of such research.*
- 1.5 To investigate mechanisms for public recreational access overseas that might have application to New Zealand.*
- 1.6 To establish links with organisations sharing interests in common with the Trust.*
- 1.7 To formulate policies for the better provision and management of public recreational access and use.*
- 1.8 To promote recreational practices conducive to the protection of natural and recreational resources.*
- 1.9 To encourage different outdoor recreational codes to work cooperatively towards furtherance of the objects of the Trust.*
- 1.10 To co-operate with other organisations or persons for the promotion of the above objectives in particular areas or generally.*

1.11 To seek and disburse funds for the promotion of the above objectives.

2. GENERALLY to carry out services in New Zealand which are beneficial to the community by promoting the objects set out in clause 1.

3. TO carry on any other charitable objects capable of being conveniently carried on in connection with the above objects or calculated directly or indirectly to advance the objects of the Trust or any of them."

4. The following statements appear on the Applicant's website:¹

"Public Access New Zealand (PANZ) was formed in 1992 to counter a major shift towards privatisation of public lands and waters, with consequent loss of public recreational rights.

'We are committed to resist private predation of the public estate'.

PANZ is a research-based advocate – we make no apologies for information overload. These pages are being expanded to provide everything you should ever need to know about public rights of access to the outdoors. We also provide authoritative information about New Zealand's public lands.

5. There is also information on the Applicant's website regarding the Applicant's opposition to the Court of Appeal decision restricting property rights of the Crown in relation to the foreshore, including beaches and the seabed. The Applicant launched the following petition to be returned before 31 October 2003:

***'Beaches for Recreation'
petition launched***

Other than in time of war, the current challenge to Crown ownership of beaches, foreshore and seabed is undoubtedly the gravest threat to enjoyment of the outdoors that New Zealanders have ever had to face. 'The beach' is New Zealand's most popular outdoor recreation setting - it is very much part of the national psyche.

This is a defining issue for the nation.

The following petition has been launched by Public Access New Zealand Inc. (PANZ) to provide a recreational users' view of the current controversy over the ownership of New Zealand's beaches, foreshore and seabed.

'That the House of Representatives pass legislation that clearly establishes inalienable, sole Crown title, ownership, and authority over New Zealand's beaches, foreshore and seabed and guaranteed secure rights of recreation for all New Zealanders'

6. The Commission analysed the application for registration and on 18 February 2008, sent the Applicant a notice advising that its application for registration might be declined because its purposes did not meet registration requirements in the Act.
7. The Applicant responded in a letter dated 12 March 2008² submitting that its activities were charitable under both advancement of education and

¹ www.publicaccessnewzealand.com.

² It is noted that this letter was received on 1 April 2008.

“other benefit to the community”, and that its advocacy activities were not a primary purpose of the organisation. The Applicant also provided a list of its recent activities undertaken “in the public interest”.

8. The Commission sent a second notice that may lead to a decline on 9 April 2008, advising that the Commission considered that some of the Applicant’s rules and activities were political in nature and were not ancillary to a charitable purpose.
9. The Applicant responded to the second notice in a letter dated 14 November 2008 stating that political advocacy was not a primary purpose. The Applicant noted that it had always believed that some of its activities could reasonably be categorised under social advocacy on behalf of the general public, and was at a loss to understand how its activities could be interpreted otherwise. The Applicant then stated “[w]e readily agree we may have in the past, and could do so again in the future make comment on specific legislation but we believe our record is clear that those occasions are few and far between and represent only a very minor part of our overall activity.”

The issues

10. The Commission must consider whether the Applicant meets all of the essential requirements for registration under the Act. In this case, the key issue for consideration is whether the Applicant is a 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:
 - (a) whether all of the Applicant’s purposes fall within the definition of charitable purpose in section 5(1) of the Act; and
 - (b) if any of the Applicant’s purposes are non-charitable, whether those purposes are ancillary to a charitable purpose?

The law on charitable purpose

11. Under section 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.
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 aimed at benefitting the public or a sufficient section of the public.³
13. In order for a purpose to qualify as “any other matter beneficial to the community”, the purpose must be beneficial to the community and within

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

the spirit and intendment of the purposes set out in the Preamble to the Statute of Charitable Uses 1601 (Statute of Elizabeth).

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

15. 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; ...”*

16. In order to be a valid trust at law, a trust that is for charitable purposes must be exclusively charitable or it will be void for uncertainty. Section 61B of the Charitable Trusts Act 1957 provides that, if the trust is substantially charitable but would otherwise be rendered invalid by the presence of some actual or potential non-charitable purpose, the trust will be treated as valid and operate only in relation to the relevant charitable purposes. In such a case, the law directs that the trust is to be interpreted and given effect to as if the invalid and non-charitable purposes did not apply.⁴

Relevant case law

Recreation

17. In *Inland Revenue Commissioners v Baddeley*⁵ Lord Reid stated that “mere recreation, hospitality, and entertainment are not charitable, for the provision of entertainment and amusement per se is inconsistent with accepted notions of charity”.

18. Following the decision in *Baddeley*, the Charitable Trusts Act 1957 was passed. Section 61A of that Act provides:

“61A *Trusts for recreational and similar purposes*

(1) *Subject to the provisions of this section, it shall for all purposes be and be deemed always to have been charitable to provide, or assist in the provision of, facilities for recreation or other leisure-time occupation, if the facilities are provided in the interests of social welfare: Provided that nothing in this section shall be taken to derogate from the principle that a trust or institution to be charitable must be for the public benefit.*

(2) *The requirement of subsection (1) of this section that the facilities are provided in the interests of social welfare shall not be treated as satisfied unless—*

⁴ *Re Beckbessinger* [1993] 2 NZLR 362; *Re Ashton* [1955] NZLR 192 (CA); *Re Howey* [1991] 2 NZLR 16 (CA).

⁵ [1955] AC 572 at 600.

- (a) *The facilities are provided with the purpose of improving the conditions of life for the persons for whom the facilities are primarily intended; and*
- (b) *Either—*
 - (i) *Those persons have need of such facilities as aforesaid by reason of their youth, age, infirmity, disablement, poverty, race, occupation, or social or economic circumstances; or*
 - (ii) *The facilities are to be available to the members of the public at large or to the male or female members of the public at large.*
- (3) *Without restricting the generality of the foregoing provisions of this section it is hereby declared that, subject to the said requirement, subsection (1) of this section applies to the provision of facilities at public halls, community centres, and women's institutes, and to the provision and maintenance of grounds and buildings to be used for purposes of recreation or leisure-time occupation, and extends to the provision of facilities for those purposes by the organising of any activity."*

19. The authors of *Tudor on Charities*⁶ noted that not all facilities would be encompassed by the United Kingdom equivalent to section 61A of the Charitable Trusts Act 1957:

"With regard to the second conditions, it is considered that facilities must be of a type which are in them themselves capable of improving the conditions of the recipients. It is not sufficient that the trustees intend, subjectively, to improve conditions of life; the test is an objective one. Facilities which are likely to meet such an objective test are those whose dominant feature is that they reduce social exclusion and encourage public participation or improve education or health where previously no, or no adequate, facilities exists."

20. In *Travis Trust v Charities Commission*⁷, Williams J made the following comments concerning sport and recreation:

"[52] The cases then seem to establish some workable first principles. The first, the class of charitable purposes does indeed evolve over time and the Courts (including those in New Zealand) have shown a willingness to develop new categories of charitable purposes and to develop or extend established ones. In the area of sport and leisure, the general principle appears to be that sport, leisure and entertainment for its own sake is not charitable but that where these purposes are expressed to be and are in fact the means by which other valid charitable purposes will be achieved, they will be held to be charitable. The deeper purpose of the gift or trust can include not just any of the three original Pemsel heads but also any other purpose held by subsequent cases or in accordance with sound principle to be within the spirit and intendment of the Statute of Elizabeth.

[53] In the areas of sport, the deeper purpose is usually health or education."

⁶ 9th edition, Sweet & Maxwell, London 2003, p122.

⁷ CIV-2008-485-1689, 3 December 2008, para 52-53

Educational purposes as advocacy

21. Since *Bowman v Secular Society Ltd*⁸, the Courts have consistently held that a trust or a society for the attainment of political objects is not charitable, not necessarily because it is invalid but because the Courts have no means of judging whether a proposed change in the law will or will not be for the public benefit, and therefore cannot say that a gift to secure the change is a charitable gift.
22. In *McGovern v Attorney General*⁹, it was held that a trust whose main objects are to secure the alteration of the law would not be regarded as charitable because the Court had no adequate means of judging whether a proposed change in the law would or would not be for the public benefit. Slade J further held that if a principal purpose of the trust was to reverse government policy or particular administrative decisions of governmental authorities it would not be charitable.
23. In *Charity Law in Australia and New Zealand*, Dal Pont states that “there is also authority to the effect that advocating or promoting the maintenance of the present law is a political purpose”¹⁰.
24. In *Molloy v Commissioner of Inland Revenue*¹¹, the New Zealand Court of Appeal held that the Society for the Protection of the Unborn Child, the main object of which was to preserve the integrity of the current law on abortion against the claims of those who desired its alteration, was not a charitable society. Somers J stated:

“... reason suggests that on an issue of a public and very controversial character, as in the case of abortion, both those who advocate a change in the law and those who vigorously oppose it are engaged in carrying out political objects in the relevant sense. The law, statutory or otherwise, is not static... The inability of the Court to judge whether a change in the law will or will not be for the public benefit must be as applicable to the maintenance of an existing provision as to its change. In neither case has the Court the means of judging the public benefit.”
25. In *Public Trustee v Attorney-General*¹², Santow J summarised the state of the law concerning “political” purposes. He commented that an organisation “whose main purpose is directed to altering the law or government policy, as distinct possibly from an organisation to encourage law reform generally, cannot be saved from being political by appeal to the public interest”. In that case, although the Judge took a very progressive view of “advocacy”, he nevertheless struck down as non-charitable clauses purporting to change the law discriminating against aboriginal people. However, he maintained the trust using the *cy-pres* doctrine and the power given to the court by a disposition similar to our section 61B of the

⁸ [1917] AC 406.

⁹ [1982] Ch 321 at 338-340.

¹⁰ Gino Dal Pont, *Charity Law in Australia and New Zealand*, London, Oxford University Press at 205.

¹¹ [1981] 1 NZLR 688 at 695-696.

¹² (1997) 42 NSWLR 600 at 619.

Charitable Trusts Act 1957 by severing the four out of 12 clauses purporting to change the law. He found that the other eight purposes were charitable and could survive even if the "political" purposes were severed.

26. A distinction must however be made between main purposes and means to attain these purposes. In *McGovern v Attorney-General*¹³ and *Public Trustee v Attorney-General*¹⁴, the Courts held that in considering the purposes of an entity, it must find the main purpose of that entity. It is the purpose in question that must be political; the mere fact that political means may be employed in furthering charitable objects does not necessarily render the gift or institution non-charitable. Similarly, in *Vancouver Society of Immigrant and Visible Minority Women v M.N.R.*¹⁵, the Supreme Court of Canada stated that "although a particular purpose was not itself charitable, [if] it was incidental to another charitable purpose, [it] was therefore properly to be considered not as an end in itself, but as a means of fulfilment of another purpose, which had already been determined to be charitable. Viewed in this way, it did not vitiate the charitable character of the organisation".
27. Furthermore, in *Public Trustee v Attorney-General*¹⁶, it was held that seeking the amendment of the law, according to law, is not a "political" purpose, but a legitimate one if the main purpose is charitable even if the means seem "political". The Judge stated that "if political persuasion [other than direct lobbying of the government for legislative or policy change] were not permitted at all, many such educative trusts would be inherently incapable of ever achieving their objects".
28. In *Re Collier (deceased)*¹⁷, Hammond J considered that there are three different categories of political trust which have been impugned in the case law. The first category is "that charitable trusts to change the law itself are invalid". The second category, trusts to support a political party, are rejected because "it is thought undesirable for the advantages of charity to be conferred on trusts which overtly secure a certain line of political administration and policy". The third category of prohibited political trust are those for the perpetual advocacy of a particular point of view or propaganda trust. This is because the Court has no means of judging whether or not a proposed change in the law will or will not be for the public benefit, and therefore cannot say that a gift to secure the change is a charitable gift.
29. Hammond J criticized these decisions, especially in light of section 13 (freedom of thought, conscience, and religion) and section 14 (freedom of expression) of the New Zealand Bill of Rights Act 1990. Nevertheless, he noted that he had "considerable sympathy for that viewpoint which holds that a Court does not have to enter into the debate at all, hence the inability of the Court to resolve the merits is irrelevant". He went on to say "[i]n this Court at least, there is no warrant to change these well established

¹³ [1982] 1 Ch 321 at 340.

¹⁴ (1997) 42 NSWLR 600 at 616.

¹⁵ [1999] 1 SCR 10 at para 157.

¹⁶ (1997) 42 NSWLR 600 at 618.

¹⁷ [1998] 1 NZLR 81.

principles – which rest on decisions of the highest authority – even though admirable objectives too often fall foul of them.”¹⁸

30. In *Victorian Women Lawyers' Association Inc v Commissioner of Taxation*¹⁹, the Court made the following obiter comments about political purposes:

“The High Court’s formulation suggests that a trust may survive in Australia as charitable where the object is to introduce new law consistent with the way the law is tending. In his paper in the Australian Bar Review, Santow J also observed that the trust which has an undoubtedly charitable object does not lose its charitable status simply because it also has an object of changing the law or reversing policy (at 248): “the question is always whether that political object precludes the trust satisfying the public benefit requirements”.

Charities Commission’s analysis

31. According to clause 1 of the Appendix to the Applicant’s Trust Deed, the main purposes of the entity are:
- the preservation and improvement of public access to public lands and waters and throughout the New Zealand countryside in general; and
 - the retention in public ownership and control of all publicly owned lands and waters with value for public recreation and/or nature conservation, all inland and coastal waters, and recreational resources.
32. The Commission is of the view that the preservation and improvement of public access to public lands and waters, and the retention of public ownership and control of all publicly owned lands and waters, are not purposes that fall under any of the first three heads of charity. It is therefore necessary to consider whether the Applicant’s purposes are charitable in terms of the fourth head of charity (other purposes beneficial to the community) by being beneficial to the public and within the spirit and intentment of the Preamble to the Statute of Elizabeth.
33. While the Applicant’s objects refer to the conservation of nature, there is little evidence in the Trust Deed itself to that effect, other than the reference in clause 1 that the purpose of improvement of public access is “with value for public recreation and/or conservation of nature”. In the list of recent activities that the Applicant provided as an appendix to its letter of 12 March 2008, none related to the conservation of the environment.
34. The Commission has considered the Applicant’s activities as required by section 18(3) of the Act, in order to assess whether the Applicant’s purposes are charitable. Seven of the ten activities listed in the appendix to the Applicant’s letter of 12 March 2008 relate to maintaining public access to land and waters for public recreation. For example, the Applicant has:

¹⁸ [1998] 1 NZLR 81 at 90.

¹⁹ [2008] FCA 983 (Federal Court of Australia).

- provided assistance to a local group to help oppose Te Anau vehicle closure to the lake foreshore;
 - opposed the Dunedin City Council's proposal to stop Pugh Road access to the Taieri River;
 - in Gisborne City, made a complaint regarding misleading advertising concerning public access to public resources;
 - in Auckland, provided advice and assistance to a local horse rider wanting suitable access to forestry roads;
 - in Dunedin City, provided advice and educational comment to local angling clubs regarding recreational access matters;
 - made a submission to the Otago Conservation Board opposing a proposal by a Government Department to substantially diminish a previous public access resource in favour of the Department; and
 - mediated in a longstanding dispute between a recreational horse trekker and the management of Molesworth Station on horse access to Molesworth.
35. The Commission has considered whether the Applicant's purposes are charitable in terms of section 61A of the Charitable Trusts Act 1957. However, the Commission considers that the Applicant is not providing any facilities as envisaged by that legislation. Public access to public land and waters is not similar to "the provision of facilities at public halls, community centres, and women's institutes, and to the provision and maintenance of grounds and buildings to be used for purposes of recreation or leisure-time occupation". Furthermore, the Applicant has provided no evidence that its purposes are intended to "reduce social exclusion and encourage public participation or improve education or health where previously no, or no adequate, facilities exists."²⁰
36. The Applicant's Trust Deed provides 11 methods of achieving the main object of "the preservation and improvement of public access to public land and waters".
37. The Commission considers that clauses 1.1, 1.2, 1.7 and 1.9 of the Applicant's Trust Deed are not charitable because they do not fall under any of the four heads of charity and are not covered by section 61A of the Charitable Trusts Act 1957.
38. The purpose set out in clause 1.8, "to promote recreational practices conducive to the protection of natural and recreational resources", could be considered charitable for the conservation of the environment under the fourth head of charity.²¹ However, as this clause is primarily promoting recreational practices, protection of the environment appears to be an ancillary purpose.

²⁰ *Tudors on Charities*, 9th ed, Sweet & Maxwell, London 2003, p 122.

²¹ Re Centrepont Community Growth Trust [2000] 2 NZLR 325.

39. Clause 1.11 is a power, and clauses 1.6 and 1.10 are ancillary because they seek to establish links with organisations sharing common interests and to foster co-operation with other organisations for the promotion of those objects.
40. Finally, the Commission considers that clauses 1.3, 1.4 and 1.5 could be educational in nature.
41. The Applicant acknowledges that it is involved in advocacy.²² The Applicant's website refers to the Trust as a "research-based advocate", and its petition launched in 2003 to oppose the Court of Appeal decision asking Parliament to amend the law is another example of the Applicant's advocacy activities.
42. Having regard to the purposes and activities of the Applicant, the Commission considers that the main purposes of the Applicant are political in that they are aimed at either maintaining the status quo or bringing about changes in the law and governmental policies regarding public ownership of land and waters with value for recreation, nature conservation and public access. Courts have often held that if one of the purposes is to advocate to change the law or maintain the status quo, they cannot assess whether the activities will provide a public benefit or not.²³ Similarly, in the presence of main purposes which are political, it is impossible to assess whether these main purposes are beneficial to the public.
43. The Commission has considered whether section 61B of the Charitable Trusts Act 1957 applies. Section 61B provides that if a trust is substantially charitable but would otherwise be rendered invalid by the presence of some actual or potential non-charitable purpose, the trust will be treated as valid and operate only in relation to the relevant charitable purposes.²⁴ The Commission does not consider that the Applicant has substantially charitable purposes, therefore section 61B of the Charitable Trusts Act 1957 cannot be used to validate the trust.

Charities Commission's determination

44. The finding of the Commission is that the Applicant has failed to meet an essential requirement for registration as a charitable entity in that the Applicant is not a 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. The Applicant has non-charitable political purposes, which are not ancillary to charitable purposes.


²² Letter to the Commission dated 14 November 2008.

²³ See *National Anti-Vivisection Society v Inland Revenue Commissions* [1948] AC 31 at 50; *McGovern v Attorney-General* [1982] 1 CH 321 at 336-337.

²⁴ *Re Beckbessinger* [1993] 2 NZLR 362.

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

26/1/09.....
Date