

Deregistration decision: The Business in the Community Charitable Trust

The facts

1. The Business in the Community Charitable Trust (the Trust) is an unincorporated trust established by deed on 8 October 1991. The Trust was registered as a charitable entity under the Charities Act 2005 (the Act) on 7 February 2008.
2. The Trust's purposes as set out in Clause 3 of the Trust Deed are:

3. OBJECTS OF THE TRUST

The Trust Fund shall be applied and used exclusively by the trustees for such of the following purposes as the trustees from time to time decide upon in their absolute discretion, namely, purposes within New Zealand which are charitable according to the law of New Zealand including (but without detracting from the general charitable purpose hereof) the economic development of New Zealand by way of:

- a) promoting businesses and new business opportunities throughout New Zealand;*
- b) giving advice and information on the efficient and successful running of businesses in New Zealand;*
- c) promoting use of New Zealand's business resources in the most efficient manner;*
- d) promoting use of the resources of successful and established businesses to advance new or small businesses in New Zealand;*
- e) promoting the transfer of business skills advice and information from successful businesses to businesses in New Zealand that are new or that need those skills;*
- f) increasing the opportunities for employment in New Zealand through promotion of new businesses in co-operation with community groups;*
- g) fostering innovation and competition among and for the development of the business community in New Zealand;*
- h) fostering cooperation among non-competing businesses in New Zealand;*
- i) carrying out the above objects in a manner that promotes conservation of New Zealand's natural resources;*
- j) promoting within New Zealand attitudes that will enhance or assist in achieving all or any of the foregoing purposes.*

3. The Commission initiated a review of the Trust's ongoing qualification for registration after it received information during the application process of another organisation that raised questions about whether the Trust carried out primarily charitable purposes.
4. On 9 February 2010, a formal notice was sent informing the Trust that the Commission had reached a preliminary view that the Trust was not qualified for registration as a charity and it therefore intended to remove the Trust from the Charities Register. The Commission's view was based on there being insufficient public benefit arising from the Trust's primary purpose of providing business-mentoring services to owners of businesses.
5. On 19 March 2010, the Commission received an objection to removal from the Charities Register from solicitors acting for the Trust at that time. The grounds put forward to support this objection were that the Trust's purposes are charitable as the advancement of education and/or as other matters beneficial to the community. Submissions supporting these grounds were provided. In addition, the Trust submitted a set of proposed amendments to clause 3 of the Trust Deed, which it considered would "*more accurately capture the Trust's purposes*", and requested feedback from the Commission on these.
6. Prior to considering the submissions made by the Trust in the response of 19 March 2010, the Commission became aware that on 18 March 2010, the High Court had issued a decision in the matter of *Canterbury Development Corporation v Charities Commission (CDC)*¹. The Commission considered this decision had great significance in relation to its review of the Trust. For this reason, the Commission contacted the Trust's solicitor by telephone to enquire whether the Trust was aware of the *CDC* decision and if so, whether it wished to make further submissions. The solicitor stated that he was aware of *CDC* but while he disagreed with it, he would not take the opportunity to make further submissions.
7. Following consideration of the Trust's submissions and the proposed amendments to clause 3 of the Trust Deed, the Commission sent the Trust a second notice of intention to remove from the register on 26 July 2010. This notice informed the Trust that the Commission still intended to remove the Trust from the Charities Register on the grounds that the current purposes and proposed purposes are not charitable.
8. On 28 July 2010, the Trust contacted the Commission by phone and requested a meeting to discuss ways in which its non-charitable activities might be separated out from its charitable activities in such a way as to enable the Trust to remain registered as a charitable entity. This meeting took place on 29 July 2010 and was attended by representatives of the Commission, the Trust and the Trust's new solicitor. It was agreed at the meeting that the Trust would be granted further time to prepare additional submissions.

¹ HC WN CIV 2009-485-2133 [18 March 2010].

9. On 30 August 2010, the Commission received additional submissions from the Trust's solicitor. The Trust again objected to removal from the Charities Register on the grounds that its purposes were charitable as the advancement of education or as other matters beneficial to the community. Additional supporting documentation was provided. The Trust also requested further assistance from the Commission to enable it to maintain charitable registration.
10. On 19 October 2010, the Commission sent a third formal notice informing the Trust of its intention to remove the Trust from the Register. This notice also addressed the request for further assistance made by the Trust, summarising the ongoing assistance the Commission had provided to the Trust.
11. On 2 December 2010, the Commission received a request from the Trust's solicitor for an extension of the time by which the Trust was required to respond to the notice of 19 October 2010. In addition, the Trust's solicitor again requested the Commission's assistance to "carve out" activities from its operations to enable it to retain its charitable registration.
12. On 6 December 2010, the Commission responded to the letter of 2 December 2010, granting the time extension and again pointing out that the Commission had provided considerable assistance to the Trust since February 2010.
13. On 16 December 2010, a second meeting was held between the Commission and a representative of the Trust, at the Trust's request. The Trust's representative informed the Commission that the Trust was again considering whether it might restructure its activities to enable the Trust to meet registration requirements. The Commission agreed to provide further assistance to the Trust by commenting in writing on any proposal the Trust might submit for consideration.
14. On 18 January 2011, the Commission received proposed restructuring plans from the Trust. On 20 January 2011, the Commission responded to the restructuring plan. On 21 January 2011, the Commission received a revised plan for restructuring of the Trust. On 25 January 2011, the Commission responded to that plan.
15. On 24 February 2011, the Commission received a letter from the Trust's solicitor to be presented to the Board if the Commission decided to continue with the deregistration process. This letter provided further submissions in support of the Trust's contention its purposes are charitable as the advancement of education and/or other matters beneficial to the community.

The issues

16. 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.
17. In order to be qualified for registration, the Trust must meet all of the essential requirements for registration under 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.
18. In particular, the Commission must consider:
 - 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 merely ancillary to a primary charitable purpose or amenable to the operation of section 61B of the Charitable Trusts Act 1957.

The law on charitable purposes and deregistration

19. The essential requirements for registration are set out in section 13 of the Act. 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.
20. 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.² This means that the purpose must be directed to benefiting the public or a sufficient section of the public.
21. 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. Section 61B of the *Charitable Trusts Act 1957* may also operate in some circumstances to save a trust that has both charitable and non-charitable purposes.
22. 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.

² See *Latimer v Commissioner of Inland Revenue* [2002] 3 NZLR 195.

23. When considering whether a registered entity continues to qualify for charitable status, section 50(2) of the Act empowers the Commission to examine and enquire into matters in connection with charitable entities or persons, including:
- (a) *the activities and proposed activities of the charitable entity or person:*
 - (b) *the nature, objects, and purposes of the charitable entity:*
 - (c) *the management and administration of the charitable entity:*
 - (d) *the results and outcomes achieved by the charitable entity or person:*
 - (e) *the value, condition, management, and application of the property and income belonging to the charitable entity or person.*
24. 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.

The Trust's organisational structure and activities

25. The Trust's website describes the Trust as follows;

"About us

Business Mentors New Zealand service, which is owned and operated by Business in the Community Charitable Trust, provides a structured and supported voluntary mentoring service for the SME sector in New Zealand.

The Business in the Community Charitable Trust and its operational arm, Business in the Community Limited, were established in 1991.

The 'Business Mentor Scheme' as it was originally described was delivered under the Business in the Community brand until 2005 when the Business Mentors New Zealand brand was introduced.

The Business in the Community Business Mentor Scheme was introduced into New Zealand by Dr Grahame Craig and was based on the concept of Business in the Community English and European models that were established in 1979.

From the start, Business in the Community set out to fulfil a major need in New Zealand to assist the owners of SME businesses to prosper and grow, and accordingly, to create wealth and employment opportunities.

*The Business in the Community Charitable Trust is a Private Enterprise Charitable Trust. The operational arm of the Trust is a 100% owned tax exempt non-profit earning company, Business in the Community Limited."*³

³ <http://www.businessmentors.org.nz/about/index.php> (accessed 5/7/2010)

26. The Commission notes the Trust has recently changed the “About Us” page considerably.⁴
27. In the response of 19 March 2010, the Trust’s solicitor provided further insight into the Trust’s activities as follows.

“Activities of the Trust

The activities of the Trust involve potential interaction with all business in New Zealand. There is no constitutional exclusion of any one sector so as to preclude charitable classification on the ground that the Trust's activities are not conducted with the public of New Zealand.

Through various media, the Trust advises the business community that the Trust can arrange for the supply of business skills and assistance.

A business proprietor may appreciate that external assistance is required. In the current economic cycle, the desired assistance may be to prevent further financial deterioration, if not termination, of the business. In more prosperous times, the assistance may be directed at orderly expansion of the business.

...

It is clear that the activities of the Trust are directed to assisting the business community in New Zealand.”

28. According to information on the Trust’s website at the time the Commission initiated its review of the Trust’s charitable status, the criteria for business owners to be able to access the Trust’s services was 6 months or more of operation and less than 25 employees. However, during the course of the Commission’s review, the Trust amended the criteria so that now any business, which is currently operating, has less than 25 employees and is the business owner’s primary source of income may now qualify.
29. The Commission notes from information provided by the Trust that the Trust also works alongside Te Puni Kokiri in its development of Maori businesses and the Pacific Island Business Trust in South Auckland. In recent times, the Trust has been provided with government grants to work alongside other organisations to deal with the ongoing economic effects of the 2010 and 2011 Christchurch earthquakes and the 2010 Pike River Mine disaster. The Trust also conducts business mentoring in the Pacific Islands.

⁴ <http://www.businessmentors.org.nz/AboutUs.aspx> (accessed 7/3/2011)

Charities Commission analysis

30. Drawing on the information above, the Commission has reviewed the Trust's ongoing qualification for registration on the basis that its primary purpose is to provide business-mentoring services to business owners within the New Zealand business community including 'for-profit' businesses, governmental agencies and 'not-for-profit' entities. These services are provided through the Trust's operational arm, Business In The Community Limited.
31. The Commission also acknowledges that the Trust undertakes activities aimed at training and providing support to the voluntary mentors who provide the "hands on" business mentoring services. However, the Commission considers these activities are ancillary to the primary purpose.
32. In order to assess 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 Deed, information available on the Trust's website and information provided by the Trust in response to the Commission's notices of intention to remove from the Charities Register and other communications.
33. None of the purposes in Clause 3 expresses an intention to provide relief of poverty or to advance religion. The Commission has therefore assessed these purposes in relation to whether they are charitable as "advancement of education" or as "other matters beneficial to the community". This approach is also consistent with the Trust's submissions.

Advancement of Education

34. 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.⁵ Learning must also be passed on to others.
35. Education does not include advertisements for particular goods or services or promotion of a particular point of view.⁶ 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.

⁵ *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.).

⁶ *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.

36. In the New Zealand High Court case of *Re Collier (deceased)*⁷, 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 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.

37. In the response of 19 March 2010, the Trust's solicitor submitted, "it would be reasonable to conclude that the Trust's activities are directed to the advancement of education" for the following reasons.

- *At a practical level, the trust's activities compliment the academic learning of tertiary students studying business subjects with advice on how best to implement the abstract principles of accounting, finance, marketing, human relations, the regulatory legal environment etc taught at educational institutions.*
- *Mentors give advice on how to deal with financing, personnel, operational and like matters; all with the objective of developing the skills of the business operator.*
- *The business mentoring situation is analogous to the situation in which personnel of a business (such as accountants, tradespersons etc) attend courses of instruction to maintain and develop skills. While so engaged, it cannot be doubted that a process of education is present. Similarly, when mentors perform their role, the mentor is furnishing the client with the knowledge and expertise enabling the client to perform better. The client will have received instruction or education in areas where he/she may previously have had shortcomings. Like the tradesperson, the client receives vocational training appropriate to his/her role."*
- *The educational role performed by mentors may be illustrated from another perspective. It will be the case that a business may employ specialist personnel such as tradespersons, accountants and so on. To assist with maintaining and developing skills the personnel may from time to time attend courses of instruction. Whilst so engaged it could not be doubted that a process of education is present.*
- *Instruction by the mentor outside of a formal class/lecture structure would be no barrier to the formation of a charitable purpose. The Commission in its paper on "Charitable Purposes" notes that the modern concept of education includes "less formal education in the development of individual capabilities, competencies, skills and understanding". These comments capture the work of the mentors.*

⁷ *Re Collier (deceased)* [1998] 1 NZLR 81, 91-92.

38. While the Trust provided a large quantity of information about the nature of the business mentoring programmes it operates and the mentor – business owner relationship, the Commission accepts that there is a sufficient connection between the provision of business mentoring programmes and the advancement of education for such programmes to be a charitable purpose.
39. However, in the letter of 24 February 2011 addressed to the Board, the Trust’s solicitor states,
- “The Trust freely admits that while it provides business mentoring to ‘not-for-profit’ organisations, young people and people with special needs, in the main it is ‘for-profit’ private businesses that receive business mentoring from the Trust.”*
40. It is settled law that public benefit may be assumed in relation to the charitable purpose of advancement of education unless the contrary is shown.⁸ In the present case however, the Commission considers that a contrary view can be drawn from this acknowledgement by the Trust that the primary beneficiaries of its activities and purposes are the owners of ‘for-profit’ businesses.

Case law re the public benefit requirement and the advancement of education

41. *Re Mason*⁹ concerned an entity involved in the production and publication of law reports and the provision of a law library primarily for use by lawyers, law students and judges. The New Zealand Supreme Court in this case held the objects of the Auckland District Law Society to be entirely wholesome and likely to lead to the ultimate benefit of the public. However, the Court considered this fell short of making the society a charity.
42. In reaching this decision, the Court distinguished between charitable institutions whose main object was the advancement of education that provided a clear public benefit, and non-charitable institutions whose main object was the protection and advantage of those practising in a particular profession.
43. To highlight this distinction, McMullin J used examples such as an institute of pathology,¹⁰ and a college of nursing,¹¹ to demonstrate charitable institutions that advanced education in the charitable sense. His Honour then used an insurance institute,¹² and a society of writers,¹³ as examples of non-charitable institutions that provide services of an educative nature, but which lacked the public benefit necessary to be charitable.

⁸ *National Anti-Vivisection Society v Inland Revenue Commissioner* [1948] AC 31, 65.

⁹ [1971] NZLR 714, 721.

¹⁰ *Royal College of Surgeons of England v National Provincial Bank* [1952] AC 631; [1952] 1 All ER 984.

¹¹ *Royal College of Nursing v St Marylebone Corporation* [1959] 1 WLR 1077; [1959] 3 All ER 663.

¹² *Chartered Insurance Institute v Corporation of London* [1957] 1 WLR.

¹³ *Society of Writers to Her Majesty’s Signet v Commissioners of Inland Revenue* (1886) 2 TC 257.

44. It is clear that the promotion of a charitable purpose must be an entity's predominant object and any private benefits to individuals that result from an entity's activities must be of a subsidiary or incidental nature.¹⁴
45. While the Commission acknowledges that the distinction in *Re Mason* was drawn in relation to whether an entity whose purposes primarily benefited "professionals" was charitable, the Commission considers the issue in the present case is analogous.
46. Further support for the Commission's view that purposes directed to providing business support services to the owners of private businesses is not charitable as the advancement of education can be found in the recent High Court decision of *CDC*, where Ronald Young J held:
- "Nor in my view is supporting businesses by providing assistance to their proprietors, in such aspects as financial management or marketing, the support or advancement of education or learning."*¹⁵
47. In summary, the Commission does not consider the Trust's purposes are charitable as the advancement of education because even though the provision of business mentoring programmes is capable of being a charitable purpose, in the present case the purpose lacks the requisite public benefit required for registration as a charity.

Other matters beneficial to the community

48. In order for a purpose to qualify as "any other matter beneficial to the community", the purpose must be both beneficial to the community and within the spirit and intendment of the purposes set out in the Preamble to the Charitable Uses Act 1601 (the Statute of Elizabeth) namely:
- 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.

¹⁴ *Inland Revenue Commissioners v City of Glasgow Police Athletic Association* [1953] AC 380.

¹⁵ *Canterbury Development v Charities Commission* HC, WN, [18 March 2010], CIV 2009-485-2133, para 33.

Economic development as a charitable purpose

49. Courts have found the promotion of economic development charitable as “other matters beneficial to the community” in some circumstances.
50. In *Commissioners of Inland Revenue v Yorkshire Agricultural Society*,¹⁶ specific purposes relating to the improvement of agriculture were considered charitable because they were for the benefit of the public. However, the judge in this case made it clear that **the promotion of agriculture for private profit or benefit would not be charitable.** [Emphasis added]
51. In *Crystal Palace Trustees v Minister of Town and Country Planning*,¹⁷ the management of a public place for education and recreation and **for the promotion of industry, commerce and art was held to be charitable because there was no intention to further the interests of individuals engaged in trade, industry or commerce.** [Emphasis added]
52. In *Commissioners of Inland Revenue v Oldham Training and Enterprise Council*,¹⁸ the Court considered whether promoting the interests of individuals engaged in trade, commerce or enterprise in order to improve employment prospects in a particular locality was a charitable purpose. The Court held that the purposes would primarily confer benefits on business owners regardless of any beneficial consequences for employment. The Court held that **Oldham’s purposes were not charitable because any benefits to the community arising from them would be too remote.** [Emphasis added]
53. The position taken by the Court in *Oldham* was also taken in the recent High Court decision of *CDC*, where Ronald Young J held,
- “Any public benefit therefore from CDC’s purpose and operation’s is in my view too remote to establish CDC as a charity. Public purpose is not the primary purpose of CDC’s objects or operation. Its primary purpose is the assistance of individual businesses. The creation of jobs for the unemployed, as opposed to jobs for those who are employed and not in need, is hoped for, but remote and uncertain, result of the way in which CDC approaches its task. **The relief of unemployment is certainly not a direct object or purpose of CDC’s function. The public benefit is hoped for but ancillary. In the same way the general economic lift for the Canterbury region from CDC’s work is the hoped for result of helping individual businesses. It is remote from the purpose and operation of CDC.**”*¹⁹ [Emphasis added]
54. The Trust submits that its purposes are charitable as ‘other matters beneficial to the community’ on three grounds.

¹⁶ *Commissioners of Inland revenue v Yorkshire Agricultural Society* [1928] 1 KB 611.

¹⁷ *Crystal Palace Trustees v Minister of Town and Country Planning* [1951] 1 Ch 132.

¹⁸ *Commissioners of Inland revenue v Oldham Training and Enterprise Council* [1996] 69 TC 231; STC 1218.

¹⁹ HC WN CIV 2009-485-2133 [18 March 2010] para 67.

First ground – Economic development generally is a recognised Charitable purpose

55. The Trust's first submission is that case law supports a **general** proposition for economic development being charitable under the fourth head of charity and cites three cases, *Re Tennant*, *TECC and Triton*, as supporting this proposition.

- *First case – Re Tennant*

56. *Re Tennant*²⁰ concerned a gift of a church, public hall, and creamery to a rural community. In that case, the court applied other cases which had held the general promotion of agriculture to be charitable such as *Inland Revenue Commissioners v Yorkshire Agricultural Society*²¹ and *Waitemata County v Commissioner of Inland Revenue*.²²

57. In relation to this case, the Trust submits,

"In Re Tennant, the High Court recognised that "the promotion of an industry may be a charitable purpose". There could be no doubt whatever that a New Zealand Court would hold that the principle extends to the purpose of the promotion of industry in general."

58. The Commission considers that the Trust's submission does not address two important points in relation to *Re Tennant* which, when taken into account, negate the Trust's submission.

59. Firstly, the Commission considers *Re Tennant* was decided in conformity with earlier case law recognising the promotion of industry or economic development as being charitable *where a need for such is identified*. This is demonstrated in Hammond J's acknowledgement of the special needs of the community to whom the gift was directed, when his Honour 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 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.**"*
[Emphasis added]

60. Secondly, at the time of the *Re Tennant* decision, it was settled law that the promotion of the specific industry of agriculture was charitable. The Court applied cases such as *Inland Revenue Commissioners v Yorkshire Agricultural Society*²³ and *Waitemata County v Commissioner of Inland Revenue*,²⁴ to demonstrate this settled law position and in doing so acknowledged that *Re Tennant* itself involved the promotion of agriculture for the public benefit.

²⁰ [1996] 2 NZLR 633

²¹ [1928] 1 KB 611.

²² [1971] NZLR 151.

²³ [1928] 1 KB 611.

²⁴ [1971] NZLR 151.

61. When these two points are taken into consideration, the Commission believes *Re Tennant* recognises that the promotion of agriculture specifically for the public benefit may be charitable, and the promotion of industry generally may be charitable in circumstances where a particular need for such can be identified.
62. The Trust's purposes are not directed at the promotion of the agricultural industry for the public benefit or for communities with particular special needs although the Commission acknowledges that in providing business-mentoring services to the business community generally, some agricultural businesses, business owners with special needs, and localities with special economic development needs may be assisted.
- *Second case - Tasmanian Electronic Commerce Centre Pty Ltd*
63. The Australian Federal Court of Appeal in *Tasmanian Electronic Commerce Centre Pty Ltd (TECC)*,²⁵ decided that a company established "*to help the Tasmanian business community to adopt electronic commerce and to compete in the electronic market place*", was charitable under the fourth head of charity.
64. In support of these purposes, *TECC* maintained a website to demonstrate a variety of features as part of an e-commerce awareness raising process. *TECC* also endeavoured to raise the e-commerce awareness of businesses in Tasmania through media releases, speaking engagements, boardroom briefings and business publications. *TECC* also funded individual companies to enable them to enhance the effectiveness of their computer software systems.
65. The Trust submits that three aspects of the case are particularly relevant to the present matter.
66. The Trust submits firstly that,
- "the case confirmed that a purpose of assisting business generally is a charitable purpose. The Court remarked that an institution the objects of which are to promote a particular form of industry or commerce, either generally or within a particular locality may be charitable. It follows that an organisation like the Trust formed to assist business generally is capable of charitable classification."*
67. Secondly, the Trust submits that,
- "The Court seemed to be in no doubt that assistance to business would be for the public benefit. The Court explained this aspect as follows:*

²⁵ *Tasmanian Electronic Commerce Centre Pty Limited v Federal Commissioner of Taxation* (2005) 219 ALR 647.

"In a capitalist economy like Australia's, a prosperous and productive private sector generates profits and creates employment which in turn raises incomes which individuals can either spend, creating demand, or save, creating capital for further investment. Either way, people can make a better life for themselves and their families. In a prosperous economy, more money can be raised by taxes to improve education, health and other essential public services".

68. The Trust's solicitor emphasised that these comments helped explain why assistance to business generally may be a charitable purpose because "*Helping business in turn promotes community well-being.*"

69. Thirdly, the Trust's solicitor submits that *TECC* makes it clear that the conferral of a benefit of a personal nature does not, of itself, prevent charitable status. It is still necessary to analyse the whole picture and ascertain what are the true objectives of a set of activities.

"The Court [in TECC] recognised assistance to develop a prosperous and productive private sector would result in direct financial benefit to businesses. A benefit of that kind was evident, for example, from the grants made to some specific businesses. Nonetheless, the Court was of the view that this factor did not, of itself, prevent charitable status. The Judge observed," I do not see how the fact that individual businesses may benefit can be a disqualifying factor".

70. However, the Commission considers that the Court in *TECC* was in no doubt that providing assistance to businesses *in the particular circumstances operating in Tasmania* at the time of the decision would be charitable regardless of the private benefit accruing to individual businesses. In the quotes above the Court was acknowledging that within the broader context of the Australian capitalist economy, the public benefit accruing to a *comparatively poor locality with a small population and unique geographic challenges*, outweighed the private benefits accruing to individual businesses. As such, the case is decided on similar grounds to those in *Re Tennant*.

71. The Commission's view of *TECC* is evident in the comments of Heeney J,²⁶ who wrote,

*"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 those 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."* [Emphasis added]

²⁶ *Tasmanian Electronic Commerce Centre Pty Limited v Federal Commissioner of Taxation* (2005) 219 ALR 647, paras 59,60.

72. Further, the decision in the recent case of *Canterbury Development Corporation v Charities Commission* supports the Commission's approach to *Re Tennant* and *TECC*²⁷. When discussing whether economic development can fall within the "spirit and intendment of the Statute of Elizabeth", Ronald Young J states:

"What must be kept in mind is that the charitable purpose of benefit to the community is a community benefit to assuage need. In cases such as Re Tennant and TECC focus is on providing community benefit where an identified need is established. Save for advancement of religion all charitable purpose can be seen as meeting a need."

73. In relation to the Trust's assertion that *TECC* stands as authority for the proposition that conferral of a benefit of a personal nature does not, of itself, prevent charitable status, the Commission agrees although adds that personal benefits must of course be incidental or secondary to the primary charitable purpose. The issue of whether the personal benefit conferred on private business owners is ancillary or secondary in the present case is canvassed later in this paper.

- *Third case – Triton*

74. The third case cited by the Trust as supporting its view that the Trust's purposes of promoting economic development for the benefit of New Zealand are charitable, is that of *Federal Commissioner of Taxation v The Triton Foundation* (Triton).²⁸

75. *Triton* concerned a foundation established for "the promotion of a culture of innovation and entrepreneurship in Australia, particularly among the young, by visibly assisting innovators to commercialise their ideas".

76. The Commission considers that *Triton* may be distinguished from the situation existing in terms of the Trust's purposes because *Triton's* purposes were also expressed as being aimed "particularly at the young" and were focussed on promoting innovation and entrepreneurship. *Triton's* purposes and activities, while conferring private benefits on individual inventors, nevertheless were intended to "assuage need" in that the assistance offered was directed to young people and/or would-be inventors who lacked the business skills to take their ideas and turn them into actual commercial products.

²⁷ *Canterbury Development Corporation v Charities Commission* HC WN CIV 2009-485-2133 [18 March 2010] para 42.

²⁸ *Commissioner of Taxation v The Triton Foundation* [2005] FCA 1319.

77. Further, in *CDC*, Ronald Young J had this to say about *Triton* and its bearing on whether the purposes of *CDC* were charitable.

“To some degree, the Court’s assessment in Triton is a question of perspective. The Court saw the overarching object was to promote innovation and entrepreneurship in Australia. It did that by supporting innovations to commercialise these products. The alternative perspective was that the Foundation primarily helped innovators commercialise their ideas. As a result, the Foundation hoped this commercialisation would promote innovation and thereby benefit Australian society.

In CDC however, the pursuit of the objects is focused on the development of individual businesses. The provision of support to these businesses is done in the hope and belief that their economic success would be reflected in the economic wellbeing of the Canterbury region. This can be contrasted with the broad public benefit identified in Triton.

*CDC’s assistance to business is not collateral to its purposes but central to it. The purposes of CDC’s assistance to business, as the constitution identifies and the operation confirms, is to make businesses more profitable. CDC believes that this assistance will, in turn, result in benefits to the Canterbury Community. The **central focus however remains on increasing the profitability of businesses not public benefit.**²⁹ [emphasis added]*

78. The Commission considers that the Trust’s purposes fall within Ronald Young J’s “alternative perspective,” being more similar to the purposes of *CDC* and *Oldham* than those of *Triton* although some young people and entrepreneurs may benefit from the Trust’s assistance. The Trust “hopes and believes” that the success of individual businesses assisted by its mentoring programmes will result in benefit to the economic wellbeing of New Zealand. However, the Trust’s assistance to individual businesses is not collateral to its purposes, it is are central. This is evident in the express terms of the Trust deed and its operation.
79. In summary, the Commission does not accept the Trust’s assertion that the Courts have recognised a general proposition for the provision of assistance to business being charitable. The Courts have recognised limited circumstances where the provision of assistance to individual businesses may be charitable. The Commission does not consider that any of those limited circumstances apply in the present case, the Trust’s purposes being directed to providing assistance to businesses generally.

²⁹ *Canterbury Development Corporation v Charities Commission* HC WN CIV 2009-485-2133 [18 March 2010] para 60.

Second ground – Funds are sourced from central and local government

80. The Trust's second ground for submitting that its purposes are charitable as "other matters beneficial to the community" is because the Trust receives substantial financial assistance from the New Zealand Government through Trade and Enterprise grants. The submission states,

"Trade and Enterprise is a Government department charged with disbursing public monies in ways considered to be appropriate to the national good. No doubt, Trade and Enterprise has made the judgment that helping finance the Trust is a worthwhile measure in helping the country's economic development. Evidently, Trade and Enterprise did not feel inhibited in taking that view by the notion that private business owners might incidentally benefit."

81. The Commission does not accept that because an entity receives money from central or local government, it is charitable. The Judicial Committee in *Latimer v Commissioner of Inland Revenue* addressed this proposition by stating,

"Governments can and do make public money available for a variety of non-charitable purposes. All charitable purposes (with well known exceptions) are public purposes; but not all public purposes are charitable purposes."³⁰

82. While the Commission acknowledges that within the Trust's broad purpose of providing business mentoring programmes to individual business owners in the business community, it is funded by government to carry out specific economic development programmes in Christchurch and Greymouth, localities in New Zealand where disasters have created a need for economic development. The Trust has also received government funding for business development programmes in economically underdeveloped Pacific nations. Such programmes, together with programmes aimed specifically at unemployed individuals and localities with high unemployment statistics within New Zealand would likely be charitable. However, carrying out such programmes is not the primary purpose of the Trust.

Third ground – the public benefits arising are sufficient to meet registration requirements

83. The Trust submits that the public benefit arising from the provision of its business mentoring programmes is such that it meets the requirements for charitable status as other matters beneficial to the community. The Trust states that *"the Trust is benefiting the public by improving and supporting local economies"* through the following outcomes;

³⁰ *Latimer v Commissioner of Inland Revenue* [2004] UKPC 13, 3 NZLR 157 para 37.

- (a) *Saving and creating employment;*
- (b) *Saving marriages, relationships, families and personal tragedies;*
- (c) *Creating spending power in communities that are in need of financial support and therefore creating more employment;*
- (d) *Saving and creating incomes on which tax is paid either directly or by payment of consumer taxes;*
- (e) *Reducing reliance on, or the resorting to government support benefits and assistance;*
- (f) *Educating and upskilling clients and staff, often beginning with the most basic aspects of business and financial management and introducing innovation and where possible entrepreneurship;*
- (g) *Supporting the development of apprenticeships and similar employment training, particularly for disadvantaged youth often in poorer rural regions where unemployment is significantly higher. The survival of these businesses has a much greater impact on the overall viability on these types of communities;*
- (h) *Assisting poor and rural businesses that support smaller communities.*

84. The Trust also provided several case studies and statistical information that it believes supports its contention that sufficient public benefit arises from its activities to meet registration requirements.

85. The Commission acknowledges that some of the case studies identify individuals who “might” be regarded as poor or otherwise economically disadvantaged. However, such submissions must be considered against a backdrop that is clearly summed up by the Trust in its letter to the Board of 24 February 2011, that, “...while it [the Trust] provides business mentoring to ‘not-for-profit’ organisations, young people and people with special needs, in the main, it is ‘for-profit’ private businesses that receive business mentoring from the Trust”.

86. The Commission agrees that the outcomes listed above may arise from the Trust’s activities and that many of them are of benefit to the public; however, these are not the direct benefits of the Trust’s purposes but the “hoped for” benefits. The Trust’s primary benefits are directed towards individual business owners and according to the information below taken from the Trust’s website, are intended to confer personal benefits.

“From the start, Business in the Community set out to fulfil a major need in New Zealand to assist the owners of SME businesses to prosper and grow, and accordingly, to create wealth and employment opportunities.”³¹

87. While this page of the Trust’s website has been changed since the Commission’s review began, the Commission is satisfied that the information provided by the Trust overwhelmingly demonstrates that the primary purpose is still to confer benefits on ‘for-profit’ private business owners.

³¹ <http://www.businessmentor.org.nz/index.php> (last accessed 8/2/2010)

88. In summary, the Commission does not consider the Trust's purposes are charitable as 'other matters beneficial to the community' because its services are not aimed specifically or primarily at economically disadvantaged communities or individuals. Nor are they directed specifically at the promotion of the agriculture industry for the public benefit. Therefore, the purposes do not meet the necessary public benefit requirements for registration as 'other matters beneficial to the community'.

Ancillary non-charitable purposes

89. The Trust submits that,

"It would be appropriate to conclude that the objectives of the trust are for the assistance of industry generally and, as such, within the fourth category of charitable purpose relating to other matters beneficial to the community. The personal benefit devolving upon individual business owners is no more than an inevitable but incidental consequence of achieving that wider, charitable objective."

90. Section 5(3) of the Act expressly states,

5(3) For the avoidance of 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, or society, or institution, the presence of that non-charitable purpose does not prevent the trustees of the trust, the society, or institution from qualifying for registration as a charitable entity.

91. All the information that the Commission has at hand points to the provision of business mentoring programmes being the only primary purpose of the Trust. The Commission does not therefore consider the Trust has a charitable purpose from which the non-charitable purpose of conferring private benefit on individual business owners arises.

Additional information

92. The Trust made an additional late submission on 15 March 2011 relating to the work currently being carried out by the Trust in Christchurch and Greymouth (Pike River).
93. The Trust notes that demand for business mentoring in the Canterbury area between October and December 2010 increased by 51.3% on the same period for 2009 and the Trust expects this demand to increase significantly following the February 2011 earthquake.
94. The Ministry of Economic Development has approached the Trust to put forward a proposal for the provision of business mentoring support as part of the Government's recovery initiative in Canterbury and if the proposal is accepted, the Trust envisages establishing a special team of volunteer business mentors to operate in the area fulltime.

95. As part of the Government's response to the Christchurch earthquakes and the Pike River mining disaster and subsequent receivership of the Company, New Zealand Trade and Development have been paying the registration fees of those business owners in the Canterbury area seeking business mentoring assistance.
96. The Trust reasons that if businesses do not survive these disasters, employment in the affected regions will be lacking and people will therefore move out of the areas.
97. The Trust also pointed to recent public statements made in the media, that the economic effects of the Christchurch earthquake will be felt nationwide.
98. The Commission again acknowledges that any business mentoring carried out in Christchurch and Pike River/Greymouth in the foreseeable future is likely to be charitable given recent disasters in these areas (see paragraph 82). While the additional information provides more detail of these particular activities, it is not the main purpose of the Trust.
99. Further, it is because of the extremely worthy work carried out by the Trust in disaster areas, in developing nations, and with the unemployed, poor and disabled in New Zealand, that the Commission has provided considerable assistance to the Trust since the review of the Trust's ongoing qualification for registration was initiated in February 2010. Such restructuring would have enabled this work to continue to be recognised as charitable.

Section 61B Charitable Trusts Act 1957

100. 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.
101. The first is where an 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).³²

³² *Re Beckbessinger* [1993] 2 NZLR 362, 376.

102. 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.”³³

103. The Commission does not consider that the Trust fits into either situation. While the Trust’s express purpose clauses (and the proposed purpose clauses) contain both charitable and non-charitable purposes, the non-charitable purpose cannot be “blue pencilled out” because it is the primary purpose the Trust carries out. Furthermore, while the representatives of the Trust have in the past expressed a personal desire to restructure the organisation so as to retain charitable status, the Trust has ultimately concluded such reorganisation would be untenable. This appears to be because the Trust would lose the 70% of its funding which it obtains from the private sector. As the Trust points out, such supporters would be likely to direct their donations towards entities that will allow them to obtain a tax deduction.

Public Interest

104. Section 10(1)(a) of the Charities Act 2005 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.

105. The Commission considers The Business in the Community Charitable Trust does not meet the essential requirements for registration as a charitable entity. For this reason, the Commission considers it is in the public interest to remove The Business in the Community Charitable Trust from the Charities Register.

Charities Commission’s determination

106. The Commission determines that The Business in the Community Charitable 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 Charities Act.

107. Under section 35(1) of the Charities 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.

³³ *Re Beckbessinger* [1993] 2 NZLR 362, 376.

108. The decision of the Commission is therefore to remove The Business in the Community Charitable Trust from the Register, pursuant to section 31 of the Charities Act, with effect from 14 April 2011.

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

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Trevor Garrett
Chief Executive

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Date