

## Deregistration decision: The Icehouse Limited

### The facts

1. The Icehouse Limited (the Company) was incorporated under the *Companies Act 1993* on 2 August 2001.
2. The Company was registered as a charitable entity under the *Charities Act 2005* (the Act) by the Charities Commission on 15 October 2008 with registration backdated to 30 June 2008.
3. The Company's purposes are set out in rule 4 of its constitution:

#### **4 Restriction on Capacity – Activities**

##### **4.1 The Company may not carry on any activity other than:**

4.1.1 *To provide teaching and learning services for the benefit of owners, operators and managers of small and medium sized enterprise companies and students;*

4.1.2 *To provide office accommodation and support services (initially off-site services for start-up companies and micro-sized businesses, developing to on-site services where tenants are physically co-located in the Company's premises);*

4.1.3 *To provide mentoring and advisory services to the small to medium sized business enterprise sector and/or start-up businesses;*

4.1.4 *To undertake research and issue publications on matters relating to entrepreneurship, the small to medium sized business enterprise sector, start-up business operations and development initiatives;*

4.1.5 *To organise events such as seminars and conferences, research forums, practitioner and student-focused competitions, networking and placement activities;*

4.1.6 *To promote public policy advice to government or other similar organisations on matters relating to small to medium sized business enterprises.*

*any other associated incidental activities which will further the advancement of the objects of the shareholders in New Zealand.*

- 4.2 *The activities of the Company as described in clause 4.1 are intended to be charitable in accordance with the laws of New Zealand and shall be deemed not to include or extend to any matter or thing which is not charitable.*

4. Some time after the Company's registration, the Commission received information from another application for registration with similar purposes to the Company. That information led to a decision by the Commission to review the Company's eligibility for registration.
5. The Commission commenced an investigation into the Company once its annual return and financial report for the period ending 31 March 2009 had been received.
6. The Commission reassessed the Company's purposes and the grounds for registration, drawing on information available on the Company's website and its annual return. This information gave more insight into the Company's purposes than was possible at the time of registration.
7. The Commission reached the preliminary conclusion that while the Company was carrying out some charitable activities, it also appeared to be promoting the private interests of business owners.
8. On 15 December 2009, the Commission sent the Company a notice of intention to remove the Company from the register on the basis that the Company no longer qualified for registration as a charitable entity as it was not established and maintained exclusively for charitable purposes. The notice stated that the Commission was of the view that the purposes outlined in clause 4 of the Company's constitution allowed the Company to undertake non-charitable purposes such as supporting small and medium enterprises and generating increased income for private business owners.
9. On 16 April 2010, the Company responded to the notice submitting:

*"The ICEHOUSE submits that its purposes fall within the charitable heads of the advancement of education and other purposes beneficial to the community. ... The ICEHOUSE and ICE Funds submit that their activities confer a benefit on the public or a sufficient section of the public, so as to satisfy both limbs of the public benefit test. Therefore, THE ICEHOUSE and ICE Funds are eligible to be registered under the Charities Act 2005.*

*We have focused our briefing paper to the Commission on the facts as we believe the information that the Commission had at its disposal may not have reflected what The ICEHOUSE and ICE Funds undertakes in practice. ...*

*We acknowledge that our website, [www.theicehouse.co.nz](http://www.theicehouse.co.nz) is not helpful in detailing the breadth of The ICEHOUSE activities or its purposes as identified by the Charities Commission. As part of this process, we have begun a review of the content of the site and it will be amended to ensure it accurately reflects the reality. ...*

*We have therefore not at this point covered the legal arguments supporting our submission including specific comparisons to the case law, and would be happy to do so if the Commission considers it necessary following this submission."*

10. The Company's submissions included a briefing paper which outlined in detail the background, purposes and programmes undertaken by the Company.
11. On 27 April 2010, the Commission sent the Company a letter stating that in order to complete its assessment of the Company's eligibility requested a complete submission from the Company, including the legal arguments and case law.
12. On 25 May 2010, the Company responded with the following submission:

*"... Icehouse submits that its purposes fall within the charitable heads of the advancement of education and other purposes beneficial to the community. Similarly, Ice Funds submits that its purpose falls within the charitable head of other purposes beneficial to the community. Icehouse and Ice Funds submit that their activities confer a benefit on the public or a sufficient section of the public, so as to satisfy both limbs of the public benefit test. Therefore, Icehouse and Ice Funds are eligible to be registered under the Act. ...*

*In determining whether an entity is charitable, it is necessary to consider the circumstances surrounding its foundation, the founding documents and the activities of the entity. ...*

#### Background

*Icehouse's website states that 'it was established in 2001 in recognition of the importance of SME's to the New Zealand economy' and that its mission is to 'get alongside people who want to transform their companies, helping to grow both talent and our country's prosperity'.*

*Icehouse's statement that 'it was established in 2001 in recognition of the importance of SME's to the New Zealand economy' has its origin in work undertaken by the Government in relation to innovative small and medium sized enterprises (SMEs). In 1999, what was then known as the Ministry of Commerce and is now known as the Ministry of Economic Development, undertook a consultation process and it highlighted the difficulty experienced by many New Zealand innovative companies in raising start-up capital. ...*

*The Government recognised that there was a gap in the provision of capital and expertise for early stage companies with high-growth potential, and considered that that gap ought to be addressed. ...*

*... in February 2001, the Cabinet of the day agreed to set up a "Crown Seed Capital Fund" (CSCF) to accelerate the development of the seed capital market in New Zealand. ...*

*The Government established the New Zealand Venture Investment Fund (NZVIF) in 2002 to build a vibrant capital market in New Zealand. The establishment of NZVIF arose out of the Government recognising that there was a need to assist innovative people and companies, and that, among other things, access to funding was a major issue for people and companies with innovative ideas.*

*The Government considered that it was in the interest of New Zealand's welfare to support innovative people and companies, and it established NZVIF to provide such support. ...*

The NZVIF has approximately \$200 million in funds under its management, which is invested via two vehicles: the Venture Capital Fund of Funds and the Seed Co-Investment Fund. The NZVIF invests alongside angel investors, who include the Ice Angels (who are brought together by Icehouse). The Seed-Co-Investment Fund was created because of a Government initiative to relieve what the Government perceived as a need to support New Zealand innovation and turning of an innovative idea into a commercial success. ...

Additionally, to provide further support for innovative companies, the Government enacted tax incentives in the Taxation (Depreciation, Payment Dates Alignment, FBT, and Miscellaneous Provisions) Act 2006, to further assist venture capital investment, by increasing the ease with which New Zealand companies could access offshore venture capital.

... Icehouse was established and functions to relieve a need identified by the New Zealand Government to exist. Icehouse and Ice Funds have a direct relationship with the Seed Co-Investment Fund, and in undertaking their activities are fulfilling the Government's policy of providing assistance (educational and financial assistance) to innovative people and businesses. By providing educational and financial support, Icehouse and Ice Funds are providing relief to a need recognised by the Government to exist, and are thereby undertaking activities which are of benefit to the community. ...

#### Overview of the activities of Icehouse and Ice Funds

... Icehouse was established with the aim of using education, research, mentoring, training and related services for enabling the growth of start-up companies and SME's. ...

*Icehouse educates and supports innovators (from a wide variety of industries) and where financial assistance is sought, brings them together with investors (including the Ice Angels). ...The innovators and investors that can utilise Icehouse's services are not limited to being part of a specific trade, business, profession or industry (for example, people all sharing an agricultural interest) but can come from any industry, trade, business or profession.*

*Icehouse provides many educational opportunities and materials to any member of the public, and in many instances Icehouse provides its support free-of-charge. ...*

The activities undertaken by Icehouse include:

- (a) providing advice on marketing, intellectual property, business planning, and how to pitch business ideas;
- (b) providing office space and equipment;
- (c) having case managers who review applications and provide guidance, support and mentoring;
- (d) promoting competitions and work experience placements for students;
- (e) seeking media exposure to promote innovation in New Zealand, by using case examples;
- (f) organising seminars and workshops for people and businesses within innovative ideas and products; and
- (g) not charging fees for some services provided (although in instances where fees are charged, the quantum of the fee is merely to cover costs and not to make a profit).

*Icehouse has different programmes tailored to the different components of a business in early development, for example, to the inspirational and idea conception phase, start-up phase, emerging phase, and the established phase of a SME.*

*At the idea conception phase, a number of educational programmes are offered by Icehouse. The Vision 2 Business programme is a free 12-week programme on entrepreneurship and innovation. ... The FAST Pitch programme is a competition that gives young entrepreneurs the opportunity to pitch business and innovation ideas and gain feedback on their performance.*

*In the start-up phase of the business lifecycle, Icehouse offers the Kick-Start seminar which is aimed at people wanting to learn about turning an idea into a business. The Kick-Start seminar is an interactive, day-long seminar providing advice from experts and entrepreneurs on how to commercialise a venture. ... In 2010, this programme will be replaced by a new concept, the first Wednesday Club, which will be free for attendees and run each month.*

*For people who are already in business, Icehouse offers the ICE Accelerator which is a free monthly event designed for people looking to accelerate their business.*

*There is also the Achieving Business Growth Functions programme under which Icehouse runs regional events for SME's where anyone in business can attend to obtain tools and tips on how to take their business forward. ...*

*There are also other programmes (ie ICE Bridge programmes) offered to owners of businesses, such as the Owner-Manager programme and the Agri-Business Manager programme. ...*

*The SPARK! Entrepreneurship Challenge and CHIASMA competitions are aimed at university students, particularly those in attendance at the University of Auckland ... and provide intensive mentoring and workshops to entrepreneurial students that assist with the promotion of business plans and development. ...*

*Other educational opportunities that Icehouse provides free of charge include:*

- (a) University of Auckland Entrepreneur in Residence Programme;*
- (b) Demystifying Starting Your Business and Funding for your Start-Up;*
- (c) Visiting Fellows Programme; and*
- (d) University of Auckland Business School Entrepreneurs Challenges.*

*Icehouse also ran its first inaugural Open Day in 2009, which had free and open entry. There were over 350 people in attendance, with Icehouse providing a combination of forums, mentoring services and networking activities. ...*

*A number of research programmes have also been carried out by Icehouse, many of which have been a collaborative effort with the University of Auckland. ...*

*Research findings have also been published in a number of academic texts  
....*

*The Icehouse's Owner Manager Programme has also led to other research publications and seminar papers ....*

*Icehouse's annual report for the year ended 31 March 2009 shows that it receives funding grants from NZTE. Icehouse's 2009 Annual Report also shows that its operating revenue was applied to*

- (a) Ice Accelerator;*
- (b) Ice Angels;*
- (c) Ice Bridge;*
- (d) Ice Lab.*

*The Achieving Business Growth Functions programmes is an example of the significant work and assistance that Icehouse provides to SME's in New Zealand. Icehouse recognises the significant role that SME's play in the New Zealand economy, and it is for this reason that support and assistance is provided to SME's: there is no point in supporting the assistance of start-up and innovative companies if the same support is not provided to SME's which are essentially what start-up and innovative companies evolve into.*

*Any funds derived by Icehouse are applied towards the maintenance of the running costs and educational activities of Icehouse.*

### ***Submission: Icehouse was established to advance education***

#### ***Purpose and activities of Icehouse***

*It is submitted that the purpose of Icehouse and some of its activities are the advancement of education, on the basis that knowledge is passed from one person to another via the provision of teaching, mentoring, providing seminars and publications, undertaking research and making research results publicly available. The provision of teaching, mentoring, seminars, research and publications has been held by the courts to be the advancement of education ....*

*However, the mere provision of collaboration with person in developing and providing technical, financial, marketing and counselling services for all kinds of businesses does not fall within the charitable head of advancement of education ....*

*Icehouse's website states that its mission is to "get alongside people who want to transform their companies, helping to grow both talent and our country's prosperity". Such a purpose has been held by the courts to be charitable. ...*

*There are only two activities which arguably do not fall within the charitable head of education: the provision of office accommodation (clause 4.1.2) and the promotion of public policy advice to government or other similar organisations (clause 4.1.6). ...*

*Clause 4.1.2 relates to the provision of office accommodation and support services, and is not the provision of an educational activity, and is therefore outside the charitable head of being the advancement of education. ...*

*The promotion of public policy advice to government or other similar organisations may fall within the educational head, on the basis that the promotion of public policy is based on research that has been undertaken, and is therefore the dissemination of research. Notwithstanding, both activities are incidental to Icehouse's main purpose, and as such even if they do fall outside the scope of the charitable head of the advancement of education, they do not detract from the charitable nature of Icehouse.*

*... The Icehouse Notice omits to mention that Icehouse also provides its educational services to students. Consequently, Icehouse provides its services to three categories of people: people who are already running an innovative business and wanting to improve their business skills; people who are not in business but have an innovative idea and are seeking to commercialise that idea; and students who are interest in innovation. ...*

*Icehouse is regularly involved in providing intern programmes for students to work with real businesses to obtain real world experience and to provide the opportunity to apply the academic learnings received in their university studies. ...*

*The subject matter of the educational activities described ... are aimed at people who either want to establish their own business based on their own innovative idea or people who are already running an innovative business and wanting to improve their business skills, or students who are interested in innovation. There is no legal basis for denying Icehouse's activities are not the advancement of education on the ground of the subject matter of the educational activities. That is, there is no basis for denying Icehouse advances education purely because some, (but not all) of its educational activities are aimed at people who are already running an innovative business and wanting to improve their business skills. ...*

#### **Benefit to the public**

*It is submitted that what is required is not a "significant public benefit" as stated by the Commissioner but a benefit, no matter what size, to the public or a sufficient section of the public. There is no threshold in relation to the level or size of the benefit that is to be provided to the public. Therefore, an activity which produces a benefit which is small or minimal can still be a charitable purpose when provided to the general public or a sufficient section of the public. ...*

*Icehouse operates on a national scale. ...*

*The educational activities and eligibility criteria of Icehouse are very different to those of Canterbury Development Corporation. Icehouse's educational activities are more clearly stated, being explicitly stated in the constitution and are far broader than Canterbury Development Corporation's, including undertaking and publishing research, providing public seminars and mentoring and advisory services.*

*Furthermore, Icehouse does not have narrow eligibility criteria as to who may attend or utilise its services; many of its educational activities are available to any member of the public who wishes to attend. Consequently Canterbury Development Corporation is not applicable and therefore does not impact on the issue of whether Icehouse's educational activities fall within the charitable purpose of advancement of education.*

*The purpose of Icehouse is not aimed at providing benefits to members of a particular trade, business or profession, or even a particular industry. The purpose of Icehouse is aimed much higher, at New Zealand as a whole, with the benefits of the activities of Icehouse being available to any person who has an innovative idea or is undertaking any sort of innovative commerce on a small or medium scale and to students who are interested in innovation. It is in this way that the necessary support as identified by the Government is provided by the activities of Icehouse. ...*

*It is submitted that the main purpose of Icehouse is not to promote industry, commerce or enterprise, and therefore, Oldham Training and Enterprise Council can be distinguished and is therefore not applicable.*

*Icehouse's mission statement establishes that the focus of Icehouse's activities is on innovation, harbouring that innovation and talent in a useful manner, to grow both talent and New Zealand's prosperity. ... Icehouse's focus is on innovation and talent, that is the aim of Icehouse: that is its purpose. The assistance Icehouse provides to businesses, and any private benefits which may result, is only the means by which its aim is carried out.*

*That a benefit to the public arises from the activities of Icehouse is support by The Triton Foundation. ...*

*The object or aim of the Triton Foundation is fundamentally identical to the aim of Icehouse. Many of the activities undertaken by the Triton Foundation are identical to the activities undertaken by Icehouse. The mission of Icehouse is to increase talent and New Zealand's prosperity (which is akin to the Triton Foundation's aim to assist innovators to commercialise their ideas) and not to increase the income or profitability of a select few private business owners. ... The distinction lies in the difference between the aim of the entity (helping grow both talent and New Zealand's prosperity) and the means by which that aim is achieved (assisting individuals and businesses), as recognised in Latimer.*

*General public or a significant part of it*

*The test requires, first, that the recipients must not be numerically negligible and secondly, that the benefits are not private benefits. ...*

*Given that educational opportunities and resources are available to any member of the public who are either already in business ..., or who have an innovative idea and want to enter business on the basis of that idea, or who are students who are interested in innovation, the section of the public who may be interested in the educational opportunities and resources provided by Icehouse is large. In essence, the only members of the public who would not be interested in Icehouse's educational materials and resources are people who are not in business as they do not want to be in business and are not interested in innovative ideas. ...*

*Therefore, the number of recipients of the benefits of Icehouse's activities is not numerically negligible.*



*In The Triton Foundation, the Court accepted that some restriction on who would be provided assistance by the Triton Foundation was acceptable, on the basis that initial services were available to anyone and then further assistance was only provided to people and projects that were more likely to be successful.*

#### **No private benefit**

*A private benefit arising can be an inescapable and necessary part of fulfilling the main charitable purpose, and that does not mean that an entity is non-charitable. If that were the case, the benefits arising to specific people suffering from poverty would mean that the relief of poverty could not be charitable. The activities of Icehouse are fulfilling a need recognised by the Government, to support talented and innovative persons and businesses within New Zealand. The fact that a private benefit may be conferred to some persons as a result of the activities of Icehouse does not detract from or negate Icehouse's charitable purpose.*

*It is recognised that by carrying out its purpose, private individuals may benefit from the activities of Icehouse; however, this does not negate the charitable purposes of Icehouse. ...*

*The purpose of Icehouse is not aimed at providing benefits to members of a particular trade, business or profession, or even a particular industry. The purpose of Icehouse is aimed much higher, at New Zealand as a whole, with the benefits of the activities being available to any person who has an innovative idea or is undertaking any sort of innovative commerce on a small or medium scale and to students. It is in this way that the support as identified by the Government is provided by the activities of Icehouse.*

*Icehouse provides services (including educational opportunities and resources) to many different businesses. Ideas and products can come from any industry or business sector. ... Therefore, the activities of Icehouse are not aimed at benefiting a particular class of persons where that class is defined by reference to the person's trade, business or profession. ...*

#### **Submission: Icehouse and Ice Funds were established to undertake other purposes beneficial to the community**

*... The general improvement of a particular industry and the promotion of industry or commerce in general have been held by the courts to be charitable purposes within the charitable head of other purposes beneficial to the community. ...*

*In Oldham Training and Enterprise Council, Lightman J held that the Council was not charitable because its objects included the promotion of the interests of individuals engaged in trade, commerce or enterprise in the Oldham district. Oldham Training and Enterprise Council is distinguishable from the position of Icehouse. The case emphasises the importance of any benefit to any individual being incidental to the furtherance of the charitable purpose, which it is in Icehouse's case ... . Icehouse's objects are not the promotion of the interests of individuals engaged in trade, commerce or enterprise. Icehouse's purpose is the promotion of a culture of innovation and entrepreneurship. ...*

*The promotion of a culture of innovation and entrepreneurship has been held to be a purpose beneficial to the community (The Triton Foundation). ...*

*Therefore, the Courts have held that the general improvement of a particular industry, the promotion of industry or commerce in general and the promotion of a culture of innovation and entrepreneurship are charitable purposes, whereas the providing of private benefits to a particular class of people, where that class is defined by reference to a trade, business or profession is not charitable. ...*

*Icehouse does not seek to improve a particular industry, it aims to promote industry in general. Icehouse provides its services to many different SME businesses from the idea inception stage to the established business stage. It does not provide assistance to one industry in particular over others. Icehouse promotes industry, innovation and entrepreneurship, fulfilling the gap recognised by the Government to exist in terms of the lack of capability for all SMEs, the lack of funding available for many seed and start-up innovations and the lack of networks again for all SME's that will assist them to advance.*

*In Canterbury Development Corporation, Young J stressed that there must be a need to be relieved under this charitable head.*

*... [T]he New Zealand Government has clearly established that there is a need to support innovative people and businesses within New Zealand, and that such support is in the interest of New Zealand's welfare. ... Therefore, a need has been identified, and Icehouse's purpose is to relieve that need. By providing financial and other support (such as the utilisation of Icehouse's business premises and educational resources), Icehouse and Ice Funds are providing relief to a need recognised by the Government to exist, and are thereby undertaking activities which are of benefit to the community.*

*That Icehouse's activities fall within this charitable head is clearly supported by The Triton Foundation and Tasmanian Electronic Commerce Centre Pty.*

*The object or aim of the Triton Foundation is fundamentally identical to the aim of Icehouse. Many of the activities undertaken by the Triton Foundation are identical to the activities undertaken by Icehouse.*

*In both The Triton Foundation and Tasmanian Electronic Commerce Centre Pty the court took into account that the government had recognised that there was a need which was to be relieved. Therefore, on the basis of the need identified by the New Zealand Government and with supporting case law establishing that activities such as those undertaken by Icehouse have been held to be charitable by the courts, and on the basis that they fall within the spirit and intendment of the Preamble of the Statute of Elizabeth, it is submitted that Icehouse and Ice Funds are undertaking charitable purposes, namely, purposes beneficial to the community and that that purpose confers a benefit on the public. New Zealand is in a very similar situation to Tasmania, as it relates to the relative economic performance when compared to Australia and without significant effort, we will continue our slide even further, ending up out of the OECD and in a similar position to the impoverished Islands in the Pacific like Fiji, Samoa, Tonga and Niue who rely on foreign aid to stay above the poverty line. ...*

#### **No private benefit**

*As stated above ... the fact that members of a particular trade or profession may benefit from a charity does not mean that there is no charitable purpose. It is difficult to imagine how Icehouse could assist innovative persons and businesses, and provide educational workshops without specific individual*

*innovators, businesses or industries benefiting from that education. Any element of private benefit is incidental to, and not part of, the purpose for which Icehouse was established, and therefore does not prevent it from being a charitable entity. ...*

***Submission: that it is not in the public interest to remove Icehouse and Ice Funds from the register***

*As an alternative submission ... it is submitted that it would not be in the public interest to remove Icehouse and Ice Funds from the Charities register.*

*This submission is made on the basis that the submissions above clearly show that:*

- (a) the activities of Icehouse and Ice Funds are directed at relieving a need identified by the Government to exist;*
- (b) Icehouse and Ice Funds were not established with the main aim of conferring private benefits;*
- (c) Icehouse and Ice Funds confer a benefit on the public;*
- (d) the recipients of Icehouse's activities can be any member of the public;*
- (e) the recipients of Icehouses activities are not connected by blood or contract; and*
- (f) in the few circumstances where there are fees or restrictions on who may be a recipient of some of Icehouse's activities, such fees and restrictions are necessary and rational due to the limited resources and funding of Icehouse and Ice Funds.*

*The activities of Icehouse and Ice Fund support the Government's policy objectives. The removal of Icehouse and Ice Funds from the register would frustrate the Government's policy and initiative in establishing the NZVIF, and consequently, it is not in the public interest for Icehouse and Ice Funds to be removed from the register."*

## **The issues**

13. The Commission must consider whether the Company is not, or is no longer, qualified for registration as a charitable entity under section 32(1)(a) of the Act.
14. In order to be qualified for registration, the Company must meet all of the essential requirements for registration under the Act. In this case, the key issue for consideration is whether the Company is established and maintained exclusively for charitable purposes and is not carried on for the private pecuniary profit of any individual, as required by section 13(1)(b) of the Act. In particular:
  - (a) are all of the Company's purposes charitable?
  - (b) do the Company's purposes provide a public benefit?
  - (c) if any of the Company's purposes are non-charitable, are those purposes ancillary to a charitable purpose?

## The law on the deregistration of charitable entities

15. Under section 13(1)(b) of the Charities Act, a society or institution must be established and maintained exclusively for charitable purposes and must not be 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. Section 5(3) of the Act provides that any non-charitable purpose must be ancillary to a charitable purpose.
18. Section 5(4) of the Act states a non-charitable purpose is ancillary to a charitable purpose of the trust, society or institution if the non-charitable purpose is:
  - (a) *ancillary, secondary, subordinate, or incidental to a charitable purpose of the trust, society or institution; and*
  - (b) *not an independent purpose of the trust, society, or institution.*
19. Section 32(1)(a) of the Act provides that an entity may be removed from the register if it is not, or is no longer, qualified for registration as a charitable entity.
20. 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 and 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.*
21. Under section 35(1)(a) of the Act, if an objection to 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.

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

## Charities Commission's analysis

22. The Commission has assessed the Company's stated purposes, drawing on information available on the Company's website, the Company's financial records for the year ending 2009, information provided by the Company in response to the notice of intention to remove the Company from the register, and the relevant case law.
23. The Commission considers that the purposes in clause 4.1 do not disclose an intention to relieve poverty or advance religion. Therefore, these purposes have been considered under the advancement of education and "any other matter beneficial to the community". First, however, the Commission has considered the effect of clause 4.2.

### Effect of clause purporting to limit purposes

24. Clause 4.2 of the constitution states:

*"The activities of the Company as described in clause 4.1 are intended to be charitable in accordance with the laws of New Zealand and shall be deemed not to include or extend to any matter or thing which is not charitable"*

25. In *M K Hunt Foundation Ltd v Commissioner of Inland Revenue*,<sup>2</sup> Hardie Boys J cited with approval the comments Lawrence LJ made in *Keren Kayemeth le Jisroel Ltd v Commissioners of Inland Revenue*.<sup>3</sup> 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>4</sup> Hardie Boys J further wrote that

*"... in so holding, Lawrence LJ 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>5</sup>

26. In *Commissioner of Inland Revenue v White*,<sup>6</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 purposes within the specified field and the Association would not be entitled to registration as a charity."*

<sup>2</sup> [1961] NZLR 405, 407.

<sup>3</sup> [1932] 2 KB 465.

<sup>4</sup> [1931] 2 KB 465, 481.

<sup>5</sup> [1961] NZLR 405, 408.

<sup>6</sup> (1980) 55 TC 651.

*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>7</sup>

27. Finally, in *Canterbury Development Corporation v Charities Commission*,<sup>8</sup> 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".<sup>9</sup> The judge went on to say "in the end the objects and operation of the organisations either support a charitable purpose or they do not."<sup>10</sup> In that case, Young J concluded that they did not support a charitable purpose.
28. The Commission does not consider that the inclusion of clause 4.2 provides conclusive evidence that the Company's purposes are in fact exclusively charitable. The Commission must be certain that the Company qualifies for registration as a charitable entity.

#### 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>11</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>12</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 the New Zealand High Court case of *Re Collier (deceased)*<sup>13</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 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>7</sup> (1980) 55 TC 651, 653.

<sup>8</sup> HC WN CIV 2009-485-2133 [18 March 2010].

<sup>9</sup> HC WN CIV 2009-485-2133 [18 March 2010] at para 56.

<sup>10</sup> HC WN CIV 2009-485-2133 [18 March 2010] at para 56.

<sup>11</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>12</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>13</sup> [1998] 1 NZLR 81, 91-92

32. In *Vancouver Society of Immigrant and Visible Minority Women v Minister of National Revenue*<sup>14</sup>, Iacobucci J stated:

*"[T]he threshold criterion for an educational activity must be some legitimate, targeted attempt at educating others whether through formal or informal instructions, training, plans of self study, or otherwise."*

33. In the recent decision of *Canterbury Development Corporation v Charities Commission*<sup>15</sup> the High Court held that providing advice and assistance to businesses and business owners was not charitable under the advancement of education. Young J stated:

*"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."*<sup>16</sup>

34. Case law clearly recognises that there are institutions whose purposes advance education in the broad sense but which do not advance education in the charitable sense because they lack the requisite public benefit.

35. *Re Mason*<sup>17</sup> concerned 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.

36. In reaching this decision, the Court distinguished between charitable institutions whose main object was the advancement of education, which provided a clear public benefit, and non-charitable institutions whose main object was the protection and advantage of those practising in a particular profession.

37. McMullin J gave examples of charitable institutions, such as an institute of pathology<sup>18</sup> and a college of nursing.<sup>19</sup> He also provided examples of non-charitable institutions that primarily conferred private benefits on members, such as an insurance institute<sup>20</sup> and a society of writers.<sup>21</sup> Promotion of 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.<sup>22</sup>

<sup>14</sup> (1999) 169 DLR (4<sup>th</sup>) 34, 114.

<sup>15</sup> HC, WN, [18 March 2010], CIV 2009-485-2133.

<sup>16</sup> *Canterbury Development v Charities Commission* HC, WN, [18 March 2010], CIV 2009-485-2133, para 33.

<sup>17</sup> [1971] NZLR 714, 721.

<sup>18</sup> *Royal College of Surgeons of England v National Provincial Bank* [1952] AC 631; [1952] 1 All ER 984.

<sup>19</sup> *Royal College of Nursing v St Marylebone Corporation* [1959] 1 WLR 1077; [1959] 3 All ER 663.

<sup>20</sup> *Chartered Insurance Institute v Corporation of London* [1957] 1 WLR 867.

<sup>21</sup> *Society of Writers to Her Majesty's Signet v Commissioners of Inland Revenue* (1886) 2 TC 257.

<sup>22</sup> *Inland Revenue Commissioners v City of Glasgow Police Athletic Association* [1953] AC 380.

## Company's activities

38. The Company submits that its annual return shows its operating revenue was applied to Ice Bridge, Ice Accelerator, Ice Angels, and Ice Lab.
39. The programmes offered by the Company through ICE BRIDGE are outlined on its website<sup>23</sup> and include:

### Owner Manager Programme

*This is a programme for high-calibre owner-managers with energy and a passion for success. You'll need:*

- *A significant equity stake in your current business*
- *Management control*
- *Revenue over \$2m*

*Programme Fee is \$19,750 + GST*

### Achieving Business Growth Workshop

*Designed for owner managers and senior leaders of New Zealand's small to medium enterprises; exporters; and Agri-based businesses*

*Regular price \$1,250.00 + GST*

### Agribusiness Management Programme

#### Admission Requirements

- *A significant equity stake in your current business*
- *Partner status and/or management control*
- *Revenue of \$0.5M+ or an equity stake of \$1M+*
- *A deep understanding of the technical requirements of your industry*
- *A desire to look at your business in a fresh light with a view to growing it significantly*

#### Programme Fees

*New Zealand Participants \$10,900 + GST; Australian Participants AU\$9,800 + GST*

### Leading and Managing for Growth Programme

#### Admission Requirements

- *You are a key staff member or senior manager in an owner-managed business*
- *You play an integral role in enabling the business to achieve its objectives*

*Programme Fee \$7,800 + GST*

### Customised Programmes

*In 2008, programmes at The ICEHOUSE took a new turn with the advent of the first customised programmes. The reputation we have built for delivering high-impact learning environments and growth enablers helping owners and managers transform their businesses has attracted a handful of larger owner-managed or family owned businesses to seek us out. Facing shifting market dynamics, new competitors, more demanding customers, or other strategic challenges we developed customised programmes to strengthen the leadership capacity of the executives and managers in these businesses and of the organisation as a whole.*



Organisations we have delivered customised programmes or processes for include Stevenson Group, Giltrap Group Holdings and Glidepath Limited. In almost every case customers who want tailored programmes are looking to build management competency into their business operations and to develop leaders who can make a difference within the organisation. While each company faces its own unique set of issues, challenges and opportunities, all typically partner with The ICEHOUSE to help achieve a lift in individual and organisational competency and inject new thinking and contemporary wisdom to take the business forward.

40. The Company is also offering a range of courses aimed at owner managers including workshops on pay and performance, people management, finance, strategic planning and governance.<sup>24</sup>
41. The programmes offered by the Company through ICE ACCELERATOR are aimed at start up businesses and include:<sup>25</sup>

Market Validation Programme

*In the 90-day market validation programme you will:*

- *Put your idea on paper and learn how to best communicate it to others*
- *Spot your ideal customers and determine how to attract them*
- *Figure out how much money you need and have a plan to raise it*
- *Identify your competitors and prepare to outcompete them*
- *Understand the resources you will need and create a plan to obtain them*

Incubator

*The ICE Accelerator is committed to mentoring only the best. Incubator residents will be entrepreneurial ventures of outstanding quality with high growth potential.*

**Our criteria:**

- *A strong, committed entrepreneur who is keen to climb a steep learning curve and deliver against milestones.*
- *An emerging market opportunity that presents opportunities for substantial and rapid growth, especially in international markets.*
- *An innovative product or technology that presents a clear and distinct value proposition, and has an element of Intellectual Property.*

*Residency monthly fees:*

- *\$2500 + GST*
- *\$400 + GST per desk*

42. The Company's ICE ANGELS website<sup>26</sup> states:

*"Founded in 2003 the ICE Angels is Australasia's largest group of experienced investors, with over 90 members the club has supported over 14 companies, providing funding of over \$23.9Million across 38 investment rounds.*

*The ICE Angels connect high-potential start-up ventures, with willing investors to facilitate the funding and success of emerging companies. Operating as a collective of private investors who work together to increase their 'deal flow' (the number of investment opportunities they see) ICE Angels invest both expertise and money in selected companies.*

<sup>24</sup> <http://www.theicehouse.co.nz/Bridge/Events/tabid/87/Default.aspx>.

<sup>25</sup> <http://www.theicehouse.co.nz/Accelerator/tabid/58/Default.aspx>.

<sup>26</sup> <http://theicehouse.co.nz/Angels/tabid/59/Default.aspx>.

*ICE Angels deal flow is sourced from within and outside of The ICEHOUSE business incubator. External deals are sourced from our partners such as The University of Auckland, CRI's, other incubators and organisations such as Hi Growth. We also welcome investment opportunities from outside this network, provided they meet our strict investment criteria. ICE Angel investors are interested in early stage ventures that have high growth potential (beyond New Zealand) within sectors such as:*

- *Software*
- *Media*
- *Internet*
- *Communication*
- *Life Sciences*
- *Medical Devices*

*And other sectors where the members have sufficient competency to add value to the venture.*

*As a guide ICE Angel investment typically includes qualification criteria such as:*

- **Capital Needs** - *Ventures will typically be in the product development phase and need capital of \$0.1- \$1m to advance to the next phase of their development.*
- **Market Opportunity** - *The market opportunity will be international, typically with a potential market of NZ\$100m+. Timing will be a minimum of 12 months ahead of the market.*
- **Financeability** - *It is desirable that subsequent funding sources be identified at the time of the investment.*

*Potential deals undergo a thorough due diligence process prior to investment. ICE Angels are experienced entrepreneurs and business people who take an active interest in the management of investee companies. ICE Angels is not a venture capital fund, though we do have venture capitalists as affiliate members."*

43. The Company has submitted that ICE LAB provides research and development on owner-manager businesses.
44. The Company supports a range of other activities including competitions such as Spark! Entrepreneurship Challenge and FAST Pitch, the provision of mentors, the provision of seminars, events and programmes aimed at exporters or those firms who aspire to build global businesses, and supporting the visiting fellows programme.
45. As set out earlier, the Company's purposes in clause 4.1 of its constitution are:
  - 4.1.1 *To provide teaching and learning services for the benefit of owners, operators and managers of small and medium sized enterprise companies and students;*
  - 4.1.2 *To provide office accommodation and support services (initially off-site services for start-up companies and micro-sized businesses, developing to on-site services where tenants are physically co-located in the Company's premises);*

- 4.1.3 *To provide mentoring and advisory services to the small to medium sized business enterprise sector and/or start-up businesses;*
- 4.1.4 *To undertake research and issue publications on matters relating to entrepreneurship, the small to medium sized business enterprise sector, start-up business operations and development initiatives;*
- 4.1.5 *To organise events such as seminars and conferences, research forums, practitioner and student-focused competitions, networking and placement activities;*
- 4.1.6 *To promote public policy advice to government or other similar organisations on matters relating to small to medium sized business enterprises.*

*Any other associated incidental activities which will further the advancement of the objects of the shareholders in New Zealand.*

46. The Company has submitted that it provides its services to three categories of people namely:
- People who are already running an innovative business and wanting to improve their business skills;
  - People who are not in businesses but have an innovative idea and are seeking to commercialise that idea
  - Students who are interested in innovation
47. The Commission considers that the purpose outlined in clause 4.1.4 may advance education. In addition, clauses 4.1.1 and 4.1.5, in so far as they relate to students, may advance education and provide sufficient public benefit.
48. However, based on the case law cited above, and in particular *Canterbury Development Corporation v Charities Commission*,<sup>27</sup> the Commission considers that the Company's purposes outlined in clauses 4.1.1, 4.1.2, 4.1.3, 4.1.5 and 4.1.6 relating to the provision of services to or aimed at small to medium sized business enterprises and/or start-up businesses do not amount to advancing education.

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<sup>27</sup> HC, WN, [18 March 2010], CIV 2009-485-2133.

### Any other matter beneficial to the community

49. In order to be considered charitable as “any other matter beneficial to the community”, purposes 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>28</sup>, 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.
50. However, not all organisations having purposes that benefit the community will be charitable. The purposes must benefit the community in a way that the law regards as charitable. According to *Charity Law in Australia and New Zealand*:
- “... it is not all objects of public utility that are charitable, ‘for many things of public utility may be strictly matters of private right, although the public may indirectly receive a benefit from them.’ Nor are essentially economic or commercial objects within the spirit of the Preamble.”<sup>29</sup>*
51. In cases such as *Re Tennant*<sup>30</sup>, *Tasmanian Electronic Commerce Centre Pty Ltd v Commissioner of Taxation*<sup>31</sup> and *Canterbury Development Corporation v Charities Commission*<sup>32</sup>, economic development of a community has been held to be charitable under “any other matter beneficial to the community” where essential services are provided or where the community is under a particular disadvantage.

<sup>28</sup> *Re Jones* [1907] SALR 190, 201; *Williams Trustees v Inland Revenue Commissioners* [1947] AC 447, 455; *Scottish Burial Reform and Cremation Trust 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 Trust of Accountants v Commissioner of Inland Revenue* [1986] 1 NZLR 147, 157; *Re Tennant* [1996] 2 NZLR 633, 638.

<sup>29</sup> Gino Dal Pont, 2000, Oxford University Press, p 178; citing *Nightingale v Goulburn* (1847) 5 Hare 484, 490 and *Re Davis (deceased)* [1965] WAR 25, 28.

<sup>30</sup> [1996] 2 NZLR 633.

<sup>31</sup> (2005) FCA 439; [2005] 59 ATR 10 (*Australian Federal Court of Appeal*) at pp 25-26, para 59-60.

<sup>32</sup> HC WN CIV 2009-485-2133 [18 March 2010].

52. *Re Tennant* related to a rural community and the provision of a creamery. In that case, Hammond J stated:

*“Obviously each case will turn on its own facts. I would not be prepared to say that there may not be cases which would fall on the other side of 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.”<sup>33</sup> [Emphasis added]*

53. Similarly, in *Tasmanian Electronic Commerce Centre Pty Ltd v Federal Commissioner of Taxation*, the Australian Federal Court of Appeal decided that the entity was charitable because it was created to provide internet and communications infrastructure for Tasmania, a particularly economically disadvantaged area. Heeney J 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”<sup>34</sup>. [Emphasis added]*

54. In *Canterbury Development Corporation v Charities Commission*, in discussing whether economic development can fall within the “spirit and intendment of the Statue 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* [1996] 2 NZLR 633 and *Tasmanian Electronic Commerce Centre v Commissioner of Taxation* [2005] FCA 439 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.”<sup>35</sup>*

55. The Company has submitted that it is relieving a need to support innovative people and businesses within New Zealand, which is recognised by the Government to exist. It is thereby undertaking activities that are of benefit to the community.

56. The Commission does not consider that all purposes identified by the Government as requiring attention, funding or resources will necessarily be charitable as “any other matter beneficial to the community”.

<sup>33</sup> *Re Tennant* [1996] 2 NZLR 633, 640.

<sup>34</sup> (2005) FCA 439; [2005] 59 ATR 10 (Australian Federal Court of Appeal) at pp 25-26, para 59-60.

<sup>35</sup> HC WN CIV 2009-485-2133 [18 March 2010] para 42.

As stated above, in order to fall within this head of charity a purpose must be both beneficial to the community and be within the spirit and intent of the purposes set out in the Statute of Elizabeth. In *Latimer v CIR*, the Privy Council stated:

*“Accordingly, the critical feature of the present case is that the ultimate trust is in favour of the Crown. Their Lordships cannot accept the trustee’s contention that the Crown is itself a charity, or that it holds all its funds to be applied exclusively for charitable purposes. If either were true there would be no need to exempt the Crown from income tax. But like other public authorities (which have their own exemption) its money is applicable and is applied for numerous non-charitable purposes. It is true that these are public purposes rather than private purposes; but this means only that the government of the day considers it expedient to make public funds available for such purposes. It cannot be doubted that the Crown was entitled to establish a trust to assist Maori to bring their claims, and would have been entitled to do so whether or not this was a charitable purpose. 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.”*<sup>36</sup> [emphasis added]

57. In *Canterbury Development Corporation v Charities Commission*, the Canterbury Economic Development Fund involved the provision of start up money. Ronald Young J stated:

*“As to the second rationale in Tennant relating to an assessment of the creamery on its own I differ from Hammond J’s analysis. By itself I cannot see how a kick start for a particular business can be charitable. As with CEDF, while the hope is laudable, to kick start an industry to the economic benefit of a region, and ultimately perhaps through this to relieve unemployment, the provision of help to a fledgling business is not for public economic benefit nor does it have charitable intent. I consider in Tennant if the creamery is looked at on its own, then it provides a private benefit conferred on a private industry which ultimately it is hoped might benefit a community. This is not a charitable purpose. The only basis on which this could be seen as charitable is based on the needs assessment undertaken, for example, in Tasmanian Electronic Commerce Centre. If this is the rationale for the creamery on its own then Tennant is distinguishable from this case. Here there is no claim of need in the Canterbury region.”*<sup>37</sup> [Emphasis added]

58. The Company has submitted that:

*“New Zealand is in a very similar situation to Tasmania, as it relates to the relative economic performance when compared to Australia and without significant effort, we will continue our slide even further, ending up out of the OECD and in a similar position to the impoverished Islands in the Pacific like Fiji, Samoa, Tonga and Niue who rely on foreign aid to stay above the poverty line.”*

<sup>36</sup>

[1994] 3 NZLR 157 at 170.

<sup>37</sup>

HC WN CIV 2009-485-2133 [18 March 2010] para 88.

59. In *Canterbury Development Corporation v Charities Commission* the Appellant submitted that the court should have regard to a comparison between the economic situation of Tasmania and that of the Canterbury region. However, Ronald Young J stated:

*“Further in Tasmania Electronic Commerce Centre public benefit was established because the purpose of encouraging electronic commerce was to boost Tasmania’s (relatively) deprived economy and thereby confer public benefit. No such economic deprivation is claimed for Canterbury. The position may be different in an identifiably economically deprived area in New Zealand.”*<sup>38</sup> [Emphasis added]

60. The Commission therefore considers that a comparison should not be made between the economic situations of different countries, rather it should be made between the economic situations of regions within the same country.
61. In this case, the Company has stated that it is providing its services nationally across all of New Zealand. Accordingly, the Commission does not consider that it has shown that it is providing services essential to a region or assisting areas that are under any particular disadvantage.

#### Public or private benefit

62. In order to fall under “any other matter beneficial to the community”, the benefits must be to the community rather than to private individuals. Any private benefits arising from the Company’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>39</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>40</sup>
63. The Courts have found the promotion of industry and commerce to be charitable under any other matter beneficial to the community when it is for public benefit and not for the benefit of private individuals.
64. Thus, in *Inland Revenue Commissioners v Yorkshire Agricultural Society*<sup>41</sup> the improvement of agriculture was held to be charitable when it was for the benefit of the public at large. However, Lord Hanworth made it clear that the promotion of agriculture for private profit or benefit would not be charitable.

<sup>38</sup> HC WN CIV 2009-485-2133 [18 March 2010] para 61.

<sup>39</sup> *Inland Revenue Commissioners v Oldham Training and Enterprise Council* (1986) STC 1218; *Travel Just v Canada Revenue Agency* 2006 FCA 343 [2007] 1 CTC 294.

<sup>40</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>41</sup> [1928] 1 KB 611.

65. In *Crystal Palace Trustees v Minister of Town and Country Planning* a body of trustees was entrusted with the control and management of Crystal Palace and park as a public place for education and recreation, and for the promotion of industry, commerce and art. Danckwerts J stated:

*"... it seems to me that the intention of the Act in including in the objects the promotion of industry, commerce and art, is the benefit of the public, that is, the community, and is not the furtherance of the interests of individuals engaging in trade or industry or commerce by the trustees."*<sup>42</sup>

66. In *Hadaway v Hadaway* the Privy Council held that assisting persons carrying on a particular trade or business or profession would not be charitable unless there was a condition that this assistance could only be made for a purpose which was itself charitable. In that case, the court held that any eventual benefit to the community was too remote:

*"The promotion of agriculture is a charitable purpose, because through it there is a benefit, direct or indirect, to the community at large: between a loan to an individual planter and any benefit to the community the gulf is too wide. If there is through it any indirect benefit to the community, it is too speculative."*<sup>43</sup>

67. In *Commissioners of Inland Revenue v White and Others and Attorney General* it was held that the entity's purpose to "promote any charitable purpose which will encourage the exercise and maintain the standards of crafts both ancient and modern, preserve and improve craftsmanship and foster, promote and increase the interest of the public therein" was charitable. However, in that case, Fox J stated:

*"The three cases which I have last mentioned seem to me to establish that the promotion or advancement of industry (including a particular industry such as agriculture) or of commerce is a charitable object **provided that the purpose is the advancement of the benefit of the public at large and not merely the promotion of the interests of those engaged in the manufacture and sale of their particular products. ... The charitable nature of the object of promoting a particular industry depends upon the existence of a benefit to the public from the promotion of the object.**"*<sup>44</sup> [Emphasis added].

68. In that case, Fox J found that the purposes of the Association were capable of providing a public benefit and that any private benefit of individual craftsmen was not an object of the Association.

69. In *Commissioners of Inland Revenue v Oldham Training and Enterprise Council*, the Court held:

*"[T]he second main object, namely promoting trade, commerce and enterprise, and the ancillary object, of providing support services and advice to and for new businesses, on any fair reading must extend to enabling Oldham TEC to promote the interests of individuals engaged in trade, commerce or enterprise and provide benefits and services to them [...] **Such efforts on the part of Oldham TEC may be intended to make the***

<sup>42</sup> [1951] 1 Ch 132, 142.

<sup>43</sup> [1955] 1 WLR 16, 20 (PC).

<sup>44</sup> (1980) 55 TC 651, 659.



*recipients more profitable and thereby, or otherwise, to improve employment prospects in Oldham. But the existence of these objects, in so far as they confer freedom to provide such private benefits regardless of the motive or the likely beneficial consequences for employment, must disqualify Oldham TEC from having charitable status. The benefits to the community conferred by such activities are too remote.*"<sup>45</sup> [Emphasis added].

70. In *Commissioner of Taxation v Triton Foundation*,<sup>46</sup> the Federal Court of Australia held that a foundation set up to assist inventors provided sufficient public benefit. In reaching this conclusion, the court noted that the Foundation's purposes were particularly directed at young people, but were also available to "any member of the community who had the desire or inclination to use them", and a number of the resulting inventions had been of benefit to the community.
71. In *Travel Just v Canada (Revenue Agency)*,<sup>47</sup> the Canadian Federal Court of Appeal considered a case relating to an entity whose purposes were the creating of model tourism development projects and the production and dissemination of tourism information. The Court found that promoting commercial activity with a strong flavour of private benefit was not a purpose beneficial to the public and expressed doubt that the dissemination of information as described would qualify as either publication of research or an educational purpose.
72. In *Canterbury Development v Charities Commission*, Ronald Young J held:

*"The important point in this case is that CDC's assistance to business is not collateral to its purposes but central to it. The purposes of CDC's assistance to business is, as the constitution identifies, and the operation confirms, to make the businesses more profitable. CDC believes this assistance will, in turn, result in benefit to the Canterbury community. The **central focus however remains on increasing the profitability of businesses not public benefit.** ...*

*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 unemployment is certainly not a direct object of 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.** Public benefit is not at the core of CDC's operation."<sup>48</sup> [Emphasis added]*

<sup>45</sup> (1996) 69 Tax Cases 231, 251.

<sup>46</sup> (2005) 147 FCR 362.

<sup>47</sup> 2006 FCA 343 [2007] 1 CTC 294, 2007 DTC 5012 (Eng.) 354 NR 360.

<sup>48</sup> *Canterbury Development v Charities Commission* HC WN CIV 2009-485-2133 [18 March 2010] at paras 60, 67.

73. The Commission considers that the provision of services to or aimed at small to medium sized business enterprises and/or start-up businesses is a primary purpose of the Company. The primary benefits from these purposes will accrue to business owners without regard to the wider benefit to the public. Any benefits conferred on the community at large will be too remote to give the purposes a charitable nature.
74. The Company has submitted that its purposes are charitable because it has not engaged in activities aimed at benefiting any particular individual business, industry, trade or profession.
75. The Commission does not consider that providing services across a range of industries will necessarily be sufficient to constitute a public benefit. In both *Oldham Training and Enterprise Council* and *Canterbury Development Corporation*, the Court found that there was insufficient public benefit, even though the entities worked with organisations from a range of different industries.
76. The Company has submitted that its primary purpose is the promotion of innovation, harbouring that innovation and talent in a useful manner, to grow both talent and New Zealand's prosperity. Because of this, the Company submits that its purposes are distinguishable from those in *Oldham Training and Enterprise Council* and *Canterbury Development Corporation*. Rather, the Company submits that its purpose is analogous to the primary purpose in *The Triton Foundation*. Moreover, the Company argues that any benefits to private individuals are ancillary to the public benefit received from promoting "innovation" as supporting businesses is just the means by which the Company carries out its broader purpose.
77. The Commission notes that the Company's stated purposes are not restricted to the promotion of innovation or to purposes which will result in an identified public benefit.
78. The Company's stated purposes in clauses 4.1.1 to 4.1.3 and 4.1.6 are:
- 4.1.1 *To provide teaching and learning services **for the benefit of owners, operators and managers of small and medium sized enterprise companies and students;***
  - 4.1.2 *To provide office accommodation and support services (initially off-site services **for start-up companies and micro-sized businesses,** developing to on-site services where tenants are physically co-located in the Company's premises);*
  - 4.1.3 *To provide mentoring and advisory services **to the small to medium sized business enterprise sector and/or start-up businesses; ...***
  - 4.1.6 *To promote public policy advice to government or other similar organisations **on matters relating to small to medium sized business enterprises.** [Emphasis added]*

79. The Commission considers that the above purposes are aimed predominately at providing services to existing businesses or start up businesses, including advisory and mentoring services. Moreover, many of the Company's programmes have eligibility criteria that require the participants to be owners or managers of existing businesses. As such, the Commission considers that the Company's purposes and activities are analogous to those in *Oldham Training and Enterprise Council* and *Canterbury Development Corporation*, which were held not to be charitable.
80. The Commission considers that the Company's focus on existing businesses distinguishes it from the purposes considered in *The Triton Foundation*. In that case, the focus was not on businesses but individual inventors, especially the young, and purposes which would result in an identifiable public benefit.
81. In *Canterbury Development Corporation v Charities Commission* Ronald Young J held:

*"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."<sup>49</sup>*

82. The Commission considers that the Company's purposes are analogous to those considered by the court in *Canterbury Development Corporation v Charities Commission*.<sup>50</sup>
83. The Commission therefore concludes that the Company has a main purpose of assisting small to medium sized business owners to receive a private pecuniary profit. This does not constitute a public benefit.

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<sup>49</sup> HC WN CIV 2009-485-2133 [18 March 2010] at paras 65, 66  
<sup>50</sup> HC WN CIV 2009-485-2133 [18 March 2010] at paras 65, 66

## Company's submissions

84. Section 2 of the Charities Act 2006 (UK) changed the definition of "charitable purpose" in the United Kingdom to include 13 heads of charity, namely:

- (a) *the prevention or relief of poverty;*
- (b) *the advancement of education;*
- (c) *the advancement of religion;*
- (d) *the advancement of health or the saving of lives;*
- (e) *the advancement of citizenship or community development;*
- (f) *the advancement of the arts, culture, heritage or science;*
- (g) *the advancement of amateur sport;*
- (h) *the advancement of human rights, conflict resolution or reconciliation or the promotion of religious or racial harmony or equality and diversity;*
- (i) *the advancement of environmental protection or improvement;*
- (j) *the relief of those in need by reason of youth, age, ill-health, disability, financial hardship or other disadvantage;*
- (k) *the advancement of animal welfare;*
- (l) *the promotion of the efficiency of the armed forces of the Crown, or of the efficiency of the police, fire and rescue services or ambulance services;*
- (m) *any other purposes within subsection (4). ...*

- (4) *The purposes within this subsection (see subsection (2)(m)) are—*
- (a) *any purposes not within paragraphs (a) to (l) of subsection (2) but recognised as charitable purposes under existing charity law or by virtue of section 1 of the Recreational Charities Act 1958 (c. 17);*
  - (b) *any purposes that may reasonably be regarded as analogous to, or within the spirit of, any purposes falling within any of those paragraphs or paragraph (a) above; and*
  - (c) *any purposes that may reasonably be regarded as analogous to, or within the spirit of, any purposes which have been recognised under charity law as falling within paragraph (b) above or this paragraph.*

85. The Company has submitted that *Oldham Training and Enterprise Council* can be distinguished on the basis that section 2 of the Charities Act 2006 (UK) has overridden the case and it is therefore no longer good law in relation to the types of activities that are considered non-charitable.

86. The Commission notes that the amended definition of "charitable purpose" in the United Kingdom does not include the advancement of economic development generally. Moreover, in its 2008 publication entitled "Analysis of the law underpinning Charities and the Public Benefit"<sup>51</sup> the Charity Commission for England and Wales relies on case law decided prior to the 2006 Act amendment, including *IRC v Oldham Training and Enterprise Council*.<sup>52</sup> The Commission therefore considers that *IRC v Oldham*

<sup>51</sup> <http://www.charitycommission.gov.uk/Library/guidance/lawpb1208.pdf>.

<sup>52</sup> [1996] STC 1218.

*Training and Enterprise Council* continues to be applicable in relation to charities law in both the United Kingdom and New Zealand.

### Conclusion

87. The Commission concludes that the purpose outlined in clause 4.1.4 and the purposes outlined in clause 4.1.1 and clause 4.1.5 in so far as they relate to students may advance education. However, the Company's primary purposes outlined in the remaining clauses (4.1.2, 4.1.3, and 4.1.6) and the purposes in clauses 4.1.1 and 4.1.5 relating to owners, operators, and managers of small to medium sized enterprise companies are not charitable purposes and do not provide sufficient public benefit. The Company has therefore failed to meet an essential requirement for continued registration as a charitable entity in that it is not established and maintained exclusively for charitable purposes as required by section 13(1)(b)(i) of the Act.

### Public interest

88. Section 35(1) of the Act states that the Commission must not proceed with the removal of entity from the register unless it is satisfied that it is in the public interest to do so.
89. The Company has submitted would not be in the public interest to remove the Company and Ice Funds from the Register because:

*"This submission is made on the basis that the submissions above clearly show that:*

- (a) the activities of Icehouse and Ice Funds are directed at relieving a need identified by the Government to exist;*
- (b) Icehouse and Ice Funds were not established with the main aim of conferring private benefits;*
- (c) Icehouse and Ice Funds confer a benefit on the public;*
- (d) the recipients of Icehouse's activities can be any member of the public;*
- (e) the recipients of Icehouses activities are not connected by blood or contract; and*
- (f) in the few circumstances where there are fees or restrictions on who may be a recipient of some of Icehouse's activities, such fees and restrictions are necessary and rational due to the limited resources and funding of Icehouse and Ice Funds.*

*The activities of Icehouse and Ice Fund support the Government's policy objectives. The removal of Icehouse and Ice Funds from the register would frustrate the Government's policy and initiative in establishing the NZVIF, and consequently, it is not in the public interest for Icehouse and Ice Funds to be removed from the register."*

90. Section 10(1)(a) of the Act obliges the Commission to promote public trust and confidence in the charitable sector. The Commission considers that public trust and confidence in registered charitable entities would be eroded if entities that did not meet the essential requirements for registration remained on the register.

91. Accordingly, the Commission considers that it is in the public interest to remove the Company from the register, as this will maintain public trust and confidence in the charitable sector.

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

92. The Commission has determined that the Company is not qualified for registration as a charitable entity because it is not established and maintained exclusively for charitable purposes as required by section 13(1)(b)(i) of the Charities Act.
93. Under section 35(1) of the Act, the Commission is satisfied that it is in the public interest to remove the Company from the register and one ground for removal from the register has been satisfied, that is, the Company is not qualified for registration as a charitable entity.
94. The decision of the Commission is therefore to remove the Company from the Register, pursuant to section 31 of the Act, with effect from 15 September 2010.

**For the above reasons, the Commission determines to deregister the Company as a charitable entity by removing the Company from the Register.**

Signed for and on behalf of the Charities Commission

  
.....  
Trevor Garrett  
Chief Executive

18/8/10  
.....  
Date