

Registration Decision: Thorndon Farmers' Market Trust

The facts

1. Thorndon Farmers' Market Trust (the Applicant) was created by a deed of trust dated 17 June 2009. The trustees of the trust were incorporated as a board under the Charitable Trusts Act 1957 on 18 June 2009.
2. The Applicant applied to the Charities Commission for registration as a charitable entity on 24 June 2009.
3. Clause 3 of the Applicant's deed of trust indicates that its objects are:
 - a. *To establish and oversee a fresh food market in Thorndon, Wellington which will provide a focal point for and help to revitalise the local community;*
 - b. *To provide residents of Thorndon and surrounding suburbs with regular access to supplies of locally grown and produced fresh food;*
 - c. *To better public health by providing opportunities for education about food preparation, nutrition, horticulture and the environment.*
 - d. *To benefit the environment by practising and encouraging renewable packaging, responsible waste disposal and recycling;*
 - e. *To encourage sustainable transport options;*
 - f. *To support and stimulate business growth for producers from the Wellington region and the Lower North Island and to provide employment opportunities in Wellington;*
 - g. *To contribute to the economic and social development of Wellington and the Lower North Island;*
 - h. *To provide a space for community not-for-profit fundraising*
 - i. *To do anything necessary or helpful to achieve these objectives.*
4. The Commission analysed the application and on 29 June 2009 sent the Applicant a notice that may lead to decline. The basis for this notice was that although some of its purposes could be considered charitable, the main purpose of operating a farmers' market would primarily benefit individuals and would not provide sufficient benefit to the public.
5. On 2 August 2009 the Applicant responded stating that two other farmers' markets had been registered by the Commission:

"Like the Thorndon Farmers' Market Trust, these not-for-profit, volunteer-dependant entities have been established to provide urban dwellers with regular and reliable access to fresh, quality fruit, vegetables and other locally produced consumable products and to enhance the communities in which they operate. You will see from a

search of the rules of these entities that their primary and ancillary purposes are directly comparable with those of the Trust.”

The issue

6. The Commission must consider whether the Applicant meets all of the essential requirements for registration under the *Charities Act 2005*. In this case, the key issue for consideration is whether the Applicant is a trust of a kind in relation to which an amount of income is derived by the trustees in trust for charitable purposes, as required by section 13(1)(a) of the Act. In particular, whether the Applicant’s purposes fall within the definition of charitable purposes in section 5(1) of the Act.

The law on charitable purposes

7. Under section 13(1)(a) of the Charities Act, a trust qualifies for registration if it is of a kind in relation to which an amount of income is derived by the trustees in trust for charitable purposes.
8. 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.¹ This means that the purpose must be directed at benefiting the public or a sufficient section of the public.
9. Section 5(3) of the Act provides that any non-charitable purpose must be ancillary to a charitable purpose.
10. In considering an application for registration, section 18(3)(a) of the Act requires the Commission to have regard to:
 - (i) *the activities of the entity at the time at which the application was made; and*
 - (ii) *the proposed activities of the entity; and*
 - (iii) *any other information that it considers is relevant; ...”*

Charities Commission’s analysis

11. The Commission considers that the Applicant’s purpose in clause 3(c) may be charitable under the advancement of education. The purposes in clauses 3(d) and 3(e) are likely to be charitable under “other matters beneficial to the community” because they amount to protection of the environment. The purposes in clauses 3(h) and (i) are ancillary.

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

12. The remaining purposes, set out in clauses 3(a), (b), (f), and (g) do not indicate an intention to relieve poverty, advance education or religion. They have therefore been considered in relation to "other matters beneficial to the community." Firstly however, the Commission has considered whether the introductory wording in clause 3 limits the Applicant's purposes to only those that are charitable.

Effect of wording appearing to limit purposes

13. The introductory wording to clause 3 states "The objects of the Trust will always remain charitable and are . . .".
14. The Commission does not consider that the above wording provides conclusive evidence that the Applicant's purposes are in fact charitable. Before the Commission can register an applicant as a charitable entity, it must be certain that the applicant meets all of the essential elements of registration set out in section 13 of the Charities Act. In addition, section 18(3)(a) of the Charities Act requires the Commission to have regard to the current and future activities of an applicant for registration.

Other matters beneficial to the community

15. In order for a purpose to qualify as "any other matter beneficial to the community", the purpose must be beneficial to the community and must be within the spirit and intendment of the purposes set out in the Preamble to the Charitable Uses Act 1601 (the Statute of Elizabeth):²
- 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.³

² *Re Jones* [1907] SALR 190, 201; *Williams Trustees v Inland Revenue Commissioners* [1947] AC 447, 455; *Scottish Burial Reform and Cremation Society v Glasgow Corporation* [1968] AC 138, 146-48; *Incorporated Council of Law Reporting (QLD) v Federal Commissioner of Taxation* (1971) 125 CLR 659, 667, 669; *Royal National Agricultural and Industrial Association v Chester* (1974) 48 ALJR 304, 305; *New Zealand Society of Accountants v Commissioner of Inland Revenue* [1986] 1 NZLR 147, 157; *Re Tennant* [1996] 2 NZLR 633, 638.

³ *Charitable Uses Act 1601* 43 Elizabeth I c. 4.

16. Not all organisations that have 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.”⁴

17. In cases such as *Re Tennant*⁵ and *Tasmanian Electronic Commerce Centre Pty Ltd v Commissioner of Taxation*⁶ economic development of a community has been held to be charitable under “other matters beneficial to the community” where essential services are provided or where the community is under a particular disadvantage.

18. In *Re Tennant* 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.**”⁷*
[Emphasis added]

19. Similarly in *Tasmanian Electronic Commerce Centre Pty Ltd v Commissioner of Taxation*, the Australian Federal Court of Appeal considered that providing internet and communications infrastructure for a disadvantaged area such as Tasmania was charitable. Heeney J stated:

“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 whose 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.”⁸

20. The Applicant has not provided any evidence that it is either providing essential services or assisting an area that is under any particular disadvantage. The Commission considers that the Applicant’s purposes set out in clauses 3(a), (b), (f), and (g) are not within the

⁴ 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.

⁵ [1996] 2 NZLR 633.

⁶ (2005) FCA 439.

⁷ [1996] 2 NZLR 633, 640.

⁸ (2005) FCA 439 at paras 59-60.

spirit and intent of the preamble to the Statute of Elizabeth and therefore they are not charitable under the fourth head.

Public or private benefit?

21. In addition, in order for a purpose to be regarded as “beneficial to the community”, the benefits must be to the community rather than to private individuals. Any private benefits arising from the Applicant’s activities must only be a means of achieving an ultimate public benefit and therefore be ancillary or incidental to it. It will not be a public benefit if the private benefits are an end in themselves.⁹ 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.¹⁰

22. In *Commissioners of Inland Revenue v Yorkshire Agricultural Society*,¹¹ the improvement of agriculture was held to be charitable where 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 will not be charitable.

23. 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.”*¹² [Emphasis added]

24. 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.”*¹³

25. In *Commissioners of Inland Revenue v White Fox* J stated:

⁹ *Commissioners of Inland Revenue v Oldham Training and Enterprise Council* 69 TC 231; *Travel Just v Canada Revenue Agency* 2006 FCA 343 [2007] 1 CTC 294.

¹⁰ *Gilmour v Coats* (1949) AC 26; *Re Blyth* [1997] 2 Qd R 567, 582; *D V Bryant Trust Board v Hamilton City Council* [1997] 3 NZLR 342, 350.

¹¹ [1928] 1 KB 611.

¹² [1951] 1 Ch 132, 142.

¹³ [1955] 1 WLR 16, 20 (PC).

*“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 interest of those engaged in the manufacture and sale of their particular products.**”*¹⁴ [Emphasis added]

26. 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 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.**”*¹⁵ [Emphasis added].

Conclusion

27. The Commission concludes that the purposes in clauses 3(a), (b), (f), and (g) are non-charitable purposes which will provide private benefits to stall-holders who use the market to sell their goods. Any benefits conferred on the remainder of the community from these purposes will be too remote.

Applicant's submission

28. In its letter of 2 August 2009 the Applicant noted that two other farmers' markets had been registered by the Commission.
29. The Commission points out that it takes a case-by-case approach to each application for registration as a charitable entity. The Commission considers the specific wording of each Applicant's rules document and has regard to the current and future activities of each applicant as required by section 18(3)(a) of the Charities Act. The fact that the two farmers' markets identified by the Applicant were registered and then subsequently removed from the Charities Register will have no bearing on the Applicant's eligibility for registration.

¹⁴ (1980) 55 TC 651, 659.

¹⁵ (1996) 69 Tax Cases 231, 251.

Section 61B of the Charitable Trusts Act

30. In order to be a valid trust at law, a trust for charitable purposes must be exclusively charitable or it will be void for uncertainty. Section 61B of the Charitable Trusts Act 1957 however, can operate in two situations to “save” a trust that has both charitable and “non-charitable and invalid” purposes. The first is where the entity’s **stated purposes** include charitable and non-charitable purposes (in which case the non-charitable purposes may be “blue pencilled out”). The second is where the stated purposes are capable of both a charitable and a non-charitable **interpretation** (in which case the purposes could be deemed to apply only in terms of the charitable interpretation). The primary thrust of the gift must, however, be charitable.¹⁶
31. The Commission considers that the Applicant’s stated purposes set out in clauses 3(c), (d), and (e) appear to be charitable, but the purposes set out in clauses 3(a), (b), (f), and (g) are non-charitable for the reasons set out above. The Applicant appears to have more non-charitable primary purposes than charitable purposes and has not provided any evidence of a substantial charitable intention. It is therefore not possible to “blue-pencil out” the non-charitable purposes.
32. In *Re Beckbessinger Tipping J* held:
- “In the case of designated and identifiable organisations it may well be necessary to have evidence as to whether or not they are charitable to determine the flavour of the gift. The Court cannot in my judgment say, . . . that because a gift might have been applied for charitable purposes, s 61B can be used to save it. The testator must be shown to have had a substantially charitable mind but to have fallen foul of the law of uncertainty by including either actually or potentially a non-charitable element or purpose.”¹⁷*
33. The Commission has analysed the wording of clause 3 and does not consider that this provides evidence of “a substantially charitable mind” with an intention to create a charitable trust, but which was not conveyed by the drafting. In spite of the inclusion of the introductory words to clause 3, the Commission does not consider that the purposes in this clause indicate an intention to create a substantially charitable trust.
34. On these bases the Commission considers that the Applicant’s purposes are not substantially charitable and therefore section 61B of the Charitable Trusts Act cannot operate to validate the trust.

¹⁶ *Re Beckbessinger* [1993] 2 NZLR 362, 373.

¹⁷ *Re Beckbessinger* [1993] 2 NZLR 362, 376.

Charity Commission's determination

35. The finding of the Commission is that the Applicant has failed to meet an essential requirement for registration as a charitable entity in that the Applicant is not a trust of a kind in relation to which an amount of income is derived by the trustees in trust for charitable purposes, as required by section 13(1)(a) of the Act.

For the above reasons, the Commission declines the Applicant's application for registration as a charitable entity.

Signed for and on behalf of the Charities Commission



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Trevor Garrett
Chief Executive

29/9/09

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Date