

Registration decision: Waitakere Enterprise Trust Board

The facts

1. The Waitakere Enterprise Trust was established as a trust on 27 May 1994. The trustees were incorporated as a board under the Charitable Trusts Act 1957 on 13 June 1994. The Waitakere Enterprise Trust Board (the Applicant) applied to the Charities Commission (the Commission) for registration as a charitable entity under the Charities Act 2005 (the Act) on 16 July 2007.
2. The Applicant's objects are set out in clause 3.2 of the trust deed (as amended by covenants 1.1 and 1.2 of the deed of modification dated 12 September 1995):

"3.2 The objects and purposes of the Trust to the extent that they are a Charitable Purpose within New Zealand are as follows:

3.2.1 To promote, foster and develop a dynamic and innovative economy in Waitakere City for the benefit of the Waitakere City community by

- *encouraging and assisting in the establishment and development of sustainable new and existing businesses*
- *promoting new investments*
- *developing viable employment opportunities*
- *marketing business opportunities*
- *and such other means as the Board thinks fit.*

3.2.2 To solicit and raise funds and carry out such businesses and other activities as are necessary or conducive for the carrying out and giving effect to the objects and purposes of the Trust.

3.2.3 To vest in or re-settle upon Trust the whole or any portion or portions of capital as well as the income of the Trust Fund in any manner which in the opinion of the Board as approved by the Council, is consistent with the objects and purposes of this Trust provided that such vesting or re-settlement shall not transgress the rule against perpetuities."

3. The Commission analysed the application for registration and on 2 October 2008, sent the Applicant a notice advising that its application may be declined on the basis that the Applicant's principal purpose would advance the interests of businesses and would not provide sufficient public benefit to be considered charitable.
4. On 15 April 2009, the Applicant, through its lawyers, responded to the notice submitting:
 - There is case law authority supporting the position that the Applicant's purposes are exclusively charitable and can be distinguished from the case of *Inland Revenue Commissioners v Oldham Training and Enterprise Council* [1996] BTC 539;
 - The Applicant's purposes are beneficial to the public and are pursued for the benefit of a sufficient section of the public;

- It is irrelevant that Waitakere City is an “average” rather than a poor or below average New Zealand community in relation to household income, education, unemployment, household transportation costs and similar statistics;
- Any private benefits conferred as a result of the Applicant’s activities are an inevitable but merely incidental consequence of the pursuit of its charitable purpose, and therefore do not impact on the Applicant’s charitable status.

The issues

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

The law on charitable purpose

6. Under section 13(1)(a) of the 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.
7. 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.
8. Section 5(3) of the Act provides that any non-charitable purpose must be ancillary to a charitable purpose.
9. 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

10. The Commission considers that the Applicant’s purposes in clause 3.2 are not aimed at the advancement of religion. The Commission has therefore considered whether the purposes relate to the relief of poverty, the advancement of education or any other matter beneficial to the community.

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

Firstly, however, the Commission has considered the argument that the preliminary wording of clause 3.2 limits the Applicant's purposes to only those that are charitable.

Effect of clause appearing to limit purposes

11. Clause 3.2 of the Applicant's trust deed provides that "*The objects and purposes of the Trust to the extent that they are a Charitable Purpose within New Zealand are as follows ...*". The Applicant submits that this clause ensures that the Applicant is "*legally restrained to pursue purposes that are charitable at law.*"
12. In *McGovern v Attorney-General*, Slade J considered a similar clause, which appeared to restrict the powers of the trustee to objects that were charitable according to the law of the United Kingdom. He concluded that the trusts could not be regarded as charitable and that the proviso could not enable the trusts declared by the deed to escape total invalidity.²
13. The Commission does not consider that the inclusion of the wording "...to the extent they are a charitable purpose within New Zealand..." in clause 3.2 provides conclusive evidence that the purposes that follow are in fact charitable. Before the Commission can register an applicant as a charitable entity, it must be satisfied that the entity meets all of the essential elements of registration set out in section 13 of the Act.

Relief of poverty

14. Purposes and activities that are directed at people who are poor, in need or suffering genuine hardship, can be charitable under the first head of charity, relief of poverty.
15. In *Re Central Employment Bureau for Women and Students' Careers Association Inc.*,³ Simonds J stated:

*"The implication of the gift to enable recipients to become self-supporting is a sufficient indication that they stand on the poverty side of the borderline - that is to say, that they are persons who could not be self-supporting in whatever enterprise they embarked, without the assistance of this fund."*⁴
16. Activities undertaken by the Applicant such as TrainSmart, which is provided to students who receive an unemployment benefit or independent youth benefit, or are unemployed, could relate to the relief of poverty. The Commission also notes that "TrainSmart students also include a large number refugees or migrants, from Africa, Asia, the Middle East and Europe."⁵

² [1982] 1 Ch 321, 343-344, 353.

³ [1942] 1 All ER 232.

⁴ [1942] 1 All ER 232, 233.

⁵ Letter from Applicant's solicitor dated 15 April 2009.

Advancement of education

17. In addition to TrainSmart, the Applicant undertakes a number of activities that involve working with secondary school students and education and training providers. Activities such as Educational Advocacy and Leadership, the Gateway Programme, and the Young Enterprise Scheme are likely to be considered charitable under the advancement of education.

Other matters beneficial to the community

18. The Applicant's solicitor states, in his letter dated 15 April 2009, that while the pursuit of the purposes referred to in paragraph 17 (above) does relieve poverty and involves a significant element of advancement of education, the purposes are charitable under the fourth head of charity, other matters beneficial to the community.
19. In order for a purpose to qualify as "any other matter beneficial to the community", the purpose must be beneficial to the community and be within the spirit and intendment of the purposes set out in the Preamble to the Statute of Charitable Uses 1601 (Statute of Elizabeth).⁶ In determining what is within the "spirit and intendment" of the Preamble to the Statute of Elizabeth, it is important to be guided by principle rather than by a detailed analysis of decisions in particular cases.
20. In *Travis Trust v Charities Commission*⁷, Williams J noted that:
- "... regard must be had to the particular words of the preamble and, it has now long been held, any cases in which purposes have been found to be within the spirit and intendment of the preamble by analogy."*
21. Not all organisations which have purposes that benefit the community will be charitable. The purposes must benefit the community in a way that the law regards as charitable.⁸ The Applicant's solicitor argues that there is general authority specifically recognising that the general purpose of promoting commerce and industry is charitable.

⁶ *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.

⁷ CIV-2008-485-1689, High Court, Wellington, 3 December 2008, at para 20.

⁸ In *Re Cumming* [1951] NZLR 498, 501.

22. However, Dal Pont, in *Charity Law in Australia and New Zealand*, states:

*"... 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 directly receive a benefit from them. **Nor are essentially economic or commercial objects within the spirit of the Preamble**' [Emphasis added]."*⁹

23. The Applicant's solicitor submits that the reference in the Preamble to the Statute of Elizabeth to relief of aged, impotent and poor people and to the supportation, aid and help of young tradesmen and handicraftsmen, indicates that economic development purposes including relieving unemployment and promoting commerce and industry may be charitable.

24. The Commission notes, however, that the courts have held that economic development purposes and activities that reduce unemployment may not be charitable if they do not provide sufficient public benefit. In *Commissioners of Inland Revenue v Oldham Training and Enterprise Council*¹⁰, the Court stated:

*"[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** [Emphasis added]."*¹¹

25. In *Crystal Palace Trustees v Minister of Town and Country Planning*¹², 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."*¹³

26. In *Crystal Palace Trustees*, the promotion of industry was found to be charitable because it provided education and facilities for the use of the general public. In the Applicant's case, economic development is promoted by activities set out in clause 3.2.1 of the trust deed, that is by "encouraging

⁸ Oxford (UK) Oxford University Press, 2000, at 178 citing *Nightingale v Goulburn* (1847) 5 Hare 484 at 490 and *Re Davis (deceased)* [1965] WAR 25, 28.

¹⁰ (1996) 69 Tax Cases 231.

¹¹ (1996) 69 Tax Cases 231, 251.

¹² [1951] 1 Ch 132.

¹³ [1951] 1 Ch 132, 142.

and assisting in the establishment and development of sustainable new and existing businesses," "promoting new investments" and "marketing business opportunities". As the Court of Appeal stated in *Commissioners of Inland Revenue v Oldham Training and Enterprise Council*¹⁴, these purposes and activities, "on any fair reading must extend to enabling [the trust] to promote the interests of individuals engaged in trade, commerce or enterprise and provide benefits and services to them ...".

27. Courts have held the economic development of a community to be charitable under "other matters beneficial to the community", but only where that region has a particular need.¹⁵

28. The case of *Re Tennant* related to a rural community and the provision of a creamery. In that case, the court applied other cases that had held agriculture generally to be charitable such as *Inland Revenue Commissioners v Yorkshire Agricultural Society*¹⁶ and *Waitemata County v Commissioner of Inland Revenue*¹⁷. 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."*¹⁸ [Emphasis added]

29. In *Tasmanian Electronic Commerce Centre Pty Ltd v Federal Commissioner of Taxation*¹⁹, relied upon by the Applicant's solicitor, 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 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."*²⁰

30. It is difficult to conclude that Waitakere is an area that is in need of assistance because:

- the unemployment rate in this area is only slightly higher than the rest of the country (6% compared with 5% for all of New Zealand);

¹⁴ (1996) 69 Tax Cases 231, 251.

¹⁵ *Re Tennant* [1996] 2 NZLR 633.

¹⁶ [1928] 1 KB 611.

¹⁷ [1971] NZLR 151

¹⁸ *Re Tennant* [1996] 2 NZLR 633, 640.

¹⁹ [2005] 59 ATR 10 (Australian Federal Court of Appeal).

²⁰ [2005] 59 ATR 10, 25-26.

- the median income is the same as the rest of the country (\$24,400);
 - the median household income is higher than the rest of the country (\$54,800 compared with \$51,400 for all of New Zealand);
 - the percentage of dwellings owned by usual residents is higher than the rest of the country (57% compared with 55% for all of New Zealand).²¹
31. The Applicant's solicitor submits that *Tasmanian Electronic Commerce Centre Pty Ltd v Federal Commissioner of Taxation*²² is authority for the proposition that providing service and infrastructure generally to any locality is charitable. However, the decision in that case turns clearly on the fact that the region where the entity was operating was a regional, rural and remote area that was economically disadvantaged.²³
32. The Applicant's purposes are not directed to meeting the needs of an economically disadvantaged area, and the Applicant has not provided any evidence that its purposes are essential to the life of the Waitakere City community. As indicated above, one of the Trust's main purposes is to encourage "the establishment and development of sustainable new and existing business" and "market business opportunities". Its purposes can therefore be distinguished from those considered by the court in *Re Tennant and Tasmanian Electronic Commerce Centre Pty Ltd*.
33. Even if the Commission agreed that the above cases were authority for the statement that developing telecommunications infrastructure by providing information technology to business and industry is a charitable purpose, the Commission considers that the Applicant has not shown that its activities are analogous to providing such services and infrastructure. As indicated in clause 3.2.1 of the trust deed, the Applicant's activities include encouraging the establishment and development of sustainable new and existing business, promoting new investments and marketing business opportunities. These purposes are not directly comparable to providing services and infrastructure for telecommunications and could extend to non-charitable activities.

Public or private benefit

34. The public benefit criterion necessarily includes the requirement that any private benefits arising from the Applicant's activities must only be a means of achieving an ultimate public benefit and therefore be ancillary or incidental to it. It will not be charitable and will not meet the public benefit requirement if the private benefits are an end in themselves.²⁴ In addition, in terms of the fourth head of charity (purposes otherwise beneficial to the

²¹ Waitakere City Council, population and statistics, <http://www.waitakere.govt.nz/abtci/ps/2006census.asp> (accessed 8 June 2009).

²² [2005] 59 ATR 10.

²³ [2005] 59 ATR 10 (Australian Federal Court of Appeal) at pages 25-26.

²⁴ *Commissioners of Inland Revenue v Oldham Training and Enterprise Council* (1996) STC 1218; *Travel Just v Canada (Revenue Agency)* 2006 FCA 343 [2007] 1 CTC 294.

community) 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.²⁵

35. In *Commissioners of Inland Revenue v Oldham Training and Enterprise Council*²⁶, the court decided that the public benefit requirement was not met because:

*"..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."*²⁷

36. The Applicant's solicitor appears to submit that the purposes set out in the *Oldham* case can be distinguished from the Applicant's purposes on the basis that the Applicant's purposes are charitable at law. The Commission does not agree that the Applicant's purposes can be distinguished from those in the *Oldham* case.
37. The Applicant's solicitor submits that any private benefits to business owners and employers resulting from the Applicant's activities are merely incidental. The Commission does not agree. Business owners and employers could benefit from the Applicant's purposes without necessarily passing on the benefits to the wider public; for example, if successful business owners chose not to expand their businesses in Waitakere, not to take on any additional employees from the Waitakere area, or not to apply their profits in the Waitakere area.
38. The Commission also notes the comments made by the Applicant's solicitor that it is "inevitable" that business owners and employers operating in Waitakere city will benefit.²⁸
39. The Commission concludes that the purposes set out in clause 3.2 of the Applicant's trust deed are aimed at providing private benefits for local business owners and employers, and therefore these purposes are not charitable.

Section 61B of the Charitable Trusts Act

40. 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 to "save" a trust that has both charitable and "non-charitable and invalid" purposes.

²⁵ *Gilmour v Coates* (1949) AC 26; see also Dal Pont, *Charity Law in Australia and New Zealand*, Oxford University Press, 2000 at 175 where he wrote:

Whether the relevant criterion is defined as public benefit or beneficial to the community, the court does not assume or presume its existence as in the case of the other head of charity – the benefit in issue must be affirmatively proved or clear to the court. In other words, the word "beneficial" requires independent examination after the purposes and the beneficiaries have been ascertained.

²⁶ (1996) 69 Tax Cases 231.

²⁷ (1996) 69 Tax Cases 231, 251.

²⁸ Letter from Applicant's solicitor dated 15 April 2009, para 6.4, 45 and 47.

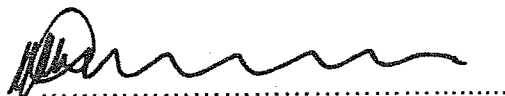
41. Section 61B can operate in cases where the entity's **stated purposes** include charitable and non-charitable purposes (in which case the non-charitable purposes may be "blue pencilled out"). It can also operate where the stated purposes are capable of both a charitable and a non-charitable **interpretation** (in which case the purposes could be deemed to apply only in terms of the charitable interpretation).²⁹ In both instances, the trust's purposes must be substantially charitable in nature for section 61B to operate to "save" the trust as a valid charitable trust.³⁰
42. For the reasons set out above the Commission considers that the Applicant's purposes, set out in clauses 3.2.1, 3.2.2, and 3.2.3 of the trust deed, are non-charitable purposes. As there are no additional charitable purposes, it is not possible to "blue-pencil out" the non-charitable purposes to leave a charitable purpose.
43. The words used in clauses 3.2.1, 3.2.2, and 3.2.3 do not indicate an intention to create a substantially charitable trust. In addition, evidence of the Applicant's activities indicates that inclusion of the words "... to the extent they are a charitable purpose within New Zealand..." in clause 3.2 does not appear to be restricting the Applicant to pursuing substantially charitable purposes. The Commission therefore does not consider that the Applicant's purposes are capable of a charitable interpretation.
44. Consequently, section 61B of the Charitable Trusts Act cannot operate to validate the trust.

Charities Commission's determination

45. 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



Trevor Garrett
Chief Executive

9/8/09
Date

²⁹ *Re Ashton (deceased)* [1955] NZLR 192, 197; *Re Beckbessinger* [1993] 2 NZLR 362, 373.

³⁰ *Re Ashton (deceased)* [1955] NZLR 192, 205; *Re Pettit* [1988] 2 NZLR 513, 543; *Re Howey* [1991] 2 NZLR 16, 21; *Re Beckbessinger* [1993] 2 NZLR 362, 374; *Re Collier (deceased)* [1998] 1 NZLR 81, 97.