

Deregistration decision: Wakatere Sailing Development Trust

The facts

1. Wakatere Sailing Development Trust (the Trust) was registered as a charitable entity under the Charities Act 2005 (the Act) by the Charities Commission (the Commission) on 20 October 2008, with registration backdated to 30 June 2008.
2. The Trust's purposes are set out in clause 3 of the Trust Deed:

3 **Charitable Purposes**

3.1 **Purposes:** *The Trustees shall hold the Trust Assets upon trust to pay or apply the income and the capital of the Trust Assets in such amounts, at such times, and subject to such terms and conditions, as the Trustees may decide for all or any of the following purposes, namely to:*

3.1.1 *Promote, foster and advance the education, training and development of persons involved in yachting in New Zealand at all levels of participation for the purpose of increasing their expertise and skill as sailors and in all maritime disciplines, practices and usages, so as to foster safety at sea and the understanding and application of the principles of good seamanship;*

3.1.2 *Promote foster and advance the establishment and administration of training and education facilities and school and club activities to encourage the safe enjoyment of yachting in New Zealand;*

3.1.3 *Promote, foster and advance in New Zealand water skills and water safety and*

3.1.4 *Promote foster and advance such other charitable purposes as the Trustees may decide.*

3. Information received by the Commission during an assessment of an entity connected to the Trust prompted the Commission to review the Trust's eligibility for registration.
4. On 19 May 2011, the Commission sent the Trust a notice of intention to remove the Trust from the register on the basis that its main purpose was to provide assistance to elite young sailors, and therefore the Trust did not provide sufficient public benefit.

5. On 22 July 2011, the Trust made the following submissions in response:

The Commission has reviewed our Deed, financial information and material available on the Wakatere Sailing Club's website and has come to the view that WSDT is not providing sufficient public benefit because it is restricting its benefits to elite young sailors primarily from the Wakatere Boating Club.

We have been given the opportunity to respond and would like to do so on the grounds that it would not be in the public interest to remove WSDT from the register.

In its three years of activity, WSDT has been able to provide financial assistance to a total of seventeen sailors.

The seventeen sailors have achieved at various levels nationally and gained selection to represent New Zealand at International Championships. These range from three sailors running campaigns for Olympic selection to others attending World Championships and the younger sailors attending regional championships.

Six (35%) of these seventeen sailors actively coach other sailors at Wakatere and elsewhere.

Five (30%) of these sailors are not from the Wakatere Sailing Club.

Whilst New Zealand is an ideal development ground for the sport of sailing, with an abundance of usable sea and lakes and a variety of wind conditions, it is one of the most difficult countries for sailors to develop internationally due to its isolation, low buying power of the New Zealand Dollar and extremely limited funding opportunities.

WSDT was set up to assist young sailors to attend these International regattas and help them to reach their potential. The benefit to the public and the sailing community is widespread:

- New Zealand has a long history and strong international reputation in the sport of sailing. The success of our boating industry – manufacturing and design can be put down to the success of our sailors in the international arena.*
- International success in any sport at a high level promotes that sport back at a National and local level. This means that more members of the public are attracted to the sport.*
- The junior component of the Wakatere Sailing Club has grown significantly over the last few years and many members believe it is largely as a result of the international success achieved by the sailors that the WSDT is, in part, assisting.*
- These sailors are role models to the growing number of new sailors, and they pass on their knowledge to the tiers below further encouraging them to raise their standards. This enthusiasm in turn attracts the next tier of budding sailors.*
- Wakatere Sailing Club also hosts a highly successful 'learn to sail' program – benefited to a large degree by the activity that this group observe in the club. This provides the 'pull through' of community and school based program.*

For these reasons we believe that WSDT is providing a very real benefit to the public interest. We urge the commission to reconsider and allow the Wakatere Sailing Development Trust to remain on the register and continue to provide funding for the sailing community and the greater public good.

The issues

6. The Commission must consider whether the Trust is not, or is no longer, qualified for registration as a charitable entity under section 32(1)(a) of the Act. In this case, the key issue for consideration is whether the Trust is of a kind in relation to which an amount of income is derived by the trustees in trust for charitable purposes, as required by section 13(1)(a) of the Act.

The law on charitable purpose and deregistration

7. Section 13 of the Act sets out the essential requirements for registration. Under 13(1)(a) of the Act, a trust must be of a kind in relation to which an amount of income is derived by the trustees in trust for charitable purposes.
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 to benefiting the public or a sufficient section of the public.
9. Courts have held that in order to be charitable, an entity must have exclusively charitable purposes. Thus, in *McGovern v Attorney General*,² Slade J states:

The third requirement for a valid charitable trust is that each and every object or purpose designated must be of a charitable nature. Otherwise, there are no means of discriminating what part of the trust property is intended for charitable purposes and what part for non-charitable purposes, and the uncertainty in this respect invalidates the whole trust.

10. In relation to non-charitable purposes carried on by an entity, section 5(3) of the Act provides that any non-charitable purpose that is merely ancillary to a charitable purpose will not prevent an entity from qualifying for charitable status.
11. Section 50(2)(b) of the Act provides that the Commission may examine and inquire into the activities and proposed activities of the charitable entity.

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

² [1982] 1 Ch. 321, 341. (See also *Molloy v Commissioner of Inland Revenue* [1981] 1 NZLR 688, 691.)

12. Section 32(1)(a) of the Act provides that the Commission may remove an entity from the register if the entity is not, or is no longer, qualified for registration as a charitable entity.
13. Under section 35(1)(a) of the Act, if an objection to the removal of an entity from the register is received, the Commission must not proceed with the removal unless it is satisfied that it is in the public interest to proceed with the removal and at least one ground for removal has been satisfied.

The Charity Commission for England and Wales' approach to sport

14. In its guidance for charitable status and sport, the Charity Commission for England and Wales states:

Open membership

14. Open membership is essential if a club is to meet the requirement of public benefit that applies to all charities. A club that operates restrictions in its membership provisions ... could not claim to be encouraging community participation.

Legitimate restrictions on membership

15. As far as is reasonably practical, a CASC [community amateur sports club] will need to provide facilities for all who wish to play. That said, there are some circumstances in which certain restrictions on membership are reasonable and justified.

16. We accept that the facilities of some clubs are quite limited and that it is not always possible to accommodate everyone who wishes to become a member, on practical or health and safety grounds for example. In those circumstances, it is perfectly reasonable for a club to establish a waiting list for membership where they are oversubscribed, provided that the next available membership is offered to the person at the top of the waiting list (on a first come, first served basis) and not offered to someone lower down the list on the basis that they are a better player. ...

Competition and team structures

27. The competitive element in sport is an intrinsic and essential part of its appeals to players, whatever their level of skill. CASCs will need, and have a wide freedom to run competitive teams, and other arrangements, such as leagues and ladders, based on competition and structured according to ability. The most skilled and dedicated players may want to devote more time and playing than the less committed, and facilities may be allocated so as to reflect this and to allow competitive teams to play, and prepare for, internal and external fixtures. This is all entirely in keeping with charitable status, provided only that the club's arrangements remain consistent with its charitable purpose of promoting community participation. In other words, the extent to which facilities and resources are devoted to competitive play must not damage the principle of genuinely open membership.

28. In practical terms, this means that a club which devotes a lot of its facilities to competitive matches and to members of its competitive teams, while still offering others appropriate and broadly equivalent opportunities to play, can be charitable. A club would not be charitable if the priority given to competitive teams and players resulted, for members who did not choose to play competitively, in materially worse opportunities to participate. The same would be true if it was similarly clear for other reasons that competitive success, and not community participation, was the true purpose of the club.....

What sort of sports clubs could not be regarded as charitable?

35. Our decision to recognise the promotion of community participation in healthy recreation as a charitable purpose does not mean that all sports bodies can be charitable. Those bodies which have a restricted membership ... perhaps for social reasons or because they are concerned with professional or elite sport, for example, or which are not capable of improving physical health and fitness, would not be able to take advantage of our decision.³

The New Zealand Charities Commission's approach to sport and recreation bodies

15. In *Travis Trust v Charities Commission*, Joseph Williams J states:

In the area of sport and leisure, the general principle appears to be that sport, leisure and entertainment for its own sake is not charitable but that where these purposes are expressed to be and are in fact the means by which other valid charitable purposes will be achieved, they will be held to be charitable. The deeper purpose of the gift or trust can include not just any of the three original Pemsel heads but also any other purpose held by subsequent cases or in accordance with sound principle to be within the spirit and intendment of the Statute of Elizabeth.⁴

16. The Commission considers that the above case is authority for the proposition that sporting entities can be charitable if they are advancing another charitable purpose. Examples of other charitable purposes that sporting entities may advance include:

- Providing community recreational facilities "in the interests of social welfare";
- Relieving poverty;
- Advancing education; or
- Providing a purpose otherwise beneficial to the community, such as promoting health by providing opportunity for participation in amateur sports that involve the pursuit of physical fitness or providing community recreational facilities.

³ <http://www.charity-commission.gov.uk/Publications/rr11.aspx> [accessed 06 October 2011].

⁴ (2009) 24 NZTC 23,273, 23,281.

17. In addition, in order to be charitable, a sporting entity must provide a public benefit. Factors that may count against this include where:
- There are unreasonable or unjustifiable restrictions placed on who may benefit from the activity;
 - There are prohibitive costs associated with the activity (including fees and equipment) which will exclude the less well off;
 - There is an unreasonable risk of injury or harm associated with the activity which will outweigh any benefit to the public;
 - Providing amusement, entertainment, or social activities for members is a primary purpose.

Charities Commission's analysis

18. In order to determine whether the Trust is of a kind in relation to which an amount of income is derived by the trustees in trust for charitable purposes, the Commission has considered the Trust's stated purposes, information provided by the Trust, other information that is publicly available online, and the relevant case law.
19. The Commission considers the purpose in clause 3.1.4 is charitable by definition. The Trust's purpose set out in clauses 3.1.1 to 3.1.3 and the activities it undertakes do not indicate an intention to advance religion. Accordingly, the Trust's purposes and activities have been assessed under the relief of poverty, advancement of education and "other matters beneficial to the community."

Relief of poverty

20. In order to be charitable under the relief of poverty, a purpose must be directed at people who are poor, in need, aged, or suffering genuine hardship and it must provide relief.⁵
21. "Poverty" is interpreted broadly in law and a person does not have to be destitute to qualify as "poor".⁶ People who are in need, aged, or who are suffering genuine financial hardship from a temporary or long-term change in their circumstances are likely to qualify for assistance. Generally, this will include anyone who does not have access to the normal things of life that most people take for granted.⁷

⁵ *DV Bryant Trust Board v Hamilton City Council* [1997] 3 NZLR 342.

⁶ *Re Bethel* (1971) 17 DLR (3d) 652 (Ont: CA); affirmed sub nom *Jones v Executive Officers of T Eaton & Co Ltd* (1973) 35 DLR (3d) 97 (SCC) referred to in *D V Bryant Trust Board v Hamilton City Council* [1997] 3 NZLR 342. See also *re Pettit* [1988] 2 NZLR 513.

⁷ *Inland Revenue Commissioners v Baddeley* [1955] AC 572; [1955] 1 All ER 525, applied in *Re Pettit* [1988] 2 NZLR 513 and *Re Centrepont Community Growth Trust* [2000] 2 NZLR 325.

22. To provide “relief”, the people who would benefit should have an identifiable need arising from their condition that requires alleviating and these people should have difficulty in alleviating that need from their own resources.⁸ Further, to provide “relief” is not the provision of a benefit, but the provision of a necessity or quasi-necessity.⁹

23. In its letter of 22 July 2011 the Trust states:

In its three years of activity, WSDT has been able to provide financial assistance to a total of seventeen sailors.

The seventeen sailors have achieved at various levels nationally and gained selection to represent New Zealand at International Championships. These range from three sailors running campaigns for Olympic selection to others attending World Championships and the younger sailors attending regional championships.

24. The Trust’s page on the Wakatere Boating Club website states:

For more than 80 years, the Devonport-based Wakatere Boating Club (established 1927) has been teaching young people to sail. In that time, many of those young people have gone on to achieve success in the sport at national and international level.

*However, the high financial commitment of success at elite level is daunting. With this in mind, a group of enthusiastic club members have established a registered charitable trust, the **Wakatere Sailing Development Trust**, to assist sailors, primarily from the club, to apply for and administer funds to enable them to reach their full potential . . .*

WHY ESTABLISH SUCH A TRUST?

The Trustees have recognised that most parents can only afford to support their children to a certain level in sport – especially in expensive, equipment-based sports such as yachting. . . .

Some of Wakatere’s top young sailors have already been to national and world championships at considerable expense to their families.

However, to enable them to step up to the next level, the Trust will assist them to apply for grants and help them to administer funds received.

WHO WILL BENEFIT FROM THE TRUST?

The Trust has been established to help elite young sailors primarily from the Wakatere Boating Club reach their potential.

⁸ *Joseph Rowntree Memorial Trust Housing Association Ltd v Attorney-General* [1983] Ch 159; [1983] 1 All ER 288. See also *D V Bryant Trust Board v Hamilton City Council* [1997] 3 NZLR 342.

⁹ *Inland Revenue Commissioner v Baddley* [1955] AC 572, 585 per Viscount Simonds.

These young achievers include:

- *Optimist World champion; Splash World Champion*
- *Second in the World OK Dinghy championship;*
- *Silver at Optimist World Champs; Silver World Youth Champs, 29er; NZL Sailing Team 2010 – 470*
- *Second NZ female in the World RSX championship; NZL Sailing Team 2010 – RSX*
- *Seventh in the World 420 championship*
- *Tanner Cup champion; ninth in the World Optimist champs; Starling & 420 National champion 2010*
- *Silver 420 World Champs 2009*

WHAT IS THE ROLE OF THE TRUST?

The Wakatere Sailing Development Trust has been established to act as a facilitator for raising funds to assist elite young sailors striving to excel in their sport. It is envisaged that the Trust, as a charity and an independent, professionally-managed entity, will be able to access sources of funding that may not be available to individuals. . . .

Permissible funding areas

The following items are examples of where funding will be considered, but applications are not limited to these items.

- *Travel and Accommodation*
- *Equipment*
- *Regatta Costs*
- *Insurance¹⁰*

25. The Commission does not consider providing financial assistance to sailors to participate in elite national and international sporting competitions will amount to relief for people who are suffering genuine hardship or who do not have access to the normal things of life that most people take for granted. The Commission therefore concludes that this is not charitable under the relief of poverty.

Advancement of education

26. 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.¹¹ In order to advance education, learning must be passed on to a broad section of the public.¹²

¹⁰ <http://www.wakatere.org.nz/WakaDevTrust.html> [accessed 5 October 2011].

¹¹ *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;

27. In New Zealand in the case of *Re Collier (deceased)*,¹³ 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 a 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.¹⁴

28. The purposes in clauses 3.1.1 to 3.1.3 of the trust deed are:

3.1.1 *Promote, foster and advance the education, training and development of persons involved in yachting in New Zealand at all levels of participation for the purpose of increasing their expertise and skill as sailors and in all maritime disciplines, practices and usages, so as to foster safety at sea and the understanding and application of the principles of good seamanship;*

3.1.2 *Promote foster and advance the establishment and administration of training and education facilities and school and club activities to encourage the safe enjoyment of yachting in New Zealand;*

3.1.3 *Promote, foster and advance in New Zealand water skills and water safety and*

29. The Trust's webpage states that the Trust's funds are for elite young sailors, primarily from Wakatere Boating Club, in order for them to partake in high level competitions. Examples of what the funding was to be used for included:

- Travel and Accommodation
- Equipment
- Regatta Costs
- Insurance¹⁵

30. In its letter dated 22 July 2011 the Trust states:

In the three years of activity, WSDT has been able to provide financial assistance to a total of seventeen sailors.

The seventeen sailors have achieved at various levels nationally and gained selection to represent New Zealand at international Championships. These range from three sailors running campaigns for Olympic selection to others attending World Championships and the younger sailors attending regional championships.

Chartered Insurance Institute v London Corporation [1957] 1 WLR 867; *Flynn v Mamarika* (1996) 130 FLR 218.

¹² See *Canterbury Development Corporation v Charities Commission* HC WN CIV 2009-485-2133 [18 March 2010]; *Re New Zealand Computer Society Incorporated* HC WN CIV-2010-485-924 [28 February 2011].

¹³ [1998] 1 NZLR 81.

¹⁴ [1998] 1 NZLR 81, 91-92.

¹⁵ <http://www.wakatere.org.nz/WakaDevTrust.html> [accessed 5 October 2011].

31. The Commission considers that the purposes stated in clauses 3.1.1 to 3.1.3, appear to be charitable under the advancement of education because they relate to educating people 'at all levels of participation' about sailing skills and water safety.
32. Information provided by the Trust and information available on the Trust's webpage however, indicates that the Trust is providing financial assistance for elite sailors for items such as: travel and accommodation, equipment, regatta costs, and insurance. The Commission does not consider that this amounts to providing the systematic process of instruction, training and practice that is required in order to advance education.
33. In addition, for the reasons set out in the "Public benefit" section below, the Commission does not consider that the benefits provided by the Trust are available to anyone other than 'a limited number of elite young sailors primarily from the Wakatere Boating Club'. If the Trust is not providing benefits for a broad section of the public, this will not be charitable under the advancement of education.

Other matters beneficial to the community

34. 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):¹⁶
 - 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.¹⁷

¹⁶ *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.

¹⁷ *Charitable Uses Act 1601* 43 Elizabeth I c. 4.

35. Over the years, the courts have recognised many new charitable purposes that are substantially similar to those listed in the Statute of Elizabeth, acknowledging that what is accepted as a charitable purpose must change to reflect current social and economic circumstances. In particular, courts have found the promotion of public health to be charitable under this head where the benefit is available to a sufficient section of the public.¹⁸
36. The Commission notes that while there may be some health benefits for the limited number of elite sailors, the Trust has not provided any evidence to show how this will provide health benefits for the wider community. For the reasons set out below, the Commission does not consider that providing assistance to 17 sailors over three years can amount to the promotion of public health and therefore this is not a charitable purpose under “other matters beneficial to the community”.

Public benefit

37. In order to be charitable, the benefits from an entity’s purposes must be available to a sufficient section of the community. Any private benefits arising from the Trust’s purposes 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.¹⁹ 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.²⁰
38. There are two aspects to the public benefit test, that is:
- there must be an identifiable benefit, assessed in the light of modern conditions and
 - the benefit must be to the general public or to a sufficient section of the public.²¹
39. In *Inland Revenue Commissioners v Baddeley*,²² Viscount Simonds stated:
- Somewhat different considerations arise if the form, which the purporting charity takes, is something of general utility which is nevertheless made available not to the whole public but only to a selected body of the public – an important class of the public it may be. For example, a bridge which is available for all the public may undoubtedly be a charity and it is indifferent how many people use it. But confine its use to a selected number of persons, however numerous and important: it is then clearly not a charity. It is not of general public utility: for it does not serve the public purpose which its nature qualifies it to serve.*

¹⁸ *McGregor v Commissioner of Stamp Duties* [1942] NZLR 164; *Re Laidlaw Foundation* (1984) 13 DLR (4th) 491.

¹⁹ *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.

²⁰ *Gilmour v Coats* [1949] AC 426; *Re Blyth* [1997] 2 Qd R 567, 582; *D V Bryant Trust Board v Hamilton City Council* [1997] 3 NZLR 342, 350.

²¹ See Tudor on Charities, 9th edition, London, Sweet & Maxwell, 2003, at 7.

²² [1955] AC 572, 592.

40. Hubert Picarda, in *The Law and Practice Relating to Charities*, states:

There is, as Viscount Simonds pointed out in IRC v Baddeley, a distinction

'between a form of relief extended to the whole community yet, by its very nature, advantageous only to the few, and a form of relief accorded to a selected few out of a larger number equally willing and able to take advantage of it'.²³

41. As set out in the case law cited above, the Commission has considered whether there are unreasonable or unjustifiable restrictions placed on who may benefit from the activities undertaken by the Trust in order to determine whether these will provide a public benefit.

42. On 22 July 2011 the Trust stated:

In its three years of activity, WSDT has been able to provide financial assistance to a total of seventeen sailors.

The seventeen sailors have achieved at various levels nationally and gained selection to represent New Zealand at international championships. These range from three sailors running campaigns for Olympic selection to others attending World Championships and the younger sailors attending regional championships.

*Six (35%) of these seventeen sailors actively coach other sailors at Wakatere and elsewhere
Five (30%) of these sailors are not from the Wakatere Sailing Club ...*

43. The Trust's webpage states:

WHO WILL BENEFIT FROM THE TRUST?

The Trust has been established to help elite young sailors primarily from the Wakatere Boating Club reach their potential.

WHAT IS THE ROLE OF THE TRUST?

The Wakatere Sailing Development Trust has been established to act as a facilitator for raising funds to assist elite young sailors striving to excel in their sport. It is envisaged that the Trust, as a charity and an independent, professionally-managed entity, will be able to access sources of funding that may not be available to individuals. ...

44. The Commission considers that there may be an identifiable benefit for the elite sailors who receive financial assistance from the Trust. Providing financial assisting to seventeen 'elite young sailors primarily from the Wakatere Boating Club' over three years, however, does not amount to providing a benefit to a sufficient section of the public who would be willing and able to take advantage of this. Accordingly, the Commission does not consider that the benefits from the Applicant's purposes will be available to a significant section of the public.

²³

Hubert Picarda, *The Law and Practice Relating to Charities*, 3rd Ed., London, Butterworths, 1999 at 21.

Applicant's submissions

45. In its letter dated 22 July 2011 the Trust stated:

- *New Zealand has a long history and strong international reputation in the sport of sailing. The success of our boating industry – manufacturing and design can be put down to the success of our sailors in the international arena*
- *International success in any sport at a high level promotes that sport back at a National and local level. This means that more members of the public are attracted to the sport.*
- *The junior component of the Wakatere Sailing Club has grown significantly over the last few years and many members believe it is largely as a result of the international success achieved by the sailors that the WSDT is, in part, assisting.*
- *These sailors are role models to the growing number of new sailors, and they pass on their knowledge to the tiers below further encouraging them to raise their standards. This enthusiasm in turn attracts the next tier of budding sailors*
- *Wakatere sailing Club also hosts a highly successful 'learn to sail' program – benefited to a large degree by the activities that this group observe in the club. This provides the 'pull through' of community and school based program.*

46. The Commission notes that courts have expressed a great deal of scepticism about the appropriateness of defining the purpose of a trust by reference to alleged downstream benefits. For example, in *Amateur Youth Soccer Association v Canada (Revenue Agency)*,²⁴ Rothstein J held:

*The fact that an activity or purpose happens to have a beneficial by-product is not enough to make it charitable. If every organisation that might have beneficial by-products, regardless of its purposes, were found to be charitable, the definition of charity would be much broader than what has hereto for been recognised in the common law.*²⁵

47. Similarly in its guidance, '*Analysis of law underpinning advancement of amateur for the public benefit*'²⁶ the Charity Commission for England and Wales states:

*the court has identified the benefit to the public from the viewing of high quality art or listening to performances of high quality. However there is no legal authority which suggests that being a spectator of high quality sport promotes a charitable purpose for the public benefit. ... it is argued that international sporting achievement promotes national prestige and pride. The court does not appear to have recognised this as a benefit to the public for the purpose of charity law.*²⁷

²⁴ (2007) 287 DLR (4th) 4 (SCC).

²⁵ (2007) 287 DLR (4th) 4 (SCC) at 22; quoted with approval by Joseph Williams J in *Travis Trust v Charities Commission* HC Wellington CIV-2008-485-1689 3 December 2008 at para 32.

²⁶ http://www.charity-commission.gov.uk/library/guidance/analysis_sport.pdf [accessed 6 October 2011].

²⁷ *IRC v McMullen* [1981] AC 1.

48. The Commission does not consider that the Trust has demonstrated how assisting elite young sailors primarily from the Wakatere Boating Club will achieve the purposes set out in clauses 3.1.1 to 3.1.4. Further, any beneficial by-product that may occur from the Trust's activities, as stated in their letter dated 22 July 2011, is not sufficient to make it charitable.

Conclusion

49. The Commission concludes that the purposes stated in clauses 3.1.1 to 3.1.4 appear to be charitable, if they provided a sufficient public benefit. However, as stated in *Vancouver Society of Immigrant and Visible Minority Women v MNR*,²⁸ the Commission must consider the nature of activities presently carried on by the organisation to indicate whether it has since adopted other purposes.
50. The Trust appears to have adopted a purpose of providing financial assistance to elite sailors. This is a non-charitable purpose, which is not ancillary to any charitable purposes.

Section 61B of the Charitable Trusts Act 1957

51. 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.
52. 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** and the primary thrust of the gift is considered to be charitable (in which case the purposes could be deemed to apply only in terms of the charitable interpretation).²⁹
53. 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."*³⁰
54. The Commission has analysed the wording of the Trust's purposes, surrounding context, and activities (as directed by section 50(2)(b) of the *Charities Act 2005*). The Commission does not consider that these provide evidence of "a substantially charitable mind" with an intention to create a charitable trust, but which was not conveyed by the drafting.

²⁸ [1999] 1 SCR 10 at para 194.

²⁹ *Re Beckbessinger* [1993] 2 NZLR 362, 373.

³⁰ *Re Beckbessinger* [1993] 2 NZLR 362, 376.

55. On this basis, the Commission considers that the Trust's purposes are not substantially charitable and therefore section 61B of the *Charitable Trusts Act 1957* cannot operate to validate the trust.

Public interest

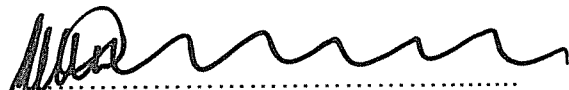
56. Section 10(1)(a) of the Charities Act obliges the Commission to promote public trust and confidence in the charitable sector. The Commission considers that public trust and confidence in registered charitable entities would not be maintained if entities which did not meet the essential requirements for registration remained on the register. This is particularly relevant for entities such as the Trust which seek funds from the public.

Charities Commission's determination

57. The Commission determines that the Trust is not, or is no longer, qualified for registration as a charitable entity because it is not a trust of a kind in relation to which an amount of income is derived by the trustees in trust for charitable purposes, as required by section 13(1)(a) of the Act.
58. Under section 35(1) of the Act, the Commission is satisfied that it is in the public interest to proceed with the Trust's removal from the register and that one ground for removal from the register has been satisfied, that is, the Trust is not qualified for registration as a charitable entity.
59. The decision of the Commission is therefore to remove the Trust from the Register, pursuant to section 31 of the Act, with effect from **23 November 2011**.

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

Signed for and on behalf of the Charities Commission



Trevor Garrett
Chief Executive

26/10/11

Date