

**Registration decision: The Donald McLean Charitable Trust  
(THE44214)**

**Summary**

1. The Charities Registration Board (the Board) has determined to decline the application for registration of The Donald McLean Charitable Trust (the Applicant).<sup>1</sup>
2. The Board has determined that the Applicant is not qualified to be registered as a charitable entity under the *Charities Act 2005* (the Act).<sup>2</sup> The Applicant's purposes are not exclusively charitable and the activities do not advance exclusively charitable purposes. The Board has determined that the Applicant has an independent non-charitable purpose to provide facilities to a Masonic Lodge. This purpose does not meet the requirements of section 61A of the *Charitable Trusts Act 1957* (CTA) as it does not meet the social welfare or public benefit requirements.
3. The Board's reasons appear below, organised under the following headings:
  - A. Background
  - B. Legal framework for registration
  - C. Charities Registration Board's analysis
    - C.1 Overview
    - C.2 Law on charitable purposes
    - C.3 The Applicant's purposes
    - C.4 Other submissions made by the Applicant
    - C.5 Section 61B *Charitable Trusts Act 1957*
  - D. Charities Registration Board's determination

**A. Background**

4. The Applicant was established by Trust Deed executed on 26 March 2012. It was incorporated under the CTA on 30 April 2012. On 7 May 2012, the Applicant applied for registration under the Act. The Trust Deed was varied by Resolution of Trustees dated 7 August 2012 to remedy an issue with the winding up provisions.

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<sup>1</sup> The decision is made under section 19 of the *Charities Act 2005*.

<sup>2</sup> The essential requirements for registration are set out in section 13 of the *Charities Act 2005*.

5. The current parties to the Trust Deed are:
- Settlers: Gary Cleland, Dennis King and Jack Williams as Trustees of the Sir Donald McLean Lodge No 1646 on the Register of the United Grand Lodge of Antient Free and Accepted Masons of England.
  - Trustees: Robert Froude, David Lawrence and Benjamin McKenzie

6. Clause C2 of the Trust Deed states:

*The Trust Fund and its income and gains shall be used and distributed in the discretion of the Trustees within Taranaki among all or any of the following:*

- (a) *To provide care of the aged and infirm, relief of poverty and assistance to the sick and widows and orphans.*
- (b) *The advancement of education and in particular the assistance and support of scholars from Taranaki at any place of learning in New Zealand.*
- (c) *Any charitable purpose which has for its objects the relief of social or economic distress within the community.*
- (d) *To provide relief following natural disaster.*
- (e) *To provide, or assist in the provision of, facilities for recreation or other leisure time occupation if –*
  - (i) *The facilities are provided with the purpose of improving the conditions in life for the persons for whom the facilities are primarily intended; and*
  - (ii) *Either –*
    - A. *Those persons have need of such facilities by reason of their youth, age, infirmity, disablement, poverty, race, occupation or social or economic conditions; or*
    - B. *The facilities are to be available to members of the public at large or to the male or female members of the public at large.*

*Subject to the immediately preceding subparagraphs (i) and (ii), this subparagraph (e) applies to (among other things) the provision of facilities at the public halls, community centres and women's institutions, and to the provision and maintenance of grounds and buildings to be used for purposes of recreation or leisure time occupation including (without being limited to) the provision of Masonic Lodge Rooms and the facilities and lending of funds to the owners of Masonic Lodge Rooms and facilities with or without security and at interest or interest free in the Trustees' discretion, and extends to the provision of facilities for any of those purposes by the organising of any activity.*

- (f) *Any other purpose in or for the direct or indirect benefit of Taranaki which in accordance with the law of New Zealand is deemed charitable.*

7. The Applicant has amended its application for registration to include an additional clause in its Trust Deed.<sup>3</sup> The new clause 15 states:

*So long as the Trust may own the freehold of the hall facilities at 20 Domett Street, Waitara (394 metres squared being Lots 12-13 on Deposited Plan 1097 and being the land in the title identifier TNE1/133 Taranaki Registry), the Trust shall make those facilities available to:*

- 15.1 *Organisations, whether incorporated or not, on a non-exclusive basis, in accordance with and for the purposes of Section 61A of the Charitable Trusts Act 1957, subject only to:*

15.1.1 *The organisation paying a rent equal to the organisations fair share of the Trust's costs of providing and maintaining those facilities or a contribution to that fair share as may be fixed by the Trust;*

15.1.2 *The Trust may ensure there is no "double booking" of those facilities; and*

15.1.3 *Nothing herein shall preclude the Trust from acting as a responsible landlord, so that for example the Trust might require the organisation to pay a bond; and*

- 15.2 *Members of the public at large, including any fraternities and sororities, on non-exclusive licences to occupy those facilities for any function, meeting or purposes, subject only to:*

15.2.1 *The temporary licensee paying a rent equal the temporary licensee's fair share of the Trust's costs of providing and maintaining those facilities or a contribution to that fair share as may be fixed by the Trust;*

15.2.2 *The Trust may ensure there is no "double booking" of those facilities; and*

15.2.3 *Nothing herein shall preclude the Trust from acting as a responsible landlord, so that for example the Trust might require the temporary licensee to pay a bond.*

8. Over the course of this application, the Department of Internal Affairs – Charities Services (Charities Services) and the Applicant have exchanged the following correspondence:

- a. *from Charities Services to the Applicant:*

- Notice of matters that may lead to decline and request for further information dated 17 July 2012;
- Notices of matters that may lead to decline dated 22 August 2012, 11 October 2012 and 2 November 2012; and
- Email correspondence dated 5 December 2012 and 14 January 2013.

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<sup>3</sup> Provided under cover of the Applicant's letters dated 14 January and 15 January 2013.

- b. *to Charities Services from the Applicant:*
- Response to notice that may lead to decline and request for information dated 6 August 2012;
  - Response to notices that may lead to decline dated 24 September 2012, 17 October 2012; 3 December 2012, 14 January 2013 and 15 January 2013; and
  - An email containing further information about the Trust dated 31 October 2012.
9. In its letter of 6 August 2012, the Applicant has provided the following information about its activities:
- It is currently not carrying out any activities under clauses C(2)(a), C(2)(b), C(2)(c), C(2)(d) or C(2)(f) of the Trust Deed. The only activity is under clause C(2)(e).
  - The Applicant's primary activity is the ownership of lodge rooms at 20 Domett Street, Waitara (the lodge rooms) which it rents to the Sir Donald McLean Masonic Lodge (the Masonic Lodge) for a rent equal to the outgoings.
  - The Masonic Lodge uses the lodge rooms for Freemasonry. It sublicenses the lodge rooms to three further masonic orders<sup>4</sup>, a fraternity<sup>5</sup> and a sorority<sup>6</sup> (the sub-licensees).
  - The primary activity of the Applicant is to provide hall facilities (being the lodge rooms) to the Masonic lodge and the sub-licensees.<sup>7</sup> The lodge rooms are primary intended for the Masonic Lodge and sub-licensees.<sup>8</sup>
  - The Masonic Lodge makes the lodge rooms available to casual users including other Masonic orders, Waitara Police Club and other members of the public from time to time<sup>9</sup>.
10. On 31 October 2012, the Applicant provided information about the membership requirements of the Masonic Lodge as follows:
- qualification for membership of the Masonic Lodge is under charter from the United Grand Lodge of England.
  - members must be over the age of twenty-one years and must be a free man (ie must not be a prisoner) and must be "reputable".
  - candidates for initiation must be proposed and seconded by subscribing members of the Lodge and must know the candidate personally.
  - every candidate must make a declaration that they have a favourable opinion of the institution and "will cheerfully conform to all the antient usages and the established customs of the Order

<sup>4</sup> The Sir Donald McLean Royal Arch Chapter No 1646, Sir Donald McLean Mark Master Masons Lodge 1064 and Mt Egmont Royal Ark Mariners Lodge 1064.

<sup>5</sup> Fitzroy Lodge 26 of the Royal Antediluvian Order of Buffaloes.

<sup>6</sup> Waitara Lodge 52 of the Loyal Elizabethan Order of Bisons.

<sup>7</sup> Applicant's letters dated 14 January 2013 and 15 January 2013 at paragraph 7.

<sup>8</sup> Applicant's letters dated 14 January 2013 and 14 January 2015.

<sup>9</sup> Applicant's letters dated 6 August 2012 at paragraph 1.2(i) and 3 December 2012 at paragraph 4.3.

11. On 3 December 2012, the Applicant amended<sup>10</sup> its application so that a draft Licence to Occupy (the licence) will provide the basis for the contractual relationship between the Masonic Lodge and the Applicant. The licence provides as follows:
- The Applicant will grant to the Masonic Lodge a licence to occupy the lodge rooms;<sup>11</sup>
  - The licence to occupy includes sub-licences<sup>12</sup> to three named masonic lodges, a fraternity and a sorority.<sup>13</sup> The Masonic Lodge has the power to grant additional sub-licences including casual licences.
  - The permitted use of the premises is for “Lodge Meetings and activities and other recreational and leisure-time occupations within the meaning of section 61A of the Charitable Trusts Act 1957”.<sup>14</sup>
  - The licence to occupy is non-exclusive and the Masonic Lodge “acknowledges that the premises are available to the members of the public at large”. The Masonic Lodge on request of a member of the public, including any fraternities and societies, shall allow them to use the lodge rooms. The member of the public shall pay a rent equating to the Masonic Lodge’s share of costs and there shall be no double-booking.<sup>15</sup>
12. In its correspondence, Charities Services has notified the Applicant that the application may be declined for the following reasons:
- The purpose in clause C(2)(e) of the Trust Deed is not exclusively charitable;
  - The Applicant’s activities show an independent purpose to lease the lodge rooms to the Masonic Lodge and other sub-licensees. This purpose is not charitable;
  - The non-charitable purpose cannot be considered ancillary to a charitable purpose; and
  - The purposes and activities do not provide sufficient public benefit.
13. Further, in answer to submissions made by the Applicant<sup>16</sup>, Charities Services advised the Applicant that:
- The clauses of the Trust Deed purporting to limit the Applicant to exclusively charitable purposes and activities are not sufficient to allow a conclusion that the Applicant is charitable.
  - Amending the licence to provide that the lodge rooms must be made available to the public at large on request does not amend the Applicant’s activity or the fact that the primary users of the lodge rooms are the Masonic Lodge and sub-licensees. This change is therefore not sufficient to allow registration.

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<sup>10</sup> Applicant’s letter dated 3 December 2012 at paragraph 2.

<sup>11</sup> Clause 2.1 license.

<sup>12</sup> Second Schedule clause 1 license.

<sup>13</sup> As named in notes 4 to 6 above.

<sup>14</sup> First Schedule license.

<sup>15</sup> Clause 2.2 license.

<sup>16</sup> Discussed below in paragraphs 15 to 17.

- The fact there are other entities with similar purposes currently on the Charities Register is not relevant when deciding whether the Applicant is eligible for registration requirements. If Charities Services is aware of other entities on the register that do not meet registration requirements, it has the power under the Act to investigate these entities and remove them from the register.
  - The remedy in section 61B CTA is not available to the Applicant. Even if the remedy was available and used, the Applicant would not be able carry out its current activities.
14. The basis for the above is discussed in detail below in paragraphs 18 to 73.
15. The Applicant has submitted that it meets registration requirements for the following reasons:
- There are a number of other trusts on the Charities Register with similar purposes. It would be less than fair if other similar entities are registered yet the Applicant were denied registration.
  - That while they accept freemasonry is not itself a charitable purpose, the provision of lodge rooms is charitable if it complies with section 61A CTA. The Applicant is a standalone body from freemasonry.
  - That the purposes and activities of the Applicant meet the requirements of Section 61A CTA and are therefore charitable.
  - That clause C2(e) of the Trust Deed has been largely copied from section 61A CTA and the activities of the Applicant under clause C2(e) are subject to clauses C2(e)(i) and (ii) which are in turn essentially a copy of section 61A(2) CTA. Therefore the Applicant has no power to provide lodge rooms unless the provision of them complies with section 61A(2) CTA. Further, the licence limits the permitted use of the lodge rooms to be within the meaning of section 61A CTA.
  - That section 61B CTA is available so that any non-charitable purposes can be deemed to be excised from the Trust Deed, leaving only the charitable and valid purposes and objects in place. If applied, the Applicant would have no power at law to let or lease the lodge rooms for purposes outside the ambit of section 61A CTA.
16. The Applicant submitted that it meets the requirements of section 61A CTA because:
- Section 61A(3) is satisfied because the Applicant provides and maintains a public hall for recreation or leisure time occupation.
  - The “social welfare” requirement in section 61A(1) is met because the Applicant provides the Lodge rooms to the masonic lodges and sub-licensees. Further, in general section 61A(1) is satisfied when section 61A(2) has been satisfied.
  - Section 61A(2) is met by the Applicant for the following reasons.
    - 61A(2)(a) - the lodge rooms are provided for the purpose of improving the conditions of life for the people the rooms are

- intended for (namely the members of the Masonic Lodge, other masonic entities, fraternities, the sorority and the members of the public who from time to time use the rooms).
- 61A(2)(b)(i) - the provision of the lodge rooms to the Masonic Lodge and other sublicenses improves the conditions of life of their members as it gives them an interest in life and enables them to feel useful by participating in charitable good works. The Masonic Lodge develops good character and is a self-improvement organisation. The membership of the Masonic Lodge is overwhelmingly elderly and all elderly people are in need of such facilities.
  - 61A(2)(b)(ii) - Masonic Lodges are not exclusive clubs. The membership requirements of the Masonic lodge are so wide that nearly every male over 21 potentially qualifies and the Applicant can only think of one example when an individual has been refused membership. There is no restriction in the licence on the right of the Masonic Lodge to let the rooms to the public and in practice the Masonic Lodge has never refused to do so. The new clause 15 of the Trust Deed ensures that the lodge rooms will be made available to organisations for the purposes of CTA<sup>17</sup> and to members of the public at large, including fraternities and sororities.<sup>18</sup> Further, section 61A(2)(ii) only requires the facilities to be made available to members of the public and says nothing about the primary users.
  - Regarding the public benefit requirement in section 61A(1) the Applicant has submitted as follows:
    - *“it would be very rare for an organisation that satisfies both Section 61A(1) **before** the [public benefit] proviso and also Section 61A(2) to not be for the public benefit. An entity which satisfies the first part of 61A(1) and 61A(2) must in general be for the public benefit, and I suspect that the reason for the public benefit provision in Section 61A(1) was to exclude rogue or strange organisations. For example a society formed for the promotion of paedophilia.... An organisation such as a Masonic Lodge dedicated, to promoting benevolence and character development and self-improvement, must inevitably in my submission be ‘for the public benefit’”*
    - It meets the public benefit requirement because the lodge rooms are available to the members of the public at large.

17. The Applicant has further submitted in relation to section 61A CTA:

- Section 61A CTA is to be interpreted in its own standalone terms, without reference to the common-law position. If the Applicant has satisfied the requirements of section 61A CTA, then the Board is entitled to register it under the Act irrespective of whether or not it complies with the common law position that a non-charitable

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<sup>17</sup> Clause 15.1 Trust Deed.

<sup>18</sup> Clause 15.2 Trust Deed.

purpose/activity negates the Trust's entitlement to be treated as a charity unless the non-charitable purpose/activity is merely ancillary to a charitable object.

- Section 61A CTA should not be "read down" in a way that restricts "the persons who the facilities are primarily intended for" to be "only charitable purposes or objects" or that only members of the public. Section 61A CTA has effected a fundamental change in the law of charity in New Zealand, as regards facilities for recreation or other leisure time occupation.

## B. Legal framework for registration

18. Section 13 of the Act sets out the essential requirements for registration. Under section 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. This criterion is not met unless the income is derived for exclusively charitable purposes.<sup>19</sup>
19. 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.<sup>20</sup>
20. In addition, to be charitable at law, a purpose must be for the public benefit.<sup>21</sup> This means that the purposes and activities must be directed at benefiting the public or a sufficient section of the public. In order to be charitable, the benefits from the Applicant's activities must flow to the public or a sufficient sector of the public<sup>22</sup> rather than to private

<sup>19</sup> See *McGovern v Attorney-General* [1982] 1 Ch 321 ("McGovern") at 340. In New Zealand, see *Canterbury Orchestra Trust v Smitham* [1978] 1 NZLR 787 at 794-796; *Molloy v Commissioner of Inland Revenue* [1981] 1 NZLR 688 at 691. See also the assumption evident in the provision at section 5(3) and (4) of the Act, that a trust will not be disqualified from registration because it has *ancillary* non-charitable purpose.

<sup>20</sup> This statutory definition adopts the general law classification of charitable purposes in *Commissioner for Special Purposes of Income Tax v Pemsel* [1891] AC 531 extracted from the preamble to the *Statute of Charitable Uses 1601* (43 Elizabeth 1 c 4) and previous common law. See generally *In Re Education New Zealand Trust* HC Wellington CIV-2009-485-2301, 29 June 2010 ("*Re Education*") at [13]; *In re Draco Foundation (NZ) Charitable Trust* HC WN CIV 2010-485-1275 [3 February 2011] at [11].

<sup>21</sup> Authorities include: *Oppenheimer v Tobacco Securities Trust Co Ltd* [1951] AC 297; *Verge v Somerville* [1924] AC 496; *Dingle v Turner* [1972] AC 601. See also: *New Zealand Society of Accountants v Commissioner of Inland Revenue* [1986] 1 NZLR 147 ("*Society of Accountants*") at 152-155; *Latimer v Commissioner of Inland Revenue* [2002] 3 NZLR 195 ("*Latimer*") at [32]; *Travis Trust v Charities Commission* (2009) 24 NZTC 23,273 (HC) ("*Travis Trust*") at [54], [55]; *Queenstown Lakes Community Housing Trust* HC WN CIV 2010-485-1818, 24 June 2011 ("*Queenstown Lakes*") at [30]; *Re Education* at [23].

<sup>22</sup> See discussion *Latimer* at [32] - [37]. The courts have held that the downstream benefits of an entity's activities do not serve to characterize the purpose of the entity: see *Society of Accountants* at 153 (the "generalised concept of benefit" identified with the public satisfaction of knowing that the fund is there to safeguard and protect clients' interests is too "nebulous and remote" to characterise the purpose of the fund); *Travis Trust* at [30] - [35] (holding that where the express purpose was to "support the New



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.<sup>23</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>24</sup> In order to provide a public benefit it must be shown that: there is an identifiable benefit, assessed in the light of modern conditions; and the benefit is to the general public or to a sufficient section of the public.

21. In considering an application for registration, section 18(3)(a) of the Act requires consideration of the entity's activities at the time the application was made, the entity's proposed activities, and any other relevant information. In cases decided under the Act, the Court has consistently taken activities into consideration in determining whether an entity qualifies for registration under the Act.<sup>25</sup> In determining qualification for registration under the Act, substance must prevail over form, and an entity cannot qualify for registration, even if its stated purposes are exclusively charitable, if its activities belie its stated purposes.<sup>26</sup>
22. Determining whether an entity's purposes are charitable involves an objective characterisation, and a declaration in an entity's rules document which purports to limit its objects to charitable purposes will not be determinative.<sup>27</sup> In *Latimer v Commissioner of Inland Revenue*,<sup>28</sup> the Privy Council stated that:

*Whether the purposes of the trust are charitable does not depend on the subjective intentions or motives of the settlor, but on the legal effect of the language he has used. The question is not, what*

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Zealand racing industry by the anonymous sponsor a group race known as the Travis Stakes", the purpose was to support that single group race and not to support the racing industry or racing public as a whole). See to the same effect *Queenstown Lakes* at [68] – [76] (held that the purpose of the Trust was to provide housing for individuals not to advance the overall welfare of the community by enabling workers to stay in the area); *Canterbury Development Corporation v Charities Commission* HC WN CIV 2009-485-2133, 18 March 2010 ("*Canterbury Development Corporation*") at [67] (primary purpose is the assistance of individual businesses and the "hope and belief" that the success of those businesses would increase the economic wellbeing of the Canterbury region does not establish public benefit as a primary purpose).

<sup>23</sup> *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.

<sup>24</sup> *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.

<sup>25</sup> *Greenpeace of New Zealand Incorporated* [2012] NZCA 533 at [48] and [51]. See also the approach taken in the High Court in *Canterbury Development Corporation* at [29], [32], [44], [45] - [57], [67], [84] - [92]; *Queenstown Lakes* at [57] - [67]; *Re The Grand Lodge of Antient Free and Accepted Masons in New Zealand* [2011] 1 NZLR 277 (HC) ("*Grand Lodge*") at [59], [71]; *Re New Zealand Computer Society Inc* HC WN CIV-2010-485-924 [28 February 2011] ("*Computer Society*") at [35] – [39], [60] and [68].

<sup>26</sup> G E Dal Pont *Law of Charity* (LexisNexis Butterworth, Australia, 2010) at [2.12], [13.19], [13.20].

<sup>27</sup> *M K Hunt Foundation Ltd v Commissioner of Inland Revenue* [1961] NZLR 405 ("*M K Hunt Foundation*") at 407; *Canterbury Development Corporation* at [56]; *McGovern* at 353.

<sup>28</sup> *Latimer*

*was the settlor's purpose in establishing the trust? But, what are the purposes for which trust money may be applied?"*<sup>29</sup>

## **C. Charities Registration Board's analysis**

### **C.1 Overview**

23. The Board considers that the purposes in clauses C2(a),(b),(c),(d) and (f) are charitable. However, the stated purpose in clause C2(e) is not exclusively charitable.<sup>30</sup>
24. Clause C2(e) relates to the provision of facilities to be used for purposes of recreation or leisure time occupation including the provision of Masonic Lodge Rooms.
25. As above, activities must be considered when determining whether an entity is charitable at law. The Applicant's activities illustrate<sup>31</sup> that its focus is the provision of lodge rooms to the Masonic Lodge (and sub-licensees). The lodge rooms are "primarily intended for Freemasons and members of other fraternities and sororities".<sup>32</sup> These activities show an independent purpose to provide lodge rooms to the Masonic Lodge and sub-licensees.
26. The Board acknowledges that the provision of facilities can be charitable under section 61A CTA. However, the Board considers that provision of lodge rooms to be used by the Masonic Lodge and sub-licensees is a non-charitable purpose of the Applicant which is more than ancillary to any charitable purpose.

### **C.2 Law on charitable purposes**

#### **Provision of facilities**

27. The provision of facilities can be charitable under section 61A CTA. Section 61A CTA provides as follows:

#### **61A Trusts for recreational and similar purposes**

- (1) *Subject to the provisions of this section, it shall for all purposes be and be deemed always to have been charitable to provide, or assist in the provision of, facilities for recreation or other leisure-time occupation, if the facilities are provided in the interests of social welfare:  
provided that nothing in this section shall be taken to derogate from the principle that a trust or institution to be charitable must be for the public benefit.*

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<sup>29</sup> *Latimer* at 168 [29].

<sup>30</sup> Refer to paragraphs 6 and 12 above.

<sup>31</sup> Refer to paragraphs 9 to 11 above.

<sup>32</sup> Applicant's letters dated 14 January 2013 and 14 January 2015.

- (2) *The requirement of subsection (1) that the facilities are provided in the interests of social welfare shall not be treated as satisfied unless –*
- (a) *the facilities are provided with the purpose of improving the conditions of life for the persons for whom the facilities are primarily intended; and*
- (b) *either –*
- (i) *those persons have need of such facilities as aforesaid by reason of their youth, age, infirmity, disablement, poverty, race, occupation, or social or economic circumstances; or*
- (ii) *the facilities are to be available to members of the public at large or to the male or female members of the public at large.*
- (3) *Without restricting the generality of the foregoing provisions of this section it is hereby declared that, subject to the said requirement, subsection (1) applies to the provision of facilities at public halls, community centres, and women’s institutes, and to the provision and maintenance of grounds and buildings to be used for purposes of recreation or leisure-time occupation, and extends to the provision of facilities for those purposes by the organising of any activity.*
- (4) *Nothing in this section shall be taken to restrict the purpose which would be regarded as charitable if this section had not been passed.*

28. There are four requirements that must be established before an entity will be deemed to be charitable under section 61A CTA, namely:

- the entity must be providing a “facility”;
- the facility must be for “recreation or other leisure time occupation”
- the facility must be provided in the interests of “social welfare”; and
- the entity must be for the public benefit.

29. Section 61A(1) CTA provides that in order to be charitable under that section, the entity must be for the public benefit.<sup>33</sup> It therefore imports the common law position regarding the public benefit requirement.

30. In *Travis Trust v Charities Commission*,<sup>34</sup> in discussing the decision *In Re Hoey*,<sup>35</sup> Williams J stated:

*Demack J applied the Queensland equivalent of our s61A of the Charitable Trusts Act 1957. This is a specific provision overriding the four Pemsel heads in the case of physical facilities providing “in the interests of social welfare”.*

*The case is accordingly not on all fours with the present facts where the gift is not for land or physical plant, but the learned Judge was*

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<sup>33</sup> Section 61A(1) states “provided that nothing in this section shall be taken to derogate from the principle that a trust or institution to be charitable must be for the public benefit”.

<sup>34</sup> *Travis Trust*.

<sup>35</sup> *In Re Hoey* [1994] 2 Qd R 510.

*nonetheless of the view that the purpose lacked the requisite character and the benefit was not public.*<sup>36</sup>

William's J's comments illustrate that when assessing purposes under section 61A CTA, the public benefit must be assessed and if a purpose lacks a public benefit it cannot be charitable.

### ***Relationship between Charitable Trusts Act 1957 and the common law***

31. The applicant has submitted that section 61A CTA is to be interpreted in standalone terms, without reference to the common law position. That is, if clause C2(e) of the Trust Deed complies with section 61A CTA the Board is entitled to register it without looking at common law position that a non-charitable purpose/activity negates the Applicant's entitlement to be treated as a charity unless the non-charitable purpose/activity is merely ancillary to a charitable object. The Applicant submitted that applying the common law imposes an implied restriction on section 61A CTA which does not appear in the wording of section 61A CTA.
32. The Board acknowledges that section 61A CTA may have the effect of broadening the common law definition of charitable. Some purposes which were previously not charitable under common law may now be charitable under s61A CTA. However, this does not derogate from the common law principle that entities must be exclusively charitable. Courts have time and again enunciated the principle that in order to achieve charitable status, a gift or association must be exclusively charitable.<sup>37</sup> Further, the required assessment of whether non-charitable purposes are ancillary continues to apply.

### ***C.3 The Applicant's purposes***

#### ***Applicant's purposes do not meet the requirements of section 61A Charitable Trusts Act 1957***

33. In assessing whether the Applicant meets requirements of section 61A CTA consideration needs to be made into the four essential elements of that section<sup>38</sup>. The Board considers that the first two requirements, that the Applicant provides a facility and the facility is provided for recreation or leisure time occupation, have been met. The critical questions for this Application are whether the facilities are provided in the interests of social welfare and whether the public benefit test has been met.

#### **(a) Social welfare**

34. Section 61A(2) CTA provides essential requirements before a facility can be seen as provided for social welfare under section 61A(1) CTA. Section 61A(2) provides:

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<sup>36</sup> *Travis Trust* at [41-42].

<sup>37</sup> *Re Brewer* [1933] NZLR 1221; [1933] GLR 831 (CA). See also paragraph 18.

<sup>38</sup> Identified above in paragraph 28.

- (a) *the facilities are provided with the purpose of improving the conditions of life for the persons for whom the facilities are primarily intended; and*
- (b) *either –*
  - (i) *those persons have need of such facilities as aforesaid by reason of their youth, age, infirmity, disablement, poverty, race, occupation, or social or economic circumstances; or*
  - (ii) *the facilities are to be available to members of the public at large or to the male or female members of the public at large.*

*Section 61A(2)(a)(i) CTA*

35. The Board considers that the facilities are provided with the purpose of improving the conditions of life for the persons for who they are primary intended, being the members of the Masonic Lodge and the sub-licensees. Therefore section 61A(2)(a) CTA is met.

*Section 61A(2)(b)(i) CTA*

36. The Applicant has submitted that the social welfare requirement has been met as the average age of members of the Masonic Lodge is at least 70 years and that all elderly people are in need of such facilities.
37. The Board accepts that the Masonic Lodge provides benefits to its members. These benefits can be seen as improving the conditions of life for members who are elderly. However, the lower age restriction for freemasonry is 21 years. Therefore not all members of the Masonic Lodge will be elderly. Any man over the age of 21 is able to become a member. This means that non-elderly people are also eligible to receive the benefits despite not being in need of the facilities because of age. As the benefits from using the facilities are not restricted to people in need of them because of their age, the test in section 61A(2)(b)(i) has not been met.

*Section 61A(2)(b)(ii) CTA*

38. Section 61A(2) CTA sets out the minimum requirements for an entity meet the social welfare requirement section 61A(1) CTA. The requirement for facilities to be made available to the public must be considered in light of the activities and the actual users of the facilities to determine whether the facilities have in substance been made available to the general public. The lodge rooms are primarily made available to the Masonic Lodge and sub-licensees. The Board acknowledges that the lodge rooms are made available to the general public including other masonic orders from “time to time” and that the Trust Deed and licence refer to the rooms being made available to the public. However, substance must prevail over form<sup>39</sup> and the information provided by the Applicant shows that the lodge rooms are primarily made available to the

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<sup>39</sup> See paragraph 21 and 22.

Masonic Lodge and sub-licensees. Therefore, in substance the rooms have not been made available to the general public.

39. Further, the provision of the lodge rooms for the Masonic Lodge, sub-licensees and any other masonic lodges cannot be seen as making them available to the public at large as the membership requirements of these organisations are such that the general public cannot join.<sup>40</sup>
40. The Board considers that the requirements of section 61A(2)(b)(i) CTA have not been met.

(b) Public benefit

41. The Applicant has submitted that the rooms will be used by the public and therefore the public benefit requirement has been met. The Board accepts that the provision of the lodge rooms to the public is for the public benefit.
42. However, the independent purpose of providing the lodge rooms to the Masonic Lodge and other sub-licensees does not meet the public benefit requirement.
43. In relation to assessing the use of facilities, in the Law of Charity, Dal Pont states:

*Consistent with charity law generally, locality cases do not validate objects that generate private profit, nor those which...do not accrue to a sufficient sector of the public. Restriction on access or use by the public accordingly threaten the charitable status of buildings just as they do land.<sup>41</sup>*

44. In *Re Cumming*<sup>42</sup> when considering whether a meeting place for 'farmers and educational societies at Gore' Kennedy J stated:

*One cannot, however, regard the gift as a gift of a hall for public purposes with some necessary restrictions on user. When a hall is dedicated to a section of the public for a particular use, one must look at that use or purpose and if it is not within the spirit and intendment of the Statute of Elizabeth, it is not a charity.<sup>43</sup>*

45. In *Travis Trust v Charities Commission*<sup>44</sup> Williams J considered the South Australian Supreme Court case of *Strathalbyn Show Jumping Club Inc. v Mayes*.<sup>45</sup> In *Strathalbyn*, Bleby J considered that the process for admitting members of three polo clubs rendered them essentially private. He stated: "admission to membership and exclusion from membership is

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<sup>40</sup> See paragraphs 45 to 48 for further discussion.

<sup>41</sup> Dal Pont, G, Law of Charity (2010) LexisNexis Butterworth p264.

<sup>42</sup> *Re Cumming* [1951] NZLR 498 ("*Re Cumming*").

<sup>43</sup> *Re Cumming* at 501.

<sup>44</sup> *Travis Trust* at 23,282.

<sup>45</sup> *Strathalbyn Show Jumping Club Inc. v Mayes* (2001) SASC 73 ("*Strathalbyn Show Jumping*").

vested in the relatively small Board of Directors or committee of management. It is not open to any member of the public who wishes to join".<sup>46</sup> In *Travis Trust*, Joseph Williams J concluded that the Cambridge Jockey Club, membership of which required a vote after a proposal and seconding by two existing members, did not constitute a sufficient section of the public to satisfy the public benefit test.

46. In the case of *Re The Grand Lodge of Antient Free and Accepted Masons in New Zealand*,<sup>47</sup> the New Zealand High Court held that the Grand Lodge did not provide a sufficient public benefit, due to membership restrictions, membership being limited to men aged over 21 of good character who have been invited to join by a Master Mason, and who have not had three black balls appear against them in a ballot.<sup>48</sup>
47. The Applicant has submitted that "organisations such as the Masonic Lodge, dedicated to promoting benevolence and character development and self-improvement, must inevitably in my submission be 'for the public benefit'". However, Freemasonry is not itself a charitable purpose. The fact freemasonry is not charitable has been acknowledged by the Applicant.<sup>49</sup> In *Re the Grand Lodge of Antient Free and Accepted Masons in New Zealand*<sup>50</sup> when considering whether Freemasonry could be consider charitable France J stated:

*Freemasonry is inward looking, and its funds and organisation exist primarily for its members. It is a membership limited to men aged over 21. It does not proselytize. It seeks to achieve its aims by making its members better people.*

*Whilst ultimately there may be a public benefit in this, it is too remote. The method by which it is achieved is the improvement of the character of its members. It exists for the self-improvement of its members and whilst praiseworthy, it cannot qualify as a charity. Nor does the fact that the membership does some charitable activity alter its characteristics. This is true of many organisations.*<sup>51</sup>

48. The Board considers that the closed nature of the Masonic Lodge membership<sup>52</sup> means that the provision of the lodge rooms to the Masonic Lodge does not meet the public benefit test. The provision of the lodge rooms to be used primarily by inward looking organisations cannot be seen as providing a public benefit. Further, the members of the Masonic Lodge and sub-licensees receive a private benefit in the use

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<sup>46</sup> *Strathalbyn Show Jumping*, as quoted in *Travis Trust* at 23,282.

<sup>47</sup> *Grand Lodge*

<sup>48</sup> *Grand Lodge* at [52-56].

<sup>49</sup> Applicant's letters dated 6 August 2012 at paragraph p and 24 September 2012 at paragraph 2.

<sup>50</sup> *Grand Lodge*

<sup>51</sup> *Grand Lodge* at [59]-[60].

<sup>52</sup> See paragraph 10.

of the lodge rooms at a rent equal to outgoings. The courts have held that purposes to confer benefits on members are not charitable per se.<sup>53</sup>

49. The Applicant submits that it would be very rare for a trust or institution that satisfies both section 61A(1) CTA before the public benefit proviso and also section 61A(2) CTA to not be for the public benefit. Even if it is rare for such cases to exist, this does not lead to a conclusion that all entities that meet section 61A(1) CTA before the public benefit proviso and section 61A(2) CTA will be for the public benefit. Further, the Board determines that the Applicant does not meet section 61A(2) CTA as discussed above.
50. In light of the above, the Board considers that providing facilities to the Masonic Lodge and other sub-licensees does not meet the public benefit requirement in section 61A(1) CTA.

(c) Conclusion of assessment of eligibility under section 61A CTA

51. The Board has determined that the Applicant's activities illustrate an independent purpose to provide the lodge rooms to the Masonic Lodge and sub-licensees. This purpose does not meet the requirements of section 61A CTA as it does not meet the social welfare or public benefit requirements contained within that section. The provision of lodge rooms to the Masonic Lodge is therefore not a charitable purpose.

***Non-charitable purposes are more than ancillary***

52. A trust qualifies for registration if it is for exclusively charitable purposes. However, the Act allows the Board to register a trust with non-charitable purposes that are *ancillary* to its charitable purposes. A non-charitable purpose is ancillary to a charitable purpose if the non-charitable purpose is -
- ancillary, secondary, subordinate, or incidental to a charitable purpose of [the entity]; and
  - not an independent purpose of [the entity].<sup>54</sup>

53. New Zealand courts have considered the question whether a purpose is ancillary. In *re Grand Lodge of Antient Free and Accepted Masons in New Zealand*, Simon France J considered that the question required both a quantitative and qualitative assessment.<sup>55</sup> Other judges have approved this statement,<sup>56</sup> and observed that it is not possible to lay down any hard and fast rules. Another judge has remarked that the assessment involves a "situation specific analysis of the relative relationship between public and private benefits".<sup>57</sup>

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<sup>53</sup> *Royal Choral Society v Inland Revenue Commissioners* [1943] 2 All ER 101 at 106-107 (Lord Greene MR); *Inland Revenue Commissioners v Baddeley* [1955] AC 572, 600; see also *Inland Revenue Commissioners v City of Glasgow Police Athletic Association* [1953] AC 380, 394-396.

<sup>54</sup> *Charities Act 2005*, section 5(3) and (4).

<sup>55</sup> *Grand Lodge* at [49]-[52].

<sup>56</sup> See for example *Computer Society* at [16].

<sup>57</sup> *Re Education* at [44].



54. In *Re Education New Zealand Trust*<sup>58</sup>, the Trust was established to promote New Zealand educational institutions, some of which were for profit and some of which were not-for-profit. Dobson J found that a 30% constituency of for-profit institutions could not realistically be characterised as ancillary, and that the Trust was therefore not entitled to charitable status.
55. The Board considers that the provision of the lodge rooms to the Masonic Lodge and sub-licensees is an independent purpose of the Trust. This independent purpose is not charitable. The primary users of the lodge rooms are the Masonic Lodges and sub-licensees. The general public only use the facilities from “time to time”. As this is an independent purpose and the primary focus of the Application, it cannot be seen as ancillary to any other charitable purpose.

#### ***Summary of assessment of Applicant's purposes***

56. The provision of facilities can be charitable under section 61A CTA. However, the common law continues to apply and entities must be exclusively charitable to be eligible for registration as a charitable entity. Section 61A CTA requires that entities must be for the public benefit.
57. The primary focus of the Applicant is to provide the lodge room facilities to the Masonic Lodge and sub-licensees. This amounts to an independent purpose and does not meet the requirements of section 61A CTA as the social welfare and public benefit requirements have not been met. This independent purpose is therefore not charitable and is more than ancillary to any charitable purpose.

### ***C.4 Other submissions made by the Applicant***

#### **(a) Other similar entities**

58. The Applicant has commented that some masonic lodge rooms are owned by charitable trusts where the only tenants are masonic bodies and that these trusts are currently registered charities. The Applicant considers it less than fair if it was denied registration while these other Trusts are on the register.
59. However, the Board must take a case by case approach with each application considering the specific wording of the applicant's rules document and the activities of the applicant. If the Board becomes aware of entities on the register who may not meet registration requirements, they have the power to enquire into those entities<sup>59</sup> and an entity can be deregistered if it no longer qualifies for registration<sup>60</sup>. Therefore, the fact that there may be other similar entities currently on

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<sup>58</sup> *Re Education at [44].*

<sup>59</sup> Sections 50 and 51 *Charities Act 2005*.

<sup>60</sup> Sections 31 and 32 *Charities Act 2005*.

the register is not determinative into an assessment into the Applicant's eligibility for registration.

(b) Effect of clauses purporting to limit Applicant to charitable purposes

60. The Applicant has provided submissions that the wording of clause C2(e) means that the provision of lodge rooms is subject to certain conditions which are copied from section 61A(2) CTA. The Applicant has submitted that this means that the Trust would not be permitted to let the lodge rooms unless it complies with section 61A CTA.
61. The Board notes that the wording of clause C2(e) does not contain the public benefit requirement in section 61A(1) CTA. Further, clause C2(e) makes specific mention of the provision of Masonic Lodge Rooms. Therefore the wording is not identical to the section 61A CTA and will not limit the Applicant to only let the rooms to entities which comply with section 61A CTA.
62. Even if the wording of clause C2(e) was identical to section 61A CTA this would not be sufficient to conclude that the Applicant was charitable. As above in paragraph 21 substance must prevail over form.
63. Further, in *Commissioners of Inland Revenue v White*,<sup>61</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 purpose within the specified field and the Association would not be entitled to registration as a charity. 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>62</sup>

64. In *Canterbury Development Corporation v Charities Commission*,<sup>63</sup> Ronald 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. However as with Oldham TEC in the end, the objects and operation of the organisations either support a charitable purpose or they do not.*<sup>64</sup>

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<sup>61</sup> *Commissioners of Inland Revenue v White* (1980) 55 TC 651 ("CIR v White").

<sup>62</sup> *CIR v White* at 653.

<sup>63</sup> *Canterbury Development Corporation*

<sup>64</sup> *Canterbury Development Corporation* at [56].

65. Therefore although clause C2(e) purports to limit the purposes to charitable activities and the wording is similar to section 61A CTA, it is not sufficient to allow a conclusion that the Trust is charitable.
66. Further, simply having the words “*within the meaning of s61A of the Charitable Trusts Act 1957*” in the licence is also not sufficient to allow a conclusion to be made that the entity is charitable,<sup>65</sup> particularly when the licence permits “Lodge meetings and activities”, and the current primary users are the Masonic Lodge and other fraternal organisations.

(c) “Reading down” section 61A(2)(a) CTA

67. The applicant further submitted that there is no basis for “reading down” section 61A(2)(a) CTA to restrict “the persons who the facilities are primarily intended for” to be only for charitable purposes or “reading down” that subsection to be only members of the public.
68. In making its determination, the Board has not equated the term “persons who the facilities are primarily intended for” with “only for charitable purpose” or “only for members of the public”. The Board has accepted that the facilities are provided with the purpose of improving the conditions of life for the persons for who they are primary intended, being the members of the Masonic Lodge and the sub-licensees. The requirement in section 61A(2)(a) CTA has been met.<sup>66</sup> However, as above<sup>67</sup>, for an entity to be charitable under section 61A CTA the social welfare and public benefit requirements in section 61A(1) CTA must also be met. This involves consideration into whether the facilities are available to the general public. These requirements have not been met by the Applicant.

### **C.5 Section 61B Charitable Trusts Act 1957**

69. The Applicant has submitted that section 61B CTA has the effect that where a trust has a mixture of charitable and non-charitable purposes, the non-charitable purposes can be deemed to be excised from the Trust Deed, leaving only the charitable and valid purposes in place.
70. Section 61B(3) CTA states as follows:

*“Every trust under which property is held or applied in accordance with an imperfect trust provision shall be construed and **given effect to** in the manner in all respects as if –*

*(a) the trust property could be used exclusively for charitable purposes; and*

<sup>65</sup> A declaration that purposes are charitable is not determinative of the characterisation question: *M K Hunt Foundation* at 407; *Canterbury Development Corporation* at [56].

<sup>66</sup> See paragraph 35.

<sup>67</sup> See paragraphs 28 to 32.

(b) *no holding or application of the trust property or any part thereof to or for any such non-charitable and invalid purpose had been or could be deemed to have been so directed or allowed.*"

[Emphasis added]

71. Case law establishes that this statutory remedy is available in cases where there is a 'substantially charitable' purpose, and it is not sufficient that a fund might be applied to charitable purposes.<sup>68</sup> Having analysed the wording of the Applicant's purposes, in particular cl C(2)(e), surrounding context, and activities, the Board does not consider that these provide evidence of "a substantially charitable" purpose. As discussed above, the focus of the Application is the provision of lodge rooms to the Masonic Lodge and sub-licensees. This is not charitable. Therefore the remedy in section 61B CTA is not available to the Applicant.
72. The Board notes that even if the remedy was available and applied to excise the non-charitable purposes from the Trust Deed, the Applicant would then have no power to enter into a lease or licence to the extent that it exceeded the scope of section 61A CTA. The Applicant would therefore not be permitted to provide the rooms to the current primary users.

#### **D. Charities Registration Board's determination**

73. The Board's finding is that the Applicant has failed to meet an essential requirement for registration as a charitable entity in that 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. The Applicant is not for exclusively charitable purposes. Specifically, the Applicant has an independent purpose to provide facilities to masonic lodges, fraternities and a sorority. This does not meet the requirements of section 61A CTA and are therefore not charitable. This independent purpose cannot be seen as ancillary to any other charitable purpose.

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

Signed for and on behalf of the Board

.....  
Roger Holmes Miller

.....  
Date

15/04/2013

<sup>68</sup> *Re Beckbessinger* [1993] 2 NZLR 362 at 376 (Tipping J).