

**Registration decision: The Education and Innovation Foundation (THE43987)**

**Executive Summary**

1. The Charities Registration Board (the Board) has determined to decline the application for registration of the Education and Innovation Foundation (the Foundation) under the *Charities Act 2005* (the Act).<sup>1</sup>
2. The Board considers that the Foundation has an independent (non-ancillary) purpose that is not charitable in law, contrary to the registration requirement set out in section 13 of the Act. We consider that the Foundation currently pursues an independent purpose to promote discussion and debate in relation to a proposal for development of a private research university in Auckland. This purpose does not advance education or any other purpose that is charitable in law. We are also not satisfied that the Foundation's purpose provides a public benefit, which is a requirement for charitable status.
3. The Board's reasons for decision appear below, organised under the following headings:
  - A. Background
  - B. Legal framework for registration decision
  - C. The Board's analysis
  - D. Section 5(3) of the Act
  - E. Determination

**A. Background**

4. The Foundation was established by deed of trust on 27 March 2012 and incorporated under the *Charitable Trusts Act 1957* on 7 May 2012.
5. The Foundation applied for registration as a charitable entity under the Act on 10 April 2012.
6. Clause 4.1 of the deed of Trust reads:<sup>2</sup>

**4.1 Exclusively Charitable Purposes:** *The Board members will hold the Foundation Fund on trust for exclusively Charitable Purposes (and in particular the advancement of education) within and for the benefit of New Zealand and, specifically, to pay or apply the capital and income of the Foundation Fund for or towards the following*

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<sup>1</sup> This decision is made under section 19 of the Act.

<sup>2</sup> As amended by deed executed on 14 November 2012

purposes which are declared to be the purposes of the Foundation, namely:

**(a) Advance Education:** *To advance education of the public (ie, to provide a structured method of transmitting information or analysis to the public, so as to train the minds of as many members of the public as is practicable and to improve a useful branch of human knowledge) by promoting and informing debate and discussion in relation to the contributions that education makes or may make to the problems facing New Zealand's economy and society, having regard (without limitation and without any necessary endorsement) to the Theses; and*

**(b) Incidental matters:** *All things incidental to the purposes described in this clause 4.*

*The Board Members consider that, whilst the purposes of the Foundation will always be exclusively Charitable Purposes, they will necessarily evolve over time having regard to the then circumstances. They do not consider it desirable to be prescriptive as to the manner in which such purposes will evolve and propose that such evolution is best left to be determined by the Board Members from time to time. Accordingly, the Board Members have agreed that the purposes of the Foundation may be amended from time to time pursuant to the terms of this deed, provided that at all times the Foundation Fund will be held for exclusively Charitable Purposes within and for the benefit of New Zealand.*

7. Clause 1.1 of the trust deed contains the following defined terms:

*Theses means one or more of the theses set out in the Work.*

*Work means The Pine Tree Paradox, ISBN 978-0-473-16405-8, authored by the Sponsor and first published in 2010.*

8. For convenience, we will refer to the “theses” set out in the “work” as “the Pine Tree Paradox proposal”. The full title of the book is *The Pine Tree Paradox: Why Creating the New Zealand We All Dream of Requires a Great University*. The publisher’s synopsis of the book (as it appears on the book jacket) reads.<sup>3</sup>

*The Pine Tree Paradox sets out a vision for New Zealand driven by innovation, not agriculture. While ‘being innovative’ is orthodox economic thinking in New Zealand today, our approach is not nearly bold enough. A clear-eyed review of our national strengths reveals that we are well-placed to transform our economy into a global centre of innovation. What is required is a world-class university: Stanford on the Waitemata. Parker contrasts our economic experience with that of North California and asks: why not us? Building this future will be slow and costly. But – as the last 50 years have proved – not as costly as doing nothing”.*

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<sup>3</sup> The text of the book jacket was provided in the cover letter for the Foundation’s application for registration under the Act dated 10 April 2012. See also <http://www.publishme.co.nz/shop/thepinetreeparadox-p-697.html> [accessed 5 December 2012].

**Correspondence on the Foundation's application for registration**

9. In the cover letter for the Foundation's application, the Foundation's lawyers wrote:

*In accordance with the terms of the trust deed of the Foundation, and in particular clause 4, the Foundation has been established to promote and inform debate and discussion in relation to ideas that have been put forward for promoting education and innovation for the benefit of New Zealand – in particular, through having a world-class, research and innovation-focussed tertiary institution in Auckland.*

*The establishment of the Foundation has been inspired by ideas put forward by the settlor, Michael Wade Parker, in his book *The Pine Tree Paradox* ...*

*Although Mr Parker is the settlor of the Foundation and one of its initial trustees, he does not stand to benefit from the Foundation and his involvement is purely altruistic ...*

*In addition, the ideas put forward in Mr Parker's book are not taken as a given and the role of the Foundation is not merely to promote/advertise these ideas, i.e. it is intended that there be genuine discussion and debate – and evolution – of ideas to promote education and innovation for the benefit of New Zealand. In other words, not only do the objects of the Foundation ultimately relate to the advancement of education and innovation in New Zealand, but it is also intended that the role of the Foundation in and of itself will advance education ...*

10. On 12 July 2012, Charities Services wrote to the Foundation to notify that the application may be declined.<sup>4</sup> The letter stated that, in light of public information about the Foundation's activities, the Foundation had a purpose to promote and inform debate in relation to the *Pine Tree Paradox* proposals, and this did not appear to advance education, was a political purpose of the kind that is not charitable under New Zealand law, and may confer private benefits that are not ancillary to a valid charitable purpose.
11. On 13 August 2012, the Foundation responded to the notice. It wrote to "clarify the purposes and activities of the Foundation", and not to "progress with a discussion of the legal position". It reiterated that the Foundation aims "to educate, to inform and invite debate around all possible options and potential solutions to the problems facing New Zealand's economy and society, using the book and other publications and commentaries as contributions to the debate and as galvanising factors". It also submitted:
- the Foundation is not the alter ego of Michael Parker.
  - the Foundation has seized upon the *Pine Tree Paradox* "and other recent events with a view to promoting debate and discussion. The Foundation's intentions are to educate as

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<sup>4</sup> Pursuant to section 18(3) of the Act.

many members of the public as is possible and to do so in the expectation that, over time, some consensus will emerge”.

- the Foundation’s purposes aim to educate the public on differing means of benefitting New Zealand’s economy and, ultimately, society at large, using *The Pine Tree Paradox* as “one of a number of points of focus for discussion and debate”.
- the preliminary view of Charities Services was influenced by activities reported in the media that pre-dated the formation of the Foundation and were in relation to Michael Parker, not the Foundation, promoting his book.

12. Charities Services wrote to the Foundation on 30 August 2012 to extend an additional opportunity to provide information about the Foundation’s current and proposed activities and to address the legal position in relation to registration as a charity. Charities Services requested more specific information about the Foundation’s current and proposed educational activities. Charities Services also asked for the Foundation’s comment on a media report that the Foundation was in the process of commissioning a feasibility study around the proposals in the *Pine Tree Paradox*.<sup>5</sup>

13. On 28 September 2012, the Foundation responded to the 30 August 2012 letter. The response:

- confirmed that the Foundation “has only one current activity”, and that activity “is to seek to raise funding to permit a critical review of some of the theses espoused by Michael Parker and then engage independent economists to carry out part of that review”;
- stated that the trustees “are seeking an objective critique, and expect that that critique will form part of the ‘information pack’ that will inform and invite debate”;
- provided a copy of the proposed terms of engagement with a private consultancy to produce a feasibility study of the *Pine Tree Paradox* theses;
- provided copies of the minutes of meetings of the trustees on 8 May 2012 and 19 September 2012;
- stated that the Foundation’s activity is “only a first step” towards “progressing the Foundation’s singular purpose, to inform and invite debate around the possible options and potential solutions to the problems facing New Zealand’s economy and society”; and
- declined to make further comment on the legal position and reserved the right to make further submissions on the legal position, if required.

14. The Foundation submitted:

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<sup>5</sup> Michael Parker, “The Pine Tree Paradox – 2 years on” (22 August 2012) published at: <http://www.interest.co.nz/business/60775/author-michael-parker-says-feasibility-study-coming-his-concept-world-class-university> [accessed 5 December 2012].

*Your question ... pre-supposes that The Pine Tree Paradox is a work in relation to which the Foundation promotes and informs debate and discussion ... this reflects a bias that is inconsistent with DIA Charities' statutory obligations ...*

15. On 1 October 2012, Charities Services wrote to the Foundation to confirm the notice that the application for registration may be declined, and provide a final opportunity to make submissions, including any further submissions on the legal requirements for registration. Charities Services restated its view that a purpose to promote debate and discussion per se is not itself a charitable purpose in New Zealand law.
16. On 16 November 2012, the Foundation submitted its response to the final notice from Charities Services, including a copy of the 14 November deed of amendment, to the Foundation's purposes. The Foundation wrote:

*In our opinion, even without the clarity provided by the Amendment, the reasons you have given to deny registration:*

  - *can really only be understood in a context where DIA Charities and others involved have a discretion to decline registration, whereas no such discretion exists;*
  - *result from a complete failure to separate the personal purposes of Michael Parker (or at least the purposes espoused in his book), from the sole purpose of the Foundation;*
  - *result from an erroneous view that the proposed activities of the Foundation can be extrapolated from the Foundation's only present activities;*
  - *continue to confuse 'activities' with 'purposes';*
  - *continue to draw incorrect conclusions as to our purpose, based on incorrect analysis of our activities;*
  - *are only consistent with a finding that the trustees here are acting in bad faith;*
  - *purport to rely on case law in a manner that, on both our lawyer's and our own readings, is incorrect and calculated to mislead.*
17. The Foundation's 16 November 2012 letter developed these submissions over 20 pages. We have read this letter and taken the submissions into account.
18. Since 16 November 2012, there has been further correspondence between the Foundation and Charities Services, in which the Foundation has sought that its application be put to the Board "for comment" without prejudice to its right to put additional information and submissions in support of the application. Charities Services has advised that applications are not put to the Board "for comment"; and has invited the Foundation to identify if there are any issues notified on which it has not been given opportunity to make submissions and, if so, to request an extension of time to make submissions on those issues. The Foundation has not made any further submissions in the prescribed time.

## B. Legal framework for registration

19. Section 13 of the Act sets out the essential requirements for registration. Under section 13(1)(a) of the Act, a trust qualifies for registration if it is a trust 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>6</sup>
20. 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 or religion, or any other matter beneficial to the community”. This statutory definition adopts the well-established fourfold classification of charitable purpose at general law.<sup>7</sup>
21. To be charitable at law a purpose must be for the public benefit.<sup>8</sup> Public benefit must be expressly shown where the claimed purpose is benefit to the community.<sup>9</sup> Further, in every case, the direct benefit of the entity’s purposes must flow to the public or a sufficient sector of the public.<sup>10</sup> Any private benefits arising from an entity’s activities must only be a

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<sup>6</sup> *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 (“*Molloy*”) at 691. See also the assumption evident in the provision set out in section 5(3) and (4) of the Act, that a trust will not be disqualified from registration because it has *ancillary* non-charitable purpose/s.

<sup>7</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: *Greenpeace of New Zealand Incorporated* [2012] NZCA 533 (“*Greenpeace, CA*”) at [42]; *In Re Education New Zealand Trust* HC Wellington CIV-2009-485-2301, 29 June 2010 (“*Education New Zealand Trust*”) at [13]; *In re Draco Foundation (NZ) Charitable Trust* HC WN CIV 2010-485-1275 [3 February 2011] (“*Draco*”) at [11].

<sup>8</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 (“*Accountants*”) at 152-155; *Latimer v Commissioner of Inland Revenue* [2002] 3 NZLR 195 (“*Latimer, CA*”) 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]; *Education New Zealand Trust* at [23].

<sup>9</sup> *Canterbury Development Corporation v Charities Commission* HC WN CIV 2009-485-2133, 18 March 2010 (“*CDC*”) at [45].

<sup>10</sup> See discussion in *Latimer, CA* 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 *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 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); *CDC* 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).

means of achieving an ultimate public benefit and therefore be ancillary or incidental to it.<sup>11</sup>

22. Section 5(3) of the Act provides that the inclusion of a non-charitable purpose will not preclude registration if it is merely ancillary to a charitable purpose. Pursuant to section 5(4) of the Act, a non-charitable purpose is ancillary if the non-charitable purpose is:

(a) ancillary, secondary, subordinate, or incidental to a charitable purpose of the trust, society or institution; and

(b) not an independent purpose of the trust, society or institution.

23. It is clear that determining whether a non-charitable purpose is ancillary includes a qualitative assessment of whether it is a means to advance the charitable purpose.<sup>12</sup> It also involves a quantitative assessment, focusing on the relative significance of the purpose as a proportion of the entity's overall endeavour.<sup>13</sup>

**Relevance of entity's activities in registration decision-making**

24. Section 18(3)(a)(i) and (ii) of the Act provide that the activities of an applicant entity must be taken into consideration when determining whether that entity qualifies for registration under the Act.<sup>14</sup> The courts have confirmed that consideration of activities is a mandatory aspect of decision-making under the Act.<sup>15</sup>

25. Activities are not to be elevated to purposes,<sup>16</sup> but reference to activities may assist, for example, to make a finding about:

- the meaning of stated purposes that are capable of more than one interpretation;<sup>17</sup>

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<sup>11</sup> See for example *Institution of Professional Engineers New Zealand Inc v Commissioner of Inland Revenue* [1992] 1 NZLR 570 ("Professional Engineers") at 578; *Re New Zealand Computer Society Inc* HC WN CIV-2010-485-924 [28 February 2011] ("Computer Society") at [42]; *Education New Zealand Trust* at [23]; *Queenstown Lakes* at [68] – [76]; *CDC* at [67]. Compare: *Commissioners of Inland Revenue v Oldham Training and Enterprise Council* (1996) STC 1218 ("Oldham"); *Travel Just v Canada (Revenue Agency)* 2006 FCA 343, [2007] 1 CTC 294.

<sup>12</sup> For recent judicial comment on the qualitative test see *Greenpeace, CA* at [62], [83] – [91].

<sup>13</sup> The quantitative requirement was applied by the High Court in *Re Greenpeace of New Zealand Incorporated* HC WN CIV 2010-485-829 [6 May 2011] ("*Greenpeace, HC*") at [68]; *Computer Society* at [16]; *Education New Zealand Trust* at [43]-[44]; *Re The Grand Lodge of Antient Free and Accepted Masons in New Zealand* [2011] 1 NZLR 277 (HC) ("*Grand Lodge*") at [49]-[51]. The Board notes the Court of Appeal's observation in *Greenpeace, CA* at [92], including footnote 95.

<sup>14</sup> See also section 50(2)(a) of the Act.

<sup>15</sup> *Greenpeace, CA* at [48] and [51]. See also the approach taken in the High Court in *CDC* at [29], [32], [44], [45] - [57], [67], [84] - [92]; *Queenstown Lakes* at [57] - [67]; *Grand Lodge* at [59], [71]; *Computer Society* at [35] – [39], [60] and [68]; *Greenpeace HC* at [75].

<sup>16</sup> *McGovern* at 340 and 343; *Latimer v Commissioner of Inland Revenue* [2004] 3 NZLR 157 ("*Latimer, PC*") at [36]. Compare *Public Trustee v Attorney-General* (1997) 42 NSWLR 600 ("*Public Trustee*") at 616; *Vancouver Society of Immigrant and Visible Minority Women v the Minister of National Revenue* [1999] 1 SCR 10 ("*Vancouver Society*").

<sup>17</sup> See *Professional Engineers* at 575 (Tipping J).

- whether the entity is acting for an unstated non-charitable purpose;<sup>18</sup>
  - whether the entity's purposes are providing benefit to the public;<sup>19</sup>
  - whether a non-charitable purpose is within the savings provision set out in section 5(3) of the Act.<sup>20</sup>
26. The Foundation has submitted that the issues notified to it elevate activities to purposes. The Board considers that, on the contrary, there is a statutory mandate for Charities Services and the Board to be satisfied that entities registered under the Act are undertaking activities to advance charitable purposes in a way that confers public benefit. The Board considers that section 13 of the Act focuses attention on the purposes for which an entity is *at present* established,<sup>21</sup> and that this focus is justified in the broader scheme of the Act<sup>22</sup> and the fiscal consequences of registration under the Act.<sup>23</sup>

***Relevance of specified means in registration decision-making***

27. The Foundation has submitted that in identifying the purposes of an entity whose qualification for registration is in issue under the Act, it is not appropriate to have regard to any specific provision in the rules document as to the means by which the purpose will be achieved. More particularly, it has submitted that the general words in the opening phrase of clause 4 of its trust deed are conclusive as to the purposes for which the Foundation is established.
28. We do not agree that the purposes of an organisation will be determined by reference to ambulatory words, adopting a general law classification of charitable purpose, without regard to specific provisions in the organisation's rules for the means by which the purpose is to be achieved. It is well established that the charitable status of an association is determined by construing its objects and powers in context as a whole, rather than construing objects and powers individually.<sup>24</sup>

<sup>18</sup> *Inland Revenue Commissioners v City of Glasgow Police Athletic Association* [1953] AC 380 ("*Glasgow Police Athletic Association*"); compare *Commissioner of Taxation of the Commonwealth of Australia v Word Investments Limited* [2008] HCA 55 ("*Word Investments*") at [25] (Gummow, Hayne, Heydon and Crennan JJ).

<sup>19</sup> See for example *Glasgow Police Athletic Association*; *CDC* at [29], [32], [44], [45] - [57], [67], [84] - [92]; *Queenstown Lakes* at [57] - [67]; *Grand Lodge* at [59], [71]; *Computer Society* at [35] - [39], [60] and [68].

<sup>20</sup> See for example *Greenpeace, CA* at [40], [48], and [87] - [92], [99] and [102], [103]. Earlier authorities to the same effect include *Molloy* at 693 and the authorities cited there.

<sup>21</sup> *Greenpeace, CA* at [40]. See to the same effect *Institution of Mechanical Engineers v Cane* [1961] AC 696 (HL) at 723; *Guaranty Trust Company of Canada v Minister of National Revenue* [1967] SCR 133 at 144; *Word Investments* at [25] - [26] (Gummow, Hayne, Heydon and Crennan JJ) and [173] - [174] (Kirby J, dissenting); *Cronulla Sutherland Leagues Club Ltd v Commissioner of Taxation* (1990) 23 FCR 82 at 89.

<sup>22</sup> Including the statutory functions set out in section 10 of the Act, "promote public trust and confidence in the charitable sector" and "encourage and promote the effective use of charitable resources".

<sup>23</sup> Compare *Greenpeace, CA* at [34]. While the statutory criteria for eligibility for fiscal privileges are in tax legislation administered by Inland Revenue, one of the benefits of registration is that it qualifies entities to be eligible for tax exemption on charitable grounds.

<sup>24</sup> Gino Dal Pont, *Law of Charity in Australia and New Zealand* (2<sup>nd</sup> ed., LexisNexis Butterworths, Australia, 2010) ("*Dal Pont*") at [13.17]. For example, in *Travis Trust* at



29. The Foundation has submitted that *Commissioners of Inland Revenue v White and Others and Attorney General*<sup>25</sup> is authority that, where an entity's rules contain restrictions on how a purpose may be achieved, these restrictions will be immaterial to the question whether the entity qualifies for registration under the Act. However, that case considered a rules document in which one clause stating a "principal object" was followed by a separate clause providing that the entity would have certain other objects "in furtherance of its principal objects, but no further or otherwise". Fox J commented that the provisions in this second clause "add nothing to the scope of [the principal object]".<sup>26</sup>

***Characterisation of an entity's purposes***

30. Once an entity's purposes are established as a matter of fact, whether or not they are charitable is a question of law.<sup>27</sup> The Board is bound to apply the law as declared by the courts and legislature, and adopted by the Act.
31. Determining whether an entity's purposes are charitable involves an objective characterisation, and a declaration in an entity's rules document that the entity's purposes are charitable in law will not be determinative.<sup>28</sup> Similarly, the subjective intentions of individuals involved in a charity do not establish its charitable status.<sup>29</sup>

**C. The Board's Analysis**

32. The Foundation maintains that its sole purpose is to advance education for the public benefit. We consider that the Foundation's current purpose is to promote discussion and debate of the *Pine Tree Paradox* proposal for a private research university in Auckland ("the *Pine Tree Paradox*

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[30] – [35], [58], Joseph Williams J determined that a purpose to "support the New Zealand racing industry by the anonymous sponsor of a group race known as the Travis Stakes" was not charitable. His Honour rejected a submission that the purpose was to benefit the racing industry. Despite the opening words of the purpose clause, his Honour held that the purpose was to support a single group race. See to the same effect: *Glasgow Police Athletic Association* (where machinery provisions in the association's rules were taken into account to identify the purposes of the Association); *Professional Engineers* (where Tipping J looked to the rules as a whole to resolve the uncertainty in the way in which the primary object was stated).

<sup>25</sup> (1980) 55 TC 651.

<sup>26</sup> *Commissioners of Inland Revenue v White and Others and Attorney General* (1980) 55 TC 651 at 653 (Fox J): "[I]f the [principal objects] are charitable, nothing in clause 2(c) will affect that status; equally if they are not charitable, nothing in clause 2(c) can save them."

<sup>27</sup> *Molloy* at 693.

<sup>28</sup> *M K Hunt Foundation Ltd v Commissioner of Inland Revenue* [1961] NZLR 405 at 407; *CDC* at [56].

<sup>29</sup> *Dal Pont* at [13.18], and see also the discussion at [2.8] – [2.11]. See for example *Latimer, PC* at 168 (PC) ("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 was the settlor's purpose in establishing the trust? But, what are the purposes for which trust money may be applied?"); *Molloy* at 693; *Keren Kayemeth Le Jisroel Ltd v Inland Revenue Commissioners* [1932] AC 650 at 657 (Lord Tomlin), 661 (Lord Macmillan); *Oldham* at 251 (Lightman J).

proposal”) (section C.1 below); and that the Foundation’s purpose to promote discussion of the *Pine Tree Paradox* proposal is not charitable in law because it does not advance education (section C.2 below). We also consider that the purpose may confer private benefits that are not ancillary to any valid charitable purpose (section C.3 below).

### **C.1 The Foundation’s current purpose to promote discussion and debate about the *Pine Tree Paradox* proposal**

33. We consider that it is a purpose of the Foundation to promote discussion and debate in relation to the *Pine Tree Paradox* proposals. The stated objects of the Foundation relate to discussion and debate of the *Pine Tree Paradox* proposals. Further, all current and proposed activities of the Foundation advance discussion and debate of the *Pine Tree Paradox* proposals.
34. The Foundation submits that its objects clause (as amended 14 November 2012) establishes the Foundation for the purpose of promoting education, and that it would be wrong in law to conclude that the Foundation has a purpose to promote discussion and debate in relation to the *Pine Tree Paradox* proposal in light of the express statement of its broader educational purpose in the opening words of clause 4.1.
35. For the reasons given above, we do not accept that decision-making on the Foundation’s qualification for registration under the Act must focus solely on the words of clause 4.1. Such an approach would be inconsistent with authorities that construe an entity’s constitution as a whole, and the clear statutory mandate to consider an entity’s current and proposed activities when making a determination whether the entity qualifies for registration under the Act.
36. The Foundation’s activities advance discussion and debate of the *Pine Tree Paradox* proposal. The Foundation’s establishment was inspired by ideas put forward by the settlor in *Pine Tree Paradox*.<sup>30</sup> Further, the Foundation has confirmed that its sole current proposed activity is to raise funds to engage a consultancy firm to develop the proposals in the *Pine Tree Paradox*.<sup>31</sup>
37. Moreover, the Foundation’s activities from its establishment have focused on the viability of a proposal for a private research university on the Auckland waterfront. We note that the trustees’ meeting on 8 May 2012 included a presentation by Professor Greg Whittred, which “provided useful background information on the University of NSW (Asia)

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<sup>30</sup> We refer to: second numbered paragraph in the cover letter to the Foundation’s application for registration dated 10 April 2012; Background point A of the deed of Trust, which reads “the Board Members wish to promote and inform debate and discussion in relation to the Theses and, subject to that debate and discussion, may wish to carry out other purposes as set out in or contemplated by clause 4 of this deed”.

<sup>31</sup> We refer to: numbered paragraph 7(b) of the Foundation’s letter of 28 September 2012.

of which he was Foundation President for 3 years”.<sup>32</sup> The minutes of the meeting record Professor Whittred’s observation that, “assuming the Foundation can deliver the funds, look at a 20 year timeframe to get a research university into the top 20 world universities”, and other more detailed advice on progressing the proposals for a private university in Auckland.

38. The trustees have informed Charities Services that they propose to engage a private consultancy to complete an economic analysis of the *Pine Tree Paradox* proposal. The economic analysis contemplated will:

*... provide a robust and objective assessment of the economic benefits and costs associated with the proposed university, to assist decision-makers and opinion-formers in deciding whether or not to support the primary thesis of the Pine Tree proposal and to assist you in promoting further debate around this idea ...*

*Specifically, the scoping study would involve the following tasks:*

- 1. Establishing the basic parameters of the Pine Tree proposal, including such things as:*
  - Staff and student head counts*
  - Share of postgraduate students*
  - Interaction with existing New Zealand universities*
  - Expected areas of research and volume of research output*
  - Types of research labs and available facilities*
- 2. Identifying how a new research university would be likely to benefit New Zealand with reference to case studies of the constraints to the scale of innovation faced by NZ-based entrepreneurs and innovators.*
- 3. Understanding the factors likely to lead to the success of the Pine Tree proposal.*
- 4. Assessment of the evidence of the benefits of research universities to the local and national economies within which they operate...*

39. The budget stated in the proposed terms of engagement provided to Charities Services is \$32,000 for the scoping study, and an additional \$30,000 - \$50,000 (estimated) for a complete cost benefit analysis of the proposal that may follow on the scoping study.<sup>33</sup>

40. Having regard to this information, we consider that, as a matter of fact, the Foundation’s current purpose is to promote discussion of the *Pine Tree Paradox* proposal.

***Foundation’s opportunity to put forward information***

41. In its letter of 14 November 2012, the Foundation has stated that it has not been asked what its proposed activities might be. We have read the

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<sup>32</sup> Minutes of meeting of trustees of the Foundation on 8 May 2012, provided by the Foundation under cover of letter of 28 September 2012.

<sup>33</sup> Proposed terms of engagement provided by the Foundation under cover of letter of 28 September 2012.

correspondence sent to the Foundation by Charities Services and are satisfied that the Foundation was given sufficient opportunity to provide information about its proposed activities, and that Charities Services clearly notified the Foundation of the importance it placed on obtaining information about the Foundation's activities (including its proposed activities). Further, the Foundation has in fact availed itself of the opportunities to provide information about its proposed activities, and has confirmed that its sole proposed activity is to raise funds to engage consultants to produce a scoping document on the *Pine Tree Paradox* proposal.

***Significance of Foundation being in "formative stage"***

42. The Foundation has submitted that it is unreasonable to consider its purposes in light of its current and proposed activities because it is in a "formative stage". We do not accept this submission for the following reasons.
43. First, we do not consider that the Act allows registration of entities in a "formative" stage without consideration of their current and proposed activities. The Act establishes a framework for decision-making on qualification for registration in which consideration of activities is central. The Act makes specific provision in relation to inferences to be drawn in cases where the trustees of a trust have not yet derived income.<sup>34</sup> In light of the statutory mandate to consider activities, and the Act's specific provision for inferences to be drawn in the case of trusts that have not derived income, it is not for us, the Board, to carve out an exception for entities in a formative stage.
44. Moreover, we note that where an application for registration is declined, the entity may re-apply at a later stage and an assessment of qualification for registration will be made in light of all relevant information, including information about the entity's then current and proposed activities.
45. Secondly, we do not consider that the Foundation is in a relevantly formative stage. The information shows that the Foundation has a defined strategic objective to test and develop the *Pine Tree Paradox* proposal so as to promote and inform debate around that proposal, and has taken steps to realising that objective. The Foundation has matured sufficiently for the trustees to determine that its purposes require it to proceed with the proposed consultancy at a cost of \$32,000 for the initial scoping study followed by \$30,000 - \$50,000 for a complete cost-benefit analysis. The Foundation has a defined course of action involving expenditure of up to \$80,000.
46. We conclude that the current purpose of the Foundation is to promote discussion and debate in relation to the *Pine Tree Paradox* proposal.

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## C.2 The Foundation's purpose and advancement of education

47. The Foundation has submitted that its purpose is charitable because it advances education for the public benefit. We consider that the Foundation's current purpose is not charitable in law because it does not advance education.

### C.2.1 Law on advancement of education

48. New Zealand law recognises that a purpose to advance education for the public benefit is a valid charitable purpose in law. Education may be advanced through formal tuition or training, and research that improves a useful branch of human knowledge<sup>35</sup> and is disseminated to the public.<sup>36</sup> Further, it may include "information or training provided in a structured way for a genuinely educational purpose – that is, to advance the knowledge and abilities of the recipients – and not solely to promote a particular point of view ...".<sup>37</sup>
49. The advancement of education does not extend to activities that disseminate information but do not have any teaching or learning component.<sup>38</sup> Moreover, research for the promotion of a product or service does not meet the threshold requirement for a legitimate educational purpose.<sup>39</sup> Feasibility studies of proposals do not advance education in the relevant sense unless they produce outcomes that improve a useful branch of human knowledge and are disseminated through publication or further application for the public benefit.<sup>40</sup>

<sup>35</sup> See for example in *Re Shaw's Will Trusts* [1952] Ch 163.

<sup>36</sup> *Re Besterman's Will Trust* (January 21, 1980, unreported) referred to in *McGovern* at 352-3. See also *Re Shaw's Will Trusts* [1952] Ch 163; *Taylor v Taylor* (1910) 10 CLR 218; *Re Hopkins' Will Trusts* [1965] Ch 669.

<sup>37</sup> *Vancouver Society* at [169]. See also *Draco* at [42] - [43], [74];

<sup>38</sup> *Draco* at [41], and see also [41]. *Draco* adopted threshold requirements for education consistent with comparative case-law, and administrative interpretations of that law, see: In United Kingdom - *Re Shaw, Public Trustee v Day* [1957] 1 WLR 729 and Charities Commission for England and Wales, *The Advancement of Education for the Public Benefit* (December 2011) published at <[http://www.charity-commission.gov.uk/charity\\_requirements\\_guidance/charity\\_essentials/public\\_benefit/pb\\_educ.aspx#](http://www.charity-commission.gov.uk/charity_requirements_guidance/charity_essentials/public_benefit/pb_educ.aspx#)> at C4, C8, D2; In Canada - *Vancouver Society* at [171]; *Positive Action against Pornography v Minister for National Revenue* [1988] 2 FC 340 ("*Positive Action*"); *News to You Canada v Minister of National Revenue* [2011] FCA 192; Canada Revenue Agency, *Research as a Charitable Activity* published at <<http://www.cra-arc.gc.ca/chrts-gvng/chrts/plcy/cps/rsrch-eng.html>> at [11], [17].

<sup>39</sup> The Board notes that Canada Revenue Agency advises that research that concerns the internal deployment of an entity's administrative, management or fundraising resources, market surveys for an entity's product or research to determine effective methods of recruiting new employees are not educational research in the relevant sense: Canada Revenue Agency, *Research as a Charitable Activity* published at <<http://www.cra-arc.gc.ca/chrts-gvng/chrts/plcy/cps/rsrch-eng.html>> at [11], [14]-[15].

<sup>40</sup> The Board notes that the Charities Commission for England and Wales has produced guidance *Research by Higher Education Institutions* (2012) published at <[http://www.charity-commission.gov.uk/charity\\_requirements\\_guidance/specialist\\_guidance/education/high\\_erres.aspx](http://www.charity-commission.gov.uk/charity_requirements_guidance/specialist_guidance/education/high_erres.aspx)>, which notes considerations of general relevance for entities conducting or commissioning research, including research into the feasibility of specific proposals. The guidance emphasizes the importance of dissemination of useful research results within a reasonable time.

50. The courts have held that a purpose to “educate people about a point of view in a manner that might more aptly be described as persuasion or indoctrination”<sup>41</sup> does not advance education in a charitable sense. There is a distinction between charitable advancement of education on the one hand, and “propaganda or cause under the guise of education”.<sup>42</sup> To “promote an attitude of mind” is not an educational purpose.<sup>43</sup>
51. The organisation and provision of a conference can advance education, provided that there is a sufficiently targeted attempt to educate.<sup>44</sup> In *In re Koepler’s Will Trusts*,<sup>45</sup> the court recognised that a programme of annual ten to twelve week-long residential conferences at which there was a process of presentation and small group discussion that aimed to elicit an exchange of views “in a manner familiar in places of higher education”, covering a wide range of topics that were “recognised academic subjects in higher education” advanced education. The Court held that the conferences were designed “to capitalise on the expertise of participants who were there both to learn and instruct” and that the conferences “sought to improve the minds of the participants, not necessarily by adding to their factual knowledge but by expanding their wisdom and capacity to understand”.<sup>46</sup>
52. The decision in *In re Koepler’s Will Trusts* can be contrasted with decisions in cases where conferences are not carried out in a structured way so as to amount to formal training, or the material presented at the conferences is of a predominantly polemical and tendentious character not normally associated with formal training of the mind.<sup>47</sup> The fact that the activities of an entity are in form “educational” will not suffice if the material presented, and the manner of presentation, are not genuinely educational.<sup>48</sup>
53. Finally, it is settled that raising awareness of issues, or promoting debate and discussion of those issues, is not itself an educational purpose.<sup>49</sup> In *In re Draco Foundation (NZ) Charitable Trust*, the High Court held that the entity’s purpose was to influence local or central government or other

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<sup>41</sup> *Vancouver Society* at [169], see also *Draco* at [54].

<sup>42</sup> *Re Collier (Deceased)* [1988] 1 NZLR 81 at 91. In the United Kingdom, see for example *Re Bushnell (deceased) Lloyds Bank Ltd and others v Murray and others* [1975] 1 All ER 721 as applied by *Public Trustee* at 608; *McGovern*; *Southwood v Attorney-General* [2000] EWCA Civ 204 (“*Southwood*”). In Canada, see for example *Positive Action; Alliance for Life v Minister of National Revenue* [1999] 3 FCR 504; *Challenge Team v Revenue Canada* [2000] 2 CTC 352.

<sup>43</sup> *Anglo-Swedish Society v Inland Revenue Commissioners* (1931) 16 TC 34 at 38, see also *Buxton v Public Trustee* (1962) 41 TC 235 at 242; *Re Hopkinson* [1949] 1 All ER 346 at 350.

<sup>44</sup> *Draco* at [45] – [49].

<sup>45</sup> [1986] 1 Ch 423 (CA).

<sup>46</sup> [1986] 1 Ch 423 at 436.

<sup>47</sup> Compare *Human Life International in Canada Inc v Minister of National Revenue* [1998] 3 FC 202.

<sup>48</sup> See to the same effect *Southwood* and *In re Tetley* [1923] 1 Ch 258 (entities giving seminars and lectures did not advance education because content was not substantively educational).

<sup>49</sup> *Greenpeace, CA* at [59].

officials to a particular point of view, and that this did not fall within the charitable purpose to advance education.<sup>50</sup>

*In a democracy citizens are free to pursue [advocacy] but the activity is essentially political and therefore not a charitable purpose. Publicising one side of a debate is not advancing education.*

54. The High Court of Australia has recognised that a purpose to generate public debate as to governmental action to relieve poverty by provision of foreign aid is charitable under the fourth common law classification (other purposes beneficial to the public).<sup>51</sup> However, the Court of Appeal has recently considered and rejected a submission that New Zealand law should recognise a charitable purpose to promote and inform public debate on particular issues.<sup>52</sup> The Court of Appeal's approach is consistent with the approach taken by courts in Canada, where legislation and case law draws a distinction between political and charitable purposes similar to the distinction drawn in New Zealand law and reflected in section 5(3) of the Act.<sup>53</sup>

### **C.2.2 The Foundation's purpose and advancement of education**

55. We consider that the purpose to promote discussion and debate of the *Pine Tree Paradox* proposal does not advance education. The Foundation's stated purpose is to promote discussion and debate, and it is currently proposing to do that by fundraising for a consultancy report on the *Pine Tree Paradox* proposal that will form part of an information pack provided to participants in future discussions and debate of the *Pine Tree Paradox* proposals.
56. We recognise that the consultancy report is intended to provide a robust cost-benefit analysis of the *Pine Tree Paradox* proposal. However, we are not satisfied that this consultancy work can be distinguished from research for the promotion of a product or service, which does not meet the threshold requirement for a legitimate educational purpose.<sup>54</sup> In

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<sup>50</sup> *Draco* at [54].

<sup>51</sup> *Aid/Watch Incorporated v Commissioner of Taxation* [2010] HCA 42 ("*Aid/Watch*") at [46-47].

<sup>52</sup> *Greenpeace, CA* at [59], [63].

<sup>53</sup> *News to You Canada v Minister of National Revenue* [2011] FCA 192 at [29]; *Positive Action*. We also note that the charitable purpose recognised by the High Court of Australia in *Aid/Watch* did not recognise promotion of discussion and debate of all topics as a valid charitable purpose. The position in *Aid/Watch* relates to debate about government actions, and the Court found it unnecessary to decide whether it went wider than discussion and debate of governmental actions to advance charitable purposes under the first common law classification. Moreover, *Aid/Watch* affirmed that it is necessary to determine whether, on the facts of the particular case, an entity's endeavour is to generate public debate, e.g. by conducting research, publicly releasing research reports and campaigning for changes in government activity based on the outcomes of those research reports. The New Zealand High Court has drawn attention to this requirement in the Australian law, stating that "the promotion of a particular point of view is different from the purpose of generating public debate ... [e]ncouragement of rational debate presupposes that both sides of an argument will be equally considered": *Greenpeace, HC* at [69].

<sup>54</sup> The Board notes that Canada Revenue Agency advises that research that concerns the internal deployment of an entity's administrative, management or fundraising resources, market surveys for an entity's product or research to determine effective methods of

particular, we are not satisfied that the consultancy report will produce results that will be disseminated through publication or further application for the public benefit.<sup>55</sup>

57. The Foundation has submitted that its purpose to hold discussions and debates around the *Pine Tree Paradox* proposal is analogous to the educational purpose recognised in *In re Koepler Will Trusts*.<sup>56</sup> As discussed above, the process in *In re Koepler Will Trusts* was clearly educational, involving instruction by experts in established fields of study with the aim of expanding the participants' wisdom and capacity to understand.<sup>57</sup> The Foundation has not provided information to show that its purpose is to advance education in the manner recognised in *In re Koepler Will Trusts*.
58. The Foundation has submitted that it would be erroneous in law to "restrict the scope of [*In re Koepler Will Trusts*] such that it is valid only where there is evidence of demonstrable charitable activity ...[b]y all means Wilton Park's activities evidenced its charitable purpose but they were not *per se* necessary". On the contrary, Wilton Park's activities were of central importance to the ruling that the trust in question was established to advance education. In any event, for the reasons already stated, consideration of activities is mandatory under the Act and is relevant in determining whether a trust is deriving income for charitable purposes as required by section 13(1) of the Act.

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recruiting new employees are not educational research in the relevant sense: Canada Revenue Agency, *Research as a Charitable Activity* published at <<http://www.cra-arc.gc.ca/chrts-qvng/chrts/plcy/cps/rsrch-eng.html>> at [11], [14]-[15].

<sup>55</sup> The Board notes that the Charities Commission for England and Wales has produced guidance *Research by Higher Education Institutions* (2012) published at <[http://www.charity-commission.gov.uk/charity\\_requirements\\_guidance/specialist\\_guidance/education/high\\_erres.aspx](http://www.charity-commission.gov.uk/charity_requirements_guidance/specialist_guidance/education/high_erres.aspx)>, which notes considerations of general relevance for entities conducting or commissioning research, including research into the feasibility of specific proposals. The guidance emphasizes the importance of dissemination of useful research results within a reasonable time.

<sup>56</sup> [1986] 1 Ch 423 (CA).

<sup>57</sup> [1986] 1 Ch 423 at 436.



### C.3 Private benefits

59. The Foundation's work to produce a scoping document and cost-benefit analysis of the *Pine Tree Paradox* proposal for a private university will be beneficial to investors in the proposed private university. The direct effect of the report will be to refine and develop the proposal, and to provide a document that will provide benefit to an entity seeking to promote the private research university to the public and decision-makers. It is not clear that this research will provide a wider public benefit, as required to establish charitable status.

### D. Section 5(3) of the Act

60. The Board is satisfied that the Foundation's non-charitable purpose to promote discussion and debate about the *Pine Tree Paradox* proposal is its main purpose. That purpose is so pervasive and predominant it cannot realistically be considered ancillary to any valid charitable purpose of the Trust.
61. The Board notes that should the Foundation develops plans for activities that will advance education in the sense used in the cases, it may apply for registration and provide information to show that its current and proposed activities advance educational purposes for the public benefit.

### E. Determination

62. The Board's determination is that the Foundation does not qualify for registration under the Act and the application for registration should be declined. We consider that the Foundation's current purpose is to promote discussion and debate in relation to a proposal for development of a private research university in Auckland. We consider that this purpose is not charitable in law; it does not advance education and it may confer private benefit.

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

Signed for and on behalf of the Board

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Roger Holmes Miller

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Date

15 April 2013