

Registration Decision for Hastings City Marketing Incorporated (HAS28530)

The facts

1. The Hastings City Marketing Incorporated (“the Applicant”) was incorporated under the Incorporated Societies Act 1908 on 8 March 1995. The Applicant’s original name was “Mainstreets Hastings Incorporated”, but this was changed to “Hastings City Marketing Incorporated” on 10 August 2004.
2. The Applicant applied to the Charities Commission for registration as a charitable entity on 27 June 2008.
3. Clause 3 of the Applicant’s original constitution set out the purposes of the Applicant as:

3.1 *The objects for which the Society is established are those objects which are classified as charitable in New Zealand (in particular, to benefit the Hastings Community generally and to relieve poverty by promoting activities directed to creating employment for the residents of Hastings and district and to promote wholesome recreation and amusements) including the following:*

- (a) *To promote and encourage the revitalization of the city centre of Hastings as a place for its citizens to shop and work and to enjoy its surroundings while carrying out all the functions of being a community.*
- (b) *To advertise, beautify and develop the city to attract trade, tourists, visitors and increase its population.*
- (c) *To create, increase, expand or develop amenities for the use of the public.*
- (d) *To make the city centre an attractive place to do business by assisting retailers and commercial property owners in improving their premises.*
- (e) *To identify the physical assets and heritage of the city centre and to encourage the development and preservation of a place of significant character as a city centre for the enjoyment and benefit of all its citizens.*
- (f) *To undertake promotional activity of all kinds and to publicise the city centre as a preferred place for the community to shop, to be entertained, and to carry out their daily work.*
- (g) *To assist in the promotion and strengthening of the existing businesses and creating new opportunities for growth and improvement among all members of the community.*
- (h) *To market the city centre as a place to be for visitors and locals alike through the promotion of special events and retail promotions, wholesome recreation and amusements.*
- (i) *Any incidental activities of benefit to the community particularly those which may directly create employment opportunities and engender a more positive attitude in the Hastings community about its city.*

4. The Commission analysed the application and on 4 March 2009 sent the Applicant a notice that may lead to a decline on the basis that the Applicant was not established exclusively for charitable purposes and the Applicant's winding up clause did not limit the distribution of surplus assets to charitable purposes. The notice also included a recommendation to add clauses preventing private pecuniary profit during the operation of the society.
5. On 24 March 2009 the Applicant responded to the notice requesting a copy of the cases referred to in the notice and stating:

"The Society's rules were drafted in 1995 and are, in our opinion, lacking in some areas. With regards to the issue of private pecuniary profit, although clause 19 is not as clear as it could be, we believe that it effectively states that there is to be no opportunity for private benefit or profit to an individual member. The winding up provision however may need attention pending the final interpretation of the charitable nature of the purposes of the Society.

With regards to the purposes of Hastings City Marketing, we have been of the view that the promotion of business is itself a prima facie charitable act in light of the benefits that it brings to the community by way of encouraging employment, economic growth, etc. This view is held in light of the decision in Crystal Palace Trustees v Minister of Town and Country Planning [1951] Ch 132 which was followed by the New Zealand High Court in Re Tennant [1996] 2 NZLR 633. In Crystal Palace, the English Courts held that the promotion of industry and commerce for the public benefit was charitable".

6. On the 14 October 2009 the Applicant amended its constitution and lodged the amendments with the Companies Office. Clause 3 was amended to read:

3.1 The objects of the Society are those charitable objects and purposes which are recognised by the Courts of New Zealand and the Charities Act 2005 as being charitable whether relating to the relief of poverty or any other purpose beneficial to the community, including to:

- (a) *Promote the development of the city centre of Hastings so as to attract business, trade, tourists, and visitors to it and to create, increase, expand or develop the amenities of the city centre of Hastings for the general public,*
- (b) *Promote and encourage the revitalization of the city centre of Hastings,*
- (c) *Promote, beautify and develop the city centre of Hastings in order to attract and encourage Hastings residents and visitors to use the city centre, for leisure, work, or otherwise,*
- (d) *Promote and encourage community events within the city centre of Hastings to encourage Hastings residents and visitors to visit the city centre,*
- (e) *Identify the physical assets and heritage buildings within Hastings and foster and encourage the preservation, development and/or re-development of those assets and buildings for future use by Hastings residents and visitors,*

- (f) *Increase employment for Hastings residents by promoting and encouraging the growth of business and trade in Hastings, and*
- (g) *Do any act or thing incidental or conducive to the attainment of any of the above objects.*

3.2 *Notwithstanding Rule 3.1:*

- (a) *The Society shall be limited in furthering or attaining its objects to the advancement of charitable purposes in New Zealand, and*
- (b) *No Member of the Society shall derive any personal pecuniary gain from membership of the Society*

7. The Commission analysed the amended constitution and on 23 October 2009 sent the Applicant a second notice that may lead to a decline on the basis that the Applicant was not established exclusively for charitable purposes.
8. The Commission received an email from the Applicant on 2 November 2009 requesting copies of the cases referred to in our letter of 23 October 2009.
9. On 2 November 2009, the Commission emailed the Applicant copies of the case decisions and on 11 December 2009 the Applicant responded submitting:

“With respect to that notice, we do not think that the Charities Commission is correct in deciding that the purposes in the Society’s rules as now amended are not exclusively charitable. In our opinion the activities of the Society are clearly charitable and provide a benefit to the general public of Hastings. Any benefit to the members of the Society is an incidental consequence or by-blow of the Society’s main object of improving industry and commerce for the city centre of Hastings.

In our opinion, the Charities Commission has misinterpreted those two decisions (Re Tennant [1996] 2 NZLR 633 and Tasmanian Electronic Commerce Centre Pty Limited v Commissioner of Taxation (2005) FCA 439) and has read far more into the cited decisions than is warranted to justify the statement that “The promotion of business or industry has been held to be charitable under ‘other matters beneficial to the community’ where essential services are provided or where the community is under a particular disadvantage”.

The decision in Re Tennant concerned a case where a developer was intending to confer an economic and social benefit on a particular community by donating funds that would enable the construction of a school, public hall, church and a creamery. At no point in that decision did the High Court consider whether the funds were directed at providing “essential services” and there was no suggestion that the community suffered from any “particular disadvantage”. In that case, the benefactor was simply intending to benefit a locality by way of breathing life into its economy and industry (by way of the creamery).

Likewise in Tasmanian Electronic Commerce Centre Pty Limited (TECC), there was no suggestion that TECC was supplying an "essential service" in assisting businesses with research and development. It was acknowledged that TECC was assisting an "economically disadvantaged" rural Tasmanian community that was not as strong as its mainland counterpart, but the decision itself also contains the following dictum which implies that a benefit to the economy will be a benefit to the public at large, irrespective of whether that economy and its community are disadvantaged or not:

It seems to me self-evident that benefits to Tasmania's economy resulting in long-term economic advantage to Tasmania will be a benefit to the Tasmanian public, and indeed to the wider national public

In respect of any disadvantage to communities, we acknowledge that charitable status may more readily be recognised when entities are assisting "disadvantaged" communities, but in our opinion the case law provided does not appear to have considered that issue as sine qua non in terms of the making a final determination.

With reference to other decisions in respect of the fourth Pemsel category, we do not believe that any of those decisions support the contention that "essential services" or a "community under a particular disadvantage" are individually or collectively determinative of charitable status. In Commissioners of Inland Revenue v Yorkshire Agricultural Society [1928] 1 KB 611, the Court acknowledged that the improvement of agriculture was the main activity of the Society, and that it was for the benefit of the community. In Yorkshire, the community was dependent on agriculture for survival. There was, however, no suggestion that the community was disadvantaged at all, or that the Society's activities were "essential services". Likewise, in Crystal Palace Trustees v Minister of Town and Country Planning [1951] Ch 132 at 141, the decision does not refer to the activities undertaken by the Crystal Palace Trustees as being "essential" or to the community being in any way "disadvantaged".

We are concerned that the Commission's decision in this instance appears predicated on the assumption that our client needs to provide an "essential service" before it can be considered to be carrying on charitable activities. Without any legal authority for that proposition there appears to us to be no basis upon which the Charities Commission might determine charitable status based on whether an activity is "essential" or not. In respect of our client, many in Hastings would agree that the provision and organisation of events and activities in the city centre, and the general encouragement of Hastings residents and visitors to visit the city centre, is an essential service to improve and encourage industry and commerce in the Hastings city centre.

The Society is aware that it can obtain a tax exemption pursuant to CW40 of the Income Tax Act 2007 ... The problem for the Society is that it relies heavily on donations and grants for funding. As a result of the Charities Act 2005, and the changes to the tax and gifting

scheme, many donors have changed their policies in respect of making charitable donations and grants ... Put simply, without charitable entity status the Society will not benefit from many donations and grants previously received (and will therefore be handicapped in pursuit of its purposes) as the donation will not be considered charitable and the donor will not get the benefit of various tax deductions.

As is clear from the case law cited in the letter of the 23 October 2009 as well as the www.charities.govt.nz website, the promotion of industry and commerce is a charitable activity so long as it is for the benefit of the public and the sole intention is not to further the interests of any individuals engaged in that activity.

As is clear from the Society's Rules, the objects are solely charitable and do not allow any member of the Society to derive any personal pecuniary gain from membership of the Society. The main objects are to promote and encourage the development of the city centre of Hastings in order to increase business, trade and tourism as well as to develop the area for the benefit of Hastings residents. Clearly those objects are consistent with the furtherance and promotion of industry and commerce and, pursuant to relevant case law, charitable.

In respect of the employment aspect, as the Society assists in filling empty shops with new businesses and any increased commercial activity in the centre of Hastings helps create or retain jobs, it is clearly involved in increasing employment. Without new businesses to fill the empty stores there would be no further employment of the unemployed, and therefore this activity can only be charitable in nature.

Our client's position is that any benefit to its members is merely a by-product, or incidental consequence, of the Society's objects and activities... Any benefit to members from the activities and objects of the Society is incidental, as it is the objects and purposes of the Society that determine its activities. If the Society, in this instance, does indeed achieve its objects and purposes it is logical to assume that business owners in Hastings will, as a result, find that their business improves. The object and the result are inextricably linked.

There is no doubt that if the Society was set up to benefit its own members it would not be charitable. The Society's charitable intention and status is reflected in the rules in that it specifically excludes all benefit to its members. The Society is not designed to promote the interests of those individuals engaged in trade, commerce or enterprise and is not designed to provide direct benefits to them.

The Society was set up with social welfare in mind. It has consistently applied its funds to improving facilities within the city centre for use by the public and to organising activities and events for attendance by any resident of or visitor to Hastings that will serve to improve and encourage industry and commerce in Hastings. There is a public benefit attached to each and every one of its

activities as they are intended to benefit the community at large. The Society seeks to encourage residents of and visitors to Hastings to use the city centre, which in turn increases and promotes industry and commerce for the city centre and looks to return the city centre of Hastings to a vibrant shopping centre. The Society acts for the benefit of the locality of Hastings and for the economic benefit of Hastings, both of which are charitable activities in the terms of the Re Tennant decision.

It is clear from the activities detailed below that the Society does not market or promote individual businesses within the city centre of Hastings, or try to further the interests of any individual businesses currently operating in Hastings. The Society is set up to encourage industry and commerce generally within Hastings, and does so by way of public events, activities and productions with the aim of increasing the numbers of people visiting the city centre.

The events held in Hastings over the past 12 months by Hastings City Marketing are as follows:

- The Edible Fashion Awards – an event for the local Hastings schools available for all schools in the area,*
- The Business Awards – an awards function that invites all city centre businesses in Hastings to celebrate business excellence in the CBD, but promoted to the wider community who are involved in using those businesses,*
- Hot Pink – A charity cocktail event held in Hastings that serves to fundraise for the New Zealand Breast Cancer Foundation,*
- Christmas Busking Festival – another schools-based event designed to bring people to the city centre to view the performances,*
- Father Christmas fundraising – the Society assists by applying for funds to support and promote the Father Christmas Parade in the Hastings city centre to bring people to the city centre,*
- Art Deco Hastings and Spanish Mission Walks – the Society again contributes to this showcase of Hastings Art Deco and Spanish Mission heritage to bring people to the city centre,*
- Spring Retail Promotion – promotion that attempts to bring people into the CBD to celebrate the arrival of spring,*
- Spring Fashion Parade – another event that fundraises for schools, in particular the Havelock North High School Foundation,*
- Carnivals – the Society provides free entertainment for kids on the last Saturday of each month during summer (bouncy castle, balloons, magicians, etc) in order to encourage people to visit the city centre, and*
- The society produces the Hastings City Guide to publicise the city centre and the events that are held in Hastings.*

The economic downturn experienced by the Hastings retail industry led business leaders to create a “Main Streets” entity which was charged with attempting to turn around the dire economic situation that Hastings was experiencing, that entity is now this Society. The Society was established in an effort to make Hastings a vibrant,

distinctive place to visit. The Society commenced in 1994 with the intention of revitalizing the decrepit state of the city centre, beautifying the area and the district, reducing the crime rate and encouraging business development and employment opportunities. Part of the beautifying strategy included the development of an anti-graffiti program, which still continues today.

Since its inception, the Society has assisted in making the city centre of Hastings a more attractive location for Hastings residents to visit, with lower crime rates, higher employment, a more positive feeling and environment, a higher retail occupancy and a general increase in stability for the city centre's retail industry."

10. The Applicant's website contains a range of information about the Hastings region and the businesses in that area and states¹:

We are a non-profit, Incorporated Society representing the 480 businesses in the city centre. Hastings City Marketing was formed in 1994 under its previous name of Mainstreets Hastings Inc.

The society has two key roles. We provide a support network for local businesses and we develop strategies to enhance and promote Hastings City as a centre of excellence.

All businesses located within the central avenues of Hastings Street, St Aubyn Street, Nelson Street and Southampton Street are given automatic membership of Hastings City Marketing.

An Executive Committee, comprising business representatives and local councillors, co-ordinates strategies assisted by specialised sub-committees.

The issues

11. The Commission must consider whether the Applicant meets all of the essential requirements for registration under the Charities Act 2005 ("the Act"). In this case, the key issue for consideration is whether the Applicant is established and maintained exclusively for charitable purposes, as required by section 13(1)(b) of the Act. In particular,
- (a) whether the Applicant's purposes fall within the definition of charitable purpose in section 5(1) of the Act, and
 - (b) if any of the Applicants purposes are non-charitable, whether those purposes are ancillary to a charitable purpose.

¹ <http://www.hastingscity.co.nz/home/about-us/> (last accessed on 8 March 2010).

The law on charitable purposes

12. Under section 13(1)(b) of the Act, a society or institution must be established and maintained exclusively for charitable purposes.
13. Section 5(1) of the Act defines charitable purpose as including every charitable purpose, whether it relates to the relief of poverty, the advancement of education, the advancement of religion, or any other matter beneficial to the community. In addition, to be charitable at law, a purpose must be for the public benefit.² This means that the purpose must be directed at benefiting the public or a sufficient section of the public.
14. Section 5(3) of the Act provides that the inclusion of a non-charitable purpose will not prevent qualification for registration if it is merely ancillary to a charitable purpose.
15. In considering an application, section 18(3)(a) of the Act requires the Commission to have regard to:
 - (i) *the activities of the entity at the time at which the application was made; and*
 - (ii) *the proposed activities of the entity; and*
 - (iii) *any other information that it considers is relevant.*

Charity Commission's analysis

Purposes

16. The Commission considers that clause 3.1(g) is ancillary. Clauses 3.1(a) to 3.1(f) do not indicate an intention to advance religion or advance education. Accordingly, these purposes have been analysed under the relief of poverty and "any other matter beneficial to the community". First however, the Commission has considered the effect of the opening paragraph of clause 3.1 and clause 3.2.

Effect of clause purporting to limit purposes

17. The opening paragraph to clause 3.1 of the constitution states:

"The objects of the Society are those charitable objects and purposes which are recognised by the Courts of New Zealand and the Charities Act 2005 as being charitable whether relating to the relief of poverty or any other purpose beneficial to the community, including to: . . ."

18. Clause 3.2 states:

Notwithstanding Rule 3.1:

² See *Latimer v Commissioner of Inland Revenue* [2002] 3 NZLR 195.

- (a) *The Society shall be limited in furthering or attaining its objects to the advancement of charitable purposes in New Zealand, and*
- (b) *No Member of the Society shall derive any personal pecuniary gain from membership of the Society.*
19. The effects of specific and implied charitable limitations have been considered in *Canterbury Development Corporation v Charities Commission*³ and *Commissioners of Inland Revenue v Oldham Training and Enterprise Council*⁴.
20. In *Canterbury Development Corporation* the High Court considered the effect of the following words in the Appellant's constitution:
- "The capacity of the Company will at all times be limited to carrying on or undertaking any business or activity, the doing of any act, or the entering into of any transaction **to the extent that the same are undertaken for the following charitable purposes . . .***
- In furtherance of the charitable objects set out in clause 2.1 but not otherwise** the Company may pursue the following purposes . . ."* [Emphasis added]
21. Ronald Young J held "the mere fact that the constitution says that CDC's objects are charitable does not make CDC charitable."⁵
22. In *Oldham Training and Enterprise Council* Lightman J held:
- ". . . certain of its objects are indisputably charitable. The question raised is whether the remaining objects viewed in this context can and should be construed as subject to the implicit limitation "so far as charitable". There is, of course, no such express limitation. In my judgment on a careful examination of the objects clauses **no such limitation** can be implied or **is compatible with the range of benefits** and of the eligible recipients of such benefits which it is the object of Oldham TEC to provide."⁶ [Emphasis added]*
23. The Commission does not consider that the inclusion of the opening paragraph to clause 3.1 and clause 3.2 provides conclusive evidence that the other purposes are in fact exclusively charitable. Before it can register an applicant as a charitable entity, the Commission must be certain that the applicant meets all the essential elements of registration set out in section 13 of the Act. In addition, section 18(3)(a) of the Act requires the Commission to have regard to the current and future activities of an applicant for registration.

³ High Court, Wellington, 18 March 2010, CIV 2009-485-2133.

⁴ (1996) 69 TC 231.

⁵ High Court, Wellington, 18 March 2010, CIV 2009-485-2133, para 56.

⁶ (1996) 69 TC 231, 250.

Relief of poverty

24. To be charitable under the relief of poverty, a purpose must:
- be directed at people who are poor, in need, aged, or suffering genuine hardship, and
 - it must be capable of providing relief.
25. The opening paragraph to clause 3.1 states that the objects of the society are those objects which are recognised as being charitable “whether relating to the relief of poverty or ‘any other matter beneficial to the community’”. However, the Commission considers that the express purposes outlined in clauses 3.1(a) to 3.1(f) do not show an intention to provide services or assistance to help any particular disadvantaged beneficiary group. In addition, the Applicant has not provided any evidence that its activities are aimed at providing benefits for such people.
26. Accordingly, the Commission does not consider that the purposes outlined in clauses 3.1(a) to 3.1(f) are charitable under the relief of poverty.

Any other matter beneficial to the community

27. In order for a purpose to be charitable as “any other matter beneficial to the community”, the purpose must be:
- beneficial to the community and
 - substantially similar to the spirit and intent of the purposes listed in the Preamble to the Charitable Uses Act 1601 (the Statute of Elizabeth) or very similar to a charitable purpose as decided by the Courts.⁷
28. Not all organisations that have purposes that benefit the community will be charitable. The purposes must benefit the community in a way that the law regards as charitable. According to *Charity Law in Australia and New Zealand*:

“ . . . it is not all objects of public utility that are charitable, ‘for many things of public utility may be strictly matters of private right, although the public may indirectly receive a benefit from them.’ Nor are essentially economic or commercial objects within the spirit of the Preamble.”⁸

29. The purposes set out in the Statute of Elizabeth are:

⁷ *Re Jones* [1907] SALR 190, 201; *Williams Trustees v Inland Revenue Commissioners* [1947] AC 447, 455; *Scottish Burial Reform and Cremation Society v Glasgow Corporation* [1968] AC 138, 146-48; *Incorporated Council of Law Reporting (QLD) v Federal Commissioner of Taxation* (1971) 125 CLR 659, 667, 669; *Royal National Agricultural and Industrial Association v Chester* (1974) 48 ALJR 304, 305; *New Zealand Society of Accountants v Commissioner of Inland Revenue* [1986] 1 NZLR 147, 157; *Re Tennant* [1996] 2 NZLR 633, 638.

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

- relief of aged, impotent, and poor people
- maintenance of sick and maimed soldiers and mariners
- schools of learning
- free schools and scholars in universities
- repair of bridges, ports, havens, causeways, churches, sea banks, and highways
- education and preferment of orphans
- relief, stock or maintenance of houses of correction
- marriage of poor maids
- supportation, aid and help of young tradesmen, handicraftsmen, and persons decayed
- relief or redemption of prisoners or captives and
- aid or ease of any poor inhabitants concerning payment of fifteens, setting out of soldiers and other taxes.⁹

30. In addition, the courts have found the following purposes to be charitable under the “any other matter beneficial to the community”:
- beautification of a locality,¹⁰
 - preservation of a locality,¹¹
 - maintenance of public parks and gardens,¹²
 - improvement of public safety,¹³
 - maintenance of public buildings and facilities.¹⁴

Clauses 3.1(a) to 3.1(d) and 3.1(f)

31. While the Commission acknowledges that the provision of public amenities may be charitable, in this case the emphasis in clauses 3.1(a) to 3.1(d) and 3.1(f) appears to be on attracting business, trade, tourists, residents and visitors to the city centre of Hastings and promoting and encouraging the growth of business and trade in Hastings. In this regard, we note that the Applicant has submitted that: “*The main objects are to promote and encourage the development of the city centre of Hastings in order to increase business, trade and tourism as well as to develop the area for the benefit of Hastings residents*”. Accordingly, the Commission considers that these purposes are aimed at the promotion of economic development, industry, business and employment in the city centre of Hastings.

⁹ *Charitable Uses Act 1601* 43 Elizabeth I c. 4.

¹⁰ *Re Pleasants* (1923) 39 TLR 675.

¹¹ *Re Verrall* [1916] 1 Ch 100; *Scott v National Trust for Places of Historic Interest or Natural Beauty* [1998] 2 All ER 705; and *Re Centrepoint Community Growth Trust* [2000] 2 NZLR 325.

¹² *Morgan v Wellington City Corporation* [1975] 1 NZLR 416 and *Re Bruce* [1918] NZLR 16.

¹³ *Inland Revenue Commissioners v Baddeley* [1955] AC 572.

¹⁴ *Kjar v Mayor of Masterton* [1930] GLR 303; *Re Chapman* (High Court, Napier, CP89/87, 17 October 1989, Greig J); and *Guild v Inland Revenue Commissioners* [1992] 2 All ER 10 (HL).

32. The Commission considers that in cases such as *Re Tennant*¹⁵, *Tasmanian Electronic Commerce Centre Pty Ltd v Commissioner of Taxation*¹⁶ and *Canterbury Development Corporation v Charities Commission*¹⁷, economic development of a community has been held to be charitable under “any other matter beneficial to the community” where essential services are provided or where the community is under a particular disadvantage.
33. The Applicant has submitted that neither *Re Tennant* nor *Tasmanian Electronic Commerce Centre Pty Limited v Commissioner of Taxation* justify the statement that “the promotion of business or industry has been held to be charitable under ‘other matters beneficial to the community’ where essential services are provided or where the community is under a particular disadvantage”. Rather, it is submitted that the promotion of commerce and industry is a charitable activity so long as it is for the benefit of the public and the sole intention is not to further the interests of any individuals engaged in that activity.
34. The case of *Re Tennant* relates to a rural community and the provision of a creamery. In that case, Hammond J stated:

*“Obviously each case will turn on its own facts. I would not be prepared to say that there may not be cases which would fall on the other side of the line because of private profit making of some kind. But here the settlor was attempting to achieve for a **small new rural community what would then have been central to the life of that community**: a cluster complex of a school, public hall, church and creamery. In my view he was endeavouring to confer an economic and social benefit on that particular community for the public weal. To see the creamery in isolation from what was really an overall purpose of benefit to this locality – the complex – would be both unrealistic, and in my view wrong in principle.”*¹⁸ [Emphasis added]

35. The Commission considers that in this case, the Judge found that the gift was aimed at providing services that would have been central to the life of a small new rural community. In this way, the Commission considers that the Judge found these services to be “essential” to the community in question.
36. In *Tasmanian Electronic Commerce Centre Pty Ltd v Federal Commissioner of Taxation*¹⁹, the Australian Federal Court of Appeal decided that the entity was charitable because it was created to provide internet and communications infrastructure for Tasmania, a particularly economically disadvantaged area. Heeney J wrote:

As has been seen, the genesis of TECC was the provision of large amounts of Federal funding to assist “regional, rural and remote

¹⁵ [1996] 2 NZLR 633.

¹⁶ (2005) FCA 439

¹⁷ HC WN CIV 2009-485-2133 [18 March 2010]

¹⁸ [1996] 2 NZLR 633, 640.

¹⁹ [2005] 59 ATR 10 (Australian Federal Court of Appeal) at pp 25-26, para. 59-60.

*communities” a current euphemism for whose parts of Australia **which are economically disadvantaged or, put more bluntly, poor, compared with the rest of the nation** [...] Tasmania is a particular case in point. The combination of small population and long distances from markets and raw materials meant that conventional manufacturing industry was always to be at a disadvantage.*

Thus the focus of TECC is in an area where there is potential for business to develop unhindered by the restraints which in the past have made Tasmania a poor relation of the rest of the nation. TECC’s objects, and the way in which those objects have been implemented in the years in question, seem clearly to be for the direct benefit of the public.²⁰ [Emphasis Added]

37. The Commission considers that in this case, the Judge considered that the services in questions were to be provided to an economically disadvantaged region of Australia in an area of industry that could develop unhindered by the restraints that caused Tasmania to suffer from such economic disadvantage. Accordingly, the Commission considers that the services were aimed at helping to relieve the economic disadvantage suffered by the region.

38. In *Canterbury Development Corporation v Charities Commission*, in discussing whether economic development can fall within the “spirit and intendment of the Statue of Elizabeth”, Ronald Young J states:

“What must be kept in mind is that the charitable purpose of benefit to the community is a community benefit to assuage need. In cases such as Re Tennant [1996] 2 NZLR 633 and Tasmanian Electronic Commerce Centre v Commissioner of Taxation [2005] FCA 439 focus is on providing community benefit where an identified need is established. Save for advancement of religion all charitable purpose can be seen as meeting a need.”²¹

39. The Commission does not consider it can expand what is charitable beyond what has been decided to be charitable by the Courts.

40. The Applicant has submitted that it was created in 1995 because of an economic downturn experienced by the Hastings retail industry in order to turn around the dire economic situation that Hastings was experiencing. Since its inception, the Society has assisted in making the city centre of Hastings a more attractive location for Hastings residents to visit, with lower crime rates, higher employment, a more positive feeling and environment, a higher retail occupancy and a general increase in stability for the city centre’s retail industry.

41. While the retail industry in Hastings City Centre may have experienced a historical downturn prior to 1995, the Applicant has not provided any evidence that the Hastings community in general is currently experiencing any particular disadvantage. Accordingly, the Commission

²⁰ (2005) FCA 439, 389, 390

²¹ HC WN CIV 2009-485-2133 [18 March 2010] para 42

does not consider this information sufficient evidence to show that the Applicant is providing essential services or assisting an area that is under any particular disadvantage.

Public or private benefit?

42. In order to fall under “any other matter beneficial to the community”, the benefits must be to the community rather than to private individuals. Any private benefits arising from the Applicant’s activities must only be a means of achieving an ultimate public benefit and therefore be ancillary or incidental to it. It will not be a public benefit if the private benefits are an end in themselves.²² 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.²³
43. The Courts have found the promotion of business and commerce to be charitable under the fourth head when it is for public benefit and not for the benefit of private individuals.
44. Thus, in *Inland Revenue Commissioners v Yorkshire Agricultural Society*²⁴ the improvement of agriculture was held to be charitable where it was for the benefit of the public at large. However, Lord Hanworth made it clear that the promotion of agriculture for private profit or benefit will not be charitable.
45. In *Crystal Palace Trustees v Minister of Town and Country Planning* a body of trustees was entrusted with the control and management of Crystal Palace and park as a public place for education and recreation, and for the promotion of industry, commerce and art. Danckwerts J stated:

“it seems to me that the intention of the Act in including in the objects the promotion of industry, commerce and art, is the benefit of the public, that is, the community, and is not the furtherance of the interests of individuals engaging in trade or industry or commerce by the trustees²⁵.”

46. In *Hadaway v Hadaway* the Privy Council held that assisting persons carrying on a particular trade or business or profession would not be charitable unless there was a condition that this assistance could only be made for a purpose which was itself charitable. In that case the court held that any eventual benefit to the community was too remote:

“The promotion of agriculture is a charitable purpose, because through it there is a benefit, direct or indirect, to the community at large: between a loan to an individual planter and any benefit to the

²² *Inland Revenue Commissioners v Oldham Training and Enterprise Council* (1986) STC 1218; *Travel Just v Canada Revenue Agency* 2006 FCA 343 [2007] 1 CTC 294.

²³ *Gilmour v Coats* (1949) AC 26; *Re Blyth* [1997] 2 Qd R 567, 582; *DV Bryant Trust Board v Hamilton City Council* [1997] 3 NZLR 342, 350.

²⁴ [1928] 1 KB 611

²⁵ [1951] 1 Ch 132, 142

community the gulf is too wide. If there is through it any indirect benefit to the community, it is too speculative²⁶.”

47. In *Commissioners of Inland Revenue v White and Others and Attorney General* it was held that entity’s purpose to “promote any charitable purpose which will encourage the exercise and maintain the standards of crafts both ancient and modern, preserve and improve craftsmanship and foster, promote and increase the interest of the public therein” was charitable. However, in that case, Fox J states:

*“The three cases which I have last mentioned seem to me to establish that the promotion or advancement of industry (including a particular industry such as agriculture) or of commerce is a charitable object provided that the purpose is the advancement of the benefit of the public at large and not merely the promotion of the interest of those engaged in the manufacture and sale of their particular products. ...The charitable nature of the object of promoting a particular industry depends upon the existence of a benefit to the public from the promotion of the object”.*²⁷

48. In that case, Fox J found that the purposes of the Association were capable of providing a public benefit and that any private benefit of individual craftsmen was not an object of the Association.

49. In *Commissioners of Inland Revenue v Oldham Training and Enterprise Council*, the Court held:

*[T]he second main object, namely promoting trade, commerce and enterprise, and the ancillary object, of providing support services and advice to and for new businesses, on any fair reading must extend to enabling Oldham TEC to promote the interests of individuals engaged in trade, commerce or enterprise and provide benefits and services to them [...] **Such efforts on the part of Oldham TEC may be intended to make the recipients more profitable and thereby, or otherwise, to improve employment prospects in Oldham. But the existence of these objects, in so far as they confer freedom to provide such private benefits regardless of the motive or the likely beneficial consequences for employment, must disqualify Oldham TEC from having charitable status. The benefits to the community conferred by such activities are too remote** [Emphasis added].²⁸*

50. In *Commissioner of Taxation v Triton Foundation*²⁹ the Federal Court of Australia held that a foundation set up to assist inventors provided sufficient public benefit. In reaching this conclusion the court noted that the foundation’s purposes were particularly directed at young people, but were also available to “any member of the community who had the desire

²⁶ [1955] 1 WLR 16, 20 (PC)

²⁷ (1980) 55 TC 651, 659.

²⁸ (1996) 69 Tax Cases 231, 251

²⁹ (2005) 147 FCR 362

or inclination to use them”, and a number of the resulting inventions had been of benefit to the community.

51. In *Travel Just v Canada (Revenue Agency)*³⁰ the Canadian Federal Court of Appeal considered a case relating to an entity whose purposes were the creating of model tourism development projects and the production and dissemination of tourism information. The Court found that promoting commercial activity with a strong flavour of private benefit was not a purpose beneficial to the public and expressed doubt that the dissemination of information described in the second object would qualify as either publication of research or an educational purpose.
52. In *Canterbury Development v Charities Commission*, Ronald Young held:

*“The important point in this case is that CDC’s assistance to business is not collateral to its purposes but central to it. The purposes of CDC’s assistance to business is, as the constitution identifies, and the operation confirms, to make the businesses more profitable. CDC believes this assistance will, in turn, result in benefit to the Canterbury community. The **central focus however remains on increasing the profitability of businesses not public benefit.**”³¹ [emphasis added]*

...
*“Any public benefit therefore from CDC’s purpose and operation’s is in my view too remote to establish CDC as a charity. Public purpose is not the primary purpose of CDC’s objects or operation. Its primary purpose is the assistance of individual businesses. The creation of jobs for the unemployed, as opposed to jobs for those who are employed and not in need, is hoped for, but remote and uncertain, result of the way in which CDC approaches its task. **The relief unemployment is certainly not a direct object of purpose of CDC’s function. The public benefit is hoped for but ancillary. In the same way the general economic lift for the Canterbury region from CDC’s work is the hoped for result of helping individual businesses. It is remote from the purpose and operation of CDC. Public benefit is not a the core of CDC’s operation.**”³² [Emphasis added]*

53. The Commission has considered clause 3.2 and the Applicant’s submissions that its objects are solely charitable and do not allow any member of the Society to derive any personal pecuniary gain from membership of the Society. The Applicant has submitted there is a public benefit attached to each of its activities as the activities are intended to benefit the community at large, and that any benefit to its members is merely a by-product, or incidental consequence, of the Society’s objects and activities.

³⁰ 2006 FCA 343 [2007] 1 C.T.C 294, 2007 D.T.C. 5012 (Eng.) 354 N.R. 360

³¹ *Canterbury Development v Charities Commission* HC WN CIV 2009-485-2133 [18 March 2010] para 60

³² *Canterbury Development v Charities Commission* HC WN CIV 2009-485-2133 [18 March 2010] para 67

54. However, the Commission considers that the wording of clauses 3.1(a) to 3.1(d) and 3.1(f) allows the Applicant to provide private benefits to business owners in the Hastings region. Moreover, the purposes allow these benefits to be provided without regard to the consequences on employment or other benefits to the Hastings region. Accordingly, any benefits conferred on the remainder of the community from such purposes will be too remote to render them charitable.

Clause 3.1(e)

55. Clause 3.1(e) states:

“identify the physical assets and heritage buildings within Hastings and foster and encourage the preservation, development and/or re-development of those assets and buildings for further use by Hastings residents and visitors”.

56. Courts have held the preservation of certain buildings and areas of land to be charitable under “any other matter beneficial to the community”. Thus, in *Re Verrall*³³ the court held that promoting the permanent preservation of buildings for the benefit of the nation was a charitable purpose.
57. The preservation of heritage buildings, however, will not always be charitable – there must be permanent preservation of a building or area which provides an overriding public benefit.³⁴ For example, it may not be charitable to preserve a building or area if:
- it is of no historical or architectural interest,
 - it is used for non-charitable purposes,
 - there is insufficient public access,
 - there are benefits to individuals (for example the owners) which outweigh any public benefit.
58. The Commission considers that in this case clause 3.1(e) may be charitable if the above criteria was met.

Activities

59. The Commission has assessed the information provided about the activities of the Applicant. The Commission considers that while a number of the activities undertaken by the Applicant may be charitable, a number of its activities are non-charitable. In this regard, the Commission considers that some of the activities undertaken by the Applicant relate to the provision of entertainment, for example, the edible fashion awards, Christmas busking festival, spring retail promotion, spring fashion parade and carnivals. The provision of entertainment or recreation activities are only charitable where they are promoting another charitable purpose. In *Travis Trust v Charities Commission*, Joseph Williams J stated:

³³ [1916] 1 Ch 100.

³⁴ *Re Verrall* [1916] 1 Ch 100 and *Re Bruce* [1918] NZLR 16.

In the area of sport and leisure, the general principle appears to be that sport, leisure and entertainment for its own sake is not charitable but that where these purposes are expressed to be and are in fact the means by which other valid charitable purposes will be achieved, they will be held to be charitable. The deeper purpose of the gift or trust can include not just any of the three original Pemsel heads but also any other purpose held by subsequent cases or in accordance with sound principle to be within the spirit and intendment of the Statute of Elizabeth³⁵.

60. For the reasons given above, the Commission does not consider that the Applicant's activities will promote another charitable purpose.

Conclusion

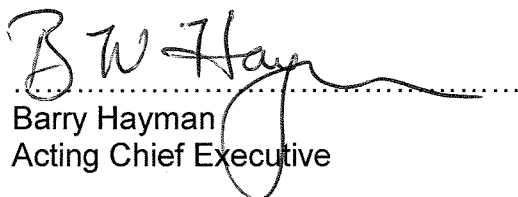
61. The Commission concludes that the Applicant's purpose in clause 3.1(e) may be charitable but that the purposes in clauses 3.1(a) to 3.1(d) and 3.1(f) are not exclusively charitable. These purposes do not show an intention to relieve poverty, advance education or advance religion. Moreover, these purposes do not come under "other matters beneficial to the community" as they are not within the spirit and intendment of the preamble to the Statute of Elizabeth and do not provide sufficient public benefit.

Commission's determination

- 62 The finding of the Commission is that the Applicant has failed to meet an essential requirement for registration as a charitable entity in that it is not established and maintained exclusively for charitable purposes, as required by section 13(1)(b) of the Act.

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

Signed for and on behalf of the Charities Commission


Barry Hayman
Acting Chief Executive

1/04/10
Date