

Registration Decision for Auckland Tourism and Visitors Trust (AUC34008)

The facts

1. Auckland Tourism and Visitors Trust ("the Applicant") was incorporated as a board under the *Charitable Trusts Act 1957* on 19 July 2002.
2. The entity applied to the Charities Commission for registration as a charitable entity on 9 June 2009.
3. The Applicant's purposes are stated in clause 3 of its trust deed:

3.1 Exclusively Charitable Objects and Purposes: *The Trustees shall stand possessed of the Trust Fund UPON TRUST to pay or apply so much of the capital and the income thereof as the Trustees think fit for or towards any one or more of the following exclusively charitable objects and purposes which are hereby declared to be the objects and purposes of the Trust, namely;*

3.1.1 Promoting Visitor Industry: *publicising and promoting the visitor industry within the Auckland Region with the particular aim of attracting international and domestic visitors, tourists and business interests thereto, and maximising the length of stay of such visitors, tourists and business interests, thereby advancing the overall wellbeing of the people who reside in, work in and visit the Auckland region in a number of ways, including through increasing work opportunities,*

3.1.2 Marketing region: *marketing, in New Zealand and overseas, the advantages of the Auckland Region for visitors and tourists, including promoting and coordinating the development of parks, holiday resorts, scenic reserves and recreational, business and tourist facilities and activities, thereby advancing the overall wellbeing of the people who reside in, work in and visit the Auckland region in a number of ways, including through increased work opportunities and the availability of better facilities,*

3.1.3 Visitor Information Services: *operating visitor information and related entertainment services to ensure visitors and tourists to the Auckland Region are welcomed and given information and assistance,*

3.1.4 Information on Resources: *researching, publishing and disseminating information on the resources of the Auckland Region in order to encourage and promote the development, co-ordination and marketing of commercial, industrial, communication, transportation, recreational, and education interests, services and facilities conducive to tourism,*

3.1.5 Statistical Information: *researching and recording statistical information on tourism and monitoring visitor numbers in order to*

provide forecasts of visitor numbers and visitor research information for the Auckland Region,

3.1.6 **General:** *all such things as are incidental or conducive to the attainment of the charitable objects and purposes described in subclauses 3.1.1 to 3.1.6.*

4. The application included a cover letter from the Applicant's solicitors submitting that:

- *"the Trust's charitable purposes have an overarching focus on the promotion of the Auckland Region so as to encourage international and domestic visitors to come to the Region, learn about the Region and all that it has to offer (and the Trust learning about the behaviours of those tourists/visitors), stay longer and spend more (in the latter case, so as to have positive effects for the Region's economy as a whole)."*
- *"In order to achieve its charitable purposes, the Trust is involved in (among other things) the following:*
 - a) *the provision of visitor entertainment centres;*
 - b) *marketing and working with industry partners, educating travel agents and tour wholesalers on the benefits of the Auckland Region;*
 - c) *marketing to attract meetings/conferences to the Auckland Region;*
 - d) *the provision of promotional materials, teaching resources (such as road/water safety) marketing of study and professional development in the Auckland Region;*
 - e) *advocacy and representation on various national forums (tourism industry representation, education forums); and*
 - f) *participation in major events offering expertise, advice and industry contacts (the Trust has provided input into most major events in the Auckland Region and the destination marketing thereof eg Rugby World Cup and the Louis Vuitton Cup)"*
- *"In carrying out the purposes as outlined above, the Trust has promoted and will continue to promote commerce and industry in the Auckland Region by increasing tourism and visitors into Auckland. This benefits the whole Region..."*
- *"The visitor information service educates users (domestic and international) of what is on offer in the Auckland Region (and elsewhere within New Zealand) by way of entertainment, travel, hospitality and so on"*
- *"A purpose may be charitable if it is beneficial to the public and there is no ground for holding that it is outside the spirit and intendment of the preamble to the Statute of Elizabeth"*
- *"We consider that all of the purposes of the Trust....fall within the ambit of the fourth head of charity as described by the Pemsel case, being objects beneficial to the public and of public utility. Promoting the Auckland region heightens residents awareness and knowledge of the community in which they live, educates visitors and tourists (and encourages the same to stay for longer). There are obvious positive consequences for industry and commerce in the entire region"*
- *"Another benefit following from the Trust's purposes is the fostering of public and community spirit in the region ie a sense of belonging and pride in one's locality"*

- *“In addition, the purpose of promoting commerce and industry has been held to be charitable”*
 - *“The potential beneficiaries of the Trust’s purposes include any people visiting or touring the Auckland Region (international and domestic) and people living in, or operating businesses within, the Auckland Region”*
 - *“It is obvious that there will be benefit to the whole of the region through boosting the business economy with the spending of visitors and tourists (as well as educational benefits and such of which all in the region can avail themselves of)”*
 - *“Finally we not [sic] that both the Trust’s purposes (clause 3.1) and means of achieving them (clause 4.2) are subject to the exclusion of any private benefit contained in clause 12”*
5. On 7 August 2009, the Commission sent a notice that may lead to decline to the Applicant on the basis that the purposes set out in clauses 3.1.1 to 3.1.3 were not charitable purposes. The notice also dealt with other issues raised by the Applicant’s application as follows:
- the request for registration to be backdated to a date earlier than the date the Commission received the properly completed application was rejected;
 - requests for information to be withheld from public access were rejected; and
 - the board was reminded of its obligation to file amendments to the trust deed with the Registrar of Incorporated Societies.
6. The Applicant responded through its solicitors on 7 September 2009, submitting that:
- *“As a preliminary point, we accept that the objects in clauses 3.1.1 and 3.1.2 are not charitable on the basis of advancing education.”*
 - *“The August Notice relies in part on a narrow reading of the proposition established in Re Shaw. Subsequent case law has provided further guidance with respect to that proposition, namely that what is important is knowledge being increased and disseminated to the public. That requirement is clearly satisfied in relation to the visitor information centres”*
 - *“Tourism Auckland’s object contained in clause 3.1.3 is readily distinguishable from that of Travel Just”*
 - *“Clause 3.1.3 refers to “related” entertainment services, ie entertainment that is related to informing visitors about the Auckland region rather than entertainment for its own sake”*
 - *“Tourism Auckland’s purposes are not directed predominantly to benefiting any particular individuals or particular businesses”*
 - *“We refer the Commission to the annual Statistics New Zealand report...Figure 4 of this report ... clearly demonstrates that tourism related businesses are not the major beneficiaries of tourism expenditure”*
 - *“The promotion of industry and commerce can be charitable provided the relevant benefits are not mainly to individuals and the benefits to the community are not too remote. In the case of Tourism Auckland, the promotion of industry and commerce is [only] one effect of Tourism Auckland’s activities”*
 - *“We urge the Commission to assess Tourism Auckland’s purposes in the light of all the relevant circumstances, without focussing*

narrowly (and, in our respectful submission, inappropriately) on just one of the benefits that flows from Tourism Auckland's activities"

- *"Tourism Auckland's objects are the provision of benefits to the public...Even if the promotion of industry and commerce was instead treated as a purpose of Tourism Auckland, viewed in the context of clause 3.1.1 itself and of the other purposes as expressly set out in the Deed this must be in a general rather than targeted or specific sense and so it must be a "public purpose of a charitable nature" as described by Danckwerts J [in Crystal Palace]"*
- *"The facts in Hadaway are therefore entirely different from the activities carried on by Tourism Auckland. Tourism Auckland does not make loans to Auckland businesses"*
- *"While individual tourist operators and businesses incidentally may benefit from Tourism Auckland's activities (ie through increased patronage), on the authority of Oldham Training and Enterprise Council the objects may still be considered charitable, as Tourism Auckland is of benefit to anyone in the community who wishes to avail themselves of the benefits"*
- *"There is no "private" nature to the benefits provided by Tourism Auckland carrying out its purposes"*
- *"We cannot understand the basis on which the Commission can plausibly take the position that clauses 12, 4.2 and 4.3 of the Deed do not operate to prevent individuals from obtaining private benefits from the activities of Tourism Auckland...if the relevant provisions restricting individuals from obtaining private benefits are included in the Deed (which they are), than that in itself satisfies that requirement that there is no private benefit"*
- *"We also consider that the issue of registration as a charitable entity should be assessed in complete isolation from, and entirely unaffected by, the possible availability of an exemption under section CW 40".*
- *"We frankly find it baffling that a not-for-profit organisation such as Tourism Auckland should have such an arduous task achieving registration as a charitable entity".*

The issue

1. The issue the Commission must consider is 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 a trust of a kind in relation to which an amount of income is derived by the trustees in trust for charitable purposes, as required by section 13(1)(a) of the Act. In particular, whether the Applicant's purposes fall within the definition of charitable purposes in section 5(1) of the Act and whether the Applicant will provide a public benefit.

The law on charitable purpose

7. Under section 13(1)(a) of the Act a trust must be of a kind in relation to which an amount of income is derived by the trustees in trust for charitable purposes.

8. Section 5(1) of the Act defines charitable purpose as including every charitable purpose, whether it relates to the relief of poverty, the advancement of education, the advancement of religion, or any other matter beneficial to the community. In addition, to be charitable at law, a purpose must be for the public benefit.¹ This means that the purpose must be directed at benefiting the public or a sufficient section of the public.
9. Section 5(3) of the Act provides that any non-charitable purpose must be ancillary to a charitable purpose.
10. In considering an application for registration, section 18(3)(a) of the Act requires the Commission to have regard to:
 - (i) *the activities of the entity at the time at which the application was made; and*
 - (ii) *the proposed activities of the entity; and*
 - (iii) *any other information that it considers is relevant; ...*

Commission's analysis

11. The Commission considers that the Applicant's purposes set out in clauses 3.1.4 and 3.1.5 may be charitable under the advancement of education. Clause 3.1.6 is ancillary.
12. The remaining purposes, set out in clauses 3.1.1, 3.1.2 and 3.1.3, do not indicate an intention to relieve poverty or advance religion. The Applicant has acknowledged, at paragraph 2.1 of its letter of 7 September 2009 that the purposes in clause 3.1.1 and 3.1.2 do not advance education. Accordingly, clauses 3.1.1 and 3.1.2 have been considered under "any other matter beneficial to the community". Clause 3.1.3 has been considered under the advancement of education and "any other matter beneficial to the community".

Advancement of education

13. In order for a purpose to advance education, it must provide some form of education and ensure that learning is advanced. Education does not however include advertisements for particular goods or services, the study of subjects that have no educational value, or the promotion of a particular point of view.²

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

² *In re Shaw (deceased)* [1957] 1 WLR 729; as interpreted in *Re Hopkins' Will Trusts* [1964] 3 All ER 46. See also *Re Collier* [1998] 1 NZLR 81.

14. *In Re Shaw (deceased)*³, the court held that “if the object be merely the increase of knowledge, that is not in itself a charitable object unless it be combined with teaching or education.”
15. *In Re Collier (deceased)*⁴, Hammond J set out the test for determining whether the dissemination of information qualifies as charitable under the head of advancement of education in New Zealand:

“It must first confer a public benefit, in that it somehow assists with the training of the mind, or the advancement of research. Second, propaganda or cause under the guise of education will not suffice. Third, the work must reach some minimal standard. For instance, in Re Elmore [1968] VR 390 the testator’s manuscripts were held to be literally of no merit or educational value.”

16. The Applicant has submitted that the Commission has taken a narrow reading of the proposition established in *Re Shaw (deceased)*⁵ and that subsequent case law authority establishes that what is important is knowledge being increased and disseminated to the public. In support of this submission, the Applicant has referred to *Re Hopkins Will Trusts*⁶, *Centrepont Community Growth Trust v Commissioner of Inland Revenue*⁷ and *Auckland Medical Aid Trust v Commissioner of Inland Revenue*⁸.

17. *Re Hopkins Will Trust*⁹, concerned a gift to the Francis Bacon Society Incorporated for the purpose of “finding the Bacon-Shakespeare manuscripts”. Wilberforce J considered the words “combined with teaching or education” used in *Re Shaw (deceased)*¹⁰ and concluded that:

“I think therefore, that the word “education” as used by Harman J in In re Shaw, decd.; Public Trustee v Day must be used in a wide sense, certainly extending teaching, and that the requirement is that, in order to be charitable, research must either be of educational value to the researcher or must be so directed as to lead to something which will pass into the store of educational material, or so as to improve the sum of communicable knowledge in an area which educational may cover”¹¹

18. In *Centrepont Community Growth Trust v Commissioner of Inland Revenue*¹², the trust was engaged in the provision of a range of courses,

³ [1957] 1 WLR 729. (See also *Re Hopkins’ Will Trusts* [1965] 1 Ch 669, [1964] 3 All ER, [1964] 3 WLR 840; *Incorporated Council of Law Reporting for England and Wales v Attorney-General* [1972] Ch 73, [1971] 3 All ER 1029, [1971] 3 WLR 853; *McGovern v Attorney-General* [1982] 1 Ch 321 at 352.)

⁴ [1998] 1 NZLR 81 at 91-92.

⁵ [1957] 1 WLR 729

⁶ [1965] 1 Ch 669

⁷ [1985] 1 NZLR 673

⁸ [1979] 1 NZLR 382

⁹ [1965] 1 Ch 669

¹⁰ [1957] 1 WLR 729

¹¹ [1965] 1 Ch 669 at 680

¹² [1985] 1 NZLR 673

seminars and workshops that included counselling and therapy activities and teachings designed to increase spiritual awareness. The Applicant's purposes were directly stated to relate to centres, schools, research, study, seminars, workshops, scholarships and grants. The Court, in concluding that the Trust advanced education, stated:

*"In those ways people come to Centrepont to learn by increasing their personal store of knowledge. Some of this knowledge may be of the spiritual nature. Some may be in areas of personal relationships. Some may be of a therapeutic kind. The printed programmes for the residential courses at Centrepont show that a substantial portion of them is concerned with the dissemination of knowledge of these kinds."*¹³

19. *Auckland Medical Aid Trust v Commissioner of Inland Revenue*¹⁴ concerned a trust whose trustees were charged with education of the public in the facts of human reproduction and in all matters concerning reproductive health and physical and social wellbeing. In that case, Chilwell J stated:

"The advancement and dissemination of education and learning is a charitable purpose. This branch of the law is not confined to teaching in the conventional sense. It extends to all branches of human knowledge and its dissemination"

20. The Applicant has submitted that it is analogous to the above cases as people attend the information centres in order to increase their knowledge in respect of the Auckland region and that knowledge is disseminated in an ostensibly "public" manner given the nature and location of the centres.
21. The Commission does not consider that the Applicant's purposes or activities are analogous to those considered in the above cases. The Applicant's purpose outlined in clause 3.1.3 does not relate to the provision of education but rather to "operating visitor information and related entertainment services". While visitor information services may include some educational activities, not all "visitor information services" will necessarily be educational in nature. Thus, information centres provide in large part a range of advertising brochures for different service providers and tourist attractions in an area. The provision of advertising information of this nature cannot be said to be educational in the legal sense as it is not neutral information but rather "propaganda or cause under the guise of education"¹⁵. In addition, "operating visitor information and related entertainment services" could include services such as taking bookings for private businesses, which would not advance education. In this regard, we note that the 'i-SITE' visitor information centres operated by the Applicant charge businesses to display their brochures, posters or other advertising such as on LCD screens and phone boards. Moreover,

¹³ *Centrepont Community Growth Trust v Commissioner of Inland Revenue* [1985] 1 NZLR 673 at 691

¹⁴ [1979] 1 NZLR 382 at 392

¹⁵ *In Re Collier (deceased)* [1998] 1 NZLR 81 at 91-92.

the i-SITEs take bookings for a range of different businesses and the Applicant operates a call centre through which people can make bookings¹⁶.

22. Furthermore, in *Travel Just v. Canada Revenue Agency*¹⁷, the Canadian Federal Court of Appeal doubted that the dissemination of tourism information would qualify as either publication of research or an educational purpose.
23. The Applicant has submitted that the Judges comments in *Travel Just* are obiter and that the Judge did not find that the promotion of tourism per se was not a charitable purpose. Rather he found that Travel Just's object, which was limited to a particular, but vague and subjective view of what kinds of tourism are beneficial to the community, was not sufficient to qualify under the fourth Pemsel head of charity.
24. The Commission acknowledges that the Evans JA's comment is obiter, however, it remains a clear statement of the court's view that the production and dissemination of information for travellers and tourists may lack the required educational element to be charitable.
25. In light of the above, the Commission does not consider that the purpose outlined in clause 3.1.3 is charitable under the advancement of education.

Any other matter beneficial to the community

26. In its letter dated 7 September 2009, the Applicant has submitted that the relevant test as to whether purposes come within "any other matter beneficial to the community" by falling within the spirit and intendment of the preamble to the *Charitable Uses Act 1601* (the Statute of Elizabeth) was established in *CIR v Medical Council of New Zealand*¹⁸ as:

objects beneficial to the public, or of public utility, are prima facie within that spirit and intendment and, in the absence of any ground for holding that they are outside its spirit and intendment, are therefore charitable in law.

27. In support of this view, the Applicant has cited *Scottish Burial Reform and Cremation Society Ltd v Glasgow Corporation*¹⁹; *Incorporated Council of Law Reporting for England and Wales v Attorney-General*²⁰ and *Crown Forestry Rental Trust v Commissioner of Inland Revenue*²¹.

¹⁶

<http://news.aucklandnz.com/pdfs/How%20to%20work%20with%20the%20Tourism%20Auckland%20i-SITEs.pdf>

¹⁷ 2006 FCA 343, [2007] 1 CTC 294.

¹⁸ (1997) 18 NZTC 13,088 (at paragraph 11).

¹⁹ [1968] AC 138

²⁰ [1972] 1 Ch. 73

²¹ (2001) 20 NZTC 17,311

28. In *The Royal National Agricultural and Industrial Association v Chester and Others*²² the High Court of Australia looked at the decisions in *Scottish Burial Reform and Cremation Society Ltd v Glasgow Corporation*²³ and *Incorporated Council of Law Reporting for England and Wales v Attorney-General*²⁴ and stated:

“it must, at least, be found that the breeding of racing pigeons is a purpose both beneficial to the community and within the spirit and intendment of the preamble to the statute 43 Elis. 1, c. 4. The House of Lords’ decisions in Williams’ Trustees v Inland Revenue Commissioners, [1947] A.C. 447, and Scottish Burial Reform and Cremation Society v Glasgow Corporation, [1968] A.C. 138 provide modern authority that the existence of these two elements is both necessary and sufficient to warrant the conclusion that a particular purpose is charitable in law

...
The attention of the Court was drawn by counsel for the appellant to the general language used by members of the Court of Appeal in Incorporated Council of Law Reporting for England and Wales v Attorney-General [1972] Ch. 73, in particular that of Russell L.J. at pp. 88 and 89 and that of Sachs L.J. at pp. 94 and 95, which, it was contended, justified bringing within the ambit of the preamble any purpose beneficial to the community unless there is some particular reason for excluding it from the conception of what is charitable. Such a development of the law would certainly go beyond any decision of the House of Lords or of this Court and would, we think, require consideration of authorities to the effect that gifts for benevolent or philanthropic purposes are too wide to be charitable ...

29. In addition, the Commission notes that while in *CIR v Medical Council of New Zealand*²⁵, the Court of Appeal considered the test which has been cited by the Applicant the majority of the Court did not base its decision on this. Instead, it found that the promotion of community health was within the spirit and intendment of the Statute of Elizabeth, relying on and further developing a line of English cases to that effect.
30. In *Crown Forestry Rental Trust v Commissioner of Inland Revenue*²⁶ the Court stated:

In view of the decision of the Court of Appeal in the Medical Council case, I believe it is appropriate to take the second approach put forward by counsel, that is to accept that a purpose which is beneficial to the public is prima facie charitable, unless there is a reason put forward for holding that it is not.

31. However, this decision was appealed in *Latimer v Commissioner of Inland Revenue*²⁷ where it was argued that:

²² [1974] 48 A.I.J.R 304, at 305

²³ [1968] AC 138

²⁴ [1972] 1 Ch. 73

²⁵ [1997] 2 NZLR 297

²⁶ (2001) 20 NZTC 17311

²⁷ [2002] 3 NZLR 195 at 205

It is also common ground that there must be a two step inquiry: first, whether the purpose is for the public benefit and, if so, secondly, whether the purpose is charitable in the sense of coming within the spirit and intendment of the preamble to the Statute of Charitable Uses 1601 (43 Eliz. c.4).

32. In *Latimer v Commissioner of Inland Revenue*²⁸ the Court of Appeal considered the approach taken in *CIR v Medical Council of New Zealand*²⁹ and found that it was “unnecessary to reach any view on whether as might appear, all of the majority in the Medical Council case adopted the approach that objects beneficial to the public or of public utility are presumed to be within the spirit and intendment to the preamble to the Statute of Elizabeth in the absence of any ground for holding otherwise” and concluded that “we have no doubt that in this case the public benefit which we have described is, in the context of New Zealand society at this time, of a charitable character”.
33. Furthermore, while the “public utility” argument from 5(2) *Halsbury's Laws of England*³⁰ was cited in *CIR v Medical Council of New Zealand*³¹, more recent authorities on charities law do not appear to endorse this approach to the fourth head. For example in *Tudor on Charities*³² Owen Davies Tudor states:

“For a purpose to be charitable under [the fourth head] it is not enough that the purpose is for the public benefit; it must be beneficial in a way that the law regards as charitable. In other words, it must be within the spirit and intendment of the preamble to the Charitable Uses Act 1601.”

34. Similarly in *Charity Law in Australia and New Zealand*³³ Dal Pont states:

“Dispositions under the fourth head must satisfy a ‘two-stage’ test as a prerequisite of validity. First the court must be satisfied that the purpose in question is beneficial to the community. Secondly, the purpose must fall within the spirit of the Preamble to the Statute of Charitable Uses. . . . Even if the object were in some way beneficial to the community, it would still be necessary to discover that it fell within the spirit and intendment of the instances given in the Statute of Elizabeth.”

35. Dal Pont also cites *Re Macduff*³⁴ where Rigby LJ said:

“to say that every purpose of general use to the community must be a charity is just about as logical as to draw from a statement in the report of an insurance society that ‘persons insured with us may be

²⁸ [2002] 3 NZLR 195 at 208-209

²⁹ (1997) 18 NZTC 13,088

³⁰ (4th edition) 1993, para 37

³¹ (1997) 18 NZTC 13,088

³² *Tudor on Charities*, 9th ed., London, Sweet & Maxwell, 2003, pg 98

³³ Dal Pont, *Charity Law in Australia and New Zealand*, Oxford University Press, 2000, pg 173

³⁴ [1896] 2 Ch 451 at 473-474

divided into men, women and children', the deduction that every man, every woman and every child is insured in that society."

36. In *Travis Trust v Charities Commission*³⁵, the first case to interpret the *Charities Act 2005*, Joseph Williams states:

"But as Lord Bramwell said in the same case (Pemsel case [1891] AC 531) "certainly every benevolent purpose is not charitable". So in a deft circumlocution of legal logic, we are required in considering what is beneficial to the community under the last of the Pemsel heads to look back to the "spirit and intendment" of the preamble to the Statute of Elizabeth to assist in dividing between those purposes that are both beneficial and charitable and those that are beneficial but not charitable. To make the division, regard must be had to the particular words of the preamble and, it as now long been held, any cases in which purposes have been found to be within the spirit and intendment of the preamble by analogy."

37. In light of the above, the Commission considers that the correct test as to whether a purpose comes under "any other matter beneficial to the community", is that the purpose must be both beneficial to the community and within the spirit and intendment of the purposes set out in the *Statute of Elizabeth*.³⁶

Within the spirit and intendment of the purposes set out in the Statute of Elizabeth

38. Courts have held the economic development of a community to be charitable under "other matters beneficial to the community", in some circumstances.³⁷
39. The case of *Re Tennant*³⁸ related to a rural community and the provision of a creamery. In that case, the court applied other cases which had held agriculture generally to be charitable such as *Inland Revenue Commissioners v Yorkshire Agricultural Society*³⁹ and *Waitemata County v Commissioner of Inland Revenue*⁴⁰ and 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

³⁵ CIV-2008-485-1689, High Court, Wellington, 3 December 2008 (Joseph Williams J.)

³⁶ See also *Re Jones* [1907] SALR 190, 201; *Williams Trustees v Inland Revenue Commissioners* [1947] AC 447, 455; *Auckland Harbour Board v IRC* [1959] NZLR 204; *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.

³⁷ *Re Tennant* [1996] 2 NZLR 633; *Tasmanian Electronic Commerce Centre Pty Ltd v Federal Commissioner of Taxation* [2005] 59 ATR 10 (Australian Federal Court of Appeal).

³⁸ [1996] 2 NZLR 633 at 640

³⁹ [1928] 1 KB 611.

⁴⁰ [1971] NZLR 151

*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. [Emphasis added]*

40. In *Tasmanian Electronic Commerce Centre Pty Ltd v Federal Commissioner of Taxation*⁴¹, 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 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.

41. The Commission considers that the Applicant's application does not fall into the same categories as those described in the *Tennant* and *Tasmanian* cases, that is providing essential services for rural, remote, or disadvantaged communities. In addition, the Applicant's purposes are not analogous to the purposes considered in the above cases. Thus, the Applicant's purposes outlined in clause 3.1.1 and 3.1.2 are aimed at publicising and promoting the visitor industry within the Auckland Region and marketing, in New Zealand and overseas, the advantages of the Auckland Region for visitors and tourists. Publicising, promoting and marketing activities are not analogous to the provision of physical facilities such as the provision of a creamery or the provision of internet and communications infrastructure.
42. In light of the above, the Commission considers that the Applicant's purposes in clauses 3.1.1 and 3.1.2 are not within the spirit and intendment of the Statute of Elizabeth.

Public or private benefit?

43. The public benefit criterion necessarily requires that any private benefits arising from the Applicant's activities must only be a means of achieving an ultimate public benefit and therefore be ancillary or incidental to it. It will not be a public benefit if the private benefits are an end in themselves.⁴² 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.⁴³

⁴¹ [2005] 59 ATR 10 (Australian Federal Court of Appeal) at pp 25-26, para. 59-60.

⁴² *Commissioners of Inland Revenue v Oldham Training and Enterprise Council* (1996) STC 1218; *Travel Just v Canada (Revenue Agency)* 2006 FCA 343 [2007] 1 CTC 294.

⁴³ *Gilmour v Coates* (1949) AC 26; see also Dal Pont, *Charity Law in Australia and New Zealand*, Oxford University Press, 2000 at 175 where he wrote:

44. The Applicant has pointed out that in the case of *Commissioner of Inland Revenue v Dick & Anor*⁴⁴, the Court decided that the examination concerning the private pecuniary profit should be limited to the relevant trust deed. They submit that if the trust deed excludes persons having the relevant capacities from receiving benefits, advantage or income, that is sufficient. In this case, they submit that clauses 12, 4.2 and 4.3 operate to prevent individuals from obtaining private benefits.
45. However, in the *Dick & Anor* case, the High Court considered whether a trustee or settler was able to receive a benefit. It referred to private benefit by persons connected with an organisation, rather than private benefit to unrelated individuals arising out of an organisation carrying out its purposes.
46. The Courts have found the promotion of industry and commerce to be charitable under the fourth head only when it is for public benefit and not for the benefit of private individuals. The private benefit referred to in these authorities, is not private benefit to people connected with the organisation but rather a private benefit from the organisation carrying out its purposes.
47. Thus, in *Inland Revenue Commissioners v Yorkshire Agricultural Society*⁴⁵ the improvement of agriculture was held to be charitable because 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 would not be charitable.
48. In *Crystal Palace Trustees v Minister of Town and Country Planning*⁴⁶ the management of a public place for education and recreation, and for the promotion of industry, commerce and art was held to be charitable because there was no intention to further the interests of individuals engaged in trade, industry or commerce. Thus, Danckwerts J stated:
- “it seems to me that the intention of the Act in including in the objects the promotion of industry, commerce and art, is the benefit of the public, that is, the community, and is not the furtherance of the interests of individuals engaging in trade or industry or commerce by the trustees”.*
49. In *Hadaway v Hadaway*⁴⁷ 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

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

⁴⁴ (2001) 20 NZTC 17, 396.

⁴⁵ [1928] 1 KB 611

⁴⁶ [1951] 1 Ch 132, 142

⁴⁷ [1955] 1 WLR 16, 20 (PC)

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

50. In *Commissioners of Inland Revenue v White and Others and Attorney General*⁴⁸ 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” [Emphasis added].

51. In *Commissioners of Inland Revenue v. Oldham Training and Enterprise Council*⁴⁹, 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].

52. In *Commissioner of Taxation v Triton Foundation*,⁵⁰ 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

⁴⁸ (1980) 55 TC 651, 659.

⁴⁹ (1996) 69 Tax Cases 231, 251

⁵⁰ (2005) 147 FCR 362

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

53. In *Travel Just v Canada (Revenue Agency)*,⁵¹ the Canadian Federal Court of Appeal considered a case relating to an entity whose purposes were the creation 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. Thus, the Court stated:

In addition, the creation and development of model tourism development projects with the characteristics described above could include the financing and operation of luxury holiday resorts in developing countries. Promoting commercial activity of this kind, with a strong flavor of private benefit, is not a purpose beneficial to the public which would make Travel Just eligible for a subvention from Canadian taxpayers as a charity.

54. The Applicant has made submissions in relation to the decisions in *Crystal Palace Trustees v Minister of Town and Country Planning*⁵², *Hadaway v Hadaway*⁵³ and *Inland Revenue Commissioners v Oldham Training and Enterprise Council*⁵⁴. Thus, the Applicant has submitted that in *Crystal Palace Trustees v Minister of Town and Country Planning*⁵⁵ the property was to be administered by the trustees as a concern which would not distribute any profits, with the provision of benefits to the public being the express purpose of the establishing Act. The Applicant has further submitted that their profits cannot be distributed and that their purposes are for the benefit of the public being the community of Auckland and visitors to Auckland, rather “than to further the interests of individuals engaging in trade or industry or commerce”. Thus they have submitted that clause 3.1.1 must be read in the context of the entire provision, which goes on to state that the particular aim of the such promotion is to attract visitors to the Auckland region “thereby advancing the overall wellbeing of the people who reside in, work in and visit the Auckland region in a number of ways”.
55. In *Hadaway v Hadaway*⁵⁶ the purpose of the trust was the granting of low interest loans to planters and agriculturalists and this was held by the Court not to be charitable because the gulf between a loan being made to an individual planter and any benefit to the community was too wide. The Applicant has submitted that in that case, the loans were directly assisting persons carrying on a particular trade, and so no direct or indirect benefit to the community was readily apparent. They submit that

51 2006 FCA 343 [2007] 1 C.T.C 294, 2007 D.T.C. 5012 (Eng.) 354 N.R. 360
52 [1951] 1 Ch 132
53 [1955] 1 WLR 16(PC)
54 [1996] STC 1218; 69 TC 231
55 [1951] 1 Ch 132
56 [1955] 1 WLR 16(PC)

their purpose are different as they do not make loans to Auckland businesses or specifically and directly subsidise or assist particular persons carrying on a particular trade.

56. Furthermore, in *Inland Revenue Commissioners v Oldham Training and Enterprise Council*⁵⁷ the Court considered that the object of “promoting trade, commerce and enterprise” extended to enabling the taxpayer to promote the interest of individuals engaged in trade, commerce or enterprise and provide benefits and services to them. Any benefits provided to the community by such an object were considered too remote. The Applicant has submitted that their purposes do not comprise promoting the interests of individuals engaged in trade. Thus, while an effect of their activities in carrying out its purposes may be to directly or indirectly benefit those engaged in trade, this is ancillary to the wider benefit available to general community.
57. The Commission notes that the *Crystal Palace* case concerned a specific building and grounds which were open to the public on a number of occasions. The benefit to the public from having these facilities was direct. However, in *Hadaway v Hadaway and Inland Revenue Commissioners v Oldham Training and Enterprise Council*⁵⁸ the direct benefit of the entity’s purposes was to private businesses and any benefit to the wider public was incidental or ancillary to this.
58. In this case, the Applicant’s purposes outlined in clause 3.1.1 and 3.1.2 relate to publicising, promoting and marketing the Auckland Region to visitors and tourists. While these purposes state that they will ‘advance the overall wellbeing of the people who reside in, work in, and visit the Auckland region in a number of ways, including through increasing work opportunities’, the benefits to the general public from such activities are not direct. Rather, the benefits to the general public are a possible result of the benefits to the businesses in Auckland that occur from attracting more visitors to the region. For example, attracting more visitors to the region could result in greater employment by generating greater trade for businesses. Accordingly, the Commission considers that the primary beneficiaries of the Applicant’s purposes outlined in clause 3.1.1 and 3.1.2 will be private businesses in the Auckland region. Any benefits conferred on the remainder of the community from such purposes are too remote to render the purposes charitable.

Applicant’s submissions

59. In paragraph 6.4 of its letter of 7 September 2009, the Applicant submitted that “*We also consider that the issue of registration as a charitable entity should be assessed in complete isolation from, and entirely unaffected by, the possible availability of an exemption under section CW 40*”.

⁵⁷ [1996] STC 1218; 69 TC 231

⁵⁸ [1996] STC 1218; 69 TC 231

60. The Commission considers all applications for registration individually on their merits against the essential requirements in the Act. The possible application of CW40 of the Income Tax Act 2007 did not form any part of the Commission's decision and was merely referred to at the end of the Commission's letter of 7 August 2009 in the section headed "options" in order to assist the Applicant.
61. The Applicant has stated: "We frankly find it baffling that a not-for-profit organisation such as Tourism Auckland should have such an arduous task achieving registration as a charitable entity".
62. The Commission notes that not-for-profit status and charitable status are distinct concepts, and reiterates that applications are assessed on their individual merits.
63. The Applicant has also submitted that the Commission has registered other trusts whose purposes include the fostering and promotion of the tourism industry in New Zealand.
64. The Commission takes a case-by-case approach to each application for registration as a charitable entity. The Commission considers the specific wording of each applicant's rules document and has regard to the current and future activities of each applicant as required by section 18(3)(a) of the Act. The fact that an entity carrying out similar activities may have been registered by the Commission does not affect any other applicant's eligibility for registration.

Section 61 A of the Charitable Trusts Act 1957

65. In order to be a valid trust at law, a trust for charitable purposes must be exclusively charitable or it will be void for uncertainty. Section 61B of the *Charitable Trusts Act 1957* however, can operate in two situations to "save" a trust that has both charitable and "non-charitable and invalid" purposes.
65. The first is where the entity's stated purposes include charitable and non-charitable purposes (in which case the non-charitable purposes may be "blue pencilled out"). The second is where the stated purposes are capable of both a charitable and a non-charitable interpretation and the primary thrust of the gift is considered to be charitable (in which case the purposes could be deemed to apply only in terms of the charitable interpretation).⁵⁹
66. The Commission considers that the main purposes in clauses 3.1.1 to 3.1.3 are non-charitable for the reasons given above. If the purposes in these clauses were "blue-pencilled" out, the Applicant would be unable to carry out its primary activities. The Commission therefore concludes that the Applicant does not have substantially charitable purposes.

⁵⁹ *Re Beckbessinger* [1993] 2 NZLR 362, 373.

67. In *Re Beckbessinger*, Tipping J held:

*"In the case of designated and identifiable organisations it may well be necessary to have evidence as to whether or not they are charitable to determine the flavour of the gift. The Court cannot in my judgment say, . . . that because a gift might have been applied for charitable purposes, s 61B can be used to save it. The testator must be shown to have had a substantially charitable mind but to have fallen foul of the law of uncertainty by including either actually or potentially a non-charitable element or purpose."*⁶⁰

69. The Team has analysed the wording of the Applicant's purposes, surrounding context, and activities (as directed by section 18 of the Charities Act). The Commission does not consider that these provide evidence of "a substantially charitable mind" with an intention to create a charitable trust, but which was not conveyed by the drafting. Accordingly, the Commission does not consider that the purposes indicate an intention to create a substantially charitable trust.

70. On these bases, the Commission considers that the Applicant's purposes are not substantially charitable and therefore section 61B of the *Charitable Trusts Act 1957* cannot operate to validate the trust.

Commission's determination

66. The Commission concludes that the Applicant has failed to meet an essential requirement for registration as a charitable entity in that the Applicant is not a trust of a kind in relation to which an amount of income is derived by the trustees in trust for charitable purposes, as required by section 13(1)(a) of the *Charities Act 2005*.

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

Signed for and on behalf of the Charities Commission



.....
Trevor Garrett
Chief Executive

12/2/10

.....
Date

⁶⁰ *Re Beckbessinger* [1993] 2 NZLR 362, 376.