

Registration decision: Dunedin Cable Car Trust

The facts

1. The Dunedin Cable Car Trust (the Applicant) was established on 23 July 2008. The Applicant applied to the Charities Commission (the Commission) for registration as a charitable entity under the *Charities Act 2005* (the Act) on 8 September 2008.

2. The Applicant's purposes are set out in clause 3 of the Trust Deed:

The Purposes of the trust are as follows:

- (a) *to educate and stimulate public interest in the re-introduction of heritage cable car transportation systems in the city of Dunedin and nation wide;*
- (b) *to promote and assist with the re-establishment of the High Street cable car and line from the Dunedin Exchange area to Mornington;*
- (c) *to integrate cable car transportation as part of Dunedin's public transport system for the benefit of the community;*
- (d) *to promote and develop cable car lines, facilities and recreational services as a tourist attraction and for the benefit and enjoyment of the community generally;*
- (e) *to liaise and work with other like groups and organisations involved with similar aims and objectives in Dunedin and elsewhere; and*
- (f) *to promote all or any by lawful means the aims and objectives of the Trust.*

3. The Commission analysed the application for registration and on 18 May 2009, sent the Applicant a notice that may lead to decline on the basis that a primary purpose of the Applicant was the promotion of tourism, which was not charitable as it did not provide sufficient public benefit.

4. The Applicant responded on 17 June 2009 and 28 July 2009 advising that it would remove the reference to the promotion of the proposed Cable Car lines and facilities as a tourist attraction from the purposes of the Trust.

5. The Applicant was then advised that notwithstanding the proposed amendment, the Applicant would not meet registration requirements as the promotion of a cable car in itself is not a charitable purpose. Further, information on the Applicant's website regarding its activities indicates that the Applicant has non-charitable purposes.

6. On 19 August 2009, the Commission sent the Applicant a second notice that may lead to decline on the basis that the Applicant's purposes were not exclusively charitable. The Commission advised that the purposes and the amended purposes would not advance education because clauses 3(a) and 3(b) amounted to advertisements for particular goods or

services or the promotion of a particular point of view. The Commission also considered that the Applicant's purposes did not amount to "any other matter beneficial to the community" (section 5(1) of the Act) as the Applicant had not shown that "the cable car transport and the re-introduction of a cable car would provide a public benefit".

7. The Applicant responded to the notice on 2 September 2009, attaching a written submission in support of its application for registration dated 27 August 2009. The Applicant's submission included the following:

- *Given the widespread support of the Dunedin community, the reintroduction of the High Street Cable Car Line will qualify for substantial funding from a wide range of regional and national sources*
- *The Dunedin Cable Car Trust believes the reintroduction of the High Street Cable Car Line and the promotion of cable car transport has significant benefits for Dunedin's long-term well-being and will make a major contribution to the community outcomes the Dunedin City Council has endorsed.*
- *As well as advancing education benefits to the community through the utilisation of research and development and related facilities within University of Otago, the Dunedin Cable Car Trust will seek to advance its charitable purposes of education and benefit to the community through a diverse range of multi-media publications and audio-visual presentations of archival and historical records and material relating to cable car transportation in Dunedin.*
- *To help ensure that learning and education is advanced for the benefit of the community, a purpose-built cable car house will be built on reserve land between Eglinton Road and Mornington Park to house the cable cars and power station as well as a dedicated Cable Car Museum, information displays, a café and restrooms and other community facilities including a children's playground.*
- *The reintroduction of the High Street Cable Car Line will reinstate an iconic and authentic landmark of Dunedin's proud heritage and enhance and develop it for future generations to marvel at and enjoy.
It will also develop and enhance Dunedin's reputation as the heritage capital of New Zealand.*
- *The reintroduction of the High Street Cable Car Line will provide Dunedin with an effective and eco-friendly form of public transport that people will want to use. Cable car transportation provides a sustainable form of transport – no direct carbon emissions – leading to a healthier environment for the community.*
- *It will also constitute a significant community project for Dunedin with a wide range of public benefits contributing to city and regional aspirations and community outcomes including education and research, technology and innovation, culture and heritage, leisure and recreation, health and community well-being, sustainable city and environment.*

The issues

8. The Commission must consider whether the Applicant meets all of the essential requirements for registration under 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 purpose in section 5(1) of the Act.

The law on charitable purpose

9. Under section 13(1)(a) of the Act, in order to meet the essential requirements for registration, 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.
10. In order to be a valid trust at law, a trust that is for charitable purposes must be exclusively charitable or it will be void for uncertainty.
11. In order for a purpose to be charitable, it must fall within the definition of charitable purpose set out in section 5(1) of the Act. 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.
12. In addition, a purpose must be for the public benefit.¹ This means that the purpose must be directed at benefitting the public or a sufficient section of the public.
13. Section 5(3) of the Act provides that for an entity to have charitable purposes, any non-charitable purpose must be ancillary to a charitable purpose.
14. In considering an application for registration, section 18(3)(a) of the Act requires the Commission to have regard to the Applicant's activities at the time the application was made, the Applicant's proposed activities, and any other information that the Commission considers relevant.

Charities Commission's analysis

15. The Commission considers that the purposes outlined in clauses 3(e) and 3(f) of the Trust Deed are ancillary. The Commission considers that the purposes outlined in clauses 3(a), 3(b), 3(c) and 3(d) are not aimed at the relief of poverty or at the advancement of religion. The Commission has therefore considered whether these purposes are charitable under the advancement of education and any other matter beneficial to the community.

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

Advancement of education

16. In order for a purpose to advance education, it must provide some form of education and ensure that learning is advanced. Education does not include advertisements for particular goods or services, promotion of a particular point of view, or the study of subjects that have no educational value.²
17. In *Re Shaw (deceased)* 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.”³ Moreover, in *Travel Just v Canada Revenue Agency*⁴, the Canadian Federal Court of Appeal doubted that the dissemination of tourism information would qualify as either publication of research or an educational purpose.
18. The purposes set out in clauses 3(a) and (b) are:
 - (a) *to educate and stimulate public interest in the re-introduction of heritage cable car transportation systems in the city of Dunedin and nation wide;*
 - (b) *to promote and assist with the re-establishment of the High Street cable car and line from the Dunedin Exchange area to Mornington;*
19. The Commission considers that the purposes in clauses 3(a) and (b) will not amount to advancing education because they are aimed at promoting a particular point of view which courts have held to be a non-charitable purpose.⁵
20. The Applicant submits, in its letter of 2 September 2009, that it will advance education through:
 - providing a cable car museum;
 - developing working relationships with University of Otago departments such as the Department of Design Studies and the Centre of Innovation;
 - developing educational and learning programmes through primary and secondary schools and tertiary institutions to ensure children of every age learn and appreciate the value of heritage cable car transportation in modern society; and

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 and *Re Bushnell (deceased)* [1975] 1 All ER 721, 729.

³ [1957] 1 WLR 729. (See also *Re Hopkins' Will Trusts* [1965] 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, 352.)

⁴ 2006 FCA 343, [2007] 1 CTC 294.

⁵ *The Margaret Thatcher Foundation* [1991] Ch Com Rep 39-41 App D(a) cited by Hubert Picarda, *The Law and Practice Relating to Charities*, London, Butterworths, 1999, page 49.

- providing scholarships, contests and prizes for children of all ages to write essays and paint pictures about the cable car.
21. The Commission considers that while the above activities may be charitable under the advancement of education, they are not reflected in the Applicant's stated purposes. Further, the Commission considers them to be ancillary to the Applicant's primary purposes.

Other matters beneficial to the community

22. In order for a purpose to qualify as "any other matter beneficial to the community", the purpose must be beneficial to the community and must be within the spirit and intendment of the purposes set out in the Preamble to the *Charitable Uses Act 1601* (the Statute of Elizabeth). The purposes in the Preamble are as follows:
- 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.⁶
23. Not all organisations that have purposes that benefit the community will be charitable. In *Williams Trustees v Inland Revenue Commissioners*⁷ the House of Lords had to decide if a trust was established exclusively for charitable purposes. The House of Lords stated:

Now Sir Samuel Romilly did not mean, and I am certain Lord Macnaghten did not mean to say that every object of public general utility must necessarily be a charity. Some may be and some may not

⁶ *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.

⁷ [1947] AC 447, 455. That case was heavily relied upon and quoted by Kennedy J In *re Cumming* [1951] NZLR 498.

be. ... Lord Macnaghten did not mean that all trust for purposes beneficial to the community are charitable, but that there were certain beneficial trusts which fell within that category: and accordingly to argue that because a trust is for a purpose beneficial to the community it is therefore a charitable trust is to turn round his sentence and to give it a different meaning.. So here, it is not enough to say that the trust in question is for public purposes beneficial to the community or for the public welfare: you must also show it to be a charitable trust.

24. Courts have found a number of purposes involving public works or services to be charitable under “any other matter beneficial to the community”. The repair or building of highways and roads⁸, providing a supply of pure water for the use of the inhabitants of a town⁹, providing a town with lighting¹⁰, building a workhouse¹¹; providing a cemetery or crematorium¹² and providing a public car park¹³ have all been held to be charitable. Moreover, the beautification¹⁴, preservation¹⁵ or improvement of a locality¹⁶ has also been held to be charitable under this head.

25. In *Travis Trust v Charities Commission*¹⁷, Joseph Williams J stated:

But, as Lord Bramwell said in the same case [Commissioners for Special Purposes of the Income Tax v Pemsel [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 has now long been held, any cases in which purposes have been found to be within the spirit and intendment of the preamble by analogy.

26. The purposes set out in clauses 3(c) and (d) are:

(c) *to integrate cable car transportation as part of Dunedin’s public transport system for the benefit of the community;*

⁸ *Attorney-General v Harrow School (Governors) (1754) 2 Ves Sen 551; Attorney-General v Day [1900] 1 Ch 31; Morgan v Wellington City Corporation [1975] 1 NZLR 416, CA.*

⁹ *Jones v Williams (1976) Amb 651.*

¹⁰ *Attorney-General v Heelis (1824) 2 Sim & St 67, 76-77.*

¹¹ *Attorney-General v Lizard (1855) 21 Beav 223; Re St Botolph Without Bishopsgate (Parish Estates) (1887) 35 Ch D 142; Webster v Southey (1887) 36 Ch Div 9.*

¹² *Attorney-General v Lizard (1855) 21 Beav 223; Scottish Burial Reform and Cremation Society Ltd v Glasgow Corp [1968] AC 138.*

¹³ *Saffron Walden Pig Market Essex [1980] Ch Com Rep 37-38, paras 126-134.*

¹⁴ *Re Pleasants (1923) 39 TLR 675, 675 per Russel J; Schellenberger v Trustees Executors and Agency Co Ltd (1952) 86 CLR 454, 461; Re Spehr (deceased) [1965] VR 770, 774-775; Re Ctoon Trust for Rural Beautification (1980) 117 DLR (3d) 542, 545.*

¹⁵ *Re Verrall [1916] 1 Ch 100, 114-116; Scott v National Trust for Places of Historic Interest or Natural Beauty [1998] 2 All ER 705, 710.*

¹⁶ *Re Bones [1930] VLR 346; Monds v Stackhouse (1948) 77 CLR 232, 246.*

¹⁷ *CIV-2008-485-1689, High Court, Wellington, 3 December 2008 (Joseph Williams J.).*

(d) *to promote and develop cable car lines, facilities and recreational services for the benefit and enjoyment of the community generally (as amended);*

27. If the purposes outlined in clauses 3(c) and 3(d) are considered analogous to “the repair of bridges, ports, havens, causeways, churches, sea banks, and highways” in the Statute of Elizabeth, then they may be charitable under “other matters beneficial to the community”.

Public or private benefit?

28. 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.¹⁸ 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.¹⁹

29. In *Vancouver Society of Immigrant and Visible Minority Women v MNR*,²⁰ the Supreme Court of Canada summarised what is meant by the public benefit requirement. Gonthier J stated “[t]here must be an objectively measurable and socially useful benefit conferred; and it must be a benefit available to a sufficiently large section of the population to be considered a public benefit.”²¹

30. The Applicant has advised that:

The main aim of the Dunedin Cable Car Trust is to reintroduce the Dunedin High Street Cable Car Line from the Exchange up to Mornington and to create a world-class tourist attraction in the centre of the city for the benefit of commuters and tourist alike. ...

The creation of such an exciting tourist attraction would also add real value to Otago’s regional rail sector market development potential. Much like a magic carpet ride, cable car passengers would thrill to the unique roller coaster ride down one of Dunedin’s steepest streets to the centre of the city. The ‘bungy jump’ of cable car travel right there in Dunedin.

¹⁸ *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.

¹⁹ *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:

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.

²⁰ [1999] 1 SCR 10.

²¹ *Vancouver Society of Immigrant and Visible Minority Women v MNR* [1999] 1 SCR 10 at para 41 per Gonthier J (dissenting).

*It would develop and enhance Dunedin's growing international reputation as a major rail tourism destination and could be promoted and marketed as part of a total package of rail and cable car experiences.*²²

31. In *Commissioners of Inland Revenue v Oldham Training and Enterprise Council*²³ the court decided that the public benefit requirement was not met because:

...the existence of these objects [promoting trade, commerce and enterprise, and providing support services and advice to and for new businesses], 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.

32. Similarly, in *Travel Just v Canada (Canada Revenue Agency)*,²⁴ the Canadian Federal Court of Appeal considered that the entity would not meet the requirement of the public benefit test because it would benefit individuals:

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.

33. The Commission considers that the Applicant has not shown that it provides “an objectively measurable and socially useful benefit” and that the tourist aspect may provide private benefits to local individual business operators.

Conclusion

34. The Commission concludes that the purposes in clauses 3(c) and (d) may be charitable, but that the main purposes in clauses 3(a) and (b) are non-charitable for the reasons given above.

Section 61B of the Charitable Trusts Act

35. 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. However, section 61B of the Charitable Trusts Act 1957 can operate in two situations to “save” a trust that has both charitable and “non-charitable and invalid” purposes.

²² Proposal to Reintroduce The Dunedin High Street Cable Car Line, 8 September 2008.

²³ (1996) 69 Tax Cases 231, 251.

²⁴ 2006 FCA 343 [2007] 1 CTC 294, para 9.

36. 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).²⁵
37. The Commission considers that the purposes in clauses 3(c) and (d) may be charitable, but that the main purposes in clauses 3(a) and (b) are non-charitable for the reasons given above. If the purposes in clauses 3(a) and (b) were "blue-pencilled out", the Applicant would be left with a very limited purpose and would not be able to carry out its main purpose, which is to generate support for the reintroduction of the Dunedin High Street Cable Car. The Commission therefore concludes that the Applicant does not have substantially charitable purposes.
38. In *Re Beckbessinger*²⁶, 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.*
39. The Commission has analysed the wording of the Applicant's purposes, surrounding context, and activities (as directed by section 18 of the 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. The Commission does not consider that the purposes indicate an intention to create a substantially charitable trust.
40. 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.

Charities Commission's determination

41. The finding of the Commission is 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 Act.

²⁵ *Re Beckbessinger* [1993] 2 NZLR 362, 373.

²⁶ *Re Beckbessinger* [1993] 2 NZLR 362, 376.

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

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Trevor Garrett
Chief Executive

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Date