

## **Deregistration decision: Film New Zealand Trust**

### **The facts**

1. Film New Zealand Trust (the Trust) was established by trust deed on 10 November 2003 and incorporated under the *Charitable Trusts Act 1957* on 18 November 2003. The Trust was registered as a charitable entity under the *Charities Act 2005* (the Act) by the Charities Commission (the Commission) on 30 January 2008.
2. The Trust's purposes are set out in clause 4.2 of the Trust Deed:

**4.2 Objects:** *The objects for which the Trust is established are:*

- (a) *to encourage and facilitate artistic achievement in the New Zealand screen production industry, by improving and developing the skills of, and opportunities for, people within the New Zealand screen production industry, for the general benefit of the New Zealand public;*
- (b) *to collaborate with the regional film offices to coordinate activities;*
- (c) *to increase the opportunity for New Zealanders to be involved in screen production, and to be engaged in work related to screen production, and to maximise employment and enterprise opportunities for New Zealand individuals and organisations provided that this object is for the promotion of the public benefit and any benefit to private individuals or organisations is merely incidental;*

*in each case, in close cooperation with the New Zealand Government, the New Zealand Film Commission, NZ On Air, or any other relevant agencies, and the New Zealand screen production industry, for the general benefit of the New Zealand public.*

**4.3 Application of objects:** *To the extent to which, and the means by which, the Trust fulfils its objects, are (subject to the terms of this deed) to be entirely within the discretion of the Trustees.*

**4.5 Activities in New Zealand:** *Notwithstanding any other term of this deed, the Objects for which the Trust is established and the activities for which the Trust Fund may be applied are limited to charitable purposes within New Zealand.*

3. Some time after the Trust's registration, the Commission received information from an applicant for registration with similar purposes to the Trust. That information led to a decision by the Commission to review the Trust's eligibility for registration.
4. The Commission commenced an investigation into the Trust once its annual return and financial report for the period ending 30 June 2009 had been received.
5. The Commission reassessed the Trust's purposes and the grounds for registration, drawing on information available on the Trust's website and its annual return. This information gave more insight into the Trust's purposes than was possible at the time of registration.
6. On 9 March 2010, the Commission sent the Trust a notice of intention to remove from the register on the basis that it was not a trust of a kind in relation to which an amount of income is derived by the Trustees in trust for charitable purposes.
7. On 17 March 2010, the Trust responded to the notice, informing the Commission it intended to file an objection to removal from the register and requesting an extension of the time in which to make submissions supporting the objection.
8. On 22 March 2010, the Commission notified the Trust by email that a time extension had been granted until 27 May 2010. No response was received by that date.
9. On 20 July 2010, the Commission made a follow up phone call to the Trust's Chief Executive. The Chief Executive advised that she intended discussing the situation with the Trust's solicitors in a week's time. Following this phone conversation, the Commission decided to allow another week to enable the Trust to consult its solicitors before making submissions supporting its objection to removal from the register. No response was received.
10. On 5 August 2010, the Commission sent an email to the Trust's Chief Executive asking her to contact the Commission to clarify whether the Trust still intended to make submissions.
11. On 9 August 2010, the Trust's Chief Executive advised the Commission by phone that she had spoken with the Trust's solicitors and auditors and intended for the auditors to make submissions on the Trust's behalf. The Commission responded by email requesting that submissions be received by 23 August 2010 or that a request for a further time extension be made by that date. No response has been received.

## The issues

12. The Commission must consider whether the Trust is not, or is no longer, qualified for registration as a charitable entity under section 32(1)(a) of the Charities Act.
13. In order to be qualified for registration, the Trust must meet all of the essential requirements for registration under the Act. In this case, the key issue for consideration is whether the Trust is 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.
14. In particular, the Commission must consider:
  - whether all of the Trust's purposes fall within the definition of charitable purpose in section 5(1) of the Act and,
  - if there are any non-charitable purposes, whether these are merely ancillary to a primary charitable purpose or amenable to the operation of section 61B of the Charitable Trusts Act 1957.

## The law on charitable purposes and deregistration

15. Section 13 of the Charities Act sets out the essential requirements for registration. Under 13(1)(a), 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.
16. 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.<sup>1</sup> This means that the purpose must be directed to benefiting the public or a sufficient section of the public.
17. In relation to non-charitable purposes carried on by an entity, section 5(3) of the Act provides that any non-charitable purpose that is merely ancillary to a charitable purpose will not prevent an entity from qualifying for charitable status.
18. Further, in relation to non-charitable purposes carried on by a trust, section 61B of the *Charitable Trusts Act 1957* may also operate to save a trust that has both charitable and non-charitable purposes.
19. Section 32(1)(a) of the Act provides that the Commission may remove an entity from the register if the entity is not, or is no longer, qualified for registration as a charitable entity.

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

20. When considering whether a registered entity continues to qualify for charitable status, section 50(2) of the Act empowers the Commission to examine and enquire into matters in connection with charitable entities or persons, including:
- (a) *the activities and proposed activities of the charitable entity or person:*
  - (b) *the nature, objects, and purposes of the charitable entity:*
  - (c) *the management and administration of the charitable entity:*
  - (d) *the results and outcomes achieved by the charitable entity or person:*
  - (e) *the value, condition, management, and application of the property and income belonging to the charitable entity or person.*
21. Under section 35(1)(a) of the Act, if an objection to the removal of an entity from the register is received, the Commission must not proceed with the removal unless it is satisfied that it is in the public interest to proceed with the removal and at least one ground for removal has been satisfied.

## **The Trust's activities**

22. The "About Film New Zealand" page on the Trust's website states:

*Film New Zealand is a member of the Association of Film Commissioners International (AFCI) and is New Zealand's national film locations office facilitating access both nationally and internationally to New Zealand as one of the world's best screen production destinations.*

*Film New Zealand provides a complete introduction service for those wishing to film in New Zealand. We can supply everything you need to know about our locations, facilities, crews, permits, immigration, transport and accommodation.*

*We aim to ensure that everyone has a satisfying experience of filming in New Zealand and we will do everything in our power to ensure this happens.*

*New Zealand's film friendly network reaches throughout the country and Film New Zealand works collaboratively with the country's regional film offices. Using our comprehensive in-house database we can provide a fast, educated response to any inquiry - whether it be a TV commercial, telefeature, documentary or feature film.*

*Film New Zealand is an independent, industry-led organisation, governed by a Board of Trustees representing industry and government.<sup>2</sup>*

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<http://www.filmnz.com/about-filmnz.html>

23. The Trust's website also provides the following information about the Trust's activities:

- Provides a comprehensive on-line database resource for the screen production industry including a services directory,<sup>3</sup> location gallery, funding directory,<sup>4</sup> equipment hire directory,<sup>5</sup> directories of production and post production commercial contacts and service providers<sup>6</sup>
- Strategic partnership with New Zealand Film Commission supporting domestic screen production and providing information on incentives including the Large Budget Screen Production Grant<sup>7</sup>
- Strategic partnership with New Zealand Trade and Industry
- Receives sponsorship from businesses supporting the New Zealand screen production industry<sup>8</sup>

### Charities Commission analysis

24. The Commission has assessed the Trust's stated purpose clauses drawing on information available on the Trust's website, the Trust's financial records for the year ending 30 June 2009, and the relevant case law.

25. The Commission considers that clause 4(b) is ancillary. The Trust's purposes in clause 4.2(a) do not disclose an intention to relieve poverty or advance religion. This clause has therefore been considered in relation to the advancement of education and "other matters beneficial to the community". The purposes in clause 4.2(c) do not disclose an intention to advance education or religion, this clause has therefore been considered in relation to the relief of poverty and "other matters beneficial to the community".

### Effect of clause purporting to limit purposes

26. Clause 4.5 of the trust deed states:

***Activities in New Zealand:*** *Notwithstanding any other term of this deed, the Objects for which the Trust is established and the activities for which the Trust Fund may be applied are limited to charitable purposes in New Zealand.*

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<sup>3</sup> <http://www.filmnz.com/a-z-directory.html> "A-Z Directory"

<sup>4</sup> <http://www.filmnz.com/production-guide/finance-film.html> "Financing"

<sup>5</sup> <http://www.filmnz.com/production-guide/equipment-hire.html> "Equipment hire"

<sup>6</sup> <http://filmnz.org.nz/production-contacts/post-production.html> "Post Production contacts"

<sup>7</sup> <http://filmnz.org.nz/about-filmnz.html#strategic-partners> "Strategic Partners"

<sup>8</sup> <http://filmnz.org.nz/about-filmnz.html#strategic-partners> "Strategic Partners"

27. In *M K Hunt Foundation Ltd v Commissioner of Inland Revenue*,<sup>9</sup> Hardie Boys J cited with approval the comments Lawrence LJ made in *Keren Kayemeth le Jisroel Ltd v Commissioners of Inland Revenue*.<sup>10</sup> In that case, the statute under consideration contained the phrase ‘for charitable purposes only’, and Lawrence LJ said in the Court of Appeal that “it is not enough that the purposes described in the memorandum should include charitable purposes. The memorandum must be confined to those purposes”.<sup>11</sup> Hardie Boys J further wrote that

*... in so holding, Lawrence L.J. makes it clear in his judgment that he had in mind, not merely the phrase ‘charitable purposes only’, but also the cases which show that non-charitable objects will prevent recognition of the body in question as a charitable trust.*<sup>12</sup>

28. In *Commissioner of Inland Revenue v White*,<sup>13</sup> the Court considered limitations in the constitution of the Clerkenwell Green Association. The court noted that the constitution showed a clear intention that this object was exclusively charitable but went on to say:

*The charitable intention, clear as it is, is not conclusive in establishing charitable status, however, because clause 2(b) limits the field in which the charitable intention is to be effectuated. If the objects specified in clause 2(b) are of such a nature that there is not charitable purpose which will assist their achievement, then there is no charitable purposes within the specified field and the Association would not be entitled to registration as a charity. In other words, the mere insertion of the word “charitable” in clause 2(b) is not by itself enough to establish that the objects of the Association are charitable.*<sup>14</sup>

29. In *Canterbury Development Corporation v Charities Commission*,<sup>15</sup> Young J wrote:

*... the mere fact that the constitution says that CDC’s objects are charitable does not make CDC charitable although such a declaration is relevant in assessing whether they are.”<sup>16</sup> The Judge went on to say “in the end the objects and operation of the organisations either support a charitable purpose or they do not.”<sup>17</sup>*

30. Young J concluded that the objects and operation did not support a charitable purpose.

31. The Commission does not consider that the inclusion of clause 4.5 provides conclusive evidence that the Trust’s purposes are in fact exclusively charitable.

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<sup>9</sup> [1961] NZLR 405, 407.

<sup>10</sup> [1932] 2 KB 465.

<sup>11</sup> [1931] 2 KB 465, 481.

<sup>12</sup> [1961] NZLR 405, 408.

<sup>13</sup> (1980) 55 TC 651.

<sup>14</sup> (1980) 55 TC 651, 653.

<sup>15</sup> HC WN CIV 2009-485-2133 [18 March 2010].

<sup>16</sup> HC WN CIV 2009-485-2133 [18 March 2010] at para 56.

<sup>17</sup> HC WN CIV 2009-485-2133 [18 March 2010] at para 56.

## Relief of Poverty

32. To be charitable as 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.
33. The law interprets “poverty” broadly so a person does not have to be destitute to qualify as poor.<sup>18</sup> People who are in need, aged,<sup>19</sup> or who are suffering genuine financial hardship from a temporary or long-term change in their circumstances are likely to qualify for assistance. Generally, this will include anyone who does not have access to the normal things of life that most people take for granted.<sup>20</sup> To provide “relief”, the people who would benefit should have an identifiable need arising from their condition that requires alleviating and these people should have difficulty in alleviating that need from their own resources.<sup>21</sup>
34. In relation to purposes purporting to be provided for the relief of poverty, Young J in *Canterbury Development Corporation v Charities Commission*,<sup>22</sup> stated:

*The appellant submits that "the generation of jobs is a purpose that is entirely within the meets and bounds of the relief of poverty, head of charity". The appellant's case is that the work of the CDC creates jobs and therefore benefits the unemployed in two ways:*

- (a) *where there is a chain of employment the creation of a new job results in movement of employed persons thus leaving employment for the unemployed*
- (b) *the creation of skilled jobs creates the needs for service jobs thus providing jobs for the unemployed*

*I do not consider the purpose of CDC is to assist the unemployed and thereby relieve poverty. I accept the unemployed could be one of the ultimate beneficiaries of its work. The aim of the CDC is to assist businesses to prosper (within the criteria of those whom it will help). This in turn, it believes, will contribute to Christchurch and Canterbury's economic wellbeing. As a result jobs may be created and those who are unemployed may obtain some of those jobs.*

*In considering whether the purpose of the CDC is the relief of the unemployed it is appropriate to consider both the terms of the constitution and the activities of CDC (s18(3)). The only purpose which deals with unemployment is the initial part of cl 2.2(a). None of the activities of the CDC are directly focused on the creation of employment for the unemployed.*

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<sup>18</sup> *Re Bethel* (1971) 17 DLR (3d) 652 (Ont: CA); affirmed sub nom *Jones v Executive Officers of T Eaton & Co Ltd* (1973) 35 DLR (3d) 97 (SCC) referred to in *D V Bryant Trust Board v Hamilton City Council* [1997] 3 NZLR 342. See also *re Pettit* [1988] 2 NZLR 513.

<sup>19</sup> *D V Bryant Trust Board v Hamilton City Council* [1997] 3 NZLR 342.

<sup>20</sup> *Inland Revenue Commissioners v Baddeley* [1955] AC 572; [1955] 1 All ER 525, applied in *re Pettit* [1988] 2 NZLR 513 and *Re Centrepont Community Growth Trust* [2000] 2 NZLR 325.

<sup>21</sup> *Joseph Rowntree Memorial Trust Housing Association Ltd v Attorney-General* [1983] Ch D 1 All ER 288. See also *D V Bryant Trust Board v Hamilton City Council* [1997] 3 NZLR 342.

<sup>22</sup> HC WN CIV 2009-485-2133 [18 March 2010] paras 27-29.

*What is illustrated by this analysis is that the purpose of CDC is not relief of poverty through providing those who are unemployed with jobs. It is to improve the general economic wellbeing of the area. In that sense, therefore, CDC's purpose cannot be the relief of poverty. The possibility of helping someone who is unemployed is too remote for it to qualify as the charitable purpose of relief of poverty.*

35. The Trust's purpose in clause 4.2(c) is:

*to increase the opportunity for New Zealanders to be involved in screen production, and to be engaged in work related to screen production, and to maximise employment and enterprise opportunities for New Zealand individuals and organisations provided that this object is for the promotion of the public benefit and any benefit to private individuals or organisations is merely incidental;*

36. To the extent that the Trust's activities result in disadvantaged/poor people gaining employment, the Commission acknowledges such activities may support a charitable purpose of relieving poverty. However, the purposes in clause 4.2(c) are not directed at people who are necessarily poor or disadvantaged. In addition, the Trust's website does not provide any information that suggests it seeks to create employment for poor or otherwise disadvantaged people. The Commission therefore does not consider the purpose in clause 4.2(c) is charitable as the relief of poverty.

#### Advancement of education

37. In order for a purpose to advance education, it must provide some form of education and ensure that learning is advanced. The modern concept of "education" covers formal education, training and research in specific areas of study and expertise. It can also include less formal education in the development of individual capabilities, competencies, skills, and understanding, as long as there is a balanced and systematic process of instruction, training and practice.<sup>23</sup> In order to advance education, learning must be passed on to others.
38. Education does not include advertisements for particular goods or services or promotion of a particular point of view.<sup>24</sup> If research is being conducted, it must be carried out in an objective and impartial way and the useful results made available, or accessible to the public.
39. In the New Zealand High Court case of *Re Collier (deceased)*<sup>25</sup>, Hammond J set out the test for determining whether the dissemination of information qualified as charitable under the head of advancement of education:

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<sup>23</sup> *Re Mariette* [1915] 2 Ch 284. (See also *Chesterman v Federal Commissioner of Taxation* (1923) 32 CLR 362; *Lloyd v Federal Commissioner of Taxation* (1955) 93 CLR 645; *Chartered Insurance Institute v London Corporation* [1957] 1 WLR 867; *Flynn v Mamarika* (1996) 130 FLR 218.)

<sup>24</sup> *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.

<sup>25</sup> [1998] 1 NZLR 81, 91-92



*It must first confer 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, deceased [1968] VR 390 the testator's manuscripts were held to be literally of no merit or educational value.*

40. In *Vancouver Society of Immigrant and Visible Minority Women v Minister of National Revenue*<sup>26</sup>, Iacobucci J stated:

*[T]he threshold criterion for an educational activity must be some legitimate, targeted attempt at educating others whether through formal or informal instructions, training, plans of self study, or otherwise.*

41. The Trust's purpose in clause 4.2(a) is:

*to encourage and facilitate artistic achievement in the New Zealand screen production industry, by improving and developing the skills of, and opportunities for, people within the New Zealand screen production industry, for the general benefit of the New Zealand public;*

42. The Commission acknowledges that the language used in clause 4.2(a) is capable of identifying a purpose that may advance education *in the modern context*. However, the Commission has not been able to find any information on the Trust's website or elsewhere that suggests the Trust provides any particular form of education. Insofar as clause 4.2(a) relates to the advancement of education therefore, the Commission considers that this purpose does not appear to be a primary purpose of the Trust.

43. In addition, the Commission is concerned that the purposes do not meet the public benefit requirements essential for registration as a charity.

44. *Re Mason*<sup>27</sup> concerned an entity involved in the production and publication of law reports and the provision of a law library primarily for use by lawyers, law students and judges. The New Zealand Supreme Court in this case held the objects of the Auckland District Law Society to be entirely wholesome and likely to lead to the *ultimate* benefit of the public. However, the Court considered this fell short of making the society a charity, distinguishing between charitable institutions whose main object was the advancement of education, which provided a clear public benefit, and non-charitable institutions whose main object was the protection and advantage of those practising in a particular profession.

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<sup>26</sup> (1999) 169 DLR (4<sup>th</sup>) 34, 114.

<sup>27</sup> [1971] NZLR 714, 721.

45. McMullin J gave examples of charitable institutions, such as an institute of pathology<sup>28</sup> and a college of nursing.<sup>29</sup> His Honour also provided examples of non-charitable institutions such as an insurance institute<sup>30</sup> and a society of writers.<sup>31</sup> These institutions lacked the requisite public benefit because they primarily conferred private benefits on members. It is clear that the promotion of charitable purposes must be an entity's predominant object and any private benefits to individuals that result from an entity's activities must be of a subsidiary or incidental nature.<sup>32</sup>
46. While the distinction in *Re Mason* was drawn in relation to the different issue of whether purposes that predominantly benefit a beneficiary class of "professionals" is charitable, the Commission considers the issue here is analogous and the reasoning is therefore of relevance.
47. Applying the reasoning in *Re Mason* to the present case, the Commission considers that individuals working within the screen production industry are the primary beneficiaries of the purpose expressed in clause 4.2(a) and the benefits conferred are of a predominantly private nature.
48. The Commission therefore does not consider that the Trust's purposes are charitable as the advancement of education.

#### Any other matter beneficial to the community

49. In order to be considered charitable as "any other matter beneficial to the community", purposes 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)<sup>33</sup>, namely:
- 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

<sup>28</sup> *Royal College of Surgeons of England v National Provincial Bank* [1952] AC 631; [1952] 1 All ER 984.

<sup>29</sup> *Royal College of Nursing v St Marylebone Corporation* [1959] 1 WLR 1077; [1959] 3 All ER 663.

<sup>30</sup> *Chartered Insurance Institute v Corporation of London* [1957] 1 WLR 867.

<sup>31</sup> *Society of Writers to Her Majesty's Signet v Commissioners of Inland Revenue* (1886) 2 TC 257.

<sup>32</sup> *Inland Revenue Commissioners v City of Glasgow Police Athletic Association* [1953] AC 380.

<sup>33</sup> *Re Jones* [1907] SALR 190, 201; *Williams Trustees v Inland Revenue Commissioners* [1947] AC 447, 455; *Scottish Burial Reform and Cremation Trust 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 Trust of Accountants v Commissioner of Inland Revenue* [1986] 1 NZLR 147, 157; *Re Tennant* [1996] 2 NZLR 633, 638.

- 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.
50. However, not all organisations having purposes that benefit the community will be charitable. The purposes must benefit the community in a way that the law regards as charitable.
51. 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.*<sup>34</sup>
52. In *Travis Trust v Charities Commission*,<sup>35</sup> William J notes that;
- ...regard must be had to the particular word 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.*
53. In *Canterbury Development Corporation v Charities Commission*,<sup>36</sup> when discussing whether economic development can fall within the “spirit and intendment of the Statue of Elizabeth”, Ronald Young J stated:
- 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.***<sup>37</sup> [emphasis added]
54. The dictum of Ronald Young J is demonstrated in cases such as *Re Tennant*<sup>38</sup>, *Tasmanian Electronic Commerce Centre Pty Ltd v Commissioner of Taxation*<sup>39</sup> where economic development has been recognised as charitable in circumstances where essential services are required or where the community is under a particular disadvantage.
55. *Re Tennant* related to the gift of a creamery to a rural community. In that case, Hammond J stated:

<sup>34</sup> 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.

<sup>35</sup> HC WN CIV 2008-485-1689 [3 December 2008] at para 20.

<sup>36</sup> HC WN CIV 2009-485-2133 [18 March 2010].

<sup>37</sup> HC WN CIV 2009-485-2133 [18 March 2010] at para 42.

<sup>38</sup> [1996] 2 NZLR 633.

<sup>39</sup> (2005) 142 FCR 371.

*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.<sup>40</sup>*  
[Emphasis added]

56. Similarly, in *Tasmanian Electronic Commerce Centre Pty Ltd v Federal Commissioner of Taxation*, the Australian Federal Court of Appeal decided that the entity was charitable because it was created to develop 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 those 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.<sup>41</sup>* [Emphasis added]

57. On the other side of the case law recognising the circumstances in which economic development may be charitable is *Commissioners of Inland Revenue v Oldham Training and Enterprise Council*<sup>42</sup> where an entity whose purposes were to promote trade, commerce, enterprise and support services and advice to new businesses was held to be not charitable. The court in this case stated,

*On any fair reading, [the purposes] 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.*

58. The case law above demonstrates that economic development may be a charitable purpose when it is aimed at providing an essential service or when directed to a disadvantaged community. The Commission does not consider that the film industry meets an “essential” need of the New Zealand community and the general New Zealand community cannot be regarded as “disadvantaged”. For these reasons the Commission does not consider the purposes in clauses 4.2(a) and (c) are within the spirit and intentment of the purposes set out in the Statute of Elizabeth.

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<sup>40</sup> *Re Tennant* [1996] 2 NZLR 633, 640.

<sup>41</sup> (2005) 142 FCR 371, 389.

<sup>42</sup> (1996) 69 Tax Cases 231, 251.

## Private or public benefit

59. 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 Company’s activities must only be a means of achieving an ultimate public benefit and therefore be ancillary or incidental to it. It will not be a public benefit if the private benefits are an end in themselves.<sup>43</sup> In addition, proof that public benefit will necessarily flow from each of the stated purposes is required, not merely a belief that it will or may occur.<sup>44</sup>
60. The Courts have found the promotion of industry and commerce to be charitable under any other matter beneficial to the community when it is for public benefit and not for the benefit of private individuals.
61. Thus, in *Inland Revenue Commissioners v Yorkshire Agricultural Society*<sup>45</sup> the improvement of agriculture was held to be charitable when 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.
62. 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 trustees.*<sup>46</sup>
63. 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 community the gulf is too wide. If there is through it any indirect benefit to the community, it is too speculative.*<sup>47</sup>

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<sup>43</sup> *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.

<sup>44</sup> *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.

<sup>45</sup> [1928] 1 KB 611.

<sup>46</sup> [1951] 1 Ch 132, 142.

<sup>47</sup> [1955] 1 WLR 16, 20 (PC).

64. In *Commissioners of Inland Revenue v White and Others and Attorney General* it was held that the 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 stated:

*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 interests 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.*<sup>48</sup> [Emphasis added].

65. 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.

66. 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.*<sup>49</sup> [Emphasis added].

67. In *Commissioner of Taxation v Triton Foundation*,<sup>50</sup> 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 or inclination to use them", and a number of the resulting inventions had been of benefit to the community.

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<sup>48</sup> (1980) 55 TC 651, 659.

<sup>49</sup> (1996) 69 Tax Cases 231, 251.

<sup>50</sup> (2005) 147 FCR 362.

68. In *Travel Just v Canada (Revenue Agency)*,<sup>51</sup> 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 as described would qualify as either publication of research or an educational purpose.

69. In *Canterbury Development v Charities Commission*, Ronald Young J 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.** ...*

*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 at the core of CDC's operation.<sup>52</sup> [Emphasis added]*

70. The Commission considers that the Trust's purposes are predominantly directed at conferring private benefits on individuals and organisations supporting or working in the film industry. Such purposes might have a beneficial consequence for employment in general but none are directly focussed on creating employment for the unemployed. As such, any public benefit arising from the Trust's activities is too remote to bring the purposes within the spirit and intent of the Charitable Uses Act 1601.

### Conclusion

71. The Commission concludes that the purposes set out in clauses 4.2(a) and (c) are non-charitable purposes. These non-charitable purposes are not ancillary to any charitable purposes and therefore, the Trust does not meet the requirements of section 13(1)(a) of the Act.

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<sup>51</sup> 2006 FCA 343 [2007] 1 CTC 294, 2007 DTC 5012 (Eng) 354 NR 360.

<sup>52</sup> *Canterbury Development v Charities Commission* HC WN CIV 2009-485-2133 [18 March 2010] at paras 60, 67.

## Section 61B of the *Charitable Trusts Act 1957*

72. 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.
73. 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).<sup>53</sup>
74. 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.*<sup>54</sup>
75. The Commission has analysed the wording of the Trust’s purposes, surrounding context, and activities. 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.
76. On this basis, the Commission considers that the Trust’s purposes are not substantially charitable and therefore section 61B of the *Charitable Trusts Act 1957* cannot operate to validate the trust.

## Public interest

77. Section 10(1)(a) of the *Charities Act* obliges the Commission to promote public trust and confidence in the charitable sector. The Commission considers that public trust and confidence in registered charitable entities would not be maintained if entities which did not meet the essential requirements for registration remained on the register. The Commission therefore considers it is in the public interest to remove the *Film New Zealand Trust* from the register.

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<sup>53</sup> *Re Beckbessinger* [1993] 2 NZLR 362, 376.

<sup>54</sup> *Re Beckbessinger* [1993] 2 NZLR 362, 376.



## **Charities Commission's determination**

78. The Commission determines that the Film New Zealand Trust is not, or is no longer, qualified for registration as a charitable entity because it is not a trust of a kind in relation to which an amount of income is derived by the trustees in trust for charitable purposes, as required by section 13(1)(a) of the Charities Act.
79. Under section 35(1) of the Charities Act, the Commission is satisfied that it is in the public interest to proceed with the Trust's removal from the register and that one ground for removal from the register has been satisfied, that is, the Trust is not qualified for registration as a charitable entity.
80. The decision of the Commission is therefore to remove Film New Zealand Trust from the Register, pursuant to section 31 of the Act, with effect from 23 September 2010.

**For the above reasons, the Commission determines to deregister the Trust as a charitable entity by removing the Trust from the Register.**

Signed for and on behalf of the Charities Commission

.....  
Trevor Garrett  
Chief Executive

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Date