

## Registration decision: Greater Auckland Netball Limited

### The facts

1. Greater Auckland Netball Limited (the Applicant) was registered under the Companies Act 1993 on 4 April 2007.
2. The Applicant's application to the Charities Commission (the Commission) for registration as a charitable entity under the Charities Act 2005 (the Act) was completed on 6 October 2009.
3. The Applicant's purposes are set out in clause 3 of its constitution:
  - (3) *Objects and Powers*
    - 3.1 **General:** *The company has been established exclusively to promote amateur sport wholly within New Zealand with the object of managing, operating and governing a team to participate in the Tasman Trophy.*
    - 3.2 **Promotion of Amateur Sport:** *The foregoing activities are to be conducted only so as to facilitate the advancement of or promotion of amateur sport, and are not to be so construed as to authorise the pursuit of any other purpose and in no circumstances may the Company allow any benefit or advantage to be derived in contravention of section CW 39 of the Income Tax Act 2004.*
4. The Commission analysed the application for registration and on 11 November 2009, sent the Applicant a notice advising that its application may be declined on the basis that managing, operating and governing a team to participate in the Tasman Trophy was not a charitable purpose. The notice also advised that the Applicant's winding up provision (in clause 20.3) would allow the transfer of assets to non-charitable purposes and the Applicant's constitution did not contain any clauses preventing private pecuniary profit during the operation of the company.
5. On 1 February 2010, the Applicant responded to the notice submitting that:
  - *Whilst it is acknowledged that part of Greater Auckland Netball purpose is to manage and operate a team in the Tasman Trophy, we have a greater role in advancing and promoting the amateur game of netball. This is done through such things as coaching clinics, school visits, training booklets and educational programmes.*
  - *Greater Auckland Netball does manage and promote a team in the ANZ Championship but it should be acknowledged that:*
    - *This promotion is not done for any commercial gain and this is reflected by a charitable status of its three sole shareholders: Netball Auckland Waitakere Inc, Netball North Inc and Netball Counties Manukau Inc.*
    - *All player payments for playing in the Tasman Trophy are provided by a separate organisation (TransTasman Netball Ltd) and Greater Auckland Netball is not able to influence this money in any way.*

*This transaction (TransTasman Netball to player) should be seen as a reasonable ("arms length") payment for goods and services.*

- *Greater Auckland Netball do not charge fee's for coaching programmes, school visits etc but acknowledge they do charge a fee for attendance at TransTasman games. However again this is not for commercial gain and any possible surplus shall always end in the hands of its three shareholders (all charitable entities).*
  - *To benefit from a Greater Auckland Netball activity (game attendance, school visit, coaching/educational programme) does not involve meeting any standard of skill or ability and does not require participants to purchase expensive uniforms and equipment.*
  - *The purpose of Greater Auckland Netball is to promote the amateur game of netball. One of its key roles is to manage and operate a team in the Tasman Trophy, however managing and operating this team is for the exclusive benefit of its three sole shareholders and these shareholders 100% represent amateur netball.*
  - *We would be happy to add the 3 clauses mentioned (in the notice dated 11 November 2009) to further prevent private pecuniary profit.*
  - *We would be happy to amend clause 20.3 to further ensure that upon winding up any remaining property after debts and liabilities ends in the hands of a charitable purpose.*
6. The Commission considered the information and on 4 February 2010, requested a copy of the Applicant's financial statements. On 5 February 2010, the Applicant provided a copy of its financial statements for the 15-month period ending 31 December 2008.

### **The issues**

7. 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 society or institution established and maintained exclusively for charitable purposes and not carried on for the private pecuniary profit of any individual, as required by section 13(1)(b) 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**

8. Under section 13(1)(b) of the Act, a society or institution must be established and maintained exclusively for charitable purposes, and must not be carried on for the private pecuniary profit of any individual.
9. 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 at benefitting the public or a sufficient section of the public.

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

10. Section 5(3) of the Act provides that any non-charitable purpose must be ancillary to a charitable purpose.
11. Section 18(3)(a) of the Act requires the Commission, in considering a registration application, to have regard to the entity's activities at the time the application was made, the entity's proposed activities, and any other information that the Commission considers relevant.

### **Commission's approach to sport and recreation bodies**

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

*In the area of sport and leisure, the general principle appears to be that sport, leisure and entertainment for its own sake is not charitable but that where these purposes are expressed to be and are in fact the means by which other valid charitable purposes will be achieved, they will be held to be charitable. The deeper purpose of the gift or trust can include not just any of the three original Pemsel heads but also any other purpose held by subsequent cases or in accordance with sound principle to be within the spirit and intendment of the Statute of Elizabeth<sup>2</sup>.*

13. The Commission considers that the above case is authority for the proposition that sporting entities can be charitable if they are advancing another charitable purpose. Examples of other charitable purposes that sporting entities may advance include:
  - Providing community recreational facilities "in the interests of social welfare";
  - Relieving poverty;
  - Advancing education; or
  - Providing a purpose otherwise beneficial to the community, such as promoting health by providing opportunity for participation in amateur sports that involve the pursuit of physical fitness.
14. In addition, in order to be charitable, a sporting entity must provide a public benefit. Factors that may count against this include where:
  - There are unreasonable or unjustifiable restrictions placed on who may benefit from the activity;
  - Prohibitive costs associated with the activity (including fees and equipment) will exclude the less well off;
  - There is an unreasonable risk of injury or harm associated with the activity which will outweigh any benefit to the public;
  - Providing amusement, entertainment, or social activities for members is a primary purpose.

<sup>2</sup> HC WN CIV-2008-485-1689 [3 December 2008] para 52.

## Charities Commission's analysis

15. The Commission considers that the purpose outlined in clause 3.1 does not indicate an intention to relieve poverty, advance education or advance religion. Accordingly, this purpose has been analysed under "any other matter beneficial to the community". First, however, the Commission has considered the effect of clause 3.2.

### Effect of clause appearing to limit purposes

16. Clause 3.2 of the trust deed states:

*The foregoing activities are to be conducted only so as to facilitate the advancement of or promotion of amateur sport, and are not to be so construed as to authorise the pursuit of any other purpose and in no circumstances may the Company allow any benefit or advantage to be derived in contravention of section CW 39 of the Income Tax Act 2004.*

17. The Commission does not consider that clause 3.2 provides conclusive evidence that the foregoing purpose in clause 3.1 is in fact exclusively charitable. Before an applicant can be registered as a charitable entity, the Commission must be certain that the applicant meets all the essential elements of registration set out in section 13 of the Act. In addition, section 18(3)(a) of the Act requires the Commission to have regard to the current and future activities of the applicant.

### Other matters beneficial to the community

18. In order for a purpose to qualify as "any other matter beneficial to the community", the purpose must be beneficial to the community and 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>3</sup>, which 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

<sup>3</sup> *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.

- 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.<sup>4</sup>
19. Over the years, the courts have recognised many new charitable purposes that are substantially similar to those listed in the Statute of Elizabeth, acknowledging that what is accepted as a charitable purpose must change to reflect current social and economic circumstances. In particular, courts have found the promotion of public health to be charitable under this head where the benefit is available to a sufficient section of the public.<sup>5</sup>
20. The Commission considers that the promotion of some amateur sports in New Zealand may promote health through providing the opportunity for individuals to be involved in healthy activity. The promotion of amateur netball would be an example of a sport that would be considered to be charitable under this category. However, not all "amateur sports" will promote health. For example, the promotion of pool or billiards as a sport would not promote health in a charitable sense. Accordingly, the promotion of amateur sport within New Zealand is too broad to be exclusively charitable under "any other matter beneficial to the public".

#### Public benefit

21. In addition to falling within one of the charitable purposes listed in section 5(1) of the Act, a purpose must provide a public benefit, that is, there must be an identifiable benefit assessed in the light of modern conditions and it must be for the general public or a sufficient section of the public.
22. As outlined above, matters that the Commission will look at in determining whether sport and recreation bodies provide a public benefit include:
- Whether there are unreasonable or unjustifiable restrictions placed on who may benefit from the activity?
  - Are there prohibitive costs associated with the activity (including fees and equipment) will exclude the less well off?
  - Is there an unreasonable risk of injury or harm associated with the activity, which will outweigh any benefit to the public?
  - Is providing amusement, entertainment, or social activities for members a primary purpose?
23. In this case, the purpose of the Applicant is to "promote amateur sport wholly within New Zealand with the object of managing, operating and governing a team to participate in the Tasman Trophy".

<sup>4</sup> *Charitable Uses Act 1601* 43 Elizabeth I c. 4.

<sup>5</sup> *McGregor v Commissioner of Stamp Duties* [1942] NZLR 164; *Re Laidlaw Foundation* (1984) 13 DLR (4th) 491.

24. In its letter of the 1 February 2009, the Applicant stated that "one of its key roles is to manage and operate a team in the Tasman Trophy". The financial statements provided by the Applicant show that almost one third of the revenue of the organisation has been paid for "player expenses" (\$415,445) and another third (\$516,140) has been paid for "general administration and employment expenses". Accordingly, it appears that a large amount of the Applicant's expenses is devoted to the Tasman Trophy netball team.
25. In light of the above, the Commission considers that "managing, operating and governing a team to participate in the Tasman Trophy" is an independent and primary purpose of the Applicant.
26. The Tasman Trophy is now called the ANZ Championship, and the ANZ Championship website states that the ANZ Championship "is the first semi-professional netball competition in Australasia"<sup>6</sup>. Moreover, the Applicant has acknowledged that players in the ANZ Championship are paid but that this payment comes from a separate organisation (TransTasman Netball Limited) and should be seen as a reasonable ("arms length") payment for goods and services.
27. The Commission does not consider that managing, operating and governing a team in the Tasman Trophy (ANZ Championship) is a purpose which provides sufficient public benefit to be charitable. The ANZ Championship teams consist of the top netball players in New Zealand and Australia. Participation in such a team is restricted to a very limited number of people based on their skill or ability and would not be open to anyone who wished to participate. Any benefits to members of the public from watching the ANZ Championship would be too remote to render this purpose charitable. Accordingly, the Commission does not consider that the benefits from managing, operating and governing the team would be open to the public or to a significant section of the public.
28. Moreover, as players in the ANZ Championship teams are paid, the Commission does not consider that these teams are "amateur" in nature. It is noted that the Oxford Concise English Dictionary<sup>7</sup> defines "amateur" as "a person who engages in a pursuit, especially a sport, on an unpaid basis".

#### Applicant's Submissions

29. The Applicant has submitted that it has a greater role in advancing and promoting the amateur game of netball through things such as coaching clinics, schools visits, training booklets and educational programmes.
30. The Commission considers that these activities may be charitable under the advancement of education and "any other matter beneficial to the community". However, the Commission notes that these activities are

<sup>6</sup> <http://www.anz-championship.com/teamhistory.asp>, last accessed on the 22 February 2010.

<sup>7</sup> *Concise Oxford English Dictionary*, 2006 (revised) New York, Oxford University Press.

ancillary to the Applicant's primary purpose of "managing, operating and governing a team to participate in the Tasman Trophy".

31. Even if these activities were considered to be primary purposes of the Applicant, this would not be sufficient to render the Applicant exclusively charitable. As indicated in *The Scottish Flying Club Limited*<sup>8</sup> and in *Molloy v Commissioner of Inland Revenue*,<sup>9</sup> the presence of but one main purpose that is not charitable prevents the entity from being registered as a charity.
32. The Applicant has submitted that operating and managing a team in the Tasman Trophy is for the exclusive benefit of its three sole shareholders, and that these shareholders all represent amateur netball.
33. The Commission acknowledges that while the shareholders are involved in promoting amateur netball at all levels, benefiting the shareholders is not a stated purpose of the Applicant. Rather, the Applicant's stated purposes indicate that managing, operating and governing a team to participate in the Tasman Trophy is a primary and independent purpose of the Applicant.

#### Conclusion

34. The Commission concludes that promoting "amateur sport" is too broad to be exclusively charitable. The Commission further concludes that a primary and independent purpose of the Applicant is to manage, operate and govern a team to participate in the Tasman Trophy and that this purpose does not provide sufficient public benefit to be charitable.

#### **Charities Commission's determination**

35. 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 society or institution established and maintained exclusively for charitable purposes, as required by section 13(1)(b)(i) of the Act.

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

Signed for and on behalf of the Charities Commission



.....  
Trevor Garrett  
Chief Executive

15 April 2010

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Date

<sup>8</sup> (1935) SC 817.

<sup>9</sup> [1981] 1 NZLR 688 at 691.