

## Registration Decision: Korako Karetai Trust

### The facts

1. Korako Karetai Trust (the Applicant) was incorporated as a board under the *Charitable Trusts Act 1957* on 20 August 1998. The Applicant applied to the Charities Commission (the Commission) for registration as a charitable entity under the *Charities Act 2005* (the Act) on 27 November 2009.
2. The Applicant's purposes and objects were set out in clause 3.0.0 and 4.0.0 of its trust deed:

#### ***“3.0.0 PURPOSE***

*The purpose of the Trust will be to exercise the sovereign virtue in the exercise of potency and efficacy in the:*

*3.1.0 Negotiation & return of lands as defined in Schedule 1 to this Deed*

*3.2.0 Management of activities on these lands as defined in Schedule 1 to this Deed*

*3.3.0 Return and protection of taoka pertaining to these lands as defined in Schedule 1 to this Deed based on the cardinal virtues of faith, hope and love*

#### ***4.0.0 OBJECTS***

*The objects of the Trust are to:*

*4.1.0 Provide for the wellbeing of the descendants of Korako Karetai through the administration, guidance, and management of the spiritual, cultural, moral, social educational and economic affairs of the whanau*

*4.2.0 Provide for the re-vesting of lands as defined in Schedule 1 of this Deed in descendants of Korako Karetai*

*4.3.0 Provide a management plan for the sustainable activities on these lands*

*4.4.0 Provide protection and safety of the taoka for future generations*

*4.5.0 Undertake those lawful activities necessary to fulfil the objects of this Trust Deed*

*4.6.0 Promote its members in the delivery of services on behalf of the Trust*

*4.7.0 Provide employment opportunities for its members and all New Zealanders*

- 4.8.0 *Provide assistance consistent with the charitable purposes of the Trust*
- 4.9.0 *Provide and arrange incantations and ceremonies where appropriate*
- 4.10.0 *For any 'charitable purpose' within New Zealand as that expression is defined from time to time."*

3. The lands defined in Schedule 1 of the trust deed are:

### **Schedule 1**

1259 Harington Point Road Peninsula (Undefined Part)

Legal Description: SEC 1 SO 22583, SEC 2 SO 22583, SEC 3 SO 22583, SEC 4 SO 22583

1260 Harington Point Road Peninsula (Undefined Part)

Legal Description: LOT 2 DP 300145

1261 Harington Point Road Peninsula

Legal Description: LOT 1 DP 300145

1245 Harington Point Road Peninsula

Legal Description: SEC 72 BLK II SO 16512 PORTOBELLO SD, SEC 73 BLK II SO 16512 PORTOBELLO SD

733 Cape Saunders Road Portobello

Legal Description: SEC 67 BLK D SO 12715 MBLK PAPANUI, SEC 68 BLK D SO 20240 MBLK PAPANUI

4. The Applicant's membership was set out in clause 7.0.0 of the trust deed:

#### ***"7.0.0 MEMBERSHIP***

7.1.0 *Membership of the Trust will be automatically conferred upon the descendants of Korako Karetai*

7.2.0 *The Trust secretary shall be responsible for maintaining a current list of the successors to Korako Karetai"*

5. On 14 December 2009, the Commission analysed the application for registration and sent the Applicant a letter requesting further information about its activities pursuant to section 18(3)(a) of the Act.

6. The Applicant responded on 12 January 2010 with the following information:

#### ***History***

*Under section 14 of the Ngai Tahu Deed of Settlement a certain parcel of land in the Department of Conservation wildlife reserve at Taiaroa Head was returned to the descendants of Korako Karetai and certain other lands in the Dunedin City Council public purposes reserve at Taiaroa Head could be returned to those descendants if certain other provisions of the Deed were met and if the DCC was comfortable with the way in which those provisions were met.*

*The Korako Karetai Trust however dismissed the Deed as facile because:*

- 1. The deed was negotiated between the Crown and Te Runanga o Ngai Tahu without either input from or the mandate of the descendants of Korako Karetai*
- 2. The descendants of Korako Karetai were not resourced to complete research into a full and proper claim to the Waitangi Tribunal*
- 3. The Waitangi Tribunal chose to hear an incomplete claim filed by Te Runanga o Ngati Tahu without input or the mandate of the descendants of Korako Karetai*
- 4. Te Runanga o Ngati Tahu for its part in the negotiations were to receive lands at Taiaroa Head pursuant to the Deed, which the Trust believed rightfully belonged to the descendants of Korako Karetai*
- 5. The claim heard by the Tribunal confined itself to supposed maori land confiscated from Korako Karetai at Taiaroa Heads post 1888 for defence and public works, which fact denied the descendants of Korako either enquiry or redress regarding:*
  - i. the Crown's taking of Karetai land at Taiaroa in 1867 by means of the Wastelands Act 1859*
  - ii. the Crowns mining of the rock face of Tarewai (an unresolved claim put to Parliament on behalf of Korako Karetai by the Hon. H.K. Taiaroa circa 1876)*
  - ii. the fact Korako Karetai held an un-relinquished Crown Grant to his lands at the time they were taken by the Crown post 1888*

#### *Activities of the Trust*

*Prior to enactment of the Ngai Tahu Claims Settlement Act 1998, Otene George Kuku Karaitiana, then secretary of the Trust filed a submission with the Parliamentary Select Committee voicing the Trust objection to that part of the settlement which dealt with Taiaroa Head. To no avail our cousin's noble recitation of this submission before that Select Committee was accentuated by his untimely death.*

*Post enactment of the NTCSA the Trust has:*

- 1. worked with the Ngai Tahu Ancillary Claims Trust to ensure the identification of all the rightful descendents of Karako Karetai*
- 2. Compiled a comprehensive history of the confiscation and manipulation of Korako Karetai's lands at Taiaroa Head post the Otago Purchase of 1844*
- 3. Prepared and forwarded a complaint to the Minister of Treaty Settlements regarding the breaches of procedure by the Office of Treaty of Settlements in regard to the Taiaroa Heads claim and asking for redress of the perpetuated injustice inflicted on the mana of Korako Karetai by the Crown*
- 4. Prepared and forwarded a complaint to the Office of the Ombudsmen regarding the breaches of procedure by the Office of Treaty of Settlements in regard to the Taiaroa Heads claim and asking for redress of the perpetuated injustice inflicted on the mana of Korako Karetai by the Crown*

5. *Engaged in numerous meetings with the Ngai Tahu Ancillary Claims Trust, the Office of Treaty Settlements, the Dunedin City Council, the Department of Conservation and Te Runanga o Otakou with an aim toward obtaining some satisfactory redress and acknowledgment of the ongoing denigration of the mana of Korako Karetai*
  6. *Engaged with the Dunedin City Council, the Department of Conservation and Te Runanga o Otakou under the auspices of the Office of Treaty Settlements in good faith negotiations pursuant to NTCSA98 regarding setting up of a Joint Management Body and management plan for the Taiaroa Heads reserves (conditional on the understanding that the Trust would not enjoin in either until a satisfactory solution was found)*
  7. *Aided by the goodwill and resources of the DCC, carried out a fluxgate potentiometer survey of much of the southern part of Pukekura Pa site in search of historic urupa*
  8. *Compiled a significant whakapapa (history) of Korako Karetai's forebears prior to and after their arrival at Pukekura (Taiaroa Head)*
  9. *With the apparent stalling of progress in regard to the provisions of the Taiaroa Head Ancillary Claim, approached the Otago Peninsula Trust with the proposition of a commercial joint venture to control public access to the growing 'little blue penguin' population at Pilots Beach. Controlling public access to the 'blues' has proved a significant challenge to the Department of Conservation which is presently relying on a system of volunteer wardens as a stop-gap solution.*
  10. *With an agreement with the OPT and the blessing of DoC, approached the DCC requesting a long term lease on the Pilots Beach reserve at nominal rental*
  11. *Kept the various branches of the Korako Karetai Whanau up to date with significant developments and sought their advice on preferred courses through group and general meetings*
  12. *Facilitated a process where by the Trust, DCC, DoC and Te Runanga o Otakou are working towards a comprehensive management plan for the Taiaroa Head reserves (presently) outside the provisions of the NTCSA98."*
7. The Applicant also provided a list of 102 living successors to Korako Karetai and stated "a list containing the names of all the children and grandchildren of these successors is yet to be complete."
  8. The Commission considered the information and on 26 January 2010 sent the Applicant a notice that may lead to decline stating that the Applicant's purposes and its activities did not meet the essential requirements for registration. The Commission stated that several of the Applicant's purposes did not fall under any of the charitable purposes in section 5 of the *Charities Act 2005* and many of the purposes and activities were for the private benefit of the descendants of one named individual, Korako Karetai.

9. The Applicant responded by email on 26 February 2010 stating that it had amended clauses 3.1 and 4.1 and removed clause 4.7. The amended clauses were stated as:

*“3.1.0 Negotiation & the **reinvestment of Korako Karetai mana** over the lands as defined in Schedule 1 to this trust Deed.*

...

*4.1.0 Provide for the wellbeing of the descendants of Korako Karetai **and the Ruahikihiki-Mamoe whanui of Pukekura** through the administration, guidance and management of the spiritual, cultural, moral, social educational and economic affairs of the whanau.”*  
[Emphasis added]

10. The Commission considered the information and on 10 March 2010, sent a second notice that may lead to decline as several of the purposes did not meet the registration requirements of section 5(1) of the Act and allowed the Applicant to undertake non-charitable activities. The notice further stated that the Commission was of the opinion that benefiting the descendants of one named individual would not satisfy the public benefit requirement.

11. The Applicant responded by email on 16 March 2010 stating that it had made further amendments to the trust deed and it stated:

*“1) Korako Karetai was the last of the Ruahikihiki - Mamoe chiefs to hold mana at Pukekura and his history is the history of his people*

*2) The Ruahikihiki - Mamoe people of Pukekura are the maori people of Otago*

*1) Taoka are the sacred treasure of the people of a place. These may be urupa (cemeteries), landmarks of historical significance or items such as mere ... or cloaks. ... To suggest the recognition and bringing home of our historical treasures a private benefit is to suggest the history of our people is of no public interest.*

*2) In your letter you also infer that the provision of incantations and ceremonies is potentially a private benefit. I do not presume to know of you religious beliefs or customs, however I would not presume to suggest they were little more than self indulgence or a means to an end.”*

12. Clause 7.0.0 referring to membership was removed and the other amended clauses were stated as:

**“3.0.0 PURPOSES**

*The purpose of the Trust will be to exercise the sovereign virtue in the exercise of potency and efficacy in the:*

**3.1.0 Promoting of the heritage of Korako Karetai and the Ruahikihiki – Mamoe peoples of Pukekura**

3.2.0 **Shared management of activities on Pukekura for the public good.**

3.3.0 *Return and protection of taoka pertaining to **Pukekura to Pukekura** based on the cardinal virtue of faith, hope and love*

#### **4.0.0 OBJECTS**

*The objects of the Trust are to:*

4.1.0 *Provide for the wellbeing of the descendants of Korako Karetai and the Ruahikihiki-Mamoe peoples of Pukekura through the administration, guidance, and management of the spiritual, cultural and social affairs of those peoples.*

4.2.0 **Provide for educational endowments for the descendants of Korako Karetai and the Ruahikihiki-Mamoe peoples of Pukakura on the basis of need**

4.3.0 **Provide for aged care for the descendants of Korako Karetai and the Ruahikihiki-Mamoe peoples of Pukekura on the basis of need.**

4.4.0 *Provide protection and safety of taoka of Pukekura for future generations*

4.5.0 *Provide for a management plan for sustainable activities at Pukekura*

4.6.0 **Provide for the protection and reintroduction of indigenous eco-systems on Otago Peninsula**

4.7.0 *Provide assistance consistent with the charitable purposes of the Trust*

4.8.0 *Provide and arrange incantations and ceremonies where appropriate*

4.9.0 *For any 'charitable purpose' within New Zealand as that expression is defined from time to time."* [Emphasis added]

13. The Commission considered the information and on 24 March 2010 it sent a letter requesting further information regarding its activities under 4.1.0. It asked how many Ruahikihiki-Mamoe people there were and how many were descendants of Korako Karetai.

14. The Applicant sent the Commission a letter on 8 April 2010 which provided further information. The letter stated:

### *“Ruahikihiki-Mamoe peoples of Pukekura*

*Pukekura has been a significant strong-hold for over a thousand years. The Rapuwai and Waitaha people were the first known to have settled the area. Three to four hundred years ago the Ngatimamoe people fought and assimilated with these earlier people as they migrated south from the North Island. Two hundred and fifty to three hundred years ago the warlike Ngati Ruahikihiki of the Ngautahu migration fought with and inter-married with the Mamoe people. Moki the great-great-great grandfather of Korako Karetai and the eldest son of Ruahikihiki was the first of these later people to hold mana at Pukekura.*

*For a further three generations the descendants of Ruahikihiki moved deeper into the south, warring with and intermarrying with the Ngatimamoe and although these people had kaika (villages) throughout Otago and Southland, Otakou, embraced by the protection of Pukekura remained their spiritual capital and principal settlement. . .*

*The Ruahikihiki-Mamoe people now number many thousands and by blood all the descendants of Korako Karetai are Ruahikihiki-Mamoe.*

### *Activities of the Korako Karetai Trust*

*Outside of those activities concerned directly with the Taiaroa Head Ancillary claim the KKT has:*

- 1. ... carried out a fluxgate potentiometer survey of much of the southern part of the Pukekura Pa site in search of historic urupa*
- 2. Compiled a significant whakapapa (history) of Korako Karetai's forebears prior to and after their arrival at Pukekura (Taiaroa Head).*
- 3. ... approached the Otago Peninsula Trust with the proposition of a commercial joint venture to control public access to the growing 'little blue penguin' population at Pilots Beach ...*
- 4. ... approached the DCC requesting a long term lease on the Pilots Beach reserve at nominal rental*
- 5. Kept the various branches of the Korako Karetai Whanau up to date with significant developments and sought their advice on preferred courses through group and general meetings*
- 6. Entered into discussions with Te Runanga o Otakou towards a joint KKT / TRoO initiative to create an entity to represent the Ruahikihiki-Mamoe people of Pukekura at Pukekura with the aim of re-establishing the heritage and involvement of these people at Pukekura. ...*
- 7. Facilitated a process whereby the Trust, DCC, DoC and Te Runanga o Otakou are working towards a comprehensive management plan for Taiaroa Head Reserves (presently) outside the provisions of NTCSA98.*

*The Korako Karetai Trust believes the involvement of and recognition of the heritage of the Ruahikihiki-Mamoe people at Pukekura is a positive step in enhancing the spiritual well-being of these people, which in turn will lead to a renewed confidence which will enhance the social well-being of the more marginalised members of the hapu.*

KKT Vision

*Whereas KKT activities in the short and long term are focused on restoring and enhancing the native wildlife and flora at various locations on the Otago Peninsula, we do look forward to developing cultural resources at Pukekura which will enhance public understanding of pre-European history and culture in the area. We also look forward to being able to provide the more disadvantaged of our people with educational and social assistance where appropriate, with a mind towards raising the spiritual and social well-being of the hapu as a whole."*

15. The Commission considered the information and on 16 June 2010, sent a third notice that may lead to decline. The notice stated that while the Commission considered the Applicant may be undertaking some charitable activities, its main purposes appear to be advocating for the return of land at Pukekura to the descendants of Korako Karetai, engaging in commercial tourism ventures which will benefit the descendants of Korako Karetai, and providing other benefits for those descendants. It stated that the Applicant had not provided evidence to support a finding that its purposes were charitable under relief of poverty, advancement of education or religion or "other matters beneficial to the community" or that they provided benefits for a sufficient section of the community.

16. On 29 July 2010 the Applicant sent the Commission an email with a letter attachment. The letter stated that:

*"... at the annual general meeting ... on Saturday 5<sup>th</sup> September 2009 ... the following resolution were unanimously carried*

*That the Korako Karetai Trust Deed be amended to the extent necessary to obtain registration with the Charities Commission*

*...  
the Korako Karetai Trust sought legal advice and as a result the trust deed has been substantially re-written and the trustees now believe it will satisfy the criteria laid down by the Charities Commission and the charitable aims of the trust."*

17. The attachment contained a further amended trust deed, which stated:

**"1.3 Charitable Objects and Purposes Exclusive and Paramount**

*Notwithstanding anything else in this deed, no power or reservation expressed or implied in this deed shall authorise the Trustees to do or suffer any act which does not further the charitable objects and purposes of the Trust, and the charitable objects and purposes set out in clause 2.4 shall be paramount so as to exclude any act or omission which is or may be deemed to be not in accordance with the charitable objects and purposes of the Trust.*

*...*

## 2.4 **Objects and Purposes**

*The objects and purposes of the Trust are:*

- (a) the advancement, education and preservation of the spiritual and cultural beliefs and practices of the Ruahikihiki-Mamoe peoples of Pukekura;*
- (b) the advancement of the natural environment, flora and fauna of the Otago Peninsula including the protection of the existing flora and fauna;*
- (c) any other charitable purpose which may seem to be capable of being conveniently carried on in connection with the above charitable purposes or calculated directly or indirectly to advance the charitable purposes of the trust.”*

18. On 30 July 2010 a letter was received by email from the Applicant’s lawyer. This letter stated:

- 1. **Past distributions:** *The Board has not made any distributions to date.*
- 2. **Registration as a charitable entity:** *there are specific reasons why the Board wishes to be registered as a charitable entity, including:*
  - (a) the Board is entering into a joint venture with the Otago Peninsula Trust (a registered charitable entity) concerning the Pukekura area. It is intended under that joint venture arrangement that each party will be registered as a charitable entity;*
  - (b) the Dunedin City Council is intending to lease land located at Pilots Beach Reserve to the Board. No rental will be charged under that lease so long as any resulting profit (if any) is applied only to charitable purposes;*
  - (c) the Board is confident that it will be better placed to meet its objects and purposes if it is registered as a charitable entity. Such registration will allow it to enter into the arrangements as set out immediately above, to enter into similar arrangements, and to obtain funding.*
- 3. **Future activities:** *... The correspondence entered into between the Commission and the Board, and the process of updating the rules, has assisted the Board’s understanding of what it is, and is not entitled to undertake.”*

19. On 12 August 2010 the amended trust deed was updated with the Companies Office.

## The issues

20. 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

21. 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.
22. 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 benefiting the public or a sufficient section of the public.
23. Section 5(3) of the Act provides that any non-charitable purpose must be ancillary to a charitable purpose.
24. In considering an application for registration, section 18(3)(a) of the Act requires the Commission 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.

## Charities Commission’s analysis

25. The Applicant’s most recent objects and purposes are set out in clause 2.4:

### **“2.4 Objects and Purposes**

*The objects and purposes of the Trust are:*

- (a) *the advancement, education and preservation of the spiritual and cultural beliefs and practices of the Ruahikihiki-Mamoe peoples of Pukekura;*
- (b) *the advancement of the natural environment, flora and fauna of the Otago Peninsula including the protection of the existing flora and fauna;*
- (c) *any other charitable object or purpose which may seem to be capable of being conveniently carried on in connection with the above charitable purposes or calculated directly or indirectly to advance the charitable purposes of the Trust.”*

<sup>1</sup>

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

26. The Commission considers that the purposes in clause 2.4(b) may amount to preservation of the environment and therefore be charitable under “other matters beneficial to the community” and the purposes in clause 2.4(c) are charitable by definition. Clause 2.4(a) is broadly worded and the Applicant could undertake both charitable and non-charitable purposes under this clause.
27. As required by section 18(3)(a) of the Act, the Commission must have regard to the Applicant’s current and future activities and any other information that it considers is relevant. Accordingly, the Commission has also considered information provided by the Applicant and information available about the Applicant. First, however, the Commission has considered the effect of clause 1.3.

Effect of clause purporting to limit objects and purposes

28. Clause 1.3 states:

**“1.3 Charitable Objects and Purposes Exclusive and Paramount**

*Nowithstanding anything else in this deed, no power or reservation expressed or implied in this deed shall authorise the Trustees to do or suffer any act which does not further the charitable objects and purposes of the Trust, and the charitable objects and purposes set out in clause 2.4 shall be paramount so as to exclude any act or omission which is or may be deemed to be not in accordance with the charitable objects and purposes of the Trust.*

29. In *M K Hunt Foundation Ltd v Commissioner of Inland Revenue*,<sup>2</sup> Hardie Boys J cited with approval the comments Lawrence LJ made in *Keren Kayemeth le Jisroel Ltd v Commissioners of Inland Revenue*.<sup>3</sup> In that case, the statute there 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>4</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>5</sup>*

30. In *Commissioner of Inland Revenue v White*,<sup>6</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:

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<sup>2</sup> [1961] NZLR 405, 407.  
<sup>3</sup> [1932] 2 KB 465.  
<sup>4</sup> [1931] 2 KB 465, 481.  
<sup>5</sup> [1961] NZLR 405, 408.  
<sup>6</sup> (1980) 55 TC 651.

*“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>7</sup>*

31. Finally, in *Canterbury Development Corporation v Charities Commission*,<sup>8</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>9</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>10</sup> In that case he concluded that they did not support a charitable purpose.
32. The Commission does not consider that the inclusion of clause 1.3 provides conclusive evidence that the Applicant’s purposes will be exclusively charitable.

#### Applicant’s activities

33. In *Commissioner of Inland Revenue v Carey’s (Petone and Miramar) Ltd*<sup>11</sup> Gresson P stated:

*“This aspect of the question before us seems to us to invoke similar (though not identical) considerations to those which exercised the mind of Lord Greene in Royal Choral Society v Commissioners of Inland Revenue [1943] 2 All ER 101 (though that was the case of the objects of a charitable institution, not the objects of a charitable trust). He said:*

It is true that you have to find the purpose of the alleged charitable establishment. It may very well be that a purpose which, on the face of it looks to be the real purpose, on close examination, is found not to be the real purpose. A body of persons may purport to set themselves up for educational purposes; but on a full examination of the facts, it may turn out that their purpose is nothing of the kind, and is one merely to provide entertainment or relaxation to others, or profit to themselves. In other words, the presence of the element of entertainment or pleasure may be either an inevitable concomitant of a charitable or educational purpose, or it may be the real fundamental purpose, and education may merely be a by-product. Whether a case falls within one class or the other is, no doubt, a question of fact, save and so far as it may depend on the construction of written documents’ (ibid., 106).

*So in this case what must be decided is whether the real fundamental purpose of this trust is charitable.”<sup>12</sup>*

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<sup>7</sup> (1980) 55 TC 651, 653.

<sup>8</sup> HC WN CIV 2009-485-2133 [18 March 2010].

<sup>9</sup> HC WN CIV 2009-485-2133 [18 March 2010] at para 56.

<sup>10</sup> HC WN CIV 2009-485-2133 [18 March 2010] at para 56.

<sup>11</sup> [1963] NZLR 450.

34. In *Auckland Medical Aid Trust v Commissioner of Inland Revenue*<sup>13</sup> Chilwell J stated “[t]he law would resist finding a charitable purpose if a trust were dressed up within a cloak of charitable purposes that cloak being in fact used for non-charitable purposes.”
35. Information provided to the Commission by the Applicant during the application process indicates that one of its main purposes is to negotiate the return and management of certain parcels of land for the descendants of Korako Karetai.
36. In its letter of 12 January 2010, responding to a request for information about its activities, the Applicant listed the following activities:
- filing submissions with the Parliamentary Select Committee voicing the Applicant’s objections
  - compiling a history of the confiscation and manipulation of Korako Karetai’s lands at Taiaroa Head
  - forwarding complaints to the Ministry of Treaty Settlements
  - forwarding complaints to Ombudsman
  - engaging in numerous meetings with the Ngai Tahu ancillary Claims Trust, Office of Treaty of Settlements, DCC, DoC and Te Runanga o Otakou with an obtaining a redress and acknowledgement of the ongoing denigration of the mana of Korako Karetai
  - compiling a history of Korako Karetai’s forebears
  - keeping various branches of the Korako Karetai whanau up to date with significant developments
37. The Applicant then referred to “the apparent stalling of progress in regard to the provisions of the Taiaroa Head Ancillary Claim” in paragraph 9 before listing other activities. The Applicant stated that it would not ‘enjoin’ in a Joint Management Body and body and management plan for Taiaroa Heads reserve, “until a satisfactory solution to its claim was found.”
38. In its letter of 8 April 2010, in response to a second request for information about its activities, the Applicant continued to refer to its Taiaroa Head Ancillary Claim for the descendants of Korako Karetai and providing benefits for these descendants. It also noted that “all the descendants of Korako Karetai are Ruahikihiki – Mamoe”.
39. The Commission notes that the *2005 Kai Tahu Ki Otago Natural Resource Management Plan*<sup>14</sup> states:

### **3.9 KORAKO KARETAI TRUST**

*The Korako Karetai Trust represents the **descendants of Korako Karetai**, the original owner of Pukekura. The trust was formed to negotiate the return of Korako Karetai land at Pukekura and to manage sustainable activities on the land, including identification and preservation of the cultural taonga of Pukekura for future generations. [Emphasis added]*

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<sup>12</sup> [1963] NZLR 450, 456.

<sup>13</sup> [1979] 1 NZLR 382, 395.

<sup>14</sup> <http://www.qldc.govt.nz/LinkClick.aspx?fileticket=1GZ9x1MsxIw%3D&tabid=421>(page37)

40. More recently *The Cultural Impact Assessment Project Next Generation Otago Harbour*,<sup>15</sup> which was produced by Kai Tahu ki Otago in May 2010 and reviewed and issued by the Applicant, states:

*The Korako Karetai Trust represents the **descendents of Korako Karetai**. Korako Karetai was the original owner of a section of the Pukekura headland through a Crown Grant Title. The trust was formed to negotiate the return of Korako Karetai land at Pukekura and to manage sustainable activities on the land, including identification and preservation of the cultural taonga of Pukekura for future generations. [Emphasis added]*

41. The Dunedin City Council Report to Community Development Committee from the Reserves Estate Officer dated 13 April 2010 states:

*“A request for a lease has been received from the Korako Karetai Trust (the KKT) over part of Pilots Beach Reserve for a penguin viewing operation, as part of a joint venture with the Otago Peninsula Trust. . .*

*The Pilots Beach site is home to a colony of little blue penguins and it has long been seen that this area could be developed into a tourism attraction that could also assist in protecting these penguins on this site.”<sup>16</sup>*

*“The concept of a lease to the KKT and the OPT would seem to be in the interest of developing a venture that both involves the **Korako Karetai descendents** with the land which they have an underlying interest in (or even rights) as well as introducing a further visitor attraction that can leverage off the success of the Royal Albatross Centre tourism attraction.”<sup>17</sup> [Emphasis added]*

42. The Commission must therefore consider whether the Applicant’s activities indicate a charitable purpose and whether they provide a benefit to a sufficient section of the public.

### Relief of poverty

43. In order to be charitable under this head, a purpose must be directed at people who are poor, in need, aged, or suffering genuine hardship and it must provide relief.<sup>18</sup>

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<sup>15</sup> [http://www.portotago.co.nz/publications/25%20Cultural%20Impact%20Assessment%20\(2010\).pdf](http://www.portotago.co.nz/publications/25%20Cultural%20Impact%20Assessment%20(2010).pdf).

<sup>16</sup> [http://www.dunedin.govt.nz/\\_data/assets/minutes\\_agenda/0018/70515/ma\\_cd\\_r\\_2009\\_06\\_09\\_leastatpilots.pdf](http://www.dunedin.govt.nz/_data/assets/minutes_agenda/0018/70515/ma_cd_r_2009_06_09_leastatpilots.pdf) (page 1 of 5).

<sup>17</sup> [http://www.dunedin.govt.nz/\\_data/assets/minutes\\_agenda/0018/70515/ma\\_cd\\_r\\_2009\\_06\\_09\\_leastatpilots.pdf](http://www.dunedin.govt.nz/_data/assets/minutes_agenda/0018/70515/ma_cd_r_2009_06_09_leastatpilots.pdf) (page 4 of 5).

<sup>18</sup> *DV Bryant Trust Board v Hamilton City Council* [1997] 3 NZLR 342.

44. "Poverty" is interpreted broadly in law and a person does not have to be destitute to qualify as "poor".<sup>19</sup> People who are in need, aged, 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>
45. 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>
46. In its letter of 8 April 2010 the Applicant states that it has:
- "Entered into discussions with Te Runaka o Otakou towards a joint KKT/TRoO initiative to create an entity to represent the Ruahikihiki Mamoe people of Pukekura at Pukekura with the aim of re-establishing the heritage and involvement of these people at Pukekura...*
- The Korako Karetai Trust believes that the involvement of and recognition of the heritage of the Ruahikihiki-Mamoe people at Pukekura is a positive step in enhancing the spiritual wellbeing of these people, which in turn will lead to a renewed confidence which will enhance the social well-being of the more marginalised members of the hapu."*
47. The Applicant's stated purposes do not indicate an intention to relieve an identifiable need and the Applicant has not provided any evidence of a disadvantage suffered by the Ruahikihiki-Mamoe people. The Commission therefore considers that providing benefits for these people is unlikely to amount to the relief of poverty.
48. The Applicant's grievance with regard to the Ngai Tahu Deed of Settlement is considered in the following section.

#### Advancement of education

49. 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>22</sup> In order to advance education, learning must be passed on to others.

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<sup>19</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>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 Centrepoin Community Growth Trust* [2000] 2 NZLR 325.

<sup>21</sup> *Joseph Rowntree Memorial Trust Housing Association Ltd v Attorney-General* [1983] Ch 159; [1983] 1 All ER 288. See also *D V Bryant Trust Board v Hamilton City Council* [1997] 3 NZLR 342.

<sup>22</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;

50. Education does not include advertisements for particular goods or services or promotion of a particular point of view.<sup>23</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.

51. In New Zealand in the case of *Re Collier (deceased)*,<sup>24</sup> Hammond J set out the test for determining whether the dissemination of information qualified as charitable under the head of advancement of education:

*“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.”*<sup>25</sup>

52. The Commission has considered whether the negotiation and management of land for the descendants of Korako Karetai could be considered charitable under advancement of education. In particular the Commission has considered whether the following activities could be considered to have educational aspects:

- working with the Ngai Tahu Ancillary Claims Trust to ensure the identification of all the rightful descendants of Korako Karetai
- compiling a comprehensive history of the confiscation and manipulation of Korako Karetai’s lands at Taiaroa Head post the Otago Purchase of 1844
- compiling a significant whakapapa (history) of Korako Karetai’s forebears prior to and after their arrival at Pukekura (Taiaroa Head)

53. The Court in *Latimer v Commissioner of Inland Revenue*<sup>26</sup> had to determine whether providing assistance to Maori in the preparation, presentation and negotiations of Waitangi Tribunal claims involving a certain area of land was a charitable purpose. In his decision Blanchard J stated:

*“[37] The evidence confirms that what is involved in preparation of a case before the Waitangi Tribunal in relation to the land in question, and the intended product of the assistance to claimants is high-quality historical research... the funding or assistance of research of that kind, the results of which will better enable the tribunal to assess the historical research of that kind, the results of which will enable the tribunal to assess the historical record of what happened to the tribal group claimants- in particular, the circumstances in which the Crown came into possession of the land – so that any breach of the Treaty suffered by the claimants can be recognised and, if appropriate, the land returned.*

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*Chartered Insurance Institute v London Corporation* [1957] 1 WLR 867; *Flynn v Mamarika* (1996) 130 FLR 218.

<sup>23</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>24</sup> [1998] 1 NZLR 81.

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

<sup>26</sup> [2002] 3 NZLR 195.

*The research funded by the trust is a means of finally determining the truth about the grievances long held by a significant section of New Zealand society.... for the benefit of all members of New Zealand society. Without such research being properly conducted the tribunal's finding might not be seen as having a sound basis and therefore might not be accepted either by Crown or Maori or, very importantly, by the general public. Settlement might not be achieved or might not be regarded as truly or full and final. If research is not properly conducted then, whether or not the parties purport to reach a settlement, grievances are likely to continue and will be bound to lead to social ferment at a future time. The public benefit in a successful resolution of the claims is therefore very considerable....There is undoubtedly, therefore, a large public benefit in the assistance purpose. The same can be said in relation to the proper presentation of the research to the tribunal and its utilisation during the negotiation process by which, it is hoped, comprehensive and lasting settlements can be achieved...*

*[38] Of course there is also a benefit to the claimant groups in having their research funded, but they themselves are, as we have said, a section of the public<sup>27</sup>*

54. While there may be some similarities between the activities in *Latimer v Commissioner of Inland Revenue*<sup>28</sup> and the activities of the Applicant, in the present case the Applicant is not pursuing a Waitangi Tribunal claim, but rather disputing the Ngai Tahu Deed of Settlement and the *Ngai Tahu Claims Settlement Act 1998*. In addition, its activities relate to a claim for the descendants of a named individual, Korako Karetai.

#### *Political purposes*

55. Political purposes have been defined as purposes directed at furthering the interests of any political party; or securing, or opposing, any change in the law or in the policy or decisions of central government, local authorities or other public bodies, whether in New Zealand or abroad.<sup>29</sup>
56. The rule that political purposes cannot be charitable was set out by Lord Parker of Waddington in *Bowman v Secular Society*:<sup>30</sup>

*“... a trust for the attainment of political objects has always been held invalid, not because it is illegal, for everyone is at liberty to advocate or promote by any lawful means a change in the law, but because the Court has no means of judging whether a proposed change in the law will or will not be for the public benefit, and therefore cannot say that a gift to secure the change is a charitable gift.”<sup>31</sup>*

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<sup>27</sup> *Latimer v Commissioner of Inland Revenue* [2002] 3 NZLR 195, 207.

<sup>28</sup> [2002] 3 NZLR 195.

<sup>29</sup> *Re Wilkinson* [1941] NZLR 1065, 1077.

<sup>30</sup> [1917] AC 406.

<sup>31</sup> *Ibid* at 442.

57. In New Zealand, the *Bowman* case has been applied by the Supreme Court in *Re Wilkinson (deceased)*,<sup>32</sup> when deciding the charitable status of the League of Nations Union of New Zealand, and in *Knowles v Commissioner of Stamp Duties*,<sup>33</sup> when deciding whether a temperance organisation was charitable.
58. In 1981, the New Zealand Court of Appeal applied *Bowman* in *Molloy v Commissioner of Inland Revenue*<sup>34</sup> when considering whether a gift to the New Zealand Society for the Protection of the Unborn Child was tax deductible. In his decision, Somers J held that a political purpose included both advocating and opposing any change in the law. He also noted that to preclude recognition as a valid charity the political object must be more than an ancillary purpose, it must be the main or a main object.
59. In the United Kingdom the *Bowman* case has been applied in *National Anti-Vivisection Society v Inland Revenue Commissioners*<sup>35</sup> and in *McGovern v Attorney-General*,<sup>36</sup> when the Court was considering the purposes of a trust established by Amnesty International. In the latter case, Slade J summarised his conclusions in relation to trusts for political purposes as:
- “(1) *Even if it otherwise appears to fall within the spirit and intendment of the preamble to the Statute of Elizabeth, a trust for political purposes falling within the spirit of Lord Parker’s pronouncement in Bowman’s case can never be regarded as being for the public benefit in the manner in which the law regards as charitable.*
- (2) *Trusts for political purposes falling within the spirit of this pronouncement include, inter alia, trusts of which a direct and principal purpose is either:*
- (i) *to further the interests of a particular political party; or*
- (ii) *to procure changes in the laws of this country; or*
- (iii) *to procure changes in the laws of a foreign country; or*
- (iv) *to procure a reversal of government policy or of particular decisions of governmental authorities in this country; or*
- (v) *to procure a reversal of government policy or of particular decisions of governmental authorities in a foreign country.*<sup>37</sup>
60. Two reasons for the principle that the Court will not regard as charitable a trust which has a main object of procuring an alteration of the law were cited by Slade J:

*“First, the court will ordinarily have no sufficient means of judging as a matter of evidence whether the proposed change will or will not be for the public benefit. Secondly, even if the evidence suffices to enable it to form a prima facie opinion that a change in the law is desirable, it must still decide the case on the principle that the law is right as it stands, since to do otherwise would usurp the functions of the legislature.”*<sup>38</sup>

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<sup>32</sup> [1941] NZLR 1065.

<sup>33</sup> [1945] NZLR 522.

<sup>34</sup> [1981] 1 NZLR 688.

<sup>35</sup> [1948] AC 31.

<sup>36</sup> [1982] 1 Ch 321.

<sup>37</sup> [1982] 1 Ch 321, 340.

<sup>38</sup> *Ibid* at pp 336-337.

61. The judge noted that the mere fact that political means were employed in furthering the non-political purposes of a trust would not necessarily render it non-charitable.

*“If all the main objects of the trust are exclusively charitable, the mere fact that the trustees may have incidental powers to employ political means for their furtherance will not deprive them of their charitable status.”*<sup>39</sup>

62. In New Zealand, in *Re Collier (deceased)*,<sup>40</sup> Hammond J upheld the principle that a trust with purposes of changing the law was not charitable, but also considered that a court could recognise an issue as worthy of debate even though the outcome of the debate could lead to a change in the law.

63. In coming to this conclusion, Hammond J criticised other decisions holding that political purposes were not charitable, especially in light of section 13 (freedom of thought, conscience, and religion) and section 14 (freedom of expression) of the *New Zealand Bill of Rights Act 1990*. Nevertheless, he wrote:

*“I have to say that I have considerable sympathy for that viewpoint which holds that a Court does not have to enter into the debate at all; hence the inability of the Court to resolve the merits is irrelevant. [...] In this Court at least, there is no warrant to change these well established principles – which rest on decisions of the highest authority – even though admirable objectives too often fall foul of them.”*<sup>41</sup>

64. Finally, the Federal Court of Australia has recently held that an entity whose purposes and activities were aimed at influencing government to ensure foreign aid was delivered in a particular manner, did not have exclusively charitable purposes because of its political purposes.<sup>42</sup> In reaching its decision the court stated:

*“Aid/Watch’s attempt to persuade the government (however indirectly) to its point of view necessarily involves criticism of, and an attempt to bring about change in, government activities and, in some cases, government policy. There can be little doubt that this is political activity and that behind this activity is a political purpose. Moreover the activity is Aid/Watch’s main activity and the political purpose is its main purpose.”*<sup>43</sup> ...

*We accept that, at one level Aid/Watch’s efforts, are not in conflict with government policy. There was no suggestion that government is not concerned to deliver aid efficiently or with due regard to environmental concerns. Aid/Watch’s concern however, is that the delivery of aid should conform to its view of the best way to achieve these objects. It does not take into account that government and its agencies inevitably have to make choices in determining where, how and how much aid is to be delivered.*

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<sup>39</sup> Ibid at p 343.

<sup>40</sup> [1998] 1 NZLR 81.

<sup>41</sup> *Re Collier (deceased)* [1998] 1 NZLR 81, 90.

<sup>42</sup> *Commissioner of Taxation v Aid/Watch Incorporated* [2009] FCAFC 128.

<sup>43</sup> *Commissioner of Taxation v Aid/Watch Incorporated* [2009] FCAFC 128, para 37.

*Undoubtedly some of these choices will involve factors with which Aid/Watch is concerned. Others, however, will involve domestic and foreign political considerations that do not concern Aid/Watch. Some of these factors may have very little to do with foreign aid or the manner of its delivery.*<sup>44</sup>

65. In *Commissioner of Taxation v Aid/Watch Incorporated*<sup>45</sup> the Court also identified that research is not charitable if it is to pursue a political purpose as the judge stated:

*“The activities described in Aid/Watch’s constitution include ‘monitoring, research and campaigning.’ It is clear that neither ‘monitoring’ nor ‘researching’ alone would allow Aid/Watch to fulfil its stated objects of “ensuring” that aid is delivered in the way outlined in its constitution. It is ‘campaigning’ (as well as other activities) that materially enable Aid/Watch to exercise influence over public opinion and ultimately delivery of Australian Aid. These activities are informed by, and made more effective through its researching and monitoring. Researching and monitoring however are preliminary to Aid/Watch’s primary goal of influencing policy.”*<sup>46</sup>

66. However, in *Latimer v Commissioner of Inland Revenue*<sup>47</sup> Blanchard J stated:

*“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. The assistance purpose of providing the Waitangi Tribunal with additional material will help produce more informed recommendations, leading in turn to the settlement of long-standing disputes between Maori and the Crown, is of that character. It is directed towards racial harmony in New Zealand for the general benefit of the community. That is not an object which can legitimately be regarded as political in nature and thus disqualifying.”*<sup>48</sup>

67. As indicated earlier, the Applicant’s research and negotiations can be differentiated from the activities undertaken in *Latimer v Commissioner of Inland Revenue*<sup>49</sup> as its activities do not relate to providing information to the Waitangi Tribunal in order to resolve a claim. Instead, they relate to challenging the Ngai Tahu Deed of Settlement which has been accepted by Ngai Tahu and incorporated into legislation in the form of the *Ngai Tahu Claims Settlement Act 1998*. This activity is therefore not directed towards informing a decision-maker or promoting racial harmony in New Zealand.

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<sup>44</sup> *Commissioner of Taxation v Aid/Watch Incorporated* [2009] FCAFC 128, para 41.

<sup>45</sup> [2009] FCAFC 128.

<sup>46</sup> [2009] FCAFC 128, para 36.

<sup>47</sup> [2002] 3 NZLR 195.

<sup>48</sup> *Latimer v Commissioner of Inland Revenue* [2002] 3 NZLR 195, 209.

<sup>49</sup> [2002] 3 NZLR 195.

68. The Commission also considers that the Applicant's activities in relation to the negotiation of land, as stated in its letters of 12 January 2010 and 8 April 2010 and other documents, amount to political purposes which are non-charitable. As set out in *McGovern*<sup>50</sup> above, the Commission has no means of judging whether negotiating for the return of lands on behalf of the descendants of Korako Karetai outside of the provisions of the Ngai Tahu Claims Settlement Act 1998 will, or will not, be for the public benefit. The Commission must decide that "the law is right as it stands, since to do otherwise would usurp the functions of the legislature".

#### Other matters beneficial to the community

69. 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)<sup>51</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
  - 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.
70. In *Travis Trust v Charities Commission*,<sup>52</sup> Joseph Williams J noted that

*"... 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".*<sup>53</sup>

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<sup>50</sup> *McGovern v Attorney-General* [1982] 1 Ch 321.

<sup>51</sup> *Re Jones* [1907] SALR 190 at 201; *Williams Trustees v Inland Revenue Commissioners* [1947] AC 447 at 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.

<sup>52</sup> (2009) 24 NZTC 23,273 (William J).

<sup>53</sup> (2009) 24 NZTC 23,273 at pp. 23,276-23,277 at para 20.

71. Furthermore, not all organisations which have purposes that benefit the community will be charitable. In *Williams Trustees v Inland Revenue Commissioners*<sup>54</sup> Lord Simonds wrote:

*“Now Sir Samuel Romilly did not mean, and I am certain Lord Macnaughten did not mean to say that every object of public general utility must necessarily be a charity. Some may be and some may not 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 purposes 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.”*<sup>55</sup>

72. The Commission does not consider that negotiating the return of land to the descendants of Korako Karetai is within the spirit of intendment of the purposes set out in the Preamble to the Charitable Uses Act 1601 and it is not intended to provide a benefit for the community.

73. In addition, the Commission notes that the Applicant has stated that it will not undertake some of its charitable activities which relate to preservation of the environment until its claim has been resolved. For example, in its letter of 12 January 2010 the Applicant states

*“Post enactment of the NTCSA the Trust has:*

*Engaged with the Dunedin City Council, the Department of Conservation and Te Runanga o Otakou under the auspices of the Office of Treaty Settlements in good faith negotiations pursuant to the NTSA98 regarding setting up of a Joint Management Body and management plan for the Tairaroa Heads reserves (**conditional on the understanding that the Trust would not enjoin in either until a satisfactory solution to its claim was found**)”* [Emphasis added]

74. In its letter of 8 April 2010 the Applicant states:

*“Outside of those activities concerned directly with the Tairaroa Head Ancillary Claim KKT has:*

*Facilitated a process whereby the Trust, DCC, DoC and Te Runanga o Otakou are working towards a comprehensive management plan for the Tairaroa Head reserves (**presently**) **outside the provisions of the NTCSA98.**”* [Emphasis added]

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<sup>54</sup> [1947] 1 All ER 513, [1947] AC 447.

<sup>55</sup> [1947] 1 All ER 513, [1947] AC 447, 455. (Applied by Kennedy J *In re Cumming* [1951] NZLR. 498.)

75. Other documentation also indicates the reluctance of the trust to enter into a management plan. The minutes of a Community Development Committee meeting on 9 June 2009 state:

*“The area over which the lease was being sought was part of the reserve that had been involved in negotiations in respect to its return to the descendants of Korako Karetai under the Ngai Tahu Claims Settlement Act 1998. The legislation requires the land to be administered by a joint management body (of which KKT would be part) as if it was a reserve. It was unlikely the Act will be implemented however, as the KKT has formally withdrawn from the process and each of the parties to the Act had issues which remain unresolved notwithstanding some 10 years of negotiation”<sup>56</sup>*

#### Public or private benefit?

76. To be charitable a purpose must be directed at benefiting the public or a sufficient section of the public. In addition, section 5 of the Act states:

(1) *In this Act, unless the context otherwise requires, charitable purpose includes every charitable purpose, whether it relates to the relief of poverty, the advancement of education or religion, or any other matter beneficial to the community*

(2) *However,-*  
(a) *the purpose of a trust, society, or institution is a charitable purpose under this Act if the purpose would **satisfy the public benefit requirement apart from the fact that the beneficiaries of the trust, or the members of the society or institution, are related by blood*** [Emphasis added]

77. In the Court of Appeal decision of *Latimer v Commissioner of Inland Revenue*<sup>57</sup> Blanchard J had to consider whether the people that were able to gain assistance from The Crown Forestry Rental Trust could be considered a sufficient section of the community. In his judgment Blanchard J stated:

*“In the New Zealand context it is, we think, impossible not to regard the Maori beneficiaries of this trust, both together and in their separate iwi or hapu groupings, as a section of the public for the purpose of a trust established by the Crown and Maori in terms of a compact between them and fulfilling the functions of the Crown Forestry Rental Trust.”<sup>58</sup>*

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<sup>56</sup> [http://www.dunedin.govt.nz/\\_data/assets/minutes\\_agenda/0018/70515/ma\\_cd\\_r\\_2009\\_06\\_09\\_leastatpilots.pdf](http://www.dunedin.govt.nz/_data/assets/minutes_agenda/0018/70515/ma_cd_r_2009_06_09_leastatpilots.pdf) Community Development Committee, 9 June 2009, Pilot Beach Reserve Lease Request.

<sup>57</sup> [2002] 3 NZLR 195.

<sup>58</sup> [2002] 3 NZLR 195 at 207.

78. Earlier, in *Dingle v Turner*,<sup>59</sup> Lord Cross stated:

*“In truth the question whether or not the potential beneficiaries of a trust can fairly be said to constitute a section of the public is a question of degree and cannot be by itself decisive of the question whether the trust is a charity. Much must depend on the purpose of the trust. It may well be that, on one hand, a trust to promote some purpose, prima facie charitable, will constitute a charity even though the class of potential beneficiaries might fairly be called a private class and that, on the other hand, a trust to promote another purpose, also prima facie charitable, will not constitute a charity even though the class of potential beneficiaries might seem to some people fairly describable as a section of the public.”*<sup>60</sup>

79. When considering whether a benefit is being provided to ‘a sufficient section of the public’ the Commission takes the following factors into consideration:

- The nature of the entity and its activities
- The number of beneficiaries and the relationship between the beneficiaries and the purpose of the charity
- The basis of the relationship between the beneficiaries
- Whether the trust is ‘substantially altruistic’ in nature;
- Whether the organisation only provides benefits to its members, or provides benefits to the general public<sup>61</sup>.

80. The UK Charity Commission guidance on public benefit provides:

*“A restriction on who can have the opportunity to benefit may be reasonable:*

- *where the class of people who can benefit is sufficiently wide or open in nature (given the charitable aims to be carried out and the resources available to the charity) to constitute a sufficient section of the public; or*
- *because the class of people whom the aims are intended to benefit have a particular charitable need which justifies restricting the benefits to them.”*<sup>62</sup>

81. Clause 2.4(a) of the Applicant’s deed states that an object is:

*“the advancement, education and preservation of the spiritual and cultural beliefs and practices of the Ruahikihiki-Mamoe peoples of Pukekura”*

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<sup>59</sup> [1972] AC 601.

<sup>60</sup> *Dingle v Turner* [1972] AC 601, 624.

<sup>61</sup> Public Benefit and the Blood ties exemption: section 5(2)(a) Board meeting 19/20 July Agenda Item C17/07/2007.

<sup>62</sup> Charities and Public Benefit, The Charities Commission’s general guidance on public benefit. Page 18, <http://www.charitycommission.gov.uk/library/guidance/publicbenefittext.pdf>.

82. As referred to above, however, information in the Applicant's letters of 12 January 2010 and 8 April 2010 appears to indicate that a main purpose of the Applicant is to provide benefits to the descendants of Korako Karetai such as:
- identifying the "rightful descendants of Korako Karetai"
  - compiling a "significant whakapapa (history) of Korako Karetai's forebears"
  - compiling "a history of the confiscation and manipulation of Korako Karetai's lands at Taiaroa Head"
  - asking for "redress of the perpetuated injustice inflicted on the mana of Korako Karetai by the Crown"
  - pursuing a claims against grievance regarding land at Taiaroa Head for the descendants
  - keeping "the various branches of the Korako Karetai Whanau up to date with significant developments"
  - seeking the advice of the Korako Karetai Whanau on their preferred courses of action.
83. In addition, the Commission has considered information in *The Cultural Impact Assessment Project Next Generation Otago Harbour* which was reviewed and issued by the Applicant and published in May 2010 (three months after the Applicant told the Commission that it had amended its purpose to include the Ruahikihiki-Mamoe people). This states:
- "The Korako Karetai Trust represents the **descendants of Korako Karetai**. Korako Karetai was the original owner of a section of the Pukekura headland through a Crown Grant Title. The trust was formed to negotiate the return of Korako Karetai land at Pukekura and to manage sustainable activities on the land, including identification and preservation of the cultural taonga of Pukekura for future generations. [Emphasis added]"*<sup>63</sup>
84. The Applicant's letter of 8 April 2010 states "The Ruahikihiki-Mamoe people now number many thousands and by blood all the descendants of Korako Karetai are Ruahikihiki-Mamoe". According to the list that the Applicant supplied on 12 January 2010 there are 102 living successors to Korako Karetai in addition to children and grandchildren. This may therefore allow the Applicant to continue to provide benefits for the descendants of Korako Karetai.
85. The Commission notes that clause 2.4 (a) refers specifically to the "Ruahikihiki-Mamoe peoples of **Pukekura**"<sup>64</sup> and the Applicant has not conclusively stated that benefits will be provided to people other than the descendants of Korako Karetai. If the primary beneficiaries are the descendants of Korako Karetai as indicated in the material cited above, then these people will necessarily be related by blood to one named individual.

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<sup>63</sup> [http://www.portotago.co.nz/publications/25%20Cultural%20Impact%20Assessment%20\(2010\).pdf](http://www.portotago.co.nz/publications/25%20Cultural%20Impact%20Assessment%20(2010).pdf).

<sup>64</sup> For the geographical area please see page 2 of Community Development Committee, 9 June 2009, Pilot Beach Reserve Lease Request.

86. The Commission has considered the nature of the Applicant and its activities, the number of potential beneficiaries, the relationship between the beneficiaries, whether the trust is substantially altruistic in nature, and whether it provides benefits to the general public. The Commission concludes that the Applicant's activities do not provide a substantially altruistic benefit for a sufficiently open section of the public. Rather, it provides benefits to a limited number of people who are descendants of one individual. Providing benefits to these people would not be sufficient to meet the requirements under section 5(2) of the Act.

### Conclusion

87. The Commission concludes that the Applicant's purposes in clause 2.4(b) and (c) appear to be charitable, but that the purpose in clause 2.4(a) would allow non-charitable activities that are not ancillary to a charitable purpose and which do not provide sufficient public benefit. Further, the Applicant has not provided an explicit indication that it will limit itself to charitable purposes.

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

88. 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. 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>65</sup>
89. The Commission considers that the Applicant's purposes set out in clauses 2.4(b) and (c) appear to be charitable, but, for the reasons set out above, the Commission does not consider that the purpose set out in clause 2.4(a) are charitable. The Commission considers that the Applicant is providing substantial support for non-charitable purposes which advance the interests of the descendants of Korako Karetai and therefore the Applicant does not have substantially charitable purposes.

90. 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>66</sup>

<sup>65</sup> *Re Beckbessinger* [1993] 2 NZLR 362, 373.

<sup>66</sup> *Re Beckbessinger* [1993] 2 NZLR 362, 376.

91. The Commission has analysed the wording of the Applicant's purposes, surrounding context, and its activities (as directed by section 18(3)(a) 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. The Commission does not consider that the purposes indicate an intention to create a substantially charitable trust.
92. On these bases, the Commission considers that the Applicant's purposes are not substantially charitable and therefore section 61B of the Charitable Trusts Act cannot operate to validate the trust.

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

93. 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. Furthermore, section 61B of the Charitable Trusts Act 1957 does not apply to validate the trust.

**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