

## Registration decision: Liaison

### The facts

1. Liaison (the Applicant) is not incorporated under any Act.
2. The Applicant applied to the Charities Commission (the Commission) for registration as a charitable entity under the *Charities Act 2005* (the Act) on 10 September 2009.
3. The Applicant's original purposes were stated in clause 2 of its trust deed:
  2. Purposes
    - 2.1 *The purposes for which the Trust is established are:*
      - a. *To benefit the community by producing goods and services in a socially responsible manner while providing training or paid employment.*
      - b. *To distribute any surplus only to organisations that will employ it for social gain and not for private profit.*
    - 2.2 *The Trust is committed, in attaining its purpose, to uphold the following principals (sic):*
      - a. *To seek efficiency in generating value for stakeholders*
      - b. *To strive to determine salience of stakeholders while not excluding the interests of general society.*
4. The provisions relating to the appointment and number of trustees are set out in clause 3 of the deed:
  3. Power of appointment and number of trustees
    - 3.1
      - a. *The number of Trustees shall not be less than 2.*
      - b. *The Trustees may, if they consider it desirable for the proper and efficient administration of the Trust Fund, appoint advisory trustees on such terms and conditions as the Trustees see fit.*
      - c. *In the event that the number of trustees fall below 2 the remaining trustee's only power shall be the appointment of trustees. The only valid business capable of transaction by the Trustee will be the appointment of at least one other Trustee.*
5. A provision relating to the employment of trustees is set out in clause 4.2:
  - 4.2 Employment

*Under clause 4.1.a the Trustees may employ as agents, officers and staff any of the trustees of the Trust.*
6. The Commission analysed the application for registration and on 2 October 2009, sent the Applicant a letter requesting further information about its activities, and specifically, the programmes and activities intended to be

carried out pursuant to clause 2.1, and the organisations to be funded pursuant to clause 2.1b.

7. On 6 October 2009, the Applicant provided the following information:

*Activities relating to the purpose 'To benefit the community by producing goods and services in a socially responsible manner while providing training or paid employment' (clause 2.1a.):*

- *Potentially establish a marketing/advertising network that may devote a portion of its resources to social marketing.*
- *Potentially establish a café.*
- *Potentially establish a music venue to support aspiring artists.*
- *Potentially establish an internet resource for game development and promotion.*
- *Liaison also intends to establish and maintain a website through which funds can be democratically distributed by public participation.*

*The organisations that will be eligible to receive these funds will have some certification that they will 'employ it for social gain and not for private profit' (clause 2.1.b). This certification will be registration with the New Zealand Charities Commission or of equivalent integrity.*

8. The Commission analysed the information provided by the Applicant, and on 14 October 2009 sent the Applicant a notice that may lead to decline on the basis that producing goods and services (clause 2.1a) is not a charitable purpose, and that the phrase "in a manner that is socially responsible" does not have any specific meaning at law and is not sufficient to render the purpose charitable. The Applicant was advised that "providing paid employment" (clause 2.1a) is only charitable when this relieves poverty and the Applicant had not shown how poverty would be relieved in this case. Further, the wording in clause 2.1b would not limit distribution to exclusively charitable organisations.

9. The Applicant responded to the notice on 20 October 2009 making the following submissions:

*Thank you for the feedback. As has been quite rightly illustrated the purpose did not fit with the legislation. We are interested in the business ethics implications of traditional firms becoming not-for-profit groups. We believe that these firms will be less likely to act in a socially irresponsible way as a financial return is not their fundamental purpose. It was this concept that led us to apply to the charities commission for registration ...*

*This was done in case it was possible that a firm with this motivation, rather than a profit motivation, could be registered as charitable. As there is no "Not For Profit" commission to certify the integrity of such an organisation, registration with the charities commission seemed the only option.*

*... Liaison does have a main activity that will be the end use of our resources and is more conventionally charitable. This was previously listed as an activity*

*"to establish and maintain a website through which funds can be democratically distributed by public participation"*

*We wish to establish ourselves for this purpose and set up a few businesses that can sustainably yield the funding we will need to maintain the web based service. We can then choose to take only the return from these businesses that will not stop them from being eco friendly or make them mistreat any stakeholders. Any business proceeds that are not needed for upkeep of our service can be distributed to other charities through the web service that is our purpose.*

*The only recipients of any funds will be organisations registered with the New Zealand Charities Commission or have other registration of equivalent integrity.*

*A new trust deed, with the previous errors corrected, is included along with a description of the intended website and its functions.*

10. The revised trust deed contained the following purposes:

2. Purposes

2.1 *The Trust is established to benefit the community by:*

*Maintaining a web based service through which donated funds can be democratically distributed, by public participation, to registered charities*

2.2 *The Trust is committed, in attaining its purpose, to uphold the following principals:*

*a. To distribute any surplus that Liaison accumulates only to organisations that are registered as charitable with the New Zealand Charities Commission or equivalent registration.*

*b. To ensure Liaison's business ventures efficiently generate value while striving to serve salient stakeholders and the environment. Making a financial return is not to compromise this principal.*

11. On 3 November 2009, the Commission sent the Applicant a second notice that may lead to decline on the basis that although the purpose in clause 2.1 appeared to be charitable, clause 2.2b of the revised trust deed and the Applicant's letter of 20 October 2009 still referred to setting up and operating businesses, which would be non-charitable purposes. In addition, the meaning of the expression "or equivalent registration" in clause 2.2a was unclear and therefore the Commission was not satisfied that this would restrict distribution of benefits to organisations with charitable purposes. Finally, the Applicant was advised that clause 3.1c did not appear to permit the Applicant to change its rules since only one trustee had been appointed.

12. On 4 November 2009, the Applicant responded to the notice as follows:

*... there has been confusion around the definition of 'activities' in this context which stems from the letter that I sent dated 2 October. In this letter I included our business activities as well as our charitable one. I see now that trusts can invest in anything in order to generate income and it is of no regard to the Charities Commission. ...*

### **Trust's purposes**

*... The confusion here seems to be due to me including business activities, which are the first four activities listed, along with the charitable activity which is listed last. ... I should have omitted the business activities that we might engage in to produce our income. This issue is resolved in the second draft deed where the only charitable activity, the online funding resource, is our sole purpose. ...*

*The "or of equivalent integrity" point in the 20 October letter, and the "or equivalent registration" as stated in the new draft deed, was to allow for charitable entities that are international or might have some other qualification of their integrity that is as valid as registration with this commission. In order to make this simple, I will alter the draft deed to only allow charities registered with the New Zealand Charities Commission to be recipients. ...*

*... It was my understanding that a charity, as well as other not-for-profits, could have business activities to fund their charitable activities. The fact that we intend to be economically sustainable and not subsistent on donations should not alter our purpose. . . . It is important to me that the business ventures owned by our charity conduct themselves in a socially responsible way. As such I wanted to stipulate in our founding documents that this will be the case. I hope this addresses any problems you had with 'principal' 2.2(b).*

### **Ancillary purposes**

*... The intent of clause 2.2(b) is not to address the way our charity uses its resources and the obligation to apply benefits only to charitable purposes. ... Nor does it aim to limit the scope of funds recipients to only those deemed charitable. ... The clause 2.2(b) relates to our "business ventures" and the way they are run. ...*

*Again these [clauses 2.2(a) and (b)] are principals not purposes.*

### **Sole trustee**

*... I must agree that [the appointment of additional trustees under clause 3.1(c)] would not be a charitable purpose but I fail to see the relevance of this comment as our purpose is clearly stated elsewhere. ... Trustees will be appointed as necessary in order to serve the stated charitable purpose and execute the charitable activity of running the web based funds distribution service.*

13. On 6 November 2009, the Applicant provided a further revised trust deed where the words "or equivalent registration" had been removed from clause 2.2a.
14. On 27 November 2009, the Commission sent the Applicant a third notice that may lead to decline on the basis that:
  - the Applicant does not appear to come within the definition of "entity" set out in section 4 of the Charities Act 2005;

- if the Applicant is an entity for the purposes of the Act, any amendments made to its trust deed by the sole trustee were invalidly made and therefore, only the original purposes in clauses 2.1 and 2.2 could be considered by the Commission;
- if the Applicant is an entity for the purposes of the Act, and the amendments to its trust deed were validly made, the purpose set out in clause 2.2b of the deed provided on 6 November and the information provided by the Applicant indicated that operating businesses (such as a marketing/advertising network, a café, a music venue, and an internet resource for game development and promotion) is an independent purpose which is not ancillary to the charitable purpose in clause 2.1.

15. The Applicant responded on 8 December 2009 as follows:

**Entity status**

*The Commission states that it does not consider Liaison a valid trust. The first point I wish to make is that it has never been asserted that Liaison is an incorporated trust. The first letter to the Commission dated 7 September 2009 states that incorporation was to be pursued when the deed was deemed suitable by the Commission. All of the draft trust deeds have been clearly labelled as such. ...*

**Original purpose**

*... The Commission need not be concerned that I cannot alter these draft deeds. They are marked as drafts and the first was signed, as a draft, to show my consent to have that version examined by the Charities Commission. No deed has been incorporated under any piece of legislation. Thus as the only potential trustee of a potential trust I assume I am free to draft, or re-draft, any document I choose. If a trust is incorporated I will be then bound by the rules in its deed and other documents.*

*Let me confirm that I do not want the earlier versions of the trust deeds to be considered, only the most recent one; emailed to the Commission on the 4<sup>th</sup> of November. This draft is the most satisfactory to the Commission*

**Amended purposes**

*... There still seems to be some confusion regarding principal 2.2b, possibly stemming from me confusing business as well as charitable activities when citing 'activities' in an earlier letter. This mistake on my part was clarified in the letter marked 4 November 2009. The Commission now states that if the trust operates business ventures then these are deemed a purpose. Such a purpose is not charitable and thus the trust cannot be registered.*

*The assertion that an entity that has business ventures is inherently not charitable seems strange. Any trust, charitable or otherwise, will have its assets invested to make a return. If the trust owns 100% of a business then that business is a business venture, or business activity, of that trust and that trust alone. The Charities Act itself discusses "business carried on by, or for, the benefit of the trustees in trust for charitable purposes" and indicates other legislation relating to such business. I am sure you will find*

*that this is not an abnormal situation and one that most, if not all, currently registered trusts are in.*

*The principal in 2.2b further limits the businesses in which the trust can invest to those that serve the community and environment not just the owner. ... It seems nonsensical for the Commission not to allow a trust to place such community minded restrictions upon itself. If the Commission maintains that this principal is inappropriate then it can be removed.*

## **The issues**

16. 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 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. In particular:
- (a) Whether the Applicant is an "entity" as defined in section 4(1) of the Act;
  - (b) If the Applicant is an "entity" for the purposes of the Act, whether the sole trustee had the authority to change the Applicant's rules;
  - (c) If the sole trustee did not have the authority to change the Applicant's rules, whether the Applicant's original purposes are charitable;
  - (d) If the sole trustee had the authority to change the Applicant's rules, whether the Applicant's amended purposes are charitable.

## **The law on charitable purpose**

17. Section 4(1) of the Charities Act states:

*entity means any society, institution, or trustees of a trust*

18. Section 13 of the Act sets out the essential requirements for registration, and provides:

### **13 Essential requirements**

- (1) *An entity qualifies for registration as a charitable entity if,—*
- (a) *in the case of the trustees of a trust, the trust is of a kind in relation to which an amount of income is derived by the trustees in trust for charitable purposes; and*
  - (b) *in the case of a society or an institution, the society or institution—*
    - (i) *is established and maintained exclusively for charitable purposes; and*
    - (ii) *is not carried on for the private pecuniary profit of any individual; and*

- (c) *the entity has a name that complies with section 15; and*
- (d) *all of the officers of the entity are qualified to be officers of a charitable entity under section 16.*

19. In order for a purpose to be charitable it must fall within one of the four charitable purposes set out in section 5(1) of the Act, it must provide public benefit, and it must not be aimed at creating a private financial profit.
20. 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 or religion, or any other matter beneficial to the community.
21. Section 18(3) of the Act requires the Commission, in considering a registration application, to have regard to the entity's activities at the time at which the application was made, the entity's proposed activities, and any other information that the Commission considers relevant.
22. Section 14 of the Act provides that the Commission may act on the basis of reasonable assumptions in relation to charitable trusts:

**14 Commission may act on basis of reasonable assumptions in relation to charitable trusts**

- (1) *A trust is not prevented from being of a kind referred to in section 13(1)(a) merely because the trustees of the trust have not yet derived an amount of income in trust for charitable purposes if, in the opinion of the Commission,—*
  - (a) *an amount of income will be derived by the trustees in trust for charitable purposes; and*
  - (b) *it is fit and proper to register the trustees of the trust as a charitable entity.*
- (2) *For the purposes of subsection (1), the Commission may act on the basis of any assumptions concerning the future derivation of income for charitable purposes that, in the opinion of the Commission, are reasonable in the circumstances of the case.*

**Charities Commission's analysis**

23. The Commission has first considered whether the Applicant is an "entity" as defined in section 4(1) of the Act, and whether the sole trustee had the authority to change the Applicant's rules.

Is the Applicant an "entity"?

24. Section 4(1) of the Act defines "entity" as "any society, institution, or trustees of a trust". The Commission has therefore considered whether the Applicant is either a validly constituted trust, or a society or institution.

### *Validly constituted trust?*

25. It has long been established that in order to create a valid trust, three certainties are needed: an intention to create a trust, certainty of subject matter and certainty of objects.
26. In order to have certainty of subject matter there must be identifiable property. Where the property is not clearly identifiable, the trust can fail for uncertainty of subject matter. A trust with no property is not a trust. In *Charity Law in Australia and New Zealand* Gino Dal Pont has written that "importantly, charitable trusts require the actual application of property for charitable purposes".<sup>1</sup>
27. In *Garrow & Kelly, Law of Trusts and Trustees* the authors wrote that "a trust that has been declared is not completely constituted until the settler has divested himself or herself of the trust property for the benefit of the beneficiaries".<sup>2</sup>
28. Evidence of property being passed into the trust is necessary. Therefore, in *Hartshorne v Nicholson*,<sup>3</sup> where blanks were left in a will for the amounts to be given to charity, the gift failed.
29. Section 14 of the Charities Act has introduced an additional consideration to the general rule that property has to pass to the trustees upon constitution of a trust. Section 14 states that the Commission may act on the basis of reasonable assumptions in relation to charitable trusts even if the trust has not yet derived an amount of income in trust for charitable purposes.
30. The Commission considers that in order for section 14 of the Act to apply there must first be a valid trust and this requires that the trust must have been validly constituted. The law is clear that no trust is constituted unless some property is identified. In order to change such a fundamental rule, the legislation must be clear and precise concerning its intention to abrogate such a rule and replace it with another one.
31. In this application, the trust deed does not contain any indication that property has passed from a settlor to the trustee. Furthermore, in his letter of 8 December 2009, the sole officer identifies himself as "the only potential trustee of a potential trust" and implied that he would only be bound by the rules in the deed if the trust was "incorporated".
32. As the certainty of subject matter is missing from the Applicant's trust deed and a binding trust does not appear to have been created, the Commission considers that a trust has not been validly constituted and therefore the Applicant cannot be considered to be the trustee of a trust.

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<sup>1</sup> *Charity Law in Australia and New Zealand*, Oxford, Oxford University Press, 2000 at 347.

<sup>2</sup> Noel Kelly, Chris Kelly and Greg Kelly, *Garrow and Kelly: Law of Trusts and Trustees*, 6<sup>th</sup> Ed., Wellington, LexisNexis NZ Ltd, 2005 at 103, para 6.2.1.

<sup>3</sup> (1858) 26 B. 58 cited by Jean Warburton, *Tudor on Charities*, 9<sup>th</sup> Ed., London, Sweet & Maxwell, 2003 at 137, para 3-008.



*Society or institution?*

33. Section 5(1) of the *Interpretation Act 1999* provides that "the meaning of an enactment must be ascertained from its text and in the light of its purpose". The terms "society or institution" are not defined in the Charities Act, it is therefore necessary to look at the plain meaning of these words and the definitions of these terms that are normally used.
34. The conventional starting point for determining the plain meaning of statutory terms is the dictionary. The *Concise Oxford English Dictionary*<sup>4</sup> defines these terms as follows:

<b>Society</b>	3. An organisation or club formed for a particular purpose or activity.
<b>Institution</b>	1. A large organisation formed for a particular purposes, such as a college, bank etc.
<b>Organisation</b>	2. An organised group of people with a particular purpose, such as a business or government department.

35. These definitions indicate that a "society" or "institution" will consist of several people who band together for a common purpose.
36. As the Applicant is not incorporated under any enactment, such as the *Incorporated Societies Act 1908*, the *Charitable Trusts Act 1957*, or the *Companies Act 1993*, the Commission considers that the Applicant must be treated as an "unincorporated entity".
37. In *Hartigan Nominees Pty Ltd v Rydge*,<sup>5</sup> the Court defined an unincorporated association as "a group of people defined and bound together by rules and called by a distinctive name".
38. In *Conservative & Unionist Central Office v Burrell*,<sup>6</sup> the court said that an unincorporated association meant:

*Two or more persons bound together for one or more common purposes, not being business purposes, by mutual undertakings, each having mutual duties and obligations, in an organisation which has rules which identify in whom control of it and its funds rests and on what terms and which can be joined or left at will. The bond of union between the members of an unincorporated association has to be contractual.*<sup>7</sup>

39. Based on the plain meaning of the words and the court's judgments in *Hartigan Nominees Pty Ltd* and *Conservative & Unionist Central Office*, the

<sup>4</sup> 11<sup>th</sup> ed., Revised, Oxford, Oxford University Press, 2006, "society", "institution" and "organisation".

<sup>5</sup> (1992) 29 NSWLR 405 cited by Gino Dal Pont, *Charity Law in Australia and New Zealand*, Oxford, Oxford University Press, 2000 at 365.

<sup>6</sup> [1980] 3 All ER 42 and on appeal [1982] 2 All ER 1 (CA).

<sup>7</sup> [1980] 3 All ER 42 at 58, and on appeal [1982] 2 All ER 1 at 4 (CA) cited by Mark von Dadelszen, *Law of Societies in New Zealand, Unincorporated, Incorporated, and Charitable* Wellington, Butterworths, 2000 at 10, para 2.1.2.

Commission considers that an unincorporated society must have at least two members. In the present case, only one individual has identified himself with the application, therefore the Commission considers that the Applicant does not constitute a "society or institution".

### *Conclusion*

40. The Commission considers that the Applicant is neither a validly constituted trust, nor a society or institution. Therefore, the Applicant is not an "entity" as defined in section 4(1) of the Charities Act.

### Did the sole trustee have the authority to change the Applicant's rules?

41. Notwithstanding the Commission's conclusion that the Applicant is not an "entity", the Commission has proceeded to consider whether the sole officer had the authority to change the Applicant's rules.

42. Clause 3.1 of the Applicant's trust deed states:

#### *3 Power of appointment and number of trustees*

- a. The number of Trustees shall not be less than 2.*
- b. The Trustees may, if they consider it desirable for the proper and efficient administration of the Trust Fund, appoint advisory trustees on such terms and conditions as the Trustees see fit.*
- c. In the event that the number of trustees falls below 2 the remaining trustee's only power shall be the appointment of trustees. The only valid business capable of transaction by the Trustee will be the appointment of at least one other Trustee.*

43. As the Applicant has only one trustee, the Commission considers that the only business that this person can undertake under clause 3.1(c) of the trust deed is "to appoint at least one other Trustee". Accordingly, a sole trustee did not have the authority to validly change the purposes set out in the trust document and therefore, the purposes contained in the rules document received on 10 September 2009 are the purposes that the Commission must assess.

### Are the purposes outlined in clause 2 of the original trust deed exclusively charitable?

44. The purposes set out in clause 2 of the trust deed received on 10 September 2009 are:

#### *2.1 The purposes for which the Trust is established are:*

- a To benefit the community by producing goods and services in a socially responsible manner while providing training or paid employment.*
- b To distribute any surplus only to organisations that will employ it for social gain and not for private profit.*

2.2 The trust is committed, in attaining its purpose, to uphold the following principals (sic):

a To seek efficiency in generating value for stakeholders

b To strive to determine salience of stakeholders while not excluding the interests of general society.

45. The Commission considers that the purposes in clause 2 are not aimed at the relief of poverty, the advancement of education or the advancement of religion. These purposes have therefore been considered under "any other matter beneficial to the community".

46. In order for a purpose to qualify as "any other matter beneficial to the community", the purpose must show two things: first, that it is beneficial to the community and second, that it is within the spirit and intendment of the purposes set out in the Preamble to the *Statute of Charitable Uses 1601* (Statute of Elizabeth).<sup>8</sup> The purposes set out in the Preamble are as follows:

- relief of aged, impotent, and poor people
- maintenance of sick and maimed soldiers and mariners
- schools of learning
- free schools and scholars in universities
- repair of bridges, ports, havens, causeways, churches, sea banks, and highways
- education and preferment of orphans
- relief, stock or maintenance of houses of correction
- marriage of poor maids
- supportation, aid and help of young tradesmen, handicraftsmen, and persons decayed
- relief or redemption of prisoners or captives and
- aid or ease of any poor inhabitants concerning payment of fifteens, setting out of soldiers and other taxes.<sup>9</sup>

47. Concerning the first limb of the test (beneficial to the community), the Supreme Court of Canada in *Vancouver Society of Immigrant and Visible Minority Women v MNR*<sup>10</sup> has summarised what is meant by the public benefit requirement. Gonthier J stated: "There must be an objectively

<sup>8</sup> *New Zealand Society of Accountants v Commissioner of Inland Revenue* [1986] 1 NZLR 147 at 157 and *Re Tennant* [1996] 2 NZLR 633 at 638.

<sup>9</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.

<sup>10</sup> *Vancouver Society of Immigrant and Visible Minority Women v MNR* [1999] 1 SCR 10.

measurable and socially useful benefit conferred; and it must be a benefit available to a sufficiently large section of the population to be considered a public benefit."<sup>11</sup>

48. In terms of purposes falling under the fourth head, the court does not assume or presume a public benefit as in the case of the other heads of charity – the benefit in issue must be affirmatively proved or clear to the court.<sup>12</sup> In *Vancouver Society of Immigrant and Visible Minority Women v MNR*, Gonthier J stated that although the public benefit requirement applies to all charitable purposes, it is of particular concern under the fourth head. "This is so because under the first three heads, public benefit is essentially a rebuttable presumption, whereas under the fourth head it must be demonstrated".<sup>13</sup>
49. Concerning the second limb of the test, the courts have established that the purposes must also be within the spirit and intendment of the Statute of Elizabeth.<sup>14</sup> This requirement is cumulative in the sense that both requirements must be met before a purpose can be said to be charitable under the fourth head of charity.<sup>15</sup>
50. Grounds for holding that purposes are within the spirit and intendment of the Statute of Elizabeth may be found in the facts of the application but also in cases decided by the Court on similar facts. In *Travis Trust v Charities Commission*<sup>16</sup>, 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.*

51. The Commission considers that "producing goods and services in a socially responsible manner while providing training or paid employment" is not a charitable purpose because it is not substantially similar to the spirit and intendment of the purposes set out in the Preamble to the Statute of Elizabeth.
52. Furthermore, according to *Commissioners of Inland Revenue v Oldham Training and Enterprise Council*,<sup>17</sup> promoting training and employment will not necessarily be a charitable purpose. In that case Lightman J 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*

<sup>11</sup> *Vancouver Society of Immigrant and Visible Minority Women v MNR* [1999] 1 SCR 10 at para 41 per Gonthier J dissenting. Gino Dal Pont, *Charity Law in Australia and New Zealand*, Oxford, Oxford University Press, 2000 at 174-175.

<sup>12</sup> *DV Bryant Trust Board v Hamilton City Council* [1997] 3 NZLR 342, 350.

<sup>13</sup> [1999] 1 SCR 10 at para 41.

<sup>14</sup> *New Zealand Society of Accountants v Commissioner of Inland Revenue* [1986] 1 NZLR 147 at 157 and *Re Tennant* [1996] 2 NZLR 633 at 638.

<sup>15</sup> *National Anti-Vivisection Society v Inland Revenue Commissioners* [1948] AC 31 at 41.

<sup>16</sup> CIV-2008-485-1689, High court, Wellington, 3 December 2008 (Joseph Williams J.) at para 20.

<sup>17</sup> (1996) 69 Tax Cases 231.

*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>18</sup>

53. The Commission considers that "producing goods and services in a socially responsible manner" is similar to promoting "ethical tourism" which was considered by the Canadian Federal Court of Appeal in *Travel Just v Canada (Canada Revenue Agency)*.<sup>19</sup> In that case, the court considered that operating in an "ethical" manner would not guarantee that the activities undertaken were exclusively charitable. The court held:

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

54. Finally, the Commission considers that the words "to distribute any surplus only to organisations that will employ it for social gain and not for private profit" would not limit distribution to exclusively charitable purposes. This is because not all organisations that are not "for social gain and not for private profit" are necessarily charitable.

### *Conclusion*

55. The Commission considers that the purposes set out in clause 2 of the original trust deed are not charitable.

### Are the purposes in clause 2 of the amended trust deed charitable?

56. The Commission has also considered whether the purposes in clause 2 of the Applicant's amended deed (received on 6 November 2009) would meet registration requirements. Clause 2 states:

2. Purposes

2.1 *The Trust is established to benefit the community by:*

*Maintaining a web based service through which donated funds can be democratically distributed, by public participation, to registered charities*

2.2 *The Trust is committed, in attaining its purpose, to uphold the following principals:*

<sup>18</sup> (1996) 69 Tax Cases 231, 251.

<sup>19</sup> 2006 FCA 343 [2007] 1 CTC 294 para 9, application for leave to appeal to the Supreme Court of Canada dismissed 2007, CanLII 15983 – 2007-05-03.

*a To distribute any surplus that Liaison accumulates only to organisations that are registered as charitable with the New Zealand Charities Commission.*

*b To ensure Liaison's business ventures efficiently generate value while striving to serve salient stakeholders and the environment. Making a financial return is not to compromise this principal.*

57. The Commission considers that the purposes set out in clauses 2.1 and 2.2a appear to be charitable. However, the purpose set out in clause 2.2b and information provided by the Applicant indicate that its main purpose is to operate business ventures (such as a marketing/advertising network, a café, a music venue, and an internet resource for game development and promotion). Such a purpose would not be within the spirit and intentment of the Preamble to the Statute of Elizabeth.

### *Conclusion*

58. The Commission considers that operating the businesses referred to in clause 2.2b will be independent non-charitable purposes, which are not ancillary to the charitable purpose set out in clause 2.1.

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

59. 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.
60. 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>20</sup>
61. 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>21</sup>*

62. For the reasons given above, the Commission does not consider that the Applicant is either a validly constituted trust or a society or institution and therefore section 61B of the Charitable Trusts Act cannot operate to "save" this application.

<sup>20</sup> *Re Beckbessinger* [1993] 2 NZLR 362, 373.

<sup>21</sup> *Re Beckbessinger* [1993] 2 NZLR 362, 376.

Conclusion

- 63. The Commission concludes that the Applicant is not a valid entity as defined by section 4(1) of the Charities Act.
- 64. If the Applicant is a valid entity, the Commission concludes that the Applicant did not have any authority to amend the purposes in clause 2 of the original trust deed and those purposes are non-charitable.
- 65. If the Applicant did have authority to amend the purposes in its trust deed, the amended purposes in clause 2 are not substantially charitable.

**Charities Commission's determination**

- 66. The Commission determines 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.
- 67. In the alternative, the Commission determines that the Applicant has not been established and maintained exclusively for charitable purposes and not for the private pecuniary profit of any individual, as required by section 13(1)(b) 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