

Registration Decision: Scoop Foundation for Public Interest Journalism

Board Decision

1. The role of the independent Charities Registration Board ("the Board") is to maintain the integrity of the Charities Register through ensuring that entities on the Charities Register qualify for registration. The Board makes its decisions by applying the law to the facts before it. The Board must decline to register an organisation when it does not advance a charitable purpose for the public benefit.
2. The Board's decision is to decline to register the Scoop Foundation for Public Interest Journalism ("the Trust") because it does not advance exclusively charitable purposes.
3. Following the three-step process of *Ellis J in Re the Foundation for Anti-Aging Research and the Foundation for Reversal of Solid State Hypothermia ("FAAR and FRSSH")*¹ the Board has considered:
 - a. whether the Trust's stated purposes are capable of being charitable;
 - b. whether the Trust's activities are consistent with or supportive of a charitable purpose; and
 - c. if the Trust's activities are found not to be charitable, whether they can be said to be merely ancillary to an identified charitable purpose.
4. The Board considers the Trust has a charitable purpose to advance education through its investigative journalism and other activities.
5. The Board has carefully considered all of the Trust's submissions and considers that the Trust has not provided sufficient information about its activities demonstrating that its relationship with Scoop Publishing Limited ("the Company") is advancing a charitable purpose. One of the Trust's main activities is providing support to the Company.
6. The Board has considered whether the Company's income is ultimately applied to charitable purposes. Based on the information provided by the Trust, the Board is not satisfied that the income is ultimately applied to charitable purposes.
7. The Trust has not shown that the Company is capable of raising funds for charitable purposes.
8. The Trust has also not provided evidence that there are sufficient protections in place to ensure that the Trust does not provide private benefits to the Company or to individuals associated with the Company.
9. The Trust was notified that it had not provided sufficient information, and given the opportunity to respond.

¹ *Re the Foundation for Anti-Aging Research and the Foundation for the Reversal of Solid State Hypothermia* [2016] NZHC 2328 ("FAAR and FRSSH").

10. This decision is separated into the following sections:
- Background.
 - What are the purposes of the Trust?
 - Does the Trust have a charitable purpose to advance education?
 - Is the Trust's purpose to raise funds via a trading company charitable?
 - Can any non-charitable purpose be considered ancillary to the charitable purposes of the Trust?
 - Determination

Background

11. The Trust applied for registration as a charity under the Charities Act 2005 ("the Act") on 2 September 2015.
12. On 5 November 2015, Charities Services² requested further information on the activities of the Trust.³ On 9 March 2016, the Trust provided further information about its activities.⁴ On 28 April 2016, Charities Services referred the application to the Board for its consideration. The Board indicated that it required more time to consider this application, and deferred its decision.
13. On 25 May 2016, the Trust provided further submissions on its application,⁵ which were considered by the Board on 22 June 2016. On 6 July 2016, on direction from the Board, Charities Services notified the Trust that it did not meet registration requirements because it had not demonstrated that it advanced education in a charitable manner, and the relationship between the Trust and the Company was not advancing a charitable purpose.⁶
14. Following a meeting between the Trust and Charities Services, the Trust provided further submissions on 11 November 2016.⁷ On 2 December 2016, Charities Services advised the Trust that the submissions it had provided demonstrated that its investigative journalism projects were sufficiently structured to advance education in a charitable manner.⁸ At this time, Charities Services also requested further information from the Trust regarding the relationship between the Trust and the Company. After a number of extensions, the Trust provided further submissions on 13 March 2018.⁹ Charities Services sought clarification of the profit figures stated in its submissions and the related-party loans listed in the Company's financial statements, and received clarification via telephone on 8 June 2018.
15. On 28 June 2018, Charities Services notified the Trust that it did not meet registration requirements because the relationship between the Trust and the Company was not advancing a charitable purpose.¹⁰ The Trust had not shown that the Company is capable of raising funds for charitable purposes. The Trust had also not provided evidence that there are

² Charities Services, Ngā Ratonga Kaupapa Atawhai, is part of the Department of Internal Affairs, and administers the Charities Act 2005 ("the Act").

³ Charities Services' request for information to the Trust dated 5 November 2015.

⁴ The Trust's submission to Charities Services dated 9 February 2016 (received on 9 March 2016).

⁵ The Trust's submission to Charities Services dated 25 May 2016.

⁶ Charities Services' notice to the Trust dated 6 July 2016.

⁷ The Trust's submission to Charities Services dated 11 November 2016.

⁸ Charities Services' request for information to the Trust dated 2 December 2016.

⁹ The Trust's submission to Charities Services dated 13 March 2018.

¹⁰ Charities Services' notice to the Trust dated 28 June 2018.

sufficient protections in place to ensure that the Trust does not provide private benefits to the Company. This notice provided the Trust with the opportunity to provide any additional submissions before a final decision was made.

16. The Trust's response was due 26 July 2018. Charities Services granted extensions of time totaling eight months; however, the Trust did not provide any further response.

What are the purposes of the Trust?

17. The Trust's stated purposes at clause 3 of the Trust Deed are:¹¹

- 3.1 educate the public in New Zealand about the role and function of independent journalism in an open, democratic society;
- 3.2 fund reporting and journalistic investigation which educates and informs the New Zealand public about:
 - (a) society, government, public institutions and officials; and
 - (b) private corporations, voluntary organisations and individuals that affect the public and the ability to participate in public decision making.
- 3.3 provide education and public information about the journalistic culture in New Zealand based on fairness, accuracy and comprehensiveness;
- 3.4 fund and assist publications and activities which support and promote the above purposes.

Does the Trust have a charitable purpose to advance education?

18. Applying the first step of Ellis J's three-step process in the *FAAR and FRSSH* decision, the Board considers that Trust's stated purposes are charitable under the advancement of education.

Do the activities of the Trust support a charitable purpose?

19. The Board applied the second step of Ellis J's three-step process in the *FAAR and FRSSH* decision and considered whether the Trust's activities support a charitable purpose.
20. The Trust's investigative journalism and some of its other activities, such as its partnership with journalism schools, are supportive of its stated educational purpose.
21. One of the main activities of the Trust is providing support to the Company. The Trust provided a "substantial" interest-free loan to the Company in 2015,¹² with the ability for the Trust to provide further loans in future.¹³ Further, the business model adopted by the Company in 2014 was centred on the idea of establishing the Trust, and the Company could not have sustained its operations during 2015 without the loans from the Trust.¹⁴ Given the strong relationship between the Trust and the Company, the Board considers that the Trust's support of the Company is an independent purpose of the Trust. The Board has therefore considered whether this purpose is charitable.

¹¹ "Trust Deed establishing the Scoop Foundation for Public Interest Journalism" dated September 2015 at clause 3.

¹² Refer, for example, to the Memorandum of Understanding dated 21 November 2016 at page 2.

¹³ The Trust's submission to Charities Services dated 13 March 2018 at 2.2.

¹⁴ The Trust's submission to Charities Services dated 13 March 2018 at page 3.

22. The Trust advised that the Company provides technical, administrative, campaign delivery and marketing/editorial services to the Trust.¹⁵ The Trust submitted that it would consider contracting the provision of these services to third-party organisations; however, it has not provided any information to support this consideration. The Board considers that the Company contracting its services to the Trust is not sufficient to support a charitable purpose.
23. The Board considered whether the Company itself had charitable purposes in order to determine whether the Trust's support of the Company could be considered to advance a charitable purpose. The Board considers that the activities of the Company are not advancing exclusively charitable purposes. The news stories, press releases, opinion pieces and other articles published on the Company's website are not advancing education for the reasons discussed in *Re Draco*,¹⁶ and do not otherwise advance charitable purposes. The website's materials are too unstructured to provide information that improves a useful branch of human knowledge, and many of the pieces promote a particular point of view.
24. The Board therefore considered whether the Trust's support of the Company was advancing a charitable purpose by using the Company to raise funds to support the Trust.

Is the Trust's purpose to raise funds via a trading company charitable?

Approach to assessing fundraising purposes

25. The advancement of charitable purposes by fundraising for those purposes has long been established as charitable in New Zealand. In *Auckland Medical Centre v Commissioner of Inland Revenue*, the Court stated:¹⁷

It is clear that if either the business itself is conducted in trust for charitable purposes or the income derived from that business is held in trust for charitable purposes, the trustees may carry on any business, buy and sell, employ staff, provide for reserves and engage in sundry and other commercial operations. It follows that the business itself may have non-charitable characteristics. The test is whether its income is ultimately applied to charitable purposes.

26. The Board must consider whether the income is ultimately applied to charitable purposes. If an entity cannot demonstrate its ability to achieve a financial return, the Board cannot be satisfied its income will ultimately be applied to charitable purposes.
27. Some considerations include the potential for the trading activity to become an independent non-charitable purpose, through the business failing to generate funds for the charity, and the charity losing resources through providing finances to the trading body at less than market rates.
28. In order to address these areas, applicants for registration whose purpose is to fundraise through business activities need to demonstrate, firstly, that the business activity is capable of raising funds for charitable purposes, and, secondly, that there are sufficient protections in place to ensure that the charity does not provide private benefits to the business entity or to individuals associated with the business entity.
29. The Board acknowledges that there is no established test to determine whether the above risks can be mitigated appropriately; however, there are ways an entity could demonstrate

¹⁵ The Trust's submission to Charities Services dated 13 March 2018 at 2.1.

¹⁶ *Re Draco Foundation NZ Charitable Trust* (2011) 25 NZTC 20-032 (HC) ("*Draco*").

¹⁷ *Auckland Medical Aid Trust v Commissioner of Inland Revenue* [1979] 1 NZLR 382 at 387 (SC).

this. Some examples include providing independent advice that the trading activities are capable of raising funds, and including strong protections in any agreements between related parties.

Is the Company capable of raising funds for charity?

30. The Trust is the sole shareholder of the Company. The Company has lost revenue in the last four years¹⁸ and the Trust has been providing loans to the Company to allow it to keep operating.¹⁹ The business model adopted by the Company in 2014 centred on the idea of establishing the Trust, and the Company could not have sustained its operations during 2015 without the loans from the Trust.
31. The Trust submitted that it is providing support for the Company but that this support will enable the Company to provide funds in the future to support the charitable purposes of the Trust.²⁰
32. The Trust submits that it expects the Company to reach a level of profitability in the 2018 to 2019 financial year. The Trust projects the Company will continue to grow revenue from licences, subscriptions and advertising with overall profits growing from \$50,000 in 2018 to \$160,000 in 2021.²¹ The Trust projects growth to flow from the ScoopPro rebrand, an upcoming awareness campaign to encourage the uptake of licences, and a resumption of Scoop advertising sales in 2018.²² The Trust has not provided up-to-date information about the outcomes of the 2018 to 2019 year to demonstrate a level of profitability.
33. The Trust states it would charge market-rate interest on its loans to the Company from 1 April 2018 with security on the Company's assets.²³ Since 2015, the Trust has loaned \$72,637 to the Company.²⁴ Although the Trust has made no further loans to the Company since March 2017,²⁵ the Trust has indicated the Company may request additional loan funds from the Trust in the future.²⁶ The Company has offset the loan by providing services to the Trust. According to the amended Memorandum of Understanding ("MoU") between the Trust and the Company dated 11 March 2018, the Company currently owes the Trust \$50,507.²⁷
34. The Trust states it may elect to roll over the loans rather than demand repayment.²⁸ The Trust submits that there is a benefit to the Trust remaining a first-ranked secured creditor of the Company. The Trust also submits the Company will be able to provide technical, marketing and administrative support for the Trust's educational and fundraising activities at an attractive price. The Trust advises it has limited financial and human resource to invest in these activities and these activities are necessary for the Trust to achieve its objectives.

¹⁸ The Company's Financial Statements for the years 2013-2014, 2014-2015, 2015-2016 and 2016-2017, received 23 November 2016.

¹⁹ The Trust's Annual Performance Report 2015-2016.

²⁰ Refer, for example, to the Trust's submission to Charities Services dated 11 November 2016.

²¹ The SPL Performance and Projections Summary.

²² The Trust's submission to Charities Services dated 13 March 2018 at 8.

²³ The Trust's submission to Charities Services dated 13 March 2018 at 7. Security to be listed on the Personal Property Securities Register.

²⁴ The SPL Performance and Projections Summary.

²⁵ The SPL Performance and Projections Summary.

²⁶ The Trust's submission to Charities Services dated 13 March 2018 at 2.2.

²⁷ The Trust's submission to Charities Services dated 13 March 2018 at 13.

²⁸ The Trust's submission to Charities Services dated 13 March 2018 at 8.

35. The Company has cut costs and has increased revenue from sources other than advertising. According to the Company's financial performance and projections summary provided, there was a loss in the year ending 31 December 2015, but the information provided by the Trust records that the Company's financial position has improved in 2016 and 2017. The Company's summary also projects the Company's profit to increase from 2018 to 2021.
36. It is not clear, however, if the Company made profits in 2016 and 2017. The Trust submits that the Company still requires 50 more licensed organisations to break even. The Company's profit also appears to rely on loans from the Trust and "crowd sales" (crowdfunding) by the Company. In 2017, for example, the Company's financial performance and projections summary states that it made a profit of \$38,331. The same year the Company received \$17,927 in loans from the Trust and \$28,498.16 from crowdfunding by the Company. The loans and crowdfunding included in the profit figures in the Company's financial performance and projections summary provided and the Company's profit and loss statement for the year ending 31 December 2017.²⁹ If the loans and crowdfunding are not included in the profit then the Company made a loss in 2016 and 2017. We do not consider that crowdfunding demonstrate the Company's ability to generate ongoing profit from its core business activities. Receiving a loan does not represent revenue, and therefore should not be included in profit calculations.
37. The Board questions the reliability of the Trust's profit projections for the Company. For example, revenue from subscriptions has decreased each year from 2015 to 2017, and yet the Trust projects that the subscription revenue will increase to \$130,000. This appears to be based on the launch of ScoopPro, but it is not clear how ScoopPro will be able to reverse the decline in subscription revenue over the next few years. While licences are increasing, it is not clear why the Trust considers subscription revenue will increase at the rate it forecasts in its projections. The advertising projections also appear to be based on only one advertising sale.³⁰
38. The Trust also projects costs to rise in 2018 to 2021, and this may reduce profits for the Company if it does not meet revenue projections.³¹ The Board considers that the Trust would need to provide independent information outlining that the projections for the Company's profitability are reasonable.
39. The financial statement for the year ending 31 March 2016 reports a liability of "Related party Receivables" totalling \$473,741 and total equity is -\$404,558.³² There are no notes in the financial statement to explain the nature of this item except that the financial statements state the shareholder, the Trust, undertakes to meet all of the Company's day-to-day obligations to allow the Company to continue as a going concern. The Board considers that these liabilities not only create doubt about the ability of the Company to provide funds for the Trust's charitable purposes but also that the Trust will be obliged to provide significant further funds for the Company to continue operating.
40. The Trust submits that this is an in error in the financial statements.³³ It submits that this liability was funds owed to Scoop Media Limited, the previous parent of the Company. This debt was extinguished when the major creditor of Scoop Media Limited, a trustee of the Trust,

²⁹ The Trust's submission to Charities Services dated 8 June 2018.

³⁰ The Trust's submission to Charities Services dated 13 March 2018 at 5.

³¹ The SPL Performance and Projections Summary.

³² The Company's financial statement for the year ending 31 March 2014 (under its previous name Scoop Subscriber Services Limited) lists this as "Intercompany- Scoop Media Ltd". Scoop Media Limited gifted its online publishing company to the Trust and was removed from the Companies Register on 17 May 2017.

³³ The Trust's submission to Charities Services dated 8 June 2018.

called in their loan and took over the Company.³⁴ The Trust submits that the Company has no debts except for the loans from the Trust and a small overdraft facility. The Board considers that the Trust would need to provide financial statements for the Company's most recent financial year in order to confirm the current liabilities of the Company.

41. If the most recent financial statements for the Company were provided to support the Trust's statements, it may have helped explain the liabilities listed in the earlier financial statements for the Company. However, the Board considers that the error is significant and raises further questions about the reliability of financial information provided by the Trust about the Company.
42. The Trust had eight months to provide further information about these issues, and to demonstrate that the Company is capable of making a profit, but has not done so. Based on the information provided by the Trust, the Board is not satisfied that the Trust has demonstrated that the Company is capable of raising funds for charity.

Does the Trust have sufficient protection in place to prevent it from providing benefits to the Company or to individuals associated with the Company?

43. The Board considers that the Trust's submissions indicate that there are some protections in place to prevent private benefit. The Trust has not provided further loans to the Company since March 2017 and has said it would charge market interest rates on the loans to the Company.
44. There is an opportunity for the Company to offset the loans by charging the Trust for the provision of services. The MoU states that any services will be priced on an arm's length basis with estimated costing from other service providers serving to guide the decisions. Despite this, there will be limited mechanisms in place to verify that services charged for were actually provided.
45. As discussed above, it is not clear that the Company will meet profit projections and there appear to be significant liabilities listed in the financial statements. If the Company fails to meet revenue targets, it may not be able to repay its loans to the Trust, let alone provide income to be applied to charitable purposes.
46. The Trust has been given the opportunity to make changes in order to be able to demonstrate that there is sufficient protection against the provision of private benefits to the Company or to individuals associated with the Company, but has not done so.

Can any non-charitable purpose be considered ancillary to the charitable purposes of the Trust?

47. Applying the third step of Ellis J's three-step process in the *FAAR and FRSSH* decision, the Board has considered whether the Trust's activities to support the trading activities of the Company can be considered ancillary to any charitable purpose.
48. As discussed, the Board considers that the support the Trust is providing to the Company is significant, and that there exists a strong relationship between the Trust and the Company.

³⁴ The Trust's submission to Charities Services dated 8 June 2018. The trust states that this occurred in December 2014 but this appears to be an error. The Companies Office listing for the Company states that MOT Group Holdings Limited acquired 100% of the shares from Scoop Media Limited on 6 May 2015 and the Trust acquired the shares on 25 November 2015.

49. The Board considers that the fundraising activities cannot be considered ancillary to the charitable purposes of the Trust.

Determination

50. The Board determines that the Trust is not qualified for registration as a charitable entity because it is not established for exclusively charitable purposes as required by section 13(1) of the Act.
51. The Board considers that the Trust has an independent purpose to support the Company. The Company does not advance exclusively charitable purposes, nor has the Trust provided sufficient information demonstrating that the Company is capable of raising funds for charitable purposes. The Trust has also not provided evidence that there are sufficient protections in place to ensure that the Trust does not provide private benefits to the Company or to individuals associated with the Company.
52. The decision of the Board is therefore to decline to register the Trust as a charity, pursuant to section 19 of the Act.

Signed for and on behalf of the Board



Roger Holmes Miller

Date

15th June 2019