

## Registration decision: Canterbury Economic Development Fund

### The facts

1. Canterbury Economic Development Fund (the Applicant) was created by a deed of trust dated 10 April 2003. The Applicant applied for registration with the Commission on 20 January 2009.

2. The Applicant's objects are set out in clause 4 of the trust deed:

*“4.1 The Settlor declares that the Trust is a trust for charitable purposes for the benefit of the present and future inhabitants of the Canterbury region and directs that the Trust Fund may be applied and used exclusively by the Trustee for the following general purposes within New Zealand (“the Objects”), namely:*

*(a) To promote sustainable employment opportunities in the Canterbury region; and*

*(b) To generate economic transformation and sustainable economic benefits for the Canterbury region.*

*4.2 In considering an application, the Trustee will have regard to:*

*(a) appropriate strategic development plans for the Canterbury region;*

*(b) whether other sources of funding or support are available, including assistance provided through industry or regional development policies and programmes of local authorities or central government;*

*(c) the objectives, roles and activities of any other organisations engaged in economic development activities in the Canterbury region; and*

*(d) any other matters that it believes are relevant.*

*4.3 The Objects of the Trust are and shall be charitable and shall not include or extend to any matter or thing which is or shall be held or determined to be non-charitable. Any private benefit which is conferred on any individual or individuals must be incidental to the pursuit by the Trust of the Objects. The powers and purposes of the Trustees shall be restricted accordingly and limited to New Zealand.”*

3. In relation to distribution of surplus assets, clause 16.2 of the trust deed states:

*“On the winding up, the Trustees will pay or apply such of the Trust Fund as then remains towards the furtherance of the objects set out in this Deed, or for exclusively charitable purposes.”*

4. The Commission analysed the application, and on 4 May 2009 sent the Applicant a notice that may lead to decline on the basis that the purposes set out in clause 4 were not charitable according to law. The notice also stated that clause 16.2 did not restrict distribution of surplus assets on winding up to charitable purposes.
5. The Applicant's solicitor responded in a letter dated 29 June 2009 submitting that:
  - The Commission has confused the Applicant's activities with its purposes:

*"The correct legal approach . . . is that an entity's purposes are determined from its constituting documents. It is not lawful for the Charities Commission to speculate on what an entity's purposes are based on its activities."*
  - The purpose contained in clause 4.1(a) is charitable under the relief of poverty because "securing gainful activity for unemployed people is charitable in its own right".
  - The purpose contained in clause 4.1(b) is charitable under the fourth head of charity, "other matters beneficial to the community", on the basis of the courts' reasoning in *Crystal Palace Trustees v Minister of Town and Country Planning*, *Commissioner of Taxation v Triton Foundation*, *Tasmanian Electronic Commerce Centre Pty Ltd v Commissioner of Taxation*, and *Commissioners of Inland Revenue v Oldham Training and Enterprise Council*.
  - Clause 4.3 prevents the Applicant from conferring any private benefit on an individual, unless that private benefit is incidental to the pursuit of the Applicant's charitable objects. The provision of substantial private benefits on individuals by the Applicant would constitute a breach of trust.
  - There is no requirement in the Charities Act or elsewhere that requires a trust to apply surplus assets to charitable purposes upon winding up. Case law confirms that only income, not capital, must be applied to charitable purposes. As the Applicant's objects are charitable, the Applicant can only apply its surplus assets to charitable purposes.

### **The issues**

6. The Commission must consider whether the Applicant meets all of the essential requirements for registration under the Charities Act 2005. 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.

## The law on charitable purposes

7. Under section 13(1)(a) of the Charities Act, a trust qualifies for registration if it is of a kind in relation to which an amount of income is derived by the trustees in trust for charitable purposes.
8. 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.
9. Section 5(3) of the Act provides that any non-charitable purpose must be ancillary to a charitable purpose.
10. In considering an application for registration, section 18(3)(a) of the Act requires the Commission to have regard to:
  - (i) *the activities of the entity at the time at which the application was made; and*
  - (ii) *the proposed activities of the entity; and*
  - (iii) *any other information that it considers is relevant; ...*

## Charities Commission's analysis

11. The purposes in clause 4.1 are not aimed at the advancement of education or religion. The Commission has therefore considered whether the Applicant's purposes relate to the relief of poverty or any other matter beneficial to the community. Firstly, however, the Commission has considered whether the wording in clause 4.3 limits the Applicant's purposes to only those that are charitable.

### Effect of clause appearing to limit purposes

12. Clause 4.3 of the trust deed provides that "The Objects of the Trust are and shall be charitable and shall not include or extend to any matter or thing which is or shall be held or determined to be non-charitable."
13. The Commission does not consider that the inclusion of such a clause provides conclusive evidence that the preceding purposes are in fact charitable. Before the Commission can register an applicant as a charitable entity, it must be satisfied that the entity meets all of the essential elements of registration set out in section 13 of the Charities Act.

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

14. In addition, section 18(3)(a) of the Charities Act requires the Commission to have regard to the current and future activities of an applicant for registration.

#### Relief of poverty

15. In order to relieve poverty, a purpose must be directed at people who are poor, in need, aged, or suffering genuine hardship and the purpose must provide relief.<sup>2</sup> "Poverty" is interpreted broadly in law and a person does not have to be destitute to qualify as "poor".<sup>3</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 which most people take for granted.<sup>4</sup> To provide "relief", the people who would benefit should have an identifiable need arising from their condition that requires alleviating and these people should have difficulty in alleviating that need from their own resources.<sup>5</sup>
16. The Commission agrees with the Applicant's solicitor's statement that relieving unemployment is likely to be a charitable purpose. The Applicant's purpose set out in clause 4.1(a), of promoting sustainable employment opportunities, however, does not indicate that the people who will benefit from this stated purpose will necessarily be unemployed or suffering some other form of hardship. The Commission therefore does not consider that the purpose in clause 4.1(a) indicates an intention to relieve poverty.

#### Other matters beneficial to the community

17. 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>6</sup>
- relief of aged, impotent, and poor people

<sup>2</sup> *D V Bryant Trust Board v Hamilton City Council* [1997] 3 NZLR 342.

<sup>3</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>4</sup> *Inland Revenue Commissioners v Baddeley* [1955] AC 572; [1955] 1 All ER 525, applied in *re Pettit* [1988] 2 NZLR 513 and *Re Centrepont Community Growth Trust* [2000] 2 NZLR 325.

<sup>5</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>6</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.

- 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>7</sup>

18. Not all organisations that have purposes that benefit the community will be charitable. The purposes must benefit the community in a way that the law regards as charitable. According to *Charity Law in Australia and New Zealand*:

*“ . . . it is not all objects of public utility that are charitable, ‘for many things of public utility may be strictly matters of private right, although the public may indirectly receive a benefit from them.’ Nor are essentially economic or commercial objects within the spirit of the Preamble.”<sup>8</sup>*

19. In cases such as *Re Tennant*<sup>9</sup> and *Tasmanian Electronic Commerce Centre Pty Ltd v Commissioner of Taxation*<sup>10</sup> economic development of a community has been held to be charitable under “other matters beneficial to the community” where essential services are provided or where the community is under a particular disadvantage.

20. In *Re Tennant* Hammond J stated:

*“Obviously, each case will turn on its own facts. I would not be prepared to say that there may not be cases which would fall on the other side of the line because of private profit making of some kind. But here the settlor was attempting to achieve for a small new rural community what would then have been central to the life of that community: a cluster complex of a school, public hall, church and creamery.”<sup>11</sup>*  
[Emphasis added]

21. Similarly in *Tasmanian Electronic Commerce Centre Pty Ltd v Commissioner of Taxation*, the Australian Federal Court of Appeal considered that providing internet and communications infrastructure for a disadvantaged area such as Tasmania was charitable. Heeney J stated:

<sup>7</sup> *Charitable Uses Act 1601* 43 Elizabeth I c. 4.

<sup>8</sup> Gino Dal Pont, 2000, Oxford University Press, p 178; citing *Nightingale v Goulburn* (1847) 5 Hare 484, 490 and *Re Davis (deceased)* [1965] WAR 25, 28.

<sup>9</sup> [1996] 2 NZLR 633.

<sup>10</sup> (2005) FCA 439.

<sup>11</sup> [1996] 2 NZLR 633, 640.

*“As has been seen, the genesis of TECC was the provision of large amounts of Federal funding to assist ‘regional, rural and remote communities’ a current euphemism for whose parts of Australia which are economically disadvantaged or, put more bluntly, poor, compared with the rest of the nation . . . Tasmania is a particular case in point. The combination of small population and long distances from markets and raw materials meant that conventional manufacturing industry was always to be at a disadvantage.”<sup>12</sup>*

22. The Applicant has not provided any evidence that it is either providing essential services or assisting an area that is under any particular disadvantage. The Commission therefore considers that the Applicant’s purpose set out in clause 4.1(b), of generating “economic transformation and sustainable economic benefits”, is not within the spirit and intent of the preamble to the Statute of Elizabeth and therefore it is not charitable under the fourth head.

Public or private benefit?

23. In addition, in order for a purpose to be regarded as “beneficial to the community”, the benefits must be to the community rather than to private individuals. Any private benefits arising from the Applicant’s activities must only be a means of achieving an ultimate public benefit and therefore be ancillary or incidental to it. It will not be a public benefit if the private benefits are an end in themselves.<sup>13</sup> In addition, proof that public benefit will necessarily flow from each of the stated purposes is required, not merely a belief that it will or may occur.<sup>14</sup>
24. In his letter of 29 June 2009 the Applicant’s solicitor has correctly identified that courts have sometimes found the promotion of industry and commerce to be charitable under the fourth head. In support of this view, he has referred to *Crystal Palace Trustees v Minister of Town and Country Planning*, *Commissioners of Inland Revenue v Oldham Training and Enterprise Council*, and *Commissioner of Taxation v Triton Foundation*.
25. The Commission has also considered the courts’ decisions in *Commissioners of Inland Revenue v Yorkshire Agricultural Society*, *Hadaway v Hadaway*, and *Commissioners of Inland Revenue v White*.
26. In *Commissioners of Inland Revenue v Yorkshire Agricultural Society*,<sup>15</sup> the improvement of agriculture was held to be charitable where it was for the benefit of the public at large. However, Lord Hanworth made it clear that the promotion of agriculture for private profit or benefit will not be charitable.

<sup>12</sup> (2005) FCA 439 at paras 59-60.

<sup>13</sup> *Commissioners of Inland Revenue v Oldham Training and Enterprise Council* 69 TC 231; *Travel Just v Canada Revenue Agency* 2006 FCA 343 [2007] 1 CTC 294.

<sup>14</sup> *Gilmour v Coats* (1949) AC 26; *Re Blyth* [1997] 2 Qd R 567, 582; *D V Bryant Trust Board v Hamilton City Council* [1997] 3 NZLR 342, 350.

<sup>15</sup> [1928] 1 KB 611.

27. In *Crystal Palace Trustees v Minister of Town and Country Planning* a body of trustees was entrusted with the control and management of Crystal Palace and park as a public place for education and recreation, and for the promotion of industry, commerce and art. Danckwerts J stated:

*"it seems to me that the intention of the Act in including in the objects the promotion of industry, commerce and art, is the benefit of the public, that is, the community, and is not the furtherance of the interests of individuals engaging in trade or industry or commerce by the trustees."*<sup>16</sup> [Emphasis added]

28. In *Hadaway v Hadaway* the Privy Council held that assisting persons carrying on a particular trade or business or profession would not be charitable unless there was a condition that this assistance could only be made for a purpose which was itself charitable. In that case the court held that any eventual benefit to the community was too remote:

*"between a loan to an individual planter and any benefit to the community the gulf is too wide. If there is through it any indirect benefit to the community, it is too speculative."*<sup>17</sup>

29. In *Commissioners of Inland Revenue v White Fox* J stated:

*"the promotion or advancement of industry (including a particular industry such as agriculture) or of commerce is a charitable object provided that the purpose is the advancement of the benefit of the public at large and not merely the promotion of the interest of those engaged in the manufacture and sale of their particular products."*<sup>18</sup> [Emphasis added]

30. In *Commissioners of Inland Revenue v Oldham Training and Enterprise Council*, the Court held:

*"[T]he second main object, namely promoting trade, commerce and enterprise, and the ancillary object, of providing support services and advice to and for new businesses, on any fair reading must extend to enabling Oldham TEC to promote the interests of individuals engaged in trade, commerce or enterprise and provide benefits and services to them . . . Such efforts on the part of Oldham TEC may be intended to make the recipients more profitable and thereby, or otherwise, to improve employment prospects in Oldham. But the existence of these objects, in so far as they confer freedom to provide such private benefits regardless of the motive or the likely beneficial consequences for employment, must disqualify Oldham TEC from having charitable status. The benefits to the community conferred by such activities are too remote."*<sup>19</sup> [Emphasis added].

<sup>16</sup> [1951] 1 Ch 132, 142.

<sup>17</sup> [1955] 1 WLR 16, 20 (PC).

<sup>18</sup> (1980) 55 TC 651, 659.

<sup>19</sup> (1996) 69 Tax Cases 231, 251.

31. In *Commissioner of Taxation v Triton Foundation*<sup>20</sup> the Federal Court of Australia held that a foundation set up to assist inventors provided sufficient public benefit. In reaching this conclusion the court noted that the foundation's purposes were particularly directed at young people, but were also available to "any member of the community who had the desire or inclination to use them", and a number of the resulting inventions had been of benefit to the community.

### Conclusion

32. The Commission concludes that the Applicant's purposes set out in clause 4.1 are non-charitable purposes which will provide private benefits for business owners in the Canterbury region. Any benefits conferred on the remainder of the community will be too remote.

### Applicant's additional submissions

33. In his letter of 29 June 2009 the Applicant's solicitor notes that Inland Revenue had previously considered the Applicant's purposes to be charitable. The Commission points out that determinations made by Inland Revenue relating to charitable status prior to 1 July 2008 are not binding on the Commission.
34. The Applicant's solicitor also notes that other economic development agencies have been registered by the Commission as charitable entities. The Commission points out that each application for registration is assessed on its own particular circumstances. As indicated in *Re Tennant and Tasmanian Electronic Commerce Centre Pty Ltd v Federal Commissioner of Taxation* above, economic development of a community can be charitable in certain circumstances.

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

35. 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>21</sup>
36. For the reasons set out above, the Commission considers that the Applicant's purposes, set out in clauses 4.1(a) and (b) of the trust deed, are non-charitable purposes. As there are no additional charitable

<sup>20</sup> (2005) 147 FCR 362.

<sup>21</sup> *Re Beckbessinger* [1993] 2 NZLR 362, 373.



purposes, it is not possible to “blue-pencil out” the non-charitable purposes to leave a charitable purpose.

37. 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>22</sup>*

38. The Commission has analysed the wording of clause 4.1 and does not consider that this provides evidence of “a substantially charitable mind” with an intention to create a charitable trust, but which was not conveyed by the drafting. In spite of the inclusion of clause 4.3, the Commission does not consider that the purposes in clause 4.1 indicate an intention to create a substantially charitable trust.

39. 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.

#### Winding up

40. As indicated above the Commission considers that the Applicant’s purposes are non-charitable. The Commission therefore concludes that distributing “such of the Trust Fund as then remains towards the furtherance of the objects set out in this Deed, or for exclusively charitable purposes” will not ensure that such distributions are restricted to charitable purposes.

41. The Applicant’s solicitor is correct in his statement that case law requires that “only income, not capital, must be applied to charitable purposes”. The Commission notes however that clause 16.2 makes no distinction between income and capital when making provision for the distribution of surplus assets on winding up.

#### **Charities Commission’s determination**

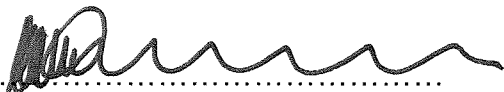
42. The finding of the Commission is that the Applicant has failed to meet an essential requirement for registration as a charitable entity in that the Applicant is not a trust of a kind in relation to which an amount of income is derived by the trustees in trust for charitable purposes, as required by section 13(1)(a) of the Act.

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<sup>22</sup> *Re Beckbessinger* [1993] 2 NZLR 362, 376.

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

25/9/07

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Date