

## **Registration decision: The Astrolabe Community Trust (THE49218)**

### **Executive Summary**

1. The Charities Registration Board (**the Board**) has determined to decline the application for registration of The Astrolabe Community Trust (**the Trust**) under the Charities Act 2005 (**the Act**).<sup>1</sup>
2. The Trust has applied for registration on the basis that it has charitable purposes to benefit the community through a range of initiatives directed to the protection or improvement of the environment, as well as providing donations to other charitable purposes.<sup>2</sup>
3. The Board has determined that the Trust is not qualified to be registered as a charitable entity under the Act. The Board considers that the Trust's current primary purpose is to seek a specific resource consent relating to the Rena Wreck on the Astrolabe Reef. The Board considers that this is not a charitable purpose. The Trust has not demonstrated that this purpose provides a self-evident public benefit. Further, there is not a sufficiently close analogy that this purpose is charitable. This non-charitable purpose is more than ancillary to any charitable purpose of the Trust.
4. The Board's reasons are organised as follows:
  - A. Background
  - B. Legal Framework for Registration Decision
  - C. The Charities Registration Board's Analysis
  - D. Section 5(3)
  - E. The Trust's Other Submissions
  - F. Determination

### **A. Background**

5. The Trust was established by Deed of Trust on 19 May 2014 (**the Trust Deed**).

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<sup>1</sup> This decision is made under section 19 of the Charities Act 2005 (the Act).

<sup>2</sup> Refer to the Trust's letter dated 19 May 2014 at paragraphs 5 and 6.

6. The Trust was settled by Daina Shipping Company (**the Settlor Company**). The Settlor Company is the owner of the container ship Rena which ran aground on the Otaiti Astrolabe reef (**Astrolabe reef**) on 5 October 2011.<sup>3</sup>
7. The Trust's purposes, as set out in clause 4 of the Trust Deed, are as follows:
  - 4.1 The Trustee shall hold the Trust Fund upon trust to pay or apply in New Zealand the Trust Fund in such amounts, at such times, and subject to the following terms and conditions, as the Trustees may decide for all or any of the following purposes:
    - 4.1.1 To monitor, remediate, restore, enhance or provide for the costal and marine environments within the Region<sup>4</sup>;
    - 4.1.2 To provide education and training to residents of the Region in marine and costal sciences, environmental management, commercial fishing, navigation and seamanship, maritime industries, emergency management, pollution, contamination and related areas;
    - 4.1.3 To arrange, undertake, fund, sponsor or otherwise assist projects within the Region for the furtherance of knowledge in the marine and coastal environment and processes, oceanography, commercial and non-commercial fisheries, marine mammals and birds within the Region;
    - 4.1.4 To assist community groups and other groups involved in surf lifesaving, coast care, non-commercial fishing and giving, and emergency response and management within the Region;
    - 4.1.5 To protect and promote historical and cultural heritage within the Region;
    - 4.1.6 To arrange, undertake, fund, sponsor or otherwise assist (whether financially or otherwise) projects in the Region that are for Charitable Purposes, including, without limitation, the projects described in clauses 4.1.7 to 4.1.11 below;
    - 4.1.7 To arrange, undertake, fund, sponsor or otherwise assist (whether financially or otherwise) projects or other activities for the protection or improvement of the natural, physical, or recreational environment on the Astrolabe Reef;
    - 4.1.8 To arrange, undertake, fund, sponsor or otherwise assist (whether financially or otherwise) projects or other activities for the protection or improvement of the natural, physical, social or cultural environment on Motiti Island;

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<sup>3</sup> Refer to the Trust's letter of 19 May 2014 at paragraph 3.

<sup>4</sup> Region is defined in clause 1.1 of the Trust Deed as "the area (including the costal marine area) within the Council's regional boundaries". Council is defined in clause 1.1 of the Trust Deed as the "Bay of Plenty Regional Council".

- 4.1.9 To arrange, undertake, fund, sponsor or otherwise assist (whether financially or otherwise) projects or other activities for the protection or improvement of the natural, physical, social or cultural environment of the tangata whenua of the Region;
- 4.1.10 To arrange, undertake, fund, sponsor or otherwise assist (whether financially or otherwise) projects or other activities for the protection or improvement of the natural, physical, social or cultural environment of other persons in the Region;
- 4.1.11 To assist community groups and other groups to arrange, undertake, fund, sponsor or otherwise assist (whether financially or otherwise) projects, research and other activities of the type described in clauses 4.1.1 to 4.1.10 above;
- 4.1.12 Any other Charitable Purposes within the Region:
- 4.1.13 Such other Charitable Purposes which are ancillary or related to any of the above purposes.

8. Clause 5 provides the means to achieve the stated purposes and includes, at clause 5.1.4, a power to:

5.1.4 [a]rrange, undertake, fund, sponsor or otherwise assist (whether financially or otherwise) projects including, without limitation, to acquire and deal with the Wreck and to obtain and give effect to resource consents and other permissions or consents relation to the Wreck or the effects of the Wreck on the environment.

The Wreck is defined in the Trust Deed at clause 1.1 as “the remains of the container ship “RENA” and its cargo situated on the Astrolabe Reef”.

9. The Trust applied for registration under the Act on 20 May 2014.

10. During the application process the Trust has provided information about its current and future intended activities.<sup>5</sup> The Trust’s current activities are:

- Applying for resource consent under the Resource Management Act 1991 in relation to the Rena Wreck (**the resource consent**).<sup>6</sup> The resource consent, as sought, would permit the Trust to leave sections of the Rena Wreck and associated debris on the Astrolabe reef, and also would provide for any future discharges of contaminants that may arise from leaving the Rena Wreck in place.<sup>7</sup> The consent application includes some salvage and recovery work with a focus on reducing environmental effects while leaving a large part of the Rena Wreck on the Astrolabe

<sup>5</sup> Refer to the Trust’s letters of 19 May 2014, 5 February 2015 and 31 March 2015.

<sup>6</sup> Refer to the Trust’s letter of 19 May 2014 at paragraph 7.

<sup>7</sup> Refer <http://www.renaresourceconsent.org.nz/#faqs> [accessed 12 May 2015].

Reef.<sup>8</sup> The resource consent sought also includes proposed conditions (for example relating to ongoing monitoring and a shoreline debris management plan).<sup>9</sup>

- Providing funds to some charitable and community bodies (for example the Trust has expressed an intention to contribute \$30,000 to surf lifesaving clubs).<sup>10</sup>
11. If the Trust's resource consent is approved as sought, the Trust will take ownership of the Rena Wreck and will be responsible for ensuring any ongoing conditions of the resource consent are adhered to. If the resource consent is approved as sought, the Trust also intends to establish a fund of at least \$2.2 million for projects and grants intended to benefit the Region. It is anticipated that the bulk of this fund will be procured for the Trust by the Settlor Company.<sup>11</sup>
  12. If the resource consent is not ultimately approved, the Trust will not receive the fund and will cease to operate.<sup>12</sup> If this were to occur, the only substantive activity carried out by the Trust would have been applying for the consent.<sup>13</sup>
  13. The Department of Internal Affairs - Charities Services (**Charities Services**) notified the Trust on 14 November 2014 that its purposes did not meet registration requirements. Charities Services notified the Trust that its purpose relating to the Rena Wreck was a non-charitable purpose.
  14. Charities Services met with the Trust's solicitor on 17 December 2014 to discuss the application and notice. Following the meeting, the Trust provided written submissions dated 5 February 2015. After providing the Trust with further information about the matters preventing registration,<sup>14</sup> Charities Services provided additional time for the Trust to provide any other information that the Trust wished to be considered before a final decision was made. The Trust provided further submissions dated 31 March 2015. Charities Services met with the Trust's barrister on 8 July 2015. The Trust's barrister provided additional submissions dated 16 July 2015.

## B. Legal Framework for Registration Decision

15. Section 13 of the Act sets out the essential requirements for registration. Under section 13(1)(a) of the Act, a trust qualifies for registration if it is a trust of a kind in relation to which an amount of income is derived by the trustees in trust for

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<sup>8</sup> Refer to part 7 of the Council Report.

<sup>9</sup> Refer to the Trust's letter of 5 August 2014 at paragraph 9.

<sup>10</sup> Refer to the Trust's letter of 5 August 2014 at paragraph 4.

<sup>11</sup> Refer to the Trust's letter of 5 August 2014 at paragraphs 5 and 6.

<sup>12</sup> We note that the Trust may appeal an initial decision not to grant resource consent (refer to the Trust's letter dated 16 July 2015).

<sup>13</sup> Refer for example to the Trust's letter of 16 July 2015 under the heading "public benefit".

<sup>14</sup> Refer to Charities Services' email of 18 February 2015.

charitable purposes. This criterion is not met unless the income is derived for exclusively charitable purposes.<sup>15</sup>

16. 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”. This statutory definition adopts the well-established fourfold classification of charitable purpose at general law.<sup>16</sup>
17. To be charitable at law a purpose must be for the public benefit.<sup>17</sup> Public benefit must be expressly shown where the claimed purpose is under the fourth head of charity, “any other benefit to the community”.<sup>18</sup> Further, in every case, the benefit of the entity’s purposes must flow to the public or a sufficient sector of the public.
18. The assessment of whether a purpose provides a benefit focuses on the clearly identifiable consequences of the undertaking—benefits that are nebulous and remote, or simply ‘hoped for’, are excluded. If a purpose is to benefit a private group, the consequential downstream benefits to the public will not suffice.<sup>19</sup> Any private benefits arising from an entity’s activities must be a means of achieving an ultimate public benefit only and therefore be ancillary or incidental to it.<sup>20</sup>

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<sup>15</sup> See *McGovern v Attorney-General* [1982] 1 Ch 321 (“*McGovern*”) at 340. In New Zealand, see *Canterbury Orchestra Trust v Smitham* [1978] 1 NZLR 787 at 794-796; *Molloy v Commissioner of Inland Revenue* [1981] 1 NZLR 688 (“*Molloy*”) at 691. See also the assumption evident in the provision at section 5(3) and (4) of the Act that a trust will not be disqualified from registration because it has *ancillary* non-charitable purpose.

<sup>16</sup> This statutory definition adopts the general law classification of charitable purposes as stated in *Commissioner for Special Purposes of Income Tax v Pemsel* [1891] AC 531. See: *Re Greenpeace of New Zealand Incorporated* [2014] NZSC 105 (“*Greenpeace SC*”) at [12],[15] and [17]; *In Re Education New Zealand Trust* HC Wellington CIV-2009-485-2301, 29 June 2010 (“*Education New Zealand Trust*”) at [13]; *In re Draco Foundation (NZ) Charitable Trust* HC WN CIV 2010-485-1275 [3 February 2011] at [11].

<sup>17</sup> Authorities include: *Oppenheimer v Tobacco Securities Trust Co Ltd* [1951] AC 297; *Verge v Somerville* [1924] AC 496; *Dingle v Turner* [1972] AC 601. See also: *New Zealand Society of Accountants v Commissioners of Inland Revenue* [1986] 1 NZLR 147 at 152-155; *Latimer v Commissioner of Inland Revenue* [2002] 3 NZLR 195 (“*Latimer, CA*”) at [32]; *Travis Trust v Charities Commission* (2009) 24 NZTC 23,273 at [54]-[55] (Joseph Williams J); *Queenstown Lakes Community Housing Trust* HC WN CIV-2010-485-1818 [24 June 2011] (“*Queenstown Lakes*”) at [30]; *Education New Zealand Trust* at [23].

<sup>18</sup> *Canterbury Development Corporation v Charities Commission* HC WN CIV 2009-485-2133, 18 March 2010 (“*CDC*”) at [45].

<sup>19</sup> See for example the discussion in *Latimer, CA* at [32] - [37]. The courts have held that the downstream benefits of an entity’s activities do not serve to characterise the purpose of the entity; *Queenstown Lakes* at [68] – [76] (held that the purpose of the Trust was to provide housing for individuals not to advance the overall welfare of the community by enabling workers to stay in the area); *CDC* at [67] (primary purpose is the assistance of individual businesses and the “hope and belief” that the success of those businesses would increase the economic wellbeing of the Canterbury region does not establish public benefit as a primary purpose).

<sup>20</sup> See for example *Institution of Professional Engineers New Zealand Incorporated v Commissioner of Inland Revenue* [1992] 1 NZLR 570 (“*Professional Engineers*”) at 578; *Re New Zealand Computer Society Inc* HC WN CIV-2010-485-924 [28 February 2011] (“*Computer Society*”) at

19. There is no presumption that if something is of benefit to the public, this will also mean that it is a charitable object.<sup>21</sup> Rather, there is a two-stage test for finding charitable purposes ‘beneficial to the community’ under the fourth head. As well as the purpose needing to be for the public benefit, the second part of the test requires an analogy to objects that have already been found to be charitable.<sup>22</sup>
20. Finally, section 5(3) of the Act provides that the inclusion of a non-charitable purpose will not preclude registration if it is merely ancillary to a charitable purpose. Pursuant to section 5(4) of the Act, a non-charitable purpose is ancillary if the non-charitable purpose is:
- (a) ancillary, secondary, subordinate, or incidental to a charitable purpose of the trust, society or institution; and
  - (b) not an independent purpose of the trust, society or institution.
21. Determining whether a non-charitable purpose is ancillary includes a qualitative assessment of whether it is a means to advance the charitable purpose.<sup>23</sup> It also involves a quantitative assessment, focusing on the relative significance of the purpose as a proportion of the entity’s overall endeavour.<sup>24</sup>

***Relevance of entity’s activities in registration decision-making***

22. Section 18(3)(a)(i) and (ii) of the Act mandate that the Board and Charities Services take activities into consideration when determining whether an entity qualifies for registration under the Act. The courts have confirmed that consideration of activities is a mandatory aspect of decision-making under the Act.<sup>25</sup>
23. While activities are not to be elevated to purposes,<sup>26</sup> reference to activities may assist, for example, to make a finding about:<sup>27</sup>

[42]; *Education New Zealand Trust* at [23]; *Queenstown Lakes* at [68] – [76]; *CDC* at [67]. Compare *Commissioners of Inland Revenue v Oldham Training and Enterprise Council* (1996) STC 1218 (“*Oldham*”); *Travel Just v Canada (Revenue Agency)* 2006 FCA 343, [2007] 1 CTC 294.

<sup>21</sup> *Greenpeace* SC at [18], [31].

<sup>22</sup> *Greenpeace* SC at [18], [30].

<sup>23</sup> For recent judicial comment on the qualitative test see *Greenpeace of New Zealand Incorporated* [2012] NZCA 533 (“*Greenpeace, CA*”) at [62], [83] – [91].

<sup>24</sup> The quantitative requirement was applied by the High Court in *Re Greenpeace of New Zealand Incorporated* HC WN CIV 2010-485-829 [6 May 2011] (“*Greenpeace, HC*”) at [68]; *Computer Society* at [16]; *Education New Zealand Trust* at [43]-[44]; *Re The Grand Lodge of Antient Free and Accepted Masons in New Zealand* [2011] 1 NZLR 277 (HC) (“*Grand Lodge*”) at [49]-[51]. The Board notes the Court of Appeal’s observation in *Greenpeace, CA* at [92], including footnote 95.

<sup>25</sup> *Greenpeace* SC at [14]. See also the approach taken in the High Court in *CDC* at [29], [32], [44], [45] - [57], [67], [84] - [92]; *Queenstown Lakes* at [57] - [67]; *Grand Lodge* at [59], [71]; *Computer Society* at [35] – [39], [60] and [68]; *Greenpeace, HC* at [75].

<sup>26</sup> See: *McGovern* at 340 and 343; *Latimer v Commissioner of Inland Revenue* [2004] 3 NZLR 157 (“*Latimer, PC*”) at [36]. Compare *Public Trustee v Attorney-General* (1997) 42 NSWLR 600 at

- the meaning of stated purposes that are capable of more than one interpretation;<sup>28</sup>
  - whether the entity is acting for an inferred or unstated non-charitable purpose;<sup>29</sup>
  - whether the entity's purposes are providing benefit to the public;<sup>30</sup> and
  - whether a non-charitable purpose is within the savings provision at section 5(3) of the Act.<sup>31</sup>
24. In determining qualification for registration under the Act, substance must prevail over form, and an entity cannot qualify for registration, even if its stated purposes are exclusively charitable, if its activities belie its stated charitable purposes.<sup>32</sup>

### ***Characterisation of an entity's purposes***

25. Once an entity's purposes are established as a matter of fact, the question whether they are charitable is a question of law.<sup>33</sup> The Board is bound to apply the law as declared by the courts and legislature, and adopted by the Act.
26. Determining whether an entity's purposes are charitable involves an objective characterisation, and a declaration in an entity's rules document that the entity's purposes are charitable in law will not be determinative.<sup>34</sup> Similarly, the subjective intentions of the individuals involved in a charity do not establish its charitable status.<sup>35</sup>

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616; *Vancouver Society of Immigrant and Visible Minority Women v the Minister of National Revenue* [1999] 1 SCR 10.

<sup>27</sup> *Re Family First New Zealand* [2015] NZHC 1493 [30 June 2015].

<sup>28</sup> See *Professional Engineers* at 575 (Tipping J).

<sup>29</sup> *Greenpeace* SC at [14] "The purposes of an entity may be expressed in its statement of objects or may be inferred from the activities it undertakes, as s 18(3) of the Charities Act now makes clear". Refer also to *Inland Revenue Commissioners v City of Glasgow Police Athletic Association* [1953] AC 380 ("*Glasgow Police Athletic Association*"); compare *Commissioner of Taxation of the Commonwealth of Australia v Word Investments Limited* [2005] HCA 55 at [25] (Gummow, Hayne, Heydon and Crennan JJ).

<sup>30</sup> See for example *Glasgow Police Athletic Association; CDC* at [29], [32], [44], [45] - [57], [67], [84] - [92]; *QLCHT* at [57] - [67]; *Grand Lodge* at [59], [71]; *Computer Society* at [35] - [39], [60] and [68].

<sup>31</sup> See for example *Greenpeace, CA* at [40], [48], [87] - [92], [99] and [102], [103]. Earlier authorities to same effect include *Molloy* at 693 and the authorities cited there.

<sup>32</sup> G E Dal Pont *Law of Charity* (LexisNexis Butterworth, Australia, 2010) ("*Dal Pont*") at [2.12], [13.19], [13.20].

<sup>33</sup> *Molloy* at 693.

<sup>34</sup> *M K Hunt Foundation Ltd v Commissioner of Inland Revenue* [1961] NZLR 405 at 407; *CDC* at [56].

<sup>35</sup> *Dal Pont* at [13.18], and see also the discussion at [2.8] - [2.11]. See for example *Latimer, PC* "whether the purposes of the trust are charitable does not depend on the subjective intentions or motives of the settlor, but on the legal effect of the language he has used. The question is not, what was the settlor's purpose in establishing the trust? But, what are the purposes for which trust money may be applied?"; *Molloy* at 693; *Keren Kayemeth Le Jisroel Ltd v Inland Revenue*

## **C. The Charities Registration Board's Analysis**

27. Taking into account the Trust's stated purposes, the powers of the trustees in the Trust Deed and the Trust's activities, the Board considers that the Trust's current primary purpose is a purpose to seek the specific resource consent relating to the Rena Wreck.
28. The Board considers that this purpose is a non-charitable purpose. The Trust has not demonstrated that the purpose provides a self-evident public benefit. In addition, there is not a sufficiently close analogy that this purpose is charitable.

### **C.1. Trust's purpose to seek a specific resource consent relating to the Rena Wreck**

#### ***Identification of the purpose***

29. The Board considers that the Trust's current primary purpose is to seek the specific resource consent relating to the Rena Wreck.
30. The current primary activity of the Trust is the consent application (discussed above in paragraph 10). The trustee has the specific power to make the consent application and give effect to the resource consent if granted (refer clause 5.1.4 of the Trust Deed). The Trust's future activities (discussed in paragraphs 11 and 12 above) are intended only if the consent application is successful.
31. The Trust has submitted that the consent application is not a stand-alone purpose and is instead a means by which some of its stated purposes will be achieved.<sup>36</sup> They submit that the application is part of a process or continuum.<sup>37</sup> The Trust submits that this is illustrated by the fact the Trust will not have achieved any of its main purposes simply by obtaining the resource consent.<sup>38</sup>
32. As above, the Board must consider the activities of applicants as well as the stated purposes. Purposes can be inferred from activities. The fact that the consent application and reference to the Rena Wreck is contained within the trustee's powers rather than the stated purposes is not determinative. The consent application cannot be seen simply as part of a continuum. As discussed in paragraph 12 above, if the resource consent is not granted, the Trust will cease to operate. There is therefore a very real possibility that the Trust will carry out no further activity. Taking into account the stated purposes, the powers in the Trust Deed and the Trust's activities, the Board considers that the Trust has a purpose to seek the specific resource consent relating to the Rena Wreck.

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*Commissioners* [1932] AC 650 at 657 (Lord Tomlin), 661 (Lord Macmillan); *Oldham* at 251 (Lightman J).

<sup>36</sup> Refer for example to the Trust's letter dated 16 July 2015 under the heading "public benefit".

<sup>37</sup> Refer for example to the Trust's letter dated 16 July 2015 under the heading "public benefit".

<sup>38</sup> Refer to the Trust's letter dated 5 February 2015 at paragraphs 17 to 19.



### ***Assessment of the purpose***

33. As discussed above in Part B of this decision, for a purpose to be charitable the purpose must provide a public benefit and there must be an analogy to objects that have already been found to be charitable.
34. The Board considers that the Trust's purpose to seek the specific terms of the consent application (to leave the Rena Wreck on the Astrolabe Reef, to permit ongoing discharge and the specific consent conditions proposed by the Trust) is not charitable. In particular:
- the Board is not satisfied that the Trust has established a self-evident public benefit in the purpose; and
  - there are no analogous cases which hold that this purpose is charitable.

### ***Public benefit has not been established***

35. The Board considers that the Trust's primary purpose to seek the specific terms of the consent application is not self-evidently for the public benefit. In particular, The Board notes that the Commissioners<sup>39</sup> have not yet made a final decision on whether the specific terms of the resource consent protect against environmental damage and promote the sustainable management of natural and physical resources.
36. The Board notes the November 2014 report of the Bay of Plenty Regional Council.<sup>40</sup> This report states that technical experts disagree on the effects of the application sought (the technical experts representing the council and the applicant). Within this report the Bay of Plenty Regional Council has expressed a view that there are potential long-term adverse effects of copper on the local environment and the reef ecology and the potential cumulative effects of future discharges are of concern. The report also stated that the effects could be addressed via robust consent conditions but that these need further consideration on the terms. The report did not reach a view on the cultural effects and noted that further identification and mitigation of these is needed. The Board considers that this report illustrates that it is not yet clear whether the terms of the resource consent as sought by the Trust will protect the environment and provide public benefit.
37. In addition, the Board notes that the terms of the resource consent sought by the Trust are controversial. The Board notes the application was publically notified under the Resource Management Act 1991 and there have been more than 151 submissions on the consent application.<sup>41</sup> This is one indicator of the

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<sup>39</sup> The Bay of Plenty Regional Council appointed four Commissioners to hear the Trust's consent application.

<sup>40</sup> Refer to the Council's Report.

<sup>41</sup> Refer to part 5 of the Council's Report.

controversy. The Board also notes that the Waitangi Tribunal has found that the Crown conduct in entering deed with the Settlor Company relating to the Rena Wreck without having consulted Māori breached the principles of Te Tiriti o Waitangi.<sup>42</sup> While this report relates to the Crown's actions rather than actions of the Trust, it does further indicate that matters relating to the Rena Wreck are subject to controversy. Although controversy is not determinative, the controversy does further support the conclusion that the Board is not placed to make a determination that the resource consent application is in the public benefit.<sup>43</sup>

38. The Trust has submitted that the terms of resource consent sought includes conditions to mitigate any further environmental damage and that therefore the terms of the resource consent are for charitable public benefit.<sup>44</sup>
39. The Trust has submitted that it is for the authorities under the Resource Management Act 1991 to make a decision on the consent application rather than the Board.<sup>45</sup> However, the Board is required to assess whether the Trust's purposes are charitable. The Board is not satisfied from the information provided that the purpose to seek the specific resource consent provides a public benefit.
40. The Trust has submitted that the required public benefit lies in the potential beneficial outcomes to be gained from making the resource consent application should the consent be approved.<sup>46</sup> As discussed above in part B, the assessment of whether a purpose provides a benefit focuses on the clearly identifiable consequences of the undertaking. Should the resource consent application be declined, the Trust will cease to operate. There is a real possibility that any potential beneficial outcomes will not eventuate.<sup>47</sup> The Board therefore considers that these potential benefits are not sufficient to permit a conclusion that the Trust's current purpose has identifiable public benefits.
41. The Trust has also submitted that its role in the resource consent process itself has public benefit as the resource consent process reflects an essential element of public good or benefit, and the process of arriving at the best decision is

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<sup>42</sup> [https://forms.justice.govt.nz/search/WT/reports/reportSummary.html?reportId=wt\\_DOC\\_85134478](https://forms.justice.govt.nz/search/WT/reports/reportSummary.html?reportId=wt_DOC_85134478) [accessed 19 May 2015]

<sup>43</sup> The Trust submits that the only reason for giving any emphasis to controversy is that it can help to explain why a purpose is not charitable, but is not relevant to the decision of whether a purpose is charitable (refer to the Trust's letter of 5 February 2015 at paragraphs 41 to 48). As discussed above in paragraph 37 controversy is relevant when determining whether a position can be assumed to be in the public benefit. The Board also notes the Trust's submission that any argument that the Board is not in a place to make a determination is really a statement that it is not prepared to make a determination and that this would breach the principles of natural justice and would be in breach of its statutory obligations (refer to the Trusts letter of 31 March 2015 at paragraph 17). However, the Board is making a determination that it is not satisfied charitable public benefit has been established and that the Trust does not meet registration requirements.

<sup>44</sup> Refer, for example, to the Trust's letter of 31 March 2015 at paragraph 5.

<sup>45</sup> Refer to the Trust's letter of 31 March 2015 at paragraph 12 and 17.

<sup>46</sup> Refer to the Trust's letter dated 16 July 2015 under the heading "public benefit".

<sup>47</sup> In addition, as discussed in paragraphs 35 and 36 above, it is not yet clear that the resource consent as sought by the Trust will provide public benefit.

inherently for public benefit.<sup>48</sup> The Board is not convinced by this submission. The Trust's purpose is to seek a resource consent on very specific terms. This promotes its terms as the best outcome rather than providing objective information/resource to assist the decision makers to reach the best outcome. The Trust further submits that both of the options open to the Commissioners would evince public benefit if pursued.<sup>49</sup> As discussed above at [36], the Board considers that the Council report illustrates that it is not yet clear whether the terms of the resource consent as sought by the Trust will protect the environment and provide public benefit.

*The purpose is not analogous to an already established charitable purpose*

42. The fact there is not self-evident public benefit is sufficient to permit a conclusion that the Trust's purpose is not charitable. However, for completeness, the Board notes that even if a public benefit in the means was established, this would not be sufficient to permit a conclusion that the Trust's purpose was charitable. This is because there are no analogous cases which hold that the purpose is charitable.<sup>50</sup>
43. The Trust has submitted that focusing on analogies for leaving the Rena Wreck on the Astrolabe reef is an incorrect focus.<sup>51</sup> The Trust submits that its purpose, in relation to the Rena Wreck, is to acknowledge that the wreck is there and to undertake containment and remediation with it. The Trust has submitted that, in this context, there are analogous cases and that the resource consent, as sought, advances charitable purposes analogous to those cases (for example the maintenance of sea walls generally, environmental protection and disaster relief).<sup>52</sup> The Trust has also submitted that its involvement in the resource consent application is charitable by analogy.<sup>53</sup>

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<sup>48</sup> Refer to the Trust's letter dated 16 July 2015 under the heading "public benefit".

<sup>49</sup> Refer to the Trust's letter dated 16 July 2015 under the heading "public benefit".

<sup>50</sup> The Trust has submitted that the fact there are no analogies is simply indicative that a court (or other regulatory authority like the Board) is unlikely to have any reason to consider whether an application to exercise a legal right under existing law (to take part in the resource consent process) provides a charitable purpose. Refer Trust's letter of 5 February 2015 at paragraphs 56-57.

<sup>51</sup> Refer to the Trust's letter 31 March 2015 at paragraphs 13 to 16.

<sup>52</sup> Refer to the Trust's letter of 5 February 2015 at paragraph 57 and 31 March 2015 at paragraphs 13 to 16. In relation to disaster relief, the Trust has relied on the case of *Re North Devon and West Somerset Relief Funds Trust Re North Devon and West Somerset Relief Funds Trust* [1953] 1 WLR 1260 which held that a fund established to benefit those who suffered as a consequence of flooding with surplus funds was charitable with surplus funds being used to continue that charitable intent (for example including remediation of land affected by flooding) (refer to Trust's letter of 31 March 2015 at paragraph 16, also refer to the attachment to that letter (at page 3 of the attachment)).

<sup>53</sup> Refer to the Trust's letter dated 16 July 2015 under the heading "the necessary charitable analogy" where the Trust submits analogies can be drawn: (1) based on the connection of proceedings for a resource consent to the remediation of disasters; and (2) the permitted scope for advocacy within the *Greenpeace SC* decision. However, the Board is not satisfied that the resource consent as sought will provide disaster relief/remediation in a way that is analogous to

44. The Board is not convinced by these submissions. The Trust's current purpose is to seek resource consent on specific terms. The Commissioners are still to decide whether to grant the application and whether the resource consent application sufficiently protects the environment or promotes the sustainable management of resources. As discussed above, the Bay of Plenty Council has stated there needs to be further consideration on the terms of the resource consent sought and what is required to mitigate environmental effects. Until the Commissioners' decision is released the Board cannot reach a conclusion that the resource consent sought will protect the environment, provide disaster relief or advance another charitable purpose in a way that is analogous to an established charitable purpose.<sup>54</sup>

***Summary of the assessment of the Trust's purpose to seek a resource consent***

45. The Board considers that the Trust's current primary purpose is to seek the specific resource consent relating to the Rena Wreck. This purpose is not charitable. The Board considers that the Trust has not demonstrated that the purpose provides self-evident public benefit. Further, there are no analogous cases which hold that the purpose is charitable.

***C.2. The Trust's other purposes***

46. The Trust's stated purposes do include charitable purposes (for example protection of the environment or promotion of heritage). Further, the Trust's current activities include the provision of \$35,572 towards a Visual AIS Beacon for the Tauranga Harbour and an intention to give funds to a surf life-saving club. There is also a future intention for the Trust to manage a larger fund for charitable distributions. However, these activities and purposes are not the current focus of the Trust.<sup>55</sup>

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an established charitable purpose. In this letter the Trust has also submitted that analogies can be drawn to the decision of *Latimer, CA*. However, that decision related to an entity that focused on research that assisted in Waitangi Tribunal claims and was seen as a means by which race relations were advanced. The Board does not consider that this can be extended to mean that the Trust's purpose is charitable by analogy.

<sup>54</sup> The Board notes that this does not mean that there will automatically be an analogous charitable purpose to the Trust's purposes following whatever decision the Commissioners' reach. Instead, once the decision is reached, the Trust's purposes will need to be considered in the light of the conditions of the consent and the Trust's activities at that time.

<sup>55</sup> Entities that have been declined charitable status have the ability to reapply should they consider that they may qualify in the future. Should the Trust gain resource consent, and consider it has exclusively charitable purposes, it may wish to reapply at that time.

## **D. Section 5(3)**

47. As discussed above, we consider that the Trust has a non-charitable purpose to seek the specific resource consent relating to the Rena Wreck.
48. The Trust's non-charitable purpose is the current focus of the Trust. This non-charitable purpose is a pervasive purpose of the Trust and cannot realistically be considered ancillary, subordinate, or incidental to the Trust's current charitable purposes or future intended charitable purposes.

## **E. The Trust's Other Submissions**

49. During the application process the Trust has questioned whether there are other entities relating to reefs or wrecks operating in New Zealand and has raised questions about specific entities. Many of the entities referred to by the Trust are not, and have never been, registered charitable entities under the Act. The Trust has also submitted that other registered charities have applied for resource consents.
50. The Board must take a case-by-case approach with each application considering the specific wording of the applicant's rules document and the activities of the applicant. If the Board becomes aware of entities on the register that may not meet registration requirements, we have the power to enquire into those entities,<sup>56</sup> and an entity can be deregistered if it no longer qualifies for registration.<sup>57</sup> Therefore, even if there are similar entities on the register, this is not determinative in an assessment of the Trust's eligibility for registration.

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<sup>56</sup> Sections 50 and 51 Act.

<sup>57</sup> Sections 31 and 32 Act.

**F. Determination**

51. The Board's determination is that the Trust does not qualify for registration under the Act and the application for registration should be declined. The Board considers that the Trust's current primary purpose is to seek a specific resource consent relating to the Rena Wreck on the Astrolabe Reef. The Board is not satisfied that this purpose provides public benefit. Further, there are no analogous cases which hold that the purpose is charitable. This non-charitable purpose is more than ancillary.

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

Signed for and on behalf of the Board

.....  
Roger Holmes Miller

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Date

2ND SEPTEMBER 2015