

## Registration decision: Enterprise North Shore Trust

### The facts

1. Enterprise North Shore Trust (the Applicant) was created by a deed of trust dated 25 February 1993. The trustees of the trust were incorporated as a board under the *Charitable Trusts Act 1957* on 11 March 1993.
2. The Applicant applied for registration with the Commission on 23 May 2008.
3. The Applicant's objects are set out in clause 5 of its revised deed of trust dated 20 May 2008:
  - 5.1 *The Trustees shall hold the Trust Fund upon trust to pay or apply the income and capital of the Trust Fund, in such amounts, at such times, and subject to such terms and conditions as the Trustees may decide for exclusively Charitable Purposes, including but not limited to all or any of the public and in particular the public of the North Shore District:*
    - (a) *Working with the secondary and tertiary education sector of the North shore district to provide workshops and other education opportunities teaching and encouraging entrepreneurial development and finding ways to bridge the gap between the education sector and the employment sector.*
    - (b) *Promoting and developing for the benefit of the public and in particular the public of the North Shore District, a sustainable innovative, vibrant and buoyant economy.*
    - (c) *Any other charitable purposes incidental or ancillary to the Charitable Purposes pursued by the trust.*
  - 5.2 *In order to achieve the purposes of the trust, in addition to all other powers vested in the Trustees, the Trustees may undertake such activities and enterprises to further the charitable purposes of the Trust as the Trustees may decide.*
4. The Commission analysed the application, and on 30 March 2009 sent the Applicant a notice that may lead to decline on the basis that the purposes set out in clause 5.1(b) were not charitable.
5. On 9 June 2009 the Applicant provided a response from its solicitors (dated 15 April 2009) making the following submissions:
  - "3.1 *ENS is structured as a charitable trust, with its trustees incorporated as a board under the Charitable Trusts Act 1957 (CTA), and is legally restricted to pursuing charitable economic development purposes for the benefit of the North Shore City community under the terms of its trust deed.*

- 3.2 *ENS undertakes a wide range of activities to advance its purposes, taking an holistic approach to local economic development for the general benefit of the community. . . .*
- 3.3 *We consider that there are very strong arguments in support of the position that ENS's local economic development purposes are exclusively charitable purposes at law and that those purposes are pursued for the benefit of the public and not for private profit. In this regard, we note the following key points:*
- (a) *There is clear and well settled case law authority supporting the position that ENS's purposes, taking into account its activities, are exclusively charitable at law, in particular under the so-called 4<sup>th</sup> head of charity, "other purposes beneficial to the community". Cases cited by the Commission do not detract from this position.*
  - (b) *It is irrelevant in this context that, with reference to certain measures of economic performance, the North Shore may be viewed as an "above average", rather than a poor or "below average", New Zealand community. This is supported by the case law.*
  - (c) *ENS's purposes, and its activities in pursuit of those purposes, are clearly beneficial to the public and they are pursued by ENS for the benefit of a significant and sufficient section of the public, i.e the North Shore City community. Sufficient proof of public benefit has been provided.*
  - (d) *In accordance with the principles set out in the case law, on balance we consider that any private benefits conferred as a result of ENS's activities are merely incidental to the pursuit of its charitable purposes and therefore do not impact on ENS's charitable status and eligibility for registration."*

## **The issues**

6. The Commission must consider whether the Applicant meets all of the essential requirements for registration under the *Charities Act 2005* (the Act). In this case, the key issue for consideration is whether the Applicant is a trust of a kind in relation to which an amount of income is derived by the trustees in trust for charitable purposes, as required by section 13(1)(a) of the Act. In particular, whether the Applicant's purposes fall within the definition of charitable purposes in section 5(1) of the Act.

## **The law on charitable purposes**

7. 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 and provide a public benefit.
8. Section 5(1) 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". 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, 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.*

### **Commission's analysis**

11. The Commission considers that the purpose set out in clause 5.1(a), which relates to "working with the secondary and tertiary education sector of the North Shore District", is likely to be charitable under the advancement of education.
12. The purpose in clause 5.1(c) appears to be incidental to the purposes in clauses 5.1(a) and (b). The remaining purpose set out in clause 5.1(b) does not indicate an intention to relieve poverty, advance education, or advance religion, the Commission has therefore considered whether this purpose could be charitable under "other matters beneficial to the community". First, however, the Commission has considered the reference to "exclusively charitable purposes" in clause 5.1.

### Effect of reference to "exclusively charitable purposes"

13. Clause 5.1 states:

*"The Trustees shall hold the Trust Fund upon trust to pay or apply the income and capital of the Trust Fund, in such amounts, at such times, and subject to such terms and conditions as the Trustees may decide **for exclusively Charitable Purposes**, including but not limited to all or any of the public and in particular the public of the North Shore District . . ." [Emphasis added]*

14. The Commission does not consider that the inclusion of the words "for exclusively charitable purposes" in clause 5.1 provides conclusive evidence that the stated purposes which follow are in fact charitable. Before it can register an applicant as a charitable entity, the Commission must be certain that the applicant meets all the essential elements of registration set out in section 13 of the Act. In addition, section 18(3)(a) of the Act requires the Commission to have regard to the current and future activities of an applicant for registration.

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

### Other matters beneficial to the community

15. 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>2</sup>
- 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>3</sup>
16. Not all organisations that have purposes that benefit the community will be charitable. In *Williams Trustees v Inland Revenue Commissioners*<sup>4</sup> Lord Simons (citing Lindley LJ in *In Re Macduff*<sup>5</sup> and Lord Cave LC in *Attorney-General v National Provincial & Union Bank of England*<sup>6</sup>) held:

*“Now Sir Samuel Romilly did not mean, and I am certain Lord Macnaghten did not mean, to say that every object of public general utility must necessarily be a charity. Some may be and some may not be. . . .*

*Lord Macnaghten did not mean that all trusts for purposes beneficial to the community are charitable, but that there were certain beneficial trusts which fell within that category; and accordingly to argue that because a trust is for a purpose beneficial to the community it is therefore a charitable trust is to turn round his sentence and to give it a different meaning. So here, it is not enough to say that the trust in question is for public purposes beneficial to the community or for the public welfare; you must also show it to be a charitable trust.”<sup>7</sup>*

<sup>2</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>3</sup> *Charitable Uses Act 1601* 43 Elizabeth I c. 4.

<sup>4</sup> [1947] UKHL 1 (21 March 1947). That case was heavily relied up and quoted by Kennedy J *In re Cumming* [1951] NZLR 498.

<sup>5</sup> [1896] 2 Ch 451, 466.

<sup>6</sup> [1924] AC 262, 265.

<sup>7</sup> *Williams Trustees v Inland Revenue Commissioners* [1947] AC 447, 455.

17. In *Charity Law in Australia and New Zealand* Gino Dal Pont confirms that purposes must benefit the community in a way that the law regards as charitable:

*“ . . . 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>*

18. The Applicant’s purpose set out in clause 5.1(b) is:

*“Promoting and developing for the benefit of the public and in particular the public of the North Shore District, a sustainable innovative, vibrant and buoyant economy.”*

19. In the Appendix to his letter dated 15 April 2009 (received 9 June 2009) the Applicant’s solicitor states:

***“Purposes***

7. *As noted above, the general purpose of ENS is ‘to encourage, promote and support the successful establishment and growth of business, investment and employment opportunities within North Shore City for the benefit of the public and in particular the people of North Shore City’. ENS’s specific purposes, to be pursued in support of that general purpose, are then listed as including (without limitation):*

7.1 *advancement of education, for example by promoting training and mentoring programmes and workshops, promoting enterprise development programmes in schools, fostering links between business and education sectors, and facilitating research (and the dissemination of research);*

7.2 *facilitating and/or coordinating private sector (individual and corporate), public sector and not-for-profit/third sector interaction and participation in the establishment and growth of business, investment and employment opportunities in North Shore City;*

7.3 *developing and making available a publicly accessible networking and information infrastructure that promotes and supports the establishment and growth of business, investment and employment opportunities in North Shore City;*

7.4 *recognising and promoting excellence in relation to the establishment and growth of business, investment and employment opportunities in North Shore City, for*

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<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.

example through enterprise awards or similar programmes; and

7.5 participating in local, regional and national initiatives that are relevant to the general purpose of ENS.

8. Both the capital and income of ENS are held on trust for these purposes. For convenience, we refer to ENS's purposes as its 'local economic development purposes'."

20. In the Appendix the Applicant's solicitor states that the following purposes in the Preamble to the Statute of Elizabeth are potentially relevant in the present context:
- relief of aged, impotent, and poor people
  - supportation, aid and help of young tradesmen, handicraftsmen, and persons decayed
  - repair of bridges, ports, havens, causeways, churches, sea banks, and highways.
21. The Commission notes that the purpose in clause 5.1(b) does not identify an intention to benefit people by reason of their age, employment in a particular trade, or particular disadvantage. In addition this clause does not indicate an intention to provide essential infrastructure for the public such as "bridges, ports, havens, causeways, churches, sea banks, and highways" or even free public access to the "information highway", including the Internet, as set out in *Vancouver Regional FreeNet Association v Minister of National Revenue*.<sup>9</sup>
22. 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 cited the following cases where the court identified charitable purposes: *Commissioners of Inland Revenue v Yorkshire Agricultural Society*,<sup>10</sup> *Crystal Palace Trustees v Minister of Town and Country Planning*,<sup>11</sup> *Commissioners of Inland Revenue v White and others and Attorney-General*,<sup>12</sup> *Re Tennant*,<sup>13</sup> *Commissioner of Taxation v Triton Foundation*,<sup>14</sup> and *Tasmanian Electronic Commerce Centre Pty Ltd v Commissioner of Taxation*.<sup>15</sup>
23. In addition to the above cases, the Commission has also considered the courts' decisions in *Hadaway v Hadaway*<sup>16</sup> and *Commissioners of Inland Revenue v Oldham Training and Enterprise Council*.<sup>17</sup>

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<sup>9</sup> [1996] 3 FC 880.

<sup>10</sup> [1928] 1 KB 611.

<sup>11</sup> [1951] 1 Ch 132.

<sup>12</sup> (1982) 55 TC 651.

<sup>13</sup> [1996] 2 NZLR 633.

<sup>14</sup> (2005) 147 FCR 362.

<sup>15</sup> (2005) FCA 439.

<sup>16</sup> [1955] 1 WLR 16.

<sup>17</sup> (1980) 55 TC 651.

24. As accepted by the Applicant's solicitor in paragraphs 40 and 42 of the Appendix, the assessment of this issue will turn on the facts of each case.
25. The Commission notes that the cases cited by the Applicant's solicitor relate to: promoting agriculture, providing a public park and exhibition facilities, educating the public about specialised crafts, providing essential services for a rural community, assisting the invention of items designed to benefit the public, and assisting a business community respectively.
26. Economic development of a geographical area was specifically considered by the courts in *Re Tennant*<sup>18</sup> and *Tasmanian Electronic Commerce Centre Pty Ltd v Commissioner of Taxation*.<sup>19</sup> In both of these cases economic development was held to be charitable under "other matters beneficial to the community" because essential services were provided and the community was considered to be under a particular disadvantage.
27. 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>20</sup>  
[Emphasis added]
28. 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:
- "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>21</sup>
30. The Applicant has not provided any evidence that it is either providing essential services or assisting an area that is under any particular

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<sup>18</sup> [1996] 2 NZLR 633.

<sup>19</sup> (2005) FCA 439.

<sup>20</sup> [1996] 2 NZLR 633, 640.

<sup>21</sup> (2005) FCA 439 at paras 59-60.

disadvantage as set out in *Re Tennant*<sup>22</sup> and *Tasmanian Electronic Commerce Centre Pty Ltd v Commissioner of Taxation*.<sup>23</sup> For the above reasons the Commission considers that the Applicant's purpose set out in clause 5.1(b), 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?

31. 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>24</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>25</sup>
32. In *Commissioners of Inland Revenue v Yorkshire Agricultural Society*,<sup>26</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.
33. 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>27</sup> [Emphasis added]
34. 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:

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<sup>22</sup> [1996] 2 NZLR 633.

<sup>23</sup> (2005) FCA 439.

<sup>24</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>25</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>26</sup> [1928] 1 KB 611.

<sup>27</sup> [1951] 1 Ch 132, 142.



*“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>28</sup>*

35. 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>29</sup> [Emphasis added]*

36. 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>30</sup> [Emphasis added].*

37. In *Commissioner of Taxation v Triton Foundation*<sup>31</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 that a number of the resulting inventions had been of benefit to the community.

38. In a letter dated 23 May 2008 which accompanied its application, the Applicant’s solicitor indicates that the Applicant undertakes activities designed to:

- meet the needs of the marine sector and the marine industry, in particular the shipyard marine industry
- develop the export sector by assisting young companies and suitable businesses to develop
- ensure that the 2011 Rugby World Cup is as successful as possible for the greater Auckland region by co-ordinating with local facilities, hotels and other community groups

<sup>28</sup> [1955] 1 WLR 16, 20 (PC).

<sup>29</sup> (1980) 55 TC 651, 659.

<sup>30</sup> (1996) 69 Tax Cases 231, 251.

<sup>31</sup> (2005) 147 FCR 362.

- facilitate business awards, including categories for community involvement and support, sustainability, and best practice.
39. In paragraph 41 of the Appendix to his letter dated 15 April 2009, the Applicant's solicitor states that "case law has held that private benefits to persons engaged in commerce and industry are merely incidental to the pursuit of economic development purposes."
  40. The Commission points out that, as indicated above, each case turns on its own facts and **in some cases** courts have held private benefits to be incidental to the public benefit. In other cases, however, courts have reached the opposite conclusion.
  41. In paragraph 47, the solicitor states:
 

*"while it is acknowledged that ENS's purposes and activities may benefit businesses/employers operating in North Shore City, this is simply an **inevitable** concomitant of pursuing those purposes and activities for the benefit of the North Shore City community as a whole, which includes not only those businesses/employers but also employees and their families and the wider community."* [Emphasis added]
  42. The Commission is not satisfied that the Applicant has provided sufficient evidence of any public benefit resulting from the purpose set out in clause 5.1(b). In addition, it appears that while private benefits for business owners and employers in the North Shore District are "inevitable", any benefits conferred on the remainder of the community will be too remote.

### Conclusion

43. The Commission concludes that the purpose in clause 5.1(b) is a non-charitable purpose which will provide private benefits for business owners and employers in the North Shore area regardless of any benefits conferred on the remainder of the community.

### Section 61B of the Charitable Trusts Act

44. 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.
45. 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>32</sup> In each case there must be a substantial charitable intention indicated.

46. 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>33</sup>

47. The Commission considers that the purpose set out in clause 5.1(a) is charitable, but the purpose set out in clause 5.1(b) is non-charitable for the reasons given above. If the purpose in clause 5.1(b) was "blue-pencilled out", the Applicant would not be able to carry out its main purpose which is "to encourage, promote and support the successful establishment and growth of business and investment within North Shore City". The Commission therefore concludes that the Applicant does not have substantially charitable purposes.

48. The Commission has analysed the wording of the Applicant's purposes, surrounding context, and activities (as directed by section 18 of the *Charities Act 2005*). The Commission does not consider that these provide evidence of "a substantially charitable mind" with an intention to create a charitable trust, but which was not conveyed by the drafting. The Commission does not consider that the purposes indicate an intention to create a substantially charitable trust.

49. On this basis the Commission considers that the Applicant's purposes are not substantially charitable and therefore section 61B of the *Charitable Trusts Act 1957* cannot operate to validate the trust.

### **Charity Commission's determination**

50. 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.

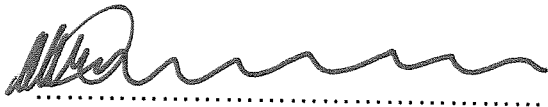
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<sup>32</sup> *Re Beckbessinger* [1993] 2 NZLR 362, 373.

<sup>33</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



Trevor Garrett  
Chief Executive

24/12/09

Date