

## Deregistration decision: Mokorina Whanau Trust (CC40304)

### The facts

1. Mokorina Whanau Trust (the Trust) was registered as a charitable entity under the Charities Act 2005 (the Act) by the Charities Commission (the Commission) on 25 May 2009, with registration backdated to 30 June 2008.

2. Clauses 1 and 2 of the trust order state:

1. **TITLE**

*The Trust shall be known as the MOKORINA WHANAU TRUST and shall apply in respect of the Initial Land Interests and all other interests in land or assets as may be acquired by the Trust from time to time combining the interests of [X] and [Y, X's wife].*

2. **OBJECTS**

*Subject to any express restrictions set out in the Trust order, the objects of the Trust shall be to administer and preserve the interests of the whanau and to use the income derived from those interests to be applied for the purposes of promoting health, social, cultural and economic welfare, education and vocation training and general advancement in the life of the Descendants.*

[Names removed]

3. Clause 12 defines "Descendants" as:

*...means the descendants from time to time of [X] and [Y, X's wife] and "Descendant" means any of those Descendants.*

[Names removed]

4. Information received by the Commission during assessment of an entity with similar purposes led the Commission to review the Trust's eligibility for registration.

5. On 20 January 2011, the Commission sent the Trust a letter under section 50 of the Act, requesting the following information:

Beneficiaries

(i) *The names of all the people who have benefited from the trust in the last five years and how they have benefited from the trust, i.e. paid for university fees, school fees etc.*

(ii) *The relationship, if any, between the people who benefited from the trust and the trustees*

(iii) *Have the trustees assisted any other persons other than the descendents of [X] and [Y]?*

(iv) *How many descendents are there of [X] and [Y]?*

Trustees

- (v) Are [X] and [Y] stated in clause 12 of the trust deed the same persons as the trustees?
- (vi) What is the relationship, if any, between the trustees?

Activities

- (vii) How have the trustees met their purposes of, 'promoting health, social, cultural and economic welfare, education and vocation training and general advancement in the life of the Descendants.'
- (viii) Does the trust intend to assist any persons other than the descendants of [X] and [Y]

Accounts

- (ix) Do the trustees hold any other assets, other than the bank account provided in the annual return financial statements of 2009 and 2010? If so what are these assets?

6. One of the trustees responded to the information request on 16 February 2011 stating:

*"there is a general point that I need to make. The Mokorina Whanau Trust is a small Trust with very little income that comes from the trustees depositing their grants from a larger whanau Incorporation each year. This amounts to some \$3000 per year earlier than later \$2000 per year. This is the yearly entitlement of whanau members to a Maori Incorporation. For most of the last few years we have been building up our limited funds and it will be this financial year that we will be giving out education grants to three grand children and one great grandchild of [X] and [Y]."*

- (i) *People who benefited over the last 5 years. In 2005 [Z, X and Y's daughter] to pursue an MBE at Auckland. In 2007 each of the trustees in terms of poverty as the whole whanau was having a difficult time then. Note that money in the trust comes mainly from the trustees giving up their rights to receive payouts especially from the Raukautuku Incorporation and other land interest. No one since then has received any benefits but this year as noted above educational grants will be given to 4 members of the next generations.*
- (ii) *The trustees are the founding parents and their three daughters.*
- (iii) *No, we are not in a position to do that*
- (iv) *17, and with spouses 22*
- (v) *Yes, and (vi) they are the founding parents, the mother and the father and the grandparents and great grandparents of the descendants.*
- (vii) *Not very well due to limited funds....We are concentration on education and vocation training at this time.*
- (viii) *At the moment no.*
- (ix) *We have registered Maori land interest in the Waiariki Land District, the Tairāwhiti Land District and the Aotea District in about between 24 and 28 blocks. But our interests are very small and the small amounts we receive go into the fund of the whanau trust. They are very modest amounts.  
[Names removed]*

7. On 18 February 2011, the Commission sent the Trust a notice of intention to remove the Trust from the register on the basis that it was not established and maintained for exclusively charitable purposes.
8. No response was received by the deadline of 18 March 2011, so on 22 March 2011 the Commission sent an email asking whether the trustees intended to make any submissions in relation to the notice.
9. On 30 March 2011 one of the trustees responded:

*We accepted the decision and have no wish to argue about it.*

### **The issues**

10. The Commission must consider whether the Trust is not, or is no longer, qualified for registration as a charitable entity under section 32(1)(a) of the Act. In this case, the key issue for consideration is whether the Trust is of a kind in relation to which an amount of income is derived by the trustees in trust for charitable purposes, as required by section 13(1)(a) of the Act. In particular, whether all of the Trust's purposes fall within the definition of charitable purpose in section 5(1) of the Act and, if there are any non-charitable purposes, whether these are ancillary to a charitable purpose.

### **The law on charitable purpose and deregistration**

11. Section 13 of the Act sets out the essential requirements for registration. Under 13(1)(a) of the Act, a trust must be of a kind in relation to which an amount of income is derived by the trustees in trust for charitable purposes.
12. 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 to benefiting the public or a sufficient section of the public.
13. In relation to non-charitable purposes carried on by an entity, section 5(3) of the Act provides that any non-charitable purpose that is merely ancillary to a charitable purpose will not prevent an entity from qualifying for charitable status.
14. Section 32(1)(a) of the Act provides that the Commission may remove an entity from the register if the entity is not, or is no longer, qualified for registration as a charitable entity.

### **Charities Commission's analysis**

15. The Commission considers that the objects in clause 2 are broadly stated therefore it must take into account the current and future activities of the Trust as set out in section 50(2)(a) of the Act to determine whether these purposes are charitable.

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

16. Information provided by one of the trustees in his email of 16 February 2011 indicates that over the last five years the Trust has assisted [Z], a daughter of [X] and [Y] and a trustee of the trust, to pursue a course of study, and in 2007 it assisted each of the trustees who were "having a difficult time". This year the Trust intends to make educational grants to three grandchildren and one great grandchild of [X] and [Y].
17. The Commission does not consider that the Trust's purposes and activities are charitable under advancement of religion or another benefit to the community therefore they have been considered under the relief of poverty and advancement of education.

#### Relief of poverty

18. In order to be charitable under this head, a purpose must be directed at people who are poor, in need, aged, or suffering genuine hardship and it must provide relief.<sup>2</sup>
19. "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 that most people take for granted.<sup>4</sup>
20. 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>
21. In his email of 16 February 2011 the trustee stated that funds were provided to each of the trustees in 2007:

*in terms of poverty as the whole whanau was having a difficult time then.*

22. Case law has determined that entities providing assistance to those in **financial** poverty have an exemption to the public benefit test.<sup>6</sup> These decisions are often described as the 'poor relations'<sup>7</sup> or 'poor employees'<sup>8</sup> cases.

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<sup>2</sup> *DV 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 Compton* [1945] Ch 123 at 137-9 per Lord Greene MR; *Re Hobourne Aero Components Ltd's Air Raid Distress Fund* [1946] 1 Ch 194 at 203-7 per Lord Greene.

<sup>7</sup> *Re Scarbrick* [1951] 1 Ch 622.

<sup>8</sup> *Dingle v Turner* [1972] AC 601.

23. However, in *Re Scarbrick*, Jenkins LJ stated:

*[T]he true question in each case has really been whether the gift was for the relief of poverty amongst a class of persons,[a charitable purpose]...or was merely a gift to individuals albeit with relief of poverty amongst those individuals as the motive of the gift [private purpose].*<sup>9</sup>

24. In *Re Segelman (deceased)*<sup>10</sup> the testator's will required the trustees to hold and apply the trust fund for 21 years after his death for the "**poor and needy** of the persons set out in the Second Schedule then living". The Second Schedule listed six members of the testator's family and included (but did not name) the issue of five of them. Chadwick J noted that this was 'very close to the line' between a charitable purpose and private purpose, but determined that it was a charitable purpose because the gift was for the relief of poverty among poor people of a particular class, rather than a gift to particular poor people.
25. The Commission considers that providing funds to beneficiaries who are suffering financial poverty is likely to be charitable under relief of poverty.
26. The Commission, however, cannot be certain that a decision by the trustees to provide financial assistance to themselves because "the whole whanau was having a difficult time" will amount to the relief of poverty as determined by the courts. This is because the trustees have not shown that at that time they did not have access to the normal things of life that most people would take for granted.
27. The Commission also considers that "the purposes of promoting health, social, cultural and economic welfare, education and vocation training and general advancement in the life of the Descendants" in clause 2 will not limit the Trust to purposes which are charitable under the relief of poverty. These purposes are therefore not charitable under the relief of poverty.

#### Advancement of education

28. In order for a purpose to advance education, it must provide some form of education and ensure that learning is advanced. The modern concept of "education" covers formal education, training and research in specific areas of study and expertise. It can also include less formal education in the development of individual capabilities, competencies, skills, and understanding, as long as there is a balanced, and systematic process of instruction, training, and practice.<sup>11</sup> In order to advance education, learning must be passed on to others.

<sup>9</sup> [1951] 1 Ch 622 at 654-7 per Jenkins LJ.

<sup>10</sup> [1995] All ER 676.

<sup>11</sup> *Re Mariette* [1915] 2 Ch 284. See also *Chesterman v Federal Commissioner of Taxation* (1923) 32 CLR 362; *Lloyd v Federal Commissioner of Taxation* (1955) 93 CLR 645; *Chartered Insurance Institute v London Corporation* [1957] 1 WLR 867; *Flynn v Mamarika* (1996) 130 FLR 218.

29. While the Commission considers that providing education grants may be a charitable purpose under advancement of education, the Commission must also be satisfied that the grants are available to a sufficient sector of the community.<sup>12</sup> The public benefit requirement is considered below.

#### Public benefit

30. The Commission has considered the trust order and the information provided by the trustees and determined a main purpose of the trust is to provide benefits to the descendants of the two individuals named in the order. Therefore, the Commission must determine whether the descendants constitute a sufficient section of the community.

31. In *Travis Trust v Charities Commission* Joseph Williams J held:

*Once it is established that if the purpose of a trust is charitable in character, it must also be established that the benefits of the trust will accrue to the public. According to Richardson J in New Zealand Society of Accountants this requires the application of a two-fold test: first, are the purposes of the trust such as to confer a benefit on the public or a section of the public; and second, do the class of persons eligible to benefit constitute the public or a sufficient section of it?*<sup>13</sup>

32. Earlier, in *Dingle v Turner*,<sup>14</sup> Lord Cross held:

*In truth the question whether or not the potential beneficiaries of a trust can fairly be said to constitute a section of the public is a question of degree and cannot be by itself decisive of the question whether the trust is a charity. Much must depend on the purpose of the trust. It may well be that, on one hand, a trust to promote some purpose, prima facie charitable, will constitute a charity even though the class of potential beneficiaries might fairly be called a private class and that, on the other hand, a trust to promote another purpose, also prima facie charitable, will not constitute a charity even though the class of potential beneficiaries might seem to some people fairly describable as a section of the public.*<sup>15</sup>

33. Section 5 of the Charities Act states:

(1) *In this Act, unless the context otherwise requires, charitable purpose includes 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.*

(2) *However,-*

(a) *the purpose of a trust, society, or institution is a charitable purpose under this Act if the purpose would **satisfy the public benefit requirement apart from the fact that the beneficiaries of the trust, or the members of the society or institution, are related by blood**; and [Emphasis added]*

<sup>12</sup> *Re Compton* [1945] 1 Ch 123; *Oppenheim v Tobacco Securities Ltd* [1951] AC 297.

<sup>13</sup> (2009) 24 NZTC 23, 273 at para [54].

<sup>14</sup> [1972] AC 601.

<sup>15</sup> *Dingle v Turner* [1972] AC 601, 624.

34. Commenting on the effect of clause 5(2)(a), which mirrored the wording of section OB 3B of the *Income Tax Act 1994*, David Brown stated:

*In the context of trusts for whanau, for example, it may depend on the size of the pool of beneficiaries and the terms of the trust, or on whether the trust or entity serve some wider public benefit. The removal of the blood ties stipulation will not be a licence to award charitable status to private family trusts, although clearly the test is less predictable than the previous blanket ban on blood ties.<sup>16</sup>*

35. When considering whether a benefit is being provided to a sufficient section of the public the Commission takes the following factors into consideration:

- The nature of the entity and its activities
- The number of beneficiaries and the relationship between the beneficiaries and the purpose of the charity
- The basis of the relationship between the beneficiaries
- Whether the trust is 'substantially altruistic' in nature;
- Whether the organisation only provides benefits to its members, or provides benefits to the general public<sup>17</sup>.

36. Applying these factors in the current circumstances, the Commission considers clause 1 of the trust order indicates that the Trust has been formed to combine the interests in land and other assets of a husband and wife.

37. Clause 2 states:

*Subject to any express restrictions set out in the Trust order, the objects of the Trust shall be to administer and preserve the interests of the whanau and to use the income derived from those interests to be applied for the purposes of promoting health, social, cultural and economic welfare, education and vocation training and general advancement in the life of the Descendants.*

38. Clause 12 defines "Descendants" as:

*...means the descendants from time to time of [X] and [Y, X's wife] and "**Descendant**" means any of those Descendants.  
[Names removed]*

39. In the trustee's email of 16 February 2011 he states that there are currently 17 descendants comprising the founding parents, their children, grandchildren and great grandchildren, 22 people if spouses are included.

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<sup>16</sup> Brown, D (2005) *'The Charities Act 2005 and the definition of charitable purposes'* Vol 21 NZULR p 620.

<sup>17</sup> Public Benefit and the Blood ties exemption: section 5(2)(a) Board meeting 19/20 July Agenda Item C17/07/2007.

40. The trustees are the founding parents and their three daughters. The only people to receive benefits from the Trust in the last five years have been the trustees (assistance for one to pursue university studies and financial assistance for each trustee). This year the trustees intend to provide benefits to three of their grandchildren/children and one great grandchild/grandchild. The trustee has stated that the Trust is not in a position to assist anyone other than the trustees' descendants.
41. The Commission considers that these factors indicate that benefits are only available for a small number of people who are closely related, the trust is not substantially altruistic in nature and it does not provide benefits for the general public. The Trust, therefore, does not provide a sufficient public benefit.
42. The Commission also notes that the purposes set out in clause 2 and the definition of "Descendants", being "the descendants from time to time of [X] and [Y]", does not appear to allow [X] and [Y] to receive benefits from the Trust.

#### Conclusion

43. The Commission concludes that the Trust's purposes and activities are not charitable and do not provide sufficient public benefit. These purposes and activities cannot be considered ancillary to any charitable purposes.

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

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>18</sup>
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>19</sup>

<sup>18</sup> *Re Beckbessinger* [1993] 2 NZLR 362, 373.

<sup>19</sup> *Re Beckbessinger* [1993] 2 NZLR 362, 376.



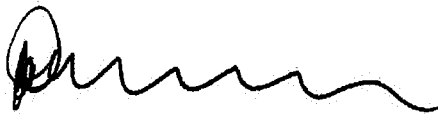
47. The Commission has analysed the wording of the Trust's purposes, surrounding context, and activities (as directed by section 50(2)(a) of the *Charities Act 2005*). The Commission does not consider that these provide evidence of "a substantially charitable mind" with an intention to create a charitable trust, but which was not conveyed by the drafting.
48. On this basis, the Commission considers that the Trust's purposes are not substantially charitable and therefore section 61B of the Charitable Trusts Act 1957 cannot operate to validate the trust.

**Charities Commission's determination**

49. The Commission determines that the Trust is not, or is no longer, qualified for registration as a charitable entity because it 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.
50. The decision of the Commission is therefore to remove the Trust from the Register, pursuant to section 31 of the Act, with effect from **25 May 2011**.

**For the above reasons, the Commission determines to deregister the Trust as a charitable entity by removing the Trust from the Register.**

Signed for and on behalf of the Charities Commission



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Trevor Garrett  
Chief Executive

25 May 2011

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Date