

## **Registration Decision: The Auckland Tourism and Visitors Trust**

### **Facts**

The Applicant is a trust board incorporated under the Charitable Trusts Act 1957. The deed of trust for the Applicant, dated 10 November 1995, indicates that its general purposes are to support tourism in Auckland and to encourage visitors to the Auckland region. Its activities include the promotion and development of the Auckland region as a cultural, historical, educational, environmental and recreational destination of choice.

The Applicant applied to the Charities Commission ("the Commission") for registration as a charitable entity on 17 May 2007 on the basis that the Applicant was established for purposes that are beneficial to the community.

The Commission analysed the Applicant's registration application and on 25 September 2007 sent the Applicant a letter advising that: "... your application for registration might be declined .... because the purposes of The Auckland Tourism and Visitors Trust do not meet the registration requirements under section 5(1) of the Charities Act 2005."

On 11 October 2007 the Applicant sent the Commission a letter, with a legal opinion attached, in support of its view that the Applicant is established for charitable purposes.

### **The issues**

The issue that the Commission has to consider 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, pursuant to section 13(1)(a) of the Charities Act 2005 (the "Charities Act").

### **The law on charitable purpose**

Section 5 of the Charities Act defines 'charitable purpose' as including every charitable purpose relating to:

- the relief of poverty;
- the advancement of education;
- the advancement of religion; or
- any other matter beneficial to the community.

The Commission applies the common law test for charitable purpose to determine whether one or more of these purposes are present.

Under section 5(3) of the Charities Act, to be held charitable, all of an applicant's purposes must be charitable in nature, or the non-charitable purposes must be ancillary to a charitable purpose.

## **Commission's analysis**

The Applicant's purposes, as set out in the objects clause (clause 3) of its trust deed dated 10 November 1995, are as follows:

- 3.1 *Exclusively Charitable Objects and Purposes: The Trustees shall stand possessed of the Trust fund UPON TRUST to pay or apply so much of the capital and the income thereof as the Trustees think fit or toward any one or more of the following exclusively charitable objects and purposes which are hereby declared to be the objects and purposes of the Trust, namely:*
- 3.1.1 *Managing Region: managing, administering and promoting the Auckland Region as a tourist destination;*
  - 3.1.2 *Promoting Visitor Industry: publishing and promoting the visitor industry within the Auckland Region with the particular aim of attracting international and domestic visitors, tourists, and business interests thereto, and maximising the length of stay of such visitors, tourists and business interests;*
  - 3.1.3 *Developing Marketing Plans: developing comprehensive plans and strategies for marketing the Auckland Region as a tourist destination, and developing the means of implementing, monitoring and reviewing those plans and strategies;*
  - 3.1.4 *Marketing Region: marketing in New Zealand and overseas, the advantages of the Auckland Region for visitors and tourists, including promoting and coordinating the development of parks, holiday resorts, scenic reserves and recreational, business and tourist facilities and activities;*
  - 3.1.5 *Convention Location: establishing, maintaining and marketing the Auckland Region as a premier convention location;*
  - 3.1.6 *Visitor Information Services: operating visitor information and entertainment services to ensure visitors and tourists to the Auckland Region are welcomed and given information and assistance;*
  - 3.1.7 *Reservation Services: providing a reservation service for accommodation, travel and tour services within the Auckland Region*
  - 3.1.8 *Information on Resources: researching, publishing and disseminating information on the resources of the Auckland Region in order to encourage and promote the development, coordination and marketing of commercial, industrial, communication, transportation, recreation, and education interests, services and facilities conducive to tourism;*
  - 3.1.9 *Coordinating Marketing: coordinating joint venture marketing campaigns with the private sector and publicly funded regional tourism organisations in order to raise the profile of the Auckland Region and to contribute to sustained tourism growth in the Auckland Region;*
  - 3.1.10 *Statistical Information: researching and recording statistical information on tourism and monitoring visitor numbers in order to provide forecasts of visitor numbers and visitor research information for the Auckland Region;*

- 3.1.11 *Promoting Events and Conventions: promoting, supporting and bidding for events and conventions that bring economic benefit to, or increase the profile of, the Auckland Region in a cost effective manner;*
- 3.1.12 *General: all such things as are incidental or conducive to the attainment of the charitable objects and purposes described in subclauses 3.1.1 to 3.1.11.*
- 3.2. *No Limitation: The objects and purposes of the Trust shall not, except where the context specifically or expressly requires it, be in any way limited or restricted by reference to or inference from the terms of any other clause or subclause or from the name of the Trust and none of the objects or purposes of the Trust shall be deemed subsidiary or ancillary to any other object or purpose of the Trust;*
- 3.3 *Objects and Purposes Independent: The Trustees shall be empowered to carry out any one or more of the objects or purposes of the Trust independently of any other object or purpose of the Trust.*

## **Object Clause**

Clause 3.1 begins by characterising the stated objects which follow as being “exclusively charitable”.

Such a statement in an entity’s rules does not by its mere existence render all of that entity’s purposes charitable. That will depend on the content of those purposes<sup>1</sup>.

Clause 3.1 has twelve sub clauses describing them. In summary, they are as follows:

- 3.1.1 Managing the region
- 3.1.2 Promoting visitor industry
- 3.1.3 Developing marketing plan
- 3.1.4 Marketing region
- 3.1.5 Convention location
- 3.1.6 Visitor information services
- 3.1.7 Reservation services
- 3.1.8 Information on resources
- 3.1.9 Coordinating marketing
- 3.1.10 Statistical information
- 3.1.11 Promoting events and conventions
- 3.1.12 General (matters incidental or conducive to the attainment of the above purposes)

The following sub clauses are relevant to their interpretation:

- 3.2 *No Limitation: The objects and purposes of the Trust shall not, except where the context specifically or expressly requires it, be in any way limited or restricted by*

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<sup>1</sup> Keoppler Will Trusts Barclays Bank Trust Co. Ltd v Slack and others [1982] K.No 943 and [1984] Ch 243 at 257-8, Mc Govern and Others v Attorney-General [1982] Ch 321 343-4 and [1981] 3 ALL ER 493, Morice v Bishop of Durham 1804 9 VES 399. Section 13 and 18 Charities Act 2005.

*reference to or inference from the terms of any other clause or subclause or from the name of the Trust and none of the objects or purposes of the Trust shall be deemed subsidiary or ancillary to any other object or purpose of the Trust;*

It necessarily follows that any non-charitable objects cannot be considered ancillary or incidental to any charitable objects.

- *3.3 Objects and Purposes Independent: The Trustees shall be empowered to carry out any one or more of the objects or purposes of the Trust independently of any other object or purpose of the Trust.*

This sub clause provides that each object of the trust is independent of the others. This effectively restates clause 3.3.

The Commission considers that the objects contained in sub clauses 3.1.8 (information on resources) and 3.1.10 (statistical information) are charitable on the basis that they advance education. The objects contained in the remaining sub clauses (3.1.1 to 3.1.7, 3.1.9, 3.1.11 and 3.1.12) do not advance religion, do not advance education nor do they relieve poverty. They could therefore only be charitable if they fall within the fourth head of charity i.e. as relating to 'any other matter beneficial to the community'.

The fourth head of charity requires that the purpose must benefit the public, or an appreciable section of the public, and fall within the spirit and intendment of the preamble to the Charitable Uses Act, 1601: 43 Elizabeth I c. 4.

The public benefit criterion necessarily requires that 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. Accordingly, it will not be charitable if the private benefits are an end in themselves<sup>2</sup>. None of the stated purposes expressly require a public benefit to be conferred nor is it necessarily implicit that a public benefit will result from them. Proof that public benefit will necessarily flow from each of the stated purposes is required not a mere belief that it will or may occur (*Gilmour v Coats (1949) AC 26*).

The primary beneficiaries of the relevant purposes appear to be the largely private and commercial tourist operators in the region. They are not the public nor are they a section of the public. The Commission therefore considers that the Applicant does not meet the necessary requirement for public benefit.

The courts have recognised new charitable purposes that are very similar to those categorised in 1601, and to that extent have acknowledged that what is accepted as being beneficial to the community will change to reflect current social and economic circumstances. The Commission considers that the Applicant's relevant purposes do not fall within the spirit and intent of the

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<sup>2</sup> IRC V Oldham Training and Enterprise Council (1986) STC 1218, and Travel Just v Canada (Revenue Agency) 2006 FCA 343, [2007] 1 C.T.C. 294, 2007 D.T.c 5012 (Eng.) 354 N.R.360

preamble to the Charitable Uses Act, and no subsequent relevant judicial decision appears to contradict that view.

The purposes of the Applicant other than those set out in sub clauses 3.1.8 and 3.1.10 are therefore not charitable.

It is accordingly then necessary to consider whether s61B of the Charitable Trusts Act 1957 may apply. In summary, the effect of that provision is that if the trust is substantially charitable but would otherwise be rendered invalid by the presence of some actual or potential non-charitable purpose the trust will be treated as valid and operate only in relation to the relevant charitable purposes (*Re Beckbessinger (1993) 2 NZLR 362*). Only two of the eleven principal purposes set out in clause 3.1 of the trust deed are charitable. Accordingly, the Commission does not consider the trust to be for purposes which are substantially charitable. It necessarily follows that s61B cannot be used to validate the trust.

The Commission's conclusion is accordingly that while the Applicant has two objects that are charitable the remaining objects are not charitable thereby rendering the Applicant ineligible for registration under the Charities Act.

#### **Applicant's activities**


In considering the application, the Commission is required to have regard to the activities of the entity (s18(3)(a)(i) of the Charities Act). The assessment of the Applicant's activities from the information supplied, indicates that the majority of those activities go beyond the two charitable purposes stated in sub clauses 3.1.8 and 3.1.10. The Applicant's activities are therefore not solely charitable.

#### **Charities Commission's determination**

The finding of the Charities Commission is that the Applicant has failed to meet an essential requirement for registration in that the Applicant does not administer a trust of a kind in relation to which an amount of income is derived by the trustees in trust for charitable purposes, pursuant to section 13(1)(a) of the Charities Act 2005, because most of the objects contained in clause 3 of its trust deed are not charitable.

**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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Sid Ashton - Chair

17/12/07  
Date