

Registration Decision: 5Million Flying Kiwis Trust

The facts

1. 5Million Flying Kiwis Trust (“the Applicant”) was incorporated as a board under the *Charitable Trusts Act 1957* on 9 December 2009.
2. The Applicant applied to the Charities Commission (“the Commission”) for registration as a charitable entity on 27 January 2010.
3. Clause 4 of the Applicant’s original trust deed (“the original trust deed”) set out the purposes of the Applicant as:

The Board is established to carry out within New Zealand the following aims:

- (a) *to research, develop and establish social enterprises for the benefit of the community;*
- (b) *to support community groups, community projects and community based charities;*
- (c) *to provide resources, facilities and venues where research and development of social entrepreneurship, social innovation, social enterprise and social investment can be carried out;*
- (d) *to promote awareness of social entrepreneurship, social innovation, social enterprise and social investment;*
- (e) *to undertake a programme of education relating to social entrepreneurship, social innovation, social enterprise and social investment, within schools, businesses and the broader community;*
- (f) *to train people on the issues of social entrepreneurship, social innovation, social enterprise and social investment;*
- (g) *to produce educational resource material on social entrepreneurship, social innovation, social enterprise and social investment;*
- (h) *to collect and maintain a specialist library relating to resources on social entrepreneurship, social innovation, social enterprise and social investment and to make this information available to the community;*
- (i) *to create a facility to research, develop, establish and promote social entrepreneurship, social innovation, social enterprises and social investment;*
- (j) *to carry on any other charitable objective of whatsoever nature which directly or indirectly achieves the above aims or which may be conveniently carried on in conjunction with the above aims;*
- (k) *to do anything else within New Zealand that will advance any of these aims.*

These aims, purposes, and objectives shall only extend to aims, purposes and objectives which are charitable and effected within New Zealand.

4. The application was analysed by the Commission and on 8 April 2010, the Applicant was sent a notice that may lead to a decline on the basis that the Applicant's purposes were not restricted to those that were charitable. In addition, the information on its website appeared to indicate that it was involved in promoting the interests of private businesses.
5. One of the Applicant's officers had made a written request for a waiver for a disqualifying factor on 6 February 2010. On 8 April 2010, the officer was sent a letter requesting written support from the remaining three officers.
6. On 11 April 2010, the remaining officers sent the Commission a letter of support for the disqualified officer.
7. On 24 May 2010, the Applicant requested a meeting with the Commission. A meeting was held between representatives of the Commission and two of the Applicant's officers on 26 May 2010.
8. On 30 June 2010, the Applicant emailed the Commission stating:

We have changed all the business activities over to the company and are in the process of registering the company with the IRD. The website will be redesigned to reflect the appropriate requirements

9. The Applicant's email included an amended trust deed. Clause 4.1 of the trust deed stated:

The trust is established to carry out every charitable purpose in New Zealand whether relating to the relief of poverty, the advancement of education, or any other purpose beneficial to the community, and:

- (a) *In all its activities shall provide a public benefit;*
- (b) *None of its activities shall result in any private benefit or profit any individual person;*
- (c) *To promote awareness of social entrepreneurship, social innovation, social enterprise and social investment;*
- (d) *To undertake a programme of education relating to social entrepreneurship, social innovation, social enterprise and social investment, within schools, businesses and the broader community;*
- (e) *To train people on the issues of social entrepreneurship, social innovation, social enterprise and social investment;*
- (f) *To produce educational resource material on social entrepreneurship, social innovation, social enterprise and social investment;*
- (g) *To collect and maintain a specialist library relating to resources on social entrepreneurship, social innovation, social enterprise and social investment and to make this information available to the community;*

- (h) *To carry on any other charitable objective of whatsoever nature which directly or indirectly achieves the above aims or which may be conveniently carried on in conjunction with the above aims;*
- (i) *To do anything else within New Zealand that will advance any of these aims.*

10. The Commission considered the amended trust deed and information provided by the Applicant. On 13 July 2010, the Commission requested further information about the Applicant's proposed activities.

11. On 4 October 2010, the Applicant responded by email with another amended trust deed ("the amended trust deed"). Clause 4 of the amended trust deed stated:

4.1 *Funds: All funds and other assets shall be held by the Trustees on behalf of the Trust to enable the Trust to observe and carry out all of the objectives, purposes and operational matters described in this deed.*

4.2 *Objectives*

(A) *The Trustees shall stand possessed of the Funds in accordance with clause 4.1 to pay or apply so much of the capital and the income thereof as the Trustees think fit for or towards anyone or more of the following exclusively charitable objectives and purposes which are hereby declared to be the objectives, purposes and operational matters of the Trust, namely to:*

- (i) *Educate the New Zealand public, business community, government and other sectors of the community about social entrepreneurship, social enterprise, social innovation, social investment and ways of understanding and addressing New Zealand's social challenges;*
- (ii) *Establish and maintain social, business, governmental and other networks to advance thinking on social entrepreneurship, social enterprise, social innovation, social investment and solutions to social challenges;*
- (iii) *Implement or assist in the implementation of projects within the field of social entrepreneurship, social enterprise, social innovation and social investment, including creating, developing and implementing (or assisting in the creation, development or implementation of) systems, solutions and know-how to address social challenges;*
- (iv) *Educate, foster, nurture and support current and future generations of social entrepreneurs and stakeholders; and*
- (v) *Establish, implement, create or foster all activities, opinions or forbearances, as are incidental or conducive to the attainment of the charitable objects and purposes described in this clause.*

(B) *In giving effect to paragraph (a) of clause 4.2 above, the Trust will:*

- (i) *Act as a focal point for the receipt of Funds intended to be held and dealt with for the Objectives; and*

- (ii) *Invest the Funds in such manner as may seem to the Trustees to be prudent; and*
- (iii) *Make payments from the Funds in furtherance of the Objectives in such amounts and in such manner as the Trustees consider appropriate.*

(C) *In giving the effect to paragraph (iii) of clause 4.2 above, the Trustees may also in their discretion, make payments from capital as well as from the income of the Funds, unless and to the extent that it is constrained from or limited doing so and in the case of any particular payment, grant or bequest made to the Trust, in accordance with any constraints or limitations found therein.*

12. The Commission considered the amended trust deed and on 2 November 2010 sent the Applicant a notice that may lead to a decline on the basis that the Applicant's amended purposes were not restricted to those that were charitable. In addition, the information on its website appeared to indicate that it was involved in promoting the interests of private businesses.
13. On 2 November 2010, the Commission also sent the Applicant a letter declining the request for a waiver from disqualification as an officer.
14. On 30 November 2010, the Applicant responded stating:

Notes:

*Have the facts – where is the threat
 Ref letter dated 8 September 2010
 Contributing to society and community
 Exemplar of good character
 This decline supports that I am apparently criminal and has not taken into consideration the circumstances
 Question the ability to make this decision on what grounds – the facts
 This conviction was a culmination of circumstances that were*

The purpose and the importance of requesting this meeting is

1. *To seek your support for the work 5MFK are doing, in particular Social Finance and Social Enterprise Development and their relevance to your ministerial portfolios.*
2. *To have opportunity to work with members of staff within your office, and governmental agencies ministerial agencies in harnessing support and resources.*
3. *To secure a financial contribution from government to help implement these developments.*

Minister Turia has already given 5MFK her support and we have, at her request attended her meetings in leading the conversation in Social Lending and Social Enterprise Development in New Zealand. She has offered to bring other Ministers with a collaborative approach into the discussions we have had.

In an egg shell, the benefits of investing resources in 5MFK for Social Enterprise Development are:

- *To roll our accelerated market based solutions to New Zealand's economic, social and environmental problems*
- *To establish a self reliant, sustainable and growth based Social Investment Fund*
- *To create jobs, grow businesses, support communities and generate wealth*
- *To build skills capability with a special focus on youth to help meet the real world needs of business*
- *To establish Social Enterprises that create new jobs within the ICT, Creative, Tourism, Environmental and Housing sectors*
- *To harness the unique power of Social Enterprise to scale, replicate, accumulate returns and generate foreign earnings, effectively reinvesting these to further the impact of Social Enterprise*
- *To be responsible, accountable and transparent in ROI/SROI and social impact measurements ...*

The issues

15. The Commission must consider whether the Applicant meets all of the essential requirements for registration under the *Charities Act 2005* (the Act).
16. In this case, the key issues for consideration are:
 - (a) 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:
 - (i) whether the Applicant's purposes fall within the definition of charitable purposes in section 5(1) of the Act; and
 - (ii) whether the Applicant provides a public benefit.
 - (b) Whether the Applicant meets the requirements in section 13(1)(d) of the Act. In particular, whether all of the officers of the entity are qualified to be officers under section 16 of the Act.

Does the Applicant meet the requirements of section 13(1)(a) of the Act?

The law on charitable purposes

17. Under section 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.
18. In order to be a valid trust at law, a trust that is for charitable purposes must be exclusively charitable or it will be void for uncertainty.
19. In order for a purpose to be charitable, it must fall within the definition of charitable purpose set out in section 5(1) of the Act. Section 5(1) of the Act states:

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.
20. In addition to being within one of the categories of charitable purpose, to be charitable at law, a purpose must also be for the public benefit¹. This means that the purpose must be directed to benefit the public or a section of the public.
21. Section 5(3) of the Act provides that for an entity to have charitable purposes, any non-charitable purpose must be ancillary to a charitable purpose.
22. In considering an application for registration, section 18(3)(a) of the Act requires the Commission to have regard to:
 - (i) *the activities of the entity at the time at which the application was made; and*
 - (ii) *the proposed activities of the entity; and*
 - (iii) *any other information that it considers is relevant; ...*

The Applicant's activities

23. The Applicant's website <http://www.fivemillionflyingkiwis.org.nz/> states:

Five Million Flying Kiwis Trust is a vibrant, smart and connected organisation founded in New Zealand by Kiwis for Kiwis.

***Our vision is in this simple phrase and at the core of what we do:
'Kiwis creating opportunities for Kiwis'***

¹ Accepted as common ground in *Latimer v Commissioner of Inland Revenue* [2002] 3 NZLR 195 at para [32].

FMFK is the home of a powerful, impactful and change-making, 'opportunity creating' process. It's a 'global family movement' that's bringing Kiwis together by carrying out business activities while pursuing social purpose in a way that has simply not been done before.

FMFK is the central hub of this movement and finds it's source of inspiration, knowledge, systems, processes and insights are what connect the Kiwi heart, mind and spirit with innovation, creativity and opportunity. Together we will make the biggest sustainable impact ever on the mindset, wealth and well-being of New Zealand and the world.

FMFK is creating opportunities on a scale that's never been done before. It's creating opportunities that are a blend of who we are, what we know and how we do things – known to us as 'Edge Thinking'. At its base is a common sense approach that is practical, logical, inspirational and emotionally intelligent. 5MFK is representative of the real 'Flying Kiwi' - the Indigenous Heart with the Industrious Mind.

Our Foundation Principals are: Family – a global family, World Purpose – it's bigger than us, Partnership – working together, Stewardship – caring for everyone and everything, Creation - the realm where all things are possible!

5MFK Limited is a Social Enterprise that manages the business arm, while 5MFK Trust represents the philanthropic arm to carry out its aims and objectives: to create jobs, grow businesses and support communities.

Five Million Flying Kiwis Trust: Creating opportunities for Kiwi Businesses ...

Start with the Answer

Providing social investment to fund high potential innovative Social Enterprises and ventures that provide market-based and accelerated solutions to social, economic and environmental problem.

Kiwis Creating Opportunities

Making the connections for the Global Family of Kiwis to create positive transformational change

Kiwis Can Fly

Partnerships, collaboration and working together to apply new ways of thinking to produce AND/AND solutions that achieve the desired outcomes for all.

Share the Vision

Who inspires us?

Prof. Muhammad Yunus the world's greatest social entrepreneur , Nobel Laureate and founder of the Grameen Bank. Kevin Roberts Worldwide CEO of Saatchi & Saatchi, the 'Nothing is Impossible' champion and New Zealand's greatest advocate. Sir Richard Branson entrepreneur extraordinaire, and our much loved Sir Peter Blake and Sir Edmund Hillary.

They, together with all our wonderful heroes and heroines leave their indelible mark on the world, and in our hearts and minds like maps and keys to show the way, whose deeds and qualities of character fuels the passion and ignites the soul. We need inspirational dreams and inspirational players, we need great hearts that can leap oceans, climb mountains and fly the heavens to make our country and our world a better place.

*Aotearoa New Zealand, the home of the 'Hybrid' the indigenous heart with the industrious mind, and 5 Million Kiwis capable of taking us to the world and winning. An entire country, a global family of Kiwis working together. We have the talent, the know-how, the experience and the resources – put them all together and we can inspire each other and show the world that **KIWIS CAN FLY***

Why are we doing this?

- *To create great opportunities for Kiwis to achieve their dreams, enjoy life and make positive worldwide transformational change*
- *To create real jobs that fill our skills gaps*
- *To meet the real world needs of our businesses by building capability and capacity through high potential innovations in ICT and Social Innovation*
- *To employ Kiwis who already have the skills and can put them to good use, benefiting themselves, the communities they live in and the economy*
- *To support community groups and projects locally, nationally and internationally by providing funding to help them get the job done.*
- *To assist them with setting up their own social enterprise to provide earned income streams, sustainability and self reliance*
- *To harness the power of business and innovation to opportunities so we can help solve social, economic and environmental problems together*
- *To grow new businesses, enter international markets and support existing businesses to be sustainable and productive*
- *To provide adaptable business practices, improved collaborative processes, informed social marketing strategies, new product and service offerings and innovations, expansion into new markets, contribution to economy, IP export, cost savings, efficiencies and scales of economy, SROI/ROI – generating wealth, economic growth with positive social outcomes.*
- *To build strong, supportive relationships and strategic partnerships with Industries, Corporate and Business Partners, Iwi and Maori Corporations, Foundations and Organisations, Local and Central Government, Tertiary Institutions, Cross-Sector Advisors, Social Entrepreneurs, Social Investors and Kiwis.*
- *To work together collaboratively and harmoniously to achieve the desired outcomes for all stakeholders. Removing bureaucratic, onerous and artificial barriers that hinder progress and development.*

How are we doing this?

By Kiwis creating opportunities

- *By taking the lead, learning from the best, collaborating and working together, teaching others to do the same*
- *By encouraging generosity and giving through advancing social entrepreneurship, social innovation and social enterprises*
- *By inspiring Kiwis around the world to make a \$5 social investment*
- *By using the social investment to fund innovative high potential projects, ventures and social enterprises that create real jobs, grow businesses and support our communities*
- *By creating strong economic growth with positive social outcomes from sustainable and self-reliant income streams*

With the help of millions of Kiwis around the world doing things just a little, all together.

FMFK Centre for Social Enterprise

5MFK has produced a social economic model that will move us from disparate silos to a connected, creative and collaborative development and delivery platform to achieve the desired outcomes for all stakeholders.

The 5MFK Centre for Social Enterprise serves as the funding and development platform for social entrepreneurs, innovators, and creators. It will provide the analysis to identify high potential innovative projects, ventures and social enterprises to invest social venture capital for start-up.

It will convene the best practices and thinking, design and execute processes that cross silos and drive effective collaboration, forge new partnerships, and channel human, financial and intellectual capital to the Centre so that social enterprises can be scaled to deliver their benefits to communities across New Zealand and Internationally.

FMFK Collaboratory

The Collaboratory is 5MFK's delivery platform that provides employment and supports projects, ventures and social enterprises that create and capture value from emerging trends in the Internet, the Workplace and Society.

This approach is the intentional creation of dynamic and socially calibrated systems, processes and culture to improve value exchange. It's a new way for Kiwis to create opportunities through social networking, active contribution, active participation, active engagement, active involvement, workforce collaboration, and partnership and stakeholder optimisation.

The end result is a centralised platform that minimises duplication and maximises cost efficiencies and scalability. Its systematic construct is designed to achieve the desired outcome for stakeholders and support and maintain the success of projects, ventures and social enterprises, grounded in reality.

FMFK Centre of Excellence

The Centre of Excellence training facility will maintain best practice, systems, methodologies, frameworks and disciplines for 5MFK projects and ventures. It provides them and future initiatives with an innovative and creative foundation platform, production studio and hothouse environment.

A core objective of the Centre of Excellence's training facility is to grow the ICT skill base of the youth of our nation, increase their employment potential through careful matching to the real world needs of business, and return net economic benefit to the community and people of Aotearoa New Zealand.

Social Investment Fund

- *5MFK is a new and highly innovative social investment vehicle that has been established to generate a continually growing fund to be applied to a range of needy community projects that provide demonstrable social benefit. Contributions to the fund originate from a combination of direct investment by social investors, social entrepreneurs, government assistance programs, economic development arms, and share profits from commercial projects and ventures.*
- *The purpose of this fund is to increase and accelerate the flow of social capital to innovative projects, ventures and social enterprises that create market-based and accelerated solutions to social, economic and environmental problems.*
- *A donation forms the basis of social investment which is used to invest in and kick-start innovative projects, ventures and social enterprises that create real jobs, grow businesses and support communities.*
- *We will collaborate with our partners and stakeholders to achieve desired outcomes that will maximise the Social Return on Investment (SROI) and Return on Investment (ROI) for Social Investors.*
- *A specialised Social Investment Team will work toward removing the barriers and restrictions of traditional forms of finance and funding. Our strategy is based on an innovative hybrid approach to social investment and the engagement of New Zealand's leading social finance experts to validate and evidence the pathways that will create profound economic growth with positive social outcomes.*

- *The Social Investment Fund is designed to be supported by the projects, ventures and social enterprises it establishes, enabling it to be sustainable, self-reliant and growth driven.*
- *It provides a unique opportunity for Kiwis looking to create positive social, economic and environmental change by supporting social enterprises with their social investment.*

...

kiWISmart360 is viewed as a key strategic initiative by 5 Million Flying Kiwis stakeholders, both for the organisation itself and for the country as a whole. At its heart is a commercial venture based on a proven product foundation that is designed to drive a wedge into the website development market in this country, while arming small business owners with the mechanisms they need to increase their marketing power on the Internet and improve their bottom line. The initiative will also pave the way for future ICT initiatives that leverage the core capability of the 5 Million Flying Kiwis-skilled teams in response to an almost unlimited, and global, market need.

The essence of kiWISmart360 is a highly optimised website for micro and small businesses that is purpose-built to generate a growing stream of targeted traffic and leads from the Internet through the application of smart technology, specialist skill sets and proven web marketing methodology. kiWISmart360 clients can expect an increasing number of visits from search engines, and any leads generated are automatically qualified, captured into a database and responses sent via email or mobile phone. In addition, all of this is offered at a highly compelling price point and with results that are monitorable, predictable and can even be guaranteed.

Although this kind of solution is easy to promise, the bad news for most in the web development community is that building cost-effective lead generation websites that produce a verifiably positive business result is highly challenging, and in the absence of systemisation, will quickly lead to tight margins and painfully negative levels of profitability. Combine this with the fact that building successful websites always require human input (it simply cannot be automated) and the fact that there is currently no curriculum in this country to impart the correct web marketing methodologies and disciplines (the current curriculums focus more on the tools) and you have a situation where the solutions become more fragmented, the results less predictable, and the skills gap continually widens. The market meanwhile remains frustrated and underserved, the build capability is diverted to more lucrative business, the opportunity evaporates, and all the while there's this huge global demand and ever-growing need.

kiWISmart360's breakthrough approach overcomes this challenge through the combination of an innovative technology platform and a proven web marketing framework, consisting of methodologies and formulae delivered through a task-based workflow with built-in review points and mentored QC. The kiWISmart360 formula also extends well beyond mere production and includes well-rehearsed sales and marketing techniques. This ensures steady product take-up while providing much needed skills gap learning in the disciplines of selling successfully to a small business market, and one that is often unable to appreciate the long-term value that will be returned. Think of

kiWISmart360 as the McDonald's approach to building 'websites that work' i.e. using scalable processes to create a consistent product offering that is produced and sold constantly at known input margins and predictable speeds.

As with most products based on human service, however, the ability of kiWISmart360 to scale to meet demand is heavily reliant on a rapid transfer of skills and capability into a untrained sales and production team. This is the function of 5 Million Flying Kiwis Centre of Excellence i.e. to leverage the core IP of the kiWISmart360 framework and create a new skill base in NZ/Aotearoa that can service a large and growing client base, both here and overseas.

Programme participants in the Centre of Excellence will be involved in a range of activities that cover the full spectrum of website development and web marketing methodology. They will receive classroom style tuition as well as hands on production and development work, all targeted at producing real-world web solutions for small business. The focus will be on building the knowledge and skills required to help small businesses make use of the internet to generate more leads and sales, and to increase the chance of repeat business and customer loyalty. The program is not simply about how to build websites, it is a fully commercial undertaking that delivers effective web marketing solutions for kiWISmart360's (expanding) client base, every day.

The kiWISmart360's project has been carefully selected to achieve quick uptake and maximum market impact with minimum risk. It is based on a proven commercial model that now requires increased scale through rising market penetration both here and overseas. This, in conjunction with the strategic relationships that 5 Million Flying Kiwis is pursuing, will assure the growth in Centre of Excellence trainee numbers and provide many more jobs while growing national capability in ICT. Recipients of the kiWISmart360's solution are the tens of thousands of micro and small business owners who will achieve added marketing capability and a more assured level of business through a growing stream of qualified leads. Finally, and in accordance with its Charter, a proportion of margins generated from the kiWISmart360 project will be channelled through 5 Million Flying Kiwis into a growing number of community projects with high social impact and long term benefit.

Definition of “Social Enterprises”, “Social Entrepreneurship”, “Social Innovation” and “Social Investment”

24. The Applicant’s trust deeds do not provide a definition of “Social Enterprises”, “Social Entrepreneurship”, “Social Innovation” and “Social Investment” and the Applicant has not provided an explanation of these terms.
25. The Commission considers that these terms do not have a single widely accepted meaning and these terms may include both not-for-profit organisations or projects and for-profit organisations or projects. Thus, in relation to the term “social entrepreneurship” it has been stated:

Though the concept of “social entrepreneurship” is gaining popularity, it means different things to different people. This can be confusing. Many associate social entrepreneurship exclusively with not-for-profit organisations starting for-profit or earned-income ventures. Others use it to describe anyone who starts a not-for profit organisation. Still others use it to refer to business owners who integrate social responsibility into their operations.²

26. In *Social and Commercial Entrepreneurship: Same, Different, or Both?* it is stated:

Definitions of social entrepreneurship range from broad to narrow. In the former, social entrepreneurship refers to innovative activity with a social objective in either the for-profit sector, such as in social-purpose commercial ventures (e.g., Dees & Anderson, 2003; Emerson & Twersky, 1996) or in corporate social entrepreneurship (e.g., Austin, Leonard, Reficco, & Wei-Skillern, 2004); or in the nonprofit sector, or across sectors, such as hybrid structural forms which mix for-profit and nonprofit approaches (Dees, 1998). Under the narrow definition, social entrepreneurship typically refers to the phenomenon of applying business expertise and market-based skills in the nonprofit sector such as when nonprofit organizations develop innovative approaches to earn income (Reis, 1999; Thompson, 2002).³

Charities Commission’s analysis

27. The Commission has analysed the purposes set out in the Applicant’s original and latest amended trust deeds, the Applicant’s activities as described on its website and the information supplied by the Applicant.

² <http://www.redalmarza.com/ing/pdf/TheMeaningofSocialEntrepreneurship.pdf>.

³ *Social and Commercial Entrepreneurship: Same, Different, or Both?* Entrepreneurship Theory and Practice, Volume 30, Issue 1, pages 1 -22 January 2006.

28. The Commission does not consider that the Applicant's purposes and the activities it undertakes will advance religion. Accordingly, the purposes have been assessed under the relief of poverty, advancement of education and "other matters beneficial to the community". First, however, the Commission has considered the effect of wording in clause 4 of the original trust deed which purports to limit the aims, purposes and objectives to those which are charitable and effected within New Zealand. The Commission has also considered the effect of the wording in clauses 4.1(A) and 4.6 of the amended trust deed.

Effect of clauses purporting to limit purposes

29. Clause 4 of the original trust deed states:

These aims, purposes and objectives shall only extend to the aims, purposes and objectives which are charitable and effected within New Zealand.

30. Clause 4.2(A) of the amended trust deed states:

The Trustees shall stand possessed of the Funds in accordance with clause 4.1 to pay or apply so much of the capital and the income thereof as the Trustees think fit for or towards any one or more of the following exclusively charitable objectives and purposes which are hereby declared to be the objectives, purposes and operational matters of the Trust...

31. Clause 4.6 of the amended trust deed states:

Charitable Purposes Paramount: *Notwithstanding anything contained or implied in this Deed no power or reservation expressed or implied herein shall authorize the trustees to do or suffer any act which does not further Charitable Purposes and the declaration of the Charitable Purposes in this Deed shall at all times be paramount so as to exclude any act or omission which is or may be deemed to be not in accordance with such purposes.*

32. In *M K Hunt Foundation Ltd v Commissioner of Inland Revenue*,⁴ Hardie Boys J cited with approval the comments Lawrence LJ made in *Keren Kayemeth le Jisroel Ltd v Commissioners of Inland Revenue*.⁵ In that case, the statute there under consideration contained the phrase 'for charitable purposes only', and Lawrence LJ said in the Court of Appeal that "it is not enough that the purposes described in the memorandum should include charitable purposes. The memorandum must be confined to those purposes".⁶ Hardie Boys J further wrote that:

*... in so holding, Lawrence L.J. makes it clear in his judgment that he had in mind, not merely the phrase 'charitable purposes only', but also the cases which show that non-charitable objects will prevent recognition of the body in question as a charitable trust.*⁷

⁴ [1961] NZLR 405 at 407.

⁵ [1932] 2 KB 465.

⁶ [1931] 2 KB 465 at 481.

⁷ [1961] NZLR 405 at 408.

33. In *Commissioner of Inland Revenue v White*,⁸ the Court considered limitations in the constitution of the Clerkenwell Green Association. The court noted that the constitution showed a clear intention that this object was exclusively charitable but went on to say:

*The charitable intention, clear as it is, is not conclusive in establishing charitable status, however, because clause 2(b) limits the field in which the charitable intention is to be effectuated. If the objects specified in clause 2(b) are of such a nature that there is not charitable purpose which will assist their achievement, then there is no charitable purposes within the specified field and the Association would not be entitled to registration as a charity. In other words, the mere insertion of the word "charitable" in clause 2(b) is not by itself enough to establish that the objects of the Association are charitable.*⁹

34. Finally, in *Canterbury Development Corporation v Charities Commission*,¹⁰ Young J wrote "the mere fact that the constitution says that CDC's objects are charitable does not make CDC charitable although such a declaration is relevant in assessing whether they are."¹¹ The judge went on to say, "...in the end, the objects and operation of the organisations either support a charitable purpose or they do not."¹² In that case, he concluded that they did not support a charitable purpose.

35. For these reasons, the Commission does not consider that the inclusion of clause 4 of the original trust deed or the inclusion of clauses 4.1(A) and 4.6 in the amended trust deed provide conclusive evidence that the Applicant's purposes are in fact charitable.

Relief of poverty

36. To be charitable under the relief of poverty, a purpose must be directed at people who are poor, in need, aged, or suffering genuine hardship, and it must provide relief.
37. Ronald Young J, in *Canterbury Development Corporation v Charities Commission*,¹³ in reference to the Oldham case, stated:

The activities of the Enterprise Council also provided for a cash allowance to those thinking of starting up a business. This was specifically aimed at people who had been unemployed for at least six weeks and were starting a business which would have the potential to employ other people. Further, the training was specifically targeted at assisting young people into work and retraining the unemployed.

⁸ (1980) 55 TC 651.

⁹ (1980) 55 TC 651 at 653.

¹⁰ HC WN CIV 2009-485-2133 [18 March 2010].

¹¹ HC WN CIV 2009-485-2133 [18 March 2010] at para 56.

¹² HC WN CIV 2009-485-2133 [18 March 2010] at para 56.

¹³ HC WN CIV 2009-485-2133 [18 March 2010].

These later activities can be contrasted with CDC's. In Oldham TEC there was, in part, specific targeting of unemployed in the context of business development. Even so, the Court concluded that the Enterprise Council was not charitable. There is no specific targeting of the unemployed by CDC in its objects and especially not in its activities. Its focus is, as I have observed, in assisting particular businesses in the hope that there would be general economic advantage and reduction of unemployment.¹⁴

38. Ronald Young J went on to state:

I do not consider the purpose of CDC is to assist the unemployed and thereby relieve poverty. I accept the unemployed could be one of the ultimate beneficiaries of its work. The aim of the CDC is to assist businesses to prosper (within the criteria of those whom it will help).

...

In considering whether the purpose of the CDC is the relief of the unemployed it is appropriate to consider both the terms of the constitution and the activities of CDC (s 18(3)). The only purpose which deals with unemployment is the initial part of cl 2.2(a) ([14]). None of the activities of the CDC are directly focused on the creation of employment for the unemployed ([10]–[13]). What is illustrated by this analysis is that the purpose of the CDC is not relief of poverty through providing those who are unemployed with jobs. It is to improve the general economic wellbeing of the area. In that sense, therefore, CDC's purpose cannot be the relief of poverty. The possibility of helping someone who is unemployed is too remote for it to qualify as the charitable purpose of relief of poverty.¹⁵

39. The Commission considers that the purposes in clause 4 of the original trust deed and the purposes in clause 4.2(A) of the amended trust deed are not limited to people who are in need of relief and therefore cannot be considered charitable under the relief of poverty. In addition, the Applicant has not provided any evidence that the people it assists have an identifiable need that requires alleviating and that they would have difficulty in alleviating that need from their own resources.

40. In light of the above, the Commission does not consider that the purposes of the Applicant are purposes that qualify as charitable under relief of poverty.

¹⁴ HC WN CIV 2009-485-2133 [18 March 2010], para 49-50.

¹⁵ HC WN CIV 2009-485-2133 [18 March 2010], para 28-30.

Advancement of education

41. 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.¹⁶ In order to advance education, learning must be passed on to others.
42. Education does not include advertisements for particular goods or services or promotion of a particular point of view.¹⁷ If research is being conducted, it must be carried out in an objective and impartial way and the useful results made available, or accessible to the public.
43. In New Zealand in the case of *Re Collier (deceased)*,¹⁸ Hammond J set out the test for determining whether the dissemination of information qualified as charitable under the head of advancement of education:

[I]t must first confer a public benefit, in that it somehow assists with the training of the mind, or the advancement of research. Second, propaganda or cause under the guise of education will not suffice. Third, the work must reach some minimal standard. For instance, in Re Elmore, deceased [1968] VR 390 the testator’s manuscripts were held to be literally of no merit or educational value.¹⁹

44. In addition, in *Canterbury Development Corporation v Charities Commission*,²⁰ Ronald Young J stated:

*I do not consider this service [business training] comes within the provision of the enhancement of education as intended by the Act. To be a charitable purpose it must provide this opportunity to a broad section of the public...**Nor in my view is supporting businesses by providing assistance to their proprietors, in such aspects as financial management or marketing, the support or advancement of education and learning.***²¹ [Emphasis added]

...

The important point in this case is that CDC’s assistance to business is not collateral to its purposes but central to it. The purpose of CDC’s assistance to businesses is, as the constitution identifies, and the operation confirms, to make the businesses more profitable.²²

¹⁶ *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.

¹⁷ *In re Shaw (deceased)* [1957] 1 WLR 729; as interpreted in *Re Hopkins’ Will Trusts* [1964] 3 All ER 46. See also *Re Collier* [1998] 1 NZLR 81.

¹⁸ [1998] 1 NZLR 81.

¹⁹ [1998] 1 NZLR 81, 91-92.

²⁰ HC WN CIV 2009-485-2133 [18 March 2010].

²¹ HC WN CIV 2009-485-2133 [18 March 2010], para 33.

²² HC WN CIV 2009-485-2133 [18 March 2010], para 60.

45. Clause 4 of the Applicant's original trust deed states:

The Board is established to carry out within New Zealand the following aims:

- (a) to research, develop and establish social enterprises for the benefit of the community*
- (b) to support community groups, community projects and community based charities*
- (c) to provide resources, facilities and venues where research and development of social entrepreneurship, social innovation, social enterprise and social investment*
- (d) to promote awareness of social entrepreneurship, social innovation, social enterprise and social investment*
- (e) to undertake a programme of education relating to social entrepreneurship, social innovation, social enterprise and social investment within schools, businesses and the broader community*
- (f) to train people on the issues of social entrepreneurship, social innovation, social enterprise and social investment*
- (g) to produce educational resource material on social entrepreneurship, social innovation, social enterprise and social investment*
- (h) to collect and maintain a specialist library relating to resources on social entrepreneurship, social innovation, social enterprise and social investment and to make this information available to the community*
- (i) to create a facility to research, develop, establish and promote social entrepreneurship, social innovation, social enterprises and social investment*
- (j) to carry on any other charitable objective of whatsoever nature which directly or indirectly achieves the above aims or which may be conveniently carried on in conjunction with the above aims*
- (k) to do anything else within New Zealand that will advance any of these aims*

46. The Commission considers that providing research, training, education, educational resource material or a specialist library in relation to social entrepreneurship, social innovation, social enterprise and social investments may be charitable under the advancement of education.

47. However, the Commission does not consider that the Applicant's original purposes are limited to the advancement of education. The purposes allow the Applicant to develop and establish social enterprises for the benefit of the community, promote awareness of and provide facilities and venues for the development of social entrepreneurship, social innovation, social enterprise and social investment and support community groups and community projects. These purposes do not necessarily advance education. Moreover, community groups and community projects are not necessarily limited to charitable organisations or purposes.

48. The Applicant's amended trust deed, at clause 4.2(A)(i) states:

Educate the New Zealand public, business community, government and other sectors of the community about social entrepreneurship, social enterprise, social innovation, social investment and ways of understanding and addressing New Zealand's social challenges

49. The Commission considers that this purpose may be charitable under the advancement of education so long as it involves a balanced and systematic process of instruction, training and practice and provides benefits for a sufficient section of the public.

50. However, the Commission does not consider that the purposes outlined in clauses 4.2(A)(ii) – (v) of the Applicant's amended trust deed are limited to the advancement of education. These purposes would enable the Applicant to be involved in activities that do not advance education.

51. Moreover, the Applicant, in its letter of 1 December 2010 stated:

In an egg shell, the benefits of investing resources in 5MFK for Social Enterprise Development are:

- *To roll our accelerated market based solutions to New Zealand's economic, social and environmental problems*
- *To establish a self reliant, sustainable and growth based Social Investment Fund*
- *To create jobs, grow businesses, support communities and generate wealth*
- *To build skills capability with a special focus on youth to help meet the real world needs of business*
- *To establish Social Enterprises that create new jobs within the ICT, Creative, Tourism, Environmental and Housing sectors*
- *To harness and unique power of Social Enterprise to scale, replicate, accumulate returns and generate foreign earnings, effectively reinvesting these to further the impact of Social Enterprise*
- *To be responsible, accountable and transparent in ROI/SROI and social impact measurements*

52. The Applicant's website states:

FMFK is the home of a powerful, impactful and change-making, 'opportunity creating' process. It's a 'global family movement' that's bringing Kiwis together by carrying out business activities while pursuing social purpose in a way that has simply not been done before²³

...

²³ <http://www.fivemillionflyingkiwis.org.nz/social-entrepreneurship-social.html>, last accessed 1 February 2011.

How are we doing this?

By Kiwis creating opportunities

- *By taking the lead, learning from the best, collaborating and working together, teaching others to do the same*
- *By encouraging generosity and giving through advancing social entrepreneurship, social innovation and social enterprises*
- *By inspiring Kiwis around the world to make a \$5 social investment*
- *By using the social investment to fund innovative high potential projects, ventures and social enterprises that create real jobs, grow businesses and support our communities*
- *By creating strong economic growth with positive social outcomes from sustainable and self-reliant income streams²⁴*

...

kiWISmart360 is viewed as a key strategic initiative by 5 Million Flying Kiwis stakeholders, both for the organisation itself and for the country as a whole. At its heart is a commercial venture based on a proven product foundation that is designed to drive a wedge into the website development market in this country, while arming small business owners with the mechanisms they need to increase their marketing power on the Internet and improve their bottom line. The initiative will also pave the way for future ICT initiatives that leverage the core capability of the 5 Million Flying Kiwis-skilled teams in response to an almost unlimited, and global, market need.²⁵

53. The information provided by the Applicant and the information on the Applicant's website show that Applicant's activities are not limited to the advancement of education. Rather the Applicant's activities include providing investment funding to a range of projects and may include activities aimed at "supporting businesses by providing assistance to their proprietors, in such aspects as ... marketing", which are not charitable.
54. In light of the above, the Commission does not consider that the Applicant is exclusively charitable under advancement of education.

Other matters beneficial to the community

55. 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):²⁶

²⁴ <http://www.fivemillionflyingkiwis.org.nz/page552753.html#Section17388671>, last accessed 1 February 2011.

²⁵ <http://www.fivemillionflyingkiwis.org.nz/social-innovation-projects.html>, last accessed 1 February 2011.

²⁶ *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*

- 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.²⁷

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

... it is not all objects of public utility that are charitable, 'for many things of public utility may be strictly matters of private right, although the public may indirectly receive a benefit from them.' Nor are essentially economic or commercial objects within the spirit of the Preamble.²⁸

57. The purposes of the Applicant in the original trust deed and the amended trust deed allow the Applicant to promote “social enterprises”, “social entrepreneurship”, “social innovation” and “social investment”. As outlined above, the Commission considers that these terms could encompass individuals or for-profit organisations including private businesses.

58. Furthermore, the information provided by the Applicant and the information provided on the Applicant’s website indicate that the Applicant has a focus on promoting businesses and employment.

59. Courts have sometimes found the promotion of business or employment to be charitable under the fourth head where essential services are provided or when the community or beneficiaries are under a particular disadvantage.

Accountants v Commissioner of Inland Revenue [1986] 1 NZLR 147, 157; *Re Tennant* [1996] 2 NZLR 633, 638.

²⁷ *Charitable Uses Act 1601* 43 Elizabeth I c. 4.

²⁸ 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.

60. *Re Tennant*²⁹ related to a rural community and the provision of a creamery. In that case, 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.*³⁰ [Emphasis added]

61. Similarly, in *Tasmanian Electronic Commerce Centre Pty Ltd v Federal Commissioner of Taxation*,³¹ the Australian Federal Court of Appeal decided that the entity was charitable because it was created to provide internet and communications infrastructure for Tasmania, a particularly economically disadvantaged area. 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 those 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*³². [Emphasis added]

62. In *Canterbury Development Corporation v Charities Commission*,³³ in discussing whether the promotion of businesses can fall within the “spirit and intendment of the Statue of Elizabeth”, Ronald Young J states:

*The first question in this case, therefore, is whether the CDC’s constitution and function is sufficiently of that “spirit and intendment” to be charitable purpose. What must be kept in mind is that the charitable purpose of benefit to the community is a community benefit to assuage need. In cases such as *Re Tennant* [1996] 2 NZLR 633 and *Tasmanian Electronic Commerce Centre v Commissioner of Taxation* [2005] FCA 439 focus is on providing community benefit where an identified need is established. Save for advancement of religion all charitable purpose can be seen as meeting a need.*³⁴

63. The Commission does not consider that the Applicants purposes outlined in its original or amended trust deeds are limited to providing services that will assuage a need. Moreover, the Applicant has not provided sufficient evidence to show that its purposes and activities will assuage a need. Accordingly, the Applicant’s purposes as outlined in its original trust deed and amended trust deed do not appear to fall within the spirit and intendment of the Statute of Elizabeth and therefore are not charitable under “any other matter beneficial to the community”.

²⁹ *Re Tennant* [1996] 2 NZLR 633.

³⁰ *Re Tennant* [1996] 2 NZLR 633, 640.

³¹ (2005) 142 FCR 371.

³² (2005) 142 FCR 371, 389.

³³ HC WN CIV 2009-485-2133 [18 March 2010].

³⁴ HC WN CIV 2009-485-2133 [18 March 2010], para 42.

Public Benefit

64. In order to be charitable, the benefits from the Applicant's activities 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.³⁵ 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.³⁶
65. In *Commissioners of Inland Revenue v Yorkshire Agricultural Society*,³⁷ the improvement of agriculture was held to be charitable when 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 would not be charitable.
66. In *Crystal Palace Trustees v Minister of Town and Country Planning*,³⁸ 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.*³⁹
67. In *Hadaway v Hadaway*,⁴⁰ 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:
- The promotion of agriculture is a charitable purpose, because through it there is a benefit, direct or indirect, to the community at large: 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.*⁴¹
68. In *Commissioners of Inland Revenue v White and Others and Attorney General*,⁴² it was held that the entity's purpose to "promote any charitable purpose which will encourage the exercise and maintain the standards of crafts both ancient and modern, preserve and improve craftsmanship and foster, promote and increase the interest of the public therein" was charitable. However, in that case, Fox J stated:

³⁵ *Commissioners of Inland Revenue v Oldham Training and Enterprise Council* (1996) STC 1218; *Travel Just v Canada (Revenue Agency)* 2006 FCA 343, [2007] 1 CTC 294.

³⁶ *Gilmour v Coats* [1949] AC 426; *Re Blyth* [1997] 2 Qd R 567, 582; *D V Bryant Trust Board v Hamilton City Council* [1997] 3 NZLR 342, 350.

³⁷ [1928] 1 KB 611.

³⁸ [1951] 1 Ch 132.

³⁹ [1951] 1 Ch 132, 142.

⁴⁰ [1955] 1 WLR 16.

⁴¹ [1955] 1 WLR 16, 20 (PC).

⁴² (1980) 55 TC 651.

*The three cases which I have last mentioned seem to me to establish that 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 interests of those engaged in the manufacture and sale of their particular products. ... The charitable nature of the object of promoting a particular industry depends upon the existence of a benefit to the public from the promotion of the object.*⁴³ [Emphasis added].

69. In that case, Fox J found that the purposes of the Association were capable of providing a public benefit and that any private benefit of individual craftsmen was not an object of the Association.

70. In *Commissioners of Inland Revenue v Oldham Training and Enterprise Council*,⁴⁴ 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.*⁴⁵ [Emphasis added].

71. In *Commissioner of Taxation v Triton Foundation*,⁴⁶ the Federal Court of Australia held that a foundation set up to assist inventors provided sufficient public benefit. In reaching this conclusion, the court noted that the Foundation's purposes were particularly directed at young people, but were also available to "any member of the community who had the desire or inclination to use them", and a number of the resulting inventions had been of benefit to the community.

72. In *Travel Just v Canada (Revenue Agency)*,⁴⁷ the Canadian Federal Court of Appeal considered a case relating to an entity whose purposes were the creating of model tourism development projects and the production and dissemination of tourism information. The Court found that promoting commercial activity with a strong flavour of private benefit was not a purpose beneficial to the public and expressed doubt that the dissemination of information as described would qualify as either publication of research or an educational purpose.

⁴³ (1980) 55 TC 651, 659-660.

⁴⁴ 1996) 69 Tax Cases 231.

⁴⁵ (1996) 69 Tax Cases 231, 251.

⁴⁶ (2005) 147 FCR 362.

⁴⁷ 2006 FCA 343, [2007] 1 CTC 294.

73. In *Canterbury Development v Charities Commission*,⁴⁸ Ronald Young J held:

*The important point in this case is that CDC's assistance to business is not collateral to its purposes but central to it. The purpose of CDC's assistance to businesses is, as the constitution identifies, and the operation confirms, to make the businesses more profitable. CDC believes this assistance will, in turn, result in benefit to the Canterbury community. The **central focus however remains on increasing the profitability of businesses not public benefit.**⁴⁹ [emphasis added]*

...

*Any public benefit therefore from CDC's purpose and operation's is in my view too remote to establish CDC as a charity. Public purpose is not the primary purpose of CDC's objects or operation. Its primary purpose is the assistance of individual businesses. The creation of jobs for the unemployed, as opposed to jobs for those who are employed and not in need, is hoped for, but remote and uncertain, result of the way in which CDC approaches its task. The relief unemployment is certainly not a direct object of purpose of CDC's function. **The public benefit is hoped for but ancillary. In the same way the general economic lift for the Canterbury region from CDC's work is the hoped for result of helping individual businesses. It is remote from the purpose and operation of CDC.** Public benefit is not at the core of CDC's operation.⁵⁰ [Emphasis added]*

74. Applying the Court's reasoning in the above cases, promoting business or employment opportunities would only be charitable if the private benefits that result from these activities are ancillary to a wider public benefit.
75. The Applicants website states:

Why are we doing this?

- *To create great opportunities for Kiwis to achieve their dreams, enjoy life and make positive worldwide transformational change*
- *To create real jobs that fill our skills gaps*
- *To meet the real world needs of our businesses by building capability and capacity through high potential innovations in ICT and Social Innovation*
- *To employ Kiwis who already have the skills and can put them to good use, benefiting themselves, the communities they live in and the economy*
- *To support community groups and projects locally, nationally and internationally by providing funding to help them get the job done.*
- *To assist them with setting up their own social enterprise to provide earned income streams, sustainability and self reliance*
- *To harness the power of business and innovation to opportunities so we can help solve social, economic and environmental problems together*

⁴⁸ HC WN CIV 2009-485-2133 [18 March 2010].

⁴⁹ HC WN CIV 2009-485-2133 [18 March 2010], para 60.

⁵⁰ HC WN CIV 2009-485-2133 [18 March 2010], para 67.

- To grow new businesses, enter international markets and support existing businesses to be sustainable and productive
- To provide adaptable business practices, improved collaborative processes, informed social marketing strategies, new product and service offerings and innovations, expansion into new markets, contribution to economy, IP export, cost savings, efficiencies and scales of economy, SROI/ROI – generating wealth, economic growth with positive social outcomes.
- To build strong, supportive relationships and strategic partnerships with Industries, Corporate and Business Partners, Iwi and Maori Corporations, Foundations and Organisations, Local and Central Government, Tertiary Institutions, Cross-Sector Advisors, Social Entrepreneurs, Social Investors and Kiwis.
- To work together collaboratively and harmoniously to achieve the desired outcomes for all stakeholders. Removing bureaucratic, onerous and artificial barriers that hinder progress and development.⁵¹

...

*Five Million Flying Kiwis Trust: Creating opportunities for Kiwi Businesses*⁵²

76. The Applicant's website also shows that the entity is undertaking a website development project aimed at "arming small business owners with the mechanisms they need to increase their marketing power on the Internet and improve their bottom line". Thus, the Applicant's website states:

*The kIWISmart360's project has been carefully selected to achieve quick uptake and maximum market impact with minimum risk. It is based on a proven commercial model that now requires increased scale through rising market penetration both here and overseas. This, in conjunction with the strategic relationships that 5 Million Flying Kiwis is pursuing, will assure the growth in Centre of Excellence trainee numbers and provide many more jobs while growing national capability in ICT. **Recipients of the kIWISmart360's solution are the tens of thousands of micro and small business owners who will achieve added marketing capability and a more assured level of business through a growing stream of qualified leads.** Finally, and in accordance with its Charter, a proportion of margins generated from the kIWISmart360 project will be channelled through 5 Million Flying Kiwis into a growing number of community projects with high social impact and long term benefit.*⁵³ (Emphasis added)

77. The Commission considers that the benefits resulting from the activities outlined above appear to accrue to private individuals and business owners without regard to the wider benefit to the public. Any benefits conferred on the community at large are too remote to give the activities a charitable nature.

⁵¹ <http://www.fivemillionflyingkiwis.org.nz/page552753.html#Section17388675>, last accessed 1 February 2011.

⁵² <http://www.fivemillionflyingkiwis.org.nz/social-entrepreneurship-social.html>, last accessed 1 February 2011.

⁵³ <http://www.fivemillionflyingkiwis.org.nz/social-innovation-projects.html>, last accessed 1 February 2011.

78. In addition, the Commission considers that the Applicant's original and amended purposes would allow the Applicant to provide benefits to private individuals or for-profit organisations. This is because the terms "Social Enterprises", "Social Entrepreneurship", "Social Innovation" and "Social Investment" encompass individuals and for-profit organisations.

Applicant's submissions

79. The Applicant has stated in its email of 4 October 2010:

We have as a result of these conversations and developments revisited our Trust Deed to better support our aims and have under advice both legal and from the Commission and M.E.D. adopted the Rules of an organisation who is very closely aligned to us, who meets all of the requirements and who have their charitable status.

80. The Commission takes a case-by-case approach to each application for registration as a charitable entity. The Commission considers the specific wording of each Applicant's rules document and has regard to the current and future activities of each applicant as required by section 18(3)(a) of the Act. The fact that other entities have been registered by the Commission has no bearing on the Applicant's eligibility for registration.
81. The Commission also notes that no amendments to the Applicant's original trust deed appear to have been filed with the Companies Office.

Conclusion

82. The Commission considers that the Applicant's purposes set out in clause 4 of the original trust deed and clause 4.2(A) of the amended trust deed are not exclusively charitable for the reasons stated above. In addition, the Commission considers that the Applicant's activities as detailed on its website are not exclusively charitable.

Does the Applicant meet the requirements of section 13(1)(d) of the Act?

83. Section 13(1)(d) of the Act states:

13 Essential requirements

- (1) An entity qualifies for registration as a charitable entity if,—
- ...
- (d) all of the officers of the entity are qualified to be officers of a charitable entity under [section 16](#).

84. Section 16 of the Act states:

16 Qualifications of officers of charitable entities

- (1) *A person who is not disqualified by this section is qualified to be an officer of a charitable entity.*
- (2) *The following persons are disqualified from being officers of charitable entities:*
 - (a) *an individual who is an undischarged bankrupt:*
 - (b) *an individual who is under the age of 16 years:*
 - (c) *an individual who, or a body corporate that, has been convicted of a crime involving dishonesty (within the meaning of section 2(1) of the Crimes Act 1961) and has been sentenced for that crime within the last 7 years:*
 - (d) *an individual who is prohibited from being a director or promoter of, or being concerned or taking part in the management of, an incorporated or unincorporated body under the Companies Act 1993, the Securities Act 1978, the Securities Markets Act 1988, or the Takeovers Act 1993:*
 - (e) *an individual who, or a body corporate that, is disqualified from being an officer of a charitable entity under section 31(4):*
 - (f) *an individual who is subject to a property order made under the Protection of Personal and Property Rights Act 1988, or whose property is managed by a trustee corporation under section 32 of that Act:*
 - (g) *a body corporate that is being wound up, is in liquidation or receivership, or is subject to statutory management under the Corporations (Investigation and Management) Act 1989:*
 - (h) *in relation to any particular entity, an individual who, or a body corporate that, does not comply with any qualifications for officers contained in the rules of that entity.*
- (3) *Subsection (2) does not apply to an officer of an entity if that officer was appointed, under an Act, by the Governor-General, by the Governor-General in Council, or by a Minister.*
- (4) *The Commission may, by written notice to an entity, waive the application of any of the disqualifying factors set out in subsection (2)(a) to (g), in relation to an officer of that entity.*
- (5) *If the Commission waives the application of a disqualifying factor set out in subsection (2)(a) to (g), the officer to whom the waiver relates must not be treated as being disqualified from being an officer of a charitable entity in relation to the entity by reason of the application of that disqualifying factor.*
- (6) *The waiver may be granted on any terms or conditions that the Commission thinks fit.*
- (7) *The Commission may vary a waiver in the same way as a waiver may be granted under this section.*
- (8) *The Commission may, by written notice to an entity, revoke a waiver granted under this section.*

85. In deciding whether to grant a waiver under section 16(4) of the Act the Commission will consider:
- When the disqualifying event occurred;
 - The responsibility and role of the office the individual will hold if the waiver is granted;
 - The background and history of the individual and the disqualifying factor;
 - The history of participation by the individual with the entity;
 - Any mitigating facts that could be seen as reducing the risk of recidivism by the individual;
 - The rules and practice of the entity, particularly in relation to financial and contractual management;
 - The endorsement from other officers in the entity for the individual.⁵⁴

Charities Commission's analysis

86. In a letter dated 6 February 2010, one of the Applicant's officers requested a waiver for the disqualifying factor set out in section 16(2)(c) of the Act. The Officer has provided information stating that they are disqualified as they were convicted of a crime involving dishonesty and were sentenced for that crime within the last 7 years.
87. In the letter of support dated 11 April 2010 the three remaining officers stated:

WE, the officers of 5Million Flying Kiwis Trust are aware of the matter that disqualifies Lea-Ann from being an officer and support her application for a waiver.

We are also aware:-

- A. *THAT: she took advice from and has the support of our solicitor ...*
- B. *THAT: she has provided the information to us and others freely and the information is available on-line to the public via the Charities Commission.*
- C. *THAT: she will inform and seek the written support of any new officers to the 5Million Flying Kiwis Trust.*
- D. *THAT: she will duly disclose the information to any party as required by law and for the purpose of transparency, trust and integrity.*

88. The Commission considered the information provided by the Officer regarding the nature of the offence committed, the circumstances surrounding the offence, the nature of the activities undertaken by the Applicant and the officer's role within the organisation.

89. In this case, the Officer was convicted of the offence in 2005 and the offence committed related to a breach of a fiduciary duty. According to the Officer's letter of the 6 February 2010, this Officer is the founder of the Applicant. Moreover, the activities of the Applicant involve receiving money for investing on behalf of other people. Thus, the Applicant's website states:

5MFK is a new and highly innovative social investment vehicle that has been established to generate a continually growing fund to be applied to a range of needy community projects that provide demonstrable social benefit. Contributions to the fund originate from a combination of direct investment by social investors, social entrepreneurs, government assistance programs, economic development arms, and share profits from commercial projects and ventures⁵⁵.

90. Based on this information, the Commission decided not to grant a waiver.

91. The disqualified officer has not been removed as an officer of the Applicant on the Commissions records. Accordingly, the Applicant does not meet the requirements of section 13(1)(d) of the Act as not all of its officers are qualified to be officers of a charitable entity under section 16 of the Act.

Charities Commission's determination

92. The finding of the Commission is that the Applicant has failed to meet the essential requirements for registration as a charitable entity in that 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. In addition, not all of the officers of the entity are qualified to be officers of a charitable entity under section 16 of the Act, as required by section 13(1)(d) of the Act.

For the above reasons, the Commission declines the Applicant's application for registration as a charitable entity.

Signed for and on behalf of the Charities Commission

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Trevor Garrett
Chief Executive

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Date

⁵⁵ <http://www.fivemillionflyingkiwis.org.nz/page552753.html#Section17388655>, last accessed on 1 February 2011.