

## Registration decision: Accounting and Finance Association of Australia and New Zealand Limited

### The facts

1. The Accounting and Finance Association of Australia and New Zealand Limited (AFAANZ) (the Applicant) is an Australian public company, limited by guarantee. It was registered by the Australian Securities & Investments Commission on 19 January 2000.
2. The Applicant applied to the Charities Commission (the Commission) for registration as a charitable entity under the Charities Act 2005 (the Act) on 16 June 2008.
3. The Applicant's purposes are stated in clause 2 of its Constitution:

#### *"2.1 Primary Objects*

*The primary objects of AFAANZ, which is established to operate as a public educational institution by supporting and advancing the character, status and teaching and research in the accounting and finance and related disciplines through educational and other activities are:*

- (a) To provide education programs and continuing professional development programs for the benefit of both members and non-members.*
- (b) To prescribe, adopt, test and recognise by way of diploma, designation or otherwise standards and classifications of attainment and qualifications in accounting and finance and related disciplines.*
- (c) To promote to the public, whether by way of publication or otherwise, information on accounting and finance and related disciplines and other subjects of interest or value to accountants, finance and related disciplines by lectures, discussions, books, journals and correspondence and other publications with the public and other bodies and individuals or otherwise.*
- (d) To encourage the study of accounting finance and related disciplines within the general public, and, for that purpose to donate and to encourage the donation, on such terms and conditions as may from time to time be determined or prescribed, of a prize or prizes or other rewards or distinctions.*
- (e) To consider all questions affecting the interests of the accounting finance and related disciplines and to initiate, promote, watch over, consider and, if necessary, to petition any organisation, any person or Parliament and to organise deputations in relation to those issues.*

## 2.2 Secondary Objects

The secondary objects of the AFAANZ are:

- (a) *To provide, maintain, extend and improve a library or libraries containing technical literature and other literature for the uses by teachers, researchers and students of accounting, finance and related disciplines, and the general public.*
- (b) *To acquire, preserve and disseminate information and statistics to the public, concerning or relating to the principles and practice of accounting and finance and other matters relating to accountants, and to provide technical support, information and advice through a range of initiatives to members of the accounting and finance and related disciplines, including the recording, printing and publishing of such material thought desirable for the promotion of the objects of the AFAANZ.*
- (c) *To find or to assist in finding employment and to act as an employment agency or bureau for Members and for accountants, academics, teachers, or researchers generally and to collect and to give information as to the recruitment, retention and employment of academics, teachers, or researchers and charge fees for so doing or to act gratuitously in such matters.*
- (d) *To carry on or engage in any other business or undertaking or project which may seem to AFAANZ capable of being conveniently carried on in connection with or calculated directly or indirectly to further the objects of AFAANZ.*
- (e) *To communicate, affiliate, amalgamate or enter into a partnership or into any arrangement for union of interests, co-operation, joint venture, reciprocal, concession or otherwise with anybody whether incorporated or unincorporated having objects of a like nature to those of AFAANZ or carrying on, or engaged, in or about to carry on or engage in, any undertaking, project, business or transactions which AFAANZ is authorised to carry on or engage in or any undertaking, project, business or transaction capable of being conducted so as directly or indirectly to benefit or further the objects of AFAANZ.*
- (f) *To acquire and hold shares and other interests in any other company having objects altogether or in part similar to those of AFAANZ or carrying on any business or undertaking capable of being conducted so as to directly or indirectly benefit AFAANZ.*
- (g) *To enter into any arrangements with any governments or authorities municipal, local or otherwise that may seem conducive to AFAANZ's objects or any of them and to obtain from any such government or authority any rights, privileges and concessions which AFAANZ may think it desirable to obtain and to carry out, exercise and comply with any such arrangements, rights, privileges and concessions.*
- (h) *To establish and support or aid in the establishment and support of associations, institutions, funds, trusts and conveniences calculated to benefit Members or ex-Members, employees or ex-employees of*

*AFAANZ or the dependents or connections of Members or ex-Members, employees or ex-employees and to grant pensions and allowances and to make payment towards insurance and to subscribe or guarantee money for or contribute to or otherwise assist any charitable benevolent patriotic or war objects or institutions or any other public general or useful object whether in Australia, New Zealand or elsewhere.*

- (i) To promote any company or companies for the purpose of acquiring all or any of the property and rights and undertaking any of the liabilities of AFAANZ or for any other purposes which may seem directly or indirectly calculated to benefit or further the objects of AFAANZ.*
- (j) Generally to purchase, take on lease or in exchange hire or otherwise acquire any real and personal property and any rights or privileges which AFAANZ may think necessary or convenient for the purposes of its business or the furtherance of these objects, and to hold and use such property and to sell, improve, manage, develop, exchange, lease, mortgage, enfranchise, dispose of, turn to account or otherwise deal with all or any part of the real and personal property and the rights of AFAANZ.*
- (k) To invest, lend and otherwise deal with moneys of AFAANZ not immediately required in such manner as may from time to time be determined.*
- (l) To draw, make, accept, discount, execute and issue cheques, promissory notes, bills of exchange, bills of lading, warrants, debentures and other negotiable or transferable instruments, including the borrowing and raising money in such manner and on such terms as appropriate.*
- (m) To undertake and execute any trusts the undertaking of which may seem desirable and either gratuitously or otherwise.*
- (n) To apply for and obtain under any order, Act of Parliament or Royal Charter, provisional or otherwise, for enabling AFAANZ to carry any of its objects into effect or for effecting any modification of the AFAANZ's Constitution or for any other purpose which may seem expedient and to oppose any proceedings or applications which may seem calculated, directly or indirectly, to prejudice AFAANZ's interests or the interests of any Member or Members of AFAANZ.*
- (o) To procure contributions to the funds of AFAANZ whether by way of donations subscriptions or otherwise and to accept any gift whether subject to a special trust or not for any one or more of these objects.*
- (p) To do all such other things as are incidental or conducive to the attainment of these objects and to the advancement of the interests of teachers, academics and researchers of accounting, finance and related disciplines.*

*The secondary objects specified in this clause are, except where otherwise expressed, to be independent secondary objects and shall be in no way limited or restricted by reference to or inference from the terms of any other*

*paragraph or the name of AFAANZ, and any reference to accountancy or to the accountancy profession or finance and related discipline wherever used in this clause shall be deemed to extend to all activities from time to time commonly undertaken by teachers, academics and researchers in accounting, finance and related disciplines."*

4. Arrangements for the disposition of surplus property in the event of winding up or dissolution are set out in clause 60:

*If upon the winding up or dissolution of AFAANZ there remains after the satisfaction of all its debts and liabilities any property whatsoever, the same shall not be paid to or distributed among the Members, but shall be given or transferred to some other institution with similar objects to be determined by the Members at or before the time of dissolution and in default by application to the Supreme Court for determination.*

5. The Commission analysed the application for registration and on 20 February 2009, sent the Applicant a notice advising that its application may be declined on the basis that the purposes set out in clauses 2.1(e), 2.2(c) and 2.2(h) were not charitable purposes, and clause 60 would allow the transfer of property to non-charitable purposes in the event of winding up or dissolution.
6. The Applicant responded in a letter dated 6 April 2009, submitting that any perceived non-charitable purposes are simply ancillary to the overall charitable objectives and that benefits from the purposes in clauses 2.2(c) and 2.2(h) are not limited to the Applicant's members. The Applicant also submitted that in the event of winding up any surplus funds would have to go to another public educational institution, which was likely to have charitable purposes.

### **The issues**

7. The Commission must consider whether the Applicant meets all of the essential requirements for registration under the Act. In this case, the key issue for consideration is whether the Applicant is a society or institution established and maintained exclusively for charitable purposes, as required by section 13(1)(b)(i) of the Act. In particular:
  - (i) whether all of the Applicant'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; and
  - (ii) whether, in the event of winding up or dissolution, the Applicant is required to dispose of its surplus assets to charitable purposes.

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

8. Under section 13(1)(b)(i) of the Act, to be registered as a charitable entity, a society or institution must be established and maintained for exclusively charitable purposes.

9. 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 at benefiting the public or a sufficient section of the public.
10. Section 5(3) of the Act provides that any non-charitable purpose must be ancillary to a charitable purpose.
11. In considering an application, section 18(3)(a) of the Act requires the Commission to have regard to:
  - (i) *the activities of the entity at the time at which the application was made; and*
  - (ii) *the proposed activities of the entity; and*
  - (iii) *any other information that it considers is relevant; ..."*

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

12. The Commission considers that the Applicant's purposes set out in clauses 2.1(a) to (d), clauses 2.2(a) and (b), and the second part of clause 2.2(c) are charitable under the advancement of education. Clause 2.1(e) and clauses 2.2(d), (e), (g), and (p) are ancillary, and clauses 2.2(f), and (i) to (o) are powers.
13. The remaining purposes, set out in the first part of clause 2.2(c) and in clause 2.2(h), do not indicate an intention to advance education or religion. They have therefore been considered in relation to the relief of poverty and other matters beneficial to the community.

#### First part of clause 2.2(c)

14. The purpose set out in the first part of clause 2.2(c) is "to find or assist in finding employment and to act as an employment agency or bureau for members and for accountants, academics, teachers, or researchers generally".
15. In order to relieve poverty, a purpose must be directed at people who are poor, in need, aged, or suffering genuine hardship and the purpose must provide relief.<sup>2</sup> "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

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

<sup>2</sup> *D V 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.

things of life which most people take for granted.<sup>4</sup> 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>

16. The purpose in the first part of clause 2.2(c) does not indicate an intention to relieve poverty. There is no indication that the Applicant’s members, and the accountants, academics, teachers, and researchers who will benefit from this purpose, will necessarily be unemployed or under some other disadvantage. Nor is there any indication that these people will have any particular difficulty in finding a job for themselves.<sup>6</sup>
17. In order for a purpose to qualify as “any other matter beneficial to the community”, the purpose must be beneficial to the community and be within the spirit and intendment of the purposes set out in the Preamble to the Charitable Uses Act 1601 (the Statute of Elizabeth).<sup>7</sup>
18. The purpose in the first part of clause 2.2(c) is not designed to provide a particular benefit to the community – rather the beneficiaries are the Applicant’s members, and accountants, academics, teachers, and researchers. In addition, acting as an employment agency for educated professionals does not appear to be within the spirit and intendment of the purposes set out in the Preamble to the Statute of Elizabeth.

#### First part of clause 2.2(h)

19. The purpose set out in the first part of clause 2.2(h) is “to establish and support or aid in the establishment and support of associations, institutions, funds, trusts and conveniences calculated to benefit Members or ex-Members, employees or ex-employees of AFAANZ or the dependents or connections of Members or ex-Members, employees or ex-employees”.
20. The purpose in the first part of clause 2.2(h) is not considered to indicate an intention to relieve poverty. There is no evidence that the Applicant’s “Members or ex-Members, employees or ex-employees of AFAANZ or the dependents or connections of Members or ex-Members, employees or ex-

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<sup>4</sup> *Inland Revenue Commissioners v Baddeley* [1955] AC 572; [1955] 1 All ER 525, applied in *re Pettif* [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> See *Re Central Employment Bureau for Women and Students’ Careers Association Incorporated* [1942] 1 All ER 232 where the court considered that a fund to help educated women and girls to become self-supporting was charitable.

<sup>7</sup> *Re Jones* [1907] SALR 190, 201; *Williams Trustees v Inland Revenue Commissioners* [1947] AC 447, 455; *Scottish Burial Reform and Cremation Society v Glasgow Corporation* [1968] AC 138, 146-48; *Incorporated Council of Law Reporting (QLD) v Federal Commissioner of Taxation* (1971) 125 CLR 659, 667, 669; *Royal National Agricultural and Industrial Association v Chester* (1974) 48 ALJR 304, 305; *New Zealand Society of Accountants v Commissioner of Inland Revenue* [1986] 1 NZLR 147, 157; *Re Tennant* [1996] 2 NZLR 633, 638.

employees" will necessarily be under some disadvantage which will be alleviated by the establishment of these entities.

21. The Commission considers that this purpose does not indicate an intention to provide a benefit to the community because the beneficiaries must be linked to the Applicant, either by being a member or ex-member, an employee or ex-employee, or by being the dependents or connections of members or ex-members, employees or ex-employees. Establishing associations, institutions, funds, trusts, and conveniences in order to benefit people simply because they are, or have been, connected with one particular entity is not within the spirit and intendment of the purposes set out in the Preamble to the Statute of Elizabeth.

#### Second part of clause 2.2(h)

22. The purpose set out in the second part of clause 2.2(h) is "to grant pensions and allowances and to make payment towards insurance".
23. The purpose set out in the second part of clause 2.2(h) does not indicate an intention to relieve poverty for people who are under some disadvantage.
24. If these benefits are only available to the "Members or ex-Members, employees or ex-employees of AFAANZ or the dependents or connections of Members or ex-Members, employees or ex-employees" mentioned in the preceding part of this clause, this purpose does not indicate an intention to provide a benefit to the community because the beneficiaries must be linked to the Applicant. In addition, providing pensions and allowances and making payments towards insurance for particular individuals without any further qualification is not within the spirit and intendment of the purposes set out in the Preamble to the Statute of Elizabeth.

#### Third part of clause 2.2(h)

25. The purpose set out in the third part of clause 2.2(h) is "to subscribe or guarantee money for or contribute to or otherwise assist any charitable benevolent patriotic or war objects or institutions or any other public general or useful objects whether in Australia, New Zealand or elsewhere."
26. While the third part of clause 2.2(h) clearly includes charitable purposes, it also includes "benevolent patriotic or war objects or institutions or any other public general or useful objects", which will not necessarily be charitable.
27. Courts have held that gifts for "religious, charitable and useful institutions"<sup>8</sup>, "charitable and public purposes"<sup>9</sup>, charitable and benevolent purposes<sup>10</sup> and "charitable and deserving objects"<sup>11</sup> could be considered charitable. However in *Re Eades*,<sup>12</sup> Sargant J stated that the greater the number of the qualifications or characteristics enumerated, the more difficult it is to

<sup>8</sup> *Wilson v Attorney-General (Vic)* (1882) 8 VLR (E) 215.

<sup>9</sup> *Blair v Duncan* [1902] AC 37.

<sup>10</sup> *Re Best* [1902] 2 Ch 357.

<sup>11</sup> *Re Sutton* (1885) 28 Ch D 464.

<sup>12</sup> [1920] 2 Ch 353, 356.

consider that the term "charitable" qualifies all the class of objects that follow.

28. In *Attorney-General (New Zealand) v Brown*,<sup>13</sup> the Privy Council held that a trust "for such charitable benevolent religious and educational institutions societies associations and objects as the trustees should select" failed because the word "charitable" could not be said to govern each of the three following words.
29. Similarly, the Commission is of the view that the third part of clause 2.2(h) is not charitable because it is broad enough to include both charitable and non-charitable purposes.

#### Public or private benefit?

30. In order to be charitable, a purpose must be directed at benefiting the public or a sufficient section of the public.
31. In *Institution of Professional Engineers New Zealand Incorporated v Commissioner of Inland Revenue*, Tipping J stated:

*"I consider that the following words of Lord Normand in the Glasgow Police Association case are highly material:-*

*'What the respondents must show in the circumstances of this case is that so viewed objectively, the association is established for a public purpose and that the private benefits to members are unsought consequences of the pursuit of the public purpose and can therefore be disregarded as incidental. That is a view which I cannot take. The private benefits to members are essential.'*

*While there can be no doubt that there are distinct public benefits from the objects and functions of IPENZ it is my view, after careful consideration of both the oral and documentary evidence, that the private benefits cannot be disregarded as incidental."<sup>14</sup>*

32. In *New Zealand Society of Accountants v Commissioner of Inland Revenue*<sup>15</sup>, the Court of Appeal held that providing benefits for people who have a contractual or fiduciary relationship to a particular entity will not have sufficient public character to be charitable.
33. The Commission considers that some public benefit may arise from the purposes in the first part of clause 2.2(c), and the second and third parts of clause 2.2(h). However, there is unlikely to be sufficient public benefit in the purpose in the first part of clause 2.2(h) since the people who will benefit must have, or have had, a connection to the Applicant.

#### Ancillary purposes

34. Section 5(3) of the Act provides that if an entity's purposes include a non-charitable purpose that is merely ancillary to a charitable purpose, the

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<sup>13</sup> [1917] AC 397.

<sup>14</sup> [1992] 1 NZLR 570, 582.

<sup>15</sup> [1986] 1 NZLR 147.

presence of that non-charitable purpose does not prevent the entity from qualifying for registration as a charitable entity. Furthermore, section 5(4) of the Act defines ancillary as "ancillary, secondary, subordinate, or incidental to a charitable purpose" and "not an independent purpose".

35. While the non-charitable objects that the Commission has identified appear under the "secondary objects" heading of clause 2.2, the end of this clause states that the secondary clauses are "independent secondary objects and shall be in no way limited or restricted by reference to or inference from the terms of any other paragraph".
36. Clause 2 of the Applicant's constitution states that it was established to operate as a public educational institution by supporting and advancing the character, status and teaching and research in the accounting and finance and related disciplines through educational and other activities. The Commission considers that the non-charitable purpose set out in the second part of clause 2.2(h), of granting pensions and allowances and making payments towards insurance, could be ancillary to operating such a public educational institution. However, the Commission considers that the remaining non-charitable purposes are independent purposes:
  - acting as an employment agency for the Applicant's members, and accountants, academics, teachers and researchers (clause 2.2(c));
  - establishing associations, institutions, funds, and trusts to benefit the Applicant's members and employees (clause 2.2(h)); and
  - contributing towards patriotic or war objects or any other useful object (clause 2.2(h)).

#### Conclusion

37. The Commission concludes that the purposes set out in clauses 2.1(a) to (d), clauses 2.2(a) and (b) and the second part of clause 2.2(c) are charitable, but that the purposes in the first part of clause 2.2(c) and in clause 2.2(h) are non-charitable purposes that do not provide sufficient public benefit. The non-charitable purposes in clauses 2.2(c) and (h) are not ancillary to the charitable purposes.

#### Winding-up clause

38. In the event of an entity being wound up, its surplus assets will be distributed prior to the entity ceasing to exist. The Commission considers that distribution of any surplus assets is included in the "maintenance" of that entity for charitable purposes under section 13(1)(b)(i) of the Act. This requires that any surplus assets are directed to charitable purposes.
39. The Commission considers that "some other institution with similar objects", set out in clause 60, will not restrict distribution to an entity with charitable purposes. This is because the Commission does not consider that the objects of the Applicant are exclusively charitable, and so an entity with similar purposes is also unlikely to be considered charitable.

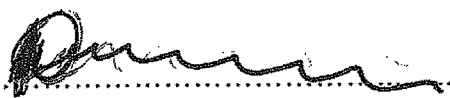
40. In addition, even if the Applicant's specific purposes had been considered to be exclusively charitable, it could not necessarily be concluded that an entity with similar purposes would also be charitable. "Charitable purpose" has a special meaning in law and while two organisations may have similar purposes, the specific nature of each may render one charitable and the other non-charitable.

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

41. The finding of the Commission is that the Applicant has failed to meet an essential requirement for registration as a charitable entity in that the Applicant is not a society or institution established and maintained for exclusively charitable purposes, as required by section 13(1)(b)(i) 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

  
.....  
Trevor Garrett  
Chief Executive

24/8/09  
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Date