

## Deregistration decision: Queenstown Lakes Community Housing Trust

### The facts

1. Queenstown Lakes Community Housing Trust (the Trust) was created by a declaration of trust dated 15 January 2007 (the Trust Deed). The Trust was incorporated as a board under the *Charitable Trusts Act 1957* on 12 July 2007. The Trust was registered as a charitable entity under the *Charities Act 2005* (the Act) by the Charities Commission on 16 January 2008.

2. The Trust's purposes are set out in clause 3 of the Trust Deed:

3.1 *The primary objects and purposes for which the Trust is established are:*

3.1.1 *Either alone or through any other entity or entities to promote and/or provide housing (whether freehold, leasehold, licence, option or some other form of ownership or rental) for households that contribute or will contribute to the social, cultural, economic and environmental well-being of those living within the District of the Queenstown Lakes Council (the "District") at a cost within their means.*

*In this clause "Households" may include a single individual or a family, which may comprise a legally married or de-facto partnered couple, and their children (aged 18 or under) who are under legal guardianship of the individual or couple and other dependents who normally occupy the same primary residence. It is acknowledged that households may also include elderly parent(s) or adult children, and the inclusion or exclusion of these members income when calculating whether housing is at a "cost within their means" will be reviewed on a case-by-case basis.*

3.1.2 *The housing to be provided pursuant to clause 3.1.1 shall be in accordance with the Queenstown Lakes Community Housing Policy as published from time to time.*

3.1.3 *To maintain and develop consultation with the Queenstown business community, Queenstown Lakes District Council and the greater community on the needs for housing to be provided pursuant to Clause 3.1.1 and as to how those needs may be met.*

3.1.4 *To establish, implement, manage, facilitate and sponsor systems for the purposes of seeking, raising, accepting, receiving, accumulating, investing and administering funds for the purpose of the Trust generally whether by the Trust directly or through companies, trusts or other entities owned, controlled or contracted by the Trust.*

3.1.5 *To carry on any other charitable objects which may seem to the Trustees capable of being appropriately carried on in connection with the above objects or calculated directly or indirectly to advance the objects of the Trust or any of them.*

3.1.6 *To apply for registration of the Trust under the Charities Act 2005. Pending registration the Trustees shall comply with this Trust Deed and all relevant law.*

3. Some time after the Trust's registration, the Commission received information from an applicant for registration with similar purposes to the Trust. That information led to a decision by the Commission to review the Trust's eligibility for registration.
4. The Commission reassessed the Trust's purposes and the grounds for registration, drawing on information available on the Trust's website and in its annual return. This information gave more insight into the Trust's purposes than was possible at the time of registration.
5. The Commission commenced an investigation into the Trust and reached the preliminary conclusion that the purposes expressed in clause 3.1.1 of the Trust Deed did not express a charitable purpose.
6. On 15 December 2009, the Commission sent the Trust a notice of intention to deregister under section 33 of the Act on the basis that the purposes of the Trust set out in clause 3.1.1 were not charitable.
7. On 17 March 2010, the Trust proposed amendments to clause 3 of the Trust Deed. Clause 1 of the proposed Deed of Variation stated:

### 3. OBJECTS

3.1 ***Exclusively Charitable Objects and Purposes:*** *The Trustees stand possessed of the Trust Fund on trust to pay or apply so much of the capital and income of the Trust Fund as the Trustees think fit for or towards any one or more of the following exclusively charitable objects and purposes in the Queenstown Lakes District ("the District") which are declared to be the objects and purposes of the Trust, namely:*

3.1.1 *Either alone or with or through any other entity or entities to promote and/or provide affordable housing for low and/or moderate income households or those of restricted means in order to relieve financial hardship and inequality of access to housing for those in need of such housing and accommodation.*

3.1.2 *To develop and maintain consultation with the Queenstown business community, Queenstown Lakes District Council and the greater community on the needs for housing to be provided pursuant to Clause 3.1.1 and as to how those needs may be met.*

3.1.3 *To establish, implement, manage, facilitate and sponsor systems for the purposes of seeking, raising, accepting, receiving, accumulating, investing and administering funds for the purpose of the Trust generally whether by the Trust directly or through companies, trusts or other entities owned, controlled or contracted by the Trust.*

3.1.4 *To carry on any other charitable objects which may seem to the Trustees capable of being appropriately carried on in connection with the above objects or calculated directly or indirectly to advance the objects of the Trust or any of them.*

3.1.5 *To maintain the registered status of the Trust under the Charities Act 2005.*

8. On 29 March 2010, the Commission sent the Trust a second notice of intention to deregister. The notice was issued on the basis that while the proposed purposes set out in the Deed of Variation may have been charitable, the Trust's activities did not appear to be charitable.
9. The Trust responded to the notice on 27 April 2010, objecting to the removal of the Trust on the basis that:
  - the grounds on which the Commission intends to remove the Trust from the Register have not been established or satisfied; and
  - it would not be in the public interest to remove the Trust from the Register.
10. The Trust submitted that the objects and activities of the Trust are charitable under the heads of charity "relief of poverty" and "any other matter beneficial to the community":

*"The object or purpose expressed in clause 3.1.1 of the Trust Deed is directed at alleviating poverty as it is understood in the context of the Queenstown Lakes community. It is also directed at other purposes beneficial to the community in that the provision of affordable housing:*

- (a) *Provides social benefit to the Queenstown Lakes district;*
- (b) *Promotes the Queenstown Lakes geographic area and establishment of the Queenstown Lakes community; and*
- (c) *Promotes a number of industries in the Queenstown Lake district, in particular the service sector of the tourism industry which is the primary industry and employer in that district."*

## **The issues**

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

## Law on charitable purpose and deregistration

13. Under 13(1)(a) of the Act, a trust qualifies for registration if it is of a kind in relation to which an amount of income is derived by the trustees in trust for charitable purposes.
14. Section 5(1) of the Act defines charitable purpose as including every charitable purpose, whether it relates to the relief of poverty, the advancement of education, the advancement of religion, or any other matter beneficial to the community. In addition, to be charitable at law, a purpose must be for the public benefit.<sup>1</sup> This means that the purpose must be directed to benefiting the public or a sufficient section of the public.
15. 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.
16. Section 5(4) of the Act provides that a non-charitable purpose is ancillary to a charitable purpose of the trust, society or institution if the non-charitable purpose is:
  - (a) ancillary, secondary, subordinate, or incidental to a charitable purpose of the trust, society or institution; and
  - (b) not an independent purpose of the trust, society or institution.
17. Section 32(1)(a) of the Act provides that an entity may be removed from the register if it is not, or is no longer, qualified for registration as a charitable entity.
18. When considering whether a registered entity continues to qualify for charitable status, section 50(2) of the Act empowers the Commission to examine and enquire into matters in connection with charitable entities, including:
  - (a) *the activities and proposed activities of the charitable entity or person:*
  - (b) *the nature, objects, and purposes of the charitable entity:*
  - (c) *the management and administration of the charitable entity:*
  - (d) *the results and outcomes achieved by the charitable entity or person:*
  - (e) *the value, condition, management, and application of the property and income belonging to the charitable entity or person.*
19. Under section 35(1)(a) of the Act, if an objection to removal of an entity from the register is received, the Commission must not remove the entity unless it is satisfied that it is in the public interest to proceed with the removal and at least one ground for removal has been satisfied.

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

## Charities Commission's analysis

20. The Commission considers that clauses 3.1.2 to 3.1.6 in the Trust's **current** deed are ancillary to the purpose in clause 3.1.1, and clauses 3.1.2 to 3.1.5 in the Trust's **proposed** deed are ancillary to the purpose in clause 3.1.1 of that deed.
21. The Commission considers that the purposes in both versions of clause 3.1.1 do not disclose an intention to advance education or advance religion, these purposes have therefore been considered in relation to "the relief of poverty" and "any other matter beneficial to the community". First, however, the Commission has considered the effect of the introductory words in **proposed** clause 3.1.

### Effect of clause purporting to limit purposes

22. Proposed clause 3.1 states:

3.1 ***Exclusively Charitable Objects and Purposes:*** *The Trustees stand possessed of the Trust Fund on trust to pay or apply so much of the capital and income of the Trust Fund as the Trustees think fit for or towards any one or more of the following exclusively charitable objects and purposes in the Queenstown Lakes District ("the District") which are declared to be the objects and purposes of the Trust, namely: ...*  
[Emphasis added]

23. In *M K Hunt Foundation Ltd v Commissioner of Inland Revenue*,<sup>2</sup> Hardie Boys J cited with approval the comments Lawrence LJ made in *Keren Kayemeth le Jisroel Ltd v Commissioners of Inland Revenue*.<sup>3</sup> 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".<sup>4</sup> Hardie Boys J went on to state:

*"... in so holding, Lawrence LJ 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."<sup>5</sup>*

24. In *Commissioner of Inland Revenue v White*,<sup>6</sup> 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*

<sup>2</sup> [1961] NZLR 405, 407.

<sup>3</sup> [1932] 2 KB 465.

<sup>4</sup> [1931] 2 KB 465, 481.

<sup>5</sup> [1961] NZLR 405, 408.

<sup>6</sup> (1980) 55 TC 651.

*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.*<sup>7</sup>

25. Finally, in *Canterbury Development Corporation v Charities Commission*,<sup>8</sup> 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".<sup>9</sup> The judge went on to state "in the end the objects and operation of the organisations either support a charitable purpose or they do not."<sup>10</sup> In that case, he concluded that they did not support a charitable purpose.
26. The Commission does not consider that the inclusion of the introductory words in the proposed clause 3.1 provides conclusive evidence that the Trust's purposes are in fact exclusively charitable.

#### Relief of poverty

27. In order to be charitable under this head, a purpose must be directed at people who are poor, in need, aged, or suffering genuine hardship and it must provide relief.<sup>11</sup> "Poverty" is interpreted broadly in law and a person does not have to be destitute to qualify as "poor".<sup>12</sup> People who are in need, aged, or who are suffering genuine financial hardship from a temporary or long-term change in their circumstances are likely to qualify for assistance. Generally, this will include anyone who does not have access to the normal things of life that most people take for granted.<sup>13</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>14</sup>
28. The purpose set out in clause 3.1.1 of the Trust's **current** deed states:

*3.1.1 Either alone or through any other entity or entities to promote and/or provide housing (whether freehold, leasehold, licence, option or some other form of ownership or rental) for households that contribute or will contribute to the social, cultural, economic and environmental well-being of those living within the District of the Queenstown Lakes Council (the "District") at a cost within their means.*

<sup>7</sup> (1980) 55 TC 651, 653.

<sup>8</sup> HC WN CIV 2009-485-2133 [18 March 2010].

<sup>9</sup> HC WN CIV 2009-485-2133 [18 March 2010] at para 56.

<sup>10</sup> HC WN CIV 2009-485-2133 [18 March 2010] at para 56.

<sup>11</sup> *DV Bryant Trust Board v Hamilton City Council* [1997] 3 NZLR 342.

<sup>12</sup> *Re Bethel* (1971) 17 DLR (3d) 652 (Ont. CA); affirmed sub nom *Jones v Executive Officers of T Eaton & Co Ltd* (1973) 35 DLR (3d) 97 (SCC) referred to in *D V Bryant Trust Board v Hamilton City Council* [1997] 3 NZLR 342. See also *re Pettit* [1988] 2 NZLR 513.

<sup>13</sup> *Inland Revenue Commissioners v Baddeley* [1955] AC 572; [1955] 1 All ER 525, applied in *re Pettit* [1988] 2 NZLR 513 and *Re Centrepont Community Growth Trust* [2000] 2 NZLR 325.

<sup>14</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.

*In this clause "Households" may include a single individual or a family, which may comprise a legally married or de-facto partnered couple, and their children (aged 18 or under) who are under legal guardianship of the individual or couple and other dependents who normally occupy the same primary residence. It is acknowledged that households may also include elderly parent(s) or adult children, and the inclusion or exclusion of these members income when calculating whether housing is at a "cost within their means" will be reviewed on a case-by-case basis.*

29. The Commission does not consider that this clause indicates an intention to provide benefits for people who have an identifiable need, therefore this will not amount to the relief of poverty. Rather the beneficiaries are people who can afford the housing and can contribute to the well-being of people already living in the area.
30. The purpose set out in clause 3.1.1 of the Trust's **proposed deed** states:
  - 3.1.1 *Either alone or with or through any other entity or entities to promote and/or provide affordable housing for low and/or moderate income households or those of restricted means in order to relieve financial hardship and inequality of access to housing for those in need of such housing and accommodation.*
31. In order to determine whether this purpose amounts to the relief of poverty, consideration must be given to the Trust's activities. At present, the only activity carried out by the Trust is the Shared Ownership Programme (the SOP). Under the SOP, beneficiaries purchase a share in a house, with the Trust owning the remainder. The two parties share ownership as tenants in common. The beneficiary must raise the majority of the purchase price through deposit and mortgage. This is based on what the beneficiary can afford and may vary from 60% to 80% of the purchase price. The Trust will purchase the remainder. The beneficiary then has the option to buy out the Trust in instalments. The beneficiary may also sell the house (the Trust has first right of refusal) and the proceeds split between the Trust and the beneficiary based on the proportions owned by each party.
32. The Trust has published an example of how the scheme would work on its website. The example is based on a beneficiary purchasing a house for \$450,000. The beneficiary provides \$315,000 (70% of the purchase price) and the Trust provides the remaining \$135,000 (30%). If the property were later sold for \$550,000, the beneficiary would receive \$385,000 and the Trust \$165,000. This would vary if, in the intervening period, the beneficiary had increased their percentage of ownership by buying out a portion of the Trust's ownership.
33. The beneficiary may increase their ownership by increments of 5%. This may be done once per year, up to 85%. The remaining 15% must be purchased in one transaction. The Trust does not receive any interest, but does charge an annual management fee of \$350.

34. The eligibility criteria for participation in the SOP are:
- The property must be used exclusively as the household's primary residence, i.e. it is not to be used as a second home or holiday house.
  - The applicant's combined household income must not exceed a certain level - this amount will be determined by the size of the household. Maximums will vary from \$86,000 for a single person household to \$122,000 for a four-person household.
  - Applicants must raise a minimum 5% deposit (of the entire property price) themselves.
  - Within each household at least one member is and will remain a permanent New Zealand resident or citizen.
  - Within each household at least one member must be employed in full time employment in the Queenstown Lakes District (minimum 30 hours per week average).
35. The Commission accepts that these criteria are guidelines rather than strict criteria. It notes, however, that the criteria would include people who had resources to meet their own housing needs and they would exclude, through the minimum required deposit, many who were suffering severe financial hardship.
36. The Trust has provided details of the beneficiaries of the SOP. The details show that of the 32 beneficiaries to date:
- three are individuals, living alone with no spouse or dependants, and another six are couples with no dependants;
  - ten of the beneficiaries have household incomes of \$80,000 or more;
  - eleven beneficiaries have made deposits of \$80,000 or more. Five of these are greater than \$100,000 and the highest is \$205,000;
  - two beneficiaries have both income and deposit over \$80,000;
  - three beneficiaries have household incomes of \$40,000 or less. A further six beneficiaries are below the National Median Income of \$64,000;
  - the Trust has made four exceptions to the requirement for a 5% deposit. Two of these were for households with incomes of \$90,000 or more, one for a household with \$76,000 and one with \$63,000.
37. The Commission considers that the beneficiary details show that the Trust is providing assistance to many people who may struggle with the costs associated with buying and owning a house with a large mortgage, but many of these people would be able to meet their housing needs through renting or purchasing a house in an alternative location.

38. The Commission considers that the SOP is an initiative that clearly helps people to buy a type of house in an area that they could not otherwise afford. While this may be a positive programme that will provide individuals with a valuable asset, it falls short of being charitable under the relief of poverty. This is because the Commission is not satisfied that the programme is aimed at people who are suffering genuine financial hardship or people who do not have access to the normal things of life that most people take for granted.
39. The Commission accepts the Trust's submission that poverty is not to be equated with destitution and can include those of moderate means (*DV Bryant Trust Board v Hamilton City Council*<sup>15</sup>). However, the Commission considers that most of those people assisted appear to have at least moderate means and do not suffer a need that requires relief through the assistance of the Trust.
40. In *Re Centrepoint Community Growth Trust*<sup>16</sup> it was held that in contemporary developed countries, poverty could be equated to lack of affordable accommodation.
41. However, Gino Dal Pont has written that "a gift expressed simply to be for the relief of a class of persons, a class that of itself contains no evident connotation of poverty does not carry the inference that it was intended to relieve against poverty".<sup>17</sup> In *Re Pettit*,<sup>18</sup> Chilwell J held that a bequest for the general purposes of the Doctors' Widows Fund did not evidence "the presence of a clear intention exclusively to make provision for the relief of poverty in the sense of the relief of some necessity or quasi-necessity".<sup>19</sup>
42. The Trust has not supplied any evidence that shows the beneficiaries of the Trust cannot afford to secure any accommodation for themselves. The Commission considers that the inability to buy an asset of this type does not indicate poverty or a need for accommodation.
43. The Trust claims that a unique situation exists in the Queenstown area, which means that people on moderate incomes can be considered "poor". This is due to the high price of housing in the area. The Commission does not accept this argument. The fact that those on moderate incomes cannot afford to buy a house in a particular locality does not mean those persons are "poor". In addition, the situation is not unique to Queenstown. The national median house price is also unaffordable to someone on the national median income following the definition of "affordable" given by the Trust.

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<sup>15</sup> [1997] 3 NZLR 342.

<sup>16</sup> *Re Centrepoint Community Growth Trust* [2000] 2 NZLR 325, and *Inland Revenue Commissioners v Baddeley* [1955] 1 All ER 525, applied in *Re Pettit* [1988] 2 NZLR 513

<sup>17</sup> *Charity Law in Australia and New Zealand*, Oxford, Oxford University Press, 2000 at 117. citing *Fe Foster* [1939] 1 Ch 22 at 25 per Bennett J.

<sup>18</sup> [1988] 2 NZLR 513.

<sup>19</sup> [1988] 2 NZLR 513, 542.

44. The Trust submits that the fact that not all beneficiaries are not “poor” in the strictest sense should not affect the charitable status of the Trust. The Commission considers that the benefits to people who are not in need and do not require relief are more than incidental and, in fact, make up a significant portion of the beneficiaries.
45. The Trust also claims that the beneficiaries are in need as they are unable to locate stable long-term accommodation that provides security. The only way to achieve this is through ownership. The Trust cites *Joseph Rowntree Memorial Trust Housing Association Limited and Others v Attorney General*<sup>20</sup> in support of this. That case found that there was a need for a specific type of housing for a specific group of people, despite some members of that group already owning a house.
46. The Commission considers that the facts in that case can be distinguished from the activities of the Trust. In that case, a specific type of housing was provided for a class of people who were in need due to their age. In contrast, the activities of the Trust are not aimed at a class of people who are defined by such a factor, other than the area in which they live. Neither is there a specific type of housing provided. Rather the only commonality is that it is the beneficiary who owns the house.

#### Other matters beneficial to the community

47. 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>21</sup>, which are as follows:
- relief of aged, impotent, and poor people
  - maintenance of sick and maimed soldiers and mariners
  - schools of learning
  - free schools and scholars in universities
  - repair of bridges, ports, havens, causeways, churches, sea banks, and highways
  - education and preferment of orphans
  - relief, stock or maintenance of houses of correction
  - marriage of poor maids
  - supportation, aid and help of young tradesmen, handicraftsmen, and persons decayed
  - relief or redemption of prisoners or captives and
  - aid or ease of any poor inhabitants concerning payment of fifteens, setting out of soldiers and other taxes.

<sup>20</sup> [1983] 1 All ER 288.

<sup>21</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.

48. Not all organisations with 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.”<sup>22</sup>

49. The Trustees have stated that the Trust’s purposes are the modern day equivalent of the supportation, aid and help of young tradesmen and handicraftsmen in 1601.
50. When considering whether the Trust’s purposes are within the spirit and intendment of the Preamble to the Statute of Elizabeth, and in particular, the “supportation, aid and help of young tradesmen and handicraftsmen”, it is necessary to consider the High Court of Justice’s decision in *Commissioners of Inland Revenue v White*.<sup>23</sup>
51. In *White*, the Court considered that in a contemporary context the “supportation, aid and help of young tradesmen and handicraftsmen” would mean assistance for those people who perform an art, trade or profession requiring special skill or knowledge.
52. The Commission notes that the specific words used in the Preamble, “young tradesmen and handicraftsmen and persons decayed”, indicates that these people had particular disadvantages and assistance would be required to overcome these disadvantages.
53. The Trust submits that the SOP constitutes the establishment of a community, which was found to be charitable in *Re Centrepont*<sup>24</sup>.
54. The Commission considers that the provision of houses is not “the establishment of a community” as the Queenstown community already exists. Further, the *Centrepont* case refers to a specific situation of establishing a community for communal living and not to the enhancement of existing communities.
55. The Trust has claimed that it provides assistance to those in the construction industry and those in the tourism industry who receive low wages.
56. The Commission considers that the Trust does not appear to benefit people by reason of their age or employment in a particular trade. The details of the beneficiaries reveal no assistance being provided to a particular industry or those who receive particularly low wages.

<sup>22</sup> Gino Dal Pont, 2000, Oxford University Press, p 178; citing *Nightingale v Goulburn* (1847) 5 Hare 484, 490 and *Re Davis (deceased)* [1965] WAR 25, 28.

<sup>23</sup> (1982) 55 TC 651.

<sup>24</sup> *Re Centrepont Community Growth Trust* [2000] 2 NZLR 325.

57. The Trust has claimed that the SOP is charitable as the promotion of industries, namely tourism and the service industry.
58. The Commission does not consider the assistance provided by the Trust to individuals working in an industry to be of benefit to that industry. Further, the details of beneficiaries provided by the Trust do not show the workers in any particular industry being preferred for assistance.
59. The Trust also submits that the SOP promotes the Queenstown Lakes District as a geographical area. Currently many people leave or do not move to the Queenstown area due to the price of housing. The provision of assistance in providing a house will attract people to the area and assist in retaining and recruiting staff. The promotion of a geographical area was noted in *DV Bryant Trust Board v Hamilton City Council*<sup>25</sup> as having been considered charitable in other cases.
60. The Commission considers that while the Trust's activities may attract people to, and retain people in, the Queenstown area, its purposes do not include the promotion of a geographical area and do not provide the public benefit which *DV Bryant* states "must be clearly demonstrated."<sup>26</sup>
61. Cases that have dealt with benefit to an area, industry and economic development in general include *Re Tennant*<sup>27</sup>, *Tasmanian Electronic Commerce Centre Pty Ltd v Commissioner of Taxation*<sup>28</sup> and *Canterbury Development Corporation v Charities Commission*<sup>29</sup>. In these cases, economic development of a community has been held to be charitable under "any other matter beneficial to the community" where essential services are provided or where the community is under a particular disadvantage.
62. *Re Tennant* 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."<sup>30</sup> [Emphasis added]*
63. Similarly, in *Tasmanian Electronic Commerce Centre Pty Ltd v Federal Commissioner of Taxation*, 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:

<sup>25</sup> [1997] 3 NZLR 342.

<sup>26</sup> [1997] 3 NZLR 342, 350.

<sup>27</sup> [1996] 2 NZLR 633.

<sup>28</sup> (2005) FCA 439; [2005] 59 ATR 10, 25-26.

<sup>29</sup> HC WN CIV 2009-485-2133 [18 March 2010].

<sup>30</sup> *Re Tennant* [1996] 2 NZLR 633, 640.

*“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.”<sup>31</sup>. [Emphasis added]*

64. In *Canterbury Development Corporation v Charities Commission*, in discussing whether economic development can fall within the “spirit and intendment of the Statute of Elizabeth”, Ronald Young J stated:

*“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.”<sup>32</sup>*

65. The Commission considers that the Queenstown Lakes area is not a new community or disadvantaged in comparison to the rest of the country. Any need arising from the higher cost of housing is not addressed by the activities of the Trust, as the activities are not aimed at those in need of assistance.
66. In conclusion, the Commission considers that the SOP does not appear to be within the spirit and intendment of the Preamble to the Statute of Elizabeth. The Commission has therefore concluded that the activities of the Trust are not charitable under “other matters beneficial to the community.”

### Public benefit

67. The public benefit criterion necessarily requires that any private benefits arising from the Trust’s activities must only be a means of achieving an ultimate public benefit and therefore be ancillary or incidental to it. It will not be a public benefit if the private benefits are an end in themselves.<sup>33</sup> In addition, proof that public benefit will necessarily flow from each of the stated purposes is required, not merely a belief that it will or may occur.<sup>34</sup>
68. In *Hadaway v Hadaway* Viscount Simonds found that the granting of loans to agricultural planters was not a charitable purpose because there were no restrictions in place to ensure the funds would be used for a charitable purpose. He stated:

<sup>31</sup> (2005) FCA 439; [2005] 59 ATR 10, 25-26.

<sup>32</sup> HC WN CIV 2009-485-2133 [18 March 2010] para 42.

<sup>33</sup> *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.

<sup>34</sup> *Gilmour v Coats* (1949) AC 26; *Re Blyth* [1997] 2 Qd R 567, 582; *DV Bryant Trust Board v Hamilton City Council* [1997] 3 NZLR 342, 350.

*"It appears ... to be impossible to regard as charitable a trust for the granting of loans at a low rate of interest to a class of persons carrying on a particular trade or business or profession, unless at least there is a condition that loans so made should be employed for a purpose which could itself be regarded as charitable.*

*... 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 and remote to justify the attribution to it of a charitable purpose. It would be equally easy and equally wrong to regard as charitable a trust for the granting of loans on generous terms to any member of any other class which performs a useful function in the social or economic life of the country."<sup>35</sup>*

69. Based on the Privy Council's decision in *Hadaway*, the Commission considers that the activities of the Trust primarily provide private benefits to the householders who receive assistance from the Trust and any benefits conferred on the remainder of the community are too remote.
70. The Trust submits that *Hadaway* can be distinguished as it refers only to low interest loans. The Commission considers that the equity share taken by the Trust under the SOP is very similar to a low or no interest loan as it effectively provides extra capital to the beneficiaries, at no cost, which is used to buy a house. The beneficiary may buy out the Trust's share, effectively repaying the loan, or sell the house at a later date and take only the value of the percentage owned, the rest going to the Trust. Any payments to increase the beneficiaries share are based on the current value of the house, rather than the purchase price. As the Trust will always get back the value it has contributed, plus any value increase in the equity owned by the Trust, the assistance provided is similar to a loan.
71. The Commission considers that the repeated reference by the Trust to the retention and attraction of key workers to the area shows that the assistance is aimed at a group of people who are considered vital to the community. This is analogous to the class of people assisted in *Hadaway*.

#### The Trust's submissions

72. In its letter of 27 April 2010, the Trust submits that it would be inconsistent to allow organisations of a similar nature to remain registered if the Trust is deregistered. In particular, the Trust cites the registration of an entity which primarily provides low cost housing "to persons and families who are in serious need of such housing".
73. 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 the Commission has registered other entities has no bearing on the Trust's eligibility for registration.

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<sup>35</sup> [1955] 1 WLR 16, 19-20.

74. The Trust claims that the SOP is not the only activity the Trust will carry out. In future, it will provide other programmes to provide housing through different methods such as rentals and leases.
75. Further evidence of the extent of such activities would be required in order to determine whether these would be considered charitable. It is possible that such methods could avoid some of the problems found with the SOP. Despite this, the Commission considers that the SOP is not a charitable activity and cannot now be considered ancillary to charitable activities that the Trust may undertake in the future. The possible addition of other programmes will not save the Trust.
76. The Trust points out that Article 25 of the Universal Declaration of Human Rights establishes a right to housing. Article 25 states:
- “1. Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.*
  - 2. Motherhood and childhood are entitled to special care and assistance. All children, whether born in or out of wedlock, shall enjoy the same social protection.”*
77. The Commission does not consider that every entity which provides the benefits set out in Article 25 will necessarily have charitable purposes. In addition, the right to an **adequate standard of living** does not necessarily mean the right to own any particular type of housing in any particular area.
78. Three supporting documents are attached to the Trust's submission. The first is a letter from Penelope Carroll, a researcher involved in the interconnections between housing, health and wellbeing. Ms Carroll submits that housing is essential to health and wellbeing. She also claims that, for most New Zealanders, a sense of security requires that they own their own home. This provides security and reduces stress.
79. The Commission considers that a lack of home ownership is not an unusual situation. All over New Zealand, people are living in rented accommodation or other alternatives to ownership. Many desire to own their own home, but this does not equate to a need. Further, the stress suffered as a consequence of being unable to fulfil that desire does not make the assistance to achieve it any more charitable.
80. Ms Carroll makes a number of other observations about how a lack of affordable housing can affect a community. The effects include higher stress and lower education and health outcomes.
81. The Commission considers that while these effects will have a strong impact for those people on low incomes, they will have less effect on those on medium incomes. As the Trust's beneficiaries are largely people on medium incomes, the Commission does not accept that the work of the Trust will provide relief to those who feel these effects the most.

82. The Commission notes that according to market rent figures published by the Department of Building and Housing for the period 1 January 2010 to 30 June 2010<sup>36</sup>, the upper quartile rent for a three-bedroom house in central Queenstown is \$495. Using the Trust's own affordability measure of 30-35% of household income, this price is within reach of 16 of the 32 beneficiaries. The lower quartile price in the same area is \$400. This is affordable for all but six of the assisted families. This shows that renting in the area is not beyond the means of middle-income families and they are not in need of affordable housing.
83. The Trust also provides a letter from the Mayor of Queenstown Lakes District, Clive Geddes. The letter states that the housing affordability issue in Queenstown was affecting the area's ability to "attract and retain key workers". The letter does not provide any evidence that the activities of the Trust are charitable.
84. The final document is a survey of renters in the Queenstown Lakes District. The Commission considers that the survey provides little assistance in determining the charitable nature of the Trust's activities due to the small sample size and the nature of the questions asked. The Commission also considers that the online survey results cannot be relied upon to form an accurate picture of the situation, as it does not capture a reliably diverse sample.
85. Some of the findings of the survey were:
- "Renters generally feel their current accommodation was adequate for their needs".
  - "Affordability is a concern, although most renters believed their current accommodations were 'fairly priced and good value' for Queenstown".
  - The most popular reason for renting was "can't afford to buy the type of home I want".
86. While the survey does indicate that people struggle to afford to buy a house in Queenstown, it also indicates that people are happy with their accommodation and are generally reasonably well off in terms of income. It also indicates that people cannot afford the homes they want, rather than cannot afford a home at all.
87. The Commission does not consider that the submissions of the Trust provide enough evidence to show that the SOP is a charitable activity.

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<sup>36</sup> <http://www.dbh.govt.nz/Utilities/marketrent/market-rent.aspx?CategoryId=258&SubCatId=6&SubCat1Id=63&SubCat2Id=71&SubCat3Id=72&ArticleId=53&Version=1.1&TLA=Queenstown+Lakes&RegionId=15>.

## Section 61B of the Charitable Trusts Act

88. In order to be a valid trust at law, a trust for charitable purposes must be exclusively charitable or it will be void for uncertainty. Section 61B of the *Charitable Trusts Act 1957* however, can operate in two situations to “save” a trust that has both charitable and “non-charitable and invalid” purposes.
89. The first is where the entity’s **stated purposes** include charitable and non-charitable purposes (in which case the non-charitable purposes may be “blue pencilled out”). The second is where the stated purposes are capable of both a charitable and a non-charitable **interpretation** and the primary thrust of the gift is considered to be charitable (in which case the purposes could be deemed to apply only in terms of the charitable interpretation).<sup>37</sup>
90. In *Re Beckbessinger*,<sup>38</sup> Tipping J held:
- “In the case of designated and identifiable organisations it may well be necessary to have evidence as to whether or not they are charitable to determine the flavour of the gift. The Court cannot in my judgment say, ... that because a gift might have been applied for charitable purposes, s 61B can be used to save it. The testator must be shown to have had a substantially charitable mind but to have fallen foul of the law of uncertainty by including either actually or potentially a non-charitable element or purpose.”*<sup>39</sup>
91. The Commission considers that the purposes in the **current** clause 3.1.1 and the **proposed** clause 3.1.1 are not charitable purposes for the reasons given above. If these purposes were “blue-pencilled out”, the Trust would be left with no substantial purposes. The Commission therefore concludes that the Trust does not have substantially charitable purposes.
92. The Commission has analysed the wording of the Trust’s purposes, surrounding context, and activities. The Commission does not consider that there is evidence of “a substantially charitable mind” with an intention to create a charitable trust, but which was not conveyed by the drafting. The Commission does not consider that the purposes indicate an intention to create a substantially charitable trust.
93. On these bases, the Commission considers that the Trust’s purposes are not substantially charitable and therefore section 61B of the *Charitable Trusts Act 1957* cannot operate to validate the trust.

## Public interest

94. Section 35(1) of the Act states that the Commission must not proceed with the removal of entity from the register unless the Commission is satisfied that it is in the public interest to do so.

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<sup>37</sup> *Re Beckbessinger* [1993] 2 NZLR 362, 373.

<sup>38</sup> [1993] 2 NZLR 36.

<sup>39</sup> *Re Beckbessinger* [1993] 2 NZLR 362, 376.

95. Section 10(1)(a) of the Charities Act obliges the Commission to promote public trust and confidence in the charitable sector. The Commission considers that public trust and confidence in registered charitable entities would not be maintained if entities which did not meet the essential requirements for registration remained on the register.
96. Accordingly, the Commission considers that it is in the public interest to remove the Trust from the register, as this will maintain public trust and confidence in the charitable sector.

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

97. The Commission determines that the Trust is not, or is no longer, qualified for registration as a charitable entity because it is not a trust of a kind in relation to which an amount of income is derived by the trustees in trust for charitable purposes, as required by section 13(1)(a) of the Act.
98. Under section 35(1) of the Act, the Commission is satisfied that it is in the public interest to remove the Trust from the Register and a ground for removal from the Register has been satisfied under section 32(1)(a), that is, the Trust is not qualified for registration as a charitable entity.
99. The decision of the Commission is therefore to remove the Trust from the Register, pursuant to section 31 of the Act, with effect from 15 September 2010.

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

Signed for and on behalf of the Charities Commission



Trevor Garrett  
Chief Executive

18/8/10  
Date