

Registration decision: New Zealand Trotting Hall of Fame Incorporated

The facts

1. New Zealand Trotting Hall of Fame Incorporated (“the Applicant”) was incorporated under the *Incorporated Societies Act 1908* on 16 December 1969.
2. The Applicant applied to the Charities Commission (“the Commission”) for registration as a charitable entity on 22 October 2010.
3. Appendix 1 of the Applicant’s rules document sets out the purposes of the society as:

The objects for which the Society is established are:-

1. *To incorporate the New Zealand Trotting Hall of Fame and continue to carry on the objects and activities thereof. The funds and property of the New Zealand Trotting Hall of Fame hitherto in the names of the Trustees and all funds and property which immediately before incorporation of the Society were under the direction or control or in the order or disposition of the New Zealand Trotting Hall of Fame shall be under the direction order disposition and control of the incorporated Society and/or the Committee thereof, subject to these rules or other the Rules for the time being of the Society. The Society is empowered to hold any property whatsoever upon trust.*
2. *To acquire by purchase, exchange, lease or otherwise (and either along or in conjunction with any other person, Club or Corporation) upon such terms as may be thought fit any real or personal property and any rights and privileges either necessary or convenient for the Society's progress.*
3. *To dispose or join in disposing of by sale, lease, letting license, exchange or otherwise any property (real and personal) or any rights or privileges not immediately required for use for the purpose of the Society.*
4. *To collect and display relics and artefacts and data relating to and depicting the progress of trotting in general with the emphasis on New Zealand and with the view to promoting public interest in the sport.*
5. *To borrow or raise money on Mortgage of real or personal property of the Society or any part thereof or upon debentures or Mortgage debentures of the Society and to issue such debentures or Mortgage debentures charging the whole or any part of the assets of the Society and to execute Mortgages and other instruments to secure such debentures or Mortgage debentures or to borrow money from Bankers or other persons with or without security .*

6. *To subscribe to or otherwise aid sporting, benevolent, charitable, national or other institutions or objects of a public character or which have any moral or other claim to support by the Society by reason of the locality of its operations or otherwise.*
 7. *To enter into any arrangement for co-operation, mutual assistance, union of interests, reciprocal concession or otherwise with any society or Club having objects altogether or in part similar to those of this Society and to obtain from or make any arrangement with any authority, supreme, municipal or otherwise for any right license, concession, privilege or charter which this Society or the Committee thereof may think it desirable to obtain and to make payments (if any) under carry out and comply with any such arrangements, right, license privilege, concession or charter.*
 8. *To expend such funds of the Society and to do all such acts and things as may be deemed by the Society or the Committee thereof to be desirable or expedient in the promotion and cultivation of social intercourse and goodwill amongst members of the Society and its guests.*
 9. *To do all such other things as the Society or the Committee may think necessary or desirable for the purpose of furthering any of the objects of the Club or incidental or conducive to the attainment of the above objects or any of them.*
4. The application was analysed and on 25 November 2010, the Commission sent the Applicant a notice that may lead to a decline on the basis that the purposes are broadly worded and not exclusively charitable, and requested further information regarding the winding up clause.
 5. On 24 January 2011, the Applicant's solicitor responded to the notice that may lead to a decline. The Applicant's solicitor stated:

Section 5 (1) of the Charities Act 2005 defines "charitable purpose" as including "the advancement of education" and "any other matter beneficial to the community". A museum is generally understood to involve an element of education for those using it. As regards "any other matter beneficial to the community", courts have found the provision of public amenities such as museums to be a charitable purpose. We submit that the Hall of Fame meets the charitable purpose criteria.

Section 13 (1) (b) provides that to qualify for registration, a society must:

- (i) Be established and maintained exclusively for charitable purposes and;*
- (ii) Not carried on for the private pecuniary profit of any individual.*

Your letter states that the Objects of the society as set out in paragraphs 1-6 of the Deed are not confined to charitable purposes as referred to in the cases of McGovern v Attorney General and Vancouver Society of Immigration and Visible Minority v Minister of National Revenue in which the Judges upheld the requirement of exclusively charitable purposes.

The primary purpose of the New Zealand Trotting Hall of Fame is to ensure the ongoing preservation of harness racing memorabilia as a complete history of the sport in New Zealand. The museum is, as with other museums, visited by members of the public from all sectors of the community, including Probus Clubs, schools and visitors to Auckland from other parts of New Zealand and overseas.

Object 1.

The incorporation of the New Zealand Trotting Hall of Fame. The establishment of a museum to benefit the understanding of historical roots of a particular subject by the public was accepted by Heath J. in Taumarunui Museum Trust v Ruapehu District Council [CIV-2005-41 9-1 374] as a charitable purpose for the matter to be decided in that case.

Object 2.

The acquisition of property to house the contents of the museum is a natural progression from Object 1.

Object 3.

Gives the museum the ability to change its venue if this is deemed necessary or desirable.

Object 4.

To collect and display relics and artefacts and data. This object goes on to say "with the view to promoting public interest in the sport, but since incorporation took place in 1997, the emphasis has been on educating and informing the general public about the history of harness racing in New Zealand, and indeed, in recent years, the majority of visitors have been from Probus clubs, schools and historic societies.

Object 5.

This object is intended to ensure that the museum continues to be financially viable, as it relies on donations for maintenance and upkeep of the exhibits.

Object 6.

This intention of this object is to enable the society to support other such museums and organisations, primarily by the loan of artefacts and information appropriate for special exhibitions and occasions. This is a common occurrence.

These objects do not refer to any activities which could be classed as non-charitable apart from those necessary for the business administration of the incorporated society. We therefore fail to understand how the reference in your letter to objects not confined to charitable purposes can be justified. The building in which the Museum is housed was paid for by Noel Taylor, prior to his death, to ensure that this impressive collection is held in a secure facility accessible to the public. His intention was to establish a harness racing museum for the benefit of those who might care to enjoy it and it has operated in this way since it was built.

Your letter refers to a purpose of the entity as being entertainment. The sole functions held in the Hall of Fame are the annual induction of horses, drivers and trainers who have met the criteria to become inductees. The ever-increasing number of exhibits which have been donated from all parts of New Zealand means that space is now extremely limited and not conducive to holding a social function of any kind.

*The Auckland Museum Institute is established pursuant to the Auckland War Memorial Museum Act 1996, a copy of which is **enclosed**. Section 10 of the act provides that the Board and Institute are established for charitable purposes within New Zealand. In the event that the New Zealand Trotting Hall of Fame ceased to exist, it would be imperative that the exhibits and artefacts, including photographs and historical records, pass into the hands of another non-profit museum, to continue to benefit the general public.*

It is hoped that our further submissions have served to establish that the New Zealand Trotting Hall of Fame is exclusively a museum dedicated to the history of harness racing and the preservation of artefacts and archives for the benefit and education of the general public. We ask that this application be reviewed based on such submissions.

The issues

6. The issue the Commission must consider is whether the Applicant meets all of the essential requirements for registration under the *Charities Act 2005* (“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, the issues are:
 - (a) whether the Applicant’s purposes fall within the definition of charitable purposes in section 5(1) of the Act; and
 - (b) whether the Applicant provides a public benefit.

The law on charitable purposes

7. Under section 13(1)(b)(i) of the Act a society or institution must be established and maintained exclusively for charitable purposes.
8. 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.*
9. Section 5(3) of the Act provides that the inclusion of a non-charitable purpose will not prevent qualification for registration if it is merely ancillary to a charitable purpose.

10. Section 13(1)(b)(i) is consistent with the approach taken by the courts, who have held that in order to be charitable, an entity must have exclusively charitable purposes. Thus, in *McGovern v Attorney General*,¹ Slade J states:

The third requirement for a valid charitable trust is that each and every object or purpose designated must be of a charitable nature. Otherwise, there are no means of discriminating what part of the trust property is intended for charitable purposes and what part for non-charitable purposes, and the uncertainty in this respect invalidates the whole trust.

11. In *Vancouver Society of Immigration and Visible Minority Women v. Minister of National Revenue*,² Gonthier J states:

The first is the principle of exclusivity. To qualify as charitable, the purposes of an organisation or trust must be exclusively charitable...The primary reason for the exclusivity requirement is, as Slade J. observed in McGovern, supra, at p.340 that if charitable organizations were permitted to pursue a mixture of charitable and non-charitable purposes there could be no certainty that donations to them would be channelled to the pursuit of charitable purposes.

12. In *Molloy v Commissioner of Inland Revenue*,³ Somers J states:

To be charitable in law...an expressed purpose upon its true construction must be limited or confined to charitable purposes only.

13. 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 benefit.⁴ This means that the purpose must be directed to benefit the public or a sufficient section of the public.

14. 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

15. The Commission considers the winding up clause in clause 11 of the rules amendment dated 24 September 2010 is sufficient to meet the Commission's requirements.

¹ [1982] 1 Ch. 321, 341.

² (1999) 169 D.L.R. (4th) 34, 58.

³ [1981] 1 NZLR 688 at 691.

⁴ Accepted as common ground in *Latimer v Commissioner of Inland Revenue* [2002] 3 NZLR 195, para [32].

16. The Commission has analysed the purposes set out in Appendix 1 of the Applicant's rules document and the information supplied by the Applicant. The Commission considers that clauses 1, 2, 3, 5, 7 and 9 are powers clauses.
17. The Commission does not consider that the Applicant's purposes in clauses 4, 6, and 8, and the activities it undertakes, indicate an intention to relieve poverty or advance religion. Accordingly, these purposes have been assessed under advancement of education and "any other matter beneficial to the community".

Clause 4

18. The aim of clause 4 in Appendix 1 is:

4. *To collect and display relics and artefacts and data relating to and depicting the progress of trotting in general with the emphasis on New Zealand and with the view to promoting public interest in the sport.*

19. In order to advance education, a purpose must provide some form of education and ensure that learning is advanced. Education does not include advertisements for particular goods or services, promotion of a particular point of view, or the study of subjects that have no educational value.⁵

20. In *Re Shaw (deceased)*,⁶ the court held that:

*...there is no element of teaching or education combined with this [increase of public knowledge] nor does the propaganda element in the trusts tend to more than to persuade the public that the adoption of the new script would be "a good thing", and that, in my view, is not education.*⁷

21. Similar results were arrived at in *Re Hopkins' Will Trusts*,⁸ in which there was a bequest to the Francis Bacon Society Inc for the purposes of 'finding the Bacon-Shakespeare manuscripts'. Wilberforce J wrote that in order to qualify as educational research:

*Research must either be of educational value to the researcher or must be so directed as to lead to something which will pass into the store of educational material, or so as to improve the sum of communicable knowledge in an area which education may cover – education in this last context extending to the formation of literary taste and appreciation.*⁹

⁵ *In re Shaw (deceased)* [1957] 1 WLR 729; as interpreted in *Re Hopkins' Will Trusts* [1965] 1 Ch 669. See also *Re Collier* [1998] 1 NZLR 81.

⁶ [1957] 1 WLR 729.

⁷ [1957] 1 WLR 729 at 738.

⁸ [1965] 1 Ch 669.

⁹ [1965] Ch 669 at 680.

22. In *Re Elmore, deceased*,¹⁰ the testator's manuscripts were held to be literally of no merit or educational value. That decision followed *Re Pinion, Deceased*,¹¹ in which case Harman LJ thought there to be "no useful object to be served in foisting upon the public this mass of junk" at issue in that case.
23. In New Zealand in *Re Collier (deceased)*,¹² Hammond J set out the test for determining whether the dissemination of information qualified as charitable under the head of advancement of education:
- It 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 [1968] VR 390 the testator's manuscripts were held to be literally of no merit or educational value.*¹³
24. Hammond J held that the bequest in question (for publication of a book) did not qualify as charitable under the test:
- In my view, the minimal threshold test is not met. There is no educative value, or public utility in the 'book'. Further, it is no more than an attempt to perpetuate a private view held by Mrs Collier.*¹⁴
25. In *Vancouver Society of Immigrant and Visible Minority Women v MNR*,¹⁵ Iacobucci J wrote:
- So long as information or training is provided in a structured manner and for a genuinely educational purpose – that is, to advance the knowledge and abilities of the recipients – and not solely to promote a particular point of view or political orientation, it may properly be viewed as falling within the advancement of education.*¹⁶
26. Trusts to establish and maintain museums have been held to be charitable by the courts under both the advancement of education¹⁷ and under "other matters beneficial to the community".
27. The Commission notes, however, that the collection and display of relics, artefacts and data relating to trotting in clause 4 is not undertaken in order to advance education, but rather to promote public interest in trotting.

¹⁰ [1968] VR 390.

¹¹ [1965] 1 Ch 85 at 107.

¹² [1998] 1 NZLR 81.

¹³ [1998] 1 NZLR 81 at 91-92.

¹⁴ [1998] 1 NZLR 81 at 92.

¹⁵ [1999] 169 DLR (4th) 34.

¹⁶ [1999] 169 DLR (4th) 34 at 113.

¹⁷ *British Museum v White* (1826) 2 Sim. & St. 594; *Re Allsop* (1884) 1 T.L.R. 4; *Re Holburne* (1885) 53 L.T. 212.

28. In *Re Beckbessinger* when determining whether a bequest to the Addington Trotting Club could be considered charitable, Tipping J stated:

*The suggestion that a sum of money should be given to the trotting club at Addington to provide a stake, preferably for 4 year olds, is beyond doubt non-charitable. It cannot be and was not suggested that the Metropolitan Trotting Club is or remotely resembles a charitable organisation.*¹⁸

29. Similarly in *Travis Trust v Charities Commission*, Joseph Williams J held:

*it is clear both on the basis of first principle and on consideration of the authorities that **the promotion of a horse race is not a charitable purpose in and of itself. Nor is the promotion of horse racing generally** A trust to promote racing could only be charitable in nature if its deeper purpose was the pursuit of some other objective, either in principle or, in accordance with charities jurisprudence, a charitable purpose in its own right within the spirit and intendment of the Statute of Elizabeth.*¹⁹ [Emphasis added]

28. The Commission concludes that the main purpose in clause 4 is to promote public interest in trotting and that this is not a charitable purpose under either the advancement of education or “other matters beneficial to the community”.

Clause 6

29. Clause 6 of Appendix 1 states as a purpose:

To subscribe to or otherwise aid sporting, benevolent, charitable, national or other institutions or objects of a public character or which have any moral or other claim to support by the Society by reason of the locality of its operations or otherwise.

30. The Applicant’s solicitor stated in relation to clause 6:

This intention of this object is to enable the society to support other such museums and organisations, primarily by the loan of artefacts and information appropriate for special exhibitions and occasions. This is a common occurrence.

These objects do not refer to any activities which could be classed as non-charitable apart from those necessary for the business administration of the incorporated society. We therefore fail to understand how the reference in your letter to objects not confined to charitable purposes can be justified. The building in which the Museum is housed was paid for by Noel Taylor, prior to his death, to ensure that this impressive collection is held in a secure facility accessible to the public. His intention was to establish a harness racing museum for the benefit of those who might care to enjoy it and it has operated in this way since it was built.

¹⁸ *Re Beckbessinger* [1993] 2 NZLR 362, 376

¹⁹ (2009) 24 NZTC 23,273, 23,281.

31. The use of the disjunctive “or” between charitable and non-charitable purposes has been treated by the courts as defining distinct categories.²⁰

32. In *Travis Trust v Charities Commission*, Joseph Williams J stated:

*In the area of sport and leisure, the general principle appears to be that sport, leisure and entertainment for its own sake is not charitable but that **where these purposes are expressed to be and are in fact the means by which other valid charitable purposes will be achieved, they will be held to be charitable.** The deeper purpose of the gift or trust can include not just any of the three original Pemsel heads but also any other purpose held by subsequent cases or in accordance with sound principle to be within the spirit and intendment of the Statute of Elizabeth.²¹ [Emphasis added]*

33. A gift to a “sporting institution or object” would therefore go beyond what is charitable at law.

34. The term “benevolent” has been held by the courts to be distinct in meaning from the term “charitable”. Herbert Picarda states, “...gifts for charitable or benevolent purposes have failed as going beyond what is exclusively charitable”.²²

35. In *Chichester Diocesan Fund and Board of Finance (Incorporated) v. Simpson*,²³ Viscount Simon LC held:

[I]t is impossible to attribute to the word ‘benevolent’ an equal precision [to the word ‘charitable’] or to regard the courts as able to decide with accuracy the ambit of that expression. It is not disputed that the two words ‘charitable’ and ‘benevolent’ do not ordinarily mean the same thing. They overlap in the sense that each of them, as a matter of legal interpretation, covers some common ground, but also something which is not covered by the other.²⁴

36. The meaning of the term “national institutions or objects” is very broad. A “national institution” could relate to a governmental body or a non-governmental body. Gino Dal Pont states, “...a gift to a government or governmental body or authority is not charitable unless it can be construed as being directed to an exclusively charitable purpose.”²⁵ Furthermore, a non-governmental national body is not necessarily charitable. “National objects” is a very broad term that is not defined by law, and cannot be said to be limited to charitable objects.

²⁰ *Attorney-General v. Adams* (1908) 7 CLR 100 at 113 per Barton J; *Chichester Diocesan Fund & Board of Finance (Inc.) v. Simpson* [1944] AC 341 at 351 per Lord MacMillan.

²¹ (2009) 24 NZTC 23,273, 23,281.

²² Hubert Picarda, *The Law and Practice Relating to Charities*, 4th Ed., London, Bloomsbury Professional, 2010 at 829.

²³ [1944] AC 341.

²⁴ [1944] AC 341 at 348-349.

²⁵ Gino Dal Pont, *Charity Law in Australia and New Zealand*, 2000, Oxford University Press, p 186.

37. The term “other institutions or objects of a public character” is broad enough to allow the Applicant to support any number of non-charitable organisations. Dal Pont states, “...the words ‘public purposes’ are in their nature entirely uncertain, as opposed to ‘charitable purposes’, which are defined by law”.²⁶
38. Even more vague and uncertain, the phrase “...or which have any moral or other claim to support by the Society by reason of the locality of its operations or otherwise” could encompass any number of non-charitable institutions or objects.
39. The word “and” is usually interpreted conjunctively. In clause 6, the first four types of institutions mentioned are not separated by “and”, but by commas. Herbert Picarda states:
- ...in Williams v Kershaw a gift to three purposes ‘benevolent, charitable, and religious’, without any conjunction, copulative or disjunctive between the first two adjectives failed, being construed by Sir Charles Pepys MR disjunctively; and his decision was endorsed (though distinguished) by Peason J in Re Sutton. Had the gift in Williams v Kershaw been to benevolent and charitable and religious purposes Sir Charles Pepys MR might conceivably have come to a different conclusion.*²⁷
40. As shown from the case law above, the use of wording separated by commas such as “...sporting, benevolent, charitable, national...” is considered disjunctive and therefore too broad to be exclusively charitable.
41. In line with the case law cited above, the Commission considers that the broadness and vagueness of the phrases used in clause 6 mean that the clause is not confined to charitable purposes.

Clause 8

42. Clause 8 of Appendix 1 states as a purpose:

To expend such funds of the Society and to do all such acts and things as may be deemed by the Society or the Committee thereof to be desirable or expedient in the promotion and cultivation of social intercourse and goodwill amongst members of the Society and its guests.

43. The Applicant’s solicitor stated in its response letter of 24 January 2011:

The sole functions held in the Hall of Fame are the annual induction of horses, drivers and trainers who have met the criteria to become inductees. The ever-increasing number of exhibits which have been donated from all parts of New Zealand means that space is now extremely limited and not conducive to holding a social function of any kind.

²⁶ Ibid, p 185.

²⁷ Hubert Picarda, *The Law and Practice Relating to Charities*, 4th Ed., London, Bloomsbury Professional, 2010 at 331-332.

44. In *Travis Trust v Charities Commission*, Joseph Williams J stated:

*In the area of sport and leisure, the general principle appears to be that **sport, leisure and entertainment for its own sake is not charitable** but that where these purposes are expressed to be and are in fact the means by which other valid charitable purposes will be achieved, they will be held to be charitable. The deeper purpose of the gift or trust can include not just any of the three original Pemsel heads but also any other purpose held by subsequent cases or in accordance with sound principle to be within the spirit and intendment of the Statute of Elizabeth.²⁸*
[Emphasis added]

45. A purpose aimed at “the promotion and cultivation of social inter-course and goodwill amongst members of the Society and its guests” would therefore go beyond what is charitable at law.

46. Despite the statements of the Applicant’s solicitor about the Applicant’s current activities, clause 8 is broad enough to allow the Applicant to undertake non-charitable purposes.

Conclusion

47. The Commission concludes that the Applicant’s purposes set out in clauses 4, 6, and 8 of Appendix 1 of its rules are not exclusively charitable for the reasons stated above.

Charities Commission’s determination

48. The finding of the Commission is that the Applicant has failed to meet an essential requirement for registration as a charitable entity in that it is not established and maintained exclusively for 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

.....
Date

²⁸ (2009) 24 NZTC 23,273, 23,281.