

## Registration decision: Community Health Fitness and Development Charitable Trust (COM44074)

### Summary

1. The Charities Registration Board (**the Board**) has determined to decline the application for registration of Community Health Fitness and Development Charitable Trust (**the Applicant**).<sup>1</sup> The Board has determined that the Applicant is not qualified to be registered as a charitable entity under the *Charities Act 2005* (**the Act**)<sup>2</sup> because its purposes are not exclusively charitable *and* its activities confer private benefits that are not ancillary.
2. The Board's reasons for its decision are organised as follows:
  - A. Background
  - B. Legal framework for registration
  - C. Analysis of the Applicant's qualification for registration
    - C.1 The Applicant's purposes are not exclusively charitable
    - C.2 The Applicant's activities generate non-ancillary private benefits
  - D. Determination

### A. Background

3. The Applicant was established by deed of trust executed on 1 April 2012. It was incorporated under the *Charitable Trusts Act 1957* on 8 May 2012. On 19 April 2012, the Applicant applied for registration under the Act.
4. The parties to the trust deed are Michael Brian Kinsella (settlor), Michael Brian Kinsella (trustee), Josephine Emma Kinsella (trustee), and Sienne Wanstall (trustee).
5. Clause 4.1 of the deed states:

*The charitable objects of the Trust ('the Objects') are:*

- a. *To be beneficial to the community by providing a sport and recreation facility which will serve people within the community.*
- b. *To inspire and develop a healthy, active and vibrant community.*
- c. *To provide support to the community sport and recreational groups and organisations in the New Zealand District ('District') by the provision of advice, training, guidance and funding to assist in the improvement of, and access to, governance, management and administration of the said groups and organisations in the District.*
- d. *To provide guidance and support to schools, and educational institutions by assisting in the co-ordination of, and upskilling of teachers, trainers and coaches in the delivery of, sport and physical recreation programmes and activities in the District.*

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<sup>1</sup> The decision is made under section 19 of the *Charities Act 2005*.

<sup>2</sup> The essential requirement for registration is set out in section 13 of the *Charities Act 2005*.



million, "once approval for Charitable Trust Status has been approved". The Applicant also provided the following information:

- The Company owns and operates the brand "Boxstars 24hr Health & Fitness"; supplies sports training apparel under the brand "Boxstars"; and supplies gym equipment. It currently operates the gym facility at 295 Ti Rakau Drive.
- It is proposed that the Applicant will take over operation of the gym facility at 295 Ti Rakau Drive, which it will operate under franchise agreement with the Company. The Company will transfer of all membership contracts to the Applicant and will license it to use the Boxstar brand and trading name.
- Michael Kinsella will be the Operations General Manager and Head Trainer/coach. Josephine Kinsella will be the treasurer, Manager, and Marketing and Development Consultant.
- Michael and Josephine Kinsella will not be remunerated until such time as the Applicant can generate funding to cover remuneration and no rates of pay have been agreed.

12. The Applicant also described its other activities in more detail, noting that it has provided a fundraiser for Pakuranga Rugby League, provided free fitness training to St Kents School Netball team and Lighthouse Kindergarten, and arranged product donations from local businesses to an auction to raise funds for a summer holiday for the family of a young cancer patient.

13. On 1 October 2012, DIA Charities wrote to the Applicant to formally notify that the application for registration may be declined for two reasons - **first**, that the Applicant's purposes are not exclusively charitable in law and **second** that the Applicant's operations confer a private benefit on the Company which is not ancillary.

14. The Applicant responded to the notice on 30 October 2012. The Applicant submitted that its purposes are exclusively charitable and confer public benefit by promoting health and fitness to the wider community. It also submitted that there is no conflict of interest arising from Michael and Josephine Kinsella's involvement in the Company. The Applicant submitted that the relationship with the Company "is beneficial as the trust can utilise resources and buying power of our current company and get the discounts they would ordinarily get". The Applicant confirmed:

- the Company is currently developing a national franchise network for Boxstars branded fitness classes.
- the Company will allow the Applicant to use the Company's branded fitness classes under licence free of charge (whereas other business partners are required to enter franchise agreements on commercial terms);
- the Company will allow the Applicant to use the Company's equipment at 295 Ti Rakau Drive initially free of charge (but that the Applicant will purchase equipment from the Company as and when it develops future sites);

- the Company is supporting the Applicant by making donations to the Applicant and providing the services of Company employees and contractors to the Applicant free of charge until such time as the Applicant has funds to pay these employees and contractors for their services.

## B. Legal framework for registration

15. Section 13 of the Act sets out the essential requirements for registration. Under section 13(1)(a) of the Act, a trust must be of a kind in relation to which an amount of income is derived by the trustees in trust for charitable purposes.

16. 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.<sup>5</sup> In addition, to be charitable at law, a purpose must be for the public benefit.<sup>6</sup> This means that the purpose must be directed at benefiting the public or a sufficient section of the public, and any private benefits arising from the entity's activities are ancillary or incidental to the public benefit provided by the pursuit of valid charitable purposes.<sup>7</sup>

17. A trust for charitable purposes will be void for uncertainty if it is not for *exclusively* charitable purposes:<sup>8</sup>

*...[A] 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.*

18. Section 5(3) of the Act provides that any non-charitable purpose must be ancillary to a charitable purpose.<sup>9</sup> Determining whether a purpose is 'ancillary' requires both a quantitative and qualitative assessment.<sup>10</sup>

<sup>5</sup> This statutory definition adopts the general law classification of charitable purposes in *Commissioner for Special Purposes of Income Tax v Pemsel* [1891] AC 531 extracted from the preamble to the *Statute of Charitable Uses 1601* (43 Elizabeth 1 c 4) and previous common law. See generally *In Re Education New Zealand Trust* HC Wellington CIV-2009-485-2301, 29 June 2010 at [13]; *In re Draco Foundation (NZ) Charitable Trust* HC WN CIV 2010-485-1275 [3 February 2011] at [11].

<sup>6</sup> Authorities include: *Oppenheimer v Tobacco Securities Trust Co Ltd* [1951] AC 297; *Verge v Somerville* [1924] AC 496; *Dingle v Turner* [1972] AC 601. See also: *New Zealand Society of Accountants v Commissioner of Inland Revenue* [1986] 1 NZLR 147 at 152-155; *Latimer v Commissioner of Inland Revenue* [2002] 3 NZLR 195 at [32]; *Travis Trust v Charities Commission* (2009) 24 NZTC 23,273 (HC) at [54], [55]; *Queenstown Lakes Community Housing Trust* HC WN CIV 2010-485-1818, 24 June 2011 at [30]; *Re Education New Zealand Trust* HC Wellington CIV-2009-485-2301, 29 June 2010 at [23].

<sup>7</sup> See note 19 below and accompanying text.

<sup>8</sup> *McGovern v Attorney-General* [1982] 1 Ch. 321, 341. In New Zealand, see *Canterbury Orchestra Trust v Smitham* [1978] 1 NZLR 787; *Molloy v Commissioner of Inland Revenue* [1981] 1 NZLR 688 at 691. See also the assumption evident in the provision at section 5(3) and (4) of the Act, that a trust will not be disqualified from registration because it has *ancillary* non-charitable purposes.

<sup>9</sup> Section 5(4) of the Act defines 'ancillary purpose'.

19. In considering an application for registration, section 18(3)(a) of the Act requires consideration of the entity's activities at the time the application was made, the entity's proposed activities, and any other relevant information. In cases decided under the Act, the High Court has consistently taken activities into consideration in determining whether an entity qualifies for registration under the Act.<sup>11</sup> In determining qualification for registration under the Act, substance must prevail over form, and an entity cannot qualify for registration, even if its stated purposes are exclusively charitable, if its activities belie its stated purposes.<sup>12</sup>
20. Determining whether an entity's purposes are charitable involves an objective characterisation, and a declaration in an entity's rules document which purports to limit its objects to charitable purposes will not be determinative.<sup>13</sup>

## C. Analysis of the Applicants' qualification for registration

### C.1 Applicant's purposes are not exclusively charitable

21. The Applicant's stated purposes<sup>14</sup> are not exclusively charitable in law. The purposes relate to the promotion of sport and recreation, whereas sport and recreational purposes are only charitable in law if they are a means to advance independent valid charitable purposes; for the public benefit; and not for private profit.
22. The courts have consistently held that sporting, entertainment and social activities are not charitable in their own right:<sup>15</sup>

<sup>10</sup> *Re the Grand Lodge of Antient Free and Accepted Masons in New Zealand* HC Wellington CIV-2009-485-2633, 23 September 2010 at [49]-[52], see also *Re New Zealand Computer Society Inc* HC WN CIV-2010285-924, 28 February 2011) at [16], *Re Education New Zealand Trust* HC Wellington CIV-2009-485-2301, 29 June 2010 at [44].

<sup>11</sup> *Canterbury Development Corporation v Charities Commission* HC WN CIV 2009-485-2133, 18 March 2010 at [29], [32], [44], [45] - [57], [67], [84] - [92]; *Queenstown Lakes Community Housing Trust* HC WN CIV 2010-485-1818, 24 June 2011 at [57] - [67]; *Re The Grand Lodge Of Antient Free And Accepted Masons In New Zealand* HC WN CIV 2009-485-2633, 23 September 2010 at [59], [71]; *New Zealand Computer Society Inc* HC WN CIV-2010-485-924, 28 February 2011 at [60] and [68]; *Greenpeace of New Zealand Incorporated* HC WN CIV 210-485-829 6 May 2011 at [75]. See to same effect: *Inland Revenue Commissioners v City of Glasgow Police Athletic Association* [1953] 1 All ER 747 at 751-752; *Institution of Mechanical Engineers v. Cane*, [1961] A.C. 696 (HL) at 723; *Attorney-General v Ross* [1986] 1 WLR 252 at 263; *Vancouver Society of Immigrant and Visible Minority Women v MNR*, [1999] 1 SCR 10 at [194]; *Federal Commissioner of Taxation v Word Investments Ltd* (2008) 236 CLR 204 at [70].

<sup>12</sup> G E Dal Pont *Law of Charity* (LexisNexis Butterworth, Australia, 2010) at [2.12], [13.19], [13.20].

<sup>13</sup> *M K Hunt Foundation Ltd v Commissioner of Inland Revenue* [1961] NZLR 405 at 407; *Canterbury Development Corporation v Charities Commission* HC WN CIV 2009-485-2133, 18 March 2010, at [56].

<sup>14</sup> Refer para 5 above.

<sup>15</sup> *Travis Trust v Charities Commission* (2009) 24 NZTC 23,273, and see also *Laing v Commissioner of Stamp Duties* [1948] NZLR 154 (gift to rowing, swimming and amateur athletic associations not charitable). To same effect see *AYSA Amateur Youth Soccer Association v Canada (Revenue Agency)* [2007] 3 SCR 217 at [40]; *Re Nottage* [1895]

*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.*

23. This general law principle is recognised in section 5(2A) of the Act which provides:

***The promotion of amateur sport may be a charitable purpose if it is the means by which a charitable purpose referred to in subsection (1) is to be pursued.*** [emphasis added]

24. Sporting purposes may be charitable where, for example, sport is promoted as a means to advance public health (a valid charitable purpose under the fourth *Pemsel* classification<sup>16</sup>), or education.
25. In order to qualify as charitable, a purpose to promote sport must not only advance a valid charitable end but must also provide sufficient public benefit and must not confer private pecuniary profit. The public benefit requirement may not be met if, for example, participation in sporting activities is restricted to professional and/or elite players or the focus of the activities is on the achievement of sporting success,<sup>17</sup> the costs of participation impose a limit on participation, or there is non-ancillary private pecuniary profit.<sup>18</sup>
26. The Applicant's purposes at clause 4.1(b) and (c) are expressed in broad terms that may not qualify as exclusively charitable in law on the above principles. Further, having considered the information provided by the Applicant, it is not evident that the Applicant's current and proposed *activities* promote charitable purposes for the public benefit and not for private profit. For example, the Applicant has provided fundraising and training to the first grade team of a rugby league club (that is not a registered charity), and programming to a privately owned kindergarten

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2 Ch 649 (encouraging yacht racing not charitable); *Re Clifford* [1912] 1 Ch 29 (promoting angling not charitable); *Re Patten* [1929] 2 Ch 276 (coaching young cricketers not charitable); *Scottish Flying Club Ltd v Inland Revenue Commissioners* 1935 SC 817 (recreational flying not charitable); *Inland Revenue Commissioners v City of Glasgow Police Athletic Association* [1953] AC 380 (promotion of athletic sports and general pastimes not charitable); *Re Hoey* [1994 2 Qd R 510 (promoting horseracing not charitable).

<sup>16</sup> The promotion of health is specifically mentioned in the *Statute of Charitable Uses Act 1601* and the promotion of sport may be analysed as a means to promote health: compare the discussion in *Re Laidlaw Foundation* (1984) 13 DLR (4<sup>th</sup>) 491 at 505. Note, however, that there may be a distinction between a purpose to promote sport as a means to promote health on the one hand, and the regulation and promotion of a sporting competition or code, or the promotion of sporting success, on the other, see *AYSA Amateur Youth Soccer Association v Canada (Revenue Agency)* [2007] 3 SCR 217 at [40] (distinguishing *Re Laidlaw Foundation*).

<sup>17</sup> See for example Charities Commission Registration Decision: Waikato Rowing Performance Centre Incorporated (THE41712), Decision number 2012-04, 5 April 2012. We note that the Charities Commission for England and Wales also maintains a distinction between charitable sporting purposes and purposes to promote the sporting success of elite athletes: see *Consultation: The Advancement of Amateur Sport*, 28 February 2011, at [56].

<sup>18</sup> See discussion at section C.2 below.

(that is not a registered charity). Further, the Applicant's primary activity is operating a branded fitness programme under franchise from the Company, which confers private benefits (discussed further below).

27. We therefore consider that the Applicant is not established for exclusively charitable purposes.

## **C.2. Applicant's purposes confer non-ancillary private benefits**

28. In order to be charitable, a purpose must provide public benefits rather than benefits to private individuals. Any private benefits arising from the Applicant's activities must be ancillary or incidental to the pursuit of valid charitable purposes for the public benefit.<sup>19</sup>

29. In this regard, 'private benefits' include benefits to businesses operating for private profit in a commercial context through promotion of those businesses and provision of support and assistance that will increase the profitability of the businesses.<sup>20</sup>

30. The fact that individual businesses may benefit from the entity's work does not in itself discount the public benefit.<sup>21</sup> Rather, the public benefit test is not met unless the private benefits provided are ancillary or incidental to the pursuit of valid charitable purposes for the public benefit. The test specified in sections 5(3) and (4) of the Act involves an assessment whether the private benefit is more than secondary, subordinate or incidental to an entity's valid charitable purposes.

31. It has been observed that resolution of this question calls for a "situation specific analysis of the relative relationship between public and private benefits".<sup>22</sup> The courts have held that the conferral of some private benefit is acceptable in some cases, including where the private benefit is an

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<sup>19</sup> See *IRC v Oldham Training and Enterprise Council* (1996) 69 TC 231 at 251 (holding that the Council did not qualify for charitable status because its purposes conferred freedom to provide private benefits on individual enterprises); *Re Education New Zealand Trust* HC Wellington CIV-2009-485-2301, 29 June 2010 at [35]–[46] (holding that Trust's promotion of education industry was not exclusively charitable where 30% of the industry comprises education providers operating for profit in a commercial context); *Canterbury Development Corporation v Charities Commission* HC WN CIV 2009-485-2133, 18 March 2010 at [45]–[67] (holding that it was a central purpose of the Corporation to promote individual businesses to make them more profitable); *Queenstown Lakes Community Housing Trust* HC WN CIV 2010-485-1818, 24 June 2011 at [51]–[68] (holding that the Trust's purpose conferred a non-ancillary private benefit (assistance in meeting housing costs) on private individuals).

<sup>20</sup> See for example *Re Education New Zealand Trust* HC Wellington CIV-2009-485-2301, 29 June 2010 and *Canterbury Development Corporation v Charities Commission* HC WN CIV 2009-485-2133, 18 March 2010.

<sup>21</sup> See *Education Fees Protection Society Incorporated v Commissioner of Inland Revenue* [1992] 2 NZLR 115; *Tasmanian Electronic Commerce Centre Pty Ltd v Commissioner of Taxation* [2005] FCA 439 at [38], [56]; *Commissioner of Taxation v The Triton Foundation* [2005] FCA 1319 at [37]. These authorities are considered in *Canterbury Development Corporation v Charities Commission* HC WN CIV 2009-485-2133, 18 March 2010 at [45]–[67]; *Re Education New Zealand Trust* HC Wellington CIV-2009-485-2301, 29 June 2010 at [35]–[46]; *Queenstown Lakes Community Housing Trust* HC WN CIV 2010-485-1818, 24 June 2011 at [51]–[68].

<sup>22</sup> *Re Education New Zealand Trust* HC Wellington CIV-2009-485-2301, 29 June 2010 at [44].

*inevitable* outcome or a by-product of realising a charitable purpose<sup>23</sup> or the private benefit is merely *incidental*.<sup>24</sup>

### **C.2.1 Private benefits to the Company**

32. We consider that the Applicant's activities generate private benefits to the Company. Specifically, the Applicant's primary activity will be to operate the Company's branded fitness programmes under franchise from the Company at a time when the Company is seeking to establish a national franchise chain of its branded fitness programmes. The Applicant has pointed out that it will not initially pay a license fee to the Company. Nevertheless, we consider that the Applicant's activity promotes the branded fitness classes that the Company proposes to license to other businesses as it grows a national franchise chain.<sup>25</sup> In addition, the Applicant's proposal to operate the fitness programme under licence from the Company will confer other pecuniary benefits on the Company including payment to the Company of rental income at a commercial rate of \$33,000 per annum for use of space at 295 Ti Rakau Drive. It is indicated that the Applicant will in future pay the Company for purchase or lease of gym equipment.
33. Further, we consider that the private benefit to the Company flowing from the Applicant's activities is not ancillary to the public benefit conferred by the Applicant's purposes. First, we do not consider that it is *inevitable* that the Company should benefit from the Applicant's pursuit of its stated purposes. The Applicant's purposes could be effectively advanced by means other than operating branded fitness classes under license from the Company.
34. Second, we do not consider that the benefit to the Company is an *incidental* consequence of the Applicant's pursuit of its purposes. On the information provided, the Applicant's activities are closely co-ordinated with the commercial activities of the Company. Evidence of co-ordination between the Applicant and Company includes:
- Two of the Applicant's three trustees are the sole directors and shareholders of the Company.
  - The Company established and operates a health and fitness facility at 295 Ti Rakau Drive, operation of which will be transferred to the Applicant.
  - On the same date the deed establishing the Applicant was executed, the trustees entered into an agreement to lease premises from the Company at commercial rates, conditional on charitable status being approved.
  - The Applicant has informed us that it has determined to operate the Company's branded fitness classes on premises leased from the Company. The Company has facilitated this by agreeing to license the use of the Boxstars brand to the

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<sup>23</sup> See e.g. *Tasmanian Electronic Commerce Centre Pty Ltd v Commissioner of Taxation* [2005] FCA 439 at [56].

<sup>24</sup> See e.g. *Re Tennant* [1996] 2 NZLR 633 at 639 - 640.

<sup>25</sup> Information provided by the Applicant, and see <http://www.boxstarsinternational.com/FRANCHISE.html> [accessed 7 November 2012].



Applicant free of charge and transferring current membership database for the gym at 295 Ti Rakau Drive to the Applicant.

- The Applicant plans to employ the Company's staff and contractors, and the Company has supported the involvement of its staff and contractors in the Applicant's activities by donating staff time until such time as the Applicant has sufficient funds to provide remuneration for these services.
- The Applicant plans to use the equipment sold by the Company and the Company has supported this by providing the equipment free of charge in the initial lease, until such time as the Applicant has sufficient funds to lease or purchase equipment from the Company.

35. Third, we consider that on the information provided by the Applicant, the private benefits to the Company are unlikely to be *qualitatively or quantitatively* ancillary to the public benefit provided by the Applicant's activities. The Applicant has committed to pay commercial rent to the Company, and it is clear that its primary activity will promote the Company's branded classes, thereby making the Company's offer to franchise those classes nationally more marketable. In addition, the arrangement with the Company is conducive to the Company profiting from the Applicant's operations in the future through its role as the landlord, supplier of gym equipment and branded clothing as well as branded fitness classes under the franchise agreement.

36. In our view, the private benefit conferred on the Company by the Applicant's activities is not ancillary and disqualifies the Applicant from charitable status.

### **C.2.2 Private benefits to trustees**

37. Further, we consider that the Applicant's operations confer private benefits on two trustees which are not ancillary. As the directors and shareholders of the Company Michael and Josephine Kinsella benefit from the benefits to the Company outlined above. In addition, the Applicant has indicated that Michael and Josephine will be engaged to provide services to the Applicant for which they will be remunerated as and when the Applicant has sufficient funds.

38. In accordance with the rule of equity, trustees must not profit by their trust and the provision of pecuniary benefits to trustees is only allowed where it is expressly or impliedly provided for in the instrument of trust.<sup>26</sup> In this case, the trust deed establishing the Applicant contains a number of express provisions authorising and limiting the provision of pecuniary benefits to the trustees,<sup>27</sup> including a provision that no trustee will in any way determine or materially influence the nature and amount of any benefits to the trustee (or associate).

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<sup>26</sup> Refer Noel C Kelly, Chris Kelly and Greg Kelly, *Garrow and Kelly Law of Trusts and Trustees* (6<sup>th</sup> Ed, Wellington, LexisNexis NZ Ltd, 2005 at 561.

<sup>27</sup> Clauses 5.2, 13, 14.4 and 17 of the deed executed 1 April 2012.

39. On the information provided by the Applicant, we are not satisfied that Michael and Josephine Kinsella have complied with those express provisions of the trust deed intended to ensure that they do not materially influence the determination of benefits and advantages to themselves personally and as shareholders in the Company. As such, we are not satisfied that the trust is not operating to provide pecuniary benefits to Michael and Josephine Kinsella.
40. While it does not form part of New Zealand legislation, the Board notes that in the United Kingdom strict conditions must be satisfied before payments to trustees or their associates can be made out of the funds of a registered charity.<sup>28</sup> These conditions include requirements that:
- The payments are reasonable;
  - The trustees have decided before entering into the agreement that it would be in the best interests of the charity;
  - The number of trustees being paid should be a minority of the total number of trustees.
41. If such criteria were applicable here, we would not be satisfied on the information provided that they are being met in relation to the benefits conferred on Michael and Josephine Kinsella through the Applicant's activities. We consider that this illustrates that the trust is operating to provide pecuniary benefits to Michael and Josephine Kinsella.

#### **D. Determination**

42. The Board's finding is that the Applicant has failed to meet an essential requirement for registration as a charitable entity in that it is not a trust of a kind in relation to which an amount of income is derived by the trustees in trust for charitable purposes, as required by section 13(1)(a) of the Act. Specifically, the Applicant's purposes are not exclusively charitable *and* the Applicant's activities confer private pecuniary benefits that are not ancillary to the pursuit of valid charitable purposes.

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

Signed for and on behalf of the Board

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Roger Holmes Miller

19<sup>th</sup> November 2012  
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Date

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The conditions are set out at section 185 of the *Charities Act 2011* (UK).