

Deregistration decision: Freedomway Foundation Trust Aotearoa (CC37957)

The facts

1. Freedomway Foundation Trust Aotearoa ("the Trust") is a Trust incorporated under the Charitable Trusts Act 1957. The unsigned trust deed submitted to the Charities Commission ("the Commission") states that the deed was made on 8 January 2002. However, the signed deed held by the Companies Office states that that deed was made on 10 April 2002. The Trust was incorporated under the Charitable Trusts Act 1957 on 11 April 2002. The Commission received a complete application from the Trust on 26 June 2008. The Commission registered the Trust as a charitable entity under the Charities Act 2005 ("the Act") on 23 February 2009, with the date of registration backdated to 30 June 2008.
2. Clause 2 of the Rules supplied to the Commission sets out the Trust's purpose:

"The purpose of the Trust will be to: Enhance the individual's and their Families, for spiritual, moral, social, educational purposes.

In particular the Trust will:

 - (i) *Development of materials that increase self-awareness and self esteem i.e. books, multimedia, music, cd's, videos etc.*
 - (ii) *Development of workshops and seminars to increase public awareness as well as self-awareness.*
 - (iii) *Soliciting of funds through fund-raisers and making applications for grants and other donations and gifts*
 - (iv) *Incorporating cultural awareness, targeting specific diverse groups with suicide rates and developing coping strategies, focussing on pride in one's origin such as cultural legends, dance and music. This will eventually encompass all cultures.*
 - (v) *Emphasis will also be given to development of strategies and materials to increase self-esteem and self-awareness of the physically and mentally challenged."*
3. Clause 2 of the Rules held by the Companies Office includes all the above, but adds the extra clause 2(VI): *"Development of wellness centers to duplicate throughout New Zealand."*
4. Clause 3 of both sets of Rules states: *"The activities of the Trust will be limited to Aotearoa/New Zealand"*.

5. Clause 10.2 of both sets of Rules states:

"10.2 At the first meeting of the Board in each financial year, the Board will decide by resolution the following:

10.2.1 How money will be received by the Trust;

10.2.2 Who will be entitled to produce receipts;

10.2.3 What bank accounts will operate for the ensuing year, including the purposes of and access to accounts;

10.2.4 Who will be allowed to authorise the production of cheques and the names of cheque signatories; and

10.2.5 The policy concerning the investment of money by the Trust, including what type of investment will be permitted."

6. Clauses 10.3 and 10.4 of both sets of the Trust's Rules require true and fair accounts to be kept, and for those accounts to be audited by an accountant and be made available to the public:

10.3 The Treasurer will ensure that true and fair accounts are kept of all money received and expended by the Trust.

10.4 The Board will, as soon as practicable after the end of the financial year of the Trust, arrange for the accounts of the Trust for the financial year to be audited by an accountant appointed for that purpose. The audited accounts will be made available to the public.

7. The Officers listed with the Trust's application were Aaron Wineera Elkington (holding the position of Trustee) and Phyllis Millward Elkington (also holding the position of Trustee). Aaron Wineera Elkington's date of appointment as Trustee is listed on his Officer Certification Form as 8 January 2002. Phyllis Millward Elkington's date of appointment as Trustee on her Officer Certification Form is also listed as 8 January 2002. The Trust made an Officer Change as part of its Annual Return for the year ending 31 March 2009, adding Jonathan Richard Clary to the position of IT/Security/Vice Chairman. Mr Clary's Officer Certification Form (completed online) lists his date of appointment as 24 February 2010.

8. Based on the Trust's Annual Return for the year ending 31 March 2009 (received by the Commission on 26 February 2010), the Commission made a decision to review the Trust's eligibility for registration. This was because the Annual Return financial information raised concerns that the Trust was directing funds towards personal expenses.

Information submitted by the Trust

9. The Trust's Annual Return submission for the year ending 31 March 2009 consisted of bank account statements for an account under the Trust's name for the period 28 March 2008 – 30 September 2008 and 26 June 2009 – 27 January 2010.

10. The Trust also submitted a portfolio of documents that included account statements for hire purchases for 15 November 2007 – 2 February 2010 from Forlong Furnishings Limited. The account statements are under the name 'Mr AW Elkington'. Relevant to the Commission's investigation were hire purchase documents annotated with hand written references to 'business' expenses relating to the hire of various appliances and an "Lcd Ctv". Some of the documents did not identify the hire purchase provider, however type-faces from various documents lead the Commission to believe that these hire purchase agreements were from the same retailer.
11. The Trust did not present accounts for the period October 2008 to April 2009. Handwritten documents from the Trust purport that there was no financial activity by the Trust during this period.

Summary of the correspondence between the Trust and the Commission

12. On 6 May 2010, the Commission sent a letter to the Trust requesting information under section 50 of the Charities Act regarding the Trust's financial accounts, sources of income, bank accounts, and the purchases of commercial products as listed in the financial statements for the year ending 31 March 2009.
13. On 9 June 2010, Jonathan Clary, on behalf of the Trust, replied to the Commission via email. He advised that he had recently been appointed Chairman of the Trust (as noted above, his Officer Certification Form listed his position as IT/Security/Vice Chairman).
14. Mr Clary's email stated that the Elkingtons were addressing the questions raised by the Commission and sought an extension to provide the requested information. In his email he referred to a statement from the Elkingtons as being attached to his email. No statement was attached.
15. The Commission granted the extension. Mr Clary replied attaching a document purported to be written by the Elkingtons.
16. The statement set out that the Trust was in a research and development phase, that the Trust had not sought funds from any person or agency, and that it was working with a number of parties to develop a new model to change the outcomes of suicide.
17. The statement was lengthy and was signed by the Elkingtons.
18. On 12 July 2010, Jonathan Clary advised the Commission by email that he had been unable to bring together the financial information requested by the Commission. His email offered the Commission direct access to the Trust's online electronic banking facility and enclosed the username, account information and password. He concluded by saying that he would still endeavour to draw together the financial information requested by the Commission.

19. The Commission responded to Mr Clary advising that the Trust should not be passing out security information relating to its banking facilities, and to have the account passwords changed. The Commission reiterated its request for the financial information.
20. On 26 July 2010, Mr Clary emailed the Commission advising that the Trust had attempted to supply the information required, to the best of its abilities. However, the Trust could not provide any further financial information because of the proposed bank charges – for supplying the historical information – which the charity could not afford.
21. Mr Clary advised that the only income of the Trust had been the sickness benefits and pension received by the Elkingtons. Mr Clary attached a number of documents including archived bank statements in the personal names of Aaron and Phyllis Elkington. The bank account number is different to the account particulars submitted in its Annual Return of 31 March 2009. None of the statements showed incoming or outgoing transactions.
22. Mr Clary's email noted "*...the charity has always been only Phyllis and Aaron, they have lived and worked as the charity itself. They ARE the Charity and it IS them*". Mr Clary opined, on that basis, that purchases of food, payments for the Elkingtons' medical expenses, and the purchase of the LCD television were reasonable as these expenses advanced the Trust's charitable purposes.
23. Mr Clary's email attached documents that included five testimonials from people dated from 2002 to 2004 (one undated) purporting to show the benefits of the Elkingtons' counselling services, four self-assessment surveys from two individuals also purporting to show the benefits of the Elkingtons' counselling services, and two documents providing detail on the services provided in the Trust's counselling programmes.
24. Mr Clary's email of 26 July 2010 attached a letter from the Elkingtons (similar to their letter referred to and summarised in paragraph 16 above).
25. The letter includes the Elkingtons' admission of a lack of knowledge of trust operations or how to run a trust. They comment that they assumed because they were not using public monies that it was acceptable to run the Trust in whatever way they saw fit. The letter also includes stories of people the Trust had worked with. The letter concludes by explaining the Elkingtons' trips to the United States and advising that they would forward itineraries to the Commission to evidence their explanations.
26. The Commission has not yet received the Elkingtons' United States travel itineraries.
27. On 30 July 2010, the Commission received further documents from the trust including Bank of New Zealand transaction detail statements for 'Freedomsway Foundation Trust Aotearoa', listing two manual withdrawals (\$100.00 on 28 October 2009, and \$400.00 on 29 October 2009).

28. These withdrawals match withdrawals shown on those dates in the bank statements for the period 26 June 2009 – 27 January 2010. This leads to the conclusion that the bank statements for the period 26 June 2009 – 27 January 2010 are from the same account as those from 31 March 2008 – 30 September 2008. Additionally, the transaction details on the manual withdrawals list as 'Other party account' the account from which the archived bank statements in the personal names of Aaron and Phyllis Elkington are drawn.
29. Following the investigation, on 16 December 2010, the Commission advised the Trust of its intention to remove the Trust from the Charities Register on the basis that: the Trust had engaged in serious wrongdoing; that the trustees had engaged in serious wrongdoing in connection with the Trust; and that the Trust was not, or was no longer, qualified for registration as a charitable entity.
30. The Commission has not received any response to the Notice.
31. During the investigation, a separate process was occurring in respect of the Trust's overdue Annual Return. The Annual Return financial statements were received by the Commission on 4 February 2011, 11 months after the Annual Return due date of 31 March 2010.

The issues

Serious wrongdoing

32. The Commission must consider whether the Trust, or any person connected to the Trust, has engaged in serious wrongdoing in terms of section 32(1)(e) of the Act. In this case, the key issue for consideration is whether there have been activities amounting to serious wrongdoing as defined in section 4(1) of the Act.

Order under s 31(4) of the Act relating to an entity removed from the Charities Register

33. The Commission must also consider, in the event that the Trust is removed from the Charities Register, whether to make an order under section 31(4) of the Act:
 - that an application for the re-registration of the Trust as a charitable entity must not be made before the expiry of a specified period; and/or
 - disqualifying any officer of the Trust from being an officer of a charitable entity for a specified period that does not exceed 5 years.

Relevant law

Serious wrongdoing

34. Section 4(1) of the Act defines serious wrongdoing, in relation to an entity, as including any serious wrongdoing of the following types:
- (b) *an act, omission, or course of conduct that constitutes a serious risk to the public interest in the orderly and appropriate conduct of the affairs of the entity*
 - (d) *an act, omission, or course of conduct by a person that is oppressive, improperly discriminatory, or grossly negligent, or that constitutes gross mismanagement.*

Removing an entity from the Charities Register

35. Section 32(1)(e) of the Act provides that the Commission may remove an entity from the Register if the entity has engaged in serious wrongdoing or any person has engaged in serious wrongdoing in connection with the entity.

Order under section 31(4) of the Act

36. Section 31(4) of the Act provides that the Commission may, where it has removed an entity from the Charities Register, make either or both the following orders:
- a) an order that an application for the re-registration of the Trust as a charitable entity must not be made before the expiry of a specified period: and
 - b) an order disqualifying an officer of the Trust from being an officer of a charitable entity for a specified period that does not exceed 5 years.

Duties of Commission if objection received

37. Under section 35(1)(a) of the Charities Act, if an objection to the removal of an entity from the Register is received, the Commission must not proceed with the removal 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. In this case, the Trust has not objected to the Notice of Intention to Remove sent on 16 December 2010. Therefore, the Commission is not required to carry out duties under section 35(1)(a) of the Act.

Analysis

38. In determining whether the Trust, or any person in connection with the Trust, engaged in serious wrongdoing the Commission has considered: the Trust's rules and Annual Return financial information for the year ending 31 March 2009; documents submitted by the Trust to the Commission during the investigation; and relevant case law.

Serious wrongdoing

Mixing of Trust funds with Trustees' personal funds

39. Established law holds that it is a breach of a trustee's duties for a trustee to mix trust funds with his or her own.¹
40. Clause 10.2 of both sets of the Trust's rules states:
- "10.2 At the first meeting of the Board in each financial year, the Board will decide by resolution the following:
- 10.2.1 How money will be received by the Trust;
- 10.2.2 Who will be entitled to produce receipts;
- 10.2.3 What bank accounts will operate for the ensuing year, including the purposes of and access to accounts;
- 10.2.4 Who will be allowed to authorise the production of cheques and the names of cheque signatories; and
- 10.2.5 The policy concerning the investment of money by the Trust, including what type of investment will be permitted."
41. The Trust's rules require that the trustees identify what bank accounts it operates, who has access to these accounts and who are the signatories. As clause 10.2.3 refers to bank accounts operated by the Trust, it is implicit that the Trust will operate its own bank accounts and will not handle funds through any personal accounts.
42. In its letter of 6 May 2010 the Commission asked the Trust for:
- Details of all bank accounts that the Trust operated i.e. name of account, account number, name of bank and type of account.
 - Details of all signatories to the above bank accounts.
 - Copies of bank statements for all above banks, for the twelve-month period ending 31 March 2006, 31 March 2007, 31 March 2008, 31 March 2009 and 31 March 2010.
43. The Trust has not provided details of all signatories to its bank accounts and it has not provided the required bank statements.
44. In a letter from Aaron and Phyllis Elkington received on 26 July 2010 the Trustees stated:
- "In response to your inquiry concerning our banking details and a five year disclosure of all activities in both the trust and our personal account. We have tried to download our personal account information from on line banking but were only able to access the last month of this information."*

¹ *Lupton v White* (1808) 15 Ves 432 and *Lunham v Blundell* (1857) 27 LJ Ch 179.

45. Evidence of the mixing of Trust funds and the Elkingtons' personal funds across both Trust and personal bank accounts can be seen in the documents submitted to the Commission as part of the Annual Return for the year ending 31 March 2009 and in response to the Commission's request for the Trust's bank account information. The Trust submitted statements from two BNZ bank accounts – one under the Trust's name, the other under the name of "Elkington, Aaron Wineera and Ph".
46. In its letter of 6 May 2010, the Commission asked the Trust for information as to its sources of income. The Trust responded briefly, indicating income from pension, sickness, and invalid beneficiary payments. The Trust has not submitted any information regarding the frequency or amount of these income payments.
47. Given the information provided by the Trust and the Elkingtons, the Commission reasonably concludes that funds, purportedly for Trust programmes, are likely to have been mixed with the Elkingtons' personal funds.
48. The mixing of Trust funds with trustees' personal funds is a breach of trustees' general obligations and is a failure by the Trustees to comply with their trust deed.

Trustees' obligation to keep true and fair accounts

49. Trustees have a general duty to keep and render accounts and provide information². In *Re Apatu*,³ the court confirmed that trustees must keep financial statements, accounts relating to the distribution of the trust, and details of assets and liabilities.
50. In its letter to the Trust dated 6 May 2010, the Commission requested information regarding the Trust's financial accounts, sources of income, bank accounts and the purchases of commercial products listed in the bank statements provided as part of the financial statements for the year ending 31 March 2009.
51. Specifically, the Commission requested a full set of accounts for the Trust (consisting of a Statement of Income and Expenditure and Balance Sheet) for the years ending 31 March 2006 – 31 March 2010 and:
 - Details of all bank accounts that the Trust operated i.e. name of account, account number, name of bank and type of account,
 - Details of all signatories to the above bank accounts,
 - Copies of bank statements for all above banks, for the twelve-month period ending 31 March 2006, 31 March 2007, 31 March 2008, 31 March 2009 and 31 March 2010.

² *Re Apatu*, Maori Appellate Court, Takitimu District, 19 March 2010 2009/14 para 16 citing Garrow & Kelly Law of Trusts and Trustees, 2005 (sixth edition).

³ *ibid.*, para 25 citing Garrow & Kelly Law of Trusts and Trustees, 2005 (sixth edition).

52. The financial information submitted by the Trust to the Commission consists of:
- various documents making up the Trust's Annual Return for the year ending 31 March 2009,
 - the "archive statements" for the period 4 February 2005 – 21 December 2009 attached to the first email of 26 July 2010 (and received via post on 30 July 2010),
 - the manual cash withdrawal transaction details statements for withdrawals on 28 October 2009 and 29 October 2009 (received via post on 30 July 2010).
53. In *Kemp v Burn*⁴ the Court found:
- "In a case like the present, where an account is demanded of trustees and executors of a will by a residuary legatee, there seems to me no doubt what the duty of the executors is. Their duty is to keep proper accounts, and to have them always ready when called upon to render them."*
54. In *Freeman v Fairlie*⁵ the Lord Chancellor found:
- "The Court has every favourable leaning towards Executors and Trustees; keeping their accounts regular, and being at all times willing to inform the court of the situation of their affairs, and the difficulties they have to meet with and encounter."*
55. Clauses 10.3 and 10.4 of the Trust's Rules require true and fair accounts to be kept, and for those accounts to be audited by an accountant and be made available to the public:
- 10.3 *The Treasurer will ensure that true and fair accounts are kept of all money received and expended by the Trust.*
- 10.4 *The Board will, as soon as practicable after the end of the financial year of the Trust, arrange for the accounts of the Trust for the financial year to be audited by an accountant appointed for that purpose. The audited accounts will be made available to the public.*
56. The Trust's financial information considered by the Commission during the investigation falls well short of qualifying as true and fair accounts. This information did not enable the Commission to build a complete and accurate picture of the Trust's income, expenditure, assets and liabilities.
57. The Commission does not consider that the Trust has maintained its financial information adequately or in accordance with any generally accepted accounting practice. The Trust has therefore failed to keep true and fair accounts.
58. By failing to provide any true and fair accounts, the Trustees have failed to comply with their duties under both trust law and the Trust's own trust deed.

⁴ (1863) 4 Giff 348, 349.

⁵ (1812) 3 Mer 29, 40, 42.

Private benefit to trustees

59. Established case law holds that trustees must not make a profit for themselves out of the trust property or out of the office of trustee.⁶ In *Garrow & Kelly* it is stated:

*"In accordance with the rule of equity that trustees must not profit from the trust, trustees are not, as a general rule, entitled to remunerations for their work for the trust; they are entitled to no compensation either for their personal trouble or loss of time. Equity 'looks upon trusts as honorary and a burden upon the honour and the conscience of the trustee'...The reason underlying the rule is that the interest and duty of the trustee must not be put into conflict"*⁷

60. Further, clause 8.1 of the Trust's deed provides that any income, benefit or advantage will be applied to the Trust's charitable purposes (thereby establishing a clause that seeks to prevent private pecuniary profit).
61. The bank statements submitted by the Trust show a substantial number of payments for, what appear to be, personal items including purchases at dairies, cafes, restaurants, cinemas, takeaways, SKY television and supermarkets. For example:

\$25.00	Dinsdale Dairy, Hamilton	4 April 2008
\$30.40	Rialto Cinemas, Hamilton	7 April 2008
\$34.80	Bakehouse Café, Hamilton	11 April 2008
\$78.53	Gull Norton Road, Hamilton	14 April 2008
\$2,029.00	Flight Centre, Hamilton	21 April 2008
\$376.00	Flight Centre, Hamilton	22 April 2008
\$90.00	Shell Roscommon Road, Auckland	28 April 2008
\$9.00	Westside Takeaways, Hamilton	5 May 2008
\$46.21	Pak N Save, Hamilton	8 May 2008
\$134.27	NZ dollars to \$101.00 US dollars	14 May 2008
\$11.90	KFC Huntly	19 May 2008
\$22.80	Bakehouse Café, Hamilton	26 June 2008
\$11.90	KFC Frankton	27 June 2008
\$20.00	Dinsdale Dairy, Hamilton	30 June 2008
\$34.10	River Road Dairy, Hamilton	3 July 2008
\$18.80	Bakehouse Café, Hamilton	25 July 2008
\$22.20	Export Meat Warehouse, Hamilton	28 July 2008
\$70.62	Pak N Save, Hamilton	6 August 2008
\$44.39	Export Meat Warehouse, Hamilton	11 August 2008
\$35.60	Seafood Grotto, Frankton	26 August 2008
\$18.00	DJ Chinese Takeaway, Hamilton	2 September 2008
\$50.00	Gull Norton Road, Hamilton	12 September 2008
\$60.00	Margaret's Hair Design, Hamilton	26 September 2008
\$26.00	Shell Dinsdale	26 June 2009
\$16.00	Vege Heaven, Dinsdale	9 July 2009
\$22.00	Seafood Grotto, Frankton	27 July 2009
\$145.00	Margaret's Hair Design	28 July 2009
\$20.00	Shell Dinsdale	7 August 2009

⁶ *Rochefoucauld v Boustead* [1898] 1 Ch 550 (CA); *Eden Refuge Trust & Ors v Hohepa & Anor* (2010) 3 NZTR 20-009.

⁷ *Garrow & Kelly Law of Trusts and Trustees*, 2005 (sixth edition) p560-561.

\$12.22	Woolworths Hamilton	7 August 2009
\$10.00	Hong Kong Takeaways	10 August 2009
\$30.00	Shell Dinsdale	18 September 2009
\$7.90	St. Pierre's Te Rapa	21 September 2009
\$505.00	Flight Centre, Hamilton	30 September 2009
\$100.00	SKY TV, Auckland	7 October 2009
\$100.00	SKY TV, Auckland	7 October 2009
\$49.95	The TV Shop, Auckland	14 October 2009
\$20.70	Dunkin Donuts, Auckland	30 October 2009
\$47.40	Dominos Pizza, Hamilton	6 November 2009
\$57.50	Skycity Cinemas, Hamilton	18 November 2009
\$32.30	Burger King, Hamilton	18 November 2009
\$719.99	Woolrest Biomag	3 December 2009
\$99.90	The TV Shop, Auckland	7 December 2009
\$240.45	SKY TV, Auckland	14 December 2009
\$99.90	The TV Shop, Auckland	7 January 2010
\$11.80	DJ Chinese Takeaway	18 January 2010
\$229.00	David Watt Auto, Hamilton	22 January 2010

62. Aaron and Phyllis Elkington's letter of 12 July 2010 states:

'My husband and I will be the first to admit that we were never given a manual on how to run a charitable trust. We were under the assumption that since we were not using public funds, we were free to run the trust in whatever way we felt necessary. Because our objective is to work with people and their immediate needs we ran the trust more like any entity that provides food, entertainment, and support to shift the depressed state we find people in.' [Emphasis added]

63. Jonathan Clary's first email of 26 July 2010 states:

'As the charity has always been only Phyllis and Aaron, they have lived and worked as the charity itself. They ARE the Charity and it IS them. So it would seem reasonable to show that any and all purchases in one way or another from the basics of food, to the LCD TV used for Presentations and Training are advancing the charitable purpose of the trust.' [Emphasis added]

64. Aaron and Phyllis Elkington's letter of 12 July 2010 states:

"I had hoped to set up a branch from Freedoms Way International, but was not able to do that. So we went through the process of setting up the Trust that we have now. We have been in the research and development stage of this program until recently... We have never used public money to meet our purposes. We have gone to the United States several times which accounts for the bulk of our spending. We will attach a copy of our itineraries." [Emphasis added]

65. The Trustees have not provided any explanations or evidence to the Commission that payments, recorded in various bank statements and papers submitted, occurred for goods or services related to the Trust's programmes.

66. Other than the statement referred to in paragraph 62 above, no evidence has been presented by the Trust that links any Trust expenditure to goods and services provided by the Trust in support of people in a depressed state.
67. The Commission cannot be satisfied that the expenditure, shown in the financial information supplied by the Trust, has been incurred in accordance with the Trust's stated purposes.
68. In the absence of a reasonable explanation and detailed information explaining the Trust's expenditure from the Trustees, the Commission considers that Aaron and Phyllis Elkington are receiving a private benefit from the Trust (of which they are also trustees).
69. Providing such a private benefit to Trustees Aaron and Phyllis Elkington, puts the Trust in breach of its duties in both trust law and its own trust deed.

Trustees' obligation to comply with their trust deed

70. Established law has determined that the first duty of a trustee is to become thoroughly acquainted with the terms of the trust, which they must carry out. The second duty is to adhere to the terms of the trust. In *Garrow & Kelly* it is stated:

*'The....duty of a trustee is to adhere to the terms of the trust in all things, great and small, important and seemingly unimportant. This is his very plainest duty.'*⁸

71. The trustees do not appear to have become acquainted with, or adhered to the terms of the trust. Examples of this are:

- Failing to keep true and fair, audited accounts as required by clause 10.3 and 10.4 of the Trust's Rules.
- Lacking sufficient knowledge to develop and implement basic systems to avoid the possibility of private benefits flowing to trustees, therefore breaching the strict prohibition against private benefit in clause 8.1 of the Trust's Rules.
- Failing to keep proper bank accounts, contravening clause 10.2 of the Trust's Rules.
- The statement in Aaron and Phyllis Elkington's letter of 12 July 2010 that:

"My husband and I will be the first to admit that we were never given a manual on how to run a charitable trust. We were under the assumption that since we were not using public funds, we were free to run the trust in whatever way we felt necessary."

⁸ *Garrow & Kelly Law of Trust and Trustees, (2005) sixth edition, p525.*

72. The Commission is not satisfied that the trust has complied with specific terms of the trust deed therefore breaching the trustee's general obligation to do so.

Conclusion on issues of serious wrongdoing

73. The Commission considers that the breaches of trustees' obligations set out above constitute a serious risk to the public interest in the orderly and appropriate conduct of the affairs of the Trust, and therefore constitute serious wrongdoing within the definition in section 4(1) of the Act.
74. The Commission considers that these breaches are grossly negligent and constitute gross mismanagement, and therefore constitute serious wrongdoing within the definition in section 4(1) of the Act.
75. Therefore the Commission considers that the Trust has engaged in serious wrongdoing and that its trustees have engaged in serious wrongdoing in connection with the Trust, as defined in section 32(1)(e) of the Act.
76. As the ground for removal from the Charities Register in section 32(1)(e) of the Act has been satisfied, the Commission is able to proceed with removal of the Trust from the Charities Register.

Order under section 31(4) of the Act relating to an entity removed from the Register

77. Section 31(4) of the Act provides that the Commission may, if it has removed an entity from the Charities Register, make an order preventing an application for re-registration by the entity for a specified period, and make an order disqualifying an officer of the entity from being an officer of a charitable entity for a specified period of up to five years.
78. The Commission has made orders for disqualification on one previous occasion in the case of the Disabled Children's Trust and Hope for Children Charitable Foundation Board. A personal order against a former officer of both entities – David Charles Williamson – was also made. These orders are contained within Decision No: D2010 – 7, dated 11 June 2010 and Decision No: D2010 – 8, dated 11 June 2010.
79. In those cases, orders disqualifying both charities and Mr Williamson for a period of three years were made.
80. Similar to those cases, the Commission considers that there have been significant failures by the Trust and its Officers Aaron Wineera Elkington, Phyllis Millward Elkington and Jonathan Richard Clary that justify orders for disqualification.

81. The grounds for the Commission's conclusions in relation to the Trust, Aaron Wineera Elkington and Phyllis Millward Elkington, are:
- Breach of trustees' obligation to keep true and fair accounts.
 - Refusing to, or inability to, supply requested financial information for the bank accounts operated by the Trust. This failure to supply the information prevents the Commission from determining the full picture of Trust's activities or the extent of any private benefit that may have accrued to Aaron Wineera Elkington and Phyllis Millward Elkington.
 - Failing to supply complete bank statements for all bank accounts used by the Trust, and the failure to, specifically, identify sources of income in Trust bank statements, makes it impossible to determine the exact nature of the Trust's operations, and the extent to which it may have raised funds from the public or from the provision of services.
 - Failing to understand the relationship between trustees and beneficiaries, and the distinction between trust expenses and personal expenses.
 - Mixing Trust's funds and personal funds across two separate accounts – the Trust's own account and the personal account of Aaron Wineera Elkington and Phyllis Millward Elkington (which demonstrates a lack of distinction between Trust and personal funds and also makes it impossible to determine the exact nature of the Trust's operations).
 - Significant and fundamental failures as Officers in respect of duties and obligations at Trust law and non-compliance with the Trust's Rules.
 - A significant lack of understanding of the duties and responsibilities of Officers of trusts (emphasised through the Elkingtons' letter of 30 July 2010 in which it was stated, "*We are now ready to bring on board a team of professionals including a lawyer and an accountant to run the trust properly*".) The Commission can only reasonably conclude from this comment that the Elkingtons lack the skills and experience to run the Trust properly. Moreover, there is no evidence that the Elkingtons have subsequently engaged these professionals to run the Trust.
82. Although the Trust's financial transactions - suspected as the Elkingtons' personal expenses in the absence of any reasonable explanation – submitted as part of the Annual Return for the year ending 31 March 2009 were incurred over an extensive period, none of these transactions occurred after Jonathan Richard Clary was appointed as an Officer on 24 February 2010.
83. While the Commission considers that Jonathan Richard Clary has not committed serious wrongdoing to the same extent as the Elkingtons, there is evidence of grossly incompetent and negligent conduct or omission by him in his performance as the Trust's IT/Security/Vice Chairman.

84. The grounds for the Commission's conclusions in relation to Jonathan Richard Clary are:
- Demonstrating the same lack of understanding as the Elkingtons regarding how to operate a Trust, the relationship between trustees and beneficiaries, and the distinction between trust expenses and personal expenses.
 - Failing to supply requested information to the Commission.
 - Mr Clary stated, in his email of 9 June 2010, "*We have been working with a financial advisor to help prepare the information but it has proved difficult*". There may be valid reasons for Mr Clary's statement above, but none have been communicated to the Commission. Additionally, there is no evidence in any subsequent correspondence from him that the Trust has in fact employed the services of a financial advisor.

Charities Commission's determination

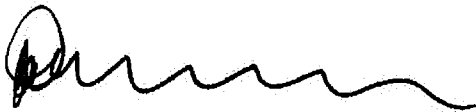
85. The Commission has concluded that there has been serious wrongdoing by the Trust, within the definition of serious wrongdoing included in section 4(1) of the Act. The ground for removal from the Charities Register in section 32(1)(e) of the Act has therefore been satisfied.
86. The decision of the Commission is therefore to remove Freedomway Foundation Trust Aotearoa from the Register, pursuant to section 31 of the Act, with effect from **25 May 2011**.
87. The Commission proposes, in accordance with section 31(4)(a) of the Act, that an order be made that an application for the re-registration of the Trust as a charitable entity must not be made before the expiry of three years after the date of removal. This decision is made on grounds of serious wrongdoing and breaches of trustees' duties and legal obligations.
88. The Commission proposes, in accordance with section 31(4)(b) of the Act, that an order be made that Aaron Wineera Elkington and Phyllis Millward Elkington be disqualified from being officers of a charitable entity for a period of three years after the date of removal. This decision is made on grounds of serious wrongdoing and breaches of trustees' duties and legal obligations.
89. Whilst the disqualification period for Mr Williamson and the two related trusts was for a period of three years (Mr Williamson's conduct in this regard has resulted in criminal deception offences), the Commission considers the nature and extent of conduct, or omission, by the Elkingtons, in its totality, justifies a similar three year period of disqualification.

90. The Commission proposes, in accordance with section 31(4)(b) of the Act, that an order be made that Jonathan Richard Clary be disqualified from being an officer of a charitable entity for a period of six months after the date of removal. This decision is made on the grounds of breaches of trustees' duties and legal obligations.

For the above reasons, the Commission determines to deregister the Trust as a charitable entity by removing the Trust from the Charities Register, and proposes to issue orders that:

- an application for the re-registration of the **Trust** as a charitable entity must not be made before the expiry of three years from the date of removal;
- **Aaron Wineera Elkington** and **Phyllis Millward Elkington** be disqualified from being officers of a charitable entity for a period of three years from the date of removal;
- **Jonathan Richard Clary** be disqualified from being an officer of a charitable entity for a period of six months from the date of removal.

Signed for and on behalf of the Charities Commission



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Trevor Garrett
Chief Executive

25 May 2011

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Date