IN THE COURT OF APPEAL OF NEW ZEALAND

CA164/04

	BETWEEN	COMMISSIONER OF INLAND REVENUE Appellant
	AND	WELLINGTON REGIONAL STADIUM TRUST Respondent

Hearing: 28 June 2005

Court: Glazebrook, O'Regan and Robertson JJ

Counsel: A C Beck and K Whitiskie for Appellant
L McKay and S M O'Sullivan for Respondent

Judgment: 6 September 2005

JUDGMENT OF THE COURT

A The appeal is dismissed.

B Leave is given to the respondent to cross-appeal out of time and we allow the cross-appeal. As a consequence, we set aside the declaration made by MacKenzie J and replace it with the following declaration:

> **Sections 5 and 6, Schedules 8 and 9 and Part 5 of the Local Government Act 2002 do not apply to the Wellington Regional Stadium Trust.**

C Costs of $6,000 plus usual disbursements are awarded to the respondent. We certify for second counsel.

REASONS

(Given by Glazebrook J)

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Introduction

[1] The issue in this appeal is whether the Wellington Regional Stadium Trust (the Trust) is a council-controlled trading organisation (CCTO), as defined in s 6 of the Local Government Act 2002 (LGA 2002). There are a number of consequences if the Trust is a CCTO, including liability for income tax and the requirement that any funding provided by the Wellington City Council (WCC) be on arms length terms – see s 63 of the LGA 2002.

[2] By judgment of 12 July 2004, now reported at [2005] 1 NZLR 250, MacKenzie J made a declaration, pursuant to the Declaratory Judgments Act 1908, that the Trust is not a CCTO as that term is defined in s 6 of the LGA 2002. The Commissioner of Inland Revenue (the Commissioner) appeals against that decision.

[3] It became clear during the course of the hearing that the Trust, on the other hand, seeks the wider declaration set out in its third amended statement of claim to the effect that ss 5 and 6, Schedules 8 and 9 and Part 5 of the LGA 2002 do not apply to the Trust. This is on the basis that the provisions of the Wellington Regional Council (Stadium Empowering) Act 1996 (the Empowering Act) mean that the LGA 2002 provisions do not apply to the Trust. We grant leave to the Trust to cross appeal out of time on this point so that the Trust may seek this wider declaration. There is no prejudice to the Commissioner, as it was always clear that the Trust was seeking to support MacKenzie J's decision on the basis of the Empowering Act provisions.

The factual background

[4] In August 1993 the Wellington Regional Council (WRC) arranged a meeting to discuss the need for a new sports stadium in the Wellington region. Various preliminary studies were undertaken after that meeting and, in September 1994, the Wellington Regional Stadium Trust Steering Group was established at the initiative of WCC. In November 1995 the Wellington Regional Stadium Development Trust was established. The Development Trust obtained a commitment for funding from WCC. In August 1995 WRC also agreed to provide funding, subject to the passage of special legislation to authorise that funding and to the project being appropriately managed.

[5] Special legislation was promoted leading to the Empowering Act being passed on 2 September 1996. This Act enabled WRC to lend up to $25 million on such terms and conditions as WRC thought fit to a trust to be established with WCC. It also provided that the trust was to be registered under the Charitable Trusts Act 1957 and for various other matters relating to the content of the trust deed, including provision that it had to contain such of the provisions in ss 225F to 225J of the Local Government Act 1974 (LGA 1974) relating to community trusts as are appropriate and relevant to the purpose of the trust. The relevant provisions of the Empowering Act are set out in Appendix 1 at [88] - [90] and the provisions of the LGA 1974 relating to community trusts are set out in Appendix 4 at [102] - [103].

[6] The Trust was established pursuant to a Trust Deed dated 19 November 1997 (see Appendix 2 at [92] - [95]) and was registered under the Charitable Trusts Act 1957 in December 1997. Funding of $40 million (out of a total of $131 million) was provided to the Trust to fund the construction of the Stadium by WCC (as to $15 million) and WRC (as to $25 million) by way of interest free, subordinated limited-recourse loans (see Appendix 3 for the relevant provisions of the Funding Deed at [96] - [98]). A loan of $33 million was also made to the Trust on commercial terms by the ANZ Bank. The remainder of the funding was provided from the sale of corporate boxes, membership, naming rights, signage and sponsorship and grants from the Lotteries Board and the Community Trust of Wellington.

[7] Although the stadium has generated an operating surplus each year, this has not reached the $2 million per annum necessary to service the interest and principal requirements of the ANZ loan. The evidence was that the stadium is not projected to reach the $2 million operating surplus in the next three years and that, if it was required to pay interest on the funding from WCC and WRC, it would be insolvent.

[8] This litigation arose because the Commissioner, in January 2002, informed the Trust that its charitable status (which had been confirmed by the Commissioner in May 1998) had ceased on 31 March 1999 as a result of changes to the LGA 1974 and to the Income Tax Act 1994 (the ITA 1994). The Trust issued these proceedings to clarify its status.

The legislative background

[9] Legislative provision for the separate incorporation of trading entities operated by local authorities was first introduced by Part 34A of the LGA 1974, which came into force on 1 November 1989, through the introduction of the concept of a local authority trading enterprise (LATE), as defined in s 594B of the LGA 1974. The underlying policy intention was encapsulated in s 37K(e) of the LGA 1974 which stated that one of the purposes of local government in New Zealand was to provide for the operation of trading undertakings of local authorities on a competitively neutral basis. On an ongoing basis, the LATE

provisions were intended to provide a framework for the transfer of trading or commercial activities carried on by local authorities out of direct local authority ownership and into separate entities owned by one or more local authorities. The LATE provisions were replaced with the concepts of CCOs and CCTOs when the LGA 2002 came into force on 1 July 2003.

[10] To be a LATE under the 1989 amendments to the LGA 1974, an entity had to be an organisation controlled by a council which operated a trading undertaking "with the intention or purpose of making a profit" – see s 594B(1)(a)(iii). This definition was amended by the Income Tax Amendment Act (No 2) 1992 to include as a LATE, in addition to the above, "[a]ny other company or organisation (being an organisation through which a trading undertaking is operated) which a local authority or local authorities, directly or indirectly, have control of by any means whatsoever" (see s 594B(1)(a)(iv)).

[11] At the same time as the LATE provisions were introduced in 1989, the Income Tax Act 1976 (ITA 1976) was amended by the introduction of s 61(2A). This provided for an exemption in respect of the income of a local authority, other than income derived from any LATE. The same rule was carried over into the ITA 1994 – see s CB3(b). The charitable and district improvement exemption provisions in s 61(25), (27) and (33) of the ITA 1976 and in s CB4(1)(c), (e) and (j) of the ITA 1994 continued, however, potentially to apply to LATEs. The relevant taxation provisions are set out in Appendix 5.

[12] In 1998, because of concerns about local authorities structuring LATEs as charities, an amendment was introduced which would have removed the ability of a LATE to obtain charitable and district improvement income tax exemptions. The Finance and Expenditure Select Committee, however, recommended that the proposed amendment be deferred until the beginning of the 1999/2000 income year to enable consultation to ensure that genuine charities were not caught in the tax net.

[13] As a result of the consultation, the amendment to the ITA 1994 went ahead but, at the same time, an amended LATE definition was introduced into the LGA 1974 by the Local Government Act 1999. This amended definition repealed

s 594B(1)(a)(iv), which had widened the scope of LATEs to include any organisation which operated a trading undertaking which a council had control of by any means whatsoever, without any requirement for this trading undertaking to be operated with the intention or purpose of making a profit. To be a LATE under the new definition an entity had to be an organisation controlled by a council which operated a trading undertaking "with the intention or purpose of making a profit" – see s 594B(1)(a)(ii)(A). Thus, the new definition was substantively largely the same as the original definition, although the subparagraphs were split into smaller parts.

[14] Under the LGA 2002 the requirement that the entity operate a trading undertaking "with the intention or purpose of making a profit" was changed to the operation of a trading undertaking "for the purpose of making a profit". In addition, LATEs were replaced with the joint concept of CCOs and CCTOs – see s 6(1) of the LGA 2002. See Appendix 4 for the relevant provisions of the LGA 1974 and the LGA 2002.

[15] It is worth tracing the history of the change in 1999 to the definition of LATE in more detail. As a result of the Finance and Expenditure Select Committee's recommendation (see at [12] above), on 26 August 1998, the Commissioner released a consultative discussion paper on LATEs. That paper defined the issue in the following terms (at 2):

> 7. In considering the above [income tax] amendment, the Finance and Expenditure Select Committee noted that the state of affairs whereby LATEs are able to claim tax-exempt status is clearly contrary to the intention of Parliament. Without some form of remedial action, the ability of these organisations to garner tax-free profits will allow them to enjoy unfair privileges in competing with most private sector organisations. Furthermore, the expansion of local bodies into areas of commercial business combined with the ability to claim tax-free status poses a growing threat to the integrity of the tax base.
>
> 8. The issue, however, is complicated by the unclear definition of LATE enacted in the Local Government Act 1974. Under that legislation, any organisation which undertakes any trading activity and to which a local body can appoint a trustee, director or manager can be defined as a LATE. Using this definition, a significant number of organisations, including some genuine charities, could be unintentionally caught in the tax net.

[16] In order to alleviate these concerns the discussion paper proposed (at 6) that the following entities be taken out of the LATE definition:

> 1. Non-profit trading organisations including charitable trusts, partnerships, joint ventures etc. that are council controlled.
>
> 2. Profit-orientated trading undertakings other than companies, where councils have 30 - 49% of voting rights or can make appointments of trustees, directors, managers etc.

[17] The policy intention relating to the new LATE definition and the taxation consequences was explained (at 11 – 12) as follows:

> 45. The policy intention of taxing LATEs is, however, inconsistent with the provisions in the Income Tax Act 1994. This is because the Act provides for charitable and district improvement income tax exemptions under section CB 4(1)(c), (e), and (j). These provisions provide for tax exemptions for charities (sub-paragraph (c)), business charities (sub-paragraph (e)) and district improvement societies (sub-paragraph (j)). Some LATEs were thus able to obtain income tax exemptions under these provisions and avoid paying taxes. Therefore, section 3 of the Taxation Remedial Provisions Act 1998 was necessary to prevent LATEs from obtaining income tax exemptions.
>
> 46. As the proposed definition of LATE is more targeted than the current definition, council controlled charitable and district improvement organisations will not be affected by [the new taxation provisions].

[18] As a result of the consultative process, an amendment to the definition of LATE was introduced. The Internal Affairs and Local Government Committee, when reporting back on the amendment, set out the history of the Bill in the following terms (at 2):

> In 1989 the Local Government Act 1974 was amended to permit councils to establish LATEs. This enabled councils to divest themselves of trading undertakings and to separate their commercial functions from their core functions. The Government had intended that those council controlled businesses should face the same commercial pressures as any other business, including the requirement to pay tax. However, it became evident that, because of the broad legal meaning of "charity", most activities carried out by LATEs could be structured to obtain tax-exempt status. To prevent this, an amendment to the law was included as section 3 of the Taxation (Remedial Provisions) Act 1998. However, because of the broad definition of a LATE, it became apparent that a number of non-business charities would lose their tax-exempt status. This was an unintended effect. It was therefore necessary to review the definition of a LATE so that only the appropriate entities would be categorised as a LATE.

[19] The effect of the proposed new definition was set out as follows (at 3):

> Under the proposed definition, council-controlled charitable non-business organisations and district improvement organisations will not be LATEs. However, council-controlled charitable companies and charitable businesses will continue to be defined as LATEs and lose their tax exemptions in the 1999/2000 income year.

[20] The Committee considered that the amendment meant that true charities would not be captured by the new definition. It said (at 4):

> We shared the concern expressed by some submitters that the proposed definition of a LATE may capture charitable companies and charitable business organisations that have a profit motive, regardless of whether such organisations reinvest that profit in the pursuance of their objectives…
>
> From a tax perspective, carrying out "a trading undertaking with the intention or purpose of making a profit" is analogous to running a "business". Whether an activity constitutes a business is a test that has been set down by case law. To be considered a business, an activity must exhibit certain characteristics. Whether an activity demonstrates these characteristics will therefore also determine whether an organisation is carrying out a trading undertaking with the intention or purpose of making a profit. The test is necessarily flexible at the boundaries, and therefore enables some non-commercial organisations to operate incidental fund-raising activities without being considered businesses.

[21] In a similar vein, the then Minister of Local Government, introducing the third reading of the legislation said ((18 March 1999) 575 NZPD 15484):

> The Select Committee was satisfied, after discussing this issue with Inland Revenue Department officials, that the business test to be applied by the department to determine whether an organisation is or is not a business is both robust and will enable a distinction to be made between organisations that make a profit to reinvest back in themselves in pursuance of the charitable objectives, and those whose prime purpose is to make a profit for shareholders.

The issues

[22] There were two questions for the High Court and the same issues arise on this appeal. The first is whether the Trust comes within the definition of CCTO in s 6 of the LGA 2002. It was common ground before the High Court and this Court that the Trust is an organisation. It was also common ground that the requisite degree of council control exists so that, if the 2002 LGA applies, the Trust falls within the

definition of "council-controlled organisation" under the LGA 2002. The Trust, for the purpose of the High Court hearing and this hearing, also accepts that it operates a trading undertaking. That leaves the question of whether the Trust operates its trading undertaking "for the purpose of making a profit" under the LGA 2002.

[23] The second question is whether the Empowering Act represents a statutory code for the Trust's establishment, governance, accountability and administration, so that the relevant provisions of the LGA 2002 do not apply. The focus of these proceedings, insofar as the Commissioner is concerned, has been on the taxation consequences, rather than the LGA 2002. The Attorney-General was, however, also a defendant in the High Court but took no active part in the proceedings.

[24] Officials from the Department of Internal Affairs had advised their Minister that the Empowering Act represents a specific governance code for the Trust and thus had advised him not to support an amendment to the Empowering Act proposed by the Trust in 2000 to clarify that the Trust was not a LATE:

> Officials from the Department of Internal Affairs have considered the submission and agree that the Empowering Act has established a specific governance code for the Stadium Trust. While the specific governance code is often at odds with the general accountability provisions for LATEs in the Local Government Act, there is sufficient evidence to suggest that the specific provisions in the Empowering Act supersede the general provisions in the Local Government Act.

[25] The Minister of Finance had advised WRC in similar vein by letter of 21 August 2000. He said:

> The Government is satisfied that the Empowering Act provides an appropriate code for local government interests in the Stadium and that the Empowering Act already overrides the accountability provisions of the Local Government Act. This includes the ability for the Wellington Regional Council to lend interest free to the Stadium Trust. As there appears to be agreement amongst all interested parties on this issue, an amendment to the Empowering Act is strictly unnecessary.
>
> Your proposed legislative amendment would also override the LATE provisions in the Income Tax Act 1994. It would effectively be providing a tax exemption for the Stadium Trust and set an undesirable precedent for other local authority controlled businesses, which are governed by the general rules in the Income Tax Act. If the Stadium Trust is a LATE for tax purposes, I see no reason to depart from an established government policy that it is subject to tax. Further, the use of local legislation for tax purposes

> is undesirable, as it would complicate the tax administration process unnecessarily.

The High Court judgment

[26] The first issue for MacKenzie J was whether the Trust was a CCTO. As indicated above at [22], this entailed consideration of whether the Trust was operating a trading undertaking for the purpose of making a profit. After considering the cases of *Plimmer v Commissioner of Inland Revenue* [1958] NZLR 147, *Commissioner of Inland Revenue v Walker* [1963] NZLR 339, *Commissioner of Inland Revenue v National Distributors Ltd* [1989] 3 NZLR 661, *Commissioner of Inland Revenue v Hunter* [1970] NZLR 116, *Holden v Commissioner of Inland Revenue* [1974] 2 NZLR 52 (PC), *Union Shipping New Zealand Ltd v Port Nelson Ltd* [1990] 2 NZLR 662, *Commissioner of Inland Revenue v BNZ Investment Advisory Services Ltd* (1994) 16 NZTC 11,111 and *Wairakei Court Ltd v Commissioner of Inland Revenue* (1999) 19 NZTC 15, 202, MacKenzie J said that, in most contexts, the term "purpose" is to be distinguished from "intention". He considered that there was such a distinction in the context of the LGA 2002. One of the factors which led him to that conclusion was the difference in wording between the LGA 1974 and the LGA 2002. The LGA 1974 refers to operating a trading undertaking "with the intention or purpose of making a profit". The LGA 2002 refers to operating a trading undertaking "for the purpose of making a profit". In the Judge's view, two significant features of that change in wording were the omission of the word "intention" and the change in the preposition from "with" in the LGA 1974 to "for" in the LGA 2002.

[27] As to the omission of the word "intention", the Judge considered that the only proper conclusion to draw is that the omission of that word was deliberate. Thus, in his view, the changed definition in the LGA 2002 had the effect of narrowing the test. He did not consider that it would be right to assume that the drafter of the LGA 2002 regarded the expression "intention or purpose" in the LGA 1974 as tautologous, and omitted the word "intention" for that reason. The case law holding that the words "intention" and "purpose" are not synonymous was, in the Judge's view, strong, and extends across a number of statutes.

[28] Turning to whether there is a purpose of making a profit, MacKenzie J noted first that the evidence clearly established that the motive of the promoters of the Trust was to provide a stadium for the use and benefit of the Wellington region. It also, in his view, clearly established that the promoters of the Trust were not profit oriented. The $40 million which WCC and WRC contributed by means of limited recourse loans was, in the Judge's view, the equivalent of what, in a normal commercial structure, would be capital. In the Judge's view, the Councils sought to establish the Trust in such a way that it would not require further injections of money from them, but they did not expect and were not entitled under the Funding Deed to obtain a return on the money that they contributed.

[29] A capital provider who has the purpose of making a profit would, in the Judge's view, expect the enterprise to generate a return on capital. The Judge noted that the Councils regard the possibility that they will even receive repayment of the principal as distant. The Judge also pointed out that "surplus funds", as defined in the funding deed, excludes many items which in accounting terms would be capital items. Thus, not all "profits" are available for repayment of the Councils' loans. In addition, the Judge considered it significant that, because the Trust is a charitable trust, cls 5 and 6 of the Trust Deed confine the application of income and capital to the objects of the Trust. Accordingly, no distribution of its profits to the Councils is possible, except to the extent that that is provided for by contract. He also accepted that the stadium could not have been built without borrowing money on non-commercial terms.

[30] Nor, in the Judge's view, could it properly be said that the purpose of the Trust itself, as distinct from the purpose of its promoters, is to obtain profits. In the Judge's view, the use in the LGA 2002 of the definite article before the word "purpose" suggests that there must be an examination of the facts to ascertain a single purpose and, if there is more than one purpose, then it is the dominant purpose which is relevant.

[31] The Judge accepted the Commissioner's submission that, from its inception and throughout its existence, the Trust has operated the stadium as a business. However, he did not consider that the fact that a trading undertaking has the

hallmarks of a business is sufficient to bring it within the definition of a CCTO. Any trading undertaking could be expected to operate along business lines and to have the characteristics associated with a business. In order for the Trust to be a CCTO, there must additionally be the purpose of making a profit and not every trading undertaking which operates along business lines necessarily has that purpose. The Judge considered that the fact that the Trust makes a profit is not sufficient on its own to meet the test.

[32] MacKenzie J accepted that the Trust must necessarily make earnings that are within the meaning of the term profit, if it is to be able to meet its principal repayment obligations. He also accepted that the Trust does make a profit. However, the Judge noted that the need to apply those profits to principal repayments on the ANZ loan means that there will be no cash surplus available, on the Trust's projections, in the forecast future. The Judge was satisfied that the dominant purpose of the Trust is not that of making a profit. The dominant purpose, in his view, is the pursuit of the objects in cl 3.1(a) and (b) of the objects clause of the Trust Deed. Paragraph (c) is, in his view, more in the nature of an object designed to assist in the achievement of objects (a) and (b) than a principal object in its own right. In MacKenzie J's view, the profits are a means to an end, namely to enable the stadium to operate as a going concern, not an end in themselves. The Judge pointed to the evidence of Ms Wilde who said in cross-examination:

> It needed to be run in a businesslike way. It needed to have what I'd call commercial imperatives, but at the same time it was something fundamentally for the community benefit and particularly for the economic benefit of the city and the region.

[33] The Judge also considered the comments by the Select Committee and the Minister (see at [18] - [21] above), in relation to the 1999 amendments. He did not consider it appropriate to attach too much significance to these comments in interpreting the LGA 2002 but he considered that the distinction made by the Select Committee and the Minister between charitable organisations that make a profit only to re-invest it in the organisation and profit-making trading organisations is a distinction which is reflected in the words of the 2002 definition. In his view, a trading undertaking whose profit objective is limited to making sufficient profit to meet the financial commitments of the organisation and which does not have the aim

of generating a surplus which will be available to its stakeholders, cannot be said to have the purpose of making a profit.

[34] Mr Beck had also submitted that policy considerations pointed to the conclusion that the Trust should be held to be a CCTO, in that, if it were not, it would be exempted from the public accountability processes which regulate such organisations. The Judge said that the Trust is subject to the accountability mechanisms contained in the Trust Deed. As required by the Empowering Act, the Trust Deed contains such of the provisions of the LGA 1974 dealing with community trusts as are appropriate and relevant. Since Parliament has specifically required accountability provisions modelled on those for a community trust, the Judge did not think that the Court should attribute to Parliament an intention that the governance and accountability provisions applying to a CCTO should also apply to the Trust.

[35] The Judge was satisfied that the evidence established that the Trust falls within the category of organisations identified by the Select Committee and the Minister in 1999, namely charitable organisations which make a profit only to reinvest it in the organisation. He held that the Trust does not operate its trading undertaking for the purpose of making a profit and that it is accordingly not a CCTO for the purposes of the LGA 2002.

[36] Turning to the second issue, MacKenzie J did not consider it necessary to address the Trust's contention that the Empowering Act represents a code for the Trust's establishment, governance, accountability and administration, as he had already held that the Trust was not a CCTO. The Judge did not consider that he should attempt to attribute an intention to Parliament as to the interrelationship between the two pieces of legislation, based on an assumption which is at variance with what he had held to be the correct position. In his view, the Trust is not subject to Part 5 of the LGA 2002, not because the Empowering Act is to be interpreted as overriding that part, but because the entity established under the Empowering Act was established in a way which does not bring it within the scope of that part.

[37] MacKenzie J did, however, deal with one point relating to the Empowering Act. One of the concerns expressed by the Trust, if it had been held to be a CCTO, was that s 63 of the LGA 2002 would apply to it, and that that would require both WRC and WCC to charge interest on the funding. The Judge accepted the submission of counsel for the Trust that that result would follow so far as the WCC loan is concerned. He did not, however, accept that it would follow with respect to the WRC loan. The making of that loan, on such terms and conditions as WRC in its absolute discretion thinks fit, is authorised by s 4 of the Empowering Act. That section, which deals specifically with the loan in question, must, in the Judge's view, clearly override the general provision in s 63 of the LGA 2002. That is so, whether or not the whole of the Empowering Act overrides the whole of Part 5 of the LGA 2002. The Commissioner does not seek to challenge this conclusion.

[38] It is convenient to note at this point that, under the terms of the Funding Deed, if the Trust is deemed to be a LATE, both Councils have the ability under cl 6.2 to require interest to be paid on the outstanding amount of the loan at the Council's bank borrowing rate. Under cl 6.4, the payment of interest is, however, deferred until repayment of the principal. We remark in passing that even these terms may breach s 63 of the LGA 2002.

The Commissioner's submissions

[39] Mr Beck, for the Commissioner, challenged MacKenzie J's decision on a number of grounds. The first was that MacKenzie J had wrongly attached significance to the changes made between the definition of LATE in the LGA 1974 and that of CCTO in the LGA 2002.

[40] Mr Beck submitted that, at the time the Trust was established in 1997, two requirements had to be satisfied in order to qualify as a LATE. The organisation concerned had to be controlled by a local authority and it had to operate a trading undertaking. The Trust was clearly operating a trading undertaking and there is, therefore, no doubt that it was a LATE from its inception until 31 March 1999. On 1 April 1999, the LGA 1974 was amended, making the requirement of intention or purpose of making a profit an essential aspect of the definition of a LATE. In

Mr Beck's submission, the evidence shows that the Trust was operated for a profit, and this was accepted by MacKenzie J. Mr Beck submitted that the evidence also shows that the Trust had the intention of making a profit.

[41] MacKenzie J placed considerable emphasis on the difference between "intention" and "purpose", and he found a deliberate legislative intention to narrow the test as between the LGA 1974 and LGA 2002. The Judge ultimately concluded that the Trust had no "purpose" of making a profit. In Mr Beck's submission, the necessary inference from the Judge's findings is that the Trust would have fallen within the wider test under the LGA 1974, and therefore, in accordance with the reasoning of McKenzie J, did have the intention of making a profit. The conclusion is therefore inescapable in Mr Beck's submission that, in terms of the LGA 1974, the Trust was a LATE from the date of its establishment until the provisions of the LGA 2002 took over.

[42] Mr Beck submitted that, if MacKenzie J was right and the test was narrowed in the LGA 2002, it is almost inconceivable that a change resulting in such a significant impact on many organisations would have gone unheralded. There was no supporting material surrounding the introduction of the LGA 2002 to suggest that the test under the new legislation would be narrower than under the LGA 1974. In Mr Beck's submission, it is clear that the wording used in the LGA 1974 was designed to refer to organisations carrying on a business. He submitted that there is no suggestion anywhere that the definition in the LGA 2002 was intended to be a departure from the business test.

[43] In the context of the present case, Mr Beck submitted that, in any event, there can be no neat distinction between the words "intention" and "purpose". Carrying on business is in essence a commercial concept, and, in commercial parlance, the two words are used interchangeably. MacKenzie J relied on a number of cases where a distinction has been drawn between "intention" and "purpose", notably *Plimmer* and *Walker*. In Mr Beck's submission, it is important to note that these cases were not focused on the question of whether a business was being carried on. *Plimmer* and *Walker* concerned the acquisition of property for the purpose of sale. In any event, in Mr Beck's submission, the decisions in *Plimmer* and *Walker* have

been overtaken by the decisions in *Hunter* and *Holden*. MacKenzie J quoted from the dissenting judgment in *National Distributors* in order to show that *Plimmer* had been approved. In Mr Beck's submission, this approach is incorrect as the majority Judges in *National Distributors* did not even mention *Plimmer* which suggests that they did not agree with it.

[44] Mr Beck's next submission was that MacKenzie J had wrongly taken into account the purpose of the promoters in assessing whether the Trust was operating a trading undertaking for the purpose of making a profit. In his submission, it is the purpose of the trading undertaking itself that has to be determined and not that of its promoters. The only practical way of doing that is by asking whether the Trust was operating the stadium as a business. In undertaking this inquiry it is, in his submission, irrelevant that the Trust was set up on non-commercial terms.

[45] Mr Beck submitted further that, in coming to his conclusion on the purpose of the Trust, MacKenzie J appears to have concluded that it had no profit-making purpose because it was a charitable enterprise. In Mr Beck's submission, that could not be an answer to the question facing the Court. The charitable nature of the enterprise was never in issue. The question was whether the particular charitable enterprise was carrying on a business. Given the clear acceptance that this was an organisation that sought to make a profit, and did in fact make a profit in ordinary commercial terms, there is, in Mr Beck's submission, no need to go any further. It is the type of organisation that was envisaged as falling with the definition of a CCTO. In addition, the Stadium has a life of around 75 years. It was therefore inappropriate, in Mr Beck's submission, for the Judge to have restricted any consideration of that issue to the immediate future period. In Mr Beck's submission, the evidence shows that there was a clear and genuine expectation of sufficient surpluses eventually to repay the loans made by WRC and WCC.

[46] Mr Beck also challenged MacKenzie J's conclusion that a dominant purpose test was applicable. Even were that the case, however, he submitted that the pursuit of profit was not a subsidiary object of the Trust. In Mr Beck's submission, MacKenzie J wrongly interpreted paragraph (c) of the objects clause, cl 3.1, as subservient to paragraphs (a) and (b). Mr Beck submitted that it is clear that the

primary object of the Trust was to ensure that the Stadium was an ongoing profitable enterprise that would not have to rely on future funds from the stakeholders. In his submission, MacKenzie J's finding is thus in conflict with the evidence. The evidence demonstrates clearly that profitability was not a subsidiary or ancillary matter.

[47] Turning to the status and effect of the Empowering Act, Mr Beck submitted that it is inherently unlikely that the Legislature intended that Act to be a code. Unlike other codifying statutes, there is no statement to that effect in the Empowering Act itself. By way of contrast, Mr Beck pointed to s 15 of the Minors' Contracts Act 1969 and s 7 Contractual Remedies Act 1979. In its own terms, the Empowering Act is concerned principally with enabling WRC to make a loan to the Trust, as is shown by the Act's long title where no mention is made of the accountability and governance regime that will apply to the Trust. In Mr Beck's submission, the Empowering Act did not override the whole of the LGA 1974. It only affected the provisions of s 594ZPA concerning the power of WRC to make an interest free loan to the Trust. Mr Beck submitted further that the LGA 2002 contains an express mechanism for the exclusion of certain organisations from its accountability provisions – see s 6(4). The Trust is not excluded from the regime under this provision. Indeed, the Trust made submissions asking to be included in the list of exempt organisations but the Select Committee did not recommend its inclusion.

[48] Mr Beck submitted finally that, even if the provisions of the Empowering Act override the LGA 2002, this does not mean that the Trust is not subject to taxation. If it comes within the definition in s 6 of the LGA 2002 then, in terms of the income tax legislation, it cannot take advantage of the charitable exemption.

The Trust's submissions

[49] On the question of whether the Trust came within the amended definition of LATE in the LGA 1974, Mr McKay challenged first the Commissioner's assertion that the "intention or purpose of making a profit" test is merely a business test. In Mr McKay's submission, it is clear from the Parliamentary materials that, insofar as

the concept of "business" was seen to be analogous to the "purpose or intention of making a profit" language in the LGA 1974, that analogy was at a broad or general level only. Those same sources indicate that the "business" concept was not seen to apply to a charity whose profits, if any, were retained by the charity for its charitable purposes and not distributed to shareholders (including local authority shareholders). In these circumstances, Mr McKay submitted that, if the "intention or purpose of making a profit" test is a "business" test – which it is not on its face – it must be interpreted to accommodate Parliament's obvious wish to exclude charitable entities such as the Trust which can only apply any profits to their core charitable purposes.

[50] In addition, in Mr McKay's submission, the core element of a "business" is an intention to make a profit. In his submission, that notion sits uneasily in the context of a trading undertaking which, by reference to the ordinary indicia of participation in a private enterprise marketplace, could not be operated as a successful undertaking at all. Those ordinary indicia include not only a capacity to pay interest on debts owing to lenders, but also to earn a return on proprietors' equity contributions to the venture. Under the private enterprise model, in Mr McKay's submission, the Trust could never have commenced to trade. In his submission, the Trust is only in a position to seek a surplus of revenue over costs because its costs are materially reduced by the subsidy represented by WRC's and WCC's interest free loans. That, in his submission, is not a business model in any conventional sense, or perhaps in any sense at all.

[51] Mr McKay suggested that a similar test to that applied by the Commissioner in Public Ruling 00/08 ("Charitable organisations and fringe benefit tax" (2000) 12(9) *Tax Information Bulletin* 3) should apply. In Mr McKay's submission, this ruling recognises that charities do not necessarily carry on business-like activities "for profit" as such. He submitted that the House of Lords decision in *Trustees of the National Deposit Friendly Society v Skegness Urban District Council* [1959] AC 293 is illustrative of this approach. In that case, Lord Denning commented at 319 - 320:

> Many charitable bodies, such as colleges and religious foundations, have large funds which they invest at interest in stocks and shares, or purchase land which they let at a profit. Yet they are not established or conducted for

> profit. The reason is because their objects are to advance education or religion as the case may be. The investing of funds is not one of their objects properly so-called, but only a means of achieving those objects. So here it seems to me that if the making of profit is not one of the main objects of an organisation, but is only a subsidiary object – that is to say, if it is only a means whereby its main objects can be furthered or achieved – then it is not established or conducted for profit.

[52] Even if these submissions are not accepted and the definition in the LGA 1974 is held to approximate a "business" test, and even if the Trust could be held to be carrying on a business and therefore falling within that definition, in Mr McKay's submission, those conclusions are ultimately irrelevant to this appeal. With effect from the coming into force of the LGA 2002, the concept of LATE was replaced with that of CCTO and the definition was amended. A CCTO status will now only be established if the Trust "operates a trading undertaking for the purpose of making a profit". In Mr McKay's submission, it cannot be the case that the LGA 2002, in deleting the "intention" component of the earlier LATE definition and focusing exclusively on "purpose", can be said to impose a "business" test. A "business" inquiry is exclusively intention based.

[53] In Mr McKay's submission, it is clear from the authorities that the term "purpose" describes the goal or end in view of the person engaged in the activity in question. Mr McKay challenged the Commissioner's contention that the failure of the majority in *National Distributors* to refer to *Plimmer* suggests that they did not agree with it. In his submission, disagreement with *Plimmer* necessarily involves disagreement with *Walker*. No such disagreement was indicated by the majority. Richardson J, in fact, referred to *Walker* with approval on the "dominant purpose" point. Mr McKay also submitted that *Plimmer* and *Walker* had not been overtaken by *Holden* and *Hunter*.

[54] Mr McKay accepted that for most persons carrying on a trading undertaking, the distinction between intention and purpose may have no particular relevance. Most such persons will have an intention of making a profit and the making of profit will also be their purpose or objective in engaging in the activity in question. The Trust is, however, in his submission, in a materially different position. The evidence was that the promoters of the stadium were aware that sporting and events stadiums are not generally profitable in their own right, but that their operation gives rise to

benefits, including revenue benefits, to the region or community in which the stadium is located. This evidence is the antithesis of any proposition that the purpose of the stadium operation was to make a profit for itself as a stand-alone entity.

[55] Mr McKay submitted further that none of the objects of the Trust either explicitly or by implication suggest that the dominant purpose, or even an incidental purpose, of the Trust, is the making of a profit per se. Rather, the focus in all of the objectives is the development and operation of a sporting and cultural venue capable of attracting quality events for the benefit of the public of the Wellington region on a sustainable basis. In Mr McKay's submission, the object or purpose of operating the Stadium on a prudent commercial basis as set out in cl 3.1(c) is not the same thing as carrying on the stadium operation for the purpose of making a profit. The purpose or end to which management on a prudent commercial basis in cl 3.1(c) is directed is explicitly provided in that clause itself: the goal of rendering the stadium a "successful, financially autonomous community asset", thereby permitting its long-term operation in a manner which did not require ongoing or further assistance from WRC and WCC. The generation of surpluses, in his submission, is a means to an end, not an end in itself.

[56] He submitted that this position is confirmed by the terms of the Empowering Act. Mr McKay noted that s 6 of that Act prescribes the permissible objects of the Trust. The single object, to which all other objects or functions are "ancillary", is the planning, construction, operation and maintenance of the stadium. In his submission, it is clear from the terms of s 6 of the Empowering Act that the direction in the Trust Deed that the stadium be operated on a prudent commercial basis cannot be an end in itself, as opposed to a statement of the desired method by which the statutory object is to be achieved.

[57] Mr McKay pointed out that the Trust has no capacity to distribute profits from its operations to third parties, including to WCC and WRC. Further, Trust capital may be applied only to the repayment of debt or to the maintenance or improvement of the stadium complex. Further again, and consistently, in the event of a wind-up of the Trust, both income and capital assets of the Trust are to be

applied to such charitable purpose or purposes in the Wellington region approved by the settlors as being as similar as is practicable to those of the Trust. In circumstances where all profits derived from the stadium operation may be employed only to maintain or improve the stadium itself, it is, in Mr McKay's submission, a misuse of language to describe the "purpose" for which that operation is carried on as being "for profit".

[58] That the Trust's purpose was not that of profit-making, also arises, in Mr McKay's submission, from inferences reasonably drawn as to Parliament's view in enacting the Empowering Act. The Empowering Act directed that the Trust settled pursuant to statutory authority by WRC and WCC was to be a charitable trust registered under the Charitable Trusts Act 1957. In his submission, a trust established for the purpose of profit-making per se, could not be a charitable trust.

[59] On the second issue as to whether the provisions of the Empowering Act represent a code for the Trust's governance and administration, Mr McKay's submission was based upon the related doctrines of implied repeal and *generalia specialibus non derogant*. Richardson J explained those concepts in the following terms in *Stewart v Grey County Council* [1978] 2 NZLR 577 at 583:

> In that situation [of a conflict between the provisions of different statutes] there are two principles for consideration. One is the maxim known as generalia specialibus non derogant. It was explained in *Barker v Edger* (1898) NZPCC 422, 427; [1898] AC 748, 754, in the following terms:
>
> > "When the Legislature has given its attention to a separate subject, and made provision for it, the presumption is that a subsequent general enactment is not intended to interfere with the special provision unless it manifests that intention very clearly. Each enactment must be construed in that respect according to its own subject-matter and its own terms."
>
> In such a case the earlier "special" statute continues to have exclusive application to its own subject-matter and the later general Act, although in terms wide enough to extend to the subject-matter of the earlier Act, is held not to have any application to it.
>
> The other is the principle of implied repeal which as it relates to legislation affecting special situations, is expressed in 36 Halsbury's Laws of England (3rd ed) para 712 as follows:
>
> > "To the extent that the continued application of a general enactment to a particular case is inconsistent with special provision subsequently made as respects that case, the general enactment is overridden by the particular, the effect of the latter being to exempt the case in question from the operation

> of the general enactment or, in other words, to repeal the general enactment in relation to that case."

[60] The doctrine of implied repeal is, in his submission, relevant to the relationship between the Empowering Act and the LATE provisions of the LGA 1974 introduced in 1989. The *generalia* rule is relevant to the relationship between the Empowering Act and the LGA 2002.

[61] In Mr McKay's submission, at the point of the enactment of the Empowering Act, the LGA 1974 was impliedly repealed, insofar as the LATE provisions within that Act might otherwise have applied to the Trust. He supported that submission by five primary considerations. The first is that there are several significant inconsistencies or conflicts between the LATE provisions of the LGA 1974 and the Empowering Act. The most significant of those inconsistencies are s 594ZPA of the LGA 1974 obliging a market rate of interest on loans to LATEs, s 594Q of the LGA 1974 in declaring the primary purpose of a LATE to be the operation of a successful business and s 594ZP of the LGA 1974, prohibiting a local authority from giving any guarantee or security in respect of any obligation of a LATE, compared with s 6(3)(c) of the Empowering Act which contemplates that guarantees or securities might be given by the Councils in respect of the Trust's obligations.

[62] Secondly, in Mr McKay's submission, a large number of the LATE provisions contained within the LGA 1974 can have no application in the context of the regime for the establishment and governance of the Trust – see for example ss 594C – 594F (relating to the transfer of undertakings and regulatory functions by local authorities and the reduction of interest in LATEs), ss 594G – 594H (relating to the listing of a LATE on the Stock Exchange and holding listed shares) and ss 594I - 594P (relating to establishment procedures) of the LGA 1974. Thirdly, in his submission, the provisions of the Empowering Act, and the provisions of its Second Schedule, are exhaustive in character. Fourthly, there is, in Mr McKay's submission, a clear analogy between the position immediately following the passage of the Empowering Act in 1996 in terms of the relationship of that legislation with the 1989 LATE provisions, and the relationship of the community trust regime introduced in 1992 with those same 1989 LATE provisions. Fifthly, if Parliament is not to be taken as impliedly repealing the LATE provisions of the LGA 1974, the

incongruity arises that WRC is accepted by the Commissioner as being entitled to make an interest-free advance to the respondent, but WCC is not. It is highly unlikely that Parliament intended that result to arise.

[63] In Mr McKay's submission, the changes effected by the LGA 2002 to the pre-2002 LATE rules are reasonably minor. The inconsistencies or conflicts referred to above with reference to the LGA 1974 continue with reference to the LGA 2002.

Discussion

The Empowering Act

[64] We deal with the Empowering Act question first as it seems to us the logically prior one. If the Empowering Act is a code then there is no need to consider the LGA 2002 at all.

[65] The regime for the Trust set up by the Empowering Act is modelled on the community trust regime in the LGA 1974 and the Empowering Act imports that regime, to the extent it is not inconsistent with the Empowering Act itself The community trust regime is separate from the CCO and CCTO regime – see s 298 of the LGA 2002 set out at [103] of Appendix 4. As the community trust regime is separately provided for in the LGA 1974 and the LGA 2002 with its own accountability regime, it is clear in our view that the CCO and CCTO regime is not intended to apply to community trusts. As it is the community trust regime that was imported into the Empowering Act, we do not consider that the Empowering Act envisages the Trust being subject to the CCO and CCTO provisions either.

[66] We also accept Mr McKay's submissions that the inconsistencies between the Empowering Act and the LGA 1974 and the LGA 2002 and the non-applicability of many of the LATE/CCTO provisions confirm that the provisions of the Empowering Act were intended to be a code. Further, we accept his submission that it is unlikely that a distinction was intended between WCC and WRC, insofar as the ability to lend to the Trust interest free was concerned. Indeed, in our view, the

ability for WRC to lend on any terms it thinks fit is in itself a strong indication that the LATE provisions were not intended to apply to the Trust. There is no logic in setting up a regime whereby the LATE provisions were to apply but then exempting WRC from one of the key features of the LATE regime.

[67] We therefore find that the provisions of the Empowering Act are a code. It follows that the Trust is entitled to the wider declaration it seeks. Our view on this issue is congruent with that expressed by officials from the Internal Affairs and by the Minister of Finance – see at [24] and [25] above. It also means that it was unnecessary for the Trust to be excluded from the CCTO regime under s 6(4) of the LGA 2002. The Trust was already excluded from that regime. There is thus, contrary to Mr Beck's submission noted at [47] above, no significance in the fact that the Select Committee did not recommend the Trust's inclusion in the list of organisations in s 6(4) – see Appendix 4 at [101] for an example of the excluded organisations.

[68] Mr Beck submitted (see at [48] above) that it is nevertheless necessary for income tax purposes that the Trust does not meet the definition of CCTO in s 6 of the LGA 2002. We are not attracted to this submission. In some circumstances, a definition from a piece of legislation is imported into another Act as a stand alone definition and is not meant to be interpreted in the context of the piece of legislation from which it was taken. This is not the case here. The amendments to the income tax legislation were an integral part of the amendments to the local authority legislation, as they ensured the level playing field sought by the introduction of the LATE (now CCTO) concept. There is no logic, therefore, in treating entities that are clearly outside the CCTO regime as nevertheless coming within the income tax provisions that were specifically designed for that CCTO regime.

The CCTO definition

[69] Even were we wrong in our conclusion set out at [68], we consider that the Trust does not come within the definition of CCTO in s 6 of the LGA 2002 in any event. In our view, MacKenzie J was correct to hold that the Trust does not operate a trading operation for the purpose of making a profit.

[70] Mr Beck's first criticism of MacKenzie J's decision was that the Judge was wrong to consider that there was significance in the omission of the word "intention" in the definition of CCTO in the LGA 2002. We do not accept this submission. We agree with Mr McKay that *Plimmer* and *Walker* were not overruled by *National Distributors* or by *Holden* and *Hunter*. The distinction between intention and purpose is thus important in the income tax context, as well as in a number of other contexts, including GST and competition law.

[71] We do not accept Mr Beck's submission that the draftsperson removed the word "intention" in ignorance of the extensive caselaw dealing with the difference between the two words. We also do not consider that the absence of Parliamentary commentary on the omission of the word "intention" has any significance. The words speak for themselves. In any event, as discussed below, we do not accept Mr Beck's submission that the position of the Trust under the LGA 1974 was different from its position under the LGA 2002. The omission of the word "intention" in our view merely clarifies the definition. It is true, as Mr McKay conceded, that, with respect to most commercial enterprises and their trading undertakings, purpose and intention will be the same. That does not mean that there is no difference between the words. We consider MacKenzie J was correct to draw a distinction between those words in the case of the Trust.

[72] Mr Beck's next criticism of MacKenzie J's decision was that the Judge was wrong to have regard to the purpose of the promoters of the Trust in coming to his conclusion as to the Trust's purpose. In our view, the purpose of the Trust's promoters, as provided for in the legislation, the Trust Deed and the Funding Deed, cannot sensibly be separated from the purpose of the Trust itself. The legislation and the Trust Deed form the foundation of the Trust and have ongoing effect. The Trust is obviously required to operate in the manner and with the limitations set out in the legislation and the Trust Deed. We note also that the Trust Deed gives certain powers of veto to the settlors. The written consent of the settlors is required before the Stadium can be sold or leased to a third party and also before the Trust is wound up (except if the Trust is wound up by law) – see cl 7.1(b) and (c).

[73] The statutory purpose of the Trust is limited, once the Stadium was built, to the ownership, operation and maintenance of the Stadium as a multi-purpose sporting and cultural venue - see s 6(2)(a) of the Empowering Act. This is, in terms of the definition of "purpose" accepted in the cases, its aim or end in view. Any additional functions must be exercised for the benefit of the public of the Wellington region and are ancillary to the functions set out in s 6(2)(a) – see s 6(2)(b) of the Empowering Act. We accept Mr McKay's submission that this necessarily means that cl 3.1(c) of the Trust Deed is subordinate to cl 3.1(a) and (b), as the Judge found it to be.

[74] We also accept Mr McKay's submission that, in its own terms, cl 3.1(c) does not connote a profit making purpose. It merely requires the Trust to be administered in a financially prudent manner so that the Stadium can be operated as a community asset (but without the necessity for further injection of funds). We agree with MacKenzie J that the fact the Trust has an operating surplus and that it is operated in a business like manner are insufficient in themselves to mean that its purpose must be profit-making.

[75] The Trust is required by the Empowering Act to be a charitable trust, with all of the limitations this requires on the purposes of the Trust, the powers of the trustees and the application of funds - see s 6(3)(b) of the Empowering Act. The Trust Deed must contain the matters in the Second Schedule to the Empowering Act, including that set out in cl (1)(k), which allows the income of the Trust to be expended only for the purpose of administering and maintaining the Trust and for the purposes specified in the Trust Deed. This is carried through into the objects of the Trust as set out in cl 3.1(a) - (e) of the Trust Deed and the provisions relating to the income and capital of the Trust and the disposition of funds if the Trust is wound up – see cls 5, 6 and 17 of the Trust Deed.

[76] Further, the manner in which the Trust is funded, as set out in the Funding Deed, recognises not only the community and charitable nature of the Trust but also the fact that the Stadium could not have been built and could not operate, had it been required to do so on commercial funding terms, as Mr Gray, the Trust's Chief Executive, deposed. Similar evidence was given by Ms Wilde, the former Mayor of

Wellington, who chaired the development trust, the predecessor to the Trust, who is a former chair of the Trust itself and who is currently the Trust's patron. The Judge set out Ms Wilde's evidence on stadia development as follows:

> As the development progressed and we learned more about the economics of stadia development and use, it became very clear to us that stadia generally do not make money. They are not profit generating businesses. In most other countries they are, in fact, built and funded by either local, regional or central government. There was evidence that the initial capital was commonly treated as an establishment cost and, even then, in many cases they appeared to have an ongoing business model that was not very profitable. So, even as a going concern, apart from the cost of capital, we were being told that a stadium was not very easy to run and to keep its head above water.

[77] According to Ms Wilde, the benefits of a stadium were rather the public benefits of the provision of a venue where sporting and cultural events of an international quality could take place and the ensuing economic benefits in creating wealth and jobs for the region. Mr Gray's evidence was that there are many events which the stadium holds which are not driven by a desire to generate revenue, but rather to ensure that the maximum number are getting a benefit from the stadium as a community asset.

[78] In our view, this evidence and the nature of the funding arrangements themselves reinforce the view that the Trust's purpose is not profit making. While there is no doubt that the Trust makes operating surpluses, this is only possible because of the totally non-commercial funding terms. The funding is interest free and limited recourse and the evidence (accepted by the Judge) was that WCC and WRC regard the possibility even of a return of capital as distant. We note in this regard that the object of the repayment of debt set out in cl 3.1(e) of the Trust Deed is quite clearly subject to the fulfilment of all of the other objects of the Trust set out in cl 3.1 (a) - (d).

[79] The next alleged error Mr Beck identified was MacKenzie J's apparent conclusion that, because the Trust was a charitable enterprise, it could have not have a profit-making purpose. If the Judge had indeed based his decision solely on the fact that the Trust is a charitable trust, then we agree with Mr Beck that he would have been in error. The Judge did not, however, do so. The Judge's analysis took

into account all the circumstances of the Trust, including the legislative context. To the extent that Mr McKay's submissions could be taken as suggesting that merely being charitable suffices (see example at [51] above), then we do not accept them. The charitable nature of the Trust is, however, clearly relevant to the analysis of its purpose, especially coupled with the evidence that the Trust could not have been set up on normal commercial terms.

[80] Mr Beck's final criticism of MacKenzie J's decision was that the Judge erred in considering that it was the Trust's dominant purpose that was relevant. In our view, the use of the definite article in the definition does have significance. It suggests, as the Judge found, that there is an assumption that there will be one purpose or aim or end in view. It is unclear what the position was to be where there is truly more than one purpose. We do not need, however, to decide whether the Judge was right that it would be necessary in such a case to ascertain dominant purpose, as it is clear from the evidence as a whole and the analysis of the legislation and the Trust deed that the Trust did not have more than one purpose. Its purpose is set out in s 6(2)(a) of the Empowering Act. Any other function must be undertaken only for that purpose – see s 6(2)(b).

[81] While strictly the question of whether or not the Trust was a LATE under the LGA 1974 was not before us, it is appropriate that we deal with that question briefly, given the importance Mr Beck placed in his argument on his submission that the Trust was clearly a LATE in terms of the definition under the LGA 1974. As noted above, the main aim of the introduction of the LATE regime was to put commercial enterprises undertaken by local authorities on a competitively neutral basis with the private sector. The taxation of LATEs was thus a vital part of that strategy. The difficulty was that many of the enterprises undertaken by local authorities are intrinsically charitable. It was thus open to local authorities to structure enterprises, which were clearly commercial in character and potentially competing with private sector organisations, as charitable entities in order to achieve a charitable exemption under the income tax legislation. The amendments to the income tax legislation introduced in 1998 were designed to deal with this perceived problem.

[82] Nevertheless, it is also clear from the legislative history that it was no part of the purpose of the amendments to capture what could be seen as true charities which were not in competition with the private sector. That is why the income tax amendments were delayed until there had been amendments to the definition of LATE in the local government legislation to ensure that such enterprises continued to enjoy the charitable exemptions. The amended definition of LATE in the LGA 1974 must be interpreted in light of this purpose (s 5(1) Interpretation Act 1999). Indeed, in our view, assurances were given to Parliament by the Select Committee and by the Minister, on the basis of assurances by Inland Revenue Department Officials, that genuine charities which made a profit only to re-invest it would not be brought into the taxation net – see discussion at [18] - [21] above. It could even be argued that such assurances may engage the principle outlined by the House of Lords in *Pepper v Hart* [1993] AC 593 at 640 per Lord Browne-Wilkinson. We consider that MacKenzie J was correct to consider that the rationale for the provisions and these assurances must also carry over into the replacement legislation, the LGA 2002. In our view, the Judge could have given this factor more weight than he did.

[83] We accept Mr McKay's submission that, if the test in the LGA 1974 was merely a business test (which, on its face, it does not appear to be), then it must be modified to take account of the purpose of the legislation. We also consider that MacKenzie J was correct to hold that the Trust came within the very class of organisation that the amendment to the definition of LATE in the LGA 1974 was meant to exclude. It is true, as Mr Beck pointed out, that, at a broad level of generality, the Stadium competes with other entertainment, exhibition and conference venues. However, many of these other venues, and certainly those which could be seen as the closest competitors of the Stadium, are themselves run by local authorities or by trusts. It is clear from the evidence that an operation of the type and scale of the Stadium could not have been set up on commercial terms. The benefits from the Stadium are not commercial benefits but wider benefits to the region.

[84] In the context of this legislation and its avowed purpose, we do not consider that the mere intention to make operating surpluses is sufficient for a trading undertaking to be operating with the intention or purpose of making a profit in terms

of the LGA 1974. The Trust could never operate on proper commercial terms, it only makes operating surpluses because of funding on non-commercial terms, it cannot distribute its profits, it is inherently charitable and it is not competing in any meaningful sense with any private sector organisation and is highly unlikely to be doing so in the future. We thus accept Mr McKay's submission that the Trust did not come within the definition of LATE in the LGA 1974 as it was amended in 1999.

Result and costs

[85] For the above reasons, the Commissioner's appeal is dismissed.

[86] We allow the Trust's cross appeal and replace the High Court declaration with the one sought by the Trust in its third amended statement of claim as follows:

> Sections 5 and 6, Schedules 8 and 9 and Part 5 of the Local Government Act 2002 do not apply to the Wellington Regional Stadium Trust.

[87] Costs of $6,000 plus usual disbursements are awarded to the Trust. We certify for second counsel.

Solicitors:
Crown Law Office, Wellington for Appellant
Phillips Fox, Wellington for Respondent

APPENDIX 1

The Empowering Act

[88] The long title of the Empowering Act is:

> An Act to permit the Wellington Regional Council to contribute to the funding of a multi-purpose sporting and cultural venue for the benefit of the public of the Wellington Region.

[89] Under s 3 the purposes of the Act are as follows:

> **3. Purposes of the Act** – The purposes of this Act are to -
>
> (a) Enable the Council [WRC] to lend a sum not exceeding $25 million to the Trust to facilitate the planning, development, and construction of the Stadium; and
>
> (b) Require the Council to participate in the establishment of, and act as one of the settlors of, the Trust before exercising any other powers conferred by this Act.

[90] Sections 4 and 5 related to the ability of WRC to make a contribution to the Stadium on such terms and conditions as it thought fit and to levy a stadium purposes rate. Section 6 deals with the establishment of the Trust and provides as follows:

> **6. Establishment of Trust** – (1) The Council may, and shall before exercising any of the powers conferred by section 4 or section 5 of this Act, jointly with the Wellington City Council, establish a trust to be known as the Wellington Regional Stadium Trust.
>
> (2) The Wellington Regional Stadium Trust -
>
> (a) Shall be responsible for the planning, development, construction, ownership, operation, and maintenance of the Stadium as a multi-purpose sporting and cultural venue; and
>
> (b) May undertake such additional function as are specified in the trust deed establishing the Trust, being functions ancillary to the responsibilities in paragraph (a) of this subsection for the benefit of the public of the Region.
>
> (3) The trust deed establishing the Trust -
>
> (a) Shall include the matters set out in the Second Schedule to this Act; and

(b) Shall comply with and be registered under the provisions of the Charitable Trusts Act 1957; and

(c) May provide that the Council and the Wellington City Council shall not in any circumstances be liable for the debts, liabilities, or commitments of the Trust.

(4) The trust deed shall not be executed by the Council without the written approval of the Minister who shall, before giving such approval, be satisfied that the trust deed is consistent with the provisions of this section and such of the provisions of sections 225F to 225J of the Local Government Act 1974 (the provisions relating to community trusts) as are appropriate and relevant to the purposes of the Trust.

(5) The Council is hereby empowered to exercise such rights, powers, and privileges, and to perform such duties and responsibilities, as are conferred on the Council under the provisions of the trust deed establishing the Trust.

[91] The Second Schedule of the Act relating to the contents of the Trust Deed provides as follows:

SECOND SCHEDULE

MATTERS TO BE INCLUDED IN TRUST DEED

(1) The trust deed shall contain provisions -

(a) Specifying the name of the Trust ("The Wellington Regional Stadium Trust"):

(b) Specifying the responsibilities of the Trust in accordance with section 6(2)(a) of this Act:

(c) Specifying any additional functions of the Trust in accordance with section 6(2)(b) of this Act:

(d) Specifying the maximum and minimum number of trustees:

(e) For the holding of, and voting at, meetings of trustees and specifying the quorum necessary for the holding of meetings of trustees:

(f) For the remuneration of trustees:

(g) Specifying the manner of appointment to or removal from the office of trustee:

(h) For the appointment of officers, employees, managers, and agents:

(i) Specifying the powers of investment of the trustees:

(j) Specifying the powers of the trustees to enter into contracts or arrangements which they consider conducive to the carrying out of the purposes of the Trust:

(k) Specifying the powers of the trustees to expend the income of the Trust, which powers shall be exercisable only for the purposes of administering and maintaining the Trust and for the purposes specified in the trust deed:

(l) For the keeping of accounts:

(m) Specifying the manner in which the trust deed may be varied.

(2) The trust deed establishing the Trust -

(a) Shall include such of the provisions required by sections 225F to 225K of the Local Government Act 1974 in respect of a community trust established under section 225D of that Act as are appropriate and relevant to the purposes of the Trust; and

(b) May contain such other provisions as are agreed between the Council and the Wellington City Council.

APPENDIX 2

The Trust Deed

[92] The recitals of the Trust Deed provide as follows:

BACKGROUND

A. The City Council and the Regional Council (together called "the Settlors") pursuant to s 6 of The Wellington Regional Council (Stadium Empowering) Act 1996, wish to establish and register under the Charitable Trusts Act 1957 a trust, to be known as The Wellington Regional Stadium Trust, to be responsible for the planning, development, construction, ownership, operation and maintenance of the stadium as a multi-purpose sporting and cultural venue.

B. The Trustees have agreed to act as trustees of the Trust.

C. This Deed is being completed by the Settlors and the Trustees to establish the terms of the Trust.

[93] Clause 3 of the Trust Deed sets out the objects of the Trust as follows:

3.0 Objects of the Trust

3.1 The objects for which the Trust is established and its responsibilities and additional functions are:

(a) To be responsible for the planning, development, construction, ownership, operation and maintenance of the Stadium as a high quality multi purpose sporting and cultural venue;

(b) To provide at the Stadium high quality facilities for use by rugby, cricket and other sports codes, musical, cultural and other users including sponsors, event and fixture organisers and promoters, so as to attract to the Stadium high quality and popular events for the benefit of the public of the Region;

(c) To administer the Stadium, and the trust Assets on a prudent commercial basis so that it is a successful, financially autonomous community asset;

(d) Generally to do all acts, matters and things that the Trustees consider necessary or conducive to further or attain the objects of the trust set out above for the benefit of the public of the Region including the acquisition of any land or interest in land or other assets as an ancillary ground or grounds or additional assets for the Stadium or for other purposes ancillary to the Stadium and to maintain and operate that venue or those assets to a high standard; and

(e) Subject to the fulfilment of the objects and responsibilities set out in sub clauses 3.1(a) to (d) inclusive, to govern and manage the Stadium and Trust Assets so as to repay all debt of the Trust (including to the Settlors) as soon as is reasonably practicable.

3.2 The Trust's objects shall only be carried out in, or to benefit people in, the Region. The Trustees may carry out activities outside the Region to promote the Trust or the Trust Assets, but only if they believe that such activities will be of ultimate benefit to people in the Region.

[94] Clauses 5, 6 and 7 provide for the disposition of income and capital and limits on major transactions. They provide:

5.0 Income of the Trust

5.1 The Trustees may with respect to all or any part of the income arising from the Trust Assets for each Financial Year:

(a) Pay, apply, or appropriate from income, (to the extent income is available), all expenses and other charges and provisions ordinarily met from income;

(b) Make, retain or charge against income any payments, reserves or provisions necessary or desirable for the proper administration and maintenance of the Trust and the Trust Assets including any appropriate reserves for capital works which the Trustees consider desirable to achieve the objects of the Trust;

(c) Reduce or repay any loans or liabilities of the Trust (other than the loan made by the Settlors); and

(d) Reduce or repay any loans made by the Settlors.

5.2 Subject to the repayment of all loans from the Settlors, or if the Settlors consent to the suspension of repayment in any year or years, any income of any Financial year not dealt with under clause 5.1 shall be accumulated and added to the Trust Assets.

6.0 Trusts of Capital

6.1 At any time the Trustees may, or may decide to, pay, apply or appropriate as much of the capital of the Trust Assets as they think fit for or towards one or more of the objects of the Trust. If the Trustees provide for more than one such object they need not treat each object equally. Any payment, application or appropriation of capital may be made either in addition to or in place of any payment, application or appropriation of income.

7.0 Controls on Exercise of Powers

7.1 Notwithstanding any provision in this Deed:

(a) The Trustees may not enter into a Major Transaction unless the Major Transaction is authorised by a Special Resolution or contingent upon the passing of a Special Resolution;

(b) The Trustees will obtain the written consent of the Settlors prior to their exercise of any power to lease the Stadium, (other than to a wholly owned entity of the Trust or in the ordinary course of business of the Trust); and

(c) The Trustees will obtain the written consent of the Settlors prior to their exercise of any power to sell the Stadium.

[95] Clauses 16 and 17 deal with alterations to the Trust Deed and the winding up of the Trust. They provide:

16.0 Alteration to the Deed

16.1 The Trustees may, from time to time by amending deed or instrument, alter, rescind or add to any of the provisions of this Deed provided that:

(a) Any amendment to this Deed made to correct a manifest error or an error which is of a formal, technical or administrative nature only, may be made by Special Resolution of the Trustees:

(b) Any amendment to this Deed, other than that in clause 16.1(a), shall not be made without the prior written consent of the Settlors and the Minister;

(c) At least 28 days notice of intention to make any amendment to this Deed must be given to all Trustees; and

(d) No alteration, rescission or addition may be made to this Deed which is prejudicial to the legal charitable status of the Trust.

17.0 Winding Up of the Trust

17.1 The Trust shall terminate and be wound up and dissolved if:

(a) The Trustees (after first obtaining the written consent of the Settlors) resolve by Special Resolution that the Trust shall be wound up; or

(b) The Trust is wound up by law.

17.2 A resolution to wind up the Trust shall specify an effective termination date of the Trust and thereafter the Trustees shall realise or dispose of the Trust Assets as soon as reasonably practicable in accordance with clause 17.0.

17.3 The Trust Assets or the proceeds resulting therefrom shall be applied by the Trustees upon the winding up in the following order of priority and manner:

(a) First in meeting all costs, expenses and liabilities of the Trust including the costs and expenses of winding up the Trust and setting aside any amount that the Trustees consider necessary or desirable (having regard to generally accepted accounting practices) in respect of any contingent liability of the Trust; and

(b) Secondly, after obtaining the prior approval of the Settlors, in the repayment or distribution (by instalments if the Settlors consider appropriate) of the remaining assets of the Trust to any Charitable purpose or purposes in the Region approved by the Settlors as being as similar as is practicable to those for which the Trust was established.

APPENDIX 3

The Funding Deed

[96] The Funding Deed regulates for the loans made by WCC and WRC. The nature of the advances is dealt with in cl 6, as well as the consequences if the Trust is held to be a LATE:

6.0 Nature of Advances

6.1 The Councils' advances under this Deed are a loan ("the loan"). Subject to clause 6.2, the loan shall be interest free, unsecured and the Councils shall have limited rights of recourse to claim repayment of

the loan as provided in this Deed. The loan shall be repaid to the Councils from the Surplus funds in the manner described in clause 14 or from such other monies of the Trust as the Trustees may determine.

6.2 From any date on which it is determined by any statutory authority having the force of law (or, if not having the force of law, an authority with whose determinations it is customary for local authorities generally to comply), that the Trust is, or is deemed to be, a LATE, the Trust shall, upon demand by the Councils, pay interest to the Councils on the outstanding amount of the loan at the Interest Rate.

6.3 If demand is not made in accordance with clause 6.2, no interest will have accrued or be payable and the Trust shall not be under, nor shall the Trust at any time become subject to, an obligation to pay interest in respect of the loan.

6.4 Payment of any interest accrued in accordance with clause 6.2 shall be made after the loan has been repaid in full in accordance with clause 14.

6.5 Where demand has been made in accordance with clause 6.2, interest on the loan shall accrue, and be calculated on the outstanding amount of the loan, from day to day and shall be calculated on the basis of a year of 365 days and the actual number of days elapsed.

6.6 The parties acknowledge that it is their intention that the Trust not be a LATE. The Trustees shall use their best endeavours to structure the Trust's activities in a way that ensures that the Trust is not deemed to be a LATE.

[97] The deed requires the Trust to prepare a strategic plan, a statement of trustee intent and a business plan (see cls 9, 10 and 11). Clause 14 provides for the repayment of the advances as follows:

14.0 Repayment of Councils' Advances

14.1 The Councils acknowledge that the Trust's overriding objective is to meet and achieve the objects of the Trust recorded in the Trust Deed and that the objectives specified in subclauses 3.1(a) to (d) of the Trust Deed are predominant. The Trustees shall operate the Trust prudently and on a sound commercial financial basis so that while continued operation and maintenance to a high standard of the Stadium is the first priority in accordance with the Trust Deed objectives, every effort shall be made to reduce and ultimately repay the Councils' advances.

14.2 The Trust shall be entitled to make at any time, payments to the Councils in reduction of their advances in addition to any payments made from Surplus funds at the end of the Financial Year.

14.3 On the completion of each year's annual accounts for the Trust, any Surplus funds shall, unless the obligation to repay is waived or

suspended by the Councils, be repaid to the Councils as a reduction of their respective advances.

14.4 Any repayments made to the Councils shall be paid to each Council in proportions equal to the amounts outstanding and owing to each Council under this Deed from time to time.

[98] Clause 24.1 gives the following definition of "Surplus Funds":

> "Surplus Funds" means in respect of the Trust and any controlled entity of the Trust the difference in each Financial year between:
>
> - the sum of all income of any nature, gifts, donations, legacies and grants, funds received on the disposal of any asset, and any funds of a capital nature including by way of loan, received by the Trust, and including the release of any provision or reserves to the general purposes of the Trust, and
>
> - the sum of all costs, expenses, taxes or charges of any nature, any appropriate provisions or reserves to meet liabilities and maintenance of the Trust Assets, any appropriate reserve to provide for capital works to replace or improve Trust Assets, appropriate capital expenditure in furtherance of the Trust's objects and any debt reduction, including any periodic repayment of Councils' loan made during the Financial Year (other than Surplus funds repaid from any prior financial period).

APPENDIX 4

Local Authority legislation

[99] The LATE concept was introduced into local government legislation by the Local Government Amendment (No. 2) Act 1989. The LATE definition in the LGA 1974 was amended on several occasions, although its final terms remained very similar to the original definition. The most relevant amendment, for this proceeding, was made in 1999, with effect from 1 April 1999. At the time of its repeal by the LGA 2002, the definition was as follows:

> **594B Definition of local authority trading enterprise**
>
> (1) In this Part of this Act, the term *local authority trading enterprise* -
>
> (a) Means –

(i) A company in which equity securities carrying 50% or more of the voting rights at a meeting of the shareholders of the company are –

(A) Held by 1 or more local authorities; or

(B) Controlled, directly or indirectly, by 1 or more local authorities; or

(ii) An organisation that –

(A) Operates a trading undertaking with the intention or purpose of making a profit; and

(B) Is subject to significant control, directly or indirectly, by 1 or more local authorities; but

(b) Does not include … [Several specific exclusions, not relevant in this case, are set out].

(2) For the purposes of subsection (1)(a)(ii), -

Organisation means any partnership, trust, arrangement for the sharing of profits, union of interest, co-operation, joint venture, reciprocal concession or other similar arrangement; but does not include a company or a committee or joint committee of a local authority:

Significant control means, in relation to an organisation,-

(a) Control of 50 per cent or more of the votes at any meeting of the members or controlling body of the organisation; or

(b) The right to appoint half or more of the trustees, directors, or managers (howsoever described) of the organisation,-

whether or not jointly with other local authorities or persons…

[100] Section 594B(1)(a)(iv), which was inserted by the Income Tax Amendment Act (No 2) 1992 and subsequently repealed by the Local Government Amendment Act 1999, provided as follows:

(1) In this Part of this Act, the term local authority trading enterprise—

(a) Means —

…

(iv) Any other company or organisation (being an organisation through which a trading undertaking is operated) which a local authority or local authorities, directly or indirectly, have control of by any means whatsoever;

[101] The LGA 1974 was replaced, as from 1 July 2003, by the LGA 2002. The term LATE was replaced by the terms CCO and CCTO. The relevant definitions are in s 6 of the LGA 2002:

> **6 Meaning of council-controlled organisation and council organisation**
>
> (1) In this Act, unless the context otherwise requires,-
>
> *council-controlled organisation* means a council organisation that is –
>
> (a) a company [controlled by a local authority] …
>
> (b) an organisation in respect of which 1 or more local authorities have, whether or not jointly with other local authorities or persons,-
>
> (i) control, directly or indirectly, of 50% or more of the votes at any meeting of the members or controlling body of the organisation; or
>
> (ii) the right, directly or indirectly, to appoint 50% or more of the trustees, directors, or managers (however described) of the organisation
>
> *council-controlled trading organisation* means a council-controlled organisation that operates a trading undertaking for the purpose of making a profit
>
> *council organisation* means –
>
> (a) a company [controlled by a local authority] …
>
> (b) an organisation in respect of which 1 or more local authorities have, whether or not jointly with other local authorities or persons,-
>
> (i) control, directly or indirectly, of 1 or more of the votes at any meeting of the members or controlling body of the organisation; or
>
> (ii) the right, directly or indirectly, to appoint 1 or more of the trustees, directors, or managers (however described) of the organisation.
>
> (2) For the purposes of subsection (1), *organisation* means any partnership, trust, arrangement for the sharing of profits, union of interest, co-operation, joint venture, or other similar arrangement; but does not include a company, or a committee or joint committee of a local authority…
>
> (4) The following entities are not council-controlled organisations:
>
> (a) an electricity company or electricity trust within the meaning of the Electricity Industry Reform Act 1998; or

(b) an energy company within the meaning of the Energy Companies Act 1992; or

(c) a port company or subsidiary of a port company within the meaning of the Port Companies Act 1988; or …

(i) an organisation exempted under section 7.

[102] The relevant provisions of the LGA 1974, dealing with community trusts, are as follows:

225D Community trusts

(1) Any local authority to which section 225C of this Act applies, may establish a trust to be known as the [Name of the district of the constituting local authority] Community Trust.

(2) The constituting local authority shall prepare a trust deed for that trust in accordance with section 225K of this Act, and shall submit the trust deed to the Minister.

(2A) A community trust shall be established under this section when, after consultation with the Minister of Revenue, the Minister agrees in writing that the general activities to be undertaken by the community trust, as specified in the trust deed, are not inconsistent with the purposes of the trust or with this Act.

(3) A community trust shall, on establishment, be a body corporate with perpetual succession and a common seal, and subject to sections 225E to 225M of this Act and to any other Act or rule of law, have and be empowered to exercise, for the purpose and within the scope of its functions and its constitution, all the rights, powers, and privileges, and may incur all the liabilities and obligations, of a natural person of full age and capacity.

(4) The common seal of any community trust established in accordance with subsection (1) of this section, shall be judicially noticed in all courts and for all purposes.

225E Purpose of Trust

All property vested in, or belonging to, any community trust established under section 225D of this Act, shall be held in trust to be applied for purposes beneficial for the community principally in the district of the constituting local authority, including charitable, cultural, philanthropic, recreational, heritage, and other purposes.

225K Matters to be included in trust deed

The trust deed establishing a community trust under section 225D of this Act shall contain provisions—

(a) Specifying the name of the community trust:

(aa) Specifying the purposes of the community trust as set out in section 225E of this Act:

(ab) Specifying the general activities to be undertaken by the community trust:

(b) Specifying the maximum and minimum number of trustees:

(c) For the holding of, and voting at, meetings of trustees and specifying the quorum necessary for the holding of meetings of trustees:

(d) For the remuneration of trustees:

(e) Specifying the manner in which a vacancy in the office of trustee shall be filled:

(f) For the appointment of officers, employees, managers, and agents:

(g) Specifying the powers of investment of the trustees:

(h) Prohibiting the community trust from undertaking in its own right any business other than business that is absolutely necessary to the carrying out of the purpose of the community trust:

(i) Specifying the powers of the trustees to expend the income of the trust, which powers shall be exercisable only for the purposes of administering and maintaining the community trust and for the purposes specified in section 225E of this Act:

(j) For the keeping of accounts:

(k) Specifying the manner in which the trust deed may be varied:

(l) Specifying such other matters as the Minister or the constituting local authority considers appropriate.

225L Trust deed not to be inconsistent with provisions of this Act

(1) No provision of a trust deed establishing a community trust shall be inconsistent with the provisions of this Act and no trust deed shall be varied so as to become inconsistent with the provisions of this Act.

(1A) No variation of the trust deed of a community trust may be executed to amend the general activities to be undertaken by the trust unless—

(a) The trustees have submitted the proposed variation to the Minister; and

(b) After consultation with the Minister of Revenue, the Minister agrees in writing that any proposed amendments to the general activities to be undertaken by the community trust are not inconsistent with the purposes of this trust or with this Act.

(2) Any provision of a trust deed establishing a community trust which is inconsistent with the provisions of this Act and any variation of the trust

deed which is inconsistent with the provisions of this Act shall be unenforceable and of no effect.

[103] The provisions of the LGA 1974 continue in operation with regard to community trusts – see s 298 LGA 2002.

298 Community trusts

(1) This section applies to any community trust which is established under section 225D of the Local Government Act 1974 and which is in existence immediately before the commencement of this section.

(2) Subject to the trust deed establishing a community trust to which this section applies, such a community trust continues in existence, and the provisions of subsections (3) and (4) of section 225D and of sections 225E to 225M of the Local Government Act 1974 continue to apply to that community trust as if they had not been repealed.

(3) Where any local authority or council-controlled organisation or subsidiary of a council-controlled organisation sells any shares or equity securities in any port company established under the Port Companies Act 1988 or where a local authority receives from a council-controlled organisation or a subsidiary of a council-controlled organisation any part of the proceeds of the sale of any such shares or equity securities, the local authority may apply any of the proceeds of the sale (including any income or capital gain arising on those proceeds) to—

(a) the payment of costs related to the sale; and

(b) the performance of any functions of that local authority; and

(c) a payment to a community trust to which this section applies.

APPENDIX 5

Income tax legislation

[104] Section 61 of the ITA 1976 provided in the relevant part:

61 Incomes wholly exempt from tax -

The following incomes shall be exempt from tax:

(2A) The income of a local authority other than –

(a) Income received in trust:

(b) Income (other than rates) derived by a local authority from any local authority trading enterprise (as defined in section 594B of the Local Government Act 1974.

(c) Income derived by a local authority trading enterprise (as defined in section 594B of the Local Government Act 1974.

[105] Under the ITA 1994, s CB3 provided:

CB 3 Public and local authorities' exempt income –

The following incomes shall be exempt from tax: …

(b) The income of a local authority other than -

(i) Income received in trust:

(ii) Income (other than rates) derived by a local authority from -

(A) Any local authority trading enterprise; or …

[106] Sections CB4(1)(c), (e) and (j) of the ITA 1994 provided as follows:

(1) The following incomes shall be exempt from tax: …

(c) Any amount derived by trustees in trust for charitable purposes or derived by any society or institution established exclusively for charitable purposes and not carried on for the private pecuniary profit of any individual, except where that income so derived is income to which paragraph (e) applies. …

(e) Any amount derived directly or indirectly from any business carried on by or on behalf of or for the benefit of trustees in trust for charitable purposes within New Zealand, or derived directly or indirectly from any business carried on by or on behalf of or for the benefit of any society or institution established exclusively for such purposes and not carried on for the private pecuniary profit of any individual: …

(j) Any amount derived by any society or association, whether incorporated or not, which is, in the opinion of the Commissioner, established substantially or primarily for the purpose of advertising, beautifying, or developing any city, borough, or other district so as to attract trade, tourists, visitors, or population, or to create, increase, expand, or develop amenities for the general public, if no part of the income or other funds of the society or association is used or is or may become available to be used for any other purpose, not being a charitable purpose:

[107] Section CB4(3) of the ITA 1994 provided (with effect from 1 April 1999):

(3) The income tax exemptions under sections CB4(1)(c), (e) and (j) do not apply to –

(a) a local authority trading enterprise; or

(b) A local authority in respect of income derived from a local authority trading enterprise.

[108] Sections CB3 and CB4(3) remained the same following the introduction of the CCO and CCTO regime, with the exception that the words "council controlled organisation" were substituted for the words "local authority trading enterprise".

[109] These provisions have been carried over into the Income Tax Act 2004, which came into force on 1 April 2005 (see ss CW32 - CW35).