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7 March, 2000

Mr John Shewan
PricewaterhouseCoopers
PO Box 243
WELLINGTON

Dear Mr Shewan

WELLINGTON REGIONAL STADIUM TRUST: "LATE" STATUS

Introduction

1. I refer to your letter and enclosures of 16 February 2000 seeking my opinion on whether the Wellington Regional Stadium Trust ("the Trust") constitutes a Local Authority Trading Enterprise ("LATE") in terms of the revised definition of the latter term introduced by the Local Government Amendment Act 1999 and adopted as an element of the income tax definition of that term, also in 1999.

2. *Your letter* outlines the significance of this issue to the Trust, the Wellington City Council and the Wellington Regional Council; the changes to the Income Tax Act 1994 and the Local Government Act 1974 relating to, or affecting, the LATE definition; rulings by, discussions with, and submissions to the Department with reference both to the charitable status of the Trust and the significance of the legislative amendments to which I have referred; and the Department's approach, and reasoning, in relation to the status of the St James Theatre Charitable Trust. The attachments to your letter also set out the advice the Trust has received from time to time on the LATE - status issue for the purposes of the Local Government Act and the Income Tax Act.

3. I have reviewed all of these materials in detail. I do nat imagine that for the purposes of my present advice it is necessary to set out a summary of them, or to re-canvass all

of the ground which they cover. They have, obviously. been of material assistance to me for the purposes of my opinion.

Statutory Definition of a LATE

4. By virtue of amendments in 1999 to both the Income Tax Act and the Local Government Act, the Trust will constitute a LATE if the Trust is:

> "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 one or more local authorities; ..."

5. I assume far the purposes of this advice that the Trust is subject to "significant control" by "one or more local authorities", an assumption fairly justified by the definition of "significant control" in section 594B(2) of the Local Government Act. On this basis, the Trust will constitute a LATE if the Trust operates a "trading undertaking", "with the intention or purpose of making a profit".

6. It is convenient to deal with these two prerequisites separately.

"Trading Undertaking"

7. The "trading undertaking" prerequisite is subject to analysis in a number of the opinions you have provided to me. The most detailed of those analyses is that set our in Chapman Tripp's letter of 24 January 1997 to the Wellington Regional Council, which letter advised that although no conclusive view was possible, on balance the "trading undertaking" requirement was not satisfied. A similar view is expressed in a number of the other opinions I have considered.

8. I disagree with that conclusion.

9. The term "trading undertaking" is currently defined in neither the Local Government Act, nor the Income Tax Act As noted in Chapman Tripp's advice, it may be the case that the term was derived from a definition employed, for unrelated purposes, within Part XII of the Local Government Act prior to the coming into force of the Local Government Amendment Act (No 2) 1989. It appears likely, based upon that definition and what may be perceived from the background materials to be the purpose of the introduction of the LATE concept, that the legislature quite deliberately chase not to define the criteria for the determination of a LATE status by reference to a "business" concept. The inference to be drawn from paragraph (d)(iii) of the "trading undertaking" definition within Part XII is that while "trading undertakings" were seen as having a number of "business-like" features, they did not necessarily constitute a "business" themselves.

10. This (seemingly) deliberate stepping away from full reliance upon a "business" definition may be a product of the consideration that particularly in non-taxation contexts there may bc some uncertainty as to the "business" status of activities which although "business-like" in terms of their scale and organisation, and tha capital and enterprise behind them, are nevertheless carried on other than for the exclusive goal or objective of profit. Both historically and currently, LATEs evidence to varying degrees this tension in that however "business-like" they appear on a purely obj ective analysis, they arc virtually without exception carried an for what arc perceived by their owners or promoters to be "public" purposes. The Trust is no exception.

11. It may be the case that the csistcncc of this public purpose dimension was seen to make it prudent to avoid the use cf the term "business" as a qualifier or prerequisite to a LATE status pursuant to the local government and income tax amendments introduced in 1989. At least insofar as the taxation dimension is concerned, it may also be the case that the Parliamentary draftsman had in mind observations such as those of Richardson J in Grieve v Commissioner of Inland Revenue (I 984) 6 NZTC 61,682. In that decision. Richardson J observed that:

> "Some organised commercial operations may be embarked upon without any motivation of profit making and it is well settled that such activities may constitute trading" (at p 61,688)

and noted that on one conception cf "business" the consideration that such activities were carried an in "an organised and coherent way" may lead to a "business" being established without reference to purpose or intention. He went on to observe, however, that "the vast majority" of persons who commit themselves to commercial ventures in an organised and sustained way have an intention to carry on the business for the purpose of making a profit. Since the latter prerequisite forms part of the test of a "business" for taxation purposes, he concluded that:

> "Parliament could not possibly have contemplated that a profession, trade, manufacture or undertaking not carried on for pecuniary profit could be treated as an assessable activity by ignoring the statutory definition and relying upon the ordinary dictionary meaning of business" (et p 61,688).

12. It is not surprising, perhaps, that in view of these observations Parliament chose a "trading undertaking" rather then a "business" concept to avoid LATEs stepping outside the relevant definitions by reference to arguments based on the pursuit of "public" as opposed to exclusively profit-oriented objectives.

13. Whether or not these inferences as to Parliament's reasoning process are correct or not, what is in my opinion clear is that the issue of whether a "trading" enterprise exists is to be examined independently of any broader "public" objectives or benefits of the enterprise in question, and, stating perhaps the same proposition in a different way, independently of whether the pursuit of profit represents the exclusive or principal reason for the carrying on of the activity in question. The first extract from the judgment of Richardson J in Grieve set out in paragraph 11 above, and the Unit4 Kingdom authorities referred to by Richardson J immediately following that extract,

places this *issue,* in my opinion, beyond real doubt. On the basis of Grieve, the interpretation of the term "trading" must be treated as requiring in the language of Richardson J reference to the extent to which the activity is "organised and coherent", constitutes a "commercial operation", or a "commercial venture" typified by commitment of energy and enterprise in an "organised and sustained way". The extent to which the activities axe profit motivated is irrelevant.

14. Judged by reference to these: criteria, and by the definition of both "trade" and "undertaking" from a variety of legal authorities, I am of the opinion that the activities of the Trust da constitute a "trading undertaking". I elaborate on the supplementary reasons underlying that conclusion below.

(i) *"Trading"*

15. The concept of "trade" or the activity of "trading" has been the subject of extensive consideration in the legal authorities, and particularly those from the United Kingdom, In that jurisdiction the *term* "trade" is used largely (but not exclusively) as a substitute for the term "business" in a significant variety of Acts of both a taxation and non-taxation character.

16. Frequently, the term "trade" or the activity of "trading" is a defined term in the *relevant* legislation. Frequently too, statutory definitions expand the ordinary meaning of the term. These considerations, combined with the further consideration that the meaning that may be appropriate to the term in the context of (for example) health and safety legislation may be inappropriate in a banking, or income tax, or trade regulation, context, gives rise to the need for circumspection in applying United Kingdom definitions of the term. Even those definitions occurring in an income tax context must be viewed with care: it is obvious from the cases that the term 'trade" is flexible and capable of a large range of meanings.

17. A number of those meanings would not extend to the activities of the Trust in constructing and operating the Stadium, or in offering admission to the Stadium for monetary consideration. These definitions arc those that see a "trade" or "trading" as limited to the buying and selling of goods, and having (at least in the particular context) no extension to services. A number of definitions falling into this class are referred to in some of the opinions from advisers you have made available to *me.*

18. Others of the definitions equally clearly would view the Trust as carrying on a trade *or* a trading activity. These are the authorities which have adopted the broader of the meanings of the term set out in Halsbury Vol 27 p 509 as extending to any business carried on for profit. It is I think a fair generalisation to say that income lax cases have a tendency to fall within this *more* general class, perhaps for the reason that, also as a generalisation, their context is a more neutral one than would frequently be the case with health and safety or other "welfare" legislation in which the issue frequently arises.

19. Whether those generalisations are correct or not, however, it is undoubtedly the case that decisions of the Privy Council and the House of *Lords have* in recent times adopted an expansive interpretation of the term "trade". In the decision of the Privy Council on appeal from Hong Kong in Kowloon Stock Exchange Limited v Inland Revenue Commissioners [1985] 1 All ER 205, for example, Lord Brightman for the Privy Council adopted the wide definition earlier laid down by the House of Lords in Ransom v Higgs [1974] 3 All ER 949. All judgments of the Law Lords in the latter cast saw the term in its ordinary usage as being free of limitations or constraints which perhaps inhered in the term in older cases, Lord Reid, for example, defied the term as:

> "... commonly used to denote operations of a commercial character by which a trader provides to customers for reward some kind of goods or services" (at p 95.5).

Lord Wilberforce in the same case commented at p 964 &at "trade involves, normally, the exchange of goods, or services, for reward . .." (at p 964).

20. These authorities, and a significant number of others which might be cited, demonstrate. that at least in some contexts the terms "trade" or "trading" contain no limitation by reference to the supply of goods, or the requirement of buying and selling goods in the manner commonly understood by the term "trader".

21. It is in my opinion prudent for the Trust to assume that the interpretation taken in Ransom v Higgs and Kowloon Stock Exchange would be held to be highly persuasive by a New Zealand tax court considering this issue. That conclusion arises not only because of the authority of the decisions in question, but for two further considerations.

22. The first is that it is very difficult to see how in scheme and purpose terms, any limitation which treated the concept of "trading" as limited to organisations buying and selling goods, and therefore as not extending to organisations involving the provision of services for a consideration, could be justified. This is not to doubt that the language of a statute is to be interpreted in accordance with its ordinary usage, and that ordinary usage is not to be distorted by reference to perceptions of the purpose of the legislation. It is, rather, to say that when a range of meanings of a word or term is legitimately open, the ordinary usage meaning from within that range which is perceived to best accommodate Parliament's likely intention should be adopted. Given that as a matter of public and Parliamentary record many, perhaps most, LATEs are service, rather than goods, providers it is difficult to see why the narrower interpretation would be held to be adopted.

23. The second consideration relates to the history of the 'trading undertaking" term, and in particularly the considerations described in paragraphs 1 l-12 of this letter. While clearly far from decisive, those considerations offer some support for the conclusion that the range of organisations intended to fall within the general ambit of the LATE concept were those exhibiting "business-like" features or characteristics. Into that general category the operations of the Trust would clearly fall.

24. For these reasons, it is in my opinion substantially more likely than not that the activities of the Trust constitute "trading".

(ii) *"Undertaking"*

25. The "undertaking" component of the "trading undertaking" phrase gives rise to no real difficulty. In virtually all definitions of that term in the cases, it is treated as being synonymous with or analogous to a "business". That accords in *my* view with the common usage, and dictionary, meaning of the term. I know of no conceivable interpretation of the term "undertaking" which would not extend to the operations of the Trust.

(iii) *Result if "Business" Test Inheres in "Trading Undertaking"*

26. In paragraph 11 of this opinion, I note the possibility that the definition of a LATE in terms of a "trading undertaking", may have been the product of a deliberate decision not to employ a "business" as opposed to a "business-like" criterion in order to close off arguments which might otherwise be available to local authorities or to LATEs to the effect that the purpose behind the carrying on of the relevant activities was not that of profit.

27. For the sake of completeness I note that were the matter seen to be of relevance, the status of the Trust would' not in my opinion be materially advanced even if the Commissioner were obliged to establish that the conventional income tax "business" test was in fact inherent within the "'trading undertaking" criteria.

28. As I note *in* paragraph 11, a. "business" for income tax purposes requires evidence that the aade or undertaking in question is "carried on for pecuniary profit", It well-established as a matter of New Zealand income tax law that the phrase "for" in this definition points not to purpose or objective, but to intention. Accordingly, it is settled law in New Zealand that the carrying on of commercial operations in a matter which objectively viewed represents the "exercise of an activity in an organised and coherent way" (Grieve at p 61,685) will constitute a business even if the purpose for which that activity is carried on is not profit-making. Rather, it is sufficient that the intention of the person carrying on that activity is pecuniary profit i s basis that McCarthy 3 was able in G v Commissioner of Inland Revenue [1961] NZLR 994 to conclude thar the activities of an evangelist carried on for the purpose of promotion of the gospel nevertheless constituted a "business" in income tax contemplation since it was carried on with the intention of profit-making. This approach, and interpretation, was approved of by the Court of Appeal in Harley v Commissioner of Inland Revenue [1971] NZLR 482 and by the same Court in the Grieve decision, notwithstanding Richardson f's recognition in the latter • SN that "in an ordinary dictionary sense 'for' might perhaps be considered to point more directly to purpose or object than to intention" (at p 61,688).

29. Applying these authorities to the current situation, it is clear from the terms of the Trust Deed that the overall objective of the enterprise or undertaking contemplated by that Deed is not pecuniary profit, but is rather the planning, construction and operation of the stadium as a sporting and cultural venue for the benefit of the public of the Wellington region. The consideration that, pursuant to paragraph (c) of clause 3.1 of the Trust Deed, these purposes are to be carried out on a prudent commercial basis in order to ensure that the Stadium is a "successful, financially autonomous community asset" does not itself establish that the purpose or objective of the Trust is pecuniary profit notwithstanding that the "prudent commercial basis" provision is itself an object rather than a power. A fair and balanced view of clause 3.1 does not justify, in my view, any conclusion that the purpose of the Trust operations is pecuniary profit, as opposed to it being a purpose that the construction and operation of the Stadium for the public benefit be carried out on such a prudent commercial basis.

30. That said, it is in my view equally clear that when the focus of the inquiry shifts from the purposes or objectives of the Trust, to the intention of the Trust in carrying on the mandated activity, a significantly different conclusion results. Much of the empowering/machinery provisions of tie Trust Deed focus upon issues of financial. management and control. Not surprisingly, the Funding Deed between the Wellington City Council, the Wellington Regional Council, and the Trust has financial issues as its virtual sole focus. By analogy with the G v Commissioner of Inland Revenue decision, it would be difficult in these circumstances to conclude that on an intention focus the "pecuniary profit" element was not satisfied.

31. For the reasons earlier noted, however, it is not important to reach any concluded view of this issue in the context of the "trading undertaking" prerequisite,, I therefore reserve a full discussion of it to the next section of this letter.

"With the intention or purpose of making a profit"

(i) ***Preliminary Observations***

32. As a **preliminary** point, I note my agreement with the PricewaterhouseCoopers submissions to the Inland Revenue Department of the need for the intention or purpose to be the dominant intention or purpose behind the relevant activity. This result would appear to follow clearly from the decision of the Court of Appeal in Commissioner of Inland Revenue v Walker [1963] NZLR 339. t i t i s a proposition which appears to be accepted by the Department in its 22 October 1999 letter to you with reference to the St James Theatre Charitable Trust.

(ii) ***LATE Definition - "Purpose"***

33. It is of course settled law for New Zealand income tax purposes that a significant difference exists between an "intention" and a "purpose". That distinction was first articulated in its modern form in the judgment of Barrowclough CJ in Plimmer v Commissioner of inland Revenue [1958] NZLR 147. The intention/purpose

dichotomy was both approved of, and relied upon, by the Court of Appeal in *its* decision in Walker and by the Court of Appeal in the Crieve decision *at p* 61,688. The dichotomy must also he regarded as cemented by its adoption in legislative drafting since the decisions in Plimmer and Walker.

34. As I earlier note, it is in my view highly unlikely that the dominant purpose underlying the operation by the Trust of the trading undertaking represented by the Stadium is the making of a profit. In both Plimmer and Walker no such dominant purpose was held to exist on facts which in my view were significantly more ambivalent on that issue than those attending the operations of the Trust.

(iii) LATE Definition - "Intention"

35. A different vfew is however, in ray opinion, required with reference to the "intention" element of the LATE definition.

35. The "intention" inquiry is a more narrowly-focused inquiry than that of "purpose". "Purpose" involves a broad-ranging investigation into the reasons why the taxpayer is engaged in the activity in which it is engaged. An "intention" inquiry is more directed to what the taxpayer actually does in pursuit of those broader objectives.

37. Clearly, it is no answer to a taxpayer who intends to make a profit that no issue Of an intention of profit-making would arise if the taxpayer did not have 'broader purposes to pursue. While it will very frequently be the case on a causation analysis that the taxpayer is only engaging in the activities in which it is engaged to promote the relevant purposes, a taxpayer intending to make a profit cannot be excused of any liability attendant upon that holding by pointing (correctly in many cases) to the fact that it would not bc engaged in those sctivitiec at all were it not for its wish to promote its non-profit purposes.

38. In the G case, for example, it is apparent that no issue of carrying on the activities for pecuniary profit would have arisen unless, for non-profit purposes, the taxpayer has sought to promote those purposes. Similarly, it is clear with reference to the facts in the Walker case that the taxpayer would never have acquired the land ultimately sold and on the profits of which the tax case focused, unless the taxpayer had been pursuing a broader objective unrelated to profit-making. And so too with Plimmer and virtually all other relevant intention/purpose New Zealand cases.

39. Rather, the New Zealand cases necessarily require an approach which puts the purposes (whether profit-making or non-profit-making) to one side, focuses upon the activities actually conducted, and asks with reference to those activities whether the intention to make a profit existed.

(iv) ***Impact of "Purpose" on Level of Profits***

40. What the cases do not explicitly address is the legal/income tax position in circumstances where the purposes have a direct impact upon the way in which any intention to ***make*** a profit is manifest or upon the level of profit derived. It is convenient to address that issue at this point.

41. Take as a hypothetical situation a charitable trust to establish a public amenity. Suppose that in the interests of promoting use of the facility, and for making the facility available to as broad a range of members of the public as possible, the facility is operated as a matter of deliberate policy on a "subsidy" basis with the result that a less-than-m&et rate of admission is charged.

42. In this hypothetical case it is impossible to segregate fully the "purpose" inquiry and the "intention" inquiry in the manner that the reported legal authorities appear to contemplate, for the reason that the "intention to make a profit" inquiry cannot sensibly be considered in isolation from the consideration that at least with reference to their level, profits arising from the activity are at a lower amount than if the deliberate decision to subsidise admissions had not been made.

43. It is less than completely clear how this issue would be dealt with by the New Zealand Courts in accordance with the purpose/intent analysis earlier described. Beyond doubt, the deliberate decision to subsidise admissions by the charging of a less than market rental must be relevant to the issue of the intention of the taxpayer in carrying out the activity. The critical issue, however, is whether in tie hypothetical example taken, the impact of the public benefit purpose is such as to provide a basis for the taxpayer's contention that no dominant intention to make a profit can exist in the circumstances described

44. I have considered this issue with care. While the information available to me does not suggest any "subsidy" of the character taken in this example attends the operation of the Stadium, the fact remains that if it is possible to develop a new or different class of case at the conceptual level to that class dealt with in the existing authorities, a basis might exist for requiring a re-analysis of the conventional (and unhelpful) approach.

45. On full reflection, however, I do not think it is likely that a New Zealand court, and in particular the New Zealand Court of Appeal, would regard the example as possessing sufficient force to require a re-examination of the existing legal authorities, Rather, I think it more likely than not that a court would hold that the clear impact of purpose upon the taxpayer's intention did not, in the last resort, alter the fundamental nature of the question raised by the "intention of making a profit" criterion. In my opinion, a court is likely to accept that a range of considerations may be taken into account in the setting of a particular charge for services, including altruistic considerations, but that the question in all cases remains the same: did the taxpayer have the (dominant) intention of making a profit in income tax contemplation as opposed to the (dominant) intention of (say) operating at a loss, or a purely break-even point. If the answer is in the affirmative, then the prerequisite would be satisfied, notwithstanding that. different taxpayers, in different circumstances, pricing *their* services by reference to different considerations, may have made a greater (or a smaller) 'profit'.

(v) *"Profit"*

46. What then is the "profit" which must be intended? In Grieve, Richardson J held on this issue:

> "In ordinary usage a profit is a net figure. It is the surplus over cost. The more difficult question is to determine what ingoings and outgoings are to be taken into account in deciding whether a pecuniary profit is being sought. Such a profit cannot sensibly be equated with the profit for tax purposes which. depend upon the shifting sands of almost endless amendments to the incentive provisions in the legislation." (at p 61,691).

47. As a matter of probability, then, the query posed by the LATE definition is whether or not the intention of the Trust was to derive a profit in what is (essentially) an accounting rather than 3. tax sense. With reference to the analysis in paragraphs 40-44 above, if the extent of the subsidy or less-than-market charge for services is such that the activity/charity in question aims to do no more than cover accounting costs, no intention of profit-me will as a factual matter be present. A similar result must follow if the (financial accounting derived) budget predicts a loss, or break-even excluding depreciation with the revenue loss in the first of these cases or the capital loss in the second of these cases being made up by (for example) further capital contributions from the settlors of the charity. But if the financial accounting projections forecast a profit after taking into account depreciation, then presumptively a profit will be treated as being intended for the purposes of the taxation legislation and the intention behind the making of that profit, at that level, will be a dominant intention.

48. As a matter of fact or evidence, the latter position obtains in the present case. (I discuss the relevant considerations in paragraphs 52-54 below).

(vi) *The Grieve "Two-fold Inquiry"*

49. This conclusion is confirmed by that further section of the Grieve judgment in which Richardson J articulates the: "twofold inquiry" to be conducted to determine whether or not the "business" criterion is satisfied. While for reasons earlier noted the "business" criterion is not directly invoked within the LATE definition, it must in my opinion follow that if the "business" criterion was satisfied on the present facts, then the LATE definition must also be satisfied.

50. Richardson J defined the "twofold inquiry" as being:

> "... as to the nature of the activities carried on and as to the intention of the taxpayer in engaging in those activities. Statements by the taxpayer as to his intentions are of course relevant but actions will often speak louder than words. Among the matters which may properly be considered *in that inquiry are* the nature *of* the activity, the period over which it is engaged in, the scale of operations and the volume of transactions, the commitment of time, money and effort, the pattern of activity, and the financial results" (at p 61,69 I).

51. After commenting that some insight might be afforded into the first of these inquiries by the pattern of activity in other "businesses", Richardson J concluded:

> "However, in the end it is the character and circumstances of the particular venture which are critical. Businesses do not cease to be businesses because they are carried on idiosyncratically or inefficiently or unprofitably, or because the taxpayer derives personal satisfaction from the venture" (at p 61,691).

52. As I have commented earlier in this opinion the "nature of the activities carried on" appears, clearly, to support the existence of a "business". Considerations of the scale of the enterprise, the commitment of time, money and effort, the long-term nature of the enterprise and the like support both the existence of an "undertaking" and (subject to intention) a "business".

53. With reference to the "intention" element of the "two-fold inquiry", and again consistently with my earlier comments, I find it very difficult to see how the Trust would be in a position to contend that an intention to make a profit did not exist. One of the objects of' the Trust is to administer the Stadium on a prudent commercial basis so that it is a successful, financially autonomous community asset. Further, and predictably, there is a heavy emphasis in the Trust Deed *on* financial aspects of the Trust's operation, and on what might be described as its contingent object or purpose to repay Wellington City Council and Wellington Regional Council advances. The Funding Deed of 30 January 1998, consistently with the terms of clause 3.1 (e) of the Trust Reed, imposes an "every effort" obligation upon the Trust to reduce and ultimately repay the Councils' advances, as well as imposing a range of financial disciplines and reporting obligations upon the Trust. In discharge of one of those reporting obligations, the 1999/2000 Westpac Trust Stadium Business Plan projects surpluses of income over expenditure (including depreciation) within its S year Summary Statement to 30 June 2004. These "profits" must be regarded as "intentional", and the intention to make them, at the levels stated, by definition dominant.

54. The 1999/2000 Business Plan also stresses the 12 month objective of the Stadium operating to budget levels from the time it opens, and as an objective for the 3-5 year period to maximise revenue earning opportunities And the 5 year Strategic Plan treats as an objective the achievement of budgets for each of the next 5 years with the outcome of substantial debt reduction,

55. A dominant intention to make a profit is in this context clearly established as a matter of evidence.

(vii) ***Amendment*** *to* ***Trust*** *Deed*

56. The third paragraph on page 8 of your 16 February 2000 letter asks whether it *would* assist the Trust's case if the objects of the Trust set out in the Trust Deed were amended to stipulate that there is no profit-making intention or purpose.

57. I doubt whether any such change would be of material assistance. While the terms of clause 3.1(c) assist the case for the Commissioner in contending for an intention to make a profit, the Commissioner's case rests not on that provision alone, but on the range of considerations summarised in paragraphs 52 - 54 above. Such is the cogency of those considerations in support of the "intent to make a profit" proposition, that deletion of clause 3.!(c) would be largely immaterial. The possibility that clause 3.1(c) might not only te deleted, but substituted for by a provision disavowing an intention (or purpose) of profit-making would, even if acceptable to the parties, be as likely to be prejudicial as beneficial in that it may well engender a cynical response from both the Commissioner and the COWS. That cynicism would arguably be well-justified given that the other provisions of the Trust Deed, the Funding Deed and the Business and Strategic Plans referred to in paragraphs 52 and 53 would cast real doubt upon any profit-disavowal amendment. The short point is that more fundamental or thoroughgoing changes would be necessary to the financial structure and financial philosophy of the Trust before an amendment of the character TO which you refer would have my substantive effect at all.

(viii) *United Kingdom Authorities*

58. For completeness, I note that I have considered the United Kingdom authorities referred to in your letter of 9 August 1999 to the Department on behalf of the St James Theatre Charitable Trust, and in particular the decision of the House of Lords in Trustees of the National ***Deposit*** Friendly Society v Skegness Urban District Council [1958] 2 All ER 601. In that decision, Lord Denning commented:

> "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 nor established or conducted far profit."

59. This extract might reasonably be regarded by the Trust as a description of the relationship between the Trust's purposes and the derivation of profit At best, the derivation of a profit is but a subsidiary purpose of the Trust, subordinate to its broader purpose of constructing a high class stadium for tie benefit of residents of the Wellington region, That acknowledged, however, it is clear from the above extract that the House of Lords in the Nations1 Deposit Friendly Society case saw the word "for" in the phrase "conducted for profit", as requiring a purpose inquiry rather than an intention inquiry. Consistently with the observations of' Richardson J in Grieve, it is conceivable that the word "for" profit in the New Zealand "business" definition might also, once, have been interpreted as requiring a purpose rather than an intention focus. If the term had in fact received a purpose interpretation in the early New Zealand cases, then the purpose/intention dichotomy which has underpinned both subsequent judicial decisions, and the style and content of legislative drafting

(including the relevant LATE definition), might never have developed, But as earlier noted, Yew Zealand law must be regarded as having embarked upon a significantly different course to that of United Kingdom law in this respect. The National Deposit Friendly Society case, and other "for profit" United Kingdom cases, do not represent the law of New Zealand.

Summary of c e

60. In my opinion, the Trust:

(a) operates a trading undertaking;

(b) with the intention of making a profit;

and is, accordingly, a "LATE" for the purposes of the current definition within the Local Government Act. While in the absence of authoritative judicial interpretation, these conclusions must be ones of opinion only, I see the case for the Commissioner in maintaining them as being very significantly stronger than the case available to the Trust in resisting them,

61. I have in this opinion focused on the technical issues on which my advice was sought, to the exclusion of other issues such as any steps which might be available to the Trust to avoid the implications of 3 LATE status. I have not considered that or related structuring issues at all. Should you wish me to do so, you will no doubt advise to that effect.

Yours faithfully

Lindsay McKay