

Our ref: 0425878

14 June 2007

The Council of the Internet Society of New Zealand Inc
PO Box 11881
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Discussion points from meeting with Michael Wallmannsberger re: charitable status for The Internet Society of New Zealand Inc

Background

- 1 As requested by Michael Wallmannsberger we write to set out some background information for consideration by the Council. The following points are ones discussed with Michael and which may have some relevance to the matters being considered at the meeting of Council on Saturday 16 June 2007.

Purpose of applying for charitable status

- 2 The application for charitable status is part and parcel of the application for a tax exemption from the Inland Revenue Department (IRD) by the Internet Society of New Zealand Inc (**Society**).
- 3 The first requirement of obtaining the above charitable tax exemption is obtaining charitable status from the Charities Commission (**Commission**) under the Charities Act 2005 (**Act**). We are of the view that this should be obtainable and our draft opinion on this has been provided to Michael.
- 4 If charitable status is granted to the Society by the Commission, the Society will then have to apply to the IRD for a charitable tax exemption. As part of the application to the IRD for a charitable tax exemption, the Society will have to convince the IRD that the Society was originally established for charitable purposes. The Society will need to convince the IRD that it was established for charitable purposes and that the Society was not established for the purpose of providing pecuniary benefit to Members since its establishment. If the Charities Commission has approved charitable status, this will be persuasive given that the objects described in its Constitution have not changed since the Society's

incorporation and the provisions in the Constitution have always restricted private pecuniary profit.

Reversibility of charitable status

- 5 Michael noted that it may be desirable for charitable status, assuming it is gained, to be given up in the future. If the Society decided to forfeit its charitable status, this decision would be able to be effected by changing the operation of the Society so that it no longer complied with the Act, in which case the Commission would de-register the Society as a charity. For example, if the Society were to change its objects and activities, it would no longer be classified as having a 'charitable purpose' and therefore the Commission would de-register it.

Ongoing monitoring

- 6 If the Society is granted charitable status there will be ongoing monitoring by the Commission to ensure that the Society continues to remain 'charitable'. Part of this monitoring will involve obligations on the Society to submit annual returns to the Commission which will enable the Commission to ensure it remains qualified to be registered. This obligation to submit annual returns to the Commission will override the obligation of the Society as an Incorporated Society to submit annual returns to the Companies Office. The Commission has said that: "Incorporated Societies that are registered with the Charities Commission will not need to send an annual financial statement to the Companies Office. They will only need to send an Annual Return to the Charities Commission".
- 7 When submitting the annual return to the Commission, the Society will need to submit an 'annual return form' which will require the Society to update the Commission (in tick box form) as to the sectors in which the Society operates, the activities involved in for that year, who benefited from those activities, etc. This annual return form forms part of the Commission's monitoring of charities to ensure that they remain 'charitable'.

Formalising a relationship with the Government and its impact on the Society's charitable status

- 8 Michael raised the question of what would be the consequence on the Society's charitable status if it were to formalise a relationship with the Government, for example through a Memorandum of Understanding or an exchange of letters, etc. This query arose given our reference in the opinion to the *Auckland Harbour Board v Commissioner of Inland Revenue* case and the issues surrounding statutory powers. Michael's concern was if the Society was to formalise such a relationship, its charitable status might be jeopardised.
- 9 Our initial view is that if the Society had charitable status and then subsequently entered into an understanding with the Government (that it would run and regulate the .nz domain), that mere understanding should not impact adversely on charitable status. However, if the understanding were escalated to the position of statute or regulation then this view would be different (absence any specific statutory exception).

Removal of the Society's Secretary

- 10 Michael asked whether removal of the Secretary as an Officer of the Society would have any implications under the Society's obligations under the Incorporated Societies Act 1908 (**Incorporated Societies Act**).
- 11 We have reviewed the Incorporated Societies Act and its Regulations, and note that there is no requirement for Societies to have a 'Secretary'.
- 12 We would recommend, before removal of the position of 'secretary', that the Society ensure that there is a some person who will be responsible for the Society's obligations under the Incorporated Societies Act that the secretary would usually be responsible for (for example responsibility for the control and use of the common seal of the Society). This would ensure that the Society would be at all times adhering to its obligations under the Incorporated Societies Act. We gather that from the discussion with Michael, this role will be assumed by the 'Executive Director'.

Recommendations to Council for amendments to the Society's Constitution under the 'Structural Review Task Force: Final Report to Council'

- 13 Michael asked us to review this document to ensure that proposed changes to the Constitution would not jeopardise the ability of the Society to gain charitable status.
- 14 We note that with regard to the change to be made to clause 13 (referring to the use of the common seal of the Society), changing 'President' to 'Secretary' is inconsistent with the intention of the Society to remove the role of the secretary. We suggest 'Secretary' be changed to 'Executive Director' in accordance with the intention of the Society to create the office of 'Executive Director' to replace the duties of the secretary.
- 15 We note that the office of 'Executive Director' is referred to in Schedule 2 of the proposed amendments to the Constitution. We note that none of the other proposed amendments refer to, or define, this office. We would suggest an amendment to the Constitution to define this role (for example 'the employee of the Society with this title'), given that it is referred to in Schedule 2.
- 16 In relation to the recommendation regarding 3.15 (Remuneration of Governance Board members) we suggest that any honorariums payable to Officers or Board Members be approved by the general membership with the Officers and Board Members abstaining from any voting. Obviously, the level of remuneration must not amount to a pecuniary profit for the recipients (but must in effect be a contribution to their time and outgoings in performing their roles for the Society). The use of the Government's fee scale is a good starting point but obviously has to be assessed in terms of the actual level of contribution from those persons.
- 17 Other recommendations to changes in the Constitution do not give rise to any issues in our view.

Member benefits

- 18 Michael explained the Society's intention to increase exclusive benefits to Members of the Society in order to increase Member numbers.
- 19 We advised that any benefit over and above what members of the general public are able to acquire will potentially jeopardise the ability of the Society to obtain/maintain charitable status as the Act specifically requires that an incorporated society not be carried on for the private pecuniary profit of any individual. If there is a specific benefit that the Society has in mind this should be considered in this context before it is offered to Members.

Eligibility of potential officers of the Society

- 20 The eligibility criteria of potential officers of the Society was discussed with Michael. The Act has specific requirements for eligibility for the Society to obtain/maintain charitable status. However, in our view it would be commercially prudent for the Society to have those or similar restrictions – as a matter of good practice and to be 'seen' as having responsible leadership. We have included our proposed amendment in the marked up draft of the Constitution.

Concluding comment

- 21 Should you have any queries arising from the above points, please do not hesitate to contact us.

Yours faithfully



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