

Registration decision: Kaikoura Aero Club Incorporated

The facts

1. Kaikoura Aero Club Incorporated ("the Applicant") was incorporated under the *Incorporated Societies Act 1908* on 4 November 1983.
2. The Applicant applied to the Charities Commission ("the Commission") for registration as a charitable entity on 3 December 2010.
3. Clause 2 of the Applicant's rules document sets out the purposes of the society as:

2. The objects for which the Club is established are:

- (a) *Generally to cooperate with and assist the Government of New Zealand in the advancement of aviation.*
- (b) *In every way to promote and encourage aviation and any art, craft, trade or profession connected therewith, or incidental thereto, and in particular in any of the modes following:*
 - i. *By carrying out instruction in aviation, mechanics or any matter connected with, or incidental to the same or either of them;*
 - ii. *By providing and establishing and managing aerodromes, flying grounds, landing grounds, workshops, repair shops or any other facilities for the use or benefit of the Club and its members;*
 - iii. *By providing and controlling aircraft of every description;*
 - iv. *By promoting or arranging for displays, pageants, competitions, lectures and discussions;*
 - v. *By establishing or arranging for the printing and publication of magazines, articles and reports;*
 - vi. *By watching and promoting general or local legislation;*
- (c) *To establish and maintain club rooms with furniture, accommodation and refreshments for the use (subject to the Rules of the Club) of members and visitors and to hold entertainments in such club rooms or elsewhere.*
- (d) *To purchase, hire, or take on lease or otherwise acquire, and to sell, lease, mortgage, charge, exchange, or otherwise deal with any real or personal property including aircraft of all and every kind and all plant, equipment, spare parts and accessories used or required in connection therewith.*

- (e) *To do all or any of the things hereby authorised alone or in conjunction with another or others.*
- (f) *To join or affiliate as a member of any Club, Association, or Society, whether incorporated under the Incorporated Societies Act 1908 or not, having as one of objects the advancement or government of aviation.*
- (g) *Generally to enter into all such agreements and contracts and to do all such acts, deeds, matters and things as may be deemed necessary or expedient for the purpose of attaining the above objects and furthering the interests of the Club and of aviation generally, whether such activities are directly concerned with aviation or not.*
- (h) *To establish and carry on for hire or reward any service by aircraft for the carriage of passengers or goods including charter flights and use of aircraft as air ambulances or for aerial spraying, aerial topdressing, air or sea rescue and generally commercial flying of every description.*
- (i) *To apply for and obtain from the appropriate authority an air service licence or other privilege or concession required or desirable in connection with the foregoing objects or any of them.*

4. The application was analysed and on 15 December 2010, the Commission sent the Applicant a notice that may lead to a decline on the basis that the purposes outlined in clause 2 were not exclusively charitable.

5. On 24 January 2011, the Applicant responded to the notice that may lead to a decline. The Applicant stated:

In response to your letter of 15 December 2010 the Kaikoura Aero Club Inc. wishes to amend our application to the Charities Commission for Charitable Status with the following submission to support our position.

The points we discussed at our meeting last week include the following:

1. *Our students receive training for a more affordable cost, that being \$35 less than our neighbours, with minimal profit to the club if any. We also have secured an agreement with our local Council to waive the landing fees for students to foster the aviation industry.*
2. *Our coastal location requires us to be available for Search and Rescue and we are on call on a daily basis.*
3. *Coastguard uses us to assist and we need to be equipped and trained (at our own expense) with maritime equipment and navigation aids for the purpose. Our most recent event involved a search on the West Coast last November.*
4. *Civil Defence has required us to transport stranded people out of the area when Acts or Nature have isolated us by road and rail We need appropriate equipment to perform these tasks safely.*

In addition, for your information, our club has one paid employee, that being our full time pilot.

Our CEO has been voluntary for nine and a half years.

Our Patron and Operations Manager, who is also an Airline Training Captain, has supported us for 25 years, for claiming only travel costs, as a generous gesture to help us provide this service. . . .

We need to be recognised by the charities Commission to enable our Club to offer our own scholarship for our own young people.

Over the years we have helped progress the careers of at least eight instructors to A Category Qualification level.

Without charitable status our club will be ineligible to apply for Charity Grants for the equipment for the patrols and emergencies off-shore and over land that are required of us in our isolated location.

The issues

6. The issue the Commission must consider is whether the Applicant meets all of the essential requirements for registration under the *Charities Act 2005* ("the Act"). In this case, the key issue for consideration is whether the Applicant is a society or institution established and maintained exclusively for charitable purposes, as required by section 13(1)(b)(i) of the Act. In particular, the issues are:
 - (a) whether the Applicant's purposes fall within the definition of charitable purposes in section 5(1) of the Act; and
 - (b) whether the Applicant provides a public benefit.

The law on charitable purposes

7. Under section 13(1)(b)(i) of the Act a society or institution must be established and maintained exclusively for charitable purposes.
8. Section 5(1) of the Act states:

...charitable purpose includes every charitable purpose, whether it relates to the relief of poverty, the advancement of education or religion, or any other matter beneficial to the community.
9. Sections 5(3) and (4) of the Act provides that the inclusion of a non-charitable purpose will not prevent qualification for registration if it is merely ancillary to a charitable purpose and not an independent purpose.

10. In *Vancouver Society of Immigration and Visible Minority Women v. Minister of National Revenue*,¹ Gonthier J states:

The first is the principle of exclusivity. To qualify as charitable, the purposes of an organisation or trust must be exclusively charitable...The primary reason for the exclusivity requirement is, as Slade J. observed in McGovern, supra, at p.340 that if charitable organizations were permitted to pursue a mixture of charitable and non-charitable purposes there could be no certainty that donations to them would be channelled to the pursuit of charitable purposes.

11. In *Molloy v Commissioner of Inland Revenue*,² Somers J states:

To be charitable in law...an expressed purpose upon its true construction must be limited or confined to charitable purposes only.

12. In addition to being within one of the categories of charitable purpose, to be charitable at law, a purpose must also be for the public benefit.³ This means that the purpose must be directed to benefit the public or a sufficient section of the public.

13. In considering an application, section 18(3)(a) of the Act requires the Commission to have regard to:

- i) the activities of the entity at the time at which the application was made; and*
- ii) the proposed activities of the entity; and*
- iii) any other information that it considers is relevant.*

Charities Commission's analysis

14. The Commission has analysed the purposes set out in clause 2 of the Applicant's rules and the information supplied by the Applicant about its activities.
15. The Commission considers that the purposes set out in clause 2(h) relating to the use of aircraft as air ambulances or for air and sea rescue are likely to be charitable under both the relief of poverty and "other matters beneficial to the community", because these purposes will protect human life. Clauses 2(e) to (g) and 2(i) are ancillary.
16. The Commission has assessed whether the Applicant's remaining purposes in clauses 2(a) to (d) and (h) are charitable.

¹ (1999) 169 D.L.R. (4th) 34, 58.

² [1981] 1 NZLR 688, 691.

³ Accepted as common ground in *Latimer v Commissioner of Inland Revenue* [2002] 3 NZLR 195, para [32].

Clauses 2(a) to (d) and (h)

17. The purposes set out in clauses 2(a) to (d) and (h) are:

- (a) *Generally to cooperate with and assist the Government of New Zealand in the advancement of aviation.*
- (b) *In every way to promote and encourage aviation and any art, craft, trade or profession connected therewith, or incidental thereto, and in particular in any of the modes following:*
 - i. *By carrying out instruction in aviation, mechanics or any matter connected with, or incidental to the same or either of them;*
 - ii. *By providing and establishing and managing aerodromes, flying grounds, landing grounds, workshops, repair shops or any other facilities for the use or benefit of the Club and its members;*
 - iii. *By providing and controlling aircraft of every description;*
 - iv. *By promoting or arranging for displays, pageants, competitions, lectures and discussions;*
 - v. *By establishing or arranging for the printing and publication of magazines, articles and reports;*
 - vi. *By watching and promoting general or local legislation;*
- (c) *To establish and maintain club rooms with furniture, accommodation and refreshments for the use (subject to the Rules of the Club) of members and visitors and to hold entertainments in such club rooms or elsewhere.*
- (d) *To purchase, hire, or take on lease or otherwise acquire, and to sell, lease, mortgage, charge, exchange, or otherwise deal with any real or personal property including aircraft of all and every kind and all plant, equipment, spare parts and accessories used or required in connection therewith. ...*
- (h) *To establish and carry on for hire or reward any service by aircraft for the carriage of passengers or goods including charter flights and use of aircraft as air ambulances or for aerial spraying, aerial topdressing, air or sea rescue and generally commercial flying of every description.*

18. In *Hadaway v Hadaway*,⁴ the Privy Council held that assisting persons carrying on a particular trade or business or profession will not be charitable unless there is a condition that this assistance can only be made for a purpose which is itself charitable.

⁴ [1955] 1 WLR 16 (PC). (See also: *Commissioners of Inland Revenue v Yorkshire Agricultural Society* [1928] 1 KB 611; *Crystal Palace v Minister of Town and Country Planning* [1951] 1 Ch 132; and *Commissioners of Inland Revenue v White* (1980) 55 TC 651.)

19. The Commission considers that the purposes stated in clauses 2(a) and (b) of advancing aviation and promoting and encouraging “aviation and any art, craft, trade or profession connected therewith” is unlikely to be charitable based on the court’s reasoning in *Hadaway v Hadaway*. This is because there is no condition that this assistance can only be made for a purpose which is itself charitable.
20. Similarly there is no condition that the purposes in clause 2(h) of establishing and carrying on “for hire or reward any service by aircraft for the carriage of passengers or goods including charter flights and the use of aircraft for ... aerial spraying, aerial topdressing, ... and generally commercial flying of every description” are restricted to those that will further a charitable purpose.
21. In *Scottish Flying Club Ltd v Commissioners of Inland Revenue*,⁵ the Court held that a flying club whose main activities were the provision of facilities for sporting flights, the maintenance of aircraft for the pleasure of members and the provision of facilities for instructional flights did not have exclusively charitable purposes, and therefore did not qualify as a charity.
22. In this case Lord Fleming held:

When one turns to the objects of this club one finds in the forefront of the memorandum of association that the objects for which the club was established include, inter alia, the provision of facilities for sporting flights and the maintenance of flying machines for the pleasure of members. These cannot be regarded as “charitable” purposes even in the widest sense. ... It was suggested that anybody might become a member of this club, but when one looks at its rules one finds that members are elected by ballot of the general committee, and that three black balls disqualify a candidate for membership. The memorandum then goes on to provide that, among other things the Company is established to buy and sell aeroplanes and other similar things that are used in connection with aviation. But what is perhaps the most important article of the memorandum as regards the question of whether the club is a charitable institution is the fifth, which runs as follows: - “To establish, maintain and conduct a club for the accommodation of members of the club and to provide a clubhouse and other conveniences, and generally to afford to members all the usual privileges, advantages, conveniences and accommodation of a club”; ...

The impression which I get from a perusal of the memorandum of association and the rules is that the main object of the Company is to provide opportunities for the members receiving instruction in the art of flying, to give them facilities for flying for their own pleasure, and also to provide them at the aerodrome with all the conveniences and advantages of a social club. I do not doubt that the club’s activities include things which may be regarded as educational or beneficial to the community, but I think that the Commissioners were entitled to take the view that these were of a subordinate character. It follows that it cannot

⁵ [1935] SC 817.

be affirmed that this club was established for charitable purposes only

...⁶

23. In *Inland Revenue Commissioners v Baddeley*,⁷ the court held that providing amusement, entertainment or social activities for members of an entity are not primary purposes that will necessarily provide a public benefit.

24. More recently in New Zealand in *Travis Trust v Charities Commission*⁸ Joseph Williams J stated:

*In the area of sport and leisure, the general principle appears to be that sport, leisure and entertainment for its own sake is not charitable but that where these purposes are expressed to be and are in fact the means by which other valid charitable purposes will be achieved, they will be held to be charitable. The deeper purpose of the gift or trust can include not just any of the three original Pemsel heads but also any other purpose held by subsequent cases or in accordance with sound principle to be within the spirit and intendment of the Statute of Elizabeth.*⁹

25. To the extent that the purposes in clauses 2(b)(ii), (c), and (d) provide leisure or social activities for the club's members, the Commission considers that these are unlikely to be charitable for the reasons set out in *Scottish Flying Club Ltd v Commissioners of Inland Revenue*,¹⁰ *Inland Revenue Commissioners v Baddeley*,¹¹ and *Travis Trust v Charities Commission*.¹²

26. It is well-established legal principle that seeking to secure or oppose a change in the law or the policy or decisions of central or local government are political purposes which cannot be charitable.¹³ The Commission therefore considers that "promoting general or local legislation" in clause 2(b)(vi) will amount to a non-charitable political purpose.

⁶ [1935] SC 817, 822-3.

⁷ [1955] AC 572, 600. See also *Inland Revenue Commissioners v City of Glasgow Police Athletic Association* [1953] AC 380, 394-396.

⁸ (2009) 24 NZTC 23,273

⁹ (2009) 24 NZTC 23,273, 23,281.

¹⁰ [1935] SC 817.

¹¹ [1955] AC 572, 600. See also *Inland Revenue Commissioners v City of Glasgow Police Athletic Association* [1953] AC 380, 394-396.

¹² (2009) 24 NZTC 23,273

¹³ *Re Wilkinson (deceased)* [1941] NZLR 1065; *Knowles v Commissioner of Stamp Duties* [1945] NZLR 522; *Molloy v Commissioner of Inland Revenue* [1981] 1 NZLR 688 (CA); *Re Collier* [1998] 1 NZLR 81. (See also *Royal North Shore Hospital of Sydney v Attorney-General for New South Wales* (1938) 60 CLR 396 at 426; *National Anti-vivisection Society v Inland Revenue Commissioners* [1948] AC 31 (HL); *McGovern v Attorney-General* [1982] 1 Ch 321 at 340.)

Public or private benefit?

27. In order to be charitable, the benefits from the Applicant's activities must be to the community rather than to private individuals. Any private benefits arising from the Applicant's activities must only be a means of achieving an ultimate public benefit and therefore be ancillary or incidental to it. It will not be a public benefit if the private benefits are an end in themselves.¹⁴ In addition, proof that public benefit will necessarily flow from each of the stated purposes is required, not merely a belief that it will or may occur.¹⁵
28. In *Commissioners of Inland Revenue v Yorkshire Agricultural Society*,¹⁶ the Court said:
- There can be no doubt that a society formed for the purposes of merely benefiting its own members, though it may be to the public advantage that its members should be benefited by being educated ... or whatever the object may be, would not be for a charitable purpose, and if it were a substantial part of the object that it should benefit its members I should think that it would not be established for a charitable purpose only.*¹⁷
29. In *Institution of Professional Engineers New Zealand Incorporated v Commissioner of Inland Revenue*,¹⁸ Tipping J stated:
- I consider that the following words of Lord Normand at page 396 in the Glasgow Police Association case are highly material:-*
- '...what the respondents must show in the circumstances of this case is that so viewed objectively, the association is established for a public purpose and that the private benefits to members are unsought consequences of the pursuit of the public purpose and can therefore be disregarded as incidental. That is a view which I cannot take. The private benefits to members are essential.'
- While there can be no doubt that there are distinct public benefits from the objects and functions of IPENZ it is my view, after careful consideration of both the oral and documentary evidence, that the private benefits cannot be disregarded as incidental.*¹⁹
30. Clause 2(b)(ii) states that the Applicant is providing facilities "for the use and benefit of the Club and its members", and clause 2(c) states the Applicant is providing club rooms for the use of members and visitors.

¹⁴ *Commissioners of Inland Revenue v Oldham Training and Enterprise Council* (1996) STC 1218; *Travel Just v Canada (Revenue Agency)* 2006 FCA 343, [2007] 1 CTC 294.

¹⁵ *Gilmour v Coats* [1949] AC 426; *Re Blyth* [1997] 2 Qd R 567, 582; *D V Bryant Trust Board v Hamilton City Council* [1997] 3 NZLR 342, 350.

¹⁶ [1928] 1 KB 611.

¹⁷ [1928] 1 KB 611, 631.

¹⁸ [1992] 1 NZLR 570.

¹⁹ [1992] 1 NZLR 570, 582.

31. In this case, the Commission considers that the private benefits available for members through the provision of aircraft, facilities and social activities are not "unsought consequences of the pursuit of the public purpose" which can be disregarded as incidental to any wider public benefit.

Applicant's submissions

32. In the letter of 24 January 2011, the Applicant stated:

In addition, for your information, our club has one paid employee, that being our full time pilot.

Our CEO has been voluntary for nine and a half years.

Our Patron and Operations Manager, who is also an Airline Training Captain, has supported us for 25 years, for claiming only travel costs, as a generous gesture to help us provide this service.

We need to be recognised by the Charities Commission to enable our Club to offer our own scholarship for our own young people.

Over the years we have helped progress the careers of at least eight instructors to A Category Qualification level.

Without charitable status our club will be ineligible to apply for Charity Grants for the equipment for the patrols and emergencies off-shore and over land that are required of us in our isolated location.

33. The fact that the Applicant has only one paid employee and its CEO and Operations Manager are not paid for their services does not render the purposes and activities of the Applicant charitable.
34. Helping to progress the careers of eight flying instructors does not provide evidence of a charitable purpose, since this benefit accrues to private individuals rather than to the public.
35. The Charities Act requires the Commission to assess each application for registration against the essential criteria set out in the Act and the relevant case law. In making its decisions, the Commission is not permitted to take into account any potential consequences for the Applicant, such as whether it will or will not be eligible for grants from any particular organisations.

Conclusion

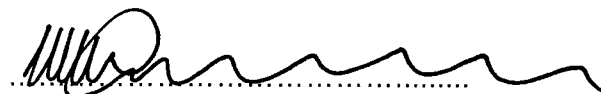
36. The Commission concludes that some of the Applicant's purposes set out in clause 2(h) may be charitable but that the remaining purposes in clauses 2(a) to (d) and (h) are non-charitable independent purposes which are not ancillary to any charitable purposes..

Charities Commission's determination

37. The finding of the Commission is that the Applicant has failed to meet an essential requirement for registration as a charitable entity in that it is not established and maintained exclusively for charitable purposes, as required by section 13(1)(b)(i) of the Act.

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

Signed for and on behalf of the Charities Commission



Trevor Garrett
Chief Executive

15/7/11
Date