

Registration decision: Balloons Over Waikato Charitable Trust

The facts

1. Balloons Over Waikato Charitable Trust (the Applicant) was established on 26 October 1999, and incorporated as a board under the *Charitable Trusts Act 1957* on 29 October 1999.
2. The Applicant applied to the Charities Commission (the Commission) for registration as a charitable entity under the *Charities Act 2005* (the Act) on 22 November 2007.
3. The Applicant's purposes are set out in clause 5 of the trust deed:

5.1 OBJECTS:

- 5.1.1 *To manage the TRUST PROPERTY and to apply the available funds forming part of the TRUST PROPERTY wholly to the CHARITABLE PURPOSES within New Zealand.*
 - 5.1.2 *To pay, apply, or appropriate the whole or any part of the capital of the TRUST PROPERTY (in specie or otherwise) or any part of the income arising from that property for the CHARITABLE PURPOSES within New Zealand.*
 - 5.1.3 *To assist in such way as the TRUST BOARD thinks fit by gift or loan or in any other way any object or activity which promotes CHARITABLE PURPOSES.*
 - 5.1.4 *To purchase, erect, extend, develop, alter, improve, repair or maintain and furnish and equip any buildings acquired by the TRUST BOARD for CHARITABLE PURPOSES.*
 - 5.1.5 *To purchase lease or otherwise acquire any real or personal property for the purposes of the trusts now declared.*
 - 5.1.6 *To accept the ownership, custody, control and management of any real or personal property either generally or for any special purposes connected with the trusts created by this deed.*
 - 5.1.7 *To do any other thing which in the opinion of the TRUST BOARD is conducive to the attainment of any of the objects now declared.*
 - 5.1.8 *The TRUST BOARD will pursue the abovementioned objects in New Zealand and not elsewhere.*
4. Charitable purpose is defined in clause 3.1(a) of the trust deed:

(a) "CHARITABLE PURPOSE" means:

(i) *The promotion advancement and encouragement of hot air ballooning for the betterment and enjoyment of the general public and promotion of the Waikato region.*

(ii) *Making grants to any trust or society or institution nominated by the TRUST BOARD and established exclusively for charitable purposes within New Zealand (that expression "charitable purposes" being as defined in Section OB1 of the Income Tax Act 1994).*

5. The Commission analysed the application for registration and on 21 January 2009, sent the Applicant a notice that may lead to decline on the basis that:
- the promotion, advancement and encouragement of hot air ballooning for the betterment and enjoyment of the general public was concerned with the provision of entertainment and therefore was not charitable; and
 - the promotion of the Waikato region was too broad to be exclusively charitable.
6. On 12 August 2009, the Applicant submitted proposed amendments to clause 3.1(a) of the trust deed as follows:
- (a) "Charitable purposes" means:
- (i) To promote, develop and advance excellence in hot air ballooning;
 - (ii) To hold an event called "Balloons over Waikato" at a suitable public venue to exhibit and promote the skill of hot air ballooning and for the dissemination and sharing of knowledge about hot air ballooning for the benefit of the participants and for the benefit of the greater Waikato region;
 - (iii) To encourage the growth and spread of hot air ballooning;
 - (iv) To maintain and develop a website for the "Balloons over Waikato" event and for the dissemination of information on hot air ballooning to the public and to hot air balloonists;
 - (v) All such things as are incidental or conducive to the attainment of the above charitable purposes.
7. The Commission analysed the proposed amendments and on 14 August 2009, sent the Applicant an email advising that the proposed amendments did not meet registration requirements because:
- the amended purposes did not fall under any of the heads of charity; and
 - the focus of the amendments is on the "Balloons Over Waikato" event which is for the amusement and entertainment of spectators and a tourist event to promote the Waikato region. This is not charitable.
8. On 10 November 2009, the Applicant submitted that:

Section 5 of the Charities Act 2005 defines the meaning of 'charitable purpose' by restating the traditional legal meaning ...

The definition includes any other matter beneficial to the community. It is well recognised that to qualify under this head the purposes must be for the benefit of the public at large. The New Zealand Parliament has made it clear in section 61A of the Charitable Trusts Act 1957 that trusts for social and physical wellbeing would continue to be charitable at law. ...

The Trust's purpose is charitable as it falls within s5(1)(d) of the Charities Act 2005 being 'any other matter beneficial to the community' as it operates

a public event for the betterment and enjoyment of the general public and promotion of the Waikato region. Further, it is deemed to be charitable by virtue of section 61A(3) as it organises an activity which improves the lives of those who experience it and is for the benefit of the public at large.

To construe the Trust's purposes as the promotion of mere sport is false – rather the ballooning is the vehicle through which the betterment and enjoyment of the general public is achieved. ...

In support of this interpretation we note the following:

- There are a number of ballooning activities which take place over the course of the week long Balloons Over Waikato event.*
- All of these activities are available to view by the general public, free to attend and therefore accessible to everyone. It is important to the Trust that all social economic groups are able to benefit from the event.*
- The balloons are inflated early in the morning and thousands of people from all over the region gather to see them take flight.*
- Throughout the week the balloons can be seen flying overhead from all parts of the region.*
- A "night glow" is held where the balloons are inflated and glow in the dark creating an amazing spectacle.*
- Rides in a balloon are given for a gold coin donation.*
- The week long event draws thousands of people into Hamilton from all over New Zealand and overseas with a resulting benefit to the local economy.*
- The Trust works to involve selected schools who are able to host a balloon, the pilot and crew. This balloon will inflate in their school grounds. Members of the school, their family and the surrounding community are involved. The schools use the event as an educational opportunity by building balloon events into the curriculum. The outcomes of their learning are displayed at participating schools for further discussion with the visiting pilots and crew. Schools will also participate in the parade this year, offering them the chance to win money and services for their school whilst encouraging creativity.*
- The trust works closely with service groups such as Lions, Kiwi Watch, Maori Wardens, Keep Hamilton Beautiful and Y-Walkers.*
- There is no benefit to any individual. The event is not a sports race or competition and in this respect may be differentiated from the cases involving sports competitions, horse racing and the like.*
- Balloons Over Waikato received the 2007 Best Waikato Event award from votes received by readers of the Waikato Times ...*

For all the above reasons one purpose of the Trust is therefore to bring the community together to promote community harmony and well being and for the betterment and enjoyment of the public and the benefit of the Waikato Region. Hot air ballooning is the vehicle through which this purpose is achieved. ...

The donation of funds to and promotion of a charity is an equally important purpose of the Trust. Every two years the trust selects a charity to support and donate funds to. We note the following:

- *In the recent past the Trust has raised funds for and promoted Camp Quality, the Salvation Army and this year their chosen charity is Plunket.*
- *Each charity chosen from the many applications received will be the chosen charity for a 2 year tenure.*
- *The chosen charity is prominently advertised by the Trust in all major advertising for the event. The charity has the opportunity to use the events over the week to produce their own advertisements. We enclose an advertisement from Plunket as an example.*
- *The Trust raises funds by the sale of glow sticks at the night glow event, by gold coin donations for hot air balloon rides, and through receiving goods from sponsors eg Tip Top. These funds go to the charity which in turn provide volunteers to assist with the events.*
- *The trust does not and never has made a profit from the event. In 2008 the Trust won the Waikato Business Excellence Award for not for profit and public sector organisations ...*
- *It is expected that this year the Trust will raise \$10,000 to \$15,000 to donate to Plunket. ...*

The Trust runs the Balloons Over Waikato event for the betterment and enjoyment of the general public, to promote the Waikato region and to make grants to and promote a chosen charity, not for the promotion of hot air ballooning as a sport or as a competition. It is the region and the general public which benefits together with the chosen charity. The Trust therefore meets the requirements of the two part test ie the Trust is charitable in nature and it provides a benefit which is public in nature.

The issues

9. The Commission must consider whether the Applicant meets all of the essential requirements for registration under the Act. In this case, the key issue for consideration is whether the Applicant is a trust of a kind in relation to which an amount of income is derived by the trustees in trust for charitable purposes, as required by section 13(1)(a) of the Act. In particular, whether the Applicant's purposes fall within the definition of charitable purpose in section 5(1) of the Act.

The law on charitable purpose

10. Under section 13(1)(a) of the Act, a trust must be of a kind in relation to which an amount of income is derived by the trustees in trust for charitable purposes.
11. In order to be a valid trust at law, a trust that is for charitable purposes must be exclusively charitable or it will be void for uncertainty.
12. Section 5(1) of the Act defines charitable purpose as including every charitable purpose, whether it relates to the relief of poverty, the

advancement of education, the advancement of religion, or any other matter beneficial to the community. In addition, to be charitable at law, a purpose must be for the public benefit.¹ This means that the purpose must be directed at benefitting the public or a sufficient section of the public.

13. Section 5(3) of the Act provides that for an entity to have charitable purposes, any non-charitable purpose must be ancillary to a charitable purpose.
14. In considering an application for registration, section 18(3)(a) of the Act requires the Commission to have regard to the Applicant's activities at the time the application was made, the Applicant's proposed activities, and any other information that the Commission considers relevant.

Charities Commission's analysis

15. The Commission considers that the purpose outlined in clause 3.1(a)(ii) of the trust deed is charitable by definition.
16. In relation to the purpose outlined in clause 3.1(a)(i), the Commission considers that while it is possible that some of the Applicant's activities such as schools hosting a balloon, pilot and crew could advance education, clause 3.1(a)(i) does not indicate an intention to advance education. Similarly, this purpose does not indicate an intention to relieve poverty or advance religion. Therefore, the purpose in clause 3.1(a)(i) has been considered in relation to "any other matter beneficial to the community".

Any other matter beneficial to the community

17. In order for a purpose to qualify as "any other matter beneficial to the community", the purpose must be beneficial to the community and be within the spirit and intendment of the purposes set out in the Preamble to the Charitable Uses Act 1601 (the Statute of Elizabeth).²
18. The purposes set out in the Preamble to the Statute of Elizabeth are:
 - relief of aged, impotent, and poor people
 - maintenance of sick and maimed soldiers and mariners
 - schools of learning
 - free schools and scholars in universities
 - repair of bridges, ports, havens, causeways, churches, sea banks, and highways
 - education and preferment of orphans

¹ See *Latimer v Commissioner of Inland Revenue* [2002] 3 NZLR 195.

² *Re Jones* [1907] SALR 190, 201; *Williams Trustees v Inland Revenue Commissioners* [1947] AC 447, 455; *Scottish Burial Reform and Cremation Society v Glasgow Corporation* [1968] AC 138, 146-48; *Incorporated Council of Law Reporting (QLD) v Federal Commissioner of Taxation* (1971) 125 CLR 659, 667, 669; *Royal National Agricultural and Industrial Association v Chester* (1974) 48 ALJR 304, 305; *New Zealand Society of Accountants v Commissioner of Inland Revenue* [1986] 1 NZLR 147, 157; *Re Tennant* [1996] 2 NZLR 633, 638.

- relief, stock or maintenance of houses of correction
 - marriage of poor maids
 - supportation, aid and help of young tradesmen, handicraftsmen, and persons decayed
 - relief or redemption of prisoners or captives and
 - aid or ease of any poor inhabitants concerning payment of fifteens, setting out of soldiers and other taxes.³
19. In addition, the Courts have found that purposes benefiting a locality may be charitable under “any other matter beneficial to the community”, and the promotion of sport may be charitable where it promotes another charitable purpose; for example, the promotion of public health.

Benefit to a locality

20. Gifts in general terms for the inhabitants of a defined area may be charitable.⁴ However, it is incorrect to conclude that a trust for the benefit of the people of a defined area will always be charitable. As set out in *The Law and Practice Relating to Charities* “A non-charitable purpose will not be rendered charitable by localising the benefits”.⁵
21. Courts have reasoned that, where no purpose is expressly referred to, the fact that the gift is directed to a locality imports the necessary element of public benefit, and therefore a charitable purpose is implicit in the context. Conversely, where a donor actually specifies a purpose, the court must determine whether or not that purpose is charitable.⁶
22. The Commission considers that the specified purpose in clause 3.1(a)(i) is not analogous to purposes aimed at benefiting a locality generally, as it is expressed to be for the promotion, advancement and encouragement of hot air ballooning.

Promotion of sports or other recreational activities

23. Sporting or recreational activities may be charitable where they are advancing another charitable purpose such as the advancement of education or the promotion of health. Thus, in *Travis Trust v Charities Commission*⁷, after looking at the case law on sports and leisure time activities, Joseph Williams J states:

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

³ *Charitable Uses Act 1601* 43 Elizabeth I c. 4.

⁴ *Re Carter (deceased)* (1897) 16 NZLR 431 (CA).

⁵ Hubert Picarda, 1999, 3rd edition, Butterworths, London, Dublin & Edinburgh, p 146.

⁶ Gino Dal Pont, *Charity Law in Australia and New Zealand*, 2000, Oxford University Press, p 183.

⁷ HC WN CIV-2008-485-1689 [3 December 2008].

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.

24. The Commission considers that the Applicant has not provided any evidence that “*the promotion advancement and encouragement of hot air ballooning for the betterment and enjoyment of the general public and promotion of the Waikato region*” will advance a charitable purpose.
25. The Courts have held that recreation, hospitality and entertainment per se is not charitable⁸. In *Williams Trustees v Inland Revenue Commissioners*⁹ it was held that a trust to create a centre to promote “the moral, social, spiritual and educational welfare of Welsh people” was not exclusively charitable. In *Royal Choral Society v Inland Revenue Commissioners*¹⁰ it was held that a society formed to promote music merely for the amusement of members was not charitable. Accordingly, the Commission considers that the promotion, advancement and encouragement of hot air ballooning for the enjoyment of the general public is not charitable.
26. In addition, the Commission considers that the Applicant has not provided any evidence that “*the promotion of the Waikato region*” through the promotion, advancement and encouragement of hot air ballooning is a charitable purpose. The promotion of the Waikato region would allow the Applicant to promote economic development or tourism within the Waikato region. It is noted that the Applicant has advised that the week long Balloons Over Waikato event draws thousands of people into Hamilton from all over New Zealand and overseas with a resulting benefit to the local economy.
27. The courts have held that economic development of a region may be charitable where that region has a particular need.¹¹ The Applicant has not provided any evidence that the Waikato area has a particular need and the Commission considers that it is difficult to conclude that this area is one which is in need of assistance because:
- The unemployment rate in this area is 5.2%, compared with 5.1% for all of New Zealand
 - The median income in the Waikato Region is \$24,100 compared with \$24,400 for all of New Zealand¹²
28. Moreover, the promotion of tourism is unlikely to be charitable as it allows for the promotion of commercial activity with a strong flavour of private benefit.¹³

⁸ See *Inland Revenue Commissioners v Baddeley* [1955] AC 572, *Travis Trust v Charities Commission* HC WN CIV-2008-485-1689 [3 December 2008].

⁹ [1947] AC 447.

¹⁰ [1943] 2 All ER 101 at 106-107 per Lord Greene MR.

¹¹ *Re Tennant* [1996] 2 NZLR 633.

¹² Statistics New Zealand, *QuickStats About Waikato Region* (<http://www.stats.govt.nz/Census/2006CensusHomePage/QuickStats/AboutAPlace/SnapShot.aspx?type=region&ParentID=1000003&tab=Income&id=1000003>) last accessed 23 November 2009.

¹³ *Travel Just v MNR* (2006) FCA 343, 2006-1-24.

29. The Commission therefore concludes that the purpose in clause 3.1(a)(i) is not analogous to the spirit and intent of those purposes listed in the Preamble to the Statute of Elizabeth or analogous to a charitable purpose as decided by the courts.

Section 61A of the Charitable Trusts Act 1957

30. The Commission has considered whether the Applicant's purposes are charitable under section 61A of the *Charitable Trusts Act 1957*¹⁴. Section 61A states:

61A Trusts for recreational and similar purposes-

- (1) *Subject to the provisions of this section, it shall for all purposes be and be deemed always to have been charitable to provide, or assist in the provision of, facilities for recreation or other leisure-time occupation, if the facilities are provided in the interests of social welfare:*

Provided that nothing in this section shall be taken to derogate from the principle that a trust or institution to be charitable must be for the public benefit.

- (2) *The requirement of subsection (1) of this section that the facilities are provided in the interests of social welfare shall not be treated as satisfied unless—*

(a) The facilities are provided with the purpose of improving the conditions of life for the persons for whom the facilities are primarily intended; and

(b) Either—

(i) Those persons have need of such facilities as aforesaid by reason of their youth, age, infirmity, disablement, poverty, race, occupation, or social or economic circumstances; or

(ii) The facilities are to be available to the members of the public at large or to the male or female members of the public at large.

- (3) *Without restricting the generality of the foregoing provisions of this section it is hereby declared that, subject to the said requirement, subsection (1) of this section applies to the provision of facilities at public halls, community centres, and women's institutes, and to the provision and maintenance of grounds and buildings to be used for purposes of recreation or leisure-time occupation, and extends to the provision of facilities for those purposes by the organising of any activity. ...*

31. There are four requirements that must be established before an entity will be deemed to be charitable under section 61A of the *Charitable Trusts Act 1957*, namely:

¹⁴ It is relevant to note that section 61A of the *Charitable Trusts Act 1957* very closely follows section 1(1) of the *United Kingdom Recreational Charities Act 1958* and is substantially similar to section 1(1) of the *Recreational Charities Act (Northern Ireland) 1958* and section 103 of the *Trusts Act 1973* in Australia

- i. The entity must be providing a "facility";
- ii. The facility must be for "recreation or other leisure time occupation";
- iii. The facility must be provided in the interests of "social welfare"; and
- iv. The facility must provide a public benefit.

The entity must be providing a facility

32. In reviewing this matter, the Commission has considered the following cases, all of which relate to a physical facility: *Commissioner of Valuation for Northern Ireland v Lurgan Borough Council*¹⁵, *Trustees of the City of Belfast YMCA v Commissioner of Valuation*¹⁶, *Springhill Housing Action Committee v Commissioner of Valuation*¹⁷, *Guild v Inland Revenue Commissioners*¹⁸, *Re Hoey*¹⁹, *Re Samford Hall Trust*²⁰, and *Clarke v Hill and Granger*.²¹

33. In *Travis Trust v Charities Commission*²², in discussing the decision in *Re Hoey*, Joseph Williams J states:

Demack J applied the Queensland equivalent of our s61A of the Charitable Trusts Act 1957. This is a specific provision overriding the four Pemsel heads in the case of physical facilities providing "in the interests of social welfare".

The case is accordingly not on all fours with the present facts where the gift is not for land or physical plant, but the learned Judge was nonetheless of the view that the purpose lacked the requisite character and the benefit was not public (Emphasis added).

34. The Applicant's purpose does not relate to a physical facility but to the promotion, advancement and encouragement of hot air ballooning. Section 61A(3) of the *Charitable Trusts Act 1957* provides:

Without restricting the generality of the foregoing provisions of this section it is hereby declared that, subject to the said requirement, subsection (1) of this section applies to the provision of facilities at public halls, community centres, and women's institutes, and to the provision and maintenance of grounds and buildings to be used for purposes of recreation or leisure-time occupation, and extends to the provision of facilities for those purposes by the organising of any activity. (Emphasis added)

35. Accordingly, the organising of an activity may be considered to be the provision of a "facility". However, it is not clear whether this activity must be provided in connection with a physical facility, for example, the organising of rugby games in connection with a sports ground, or whether it relates to the organising of any activity generally.

¹⁵ [1968] NI 104.

¹⁶ [1969] NI 3.

¹⁷ [1983] NI 184.

¹⁸ [1992] 2 AC 310; [1992] All ER 10; [1992] 2 WLR 397; [1992] STC 162, 136 SJ LB 88.

¹⁹ [1994] 2 Qd R 510.

²⁰ [1995] 1 Qd R 60.

²¹ High Court, Auckland, 2 February 2001, Priestley J, CP 68-SD99.

²² HC WN CIV-2008-485-1689 [3 December 2008].

36. In this case, the Applicant does not provide activities in connection with a physical facility, the Applicant organises the "Balloons Over Waikato" event to achieve its purpose of promoting, advancing or encouraging hot air ballooning generally. On a broad interpretation of section 61A(3), that the organising of an activity does not need to be connected to a physical facility, the Applicant could be considered to be organising an activity and therefore providing a "facility".

The facility must be for "recreation or other leisure time occupation"

37. The Applicant runs the annual Balloons Over Waikato event as the means of achieving its purpose outlined in clause 3.1(a)(i). The issue for consideration is whether an annual event of this nature can be considered a "recreation or other leisure time occupation".
38. The term "occupation" is defined as "the action, state or period of occupying or being occupied", "a job or profession" or "a way of spending time"²³.
39. Although this event is only held once each year and therefore is not an ongoing activity, the Commission considers that it is a way of spending time and therefore the Applicant can be said to be providing a facility for recreation or other leisure time occupation.

The facility must be provided in the interests of "social welfare"

40. Section 61A(2) of the *Charitable Trusts Act 1957* states that to be in the "interests of social welfare":
- (a) *The facilities are provided with the purpose of improving the conditions of life for the persons for whom the facilities are primarily intended; and*
 - (b) *Either-*
 - (i) *Those persons have need of such facilities ... by reason of their youth, age, infirmity, disablement, poverty, race, occupation, or social or economic circumstances; or*
 - (ii) *The facilities are to be available to the members of the public at large or to the male or female members of the public at large.*
41. This is not an exhaustive definition of the term "social welfare" but rather lists the essential elements that must be present if a facility is to meet the requirement of being in the interests of social welfare.²⁴
42. In addition, the Commission considers that in order to be in the interests of social welfare, the facilities must also:
- meet a need of the community which, as a matter of social ethics, ought to be met in the attainment of some acceptable standard of living; and

²³ *Concise Oxford English Dictionary*, 11th ed. 2006 Oxford University Press.

²⁴ *J Warburton, D Morris and N.F. Riddle, Tudor on Charities (9th Edition Sweet & Maxwell, London 2003) and Commissioner of Valuation v Lugan Borough Council [1968] NI 104.*

- the organisation providing the facility must be altruistic in nature.
43. Organisations providing only entertainment or social contact will not meet a need of the community which, as a matter of social ethics, ought to be met in the attainment of some acceptable standard of living and therefore do not meet the "social welfare" requirement of section 61A of the *Charitable Trusts Act 1957*.²⁵
44. However, when the facilities are provided to the public at large or to the male or female members of the public at large, it is not required to be shown that those members of the public are suffering from some form of social disadvantage such as those described in section 61A(2)(b)(i) or that they are a "deprived class".²⁶
45. The Commission considers that the Applicant is altruistic in nature. However, the Commission does not consider that the Applicant meets the social welfare requirement of section 61A of the *Charitable Trusts Act 1957*. While the purpose is stated to be for the "betterment and enjoyment of the general public", the Applicant is primarily providing entertainment through a hot air balloon show. As such, the Commission does not consider that the Applicant will improve the conditions of life for the persons whom the facilities are primarily intended nor will it meet a need of the community, which, as a matter of social ethics, ought to be met in the attainment of some acceptable standard of living.
46. In addition, the Commission notes that the general public do not directly participate in the Balloons Over Waikato event, they merely watch the event. Accordingly, the Commission considers that the facilities are not available to the members of the public at large.

The facility must provide a public benefit.

47. In order to provide a public benefit it must be shown that:
- there is an identifiable benefit, assessed in the light of modern conditions; and
 - the benefit is to the general public or to a sufficient section of the public.
48. The Commission considers that the Applicant's purposes will provide a benefit to a sufficient section of the public and therefore meets the public benefit requirement.

Conclusion

49. The Commission concludes that the purposes outlined in clauses 5.1, as defined in clause 3.1(a)(i) of the Applicant's trust deed are not charitable under "any other matter beneficial to the community" or section 61A of the *Charitable Trusts Act*, and they are not ancillary to any charitable purpose.

²⁵ See "A proposed approach to section 61A *Charitable Trusts Act 1957*" considered at the Registration Committee meeting 16 April 2008.

²⁶ *Guild v Inland Revenue Commissioners* [1992] 2 All ER 10.

Section 61B of the Charitable Trusts Act 1957

50. In order to be a valid trust at law, a trust for charitable purposes must be exclusively charitable or it will be void for uncertainty. Section 61B of the Charitable Trusts Act 1957 will operate to "save" a trust that has charitable and "non-charitable and invalid" purposes.
51. The first is where the entity's stated purposes include charitable and non-charitable purposes (in which case the non-charitable purposes may be "blue pencilled out"). The second is where the stated purposes are capable of both a charitable and a non-charitable interpretation and the primary thrust of the gift is considered to be charitable (in which case the purposes could be deemed to apply only in terms of the charitable interpretation).²⁷
52. The Commission considers that the purpose defined in clause 3.1(a)(ii) may be charitable, but that the purpose defined in clause 3.1(a)(i) is not charitable for the reasons given above. If the purpose in clause 3.1(a)(i) were "blue-pencilled out", the Applicant would be left with a very limited purpose and would not be able to carry out its main purpose which is to stage a hot air balloon event. The Commission therefore concludes that the Applicant does not have substantially charitable purposes.
53. In *Re Beckbessinger*²⁸ Tipping J held:
- In the case of designated and identifiable organisations it may well be necessary to have evidence as to whether or not they are charitable to determine the flavour of the gift. The Court cannot in my judgment say, ... that because a gift might have been applied for charitable purposes, s61B can be used to save it. The testator must be shown to have had a substantially charitable mind but to have fallen foul of the law of uncertainty by including either actually or potentially a non-charitable element or purpose.*
54. The Commission has analysed the wording of the Applicant's purposes, surrounding context, and activities (as directed by section 18 of the Act). The Commission does not consider that these provide evidence of "a substantially charitable mind" with an intention to create a charitable trust, but which was not conveyed by the drafting. Accordingly, the Commission does not consider that the purposes indicate an intention to create a substantially charitable trust.
55. On these bases, the Commission considers that the Applicant's purposes are not substantially charitable and therefore section 61B of the *Charitable Trusts Act 1957* cannot operate to validate the trust.

²⁷ *Re Beckbessinger* [1993] 2 NZLR 362, 373.

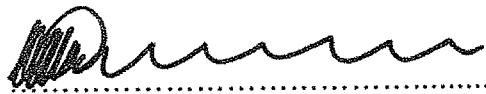
²⁸ *Re Beckbessinger* [1993] 2 NZLR 362, 376.

Charities Commission's determination

56. The finding of the Commission is that the Applicant has failed to meet an essential requirement for registration as a charitable entity in that the Applicant is not a trust of a kind in relation to which an amount of income is derived by the trustees in trust for charitable purposes, as required by section 13(1)(a) 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

3/2/10
Date