

Registration decision: The Taieri Airport Trust (THE45530)

Executive Summary

1. The Charities Registration Board (**the Board**) has determined to decline the application for registration of The Taieri Airport Trust (**the Trust**) under the Charities Act 2005 (**the Act**).¹
2. The Trust has applied for registration under the Act on the basis that its principal purpose is to be beneficial to the community by providing a secondary airport in Dunedin for public use.
3. The Board recognises that, in principle, a purpose to provide an airport for public use may be a charitable purpose. However, the Board considers that the Trust's provision for an airport in Dunedin provides private, non-charitable benefits to Otago Aero Club Incorporated (**the Club**). The Club is not a charity.
4. The benefits provided to the Club are more than incidental to the provision of an airfield for public use. Case law establishes that provision of private, non-charitable benefits that are not incidental to the advancement of a charitable purpose is inconsistent with charitable status. As the Trust's provision of private non-charitable benefits to the Club is not incidental to advancement of a charitable purpose, the Trust does not qualify for registration under the Act.²
5. The Board's reasons are organised as follows:
 - A. Background
 - B. Legal Framework for Registration Decision
 - C. The Charities Registration Board's Analysis
 - D. Section 5(3) of the Act
 - E. Determination

A. Background

6. The Taieri Airport (**the Airport**) is located on a 36.2691 ha parcel of land in Mosgiel (**the Trust Land**). The Airport has the status of a current operational "secondary airport" meeting Civil Aviation Authority requirements. As a

¹ This decision is made under section 19 of the Charities Act 2005 ("the Act").

² The essential requirements for registration are set out in section 13 of the Act.

secondary airport it can accommodate “groups 5-7 equivalent, single wheel loading 6350 kg” aircraft.³

7. Initially purchased by the Club in 1930, the Trust Land was gifted by the Club to the Dunedin City Council (**the Council**) in 1931, to hold on trust “for the purposes of aviation generally and for the purposes of an airport for the City of Dunedin and the Provincial District of Otago and for the purposes of a licensed aerodrome”.⁴ The Council granted the Club a lease at a “peppercorn” rental, but required the Club to meet outgoings. This lease agreement is on-going.⁵
8. On 27 August 2004, the Club and the Council:
 - entered into an agreement “to resolve certain issues relating to the restructuring of ownership and occupancy of the land which comprises the Taieri Airport” (**the Agreement**);⁶
 - as part of the Agreement, agreed to the sub-division of the Trust Land into two parcels (**Airport Land** and **Development Land**);⁷
 - as part of the Agreement, agreed terms on which the Trust would lease the Airport Land to the Club (**Proposed Lease**);⁸
 - as part of the Agreement, agreed that the Trust would lease or sell the Development Land “for the purpose of obtaining for the Trust the maximum potential income or value of that land consistent with retaining the necessary operational and safety margins applying in respect of the airfield”;⁹
 - as part of the Agreement, agreed that transfer of ownership of the Trust Land would not be completed until enactment of a bill to remove certain statutory restrictions on ownership of the Trust Land;¹⁰ and
 - with the initial trustees of the Trust, completed a deed establishing the terms of settlement of the Trust Land on the Trust (**the Deed**).¹¹
9. The Deed executed on 27 August 2004 provides that the Trust’s “aims and purposes are to apply both capital and income of the trust to, and for the following objects”:

³ Definitions and Interpretations Clause of the Proposed Lease Instrument provided with this application.

⁴ Recital B of the Deed of Trust.

⁵ Recitals C and E of the Deed of Trust.

⁶ Background clause 1 of the Agreement.

⁷ Clauses 1.3, 5 and 6 of the Agreement.

⁸ Clause 5 of the Agreement, and copy of the Proposed Lease Instrument annexed to the Agreement.

⁹ Clause 6 of the Agreement.

¹⁰ Clause 1.4 of the Agreement; Letter from the Trust’s lawyers dated 17 May 2013, at [1]. The relevant bill is the Reserves and Other Lands Disposal Bill 2008, which is currently still before Parliament.

¹¹ Clause 2.1 of the Agreement; Deed of Trust.

4.1.1 As the primary object, the continuation, maintenance and advancement of the Trust Land as a secondary airport in Dunedin for use by the Club and the aviation public;

4.1.2 As the secondary object, the development, maintenance and advancement of airport facilities elsewhere in the Dunedin city area for the benefit of the Club and the aviation public in the event that the Trust Land cannot be used as a secondary airport in Dunedin;

4.1.3 As the tertiary object, the purposes of aviation generally;

4.1.4 As the residuary object, any charitable purposes in Dunedin and in the Otago region which are from time to time selected by the trustees and which are valid charitable purposes.

10. The Trust made an application for registration under the Act in June 2008, and this application was approved by the Charities Commission on 2 November 2009, effective 30 June 2008 (**2008 registration**). The Trust was subsequently removed from the register on 19 July 2011 because it failed to file an annual return for the year to 30 June 2010 as required by sections 41 and 42 of the Charities Act.
11. The Trust made this current application for registration on 24 October 2012. The initial application included a copy of the Deed and the Trust's lawyers subsequently provided financial statements for the years to 30 June 2010, 2011 and 2012 when requested by staff conducting pre-checks on the application. The initial application did not include copies of the Agreement or Proposed Lease.
12. An initial analysis of the application identified two potential issues in the application. First, the financial statements provided by the Trust showed it had not received any income since its establishment in August 2004, so further information was required to show a reasonable prospect of future derivation of income.¹² Second, the terms of the Deed appeared to show that the Trust's operation would provide benefits to the Club, and it was not clear whether these benefits were incidental to the advancement of charitable purposes for the public benefit as required for charitable status under the Act.
13. On 22 March 2013, Charities Services wrote to the Trust's lawyers requesting that it provide further information to demonstrate that income would be derived by the Trust, and to provide certain information and documents (including a copy of the Proposed Lease) to enable assessment of whether benefits provided to the Club through the Trust's operation would be incidental to the Trust's advancement of charitable purposes for the public benefit.
14. On 18 April 2013, the Trust's lawyers responded to the information request enclosing a copy of their letter of 27 August 2009 in connection with the 2008 registration; and explaining that the reason for there being no income "is that the

¹² Sections 13 and 14 of the Act.

Trust is not able to become operational until the Reserves and Other Lands Disposal Bill 2008 is passed into law and we are waiting for that to happen.”

15. Charities Services responded on the same day, inviting the Trust’s lawyers to provide the specific information and documents requested in the 22 March 2013 letter.
16. On 17 May 2013, the Trust’s lawyers provided a further and more specific response to the 22 March 2013 information request. In this response, the Trust’s lawyers:
 - reiterated that there are no current activities “because enactment of the Reserves and Other Lands Disposal Bill 2008 is still pending”;
 - submitted that the Trust would derive income once operational, pointing to: (i) powers conferred in the Deed that can be used to generate income; and (ii) “clause 6 of the agreement between the Otago Aero Club Incorporated and Dunedin dated 27 August 2004 which specifically deals with Trust income [from the disposition of the Development Land]”;
 - provided a copy of the Proposed Lease;
 - provided a copy of the Otago Rescue Helicopter’s 2012 Annual Report; and
 - adopted the submissions on the Trust’s charitable status contained in their letter of 27 August 2009.
17. On 25 June 2013, after reviewing the application in light of the 17 May 2013 response, Charities Services sent to the Trust’s lawyers a notice that the application for registration may be declined, on the grounds that the Trust was not established for exclusively charitable purposes as required for registration under the Act. The notice set out Charities Services’ assessment that the Trust’s operation provided benefits to the Club other than in pursuit of a charitable purpose and invited the Trust’s lawyers to make submissions in response before a final decision on the application was made.
18. The Trust’s lawyers provided submissions in response by letter dated 26 July 2013. The main weight of the submissions are to show that the Proposed Lease of the Airport Land by the Club is the means by which the Trust will advance a charitable purpose for the public benefit (i.e. maintenance of a secondary airport in Dunedin for the public),¹³ and that any benefits accruing to the Club under the Proposed Lease are incidental to the Proposed Lease’s function as the means by

¹³ Letter from Trust’s lawyers dated 26 July 2013, [10], [11], [12] (“The Trust’s lease of the land to the Club is to assist the Trust and advance its primary purpose ... by ensuring the maintenance of the Trust land as a secondary airport”), [15] (“...the purpose of the Trust entering into the leasing arrangement is for the Trust to satisfy its primary objective to operate an airport in Dunedin for use by the public”), [16] (“In order to satisfy [its] primary purpose, the Trust intends, as part of its administration, to enter into a lease with the Club”).

which the Trust will provide an airport for public use.¹⁴ The letter makes a number of points in support of this primary submission, including:

- the terms of the Proposed Lease are “not inconsistent” with maintenance of the Airport Land as an airport for the public;
- the terms of the Proposed Lease require the Club to maintain the Airport Land and improvements to the standards required to qualify as a secondary airport;
- current use of the Airport provides benefit to the public, through:
(i) the operation of the Otago Rescue Helicopter from a base on Trust Land (and the conduct of police operations from time to time from the Rescue Helicopter base); (ii) the availability of the Airport as an alternative landing field for light aircraft when Momona airport is closed or weather conditions make it unsafe to land there; and (iii) the conduct of “recreational activities involving aviation” at the Airport that are open to the public.

19. Since receipt of the 26 July 2013 letter, there has been some correspondence of an administrative nature, including requests that the Trust’s lawyers provide a copy of the 2004 Agreement (referred to in the 26 July 2013 letter), and the Development Plan referred to in the 2004 Agreement (not included with the copy of the 2004 Agreement provided on 21 August 2013).

B. Legal Framework for Registration Decision

20. Section 13 of the Act sets out the essential requirements for registration. Under section 13(1)(a) of the Act, a trust qualifies for registration if it is a trust of a kind in relation to which an amount of income is derived by the trustees in trust for charitable purposes. This criterion is not met unless income is derived for exclusively charitable purposes.¹⁵
21. 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 or religion, or any other matter beneficial to the community”. This statutory definition adopts the well-established fourfold classification of charitable purpose at general law.¹⁶

¹⁴ Letter from Trust’s lawyers dated 26 July 2013, [13] (“...any benefit conferred on the Club is merely ancillary and incidental to its primary charitable purpose of continuing, maintaining and advancing Trust Land as a secondary airport in Dunedin open for use by the general public”).

¹⁵ Case law establishes that income is not derived “in trust for charitable purposes” unless it is derived for exclusively charitable purposes: see *McGovern v Attorney-General* [1982] 1 Ch. 321, 341; *Canterbury Orchestra Trust v Smitham* [1978] 1 NZLR 787; *Molloy v Commissioner of Inland Revenue* [1981] 1 NZLR 688 (“*Molloy*”) at 691.

¹⁶ See *Greenpeace of New Zealand Incorporated* [2012] NZCA 533 (“*Greenpeace, CA*”) at [42].

22. To be charitable at law a purpose must provide a benefit: (i) recognised in law; and (ii) to the public.¹⁷
23. In addition, an entity cannot qualify for charitable status if private benefits arising from its' activities are not incidental to the entity's advancement of a charitable purpose for the public benefit.¹⁸
24. Finally, section 5(3) of the Act provides that the inclusion of a non-charitable purpose will not preclude registration if it is merely ancillary to a charitable purpose. Pursuant to section 5(4) of the Act, a non-charitable purpose is ancillary if the non-charitable purpose is:
 - (a) ancillary, secondary, subordinate, or incidental to a charitable purpose of the trust, society or institution; and
 - (b) not an independent purpose of the trust, society or institution.
25. Determining whether a non-charitable purpose is ancillary includes a qualitative assessment of whether it is a means to advance the charitable purpose.¹⁹ It also

¹⁷ See for example: *Oppenheimer v Tobacco Securities Trust Co Ltd* [1951] AC 297; *Verge v Somerville* [1924] AC 496; *Dingle v Turner* [1972] AC 601; *New Zealand Society of Accountants v Commissioner of Inland Revenue* [1986] 1 NZLR 147 ("Accountants") at 152-155; *Latimer v Commissioner of Inland Revenue* [2002] 3 NZLR 195 ("Latimer, CA") at [32]; *Travis Trust v Charities Commission* (2009) 24 NZTC 23,273 (HC) ("Travis Trust") at [54], [55]; *Queenstown Lakes Community Housing Trust* HC WN CIV 2010-485-1818, 24 June 2011 ("Queenstown Lakes") at [30]; *Re Education New Zealand Trust* HC Wellington CIV-2009-485-2301, 29 June 2010 ("Education New Zealand Trust") at [23].

¹⁸ See for example: *Inland Revenue Commissioner v Glasgow Police Athletic Association* [1953] AC 380 ("Glasgow Police Athletic Association") at 396 (holding that the Association was not charitable because the association had a purpose to provide recreation to its members that was not merely incidental to the charitable purpose, promotion of efficiency of the police force); *IRC v Oldham Training and Enterprise Council* (1996) 69 TC 231 ("Oldham") at 251 (holding that the Council did not qualify for charitable status because its purposes conferred freedom to provide private benefits on individual for-private-profit enterprises); *Institution of Professional Engineers New Zealand Inc v Commissioner of Inland Revenue* [1992] 1 NZLR 570 ("IPENZ") at 578 – 580 and 583 (holding that the Institution's provision of professional benefits to members was not incidental to advancement of education for the public benefit); *Education New Zealand Trust* at [35]–[46] (holding that Trust's marketing of New Zealand education providers was not exclusively charitable where 30% of the providers operated for-private-profit); *Canterbury Development Corporation v Charities Commission* HC WN CIV 2009-485-2133, 18 March 2010 ("CDC") at [45]–[67] (holding that it was a central purpose of the Corporation to promote individual businesses to make them more profitable, and this was not incidental to advancing a charitable purpose); *New Zealand Computer Society Inc v Charities Commission* HC WN CIV 2010-485-924, 28 February 2011 ("Computer Society") at [68] (holding that the Society's provision of professional benefits to members was not incidental to advancement of information technology as a discipline for public benefit); *Queenstown Lakes* at [51] - [68] (holding that the Trust's purpose conferred a private benefit (assistance in meeting housing costs) on individuals, other than as a means to advance a charitable purpose). For further recognition of the principle, see *The Plumbers, Gasfitters and Drainlayers Board* [2013] NZHC 1986 ("Plumbers") at [49]-[53].

¹⁹ For recent judicial comment on the qualitative test see *Greenpeace, CA* at [62], [83] – [91].

involves a quantitative assessment, focusing on the relative significance of the purpose as a proportion of the entity's overall endeavour.²⁰

Relevance of entity's activities in registration decision-making

26. Section 18(3)(a)(i) and (ii) of the Act mandate that activities be taken into consideration when determining whether an entity qualifies for registration under the Act. The courts have confirmed that consideration of activities is a mandatory aspect of decision-making under the Act.²¹
27. Activities are not to be elevated to purposes, but reference to activities may assist, for example, to make a finding about:
- the meaning of stated purposes that are capable of more than one interpretation;²²
 - whether the entity is acting for an unstated non-charitable purpose;²³
 - whether the entity's purposes are providing benefit to the public;²⁴ and
 - whether a non-charitable purpose is "ancillary" within the meaning of section 5(3) of the Act.²⁵

Characterisation of an entity's purposes

28. Once an entity's purposes are established as a matter of fact, the question whether they are charitable is a question of law.²⁶ The Board is bound to apply the law as declared by the courts and legislature, and adopted by the Act.
29. Determining whether an entity's purposes are charitable involves an objective characterisation, and a declaration in an entity's rules document that the entity's

²⁰ The quantitative requirement was applied by the High Court in *Re Greenpeace of New Zealand Incorporated* HC WN CIV 2010-485-829 [6 May 2011] ("*Greenpeace, HC*") at [68]; *Computer Society* at [16]; *Education New Zealand Trust* at [43]-[44]; *Re The Grand Lodge of Antient Free and Accepted Masons in New Zealand* [2011] 1 NZLR 277 (HC) ("*Grand Lodge*") at [49]-[51]. The Board notes the Court of Appeal's observation in *Greenpeace, CA* at [92], including footnote 95.

²¹ See *Greenpeace, CA* at [48] and [51].

²² See *IPENZ* at 575 ("It seems to me that at best ... the rules are unclear as to what the exact object or objects of IPENZ are ... it is in these circumstances permissible to look beyond the founding document ... to see what IPENZ has actually been doing and thus how it has itself construed its stated object") and 583 ("In light of the constructional uncertainty, reference can undoubtedly be made to the evidence which discloses the activities of IPENZ. That evidence simply fortifies the conclusion to which I would have come when looking at the words of the object alone").

²³ *Glasgow Police Athletic Association*; compare *Commissioner of Taxation of the Commonwealth of Australia v Word Investments Limited* [2005] HCA 55 at [25] (Gummow, Hayne, Heydon and Crennan JJ).

²⁴ See for example *Glasgow Police Athletic Association*; *CDC* at [29], [32], [44], [45] - [57], [67], [84] - [92]; *Queenstown Lakes* at [57] - [67]; *Grand Lodge* at [59], [71]; *Computer Society* at [35] - [39], [60] and [68].

²⁵ See for example *Greenpeace, CA* at [40], [48], [87] - [92], [99] and [102], [103]. Earlier authorities to same effect include *Molloy* at 693 and the authorities cited there.

²⁶ *Molloy* at 693.

purposes are charitable in law will not be determinative.²⁷ Similarly, the subjective intentions of the individuals involved in a charity do not establish its charitable status.²⁸

Each application for registration determined on its merits

30. Every application for registration is determined on its merits. If an entity that has previously registered and deregistered makes an application for registration, the Board is not bound by the earlier registration decision. This approach is consistent with the Act's provision for on-going monitoring of registered entities and their activities to ensure their compliance with the Act.²⁹

C. The Charities Registration Board's Analysis

C.1. Overview

31. In light of well-established case law principles governing charitable status,³⁰ the essential issue is whether the Trust confers private benefits on the Club that are not incidental to the provision of an airport for public use.
32. The Board accepts that a purpose to provide an airport for public use may be a charitable purpose in law.³¹ However, for the reasons given in section C.2 and C.3 below, the Board considers that the Trust's purpose to provide an airport in Dunedin confers private benefits on the Club that are not incidental to the provision of an airport for public use.
33. The Club is not a charity,³² and the Trust accepts that a purpose to benefit the Club would not be a charitable purpose in law.³³

Issue deferred – “aviation public”

34. The Trust has submitted that its primary and secondary purposes under clauses 4.1.1 and 4.1.2 of the Deed are to provide an airport for use by “the public”. In fact, clauses 4.1.1 and 4.1.2 refer to the provision of an airport for use by the Club and “the aviation public”. The Board reserves decision on whether,

²⁷ *M K Hunt Foundation Ltd v Commissioner of Inland Revenue* [1961] NZLR 405 at 407; *CDC* at [56].

²⁸ Dal Pont, *Law of Charity* (LexisNexis Butterworth, Australia, 2010) at [13.18], [2.8] – [2.11]. See for example *Latimer v Commissioner of Inland Revenue* [2004] 3 NZLR 157 at 168; *Molloy* at 693; *Keren Kayemeth Le Jisroel Ltd v Inland Revenue Commissioners* [1932] AC 650 at 657 (Lord Tomlin), 661 (Lord Macmillan); *Oldham* at 251 (Lightman J).

²⁹ See *Greenpeace, CA* at [38]. Compare *Grand Lodge* at [62]-[69] (rejecting an argument that tax charity status granted by Commissioner of Inland Revenue before the Act came into effect should have been a dominant factor in initial decision-making under the Act).

³⁰ See authorities at 18 above.

³¹ Comparable to *Morgan v Wellington City Corporation* [1975] 1 NZLR 416 (provision of roads and public infrastructure); section 61A of the Charitable Trusts Act 1957 (provision of grounds for public recreation).

³² See note 65 below.

³³ Letter from Trust's lawyers dated 26 July 2013, [5] and [6].

in view of the costs involved in aviation, the “aviation public” constitutes a “section of the public”. It is unnecessary to resolve that question in view of our determination (explained below) that the Trust’s main focus is the provision of an airport for the benefit of the Club.

Issue satisfied –future derivation of income

35. The Board notes that the Trust has remained inoperative throughout the period since the execution of the deed of Trust in August 2004. The Trust Land has not been transferred by the Council to the Trust (a bill³⁴ to remove statutory conditions on title to the land remains pending), and the Trust has not derived any income since execution of the deed of Trust in August 2004. In these circumstances, the Trust can only qualify for registration under section 13(1)(a) of the Act pursuant to section 14(1) of the Act. The Board considers that the requirements of section 14(1) are met in this case. Despite the lapse of time, it remains reasonable to assume that the Trust Land will be transferred to the Trust and the Trust will proceed with the sub-division and disposition of the surplus Development Land anticipated in the 2004 Agreement.

C.2. Case law guidance

36. It is well-established that an entity will not have charitable status if its purposes confer private benefits that are not incidental to the advancement of charitable purposes for the public benefit.³⁵
37. The decided cases provide some important general points of guidance. First, where an entity’s activities provide a mixture of public and private benefits, the entity will not have charitable status if its rules allow the activities that confer private benefit,³⁶ and those private benefits are not incidental to the public benefit provided.³⁷
38. Second, the analysis in this area focuses on benefits that are provided to an individual or individuals specifically, separately from the benefits provided to the public.³⁸ In cases where an entity provides a public benefit and there are no

³⁴ The Reserves and Other Lands Disposal Bill 2008,

³⁵ See authorities at 18 above.

³⁶ *IPENZ* at 583. Indeed an entity may be precluded from charitable status even if its activities provide non-incidental private benefits which are *ultra vires* the entity’s constitution. In *IPENZ* at 583, Tipping J expressed doubt “whether in this field it is competent for an institution to claim that a vitiating part of its activities, which it has been freely carrying on, are *ultra vires* and thus ought not to be taken into account on a charity question”. In any event, the Board considers it unlikely that an entity whose activities provide non-incidental private benefit which are *ultra vires* the rules document could argue that it nevertheless qualifies for registration under the Act.

³⁷ In considering whether an entity’s rules allow activities that confer private benefit, the courts will construe the stated purposes in light of activities where the stated purposes are ambiguous: see note 22 above. Naturally, it will be relevant to consider the operation of section 5(3) of the Act (and, for trusts, section 61B of the Charitable Trusts Act 1957) in cases where a non-charitable purpose is identified.

³⁸ Examples include the cases regarding entities whose activities extend beyond regulation of a profession or industry to include “guild or protective society functions” (*IPENZ*, *Computer Society*); and cases where entities provide benefits directly to assist non-charitable institutions in

activities that benefit an individual or individuals *singularly* (other than as an incident of the public benefit), it is likely that the benefits to the individuals will be consistent with charitable status.³⁹

39. Third, in cases where an entity's activities confer 'private' benefits, the decided cases provide some illustrative points of reference:

- an activity that provides private benefits as a tool for obtaining funding that is applied to the entity's main charitable purpose may be a means to advance the charitable purpose;⁴⁰ and
- an activity that provides private benefits will not be a means to advance a public benefit if the public benefit it provides is "too nebulous and remote" or "merely hoped for";⁴¹ and
- provision of a facility or benefit to a private class will not be viewed as a means to advance a charitable purpose unless there is a requirement that the facility be used solely to advance the charitable purpose.⁴²

their endeavours, in the hope that the public will benefit from the activities of those institutions (see *Education New Zealand Trust* at [39] and [46]; *Oldham; CDC; Queenstown Lakes*).

39. Examples include: entities whose activities are limited to regulation of a profession or industry e.g. *Plumbers* at [51], [52]; *Commissioner of Inland Revenue v Medical Council of New Zealand* [1997] 2 NZLR 297 (CA) ("*MCNZ, CA*") at 309 (McKay J); and other entities who provide benefit to the public as a whole without discrimination and a "private class" benefits on an equal footing with the other public users, e.g. *Incorporated Council of Law Reporting for England and Wales v Attorney-General* [1972] 1 Ch 73 at 87, 93, 103. This category would also include cases where the private benefits are simply "unsought consequences of the pursuit of the public purpose": *Glasgow Police Association* at 396. The Board notes that this can be a difficult judgment to make; as is illustrated by the High Court's comment that the Australian courts' assessment in *Commissioner of Taxation v The Triton Foundation* [2005] FCA 1319 "is a question of perspective": *CDC* at [65].

40. This possibility is acknowledged in *Computer Society* at [58], although the Court went on to hold that, on the facts, the Society's activities for the benefit of members of the IT profession were not fundraising tools.

41. The courts have held that the downstream benefits of an entity's activities do not serve to characterise the purpose of the entity: see *Accountants* at 153 (the "generalised concept of benefit" identified with the public satisfaction of knowing that the fund is there to safeguard and protect clients' interests is too "nebulous and remote" to characterise the purpose of the fund); *Travis Trust* at [30] – [35] (holding that where the express purpose was to "support the New Zealand racing industry by the anonymous sponsor of a group race known as the Travis Stakes", the purpose was to support that single group race and not to support the racing industry or racing public as a whole). See to the same effect *Queenstown Lakes* at [68] – [76] (held that the purpose of the Trust was to provide housing for individuals not to advance the overall welfare of the community by enabling workers to stay in the area); *CDC* at [67] (primary purpose is the assistance of individual businesses and the "hope and belief" that the success of those businesses would increase the economic wellbeing of the Canterbury region); *Grand Lodge* at [59] – [60] (the purpose is to improve the character of members of a closed group, the public benefit in this is "too remote").

42. See for example *Re Cumming* [1951] NZLR 498, where it was held that a purpose to provide a hall to provide farmers with the facility of a club was not charitable, but that the statutory predecessor to section 61B of the Charitable Trusts Act 1957 could operate to preserve the charitable status of the purpose by limiting the provision of the hall for activities that advance

40. Fourth, a purpose cannot qualify as charitable under the fourth head of charity unless it is established positively that the purpose provides a benefit to a section of the public.⁴³
41. The Board notes that while the legal principle is clearly established, it is by no means determinative of the outcomes in particular cases.⁴⁴ Application of the principle requires an exercise of judgment with reference to the facts of the case. The decided cases “do not reflect any objective criteria for determining which side of the line the existence of personal benefits will fall ... In essence, it is a situation-specific analysis of the relative relationship between public and private benefits.”⁴⁵

C.3. Assessment of benefits to Club provided by Trust’s purposes

42. The Board has reviewed the Trust’s application in light of the above case-law principles, and considers that:
- the Trust’s operation confers private benefits on the Club (i.e. benefits that is for the Club specifically, and not for the Club on an equal footing with the public as a whole);
 - the private benefits conferred on the Club are not incidental as a proportion of the Trust’s overall endeavour;
 - the private benefits conferred on the Club are not the means by which the Trust provides an airport for public use; and
 - the Trust’s activities that benefit the Club are allowed by the Trust’s rules.
43. We expand on our reasons for each of these findings at paragraphs 44 - 61 below.

Trust’s operation and private benefits to the Club

44. We consider that the Proposed Lease provides benefits to the Club that place the Club in a privileged position in relation to use of the Airport relative to other members of the public. These benefits are set out in the Proposed Lease:
- right to occupy the Airport Land in perpetuity at a nominal rent (\$1 per year);
 - right to use the Airport Land “for aviation purposes including the operation of [a] secondary airport for use by [the Club] and the

education and other charitable purposes. Similarly, in *New Zealand Council of Law Reporting v Commissioner of Inland Revenue* [1981] 1 NZLR 682 at 684 the Court of Appeal held that the Council’s power to make grants to Law Societies did not establish a non-charitable purpose because the Council was required to make grants only to achieve the publication and distribution of Law Reports through the agency of the Law Society.

⁴³ See for example: *D V Bryant Trust Board v Hamilton City Council* [1997] 3 NZLR 342 at 350 (Hammond J); *CDC* at [45].

⁴⁴ *IPENZ* at 583.

⁴⁵ *Education New Zealand Trust* at [44].

aviation public; and [the Club]’s own club activities including the siting of clubroom, hangers owned by it or its members and sub-lessees activities and the siting of their associated improvements”;⁴⁶

- right to control and manage use of the land by the aviation public (provided that it does not unreasonably prevent or restrict the use of the land by the aviation public);⁴⁷
- right to impose reasonable charges for use of the Airport (landing fees, rentals or other);⁴⁸
- right to close the Airport from time to time for the purpose of conducting special aviation events “for itself or those conducted in association with other aero clubs or like organisations”,⁴⁹ or for non-aviation events if the Trust agrees;⁵⁰
- right to use parts of the land not required for the time being for cultivating cropping or farming;⁵¹
- right to construct or erect improvements for any of the above approved uses;⁵²
- right to erect any sign, advertisement, notice or advertising device that relates to the Club’s use of the land;⁵³
- right to sublet portions of the land to its members for purposes associated with its club activities⁵⁴ or to other users for ancillary uses (and provided that the subletting does not compromise operation of airport).⁵⁵

45. In addition, the Proposed Lease provides the Club with stability and autonomy to conduct its Club activities at the Airport in perpetuity (or an alternative site developed by the Trust in the event the current site fails, triggering the secondary purpose at clause 4.1.2).

46. We consider that the benefits provided to the Club under the lease are ‘private’ benefits.⁵⁶ The Proposed Lease establishes the Club as the primary user of the Airport with the right to control and manage use by other members of the public,

⁴⁶ Clause 7.1 of the Proposed Lease.

⁴⁷ Clause 7.2(a) of the Proposed Lease.

⁴⁸ Clause 7.2(b) of the Proposed Lease. The Club’s financial statements, published to the register of Incorporated Societies, show that hangar and ground rentals are undertaken and provide income for the Club.

⁴⁹ Clause 7.2(c) of the Proposed Lease.

⁵⁰ Clause 7.2(d) of the Proposed Lease.

⁵¹ Clause 7.2(f) of the Proposed Lease. The Club’s financial statements, published to the register of Incorporated Societies, show cropping and farming are undertaken and provide income for the Club.

⁵² Clause 8 of the Proposed Lease.

⁵³ Clause 10 of the Proposed Lease.

⁵⁴ Clause 12.2 of the Proposed Lease.

⁵⁵ Clause 12.3 of the Proposed Lease.

⁵⁶ See discussion at [36] – [41] above.

and to levy user charges on those other users, and gives the Club rights of use that are not extended to any other member of the public.

Private benefits to Club not incidental to Trust's overall endeavour

47. We consider that the provision of benefits to the Club under the Proposed Lease is central (and therefore not incidental) to the Trust's overall endeavour.
48. First, it is clear from the terms of the 2004 Agreement that the Proposed Lease (comprising the specific terms and conditions) is central to the 2004 Agreement and the prospective operation of the Trust. This point is not disputed by the Trust. It is supported by reference to the following:
- The Deed states that the primary and secondary purposes of the Trust are to provide an airport for "the Club and the aviation public", i.e. provision for the use and benefit of the Club is a mandated purpose of the Trust;
 - The Club and Council have agreed to "procure the Trust to lease the Airport Land in perpetuity to the Club once the Airport Land has a separate Certificate of Title issued"⁵⁷ and to ensure that a "restrictive land covenant protecting the operations of the Trust and the Club will be registered against the title to the Development Land on terms to be set by the Trust and the Club",⁵⁸
 - The Club and Council have agreed terms of the Proposed Lease, and these include an initial lease for 99 years at peppercorn rental, that is renewable for a further term of 99 years on the same terms and conditions, at the Club's election,⁵⁹
 - The Deed provides that the Club and Council each have the power to appoint and remove half the Trustees, and that the trustees must act unanimously – this is relevant in so far as it facilitates carrying through the terms of the Agreement between the Club and Council described above;⁶⁰
 - The Deed proscribes any dealing with the Trust Land which would "adversely affect the use of the Trust Land by the Club whilst the Club is lessee of the Trust Land".⁶¹
49. Second, while the Trust's submissions place weight on activities carried out at the Airport that involve the public or provide benefit to the public, we consider that these activities are incidental to the overall activity at the Airport and subsidiary to the Club's activities at the Airport.

⁵⁷ Clause 5.1 of the 2004 Agreement.

⁵⁸ Clause 6.1 of the 2004 Agreement.

⁵⁹ Clause 18.1 of the Proposed Lease.

⁶⁰ Clause 16.2 and 16.2.1 of the Deed.

⁶¹ Clause 5.2.2 of the Deed.

50. The Trust's submissions place weight on the fact that the Otago Rescue Helicopter is based at the Airport, and that the Rescue Helicopter's base is used for emergency missions and by the police for search and rescue missions and other police operations from time to time.⁶² The Otago Rescue Helicopter Trust and Otago Rescue Helicopter Limited are registered charities, and the services they provide advance charitable purposes for the public benefit. However, the Rescue Helicopter operates out of a purpose-built base within a hanger leased by a private for-profit company (HeliOtago Limited) at the Airport.⁶³ The Rescue Helicopter's activity does not appear to be the dominant activity conducted out of that particular hangar,⁶⁴ let alone the dominant activity conducted at the Airport. Further, the Rescue Helicopter's operation from the Airport is not reflective of endeavours on the part of the owner of the Airport Land, or the Club as the owner's 'delegate'. There is no information to suggest that the provision of the hangar from which the Helicopter operates is other than via a sub-lease from the Club to HeliOtago Limited on the normal commercial terms the Club is entitled to charge under its lease of the Airport Land.
51. The Trust has also pointed to public attendance at aviation events held at the Airport, but we do not consider that this public attendance at the Airport can advance the Trust's application for charitable status. The promotion of *recreational* aviation is not charitable.⁶⁵ Further, it would seem that the recreation events attended by the public at the Airport include events hosted by the Club, which generate revenue for the Club.⁶⁶
52. Finally, the Trust's points to the availability of the Airport as an alternative landing field for light planes when landing at Momona is unsafe. We consider this is a collateral benefit only.

Activities benefiting Club not means by which airport is provided for public

53. We have considered the Trust's submission that the Proposed Lease is merely the means by which the Trust provides an airport for the public. We do not agree with this submission. We consider that the Proposed Lease is a means of providing benefits to the Club, albeit subject to the proviso that the Club's use and occupation of the Airport Land is to be compatible with the retention of the Airport as a secondary airport available for use by the "aviation public".

⁶² Letter from the Trust's lawyer dated 26 July 2013 at [19.2], [19.3] and [19.4].

⁶³ See <http://www.otagorescue.co.nz/helicopters.php> [accessed 6 October 2013].

⁶⁴ HeliOtago is a commercial/private company that has a fleet of 12 helicopters based at Taieri, and offers services including air charters, commercial operations, agricultural operations, pest eradication, and the air ambulance: <http://www.helicoptersotago.co.nz/> [accessed 6 October 2013].

⁶⁵ See *Scottish Flying Club Limited and Commissioners of Inland Revenue* (1935) SC 817, and see discussion in the Charities Commission Registration Decision: Kaikoura Aero Club Incorporated (15 July 2011), published at <http://www.charities.govt.nz/the-register/registration-decisions/>.

⁶⁶ The Club publishes information about aviation events it hosts at the Airport, including "Wings and Wheels", and Flying New Zealand's Around New Zealand Air Safari; as well as flying competitions and Fly Away Events: <http://www.otagoaeroclub.co.nz/news-and-events> [accessed 6 October 2013].

54. The Trust has submitted that the Lease should be seen as a “normal arrangement” that protects the interests of the Trust while providing a means of advancing the provision of a public airport.⁶⁷ The Trust points out:
- there are no terms in the lease inconsistent with public use of the Airport;
 - the Club has obligations under the Proposed Lease which are consistent with the Lease being the means by which the Trust provides an airport for the public.
55. As to the Trust’s submission that the Proposed Lease requires the Club to allow public use of the Airport, we consider that there is a significant practical difference between provisos that preclude Club use that unreasonably excludes use by the aviation public (found in the Proposed Lease), and a positive mandate to operate an airport for the public.⁶⁸
56. Turning to the Trust’s submission that the Club has obligations under the Proposed Lease, we acknowledge the obligations on the Club under the lease, but do not consider that these characterise the Proposed Lease as merely a means to provide an airport for the public. First, we consider that the Proposed Lease provides benefits to the Club that outweigh the obligations imposed on the Club.⁶⁹
57. Second, the terms of the 2004 Agreement and the constitution of the Trust secure these benefits to the Club and do not anticipate any periodic assessment by the Trust as to whether the arrangement is an effective means of providing an airport for the public.⁷⁰
58. Third, it is by no means certain that the Club will in fact be required to meet all its obligations under the Proposed Lease. The Deed permits the Trust to apply income to maintain the Airport Land,⁷¹ so relieving the Club of some of its obligations under the Proposed Lease, and thereby further weighting the balance of the benefit of this arrangement in the Club’s favour. The 2004 Agreement contemplates that the lease or sale of the Development Land will produce income for the Trust that will be applied to the Trust’s purpose to maintain the Airport

⁶⁷ Letter from Trust’s lawyers dated 26 July 2013, [16].

⁶⁸ As the cases at note 42 above show, the courts do not consider that a facility is provided for a charitable purpose unless there is a requirement that the facility be used solely to advance the charitable purpose.

⁶⁹ The benefits listed at [44] and [45] above include lease of the Airport in perpetuity at a nominal rent of \$1 per year; rights that can be used to generate income; savings on costs the Club would otherwise incur, including costs of leasing clubrooms and hangars, or airfields for duration of Club events; and security of tenure; control and management of use of the land.

⁷⁰ As set out at [48] above, the Club and Council are bound by the 2004 agreement to procure the Trust to enter into the Proposed Lease; and the Deed stipulates that the Club and Council each appoint half the trustees and that all decision-making is to be unanimous.

⁷¹ Clause 5.2 of the Deed, in particular 5.2.2, 5.2.3, 5.2.4, 5.2.19.

Land. We note that the Trust in its submissions does not disagree that the Trust will apply income to improve and maintain the Airport Land.⁷²

59. In summary, for the above reasons, we do not agree with this characterisation of the Proposed Lease as a delegation to the Club of the mandate to provide a public airport (i.e. a means to advance the Trust's charitable purpose). We consider that, having regard to the circumstances of the 2004 Agreement, the Trust has been established as part of an agreement to ensure the Club's ongoing use of the Airport. It is not evident that, but for that background, an entity established to provide a public airport at Taieri would opt to advance that purpose by delegation to the Club on the terms of the Proposed Lease.

Provision of private benefits to the Club is allowed by the Trust Deed

60. As a final matter, we consider that the provision of private benefits to the Club under the Proposed Lease is allowed by the Deed at clause 4.1.1 and 4.1.2. In particular, we note that the Deed at clauses 4.1.1 and 4.1.2 stipulate that the Airport will be provided for use by the Club *and* the aviation public, and that this includes a mandate to provide the Airport for use by the Club.

C.4. Conclusion on Trust's purpose to provide an airport

61. For the reasons given in paragraphs 44 - 61 above, the Board concludes that the Trust's purpose to provide a secondary airport in Dunedin provides benefits to the Club that are not incidental to the advancement of charitable purposes for the public benefit. Accordingly, under the case-law discussed in section C.2 above, the Trust's purpose to provide a secondary airport in Dunedin is not a charitable purpose.

D. Section 5(3) of the Act

62. The Board considers that the Trust's charitable status stands or falls with the status of its purposes to provide a secondary airport in Dunedin (clauses 4.1.1 and 4.1.2).
63. The Board notes the Trust lawyer's comment that correspondence from Charities Services regarding this application has "focused on the primary purpose of the Trust only" whereas the Trust "has four discrete charitable purposes set out in the objects section of its Trust deed".⁷³ However, the Board considers that the essential issue in this application arises in connection with the Trust's primary purpose at clause 4.1.1 of the Deed (and that this issue would also arise if the primary object failed, and the secondary object at clause 4.1.2 was triggered).
64. We do not consider that inclusion of "tertiary" and "residuary" objects at clause 4.1.3 and 4.1.4 of the Deed show that the non-charitable purposes at clause 4.1.1 and 4.1.2 are ancillary within the meaning of section 5(3) of the Act.

⁷² Letter from Trust's lawyers dated 26 July 2013 at [15(h)].

⁷³ Letter from Trust's lawyers dated 26 July 2013, at [18].

The purposes at clause 4.1.1 and 4.1.2 are expressed as the primary and secondary purposes. Further, we do not see any basis in the information provided with this application to conclude that the Trust's overall endeavour will focus on the clauses 4.1.3 and 4.1.4. Quite the contrary.

65. For completeness, the Board accepts that the residuary object at clause 4.1.4 is in its terms charitable, but does not consider that the Trust's tertiary object at clause 4.1.3 ("the purposes of aviation generally") is charitable. The promotion of *recreational* aviation is not charitable,⁷⁴ and, if we extrapolate from current aviation activities occurring at the Airport, it would seem reasonable to assume that the Trust's promotion of recreational aviation will be more than incidental to its promotion of "aviation generally". As such, we do not consider that the Trust's purpose at clause 4.1.3 is exclusively charitable.

E. Determination

66. The Board's determination is that the Trust does not qualify for registration under the Act and the application for registration should be declined. This is because the Trust's purpose to provide a secondary airport in Dunedin confers private benefits on the Club which are not incidental to the provision of the secondary airport for use by the public.

For the above reasons, the Board declines the Taieri Airport Trust's application for registration as a charitable entity.

Signed for and on behalf of the Board

.....
Roger Holmes Miller

29th October 2013

.....
Date

⁷⁴ See note 65 above.