

## Registration decision: Nelson Lakes Gliding Club Incorporated (THE24568)

### The facts

1. Nelson Lakes Gliding Club Incorporated (the Applicant) was incorporated on 12 February 1960 under the name of Nelson Gliding Club Inc. It changed its name on 26 July 2005 to Nelson Lakes Gliding Club Incorporated. The Applicant applied to the Charities Commission for registration on 13 June 2008.
2. The Applicant's objects were set out in clause 3 of its original constitution as follows:
  3. *The objectives of the Club are:*
    - (a) *To provide safe soaring opportunities in sailplanes within New Zealand primarily at Lake Station, and to promote an interest in sailplane flying and soaring among the general public.*
    - (b) *To do all such things as incidental to or conducive to the attainment of the above objectives.*

*(The term sailplane includes all 3-axis control gliders including vintage and those with motors provided their primary mode of flight is motorless, but does not include hang gliders or paraponts.)*
  42. *The Club shall not be dissolved except, by Special Resolution passed in accordance with the provisions of "the Incorporated Societies Act, 1908" and any regulations made there under. If, upon winding up or dissolution of the Club, there remains, after the satisfaction of all debts and liabilities, any property whatsoever, the same shall be given or transferred to some other Club or Clubs having objects similar to the objects of the Club, to be determined by the members of the Club, at or before the time of dissolution, and in default thereof by any Judge or the District Court of New Zealand.*
3. The Commission analysed the application, and on 30 January 2009 sent the Applicant a notice that may lead to decline on the basis that the purposes set out in clause 3 were not charitable because the sport of gliding provided insufficient cardiovascular fitness and the Commission did not consider education to be the deeper or fundamental purpose of the club. Furthermore, the notice mentioned that clause 42 would allow surplus assets to go to non-charitable purposes on winding up. Finally, the notice indicated that the entity did not have clauses preventing private pecuniary profit.
4. The Applicant responded on 10 June 2009 sending a proposed new set of rules. The proposed amendments to clause 3 were as follows:
  3. *The objectives of the Club are*

(a) *To provide safe soaring opportunities in sailplanes within New Zealand primarily at Lake Station, and to promote an interest in sailplane flying and soaring among the general public.*

(b) *To do all such things as incidental to or conducive to the attainment of the above objectives. **In particular, to provide the necessary equipment to conduct the activity of soaring and to provide tuition and training at all appropriate levels in respect of all relevant skills.***

(c) *To promote the involvement of young and old in the sport of soaring, acknowledging the need to educate and train youth and also acknowledging the high percentage of older participants in soaring.*

*(The term sailplane includes all 3-axis control gliders including vintage and those with motors provided their primary mode of flight is motorless, but does not include hang gliders or paraponts.)*

5. The proposed rules added clause 15, which was sufficient to prevent private pecuniary profit. The proposed amendment to the Applicant's winding up clause was as follows:

*43. The Club shall not be dissolved except, by Special Resolution passed in accordance with the provisions of "the Incorporated Societies Act, 1908" and any regulations made there under. If, upon winding up or dissolution of the Club, there remains, after the satisfaction of all debts and liabilities, any property whatsoever, the same shall be given or transferred to some other Club or Clubs having objects similar to the objects of the Club, to be determined by the members of the Club, at or before the time of dissolution, and in default thereof by any Judge or the District Court of New Zealand **which Club or Clubs shall be registered as a Charity under the Charities Act 2005.**[Emphasis added]*

6. In the 10 June 2009 letter, the Applicant submitted that it had charitable purposes for the following reasons:

- *The Club provides a community activity that would otherwise not be available at a minimum cost;*
- *That activity includes a very significant proportion of education which is provided free of charge;*
- *That activity is beneficial to the public because without the existence of the Gliding Club the activities simply would not take place*

7. On 24 June 2009, the Commission sent an email to the Applicant confirming that "the amendments will be sufficient to meet the requirements of the *Charities Act 2005*, as we agree that the purposes appear to be charitable under the advancement of education".

8. The Applicant amended its rules as proposed and confirmation of the amendments was received by the Commission on 30 July 2009.

9. The Commission analysed the amended rules and considered the information on the Applicant's website (<http://www.glidingnelson.co.nz>).

On 9 September 2009, a second notice that may lead to a decline was sent to the Applicant. It raised two main points. First, it pointed out that in *Scottish Flying Club Ltd v Commissioners of Inland Revenue*<sup>1</sup>, the Court found that a flying club whose main activities were the provision of flying instruction, flying facilities and the conveniences and advantages of a social club did not have exclusively charitable purposes, and therefore did not qualify as a charity. Secondly, it pointed out that the entity's website shows that it is providing amusement for its members as a social club and social, recreational or entertainment activities have been held not to be charitable by the Courts. Finally, the notice indicated that the winding up clause (clause 43) was not sufficient to meet requirements because similar clubs may not be recognized as charitable by the Commission.

10. The Applicant responded through its lawyers on 28 October 2009 making the following submissions:

- *The amended winding up clause would be charitable because it is logically impossible for a club that is registered as a charity with the Commission not to comply with the requirement of the Charities Act;*
- *The amended purposes are charitable for the following reasons:*
  - *The Social intercourse provided for the entertainment of club members from time to time is ancillary to our main purpose*
  - *Providing members of the community access to a variety of activities that open up the ability to explore the New Zealand environment in a totally unique way is without question beneficial to the community*
  - *Without the provision of non-profit making gliding clubs this activity would only be accessible to the very rich*
  - *To provide this activity it is necessary to provide a high level of education and equipment*
  - *Gliding is a sport where education is virtually never finished*
  - *All activities undertaken by the Club except for a small amount of engineering work is undertaken by club members at no reward to themselves*
  - *The club's object further emphasise that it has an aim to involve young and old in the sport of soaring.*
- *The Applicant's lawyer then made an analysis of the Travis Trust<sup>2</sup> case and made the following submissions:*
  - *That decision should be restricted to that particular case and all other comments made by the judge are obiter dicta and not necessarily binding*
  - *The judge has made considerable assumptions as to the codification of previous precedents by Parliament in adopting the Charities Act 2005*
  - *The Charities Act 2005 has changed the common law and the previous precedents*
  - *Finally, new social circumstances should be taken into consideration when deciding if a club has charitable objects or not*

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<sup>1</sup> (1935) SC 817

<sup>2</sup> *Travis Trust v Charities Commission* (High Court, Wellington, 3 December 2008, Joseph Williams, J, CIV-2008-485-1689) para 52

- He submitted that “while to receive the benefits of membership of the club, one must be nominated and seconded by a club member, in fact we are unaware of anyone having been refused admission to the club”.
- Finally, he argues that since the first analyst indicated that the changed to the rules would be sufficient, the Commission should be bound to register the application.

## **The issues**

11. The Commission must consider whether the Applicant meets all of the essential requirements for registration under the *Charities Act 2005* (“the Act”).
12. In this case, the key issue for consideration is whether the Applicant is a society established and maintained exclusively for charitable purposes, as required by section 13(1)(b) of the Act. The question is whether the Applicant’s purposes fall within the definition of charitable purposes in section 5(1) of the Act.

## **The law on charitable purposes**

13. In order for a purpose to be charitable, it must fall within one of the four charitable purposes set out in section 5(1) of the Act and provide a public benefit.
14. 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”. In addition, to be charitable at law, a purpose must be for the public benefit.<sup>3</sup> This means that the purpose must be directed at benefiting the public or a sufficient section of the public.
15. Section 5(3) of the Act provides that any non-charitable purpose must be ancillary to a charitable purpose.
16. 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.*

## **Commission’s analysis**

### Analysis under the four heads of charity

17. The purposes in clauses 3(b) and 3(c) that relate to the provision of “tuition and training at all appropriate levels of all relevant skills” and

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<sup>3</sup> See *Latimer v Commissioner of Inland Revenue* [2002] 3 NZLR 195.

“educating and training youth” may be charitable under the advancement of education.

18. However, the Commission does not consider that these purposes are independent purposes. Rather, the purposes outlined in clauses 3(b) and 3(c) are ancillary or incidental to the main purpose outlined in clause 3(a), which is to “provide safe soaring opportunities in sailplanes within New Zealand primarily at Lake Station, and to promote an interest in sailplane flying and soaring among the general public”. In fact, clause 3(b) begins with stating that the club can “do all such things as incidental to or conducive to the attainment of the above objective”.
19. The purpose in clause 3(a) is not aimed at the advancement of religion, the advancement of education or the relief of poverty. The Commission has therefore considered whether this purpose could be held to be charitable under “any other matter beneficial to the community”.

#### Any other matter beneficial to the community

20. In order for a purpose to qualify as “any other matter beneficial to the community”, the purposes must be beneficial to the community and be within the spirit and intendment of the purposes set out in the *Preamble to the Statute of Charitable Uses 1601* (Statute of Elizabeth)<sup>4</sup> namely:

- 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
- 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.<sup>5</sup>

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<sup>4</sup> *New Zealand Society of Accountants v Commissioner of Inland Revenue* [1986] 1 NZLR 147 at 157 and *Re Tennant* [1996] 2 NZLR 633 at 638.

<sup>5</sup> *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.

## *Beneficial to the Community*

21. Concerning the first leg of the test (beneficial to the community), the Supreme Court of Canada in *Vancouver Society of Immigrant and Visible Minority Women v MNR*<sup>6</sup> summarized what is meant by the public benefit requirement. Gonthier J wrote that “There must be an objectively measurable and socially useful benefit conferred; and it must be a benefit available to a sufficiently large section of the population to be considered a public benefit.”<sup>7</sup>
22. In terms of purposes falling under the fourth head, the court does not assume or presume a public benefit as in the case of the other heads of charity – the benefit in issue must be affirmatively proved or clear to the court.<sup>8</sup> Thus, in *Vancouver Society of Immigrant and Visible Minority Women v MNR*, Gonthier J wrote that although the public benefit requirement applies to all charitable purposes, it is of particular concern under the fourth head of Lord Macnaughten’s scheme in *Pemsel*. “This is so because under the first three heads, public benefit is essentially a rebuttable presumption, whereas under the fourth head it must be demonstrated”.<sup>9</sup>
23. The Applicant has submitted that the Club is beneficial to the community because:

*The simple provision of the opportunity to take part in an activity that requires a high degree of technical knowledge and a legal framework operating within a legal framework provided by civil aviation authorities in New Zealand is in itself a charity as the provision of that opportunity to members of the public is beneficial to the community in a variety of ways. Providing members of the community access to a variety of activities, particularly one such as this which requires a high degree of education and technical skill and opens up the ability to explore the New Zealand environment in a totally unique way is without question beneficial to the community. Without the provision of non-profit making gliding clubs this activity would only be accessible to the very rich.*

24. The Commission considers that the Applicant has not met the test imposed by the courts of proving that the activities of the Club provide an objectively measurable useful benefit to a sufficient portion of the public. Concerning the objectively measurable and socially useful benefit of the club’s activities, the Applicant lawyer has contented himself by stating that the activities of the club are without question beneficial to the community without showing how and why this is so.

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<sup>6</sup> *Vancouver Society of Immigrant and Visible Minority Women v MNR* [1999] 1 SCR 10

<sup>7</sup> *Vancouver Society of Immigrant and Visible Minority Women v MNR* [1999] 1 SCR 10 at para 41 per Gonthier J dissent. Gino Dal Pont, *Charity Law in Australia and New Zealand*, Oxford, Oxford University Press, 2000 at 174-175.

<sup>8</sup> *DV Bryant Trust Board v Hamilton City Council* [1997] 3 NZLR 342, 350.

<sup>9</sup> [1999] 1 SCR 10 at para 41.

### *Analogy with the Statute of Elizabeth*

25. Concerning the second leg of the test, the courts have established that the purposes must also be within the spirit and intendment of the Statute of Elizabeth.<sup>10</sup> This requirement is cumulative in the sense that both requirements must be met before a purpose can be said to be charitable under the fourth head of charity.<sup>11</sup>

26. Grounds for holding that the objects are not within the spirit and intendment of the Statute of Elizabeth may be found in the facts of the application but also in cases decided by the Court on similar facts. In *Travis Trust v Charities Commission*<sup>12</sup>, Williams J. noted that

*... regard must be had to the particular words of the preamble and, it has now long been held, any cases in which purposes have been found to be within the spirit and intendment of the preamble by analogy.*

27. In *Scottish Flying Club Ltd v Commissioners of Inland Revenue*,<sup>13</sup> the Court found that a flying club whose main activities were the provision of flying instruction, flying facilities and the conveniences and advantages of a social club did not have exclusively charitable purposes, and therefore did not qualify as a charity. Although the Court in that case considered that some of the club's activities included things which may be regarded as educational or beneficial to the community, it considered that these activities were subordinate to the main purpose which was not charitable.

28. The Court wrote that:

*The provision of facilities for sporting flights and the maintenance of flying machines for the pleasure of members cannot be regarded as "charitable" purpose even in the widest sense [...] 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.*<sup>14</sup>

29. Furthermore, in *Inland Revenue Commissioners v Baddeley*, the House of Lords wrote that "mere recreation, hospitality and entertainment are not charitable, for the provision of entertainment and amusement per se is inconsistent with accepted notions of charity".<sup>15</sup> In *Travis Trust v Charities Commission* Williams J made the following comments in relation to sports and recreation:

<sup>10</sup> *New Zealand Society of Accountants v Commissioner of Inland Revenue* [1986] 1 NZLR 147 at 157 and *Re Tennant* [1996] 2 NZLR 633 at 638.

<sup>11</sup> *National Anti-Vivisection Society v Inland Revenue Commissioners* [1948] AC 31 at 41.

<sup>12</sup> CIV-2008-485-1689, High court, Wellington, 3 December 2008 (Joseph Williams J.) at para. 20.

<sup>13</sup> (1935) SC 817.

<sup>14</sup> *Scottish Flying Club Ltd v Commissioners of Inland Revenue* (1935) SC 817 at 822.

<sup>15</sup> [1955] AC 572 at 600 per Lord Reid and at 589 per Lord Simonds.

*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. In the areas of sport, the deeper purpose is usually health or education.”<sup>16</sup>*

30. The Commission does not consider that the Applicant’s purpose outlined in clause 3(a) will advance another charitable purpose such as the promotion of health or the advancement of education. This purpose appears to be aimed solely at providing safe soaring opportunities in sailplanes and promoting an interest in sailplane flying and soaring. In light of the decision in *Scottish Flying Club Ltd v Commissioners of Inland Revenue*,<sup>17</sup> the Commission does not consider that this comes within the spirit and intendment of the Statute of Elizabeth.

#### *Conclusion*

31. Section 13(1)(b) of the Act clearly establishes that an entity only qualifies for registration as a charitable entity if “a society or an institution is established and maintained exclusively for charitable purposes”. As indicated in *The Scottish Flying Club Limited*<sup>18</sup> and in *Molloy v. Commissioner of Inland Revenue*,<sup>19</sup> the presence of but one main purpose that is not charitable prevents the entity from being registered as a charity.
32. The Commission concludes that even if clauses 3(b) and 3(c) of the Applicant’s rules were charitable, the Applicant has not shown that the main purpose outlined in clause 3(a) is charitable as coming under “any other matter beneficial to the community”. This is so because the Applicant has not convinced the Commission that the main purpose provides an objectively measurable and useful social benefit. Finally, even if such benefit had been shown, the Applicant has not satisfied the Commission that the main purpose is also within the spirit and intendment of the Statute of Elizabeth.

#### Section 61A of the Charitable Trusts Act 1957

33. The Commission has considered whether the Applicant’s purposes could be held to be charitable under section 61A of the Charitable Trusts Act 1957. Section 61A states:

*61A Trusts for recreational and similar purposes*

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<sup>16</sup> *Travis Trust v Charities Commission* (High Court, Wellington, 3 December 2008, Joseph Williams J, CIV-2008-485-1689) para 52.

<sup>17</sup> (1935) SC 817.

<sup>18</sup> (1935) SC 817.

<sup>19</sup> [1981] 1 NZLR 688 at 691.



- (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.*

34. The Commission considers that providing safe soaring opportunities in sailplanes could be considered a recreational and leisure time occupation. However, the Commission does not consider that this will meet a need of the community which as a matter of social ethics ought to be met, nor is it provided with the purpose of improving the conditions of life for the persons for whom it is primarily intended.

#### Applicant's Submissions

35. The Applicant's lawyer has submitted that most of Williams J judgement in the *Travis Trust* case is obiter and that he should not have imported previous jurisprudence into the interpretation of section 5 of the *Charities Act 2005*. The Commission considers that since the *Travis Trust* case is the only one that has given judicial consideration to the *Charities Act 2005*, it is bound to follow that decision until higher courts have reversed it.

#### The winding up clause

36. The Commission agrees with the Applicant's lawyer that by adding "which club or clubs shall be registered as a Charity under the Charities

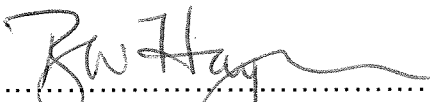
Act 2005" to clause 43, surplus assets would go to charitable organisations.

**Charity 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 the Applicant is not a society that is established and maintained exclusively for charitable purposes, as required by section 13(1)(b) 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

  
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Barry Hayman  
Acting Chief Executive

13/01/10  
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Date