**IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY**

**I TE KŌTI MATUA O AOTEAROA
TE WHANGANUI-A-TARA ROHE**

**CIV-2019-485-000302
[2020] NZHC 350**

UNDER	the Charities Act 2005
IN THE MATTER OF	an appeal under s 59 of the Charities Act 2005 against a decision of the Charities Registration Board declining to register the Better Public Media Trust as a charitable entity
BETWEEN	BETTER PUBLIC MEDIA TRUST Appellant
AND	ATTORNEY-GENERAL Respondent

Hearing:	30 September 2019
Counsel	D Nilsson and S Humphrey for Appellant D Harris and M van Alphen Fyfe for Respondent
Judgment:	2 March 2020

JUDGMENT OF CULL J

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[1] The Better Public Media Trust (the Trust) is an incorporated trust board with the stated purpose of "advancing "public media" in New Zealand, educating New Zealanders about public media and promoting informed debate about public media issues". The Trust applied to be registered as a charity under the Charities Act 2005 (the Act).[1] On 24 April 2019, the Charities Registration Board (the Board) declined the Trust's application. The Trust now appeals that decision to this Court. The central issue raised by this appeal is whether the Trust's main purpose of advancing public media is a charitable purpose within the meaning of s 5 of the Act.

Background

[2] The Trust was originally incorporated under the name the Coalition for Better Broadcasting Trust in 2013. The impetus for the Trust's formation arose from two specific advocacy campaigns, Save RNZ, which advocated against the commercialisation of Radio New Zealand in 2010, and Save TVNZ 7, which advocated against the closure of the TVNZ 7 television channel in 2012. The Trust was formed by some of the individuals behind those campaigns, including board members with expertise in media production, media studies and media law.

[3] On 12 October 2015, the Trust submitted an application for registration under s 17 of the Act. The Department of Internal Affairs (the Department) advised the Trust on 10 March 2016 that it did not qualify for registration because it did not hold income on trust for "charitable purposes" in accordance with s 13(1)(a) of the Act. Over the succeeding years, the Trust engaged in a protracted exchange of correspondence with the Department over this issue.

[4] The objects of the Trust were defined as follows in its deed dated 18 September 2015:

> The objects of the Trust are:
>
> 3.1 To promote and support public service media in New Zealand as being a public amenity in the best interests of communities, democracy and freedom of speech.

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1 Section 17.

> 3.2 To promote and support education for all New Zealanders through public service media.
>
> 3.3 To promote improved funding, operating conditions and editorial independence for public service media in New Zealand.
>
> 3.4 To promote allocation and availability of radio frequency spectrum, digital spectrum and distribution technologies for use by public service media providers.
>
> 3.5 To promote diversity of media ownership, as being important to New Zealand democracy, sovereignty and identity.
>
> 3.6 To represent and advocate on behalf of broadcasting and media audiences.
>
> 3.7 To undertake other activities that are likely to further the charitable purposes of the Trust.

[5] The 2015 deed defined "public service media" in the following way:

> 2.4 "Public Service Media" means public interest, non-profit or non-commercial media (including television channels, television programmes, radio stations, radio programmes, news media, websites, applications, games, software, and other online or broadcast media).

[6] The Trust changed its name to the Better Public Media Trust in 2 February 2018 and executed a new trust deed, with substantially similar but slightly different terms. The objects of the Trust are defined as follows in its current deed:

> The objects of the Trust are:
>
> 3.1 To advance public media in New Zealand.
>
> 3.2 To promote the role of public media in educating, informing, and entertaining all New Zealanders.
>
> 3.3 To educate New Zealanders and promote informed debate about public media issues.
>
> 3.4 To support improved access to funding, operation conditions and platforms of distribution for use by public media providers.
>
> 3.5 To represent and advance the interests of media audiences.
>
> 3.6 To undertake other activities that are likely to further the charitable purposes of the Trust.

[7] The current deed defines "public media" in the following way:

2.4 "Public Media" means public interest, non-profit, publicly-owned, independent or non-commercial media (including television channels, television programmes, radio stations, radio programmes, news media, social media, websites, applications, games, software, and other online or communication media).

[8] The Trust has over 2,000 members who pay a $40 annual membership fee. The Trust engages in a wide range of activities in support of its stated purposes. Those include:

(a) holding public meetings, lectures and workshops about public media issues;

(b) making speeches about public media to other non-government organisations;

(c) advocating for the establishment of an advertising-free television channel;

(d) commissioning research (mainly surveys) on aspects of public media;

(e) communicating with political parties (on both sides of the political spectrum) and making submissions to regulators on media policy;

(f) writing opinion pieces on public media issues; and

(g) holding a competition for secondary and tertiary students to prepare an essay, research report or short film on a public media issue.

[9] On 15 February 2019, the Chief Executive of the Department recommended, as required by s 19(1) of the Act, that the Board decline the Trust's application. On 1 March 2019, the Board requested that the Department prepare a draft decision paper for review. The Department provided this paper on 22 March 2019. On 24 April 2019, the Board released its decision declining the Trust's application.

Statutory framework

[10] Section 13 of the Act establishes the essential requirements to qualify for registration as a charity:

> **13 Essential requirements**
>
> (1) An entity qualifies for registration as a charitable entity if,—
>
> (a) in the case of the trustees of a trust, the trust is of a kind in relation to which an amount of income is derived by the trustees in trust for charitable purposes; and
>
> …

[11] "Charitable purpose" is defined in s 5 of the Act:

> **5 Meaning of charitable purpose and effect of ancillary non-charitable purpose**
>
> (1) In this Act, unless the context otherwise requires, charitable purpose includes every charitable purpose, whether it relates to the relief of poverty, the advancement of education or religion, or any other matter beneficial to the community.
>
> (2) …
>
> (3) To avoid doubt, if the purposes of a trust, society, or an institution include a non-charitable purpose (for example, advocacy) that is merely ancillary to a charitable purpose of the trust, society, or institution, the presence of that non-charitable purpose does not prevent the trustees of the trust, the society, or the institution from qualifying for registration as a charitable entity.
>
> (4) For the purposes of subsection (3), a non-charitable purpose is ancillary to a charitable purpose of the trust, society, or institution 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.

[12] Section 18(3)(a) imposes certain requirements when ascertaining the purpose of a trust:

> **18 Chief executive to consider application**
>
> …
>
> (3) In considering an application, the chief executive must—

> (a) 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 …

Board decision

[13] The Board followed the three-step process outlined by Ellis J in *Re The Foundation for Anti-Aging Research and the Foundation for Reversal of Solid State Hypothermia* (*Anti-Aging*) for assessing whether a purpose is charitable, which it summarised in the following way:[2]

> - whether the Trust's stated purposes are capable of being charitable;
> - whether the Trust's activities are consistent with or supportive of a charitable purpose;
> - if the Trust's activities are found not to be charitable, whether they can be said to be merely ancillary to an identified charitable purpose.

[14] The Board considered that the Trust's stated purpose of advancing public media was not capable of being charitable by analogy to previous cases dealing with the provision of public amenities. In this regard, the Board identified the Trust's purpose as an advocacy purpose and referred to Supreme Court's decision in *Re Greenpeace of New Zealand Inc*, which emphasised that "[a]dvancement of causes will often, perhaps most often, be non-charitable".[3] Similarly, the Board referred to the recent decision of this Court in *Re Family First New Zealand*, which commented that "[t]he advocacy cases where charitable status has been acknowledged are scarce, and seem increasingly limited to purposes of almost universal acceptance".[4]

[15] The Board concluded the provision of public media was not a charitable end goal. It considered a submission by the Trust drawing an analogy with the decision of the Federal Court of Appeal of Canada in *Vancouver Regional FreeNet Association v Minister for National Revenue (FreeNet)*, which held that the provision of free internet

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2 *Re The Foundation for Anti-Aging Research and the Foundation for Reversal of Solid State Hypothermia* [2016] NZHC 2328 [*Anti-Aging*] at [88].

3 *Re Greenpeace of New Zealand Inc* [2014] NZSC 105, [2015] 1 NZLR 169 at [73].

4 *Re Family First New Zealand* [2018] NZHC 2273, [2019] 2 NZLR 673 at [65].

access was a charitable public amenity.[5] The Board distinguished *FreeNet* on the basis that although public media provides free access to information, it does not allow a free exchange of information between members of society. The Board emphasised the distinction drawn by the Federal Court of Appeal in *FreeNet* between organisations that provide a medium for conveying a message and organisations that provide a message themselves. The Board said the Trust advocates for public media broadcasters and publishers, who are involved in the provision of a message itself, not just a medium for citizens to engage with each other.

[16] Because the Board concluded that the end of providing public media was not charitable, it did not find it necessary to consider the means and manner of the Trust's advocacy to promote that end.

[17] The Board then considered whether the Trust's advocacy of public media could be considered merely ancillary to a charitable purpose.[6] It concluded that it could not. The Trust's own statements of its purpose and its activities demonstrated its advocacy function was not merely ancillary.

[18] The Board also rejected that the Trust had a charitable purpose to advance education *about* public media or *through* public media. The advancement of education falls within the description of charitable purpose in s 5 of the Act. The Board considered that some of the Trust's activities could be educational, including its public lectures, academic research and competition for students. However, the Board held that these activities were primarily focused on promoting the Trust's particular views on public media rather than advancing education in a charitable sense.

[19] In terms of advancing education through public media, the Board observed that the Trust has not established a television station to provide education content. The Board accepted that some forms of investigative journalism are capable of advancing education but said the Trust's advocacy was not focussed on public media involving

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5 *Vancouver Regional FreeNet Association v Minister for National Revenue* (1996) 137 DLR (4th) 206 (FCA) [*FreeNet*].

6 *Anti-Aging*, above n 2, at [88]; see also Charities Act 2005, s 5(3).

investigative journalism, rather it advocated for public media more broadly, including types of media content that would not qualify as educational.

[20] Finally, the Board considered whether the Trust had a charitable purpose to promote good citizenship. The Board accepted that promoting public participation in democratic processes is capable of being a charitable purpose. The Board also accepted that public media might have the flow-on benefit of contributing to a more informed and engaged public, but it held this consequence was too indirect to be considered charitable at law.

The appeal

[21] The Trust appeals against the Board's decision under s 59 of the Act. The appeal is by way of rehearing, on the basis of the evidence before the Board.[7] In accordance with the principles set out by the Supreme Court in *Austin, Nichols & Co Inc v Stichting Lodestar*, this Court must reach its own conclusion as to the merits of the Trust's application, but the onus is on the Trust to demonstrate that the Board's decision was wrong and should be interfered with.[8]

[22] In its notice of appeal, the Trust identified five grounds of appeal, which largely overlap with each other. On behalf of the Trust, Mr Nilsson helpfully narrowed those grounds down to two essential points in his submissions:

(a) First, the Board erred in law by rejecting that the advancement of public media could be a charitable purpose.

(b) Second, the Board erred in law by rejecting that the Trust has a separate charitable purpose of advancing education about public media.

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7 High Court Rules 2018, r 20.18.
8 *Austin, Nichols & Co Inc v Stichting Lodestar* [2007] NZSC 103, [2008] 2 NZLR 141 at [4]–[5].

The parties' positions

The Trust's submissions

[23] On the central issue in this case, the Trust submits that advancing public media is a charitable purpose because it provides a public benefit and is analogous to other charitable purposes, including the provision of public amenities and the promotion of social cohesion and good citizenship.

[24] The Trust submits the Board erred in conflating the Trust's purposes with its activities, specifically its advocacy for particular public media institutions such as Radio New Zealand. Mr Nilsson for the Trust submits this confusion arose from the three-step test articulated in the *Anti-Aging* decision, which was clearly not the intention of the test, but in substance that was the effect.

[25] Although the Trust on occasion advocates for particular viewpoints on public media issues, it submits that it is not wedded to any of these viewpoints. The underlying objective of the Trust is to advance public media generally, which at times, it says, requires the Trust to take a stance on particular matters, such as when the Trust opposed the NZME-Fairfax merger or supported increased funding for Radio New Zealand. Those matters, it contends, are merely manifestations of the Trust's purpose, and should not be elevated to a purpose in their own right. Mr Nilsson emphasised the Trust is not tied to any particular model for public media distribution or funding, and it is not tied to any particular public media entities or institutions.

[26] Mr Nilsson advanced the submission that the public benefits of public media are not contestable and are capable of being demonstrated by evidence in a similar manner to the promotion of human rights or protection of the environment.[9] He relied on the evidence of Dr Thompson, who is the chairperson of the Trust and a senior lecturer in media studies at Victoria University of Wellington. Dr Thompson maintains that public media has benefits for both individuals and what he calls the "media ecology", by setting high standards of programming, encouraging competition for

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[9] Compare *Greenpeace*, above n 3, at [70]–[71].

quality and innovation, and compensating for market failures arising from a primarily commercial media environment.

[27] Mr Nilsson also relied on ss 12 and 14 of the New Zealand Bill of Rights Act 1990 (NZBORA), which affirm the rights to vote in "genuine" elections and to freedom of expression, including the freedom to receive and impart information. Relying on European jurisprudence, Mr Nilsson further suggested that the right to freedom of expression under s 14 imposes a positive obligation on the state to take steps to ensure individuals are able to exercise their rights. He submitted public media could fulfil that obligation.

[28] He submitted further that such public benefit is analogous to the provision of public amenities and promotion of social cohesion and good citizenship and referred to the *FreeNet* decision that the Trust relied upon before the Board. He argued that the Board was wrong to distinguish *FreeNet* on the basis that public media does not create a medium for the exchange of information between citizens. First, he argued public media does exactly that. He said the Court could take judicial notice of the fact Radio New Zealand operates a Facebook page that enables listeners to provide feedback on its programmes. Second, he argued the Federal Court of Appeal in *FreeNet* equally relied on the fact *FreeNet* facilitated public access to information, which is exactly what public media does. Mr Nilsson submitted the Board's reasoning that some public media broadcasters do not provide charitable content mirrored the rejected Crown argument in *FreeNet* that the purpose was not charitable because FreeNet could not control all content on the internet.

[29] Finally, Mr Nilsson submitted the Trust has a separate purpose of advancing education about public media. He said the Department originally accepted this view, and the Board failed to explain why this view had changed.

The Attorney-General's submissions

[30] Ms Harris for the Attorney-General sought to uphold the decision of the Board and submitted that the advancement of public media is not a public benefit in its ends, means or manner, and nor is the public benefit analogous to previously recognised

charitable purposes. I address the detail of the Attorney-General's submissions under the relevant issues as they appear below.

What is the Trust's stated purpose?

[31] Before addressing the issues on appeal, it is important to understand what the Trust's purpose is. At first blush, the exact nature of the Trust's purpose appears difficult to define. Who says what makes a "better media" and what does that look like? At what point does it get better? And what is understood by the term "public media"?

[32] Defining the Trust's purposes attracted considerable attention at the hearing. The "objects" of the Trust are outlined in both the 2015 and the 2018 deeds and are reprinted above at [4] and [6]. It is evident immediately that the definition of "public media" or "public service media" is crucial to understanding the Trust's purpose.

[33] At the hearing, Mr Nilsson addressed what is meant by "public media". Despite what might be suggested by the name, he insisted it did not relate to the model of media ownership. Mr Nilsson stressed that the Trust is agnostic as to the ownership model and its concern is with the nature of the content of the media. When I enquired whether this was limited to public and non-profit or non-commercial media providers, Mr Nilsson answered in the negative, explaining that the word "independent" in the definition of "public media" in the 2018 deed also encompasses commercial media providers and that government-controlled or owned media is but one way of delivering public service media. He suggested the phrase "public service media," which was used in the 2015 deed, might better capture the Trust's meaning. Another term might be "civic media". In this judgment, I use the term public media, being the term used in the 2018 deed.

[34] The key point for the Trust appears to concern the nature of media content. Public media, or public service media, was broadly described by Dr Thompson in these terms (emphasis added):

> What the term "public service" means across all these cases is a commitment to serving the broad interests of the public as *citizens*, not only as *consumers*. This generally includes a commitment to a universally-accessible service, free

> at the point of reception, provision of a diverse range of content (including informative and educational genres) which addresses the needs of a wide range of audiences (including demographic, ethic/indigenous and regional minorities).

[35] Ms Harris responded that the Trust has introduced a very broad concept of public media, which is as wide as public service models on the one hand to models like TV3 and NZME on the other. Because of the extreme breadth of "public media", she contended, the purposes of the Trust are expansive and difficult to pin down. Further, she questioned whose culture it is and whose media or portion of the media is being promoted by these objects. The difficulty, Ms Harris submits, is what is sought to be promoted is unclear from the stated purposes.

[36] It appears to me that the difficulty arises from the wording of the Trust deeds, especially the 2018 deed. If the definition of "public media" is as broad as Mr Nilsson submitted, so as to include commercial media, then the definition becomes redundant in a sense. Public media, as defined, simply means all media. In some ways this is helpful in interpreting the purpose provisions of the Trust deed in a way that does not suggest a bias for any particular model of media ownership. But in another way, it makes it very unclear what exactly the Trust is promoting.

[37] To address the infelicities in the drafting of the Trust deeds, I have considered the articulation of the Trust's purpose in the evidence of Dr Thompson and the Trust's submissions. As the discussion before me demonstrated, because of the breadth of its reach and the generality of the language used to describe it, the Trust's precise purpose is unclear. A "commitment to serving the broad interests of citizens by access to a universally-accessible service" and "advanc[ing] a culture within the media ecology" are inspirational words but are elastic in their meaning. Even the explanation of the definition of "public media" was problematic, requiring redefinition as "civic" or "public service" media, which are not the terms in the 2018 Deed. The Trust does not provide a service, such as free internet access as in *FreeNet* as the Board noted, or a radio or television channel. Instead, it "promote[s] and support[s] public service media in New Zealand as being a public amenity in the best interests of communities, democracy and freedom of speech."[10]

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10 See the wording of the objects of the Trust in the 2015 deed, at [4] of this judgment.

[38] While the wording of the Trust's objects presents a preliminary difficulty in this case because their meaning is elusive, it is well settled law that uncertainty as to object will not invalidate a charitable trust.[11] If there is ambiguity, a "benignant" or benign construction should be given to the trust's instruments.[12] In considering whether the Trust has a charitable purpose, therefore, I have taken from the evidence a generous interpretation of the definition of "public media", as described by Dr Thompson above at [34], and assessed the Trust's stated purpose, as outlined above at [6], in light of it.

Charitable purposes

[39] Charity law finds its origins in the Statute of Charitable Uses 1601 (UK), otherwise known as the Statute of Elizabeth. The law of charities recognises the important role that private philanthropy can play in providing public benefits, thereby reducing the burden on the taxpayer to provide the same. Charitable purpose, then, is inherently tied up with the needs of society at any particular time. In exchange for the private provision of a public benefit, charities are granted certain privileges by the law, including tax exemptions and tax credits for donors.[13]

[40] These principles are now incorporated within the definition of charitable purpose found in s 5 of the Act.[14] Relief of poverty, the advancement of education and the advancement of religion are recognised in the Act as categories in their own right. This case, however, primarily concerns the catch-all phrase "any other matter beneficial to the community." At common law, charitable status was recognised on a case by case basis by analogy with previous decisions falling generally within the "spirit and intendment" of the preamble to the Statute of Elizabeth. This analogical reasoning continues to play an important role under the catch-all provision in s 5 of the Act.

[41] As *Greenpeace* confirmed, there is a need to establish both public benefit and charitable purpose under the fourth, catch-all category, such that any matter which

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11 *Moggridge* v *Thackwell* (1803) 7 Ves 36, 32 ER 15 (Ch).
12 *Inland Revenue Commissioners v McMullen* [1981] AC 1 at 14; and *Re Simmonds* [1933] NZLR 172 (SC).
13 See Income Tax Act 2007, ss CW 41–42 and LD 1.
14 See *Greenpeace*, above n 3, at [12].

may be beneficial to the community must also have as its object a charitable purpose.[15] The Court also confirmed that in ascertaining whether a purpose is charitable, the method of analogy to objects already held to be charitable should be retained:

> [30] The language and structure of s 5(1) make it clear that, although "any other matter beneficial to the community" may qualify, the object must also be a "charitable purpose." The method of analogy to objects already held to be charitable is also the safer policy since charitable status has significant fiscal consequences. Since the common law methodology is assumed in New Zealand by the Charities Act, we consider that it would not be appropriate for this Court to abandon the analogical approach in favour of the view that benefit to the public presumptively establishes the purpose as charitable.

[42] In determining whether a purpose is beneficial to the public, France J observed in *Re Family First* that the public benefit has two aspects – the purpose must be one which, if attained, would be beneficial to the community and it must benefit all of, or at least a significant section of, the public.[16]

[43] Before determining whether the Trust's purpose is both beneficial to the public and charitable, it is appropriate to first deal with the Trust's challenge that the Board conflated the Trust's activities with its purpose and failed to focus on the Trust's purpose.

The relevance of activities

[44] In the analysis of charitable purpose, there is no concept of a charitable activity. The activity is to be viewed as consistent with or supportive of the charitable purpose. The Act is concerned with the purposes of an organisation. In *Anti-Aging*, Ellis J articulated a three-stage test in the following terms:

> [88] In the present case, therefore, my own view is that the proper analysis would have been to begin by asking whether FAAR's stated purposes are charitable or not. If they are clearly not, then that is the end of the inquiry. If they are (or if the stated purposes are unclear), then the chief executive or the Board needed to consider what information it has about FAAR's present and proposed activities (and to consider requesting such information). Then, the question is whether those activities are consistent with or supportive of the identified charitable purpose. If they are, then there is no difficulty. If they

15 *Greenpeace*, above n 3, at [30].
16 *Re Family First,* above n 4, at [9].

are not, then it would need to be determined whether the activities can be said to be merely ancillary to the identified charitable purpose.

[45] I do not consider it an error for the Board to have adopted the three-stage test in *Anti-Aging* so long as it is properly understood. The first step involves considering the applicant's stated purposes (as opposed to its actual purposes as determined by the Court) and whether they are charitable. The second step then cross-checks the applicant's activities with its stated purposes, to ascertain whether there is a conflict between the activities and the identified charitable purpose(s). A conflict will only matter if the activities suggest the applicant has an unstated non-charitable purpose. If there is no such purpose, then it is not necessary to consider step three.

[46] If there is an unstated non-charitable purpose, then the third step requires consideration of whether that purpose is merely ancillary to the identified charitable purpose. This step was articulated as "it would need to be determined whether *the activities* can be said to be merely ancillary to the identified charitable purpose".[17] The reference to "the activities" was clearly a shorthand for any unstated non-charitable purpose suggested by the activities.

The Trust's advocacy purpose

[47] In discussion with Counsel, Mr Nilsson articulated the Trust's primary focus. It is "to advance policies and advance a culture within the media ecology that compensates for the externalities… of an economy-based media market" that in turn "threaten the diversity of voices." When I asked whether that promulgates a specific view of some policies and culture over others, Mr Nilsson agreed, stating that the Trust has reached a view on the basis of empirical evidence that leaving the media market completely unregulated and functioning on market economic principles narrows current affairs and public interest content, such as political reporting, in-depth news and a reduction in regional or minority interest stories. Counsel acknowledged that, on the basis of this view, the Trust lobbies for specific issues, such as funding for Radio New Zealand, as part of its activities.

17 *Anti-Aging*, above n 2, at [88] (emphasis added).

[48] Although Mr Nilsson stressed that such lobbying or advocacy is only a part of the Trust's purposes and its overarching purpose is to create and encourage debate on the issues surrounding public media, it is plain that the Trust has taken a particular view of the public media, and its core purpose is to advocate for the way in which the New Zealand public should best be served by the public media with that view in mind.

[49] I accept the Crown's submission that the Trust's advocacy purpose is not an independent, ancillary purpose, particularly when the majority of the Trust's 2018 objects are advocacy-based.

Is the Trust's advocacy purpose charitable?

[50] I turn then to consider whether the advocacy purpose of the Trust is charitable and is for the public benefit.

[51] The Supreme Court decision in *Greenpeace* removed the exception that once existed for political causes, but, as Ms Harris submitted, the underlying concern remains.[18] While the Supreme Court opened the way for advocacy purposes to be accepted as charitable, it did not substantially change the underlying reluctance of the law to recognise advocacy purposes as charitable. The Court referred with approval to remarks of Lord Bramwell in the seminal case of *The Commissioners for Special Purposes of the Income Tax v Pemsel*:[19]

> I hold that the conversion of heathens and heathen nations to Christianity or any other religion is not a charitable purpose. That it is benevolent, I admit. The provider of funds for such a purpose doubtless thinks that the conversion will make the converts better and happier during this life, with a better hope hereafter. I dare say this donor did so. So did those who provided the faggots and racks which were used as instruments of conversion in times gone by. I am far from suggesting that the donor would have given funds for such a purpose as torture; but if the mere good intent makes the purpose charitable, then I say the intent is the same in the one case as in the other. And I believe in all cases of propagandism there is mixed up a wish for the prevalence of those opinions we entertain, because they are ours.

[52] It is necessary to keep in mind this need to avoid recognising the mere "wish for the prevalence of those opinions we entertain" as charitable when considering

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18 At [55]-[58].

19 *The Commissioners for Special Purposes of the Income Tax v Pemsel* [1891] AC 531 (HL) at 564, cited in *Greenpeace*, above n 3, at [33].

charity registration applications based on advocacy purposes. The majority of the Supreme Court formulated the test for advocacy purposes in the following way:[20]

> … assessment of whether advocacy or promotion of a cause or law reform is a charitable purpose depends on consideration of *the end* that is advocated, *the means* promoted to achieve that end and *the manner* in which the cause is promoted in order to assess whether the purpose can be said to be of public benefit within the spirit and intendment of the 1601 Statute.

[53] The distinction among the three concepts of *end*, *means* and *manner* is important to understand when considering an advocacy purpose. The *end* is the ultimate goal or objective for which the organisation is advocating. This will typically be formulated at a high level of abstraction, such as the examples given by the Supreme Court — abolition of slavery, advancement of human rights and protection of the environment.[21] The *means* is then the way in which the organisation advocates achieving the *end*. This is more specific and concrete, as it pertains to the practical steps the organisation supports being taken to achieve the outcome sought. Finally, the *manner* is the way in which the organisation conducts its advocacy. This is distinct from the *means* in that it concerns the practical steps the organisation takes to advocate for its cause rather than the steps it advocates should be taken by others.

[54] This three-stage test is unique to advocacy purposes because in such cases the organisation claiming to be charitable is not itself performing the charitable acts. It is advocating for those acts to be performed by others. For this advocacy to be charitable, the cause being advocated must itself be charitable and it must be advocated in a charitable way.[22] This requires more complex considerations than for other charities because the organisation is a step removed from the charitable outcome and there is a level of abstraction inherent in advocating for a cause. That is why it is necessary to assess the end goal being advocated, the means by which the organisation advocates to achieve that goal and the manner in which it advocates that goal and those means.

[55] The Supreme Court accepted it will not be common for an advocacy cause to be charitable.[23] From the examples used by the Court, such as the abolition of slavery,

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20 At [76] (emphasis added).
21 At [71].
22 *Greenpeace*, above n 3, at [102].
23 At [74].

advancement of human rights and protection of the environment, the threshold is clearly high. It will not be sufficient for an advocacy group to merely point to benefits of their cause, or academics who agree with them. The cause must be undeniably in the public interest. The Supreme Court found that controversy, or lack thereof, is not determinative.[24]

[56] As the minority of the Supreme Court observed, the consideration of whether advocacy causes are in the public benefit raises an issue of justiciability:[25]

> ... judges are usually not well-placed to determine whether the success of a particular cause would be in the public interest. This may be for reasons of institutional competence. By way of example, a dispute between Greenpeace and the chief executive of the Department of Internal Affairs under the Charities Act does not provide an ideal forum for determining the appropriate policies for New Zealand to adopt towards other states in relation to nuclear weapons and weapons of mass destruction. Similar considerations may apply in relation to Greenpeace's purpose of protecting the environment, a purpose which is closely intertwined with the advocacy of causes (for instance against genetic engineering) the worth of which are not easily determined by the courts. As well, and leaving aside the practical difficulties of forming a judgment on such issues, a judge may feel that entering into such an inquiry lies outside the proper scope of the judicial role.

[57] The majority was clearly cognisant of the judicial role in making judgments on particular causes. In dealing with the facts of the case before it, the majority said:

> [101] It is no answer to point to the international and domestic framework for nuclear disarmament... Achievement of the end of nuclear disarmament will require change in the policy pursued by such states and, to the extent to which New Zealand supports the status quo under the Treaty, to the dealings of the New Zealand government towards other nations. For the reasons discussed by Slade J in *McGovern*, the court would have no adequate means of judging the public benefit of such promotion of nuclear disarmament and elimination of all weapons of mass destruction, taking into account all the consequences, local and international. *Whether promotion of these ideas is beneficial is a matter of opinion in which public benefit is not self-evident and which seems unlikely to be capable of demonstration by evidence.*
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> [102] It is the case that it will usually be more difficult for those who promote ideas they consider to be of public benefit to show charitable purpose as readily as those who can show tangible utility in the good they do. There is truth in the point that where a charity promotes an abstraction, such as "peace" or "nuclear disarmament", the focus in assessing charitable purpose must be on how such abstraction is to be furthered. The Court of Appeal treated lack of controversy in New Zealand about the goals of nuclear

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24 At [75].

25 At [125], per William Young and Arnold JJ (citations omitted).

disarmament and the elimination of weapons of mass destruction as determinative of the question whether the promotion of these ends was charitable. We consider that it was necessary to focus rather on the manner of promotion.

(Emphasis added, citations omitted).

[58] *Aid/Watch Inc v Federal Commissioner of Taxation* (*Aid/Watch*) was a decision of the High Court of Australia concerning an organisation that monitored the aid programme of the Australian government but did not provide aid itself.[26] Kiefel J delivered a dissenting judgment in that case, concluding that Aid/Watch was merely seeking to have the government implement its own views, which, without more, could not be a charitable purpose.[27] In *Greenpeace*, the Supreme Court cited with approval the judgment of Kiefel J.[28] Similarly the High Court in *Family First*, to which the Board specifically referred, has observed that establishing a public benefit has always been a hurdle for those whose primary purpose is solely to promote a cause, and still is.[29]

[59] These decisions provide a helpful framework for assessing whether an advocacy cause is charitable. The Court is not required to engage in contested matters of political opinion. To do so would overstep its constitutional competence. Instead, the Court's focus is on whether the *end* and *means* fall into one of two categories: where the public benefit is self-evident or where the public benefit is capable of demonstration by evidence (and the evidence in fact demonstrates a public benefit). It goes without saying that genuinely contestable matters of political opinion are neither self-evident nor capable of demonstration by evidence.

[60] Assessment of the *manner* is likely to raise fewer difficulties. Relevant considerations might be whether the *manner* involves illegal activities or whether its activities demonstrate that the organisation is not in fact advocating for its stated purpose. Such an assessment here is not necessary, as there is no dispute that the Trust has acted legally and is advocating for its stated purpose. I turn then to consider its *end* and *means*.

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26 *Aid/Watch Inc v Federal Commissioner of Taxation* [2010] HCA 42, 241 CLR 539.

27 At [85]-[86].

28 At [73]-[74].

29 *Family First*, above n 4, at [49].

End

[61] If the Trust's *end* is articulated at a very abstract level and giving a generous interpretation to the meaning of the Trust's purpose, I accept it could be charitable. That *end* is to uphold the public function of public media, as best as one can understand the extent and meaning of that term.[30] This goal is agnostic as to the model of media ownership; the particular content being provided and the level of civic content. It recognises that the media plays an important function in civil society by informing and entertaining the public and holding the government and civil society to account. In short, the focus is on protecting the role of the media as the Fourth Estate. On Dr Thompson's evidence, the goal is to ensure that public media continues to play its crucial role in civil society. Where the public function of the media is in danger, the goal would be to return it to its proper place.

[62] Dr Thompson articulates the erosion of public media occurring from the rise of social media platforms, with traditional print media and the broadcasting it supports coming under increasing financial pressure from the loss of advertising revenue.[31] This, he says, risks a reduction in a universally accessible service with a diverse range of content. It is this risk that the Trust, with its goal of upholding the function of the public media, attempts to combat.

[63] This *end* then, as a high-level goal, could benefit the public, or at the very least, sections of it. An *end* that is agnostic to what this particular form should look like favours the view that it is of public benefit. There are, of course, disputable matters within this broad goal but that is equally true of the advancement of human rights and the protection of the environment. One could argue over where the limits of human rights sit (for instance, whether economic rights are human rights, or whether animals have human rights) or what trade-offs are required in order to protect the environment. Such vagaries do not preclude the *end* from being in the public benefit, although they might be relevant to the *means* depending on the stance taken by the organisation.

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30 This broadly corresponds to 3.1 of the current Trust deed, which reads: "To advance public media in New Zealand."

31 As referred to by Dr Thompson in his affidavit of 12 June 2018.

[64] I turn to whether the *end* of upholding the public function of the media is also analogous to previous charitable purposes. Dealing first with the provision of amenity, I find it is not analogous. Setting aside the debate over whether there is a difference, for charitable purposes, between the free provision of information and the free provision of a platform for the exchange of information, there is a more fundamental problem with the analogy to the provision of amenities.

[65] In *FreeNet*, the claimant was actually providing a public amenity, whereas the Trust is not. The Trust is advocating for such provision by others. This is an important distinction. As Ms Harris submitted, the Federal Court of Appeal based its decision on an analogy with the provision of more traditional forms of public amenities, such as physical infrastructure like roads and ports. When such amenities are provided by private charities, that lessens the potential burden on the taxpayer of constructing that infrastructure. There is a clear public benefit. Free provision of the internet is no different. FreeNet provided digital infrastructure to the public, which reduced the burden on the government to do the same.

[66] But no burden would be alleviated by the Trust's advocacy. Advocating for the construction of roads is quite different from actually constructing them. I understand that at some point the Trust wished to establish its own non-profit media service. If it did so, this could likely be charitable in the same manner as in *FreeNet*, but that is not the position at present.

[67] Nevertheless, the goal of upholding the public function of the media can be compared to two other accepted categories of charity: advancement of education and advancement of civil society/democracy. The advancement of education is one of the three purposes stipulated as being charitable in s 5(1) of the Act. Upholding the public function of the media is analogous to education at one level in that both ensure people are able to engage in civil society and democracy. Without access to the information provided by public media, it is arguable that such information limits the ability to formulate educated opinions. I address whether the Trust's educational purpose is a stand-alone purpose at [82]-[84].

[68] Turning to the advancement of civil society/democracy, in *Greenpeace*, the Supreme Court observed that "charity has been found in purposes which support the machinery or harmony of civil society".[32] Similarly, in *Re Draco Foundation (NZ) Charitable Trust*, Ronald Young J held that the "protection and promotion of democracy and natural justice in New Zealand" was a charitable purpose.[33]

[69] Mr Nilsson submitted Dr Thompson's evidence demonstrates that public media fulfils these purposes by compensating for market failures and ensuring a diversity of media content. Ms Harris conceded that enhancing public society and democracy would be a public benefit, but she contended there is insufficient certainty that the Trust's advocacy directly or indirectly produces this kind of public benefit. At its highest level, it is arguable that upholding the public role of the media is analogous to these charitable purposes because it involves supporting and protecting the important role played by the media in civil society and democracy.

[70] If the *end* is articulated in any less abstract way from enhancing democracy and society - for instance, promoting greater public content in the media - then the *end* would not be charitable for the same reasons I explain in relation to the Trust's *means*.

Means

[71] I am not satisfied all the Trust's *means* are charitable. The *means* are broadly articulated in cl 3.2–3.5 of the Trust deed. To paraphrase, the Trust has the following *means*:

(a) to promote the role of the media in educating, informing and entertaining;

(b) to educate and promote informed debate about media issues;

(c) to support improved access to funding, operating conditions, and platforms of distribution for public media; and

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32 At [70], citing *Incorporated Council of Law Reporting for England and Wales v Attorney-General* [1972] Ch 73 (CA) and *Incorporated Council of Law Reporting (Qld) v Commissioner of Taxation (Cth)* (1971) 125 CLR 659.

33 *Re Draco Foundation (NZ) Charitable Trust* (2011) 25 NZTC 20,032 (HC) at [19]–[22].

(d) to represent and advance the interests of public media audiences.

[72] The first, second and fourth of these *means* could be considered charitable as they are all ways of achieving the *end* without adopting a particular stance on contestable issues. The third, however, is not charitable. It clearly takes a stance on the adequacy of funding, operating conditions and platforms of distribution for public media. This changes the tenor of Trust's purpose from agnostically protecting the public role of the media to championing that role at the expense of other interests. It is evident the motivation for the inclusion of this *means* in the Trust's purpose is the belief held by the Trust that there is insufficient public media content available in New Zealand at present and the current commercial media providers are incapable of protecting the role of public media.

[73] This motivation is borne out in the evidence, which reveals that the Trust does not take an agnostic position at all. In his letter to the Department dated 12 October 2015, the Chief Executive of the Trust described public media as "distinct from *commercial media* which is created to sell advertising space". This anti-commercial theme is continued in Dr Thompson's affidavit:

> There have been significant changes in the broadcasting sector brought about by the deregulation and commercialisation of the late 1980s through the 1990s. Wayne Hope's work on the public sphere in New Zealand maps out how various historical regulatory, economic and cultural factors have shaped the media ecology in Aotearoa and circumscribed the possibilities for a diverse and inclusive 'public sphere' (i.e. the spaces for civic deliberation and participation). If colonial/state control of the media was problematic earlier in the 20th century, it is the preponderance of private, commercial ownership coupled with market deregulation under the 'Rogernomics' era that threaten the public sphere in the late 20th and 21st Century, especially in respect to the quality of news and current affairs.
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> …
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> Joe Atkinson's work demonstrates the links between commercial pressures, changes in television news/current affairs formats and the erosion of the space for more substantive political deliberation. For example, the drive to optimise prime time audiences led to a measurable decline in news story length (and thus a reduction of analytical depth) in the six o'clock bulletins and also a decline in the ratio of 'hard' political and economic stories to populist 'soft' news issues.
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> …

> … while ultra-fast broadband and subscriber video services may allow one to binge-watch Game of Thrones on any device, this does not compensate for the absence of in-depth news and current affairs in prime time, the dearth of Maori perspectives in mainstream content, and the limited range of local, educational programming for younger viewers.
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> …
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> The research clearly indicates that bolting a public service charter onto an otherwise commercial media operator (as with the TVNZ Charter) is therefore liable to result in intractable operational tensions, especially if public subsidies are not commensurate with policy expectations.
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> …
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> … there is incontrovertible evidence that a media sector driven by the pressures of a rapidly evolving commercial market in which digital convergence is disrupting traditional value chains is unlikely to adequately fulfil the civic expectations of a fourth estate or a robust public sphere.

[74] Dr Thompson clearly has strong views about what kind of media is beneficial for the public, the way in which this media should be delivered and the adequacy of current levels of public content in the media. The Trust advocates a shift away from commercialised platforms of distribution and an increase in public media content, through increased public funding or otherwise. Not everyone agrees with those positions, as evidenced by the academic literature drawn to my attention by Ms Harris.[34] But it is not necessary to resort to academic literature to realise people hold differing views on these matters, which have been the source of considerable public debate of late. The comments of Kiefel J in *Aid/Watch* about an organisation which promotes specific views are pertinent:[35]

> [82] The appellant may well consider that the changes which it seeks, from time to time, would render aid more effective, but whether that is so depends upon the correctness of its views. At some points in its reasoning, the Tribunal appears to have assumed that the appellant's views concerning the delivery of aid have been, or would be, effective. Reference was made by the Tribunal to the appellant influencing the Government "to deliver more effective aid", "improve the quality of … aid", "increase or redirect … aid" and "promot[e] the most advantageous delivery of aid". But that is to assume, without more, that its views will necessarily promote the delivery of aid. Such a result cannot be said to follow from the assertion of its views. Its motives are not sufficient to establish public benefit.

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34 An issue arose at the hearing as to the admissibility of this literature, which was not filed as evidence. Although I do not place reliance on this literature, I note that s 129 of the Evidence Act 2006 permits the Court to admit as evidence any published documents that it considers to be reliable sources of information.

35 *Aid/Watch*, above n 26.

[75] The *means* of supporting improved access to funding, operating conditions, and platforms of distribution for public media is not self-evidently for the public benefit, nor is a public benefit capable of demonstration by evidence. No amount of academic opinion, regardless of how much agreement can be found, is capable of empirically demonstrating that a greater level of funding or more non-commercialised platforms are necessary. The furthest empirical research can take the point is to demonstrate that one policy is likely to result in more or less public media content. That itself is the subject of debate. But even this would not be enough, as the question of what constitutes the right level of public media content is a question of preferences or ideology. It might involve trade-offs and priorities, such as the opportunity cost of allocating greater funding to public media or the disadvantages of shifting away from commercialised platforms. There are no empirical answers to these questions.

[76] As Lord Wright put it in *National Anti-Vivisection Society v Inland Revenue Commissioner*, "at least that approval by the common understanding of enlightened opinion for the time being is necessary before an intangible benefit can be taken to constitute a sufficient benefit to the community to justify admission of the object into the fourth class."[36] The reference to the "fourth class" in this quote is a reference to the fourth, catch-all category of "any other matter beneficial to the community" in s 5(1) of the Act.

[77] A further problem facing the Trust is the nexus between the Trust's promotion of its purpose and the public benefit. In advancing the benefits described by both Dr Thompson and Dr Graham, that public media has a "core purpose" of ensuring that citizens are able to exercise their rights in a democracy by ensuring free public access to a diverse range of information, Mr Nilsson submitted that these benefits are a combination of direct and indirect benefits to the public at large. They are also directly and indirectly recognised in legislation, and I was referred to s 8 of the Radio New Zealand Act 1995 which enacts the RNZ Charter, and s 12 of the Television New Zealand Acts 2003 which requires that TVNZ provides high quality content as specified.

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36 *National Anti-Vivisection Society v Inland Revenue Commissioners* [1948] AC 31 (HL) at 49.

[78] The fact that the above legislative provisions already incorporate the values of public media raises uncertainty about the nexus between the Trust's advocacy and the resulting public benefit. It supports Ms Harris' submission that the benefits claimed by the Trust are difficult to characterise as a public benefit *arising from* the Trust's purpose, as such benefits can also be attributed to public media safeguards in the legislation. This resonates with the words of Kiefel J that there is an assumption that, without more, the Trust's views will necessarily achieve its principal object of advancing public media in New Zealand and thereby provide a public benefit. I consider there is an insufficient nexus between the Trust's purpose and the public benefit.

[79] For completeness, I do not uphold the Trust's submission that ss 12 and 14 of NZBORA indicate that the Trust's purpose, the advancement of public media, is a public benefit. I consider the Trust's submission that the presence of public media is essential to ensuring that voters are able to exercise their rights under s 12 of NZBORA in a meaningful way is overstating the role of the Trust. This raises the question of nexus between the Trust's purpose and the claimed public benefit, which I have already found is difficult to characterise as attributed to public media alone, let alone the Trust's purpose.

[80] I also do not accept the Trust's submission that s 14 of NZBORA implies positive obligations on the state to take steps to ensure that individuals are able to exercise the rights of freedom of expression and a right to receive information. As Ms van Alphen Fyfe explained, the rights recognised in NZBORA do not import positive obligations on the state. Conversely, apart from some exceptions,[37] they affirm that individuals should be free from state interference.[38]

[81] The intractable disagreement on the issues of funding, operating conditions and platforms of distribution, in my view, take the Trust's *means* outside the categories of cases where there is an obvious public benefit, flowing from the promulgation and

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37 See, for example, *Mendelssohn v Attorney General* [1999] 2 NZLR 268 (CA) at [14]-[15].

38 Paul Rishworth and others *The New Zealand Bill of Rights* (Oxford University Press, Auckland, 2003) at 57-60.

assertion of its views. As not all the *means* adopted by the Trust to promote its stated *end* are charitable, its advocacy purpose is not charitable.

The Trust's education purpose

[82] As I have already found that the advancement of public media is a primary and not ancillary purpose of the Trust, it is therefore unnecessary to consider whether the Trust has any other charitable purposes, such as a purpose to advance education. However, the parties advanced submissions of whether the Trust has an independent purpose to advance education and these submissions can be dealt with in short order.

[83] Ms van Alphen Fyfe, who advanced this aspect of the case for the Attorney-General, submitted the Trust cannot have an independent charitable purpose of advancing education because there is no evidence that the majority of its educational activities are neutral and directed at raising awareness and fostering discussion on public media as opposed to advancing its viewpoints on public media. Although it was accepted that the research and surveys conducted by the Trust would classify as advancing education, Counsel submitted that to the extent the lectures and workshops involved advocating the benefits of public media, they should fall to be considered under the advocacy purpose, not an educational purpose.

[84] The Supreme Court in *Greenpeace*, on which the Board relied, drew a distinction between an organisation that advances education as a stand-alone object and an organisation which promotes education as part of its cause.[39] I accept the Crown's submission that the educational activities of the Trust advance the Trust's viewpoints on public media and support the advocacy purpose of the Trust. They do not independently serve an educational purpose. The Trust, therefore, does not have an independent charitable purpose of advancing education.

Conclusion

[85] I consider that this case falls to be considered as an example of a trust advancing a cause or matters of opinion. As the Supreme Court in *Greenpeace*

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39 *Greenpeace*, above n 3, at [103].

described it, advancement of causes will often be non-charitable because "it is not possible to say whether the views promoted are of benefit in the way the law recognises as charitable."[40] Similarly, matters of "opinion may be impossible to characterise as of public benefit either in achievement or in the promotion itself."[41] The Supreme Court reinforced the finding of Kiefel J in her dissent that "reaching a conclusion of public benefit may be difficult where the activities of an organisation largely involve the assertion of its views".[42] I find that these statements are apt to describe the present case.

[86] To summarise, I have found that the Trust's advocacy purpose is not charitable and uphold the Board's decision. In making this finding, I record that:

(a) The advancement of public media is a primary and not ancillary purpose of the Trust. The Trust's advancement of its cause falls to be considered under the test for advocacy purposes. Its activities largely involve the assertion of its views and the nexus between the advocacy and any public benefit is uncertain.

(b) The width of the Trust's purpose makes analogy with other cases difficult, as it is not clear that all of the Trust's activities for that purpose will be of benefit to the public and considered charitable by analogy.

(c) Not all the means adopted by the Trust to promote its stated end are charitable.

(d) Although not determinative, the Trust's definition of public media is overly wide, presenting a difficulty in defining whether the end in itself, of the promotion of the Trust's principle purpose of advancing public media, is a public benefit in a charitable sense.

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40 *Greenpeace*, above n 3, at [73].
41 At [73].
42 At [73], citing *Aid/Watch*, above n 26, at [69].

Result

[87] The appeal is dismissed.

[88] I have not heard from the parties regarding costs. Memoranda may be filed if required.

Cull J

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