IN THE COURT OF APPEAL OF NEW ZEALAND

CA333/2011
[2012] NZCA 533

IN THE MATTER OF	an appeal from a decision of the Charities Commission under the Charities Act 2005
BETWEEN	GREENPEACE OF NEW ZEALAND INCORPORATED Appellant

Hearing: 4 September 2012

Court: Harrison, Stevens and White JJ

Counsel: D M Salmon and K L J Simcock for Appellant
P J Gunn and R I Berkeley for the Board

Judgment: 16 November 2012 at 12.00 pm

JUDGMENT OF THE COURT

A The appeal is allowed.

B The decision of the Charities Commission declining to register Greenpeace of New Zealand Incorporated as a charitable entity under the Charities Act 2005 is set aside.

C The application by Greenpeace of New Zealand Incorporated for registration as a charitable entity under the Charities Act 2005 is referred to the chief executive of the Department of Internal Affairs and the Board for reconsideration in light of this judgment.

D There is no order for costs.

REASONS OF THE COURT

(Given by White J)

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Introduction

[1] The principal issue on this appeal is whether Greenpeace of New Zealand Incorporated (Greenpeace) is entitled to be registered as a charitable entity under the Charities Act 2005 (the Act) on the ground that it is established and maintained "exclusively for charitable purposes". Registration was declined by the Charities Commission[1] whose decision was upheld by the High Court.[2] Greenpeace appeals to this Court on the grounds that its objects, when properly interpreted, and its activities, when examined in context, meet the requirements of the Act for its registration as a charitable entity.

[2] Since the decisions of the Commission and the High Court were delivered, the Act has been amended, the Charities Commission has been disestablished and its functions taken over by the chief executive of the Department of Internal Affairs and

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1 *Re Greenpeace of New Zealand Inc* Charities Commission Decision 2010-7, 15 April 2010 [the Commission decision].

2 *Re Greenpeace New Zealand Inc* [2011] 2 NZLR 815 (HC) [the High Court decision].

a Board.[3] It was common ground that we should determine the issues on this appeal under the legislation in its current form as the substantive provisions remain largely unchanged.

[3] In the course of the hearing of the appeal, counsel for Greenpeace undertook to clarify the wording of Greenpeace's two specific objects which are at issue in this case. Following the hearing, a memorandum was filed indicating that Greenpeace proposes to amend these two objects. We explain the proposed amendments later in this judgment. At this stage we note that they have a significant impact on the specific issues for determination on the appeal, which now are:

(a) whether Greenpeace's object of promoting peace and nuclear disarmament and the elimination of all weapons of mass destruction is a "charitable purpose";

(b) whether Greenpeace's object of promoting the adoption of legislation, policies, rules, regulations and plans which further its objects and its use of political or judicial processes to enforce or implement its objects are merely ancillary to its charitable purposes and not independent purposes;

(c) whether, in view of the proposed amendments to Greenpeace's objects and in light of its activities, Greenpeace would be involved in illegal activities that mean that it is not maintained "exclusively for charitable purposes"; and

(d) whether, in these circumstances, this Court should remit Greenpeace's application for registration to the Board for reconsideration.

[4] We address these issues by outlining first the background to Greenpeace's application for registration and the decisions of the Commission and the High Court. We then consider the requirements of the Act and relevant aspects of the law relating

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[3] Charities Amendment Act (No 2) 2012, ss 7–16.

to the nature and scope of the expression "charitable purpose" in New Zealand and apply the law to the facts of this case.

[5] In the absence of an affected party to argue against the appeal, counsel for the Board appeared to assist the Court.

Background

[6] Since 1976 Greenpeace has been incorporated in New Zealand under the Incorporated Societies Act 1908. It has also previously enjoyed charitable status under a regime administered by the Commissioner of Inland Revenue.[4]

[7] The nature and purposes of Greenpeace are best understood from its objects, which at the time of its application to the Commission for registration read as follows:

> 2.1 Promote the philosophy that humanity is part of the planet and its interconnected web of life and whatever we do to the planet we do to ourselves.
>
> 2.2 Promote the protection and preservation of nature and the environment, including the oceans, lakes, rivers and other waters, the land and the air and flora and fauna everywhere and including but not limited to the promotion of conservation, disarmament and peace.
>
> 2.3 Identify, research and monitor issues affecting these objects, and develop and implement programmes to increase public awareness and understanding of these and related issues.
>
> 2.4 Undertake, promote, organise and participate in seminars, research projects, conferences and other educational activities which deal with issues relating to the objects of the Society.
>
> 2.5 Promote education on environmental issues by giving financial and other support to the Greenpeace New Zealand Charitable Trust.
>
> 2.6 Co-operate with other organisations having similar or compatible objects and in particular to co-operate with Stichting Greenpeace Council by abiding by its determination in so far as it is lawful to do so.
>
> 2.7 Promote the adoption of legislation, policies, rules, regulations and plans which further the objects of the Society and support the

[4] Income Tax Act 1994, s CB 4(1)(c) and s OB 1, definition of "Charitable purpose".

> enforcement or implementation through political or judicial processes, as necessary.

[8] There is no dispute that, apart from the issues raised in connection with objects 2.2 and 2.7, all the rest of Greenpeace's objects meet the definition of "charitable purpose" under the Act. The Commission accepted this in its decision and the Board did not suggest otherwise on appeal. This means that the great majority of Greenpeace's objects, including in particular its objects relating to the natural environment and its protection, have been accepted as charitable.[5]

[9] As already mentioned, during the hearing of the appeal in this Court, we sought further clarification from Greenpeace of the wording of objects 2.2 and 2.7. Following the hearing, we received advice that the Board of Greenpeace had resolved to recommend to a general meeting of Greenpeace that objects 2.2 and 2.7 be amended to read as follows (with the changes to the existing wording in bold):

> 2.2 Promote the protection and preservation of nature and the environment, including the oceans, lakes, rivers and other waters, the land and the air and flora and fauna everywhere and including but not limited to the promotion of conversation, peace, **nuclear disarmament and the elimination of all weapons of mass destruction**.
>
> 2.7 Promote the adoption of legislation, policies, rules, regulations and plans which further the objects of the Society **listed in clauses 2.1-2.6** and support **their** enforcement or implementation through political or judicial processes, as necessary, **where such promotion or support is ancillary to those objects.**

[10] As already noted, these proposed amendments have a significant impact on the specific issues raised on this appeal. The judgment proceeds on the assumption that the proposed amendments will be approved at a general meeting.

[11] When the Charities Act came into force on 1 July 2005,[6] Greenpeace, like other organisations that had previously held charitable status, was obliged to apply to the Commission for registration by July 2008 in order to qualify for the charitable income tax exemptions.[7] Greenpeace did so by application dated 25 June 2008.

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5 The Commission decision, above n 1, at [34].
6 Charities Act 2005, s 2(2).
7 Income Tax Act 2007, s CW 41.

Greenpeace submitted that its objects met the requirements for registration as a charitable entity.

[12] On 1 June 2008 Greenpeace also created the Greenpeace New Zealand Educational Trust, which was registered separately by the Commission as a charity on 30 June 2008. There is no dispute that the objects of the Trust meet the definition of "charitable purpose" under the Act.

The Commission decision

[13] The Commission declined Greenpeace's application for registration on the ground that Greenpeace was not established and maintained exclusively for charitable purposes as required by s 13(1)(b)(i) of the Act.[8] In its decision the Commission referred to the provisions of the Act relating to the definition of "charitable purpose" and the matters the Commission needed to have regard to when considering an application for registration.[9] The Commission noted that the applicable authorities, including the decision of this Court in *Molloy v Commissioner of Inland Revenue*,[10] had held that political purposes, which were more than ancillary purposes, could not be charitable.[11] The Commission also noted that it was established by case law that an entity which had a primary purpose which was illegal or contrary to public policy could not be charitable because an illegal purpose could not be for the benefit of the public.[12]

[14] The Commission summarised the information obtained from Greenpeace about its activities, including the steps taken by Greenpeace to promote disarmament and peace, and the nature of its programmes under object 2.3.[13] The Commission also referred to the following statement on Greenpeace's website:[14]

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8 The Commission decision, above n 1.
9 At [11]–[15].
10 *Molloy v Commissioner of Inland Revenue* [1981] 1 NZLR 688 (CA).
11 At [16]–[31].
12 At [32]–[33].
13 At [7].
14 At [48].

Greenpeace was born out of the desire to create a green and peaceful world. As an organisation based on principles of peace and non-violence, we strongly believe that violence cannot resolve conflict. Greenpeace is fundamentally opposed to war.

Since our founding in 1971 we have campaigned against nuclear weapons and we are committed to the elimination of all weapons of mass destruction (including nuclear and biological).

We believe that war will not eliminate these threats. We are actively campaigning for international disarmament.

We believe greater peace, greater security, greater safety is possible. Reaching out across national boundaries Greenpeace is working with citizens and political leaders around the world to make this happen.

We champion non-violence as a force for positive change in the world and promote environmentally responsible and socially just development.

We advocate policies that ensure all the world's people have access to the basic securities of life so that the injustices that lead to conflict cannot take hold.

We believe we can create a green and peaceful world.

[15] The Commission's reasons for declining Greenpeace's application were:

(a) The promotion of "disarmament" as outlined in the unamended object 2.2 was "a political purpose" and therefore not charitable.[15]

(b) The promotion of peace was also "a political purpose" and therefore not charitable as information on Greenpeace's website showed that Greenpeace was "not promoting peace solely in an educational manner".[16]

(c) Object 2.7 allowed for "political activities" and therefore was not exclusively charitable.[17] An examination of Greenpeace's activities showed that its focus on "political advocacy" was so great that "the political activities" outlined in object 2.7 were an independent non-charitable purpose.[18] Alternatively, insofar as the activities in object

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15 At [49].
16 At [50].
17 At [52].
18 At [59].

2.7 related to furthering the promotion of disarmament and peace in object 2.2, they could not be said to be ancillary to a charitable purpose.[19]

(d) As information sourced from Greenpeace's website showed that non-violent direct action was central to Greenpeace's work and might involve illegal activities such as trespassing, the Commission could not consider that illegal activities would provide a public benefit.[20]

[16] In all other respects the Commission accepted that the objects of Greenpeace met the charitable purpose test.[21]

The High Court decision

[17] Greenpeace appealed to the High Court against the decision of the Commission. In support of its appeal, it successfully obtained leave to adduce additional evidence relating to the information on its website to provide the Court with a complete record of what was before the Commission.[22]

[18] In an affirmation in support of the application for leave to adduce the additional evidence, Ann McDiarmid, the Executive Director of Greenpeace, deposed:

> 11. The Websites are effectively one integrated document, made up of many pages. To take pages in isolation risks those pages being read out of context and mischaracterising Greenpeace's focus and activities – matters which are relevant to this appeal. By way of example:
>
> (a) The Commission has concluded from material on the Websites (decision, paragraph 59) that Greenpeace's "focus on political advocacy is so great that the political activities outlined in clause 2.7 are an independent purpose", when approximately 20 out of more than 3000 pages on the Greenpeace Website make reference to advocacy. In fact, political advocacy represents a small part of Greenpeace's focus in time, financial resources and staffing structures – only 1 of 45 full time Greenpeace staff has a specific

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19 At [60].
20 At [64].
21 At [34].
22 High Court decision, above n 2, at [28]–[33].

> political advocacy role. To the extent that Greenpeace has an interface with the Government, it is incidental to Greenpeace's primary focus of educating the public on environmental issues (including for example by speaking directly to approximately 250,000 New Zealanders each year), and largely involves providing the Government with information and data, often at its request. In this sense it is typical of the nature and level of political interface that many large charities in New Zealand have.
>
> (b) The Commission has also reached conclusions about Greenpeace's emphasis on peace/disarmament, including that peace is not promoted "solely in an educational manner" (decision, paragraph 50). To the extent that isolated website pages are relied upon as a basis for concluding that lobbying on such issues is more than ancillary, the same issues arise: they are a very small part of the Websites and a very small and incidental part of Greenpeace's actual operations. The reality is that Greenpeace promotes peace through numerous educational means (producing technical reports and documentaries, doing public presentations, sending boats to bear witness, writing letters, protesting etc). For example, in the time since France stopped nuclear testing in the Pacific, Greenpeace has made political submissions only rarely on nuclear disarmament related issues.

[19] In the High Court the objects of Greenpeace then being considered were in their pre-amended form. Heath J accepted that, as the pre-existing law on "charitable purposes" remained relevant, the Commission was correct to conclude that the Act did not change the meaning of "charitable purpose".[23] Then, after reviewing the case law relating to the scope of a "charitable purpose", he felt constrained, albeit "with a degree of reluctance", to apply the prohibition on non-ancillary political purposes required by the decision of this Court in *Molloy*.[24] Heath J left open for consideration, in an appropriate case, by this Court or the Supreme Court the question whether in modern times a different approach should be adopted as had occurred in Australia in *Aid/Watch Inc v Commissioner of Taxation*.[25]

[20] Adopting a fresh appraisal of the evidence before the Commission,[26] Heath J then examined the Commission's reasons for its decision and concluded that it had not erred.[27] In particular, Heath J decided that:

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23 At [34]–[40].
24 At [59].
25 *Aid/Watch Inc v Commissioner of Taxation* [2010] HCA 42, (2010) 241 CLR 539.
26 At [60].
27 At [61]–[76].

(a) The purpose of promoting disarmament and peace was non-charitable.[28] The reference to "disarmament", not to "nuclear disarmament", fell foul of the admonition against political lobbying about the way in which disarmament should occur.

(b) The non-charitable political purposes could not be regarded as merely ancillary to the charitable purposes.[29] Advocacy of the type identified in the Commission's decision was not necessary to support the philosophy that Greenpeace embraced.

[21] After referring to the information sourced by the Commission from Greenpeace's website, Heath J said:

> [72] Whatever criticism may be made of the selective nature of the quotations taken from Greenpeace's website, it is clear the organisation promotes itself as one that campaigns for (or champions) the cause of international disarmament, particularly nuclear and biological weapons of mass destruction. The version of the website contained on the compact disc includes an introductory page, titled "About Greenpeace" now states that Greenpeace uses "high profile, non-violent direct action, research, lobbying, and quiet diplomacy" to pursue its goals and mentions the pursuit of world peace and disarmament.
>
> [73] On a quantitative assessment, the question of degree involved cannot be measured by the number of pages in a book or website. Rather, it is the way in which the philosophy is championed that must be measured against the relevant charitable purpose to determine whether, as a matter of degree, it is merely ancillary. Ultimately, that is an exercise of judgment, on the facts of any particular case. In my view, the extent to which Greenpeace relies on its political activities to advance its causes means that the political element cannot be regarded as "merely ancillary" to Greenpeace's charitable purposes.
>
> [74] Similarly, adopting a qualitative approach, the political activities designed to put Greenpeace's plea for disarmament and peace can be seen as an independent purpose. The political activities are not necessary to educate members of the public on the issues of concern to Greenpeace. In that sense, they must be regarded as independent.
>
> [75] I conclude that the Commission was correct in holding that non-violent, but potentially illegal activities (such as trespass), designed to put (in the eyes of Greenpeace) objectionable activities into the public spotlight were an independent object disqualifying it from registration as a charitable entity. In qualitative terms, the charitable purposes of Greenpeace could be

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28 At [62]–[64].
29 At [65]–[75].

> met without resort to the type of political activities that deny its right to registration.

[22] Finally, Heath J said that he did not need to determine the issue of illegal activity, but expressed "some reservations" about whether there was sufficient evidence for the Commission to draw an inference that Greenpeace was deliberately involved in taking illegal action, as opposed to some of its members being involved in activities that crossed a legal boundary.[30]

Submissions on appeal

[23] On appeal to this Court, Greenpeace submits that:

(a) The decision of this Court in *Molloy* is "stale" and should be departed from. The exemption of "political" activities is no longer a relevant or useful touchstone for what is a charitable purpose in New Zealand's modern democratic environment. New Zealand law should be brought into line with *Aid/Watch Inc*.

(b) Greenpeace's "disarmament and peace" activities meet the public benefit test. Political advocacy is acceptable, only contentious political advocacy is non-charitable. The High Court erred in its approach to these activities.

(c) Object 2.7 complied with the requirements for an ancillary purpose and the High Court was wrong to decide otherwise.

[24] The submissions for the Board supported the decisions of the Commission and the High Court. It was also submitted that:

(a) A change to the law to permit a charity to have a political object would have far reaching consequences for the way in which charities are viewed in New Zealand, including the possibility that commercial or political organisations would qualify for registration as charities.

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[30] At [76].

(b) The wider contextual evidence and argument necessary to support such a law change was not before the Court and any such change would be better considered by Parliament.

[25] The Board's submissions usefully included detailed descriptions of information received by the Commission from Greenpeace explaining how it promoted disarmament and peace and information obtained from Greenpeace's website describing its methods and the role of advocacy and direct action in achieving its objectives. The explanations of how Greenpeace promoted disarmament and peace included reference to public education, peaceful protest, attendance at international disarmament meetings under the auspices of the United Nations, publication of papers, research, public exhibitions, participation in government delegations and collaboration with others. These activities supported Greenpeace's worldwide campaign for an end to the testing, production and use of nuclear weapons and the elimination of all weapons of mass destruction including nuclear and biological weapons.

[26] The descriptions of Greenpeace's methods and the role of advocacy and direct action obtained from the website included statements that:

> Greenpeace is synonymous with action ... .
>
> Greenpeace is best known for taking non-violent direct actions that confront environmental problems directly and peacefully at their source.
>
> ...
>
> We bear witness to environmental wrongs, we lobby governments and companies to implement change, we use science and technology to promote solutions that are good for the environment, and we communicate with the world to stimulate people, like you, to also take action for our shared environment.
>
> **Non-violent direct action**
>
> Non-violent direct action is taking action physically, in person, to stop environmental destruction at its source.
>
> Non-violent direct action is at the core of Greenpeace's values and worth ... .

[27] The Board's submissions then included the following examples from Greenpeace's website suggesting engagement in advocacy and direct action in relation to disarmament and peace:

(a) claiming that the Nuclear Non-Proliferation Treaty's provisions entitling states to use nuclear power for peaceful purposes are a "contradiction in the heart of the treaty";

(b) advocating against nuclear power on the ground that it is inevitably linked with the production of weapons;

(c) advocating the view that states that pursue nuclear weapons policies have done so in anti-democratic ways;

(d) protesting against nuclear testing in Alaska (1971) and at Mururoa Atoll (1985);

(e) protesting against the invasion of Iraq by flying a "No War, Peace Now" banner at the beginning of an America's Cup yacht race;

(f) protesting against transport of nuclear material (2009);

(g) protesting against movements or deployments of France's nuclear arsenal; and

(h) protesting against specific defence initiatives in specific countries, such as the Star Wars defence initiative.

[28] Examples from Greenpeace's website of its "advocacy" were said to be:

(a) Chemicals and pollution. Advocacy against the production of synthetic chemicals, for the reduction of electronic waste by the production of longer lasting electronics.

(b) Genetic Engineering. Advocacy and marches against the introduction

or field testing of GE crops in New Zealand; for the introduction of GE food labelling in New Zealand; and for the view GE food is unsafe and leads to unsafe practices such as heavier use of herbicides.

(c) Oceans and fisheries. Advocacy against commercial whaling; criticising Norway for its reservation on international whaling agreements; against foreign industrial fishing boats; for a moratorium on bottom trawling fishing techniques; for greater regulation and overall reduction in tuna fishing; in support of members who had been arrested in Japan for trespass and theft in relation to whaling; in favour of changes to international fisheries agreements; in favour of an overall 50 per cent reduction in fishing; criticising New Zealand's quota management system; and in favour of detailed labelling of seafood including the exact species, location caught, and catching method.

(d) Energy. Advocacy; for the phasing out of fossil fuels; in favour of alternative fuel sources; for the view that nuclear energy is not a viable way to address environmental concerns; against specific resource consents for fossil fuels; for the view that farming should be brought more fully or more rapidly under the Emissions Trading Scheme and that dairy farm expansion should be halted; for changes in government energy policy including the enactment of a Climate Protection Bill; for the view that government should forsake economic growth; and for the closure of specific energy plants.

(e) Deforestation. Advocating greater enforcement action to prevent illegal logging in East Asian countries.

(f) Encouraging the public to email messages to the government and opposition urging them to act on climate change.

[29] Examples from Greenpeace's website of its "consumer campaigning" were said to be:

(a) Engaging in general consumer campaigns in relation to specific industries by publishing the "clean energy guide", "Red Fish List", the "good wood guide", the "GE Free food guide", the "Guide to Greener Electronics" and the "E-waste Hall of Shame" (which criticizes particular electronics companies whose products are found in scrap yards).

(b) The appellant also engages in consumer campaigns targeting specific companies or government agencies. For instance, a campaign targeting Nestlé over the alleged use of palm oil derived from rainforests, and a campaign to encourage whale-watching tourism in Iceland if the Icelandic government agreed to maintain a ban on whaling.

[30] Examples from Greenpeace's website of its "direct action" were said to include: boarding coal ships; occupying power stations and mines; preventing the delivery of coal to a factory by blocking it with wood fuel; boarding fishing vessels; protesting against whaling ships; disrupting whaling operations; boarding ships carrying genetically engineered food; boarding ships carrying palm kernel; placing signs on sites believed to be contaminated with dioxin; and planting trees on land thought to have been cleared for dairy farming.

[31] For Greenpeace, Mr Salmon took issue with what he called the Board's selective "web dredge" of Greenpeace's website. In particular, he submitted that the examples of "advocacy" in relation to disarmament and peace were not in fact all appropriately described as "advocacy" and were in any event part of Greenpeace's global campaign and consistent with the Nuclear Non-Proliferation Treaty, to which New Zealand is a party, and the New Zealand Nuclear Free Zone, Disarmament, and Arms Control Act 1987. Mr Salmon also submitted that to the extent that "advocacy" was involved it was ancillary to Greenpeace's charitable objects.

[32] In response to the suggestion that Greenpeace had been involved in illegal activities, Mr Salmon pointed out that there was no evidence before the Court that there had been any finding of illegality or criminal charges involving Greenpeace in

New Zealand. In the High Court Heath J had expressly made no finding of illegality.[31] Mr Salmon also pointed out that Ms McDiarmid's unchallenged evidence showed that the Board's selection of examples had been taken from five or six pages out of thousands on the website and that only one of Greenpeace's staff of 45 had an advocacy role. Mr Salmon submitted that if the Board had evidence of illegal activities the issue should be raised by the chief executive[32] with Greenpeace in the course of monitoring Greenpeace's activities.[33] The fact that Greenpeace was seeking registration on the basis of new rules with new charitable objects meant that its activities should be monitored now and not on the basis of its historical activities.

[33] We address the issues raised by Greenpeace and the Board in their submissions after outlining the relevant provisions of the Charities Act and expressing our views on relevant aspects of the law relating to the nature and scope of the expression "charitable purpose" in New Zealand.

The Charities Act

[34] The Charities Act established the Charities Commission with responsibility for the registration and monitoring of charities. The Act followed recommendations by Government-initiated reviews[34] and a report from Parliament's Social Services Select Committee,[35] which recognised that a system of registration and monitoring for charities was needed to reflect their privileges, especially the tax exemptions available to them and the rebates available to donor members of the public.[36]

[35] The Act has been amended twice this year: the first time to permit the registration of amateur sporting clubs as charitable organisations[37] and the second time, as already noted, to replace the Commission with the Department of Internal

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31 At [76].
32 Charities Amendment Act (No 2) 2012, ss 6(2) and 7.
33 Charities Act 2005, s 10(h), 10(i) and 10(j) (as amended).
34 Discussion document entitled "Tax and Charities" (June 2001); "Report by the Working Party on Registration, Reporting and Monitoring of Charities" (28 February 2002); and "Second Report by the Working Party on Registration, Reporting and Monitoring of Charities" (31 May 2002).
35 Charities Bill 2004 (108–2) (Select Committee report).
36 First Report of Working Party, above n 34, at 3.
37 Charities Amendment Act 2012, s 5.

Affairs and a Board.[38] As the functions of the chief executive of the Department and the Board largely replicate those of the Commission, it is convenient to refer to the relevant provisions of the Act as they now stand.

[36] The purpose of the Act as now enacted is:[39]

> (a) to promote public trust and confidence in the charitable sector:
>
> (b) to encourage and promote the effective use of charitable resources:
>
> (c) to provide for the registration of societies, institutions, and trustees of trusts as charitable entities:
>
> (d) to require charitable entities and certain other persons to comply with certain obligations:
>
> (e) to provide for the Board to make decisions about the registration and deregistration of charitable entities and to meet requirements imposed in relation to those functions:
>
> (f) to provide for the chief executive to carry out functions under this Act and to meet requirements imposed in relation to those functions.

[37] The purpose of the Act is implemented by provisions imposing both procedural and substantive requirements for the registration and monitoring of charities. These are reflected in the functions of the chief executive described in s 10 of the Act, which include: educating and assisting charities in relation to matters of good governance and management;[40] receiving and processing applications for registration as charitable entities;[41] referring to the Board for its decision all applications for registration and proposals for deregistration;[42] ensuring that the register of charitable entities is compiled and maintained;[43] and, significantly for present purposes:

> (h) to monitor charitable entities and their activities to ensure that entities that are registered as charitable entities continue to be qualified for registration as charitable entities; and
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> (i) to inquire into charitable entities and into persons who have engaged in, or are engaging in, conduct that constitutes, or may constitute, a

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38 See above n 3.
39 Section 3.
40 Section10(a).
41 Section 10(c).
42 Section 10(d).
43 Section 10(e).

> breach of this Act or serious wrongdoing in connection with a charitable entity; and
>
> (j) to monitor and promote compliance with this Act, including by taking prosecutions for offences against this Act in appropriate circumstances ...

[38] These latter functions indicate that Parliament intends the chief executive, like the Commission, to have an ongoing role in monitoring registered charitable entities and their activities and in ensuring their compliance with the Act and the appropriate use of their tax exemptions.[44] The Board is then given the ultimate sanction of deregistering a charitable entity.[45]

[39] The essential requirements for registration are set out in s 13 of the Act. Under s 13(1):

> An entity qualifies for registration as a charitable entity if,—
>
> (a) ...
>
> (b) in the case of a society or an institution, the society or institution—
>
> (i) is established and maintained exclusively for charitable purposes; and
>
> (ii) is not carried on for the private pecuniary profit of any individual.
>
> ...

[40] In this case Greenpeace will qualify for registration as a charitable entity only if it is "established and maintained exclusively for charitable purposes" as required by s 13(1)(b)(i). The requirement that a charitable entity be both "established and maintained" exclusively for charitable purposes reflects the need to focus not only on the objects of the society but also on its activities, current and proposed. The inclusion of the specific reference to an entity being "maintained" exclusively for charitable purposes reflects both the entity's ongoing obligations and the chief executive's ongoing monitoring function.

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44 (30 March 2004) NZPD 12108–12109.

45 Sections 31–36.

[41] The expression "charitable purpose" is defined in s 5, which relevantly provides:

> **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) ...
>
> (2A) ...
>
> (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.

[42] For present purposes, this definition has several significant features. First, Parliament has adopted the well-established fourfold classification of "charitable purpose", namely relief of poverty, the advancement of education or religion, and any other matter beneficial to the community.[46] In doing so, Parliament rejected the recommendation of the Working Party that a new definition be adopted which would have recognised as legitimate charitable purposes a number of new purposes, including "the advancement of the natural environment" and "the promotion and protection of civil and human rights".[47]

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[46] *Commissioners for Special Purposes of the Income Tax v Pemsel* [1891] AC 531 (HL) at 583; *Molloy v Commissioner of Inland Revenue*, above n 10, at 691; *New Zealand Society of Accountants v Commissioner of Inland Revenue* [1986] 1 NZLR 147 (CA) at 152; and *Commissioner of Inland Revenue v Medical Council of New Zealand* [1997] 2 NZLR 297 (CA) at 302 and 308.

[47] Second Report of Working Party Appendix 1, above n 34, and report from Parliament's Social Services Select Committee, above n 35, at 3.

[43] Second, the retention of the fourth category of charitable purpose, namely "any other matter beneficial to the community", confirms that the decisions of this Court relating to its interpretation and application remain applicable. In particular, the purpose must be for the public benefit and charitable in the sense of coming within the spirit and intendment of the preamble to the Statute of Charitable Uses Act 1601 (43 Eliz I c 4) (the preamble).[48] The public benefit requirement focuses on whether the purpose is beneficial to the community or a sufficient section of the public.[49] The requirement to be charitable within the spirit and intendment to the preamble focuses on analogies or the presumption of charitable status.[50] Even in the absence of an analogy, objects beneficial to the public are prima facie within the spirit and intendment of the preamble and, in the absence of any ground for holding that they are outside its spirit and intendment, are therefore charitable in law. Mr Gunn did not submit otherwise.

[44] Third, the enactment of an inclusive definition ("includes"), which along, with the references to "every" charitable purpose and "any other matter beneficial to the community", makes it clear that the definition remains a broad definition which in its terms is not exhaustive.[51]

[45] Fourth, the specific reference in s 5(3) to "advocacy" makes it clear that "advocacy" may be an ancillary, non-independent non-charitable purpose, but not a primary, independent purpose. A similar distinction is drawn in the Canadian legislation,[52] but not in the Australian legislation, which does not contain a definition

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48 *Latimer v Commissioner of Inland Revenue* [2002] 3 NZLR 195 at [32]: "charitable purpose" decision not challenged on appeal to Privy Council: see *Latimer v Commissioner of Inland Revenue* [2004] UKPC 13, [2004] 3 NZLR 157 at [28].

49 *New Zealand Society of Accountants v Commissioner of Inland Revenue*, above n 46, at 152.

50 *Commissioner of Inland Revenue v Medical Council of New Zealand*, above n 46, at 310, 321 and 322; and *Latimer v Commissioner of Inland Revenue* (CA), above n 48, at [13] and [39].

51 Compare *Molloy v Commissioner of Inland Revenue*, above n 10, at 691; *Commissioner of Inland Revenue v Medical Council of New Zealand*, above n 46, at 302; and J F Burrows and R I Carter *Statute Law in New Zealand* (4th ed LexisNexis, Wellington, 2009) at 417–421 (see further below at [66]–[67].)

52 Income Tax Act RSC 1985 c 1 (5th Supp) ss 149.1(6.1) and 149.1(6.2); and *News to You Canada v Minister of National Revenue* 2011 FCA 192, (2011) 336 DLR (4th) 355 at [29].

of "charitable institution".[53] The absence of this distinction was taken into account by the High Court of Australia in reaching its decision in *Aid/Watch Inc*.[54]

[46] Fifth, the specific terms of s 5(4) clarify that an ancillary non-charitable purpose that is not an independent purpose of a society does not prevent the society from qualifying for registration.

[47] An application for registration is made under s 17 of the Act and considered by the chief executive under s 18, which provides:

> **18 Chief executive to consider application**
>
> (1) The chief executive must, as soon as practicable after receiving a properly completed application for registration of an entity as a charitable entity, consider whether the entity qualifies for registration as a charitable entity.
>
> (2) In considering the application, the chief executive may request that the applicant supply further information or documentation.
>
> (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 [sic] considers is relevant; and
>
> (b) observe the rules of natural justice; and
>
> (c) give the applicant—
>
> (i) notice of any matter that might result in its application being declined; and
>
> (ii) a reasonable opportunity to make submissions to the chief executive on the matter.
>
> (4) ...

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53 *Aid/Watch Inc v Commissioner of Taxation*, above n 25, at [11]; Income Tax Assessment Act 1997 (Cth), ss 50–1 and 50–5; Fringe Benefits Tax Assessment Act 1986 (Cth), s 65J(1)(baa); and A New Tax System (Goods and Services Tax) Act 1999 (Cth), s 176–1.

54 *Aid/Watch Inc v Commissioner of Taxation*, above n 25, at [26].

[48] This provision imposes important mandatory obligations on the chief executive when considering an application for registration. It also confers a discretionary power to obtain further information from the applicant. Both the mandatory obligations and the discretionary power are significant because they show that Parliament intends the chief executive to have regard to the current and proposed "activities" of the entity and to be able to obtain information from the applicant about the true nature and scope of those activities. Under the Act the focus is clearly on consideration of all of the activities of an entity and is not limited to its objects.[55] Furthermore, the chief executive has an obligation to have regard to "any other information" that he or she considers is relevant, which may include information obtained from other sources.

[49] It is also clear from s 18 that, when considering an application for registration, the chief executive is obliged to observe the rules of natural justice and to give an applicant an opportunity to respond to any potentially adverse matter, including any information obtained from other sources.

[50] The decision whether or not to register an applicant as a charitable entity under the Act is then made by the Board on the recommendation of the chief executive under s 19, which provides:

> **19 Board to decide application for registration**
>
> (1) After considering an application, the chief executive must recommend to the Board that it either grant or decline the application.
>
> (2) If the Board is satisfied that the entity qualifies for registration as a charitable entity, the Board must grant the application and direct the chief executive to—
>
> (a) register the entity as a charitable entity; and
>
> (b) allocate a registration number to the entity; and
>
> (c) notify the entity of its registration and of its registration number.
>
> (3) The Board is not required to follow a formal process when it acts under subsection (2).

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[55] As was also the position before the Act: *Molloy v Commissioner of Inland Revenue*, above n 10, at 693.

> (4) If, after considering an application, the Board is not satisfied that an entity is qualified to be registered as a charitable entity, the Board must give the chief executive the reasons for its decision and direct the chief executive to notify the entity of the Board's decision and the reasons for it.
>
> (5) Before acting under subsection (4) in any case, the Board must be satisfied that the chief executive has complied with section 18(3) in that case.

[51] In this context the requirement that the Board be "satisfied" or "not satisfied" that an entity is qualified for registration means that the Board will need to obtain sufficient proof or information from the chief executive to be assured one way or the other.[56] After considering the entity's application and the chief executive's recommendation, the Board must decide whether or not it is satisfied that the applicant qualifies for registration.

[52] If an application for registration is granted, the entity will then acquire the privileges of charitable status, including the tax exemptions available to charities and the rebates available to members of the public.[57] In this context it is relevant to note that the cap on the level of tax deductions for charitable donations was removed from 1 April 2008.[58]

[53] If an applicant for registration is declined, as occurred in this case, the applicant then has a right of appeal to the High Court,[59] which has power to confirm, modify or reverse the decision of the Board, to exercise any of the powers that could have been exercised by the Board, and to make any other order that it thinks fit.[60]

[54] There is then a further right of appeal to this Court,[61] which has the same powers as the High Court and also power to make any further or other order that the case may require, which will include power to refer the application to the chief executive and the Board for reconsideration.[62]

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56 Compare *Discount Brands Ltd v Westfield (New Zealand) Ltd* [2005] NZSC 17, [2005] 2 NZLR 597 at [22]–[26] and [52]–[54].

57 Income Tax Act 2007, ss CW 41, CW 42, LD 1 and LD 4.

58 The last cap, imposed by s KC 5(2) of the Income Tax Act 2004, was repealed by s ZA 1 of the Income Tax Act 2007. No new cap was imposed.

59 Section 59.

60 Sections 61(1) and 61(4).

61 Judicature Act 1908, s 66.

62 Court of Appeal (Civil) Rules 2005, r 48(4).

"Charitable purpose"

[55] We now turn to consider relevant aspects of the law relating to the nature and scope of the expression "charitable purpose" in New Zealand. We note at the outset, however, our agreement with Mr Gunn's submission for the Board that any significant change to the law in this respect should be made by Parliament and not the Court. There are four reasons for our view.

[56] First, as already noted, when Parliament enacted the Act in 2005 it did not accept the Working Party recommendation that a new definition for "charitable purpose" should be adopted. In particular, Parliament did not take the opportunity to abolish the well-established prohibition on purposes that are primarily political.[63] Instead, by drawing the distinction between "advocacy" as a permitted non-independent ancillary purpose and as a prohibited primary purpose, Parliament endorsed the prohibition and, as we shall see, the decision of this Court in *Molloy v Commissioner of Inland Revenue*.

[57] Second, no steps were taken by Parliament to amend the definition this year beyond the addition of the reference to amateur sporting clubs. In particular, Parliament did not take the opportunity to amend the definition so as to reverse the decisions of the Commission and the High Court in this case.

[58] Third, the fiscal consequences involved in amending the definition to enlarge its scope mean that it is a policy matter that constitutionally should be left to Parliament. As Iacobucci J, delivering the judgment of the majority of the Supreme Court of Canada in *Vancouver Society of Immigrant and Visible Minority Women v Minister of National Revenue*, said:[64]

> ... the Society has submitted that a new, 'contextual' approach to charity should be adopted ... . This new approach, which would be triggered only

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63 *Bowman v Secular Society* [1917] AC 406 (HL) at 442 per Lord Parker of Waddington; *National Anti-Vivisection Society v Inland Revenue Commissioners* [1948] AC 31 (HL); *Molloy v Commissioner of Inland Revenue*, above n 10, at 695–696; and *McGovern v Attorney-General* [1982] 1 Ch 321 (Ch) at 336–343.

64 *Vancouver Society of Immigrant and Visible Minority Women v Minister of National Revenue* [1999] 1 SCR 10 at [197] and [200]. See also *Amateur Youth Soccer Association v Canada (Revenue Agency)* [2007] 3 SCR 217 at [44]; and *Commissioner of Taxation of Australia v Word Investments Ltd* [2008] HCA 55, (2008) 236 CLR 204 at [126].

> upon an organization's failing to meet the traditional requirements, would be to ask whether the organization is performing a 'public benefit'.
>
> ... the new approach would constitute a radical change to the common law and, consequently, to tax law. In my view, the fact that the ITA [the Income Tax Act] does not define 'charitable', leaving it instead to the tests enunciated by the common law, indicates the desire of Parliament to limit the class of charitable organizations to the relatively restrictive categories available under [*Pemsel*] and the subsequent case law. This can be seen as reflecting the preferable tax policy: given the tremendous tax advantages available to charitable organizations, and the consequent loss of revenue to the public treasury, it is not unreasonable to limit the number of taxpayers who are entitled to this status. For this Court suddenly to adopt a new and more expansive definition of charity, without warning, could have a substantial and serious effect on the taxation system. In my view, especially in light of the prominent role played by legislative priorities in the 'new approach', this would be a change better effected by Parliament than by the courts.

[59] Fourth, while there have been significant developments in the law since the prohibition on political purposes was adopted, the rationale for the prohibition has not necessarily been undermined. There is little doubt that, like Australia and Canada, New Zealand may now be described as a modern participatory democracy with well-developed constitutional arrangements for public involvement.[65] It also has a Bill of Rights protecting freedoms of thought, conscience, religion and expression.[66] It is consequently far removed from the position in England a hundred years ago when the prohibition on primary political purposes was adopted. At the same time, however, it remains important to distinguish between exercising those rights to support purposes which are recognised as primarily charitable and pursuing purely political purposes. As the Canadian Federal Court of Appeal said in *Human Life International in Canada Inc v Minister of National Revenue*:[67]

> With respect to the Charter argument based on alleged infringement of freedom of expression, the basic premise of the appellant is untenable. Essentially its argument is that a denial of tax exemption to those wishing to advocate certain opinions is a denial of freedom of expression on this basis. On this premise it would be equally arguable that anyone who wishes the psychic satisfaction of having his personal views pressed on his fellow citizens is constitutionally entitled to a tax credit for any money he contributes for this purpose. The appellant is in no way restricted by the Income Tax Act from disseminating any views or opinions whatever. The guarantee of freedom of expression in paragraph 2(b) of the Charter is not a

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65 *Lange v Atkinson* [1997] 2 NZLR 22 (HC) at 45–46.

66 New Zealand Bill of Rights Act 1990, ss 13 and 14.

67 *Human Life International in Canada Inc v Minister of National Revenue* [1998] 3 FC 202 at [18].

> guarantee of public funding through tax exemptions for the propagation of opinions no matter how good or how sincerely held.

[60] Having reached this view, we proceed on the basis that Parliament did not intend to alter the well-established principles of law relating to the nature and scope of the expression "charitable purpose" in New Zealand. This means in particular that we are not prepared to depart from the decision of this Court in *Molloy v Commissioner of Inland Revenue*,[68] which has effectively been endorsed by the Act and which established that a society established for contentious political purposes could not be said to be established principally for charitable purposes.

[61] *Molloy*, decided in 1981, involved the Society for the Protection of the Unborn Child, which had as one of its main objects opposition to a change in the then statutory provisions about abortion. The evidence before the Court established that the Society had been formed to prevent changes in the law advocated by the Abortion Law Reform Association. While the Court recognised that it was not part of its function to express any opinion on the complex issues involved, it noted that there were more views than one and that they were strongly held by sections of the community.[69] The Court then applied established authority in England and New Zealand to decide that the Society's object was political and therefore not within the "beneficial to the community" head of charitable purpose.[70] Delivering the judgment of the Court, Somers J said:[71]

> ... we are unable to accept ... that the public good in restricting abortion is so self-evident as a matter of law that such charitable prerequisite is achieved. The issue in relation to abortion is much wider than merely legal. And the
>
> fact, to which we have already referred, that this public issue is one on which there is clearly a division of public opinion capable of resolution (whether in the short or the long term) only by legislative action means that the Court cannot determine where the public good lies and that it is relevantly political in character.

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68 Above n 10.
69 At 694.
70 At 695–698.
71 At 697.

[62] In reaching that conclusion, however, this Court was careful to point out that the "mere existence" of a political object or purpose did not of itself preclude recognition as a valid charity. As Somers J said:[72]

> To reach that conclusion the political object must be more than an ancillary purpose, it must be the main or a main object. If such purpose is ancillary, secondary, or subsidiary, to a charitable purpose it will not have a vitiating effect ...

This important qualification to the prohibition on political objects has now been given statutory effect by ss 5(3) and 5(4) of the Act.

[63] As the decision in *Molloy* indicates, the prohibition on political objects is based on the inability of the Court to determine where the public good lies as between competing views of a contentious political nature. As we have already noted when referring to the *Human Life International in Canada Inc* case,[73] there is also no doubt an underlying concern that taxation benefits should not be available to a society pursuing one side of a political debate. In *National Anti-Vivisection Society v Inland Revenue Commissioners* Lord Wright pointed out that to enable a society to pursue a controversial purpose as a charitable purpose and to claim the benefit of being immune from income tax "would amount to receiving a subsidy from the state to that extent."[74] While the prohibition has produced some continuing and anomalous results,[75] which have led to criticism and suggestions for reform,[76] and no longer applies in Australia,[77] it remains part of the current law of New Zealand and we were not persuaded that there are good grounds for overriding it.[78]

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72 At 695.

73 At [59] above.

74 *National Anti-Vivisection Society v Inland Revenue Commissioners*, above n 63, at 52.

75 Compare, for example, *McGovern v Attorney-General*, above n 63, and *Action by Christians for the Abolition of Torture v Canada* 2003 FCA 499, 225 DLR (4th) 99 with *Re Green's Will Trusts* [1985] 3 All ER 455 (Ch) at 458–459 and *Re Inman* [1965] VR 238 (VSC) at 242 (political to advocate for measures to prohibit torture of humans but charitable to prevent cruelty to animals); and *Alliance for Life v Minister of National Revenue* [1993] 3 FC 504 (FCA) with *Everywoman's Health Centre Society (1988) v Minister of National Revenue* [1992] 2 FC 52 (FCA) (political to campaign against abortion but charitable to run an abortion clinic). And see further Adam Parachin "Distinguishing Charity and Politics: The Judicial Thinking Behind the Doctrine of Political Purposes" (2008) 45 Alta L Rev 871 and LA Sheridan "Charity Versus Politics" (1973) 2 Anglo-Am L Rev 47.

76 The arguments are well researched and summarised by Hamish McQueen in "The Peculiar Evil of Silencing Expression: The Relationship between Charity and Politics in New Zealand" (2012) 25 NZULR 124.

77 *Aid/Watch Inc v Commissioner of Taxation*, above n 25.

78 *R v Chilton* [2006] 2 NZLR 641 (CA) at [83].

[64] At the same time, as the decision in *Molloy* also indicates, the prohibition focuses on objects which are political in a contentious or controversial sense. The abortion debate remains a good example.[79]

[65] But again as recognised in *Molloy*, not all objects with political overtones will necessarily vitiate a charitable purpose. Truly ancillary political objects are permissible. Also other similar objects may still come within one of the four heads of "charitable purpose."

[66] It is well established that the law of charity is not static and that what may be viewed as charitable in one age may be viewed differently in another. In *National Anti-Vivisection Society v Inland Revenue Commissioners*,[80] Lord Simonds said:

> I cannot share the apprehension of the Master of the Rolls that great confusion will be caused if the court declines to be bound by the beliefs and knowledge of a past age in considering whether a particular purpose is to-day for the benefit of community. But if it is so, then I say that it is the lesser of two evils.

Similarly, in *Scottish Burial Reform and Cremation Society v Glasgow Corporation*,[81] Lord Wilberforce said the courts:

> have endeavoured to keep the law as to charities moving according as new social needs arise or as old ones become obsolete or satisfied.

[67] In *Aid/Watch Inc* the High Court of Australia said that the statutory use of the term "charitable" was to be understood by reference to its source in the general law as it was developed in Australia "from time to time".[82] In our view a similar approach should be adopted in New Zealand, while bearing in mind that the development of the law here must be consistent with and constrained by the provisions of the Act. We agree with the views of Hammond J in *DV Bryant Trust Board v Hamilton City Council*,[83] when he said:

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79 *Wall v Livingstone* [1982] 1 NZLR 734 (CA); and *Right to Life New Zealand Inc v Abortion Supervisory Committee* [2012] NZSC 68.

80 *National Anti-Vivisection Society v Inland Revenue Commissioners*, see above n 63 at 74.

81 *Scottish Burial Reform and Cremation Society v Glasgow Corporation* [1968] AC 138 (HL) at 154.

82 *Aid/Watch Inc v Commissioner of Taxation*, above n 25, at [24].

83 *DV Bryant Trust Board v Hamilton City Council* [1997] 3 NZLR 342 (HC) at 348.

> It would be unfortunate if charities law were to stand still: this body of law must keep abreast of changing institutions and societal values. And, it is to New Zealand institutions and values that regard should be had. This is not, of course, to say that "new" heads of charity will be allowed to spring up overnight without close scrutiny; rather (adapting some pertinent words from the preface to the *Book of Common Prayer*) Courts should, in appropriate cases be prepared to entertain adjustments "to things once advisedly established". That philosophy of necessity mandates a cautious approach, and one which will usually proceed by analogy; but neither does it set its face against change to what is considered to be charitable, in law.

[68] The final point of general importance in the context of this appeal is that the law is clear that a charity cannot have an illegal or unlawful purpose.[84] This is because illegal activity is neither for the public benefit nor within the spirit and intendment of the preamble and so cannot be charitable. Similarly, a society with lawful charitable purposes which pursues illegal or unlawful activities will run the risk of losing its registration as a charitable entity under the Act. This is because it will not have been "maintained" exclusively for charitable purposes as required by s 13(1)(b)(i) of the Act.

[69] We address later the point at which the illegal or unlawful activities of a registered entity or its members will jeopardise the entity's registration. We turn next to consider the specific issues raised in this appeal.

Peace and nuclear disarmament

[70] The first specific issue relates to object 2.2 of Greenpeace's rules, which is to be amended to include, along with its already accepted charitable purposes, the promotion of:

> peace, nuclear disarmament and the elimination of all weapons of mass destruction.

[71] As Mr Gunn for the Board accepted, the Courts have consistently held that the promotion of peace itself is for the public benefit and therefore capable of being

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[84] *Re Collier (Deceased)* [1998] 1 NZLR 81 (HC) at 90; *National Anti-Vivisection Society*, above n 63, at 42 per Lord Wright and at 72 per Lord Simonds; *Vancouver Society of Immigrant & Visible Minority Women*, above n 64, at [59].

a charitable purpose.[85] In *Southwood v Attorney-General*, a decision of the English Court of Appeal, Chadwick LJ said:[86]

> There is no objection – on public benefit grounds – to an educational programme which begins from the premise that peace is generally preferable to war. For my part, I would find it difficult to believe that any court would refuse to accept, as a general proposition, that it promotes public benefit for the public to be educated to an acceptance of that premise.

[72] We agree. It is uncontroversial and uncontentious today that in itself the promotion of peace is both for the public benefit and within the spirit and intendment of the preamble, either by way of analogy or on the basis of the presumption of charitable status. It is therefore within the fourth head of the definition of charitable purpose under the Act.

[73] But, as Mr Gunn submitted, the Courts have not always accepted that the promotion of particular views as to how peace is best achieved is a charitable purpose because that is essentially a political decision. A distinction is drawn between the outcome and the means of achieving that outcome. Mr Gunn relied on the decision in *Southwood v Attorney-General* where Chadwick LJ, immediately following the passage cited above, said:[87]

> That does not lead to the conclusion that the promotion of pacifism is necessarily charitable. The premise that peace is generally preferable to war is not to be equated with the premise that peace at any price is always preferable to any war. The latter plainly is controversial. But that is not this case. I would have no difficulty in accepting the proposition that it promotes public benefit for the public to be educated in the differing means of securing a state of peace and avoiding a state of war. The difficulty comes at the next stage. *There are differing views as to how best to secure peace and avoid war. To give two obvious examples: on the one hand it can be contended that war is best avoided by "bargaining through strength"; on the other hand it can be argued, with equal passion, that peace is best secured by disarmament – if necessary, by unilateral disarmament.* The court is in no position to determine that promotion of the one view rather than the other is for the public benefit. Not only does the court have no material on which to make that choice; to attempt to do so would be to usurp the role of government. So the court cannot recognise as charitable a trust to educate the public to an acceptance that peace is best secured by "demilitarisation" in the sense in which that concept is used in the Prodem background paper and briefing documents. Nor, conversely, could the court recognise as charitable a trust to educate the public to an acceptance that war is best avoided by

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85 *Parkhurst v Burrill* 177 NE 39 (Mass 1917) at 40–41; *Re Harwood* [1936] Ch 285 (Ch).

86 *Southwood v Attorney-General* [2000] EWCA Civ 204, [2000] WTLR 1199 at [29].

87 At [29]. Emphasis added.

> collective security through the membership of a military alliance – say, NATO.

[74] Again we agree. The question whether peace should be achieved through disarmament or through maintaining military strength is undoubtedly contentious and controversial with strong, genuinely held views on both sides of the debate. An entity seeking to promote peace on the basis of one or other of these views would be pursuing a non-charitable political purpose.

[75] Greenpeace's object 2.2 prior to its proposed amendment made it clear that Greenpeace sought to promote peace through disarmament. By pursuing one view in a contentious debate, Greenpeace's originally drafted object was therefore not charitable, as both the Commission and High Court correctly found.

[76] In our view, however, the proposed amendments to Greenpeace's object 2.2, which will replace the reference to "disarmament" with references to "nuclear disarmament and the elimination of all weapons of mass destruction", will make a significant difference. For the following reasons, we agree with the submission for Greenpeace that these amendments will remove the element of political contention and controversy inherent in the pursuit of disarmament generally and instead constitute, in New Zealand today, an uncontroversial public benefit purpose. In other words, applying the test from *Molloy*, the Court is not required to determine where the public good lies as that is now self-evident as a matter of law.

[77] First, the promotion of nuclear disarmament is in accordance with New Zealand's international obligations as a signatory to the Nuclear Non-Proliferation Treaty, which has been signed by 190 countries.[88] It is now well established that domestic Courts should recognise New Zealand's international treaty obligations and so far as its wording allows legislation should be read in a way which is consistent with those obligations.[89] In our view a similar approach should be adopted in considering whether the promotion of nuclear disarmament is for the public benefit and therefore capable of constituting a charitable purpose.

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88 Treaty on the Non-Proliferation of Nuclear Weapons 729 UNTS 161 (opened for signature 1 July 1968, entered into force, 5 March 1970).

89 *New Zealand Airline Pilots' Association Inc v Attorney-General* [1997] 3 NZLR 269 (CA) at 289 and Burrows and Carter, above n 51, at 495–496.

[78] Second, the promotion of nuclear disarmament is in accordance with New Zealand's domestic law as enacted in the New Zealand Nuclear Free Zone Disarmament, and Arms Control Act. The purpose of this Act is:

> to promote and encourage an active and effective contribution by New Zealand to the essential process of disarmament and intentional arms control, and to implement in New Zealand the following treaties:
>
> ...
>
> (c) The Treaty on the Non-Proliferation of Nuclear Weapons of 1 July 1968.

[79] Third, reflecting overwhelming public opinion in New Zealand, successive New Zealand Governments have confirmed their intentions to support the Treaty and retain the legislation.[90]

[80] Fourth, for similar reasons, we accept that the reference in object 2.2 to "the elimination of all weapons of mass destruction" is for the public benefit. It too is consistent with New Zealand's international treaty obligations[91] and the general purpose of the New Zealand Nuclear Free Zone Disarmament and Arms Control Act.

[81] Having accepted that the promotion of nuclear disarmament and the elimination of all weapons of mass destruction is a purpose "beneficial to the community" within the fourth category in the definition, we also consider that it is a purpose within the spirit and intendment to the preamble both on the basis of analogy and the presumption of charitable status. It is in our view analogous to the promotion of peace. There is also no ground for holding that it is outside the spirit and intendment of the preamble.

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90 Michael King *The Penguin History of New Zealand* (Penguin, Auckland, 2003) at 495, and Paul Moon *New Zealand in the Twentieth Century* (Harper Collins, Auckland, 2011) at 533; and see (12 June 2007) 639 NZPD 9759, (8 April 2009) 653 NZPD 2497–2498, and (5 May 2010) 624 NZPD 10807–10808.

91 Convention on the prohibition of the development, production and stock piling of bacteriological (biological) weapons and toxin weapons and on their destruction 1015 UNTS 163 (opened for signature 10 April 1972, entered into force 26 March 1975); Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction 1974 UNTS 45 (opened for signature on 13 January 1993, entered into force 29 April 1997).

[82] Our conclusion on the first specific issue is that the public benefit of nuclear disarmament and the elimination of all weapons of mass destruction is now sufficiently well accepted in New Zealand society that the promotion of peace through these means should be recognised in its own right as a charitable purpose under the fourth head of the definition.

Ancillary political activities

[83] The second specific issue relates to object 2.7 of Greenpeace's rules which is to be amended to read:

> Promote the adoption of legislation, policies, rules, regulations and plans which further the objects of the Society listed in clauses 2.1-2.6 and support their enforcement or implementation through political or judicial processes, as necessary, where such promotion or support is ancillary to those objects.

[84] In our view, once this object is amended in this way, it will be clear that the "advocacy" purpose is intended to be ancillary to and not independent from Greenpeace's primary charitable purposes in objects 2.1–2.6. The amended object would then be designed to meet the requirements of ss 5(3) and 5(4) of the Act and would support Greenpeace's case that it is *now* established "exclusively for charitable purposes".

[85] The proposed amendments to Greenpeace's objects would then have three significant consequences for the decisions reached by the Commission and the High Court as to Greenpeace's political activities, which were based on Greenpeace's unamended objects.

[86] First, the amendments to objects 2.2 and 2.7 when taken together answer the concerns of the Commission and the High Court that object 2.7 was not ancillary to a charitable purpose. Our decision that Greenpeace's amended "peace and nuclear disarmament" object will be charitable means that the amended "political advocacy" object will no longer be ancillary to a non-charitable purpose.

[87] Second, the amendments to object 2.7 record an intention on the part of Greenpeace that its "political advocacy" object will be truly ancillary to its principal objects and not an independent stand-alone object. For present purposes, we should assume that once this object is amended, Greenpeace as both an incorporated society and a registered charitable entity will take steps to comply with it.

[88] As a society registered as an incorporated society under the Incorporated Societies Act 1908, Greenpeace ought not to carry on any activity which is not authorised by its rules.[92] The Registrar of Incorporated Societies has statutory responsibility for ensuring that incorporated societies do not carry on any operation which is beyond the scope of the society's objects as defined in its rules.[93]

[89] As a registered charitable entity, Greenpeace would also be required to ensure that it carried out its activities in accordance with the charitable purposes in its objects and did not elevate its ancillary "political advocacy" object to independent status. Failure on the part of Greenpeace to take these steps would mean that it was not "maintained" exclusively for charitable purposes as required by the Act. This would put its charitable status at risk. As already noted, the chief executive has an ongoing role for monitoring registered charitable entities and their activities to ensure their compliance with the Act.[94]

[90] Third, on the basis that once Greenpeace has amended its objects it will take steps to ensure that through its activities it complies at all times with its new objects, we do not consider that it is necessary to focus attention entirely on the past activities of Greenpeace in the same way as the Commission and the High Court were required to. In our view the focus should now be on Greenpeace's new objects and its proposed activities in light of those objects. The question is whether Greenpeace is now "established and maintained" exclusively for charitable purposes.

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92 *Automobile Association (Wellington) Inc v Daysh* [1955] NZLR 520 (SC and CA) at 523 and 532; *Cabaret Holdings Ltd v Meeanee Sports and Rodeo Club Inc* [1982] 1 NZLR 673 (CA) at 676.

93 Incorporated Societies Act 1908, s 19(1): *Walker v Mount Victoria Residents Association Inc* [1991] 2 NZLR 520 (CA) at 523; and *Stratford Racing Club Inc v Adlam* [2008] NZCA 92, [2008] NZAR 329 at [26].

94 See above at [38].

[91] This question needs to be considered by the chief executive and the Board because Greenpeace should be given the opportunity to provide the chief executive with relevant up-to-date information relating to its proposed activities in light of its new ancillary "political advocacy" object. It is important that Greenpeace should be given this opportunity because we share the concerns of the Commission and the High Court that the information provided by Greenpeace to date does suggest that its "political advocacy" activities when assessed qualitatively were being pursued by Greenpeace as an independent object in its own right.[95] Those concerns were reinforced for us by the material obtained from Greenpeace's website set out in the submissions for the Board which we summarised earlier in this judgment.[96] If, notwithstanding the amendments to object 2.7, Greenpeace intends to pursue its "political advocacy" role to the same extent as that material would indicate, then in our view the Board could well be justified in reaching the same conclusion as the Commission and the High Court reached.

[92] But Greenpeace should be given the opportunity to persuade the chief executive and the Board that with the amendments to object 2.7 the focus of its proposed "political advocacy" activities will be truly ancillary to its principal objects and not independent stand-alone activities. In particular, the chief executive and the Board should have the opportunity to consider the evidence of Ms McDiarmid adduced for Greenpeace in the High Court and the matters referred to by Mr Salmon in response to what he described as the Board's selective "web dredge" of Greenpeace's website. These are matters of evidence which should be assessed by the chief executive and the Board at first instance and not by this Court on a second appeal.

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95 The issue whether the assessment should be both qualitative and quantitative was not argued fully before us: compare *Re Education New Zealand Trust* (2010) 24 NZTC 24,354 (HC) at [43] and *Re The Grand Lodge of Antient Free and Accepted Masons in New Zealand* [2011] 1 NZLR 277 (HC) at [49]–[51].

96 See above at [25]–[30].

Unlawful activities?

[93] The final specific issue relates to the finding by the Commission that as Greenpeace's activities might have involved illegal activities, such as trespassing, such activities would not meet the public benefit test.

[94] In the High Court Heath J did not determine this issue, but expressed "some reservations" about whether there was sufficient evidence for the Commission to draw this inference.[97]

[95] On appeal to this Court, the Board's submissions gave examples from Greenpeace's website of its "direct action" which were said to include activities that included trespassing.[98] For Greenpeace, Mr Salmon pointed out that there was no evidence before the Court that there had been any finding of illegality or criminal charges involving Greenpeace in New Zealand.

[96] There is no dispute that a society that pursues illegal or unlawful purposes or activities is not entitled to registration as a charitable entity under the Act and that a registered society with lawful charitable purposes which pursues them through illegal or unlawful activities should lose its registration. Responsibility for ensuring that a society that pursues such activities is either not registered in the first place or is subsequently deregistered rests with the chief executive, who considers applications for registration and monitors the activities of registered societies, and with the Board, which is responsible for deregistering societies no longer eligible for registration.

[97] The question whether involvement by Greenpeace or its representatives or agents in an illegal or unlawful activity will be sufficiently material or significant to preclude registration or justify deregistration will be a question of fact and degree in each case. It is likely to be influenced by a range of factors such as:

(a) the nature and seriousness of the illegal activity;

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97 Above n 2, at [76].
98 See above at [30].

(b) whether the activity is attributable to the society because it was expressly or impliedly authorised, subsequently ratified or condoned, or impliedly endorsed by a failure to discourage members from continuing with it;

(c) whether the society had processes in place to prevent the illegal activity or has since put processes in place to prevent the activity occurring again;

(d) whether the activity was inadvertent or intentional; and

(c) whether the activity was a single occurrence or part of a pattern of behaviour.

[98] In considering these factors, the chief executive and the Board would no doubt be careful to avoid declaring activity to be illegal or unlawful when that activity had not been judicially determined to be in violation of the law. Where potentially illegal or unlawful activity has come to the attention of the chief executive, it may be appropriate for the chief executive to refer the activity to the appropriate investigative authority in the first instance. The rights and interests of persons alleged to be involved in illegal or unlawful activities are subject to the principles of natural justice and the applicable provisions of the New Zealand Bill of Rights Act.[99]

[99] In Greenpeace's case, where there is some evidence of illegal activities, particularly trespass, by its members, endorsed by Greenpeace through inclusion of reports of those activities on its website, it will be necessary for Greenpeace to explain its involvement in those activities when its application is reconsidered by the chief executive and the Board. It will then be for the chief executive and the Board to decide the nature and extent of those activities and whether they should be attributed to Greenpeace so that it may be concluded that Greenpeace is pursuing illegal activities which would mean that it would not be entitled to registration as a charitable entity.

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[99] Section 27.

[100] In the absence of any finding of illegality in the High Court or any evidence of any finding of illegality or criminal charges involving Greenpeace in New Zealand, this question should be considered by the chief executive and the Board at first instance and not by this Court on a second appeal.

Reference to the chief executive and the Board?

[101] As will already be apparent from this judgment, we are satisfied that the appropriate course is for us to exercise the power of the Court to refer Greenpeace's application for registration to the chief executive and the Board for reconsideration.

[102] Our reason for reaching this conclusion is that, as a result of the proposed amendments to Greenpeace's objects, the nature of Greenpeace's application for registration has changed so significantly that Greenpeace ought to be given the opportunity to satisfy the chief executive and the Board that it should now be registered. The chief executive and the Board would then have the opportunity to reconsider the application in light of Greenpeace's amended objects, our decision that object 2.2 as amended is a charitable purpose and up-to-date information relating to Greenpeace's proposed activities.

[103] In particular, in considering whether it is satisfied that Greenpeace is now qualified for registration the Board will need to decide:

(a) whether in light of relevant up-to-date information relating to Greenpeace's proposed activities its new "political advocacy" object is truly ancillary to its principal charitable purposes and is not an independent stand-alone object; and

(b) whether Greenpeace is involved in illegal activities that mean that it is not entitled to registration as a charitable entity.

Result

[104] For the reasons given the appeal is allowed and the decision of the Charities Commission declining to register Greenpeace as a charitable entity under the Act is set aside.

[105] The application by Greenpeace for registration as a charitable entity under the Act is referred to the chief executive and the Board for reconsideration in light of this judgment.

[106] As the parties agreed that costs should lie whether they fall, there is no order for costs.

[107] Finally, we record our appreciation for the quality of the submissions of counsel for the Board and Greenpeace.

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