

Registration decision: Kiwis Against Seabed Mining Incorporated (KIW49965)

Executive Summary

1. The Charities Registration Board (**the Board**) has determined to decline the application for registration of Kiwis Against Seabed Mining Incorporated (**the Society**) under the *Charities Act 2005* (**the Act**).¹
2. The Society has applied for registration on the basis that it informs and educates communities on the impacts of sea-bed mining proposals. The Society's activities focus on opposing resource consents, and promoting its point of view on specific seabed mining proposals, and seabed mining in general. The Society submits that these activities advance charitable purposes.
3. The Board has determined that the Society is not qualified to be registered as a charitable entity under the Act.² The Board considers the Society's stated objects in its rules document are capable of being charitable for the advancement of education and the protection of the environment; however the stated objects also imply the Society may be advocating against seabed mining.
4. The Board considers the Society's purpose to advocate to prevent seabed mining in New Zealand is not charitable. Applying the Supreme Court decision of *Re Greenpeace of New Zealand Incorporated* (**Greenpeace SC**)³, the Board is bound to consider both the ends the Society is seeking to achieve and the means and manner by which the Society is seeking to achieve the end. Given the potential consequences of preventing seabed mining until all environmental impacts can be understood and mitigated, the Board does not consider it can determine a charitable public benefit.

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

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

³ *Re Greenpeace of New Zealand Incorporated* [2014] NZSC 105 [6 August 2014] ("*Greenpeace, SC*").

5. The Board's reasons are organised as follows:

- A. Background
- B. Legal Framework for Registration Decision
- C. The Charities Registration Board's Analysis
- D. Section 5(3)
- E. The Society's other submissions
- F. Determination

6. The Board is not taking a position on whether preventing or limiting seabed mining in New Zealand until all environmental impacts can be understood and mitigated would in fact be the best outcome for New Zealand. The Board notes that this decision is about whether the Society meets the requirements for registration under the Act.

A. Background

7. The rules establishing the Society were signed on 8 June 2005 (**the Rules**). The Society was incorporated under the Incorporated Societies Act 1908 on 20 June 2005. The rules were altered most recently on 3 June 2015.

8. The Society's purposes, as set out in clause 3 of the Rules are as follows:

- a. To inform the community of the seabed mining proposals in the Aotearoa - New Zealand marine environment.
- b. To raise public awareness of the consequences of sea bed mining by educating and informing the public.
- c. To support communities taking responsibility for their own coastal and marine environment.
- d. To be a vehicle for the promotion of appropriate objective scientific and legal research endeavours and/ or form partnerships with existing organizations to achieve the same.
- e. To seek legislative changes to protect and preserve the New Zealand marine environment.
- f. To foster relationships with current and future governments and government agencies both at central and local government level.
- g. The protection and preservation of marine coastal environments for future generations to enjoy.
- h. When appropriate, be prepared to advocate when requested by communities affected by seabed mining proposals.

- i. To seek and secure external contracts with crown agencies and other parties.
 - j. To act as consultants or advocates, or to contract out our services, to central and local government agencies and communities.
 - k. To promote, provide and create opportunities for education on environmental and marine issues, and related or associated crown policies.
 - l. To follow a path of non-political alignment.
 - m. To offer, provide, sponsor or contribute towards any other activities in attaining any of the objects or to further the aims of the Society.
9. The Society applied for registration under the Act on 25 September 2014.
10. During the application process, the Society has provided information to the Department of Internal Affairs - Charities Services (**Charities Services**) about its activities.⁴ Public information about the Society states that "KASM - Kiwis Against Seabed Mining are a community based action group who strongly oppose seabed mining. We are calling for a moratorium on seabed mining."⁵
11. The Society has described its current activities as:
 - Helping coastal residents and the public to learn about any current and future seabed mining proposals.
 - Raising awareness of proposals to mine the foreshore and seabed of New Zealand, so that New Zealanders understand what is happening around them, and are able to "make properly informed decisions on environmental matters."⁶
12. The Society further clarified its activities after notification on its purposes.⁷ The Society has described its two principal activities to date as submissions to the Decision Making Committees relating to the Trans-Tasman Resources Limited (**TTR**) and Chatham Rock Phosphate Limited (**CRP**) applications for resource consent for sea-bed mining, and attending the relevant hearings, including engaging legal counsel, and scientific and economic experts.

⁴ Refer to the Society's letters of 3 October 2014, 15 May 2015, 18 June 2015, and 23 July 2015.

⁵ <https://www.facebook.com/pages/Kiwis-Against-Seabed-Mining/240973862607117> [accessed 11/11/2014]. See also <http://kasm.org.nz/inside-kasm/about> [accessed 27/06/2016] which contains a similar statement of the Society's mission.

⁶ Refer to the Society's letter of 3 October 2014.

⁷ Refer to the Society's letter of 23 February 2015.

13. The Society has described its other activities as:

- Running a website “designed to inform New Zealanders and global citizens of seabed mining proposals and educate as to the known and possible effects of seabed mining”. The website comprises information on seabed mining including: the history, current deposits, potential environmental impacts, the economics, cases studies, and current permits and legislative framework drawn from the Ministry of Business, Innovation and Employment. The website also includes a blog discussing the current activities of the Society, information on its previous submissions, media regarding seabed mining and a petition against seabed mining.⁸
- Producing a submission attached to the petition on the inadequacy of the current regulation of seabed mining and being invited to present and talk to the petition at the Parliamentary Select Committee to the Environment and Local Government.
- Submissions to the Coastal Policy Review Document, Foreshore and Seabed Review and the Crown Minerals Programme relating to the impacts of seabed mining.
- Submissions and promoting public submissions on the Resource Legislation Amendment Bill and the Ministry for the Environment’s consultation on a new Marine Protected Areas Act.
- Meeting with and discussing the issue of seabed mining with politicians from all major political parties.
- Holding information stands and sending speakers around the country in an advisory capacity on the impacts of seabed mining.
- Running a coastal campaign which involves direct engagement with communities to raise awareness and educating the public of seabed mining and its known and possible effects.
- Speaking at numerous schools in the Waikato and Taranaki regions on the impacts of seabed mining.

14. In considering whether the activities of the Society advance charitable purposes, Charities Services assessed the activities information provided by the Society directly, and the Society’s submissions on its purposes. Charities Services also considered publicly available information produced by the Society, including the Society’s website, Facebook page, submissions the Society has made to decision makers, and financial statements sourced from the Register of Incorporated Societies.

⁸ <http://kasm.org.nz/> [accessed 27/06/2016].

15. Charities Services has also considered other information that it considered material to assess whether the Society's advocacy activities advance a charitable public benefit. Specifically, media reports relating to the Society,⁹ public information regarding the CRP and TPP applicants for resource consent and New Zealand's Energy Strategy.¹⁰ The Society has been advised of all information Charities Services relied on in its assessment, and gave the Society an opportunity to respond.
16. Charities Services notified the Society on 14 November 2014 that its purposes did not meet registration requirements. Although accepting that the Society has a charitable end of protecting the environment, Charities Services considered that the primary means by which the Society is seeking to achieve its end is advocating against seabed mining applications, putting a moratorium on seabed mining and promoting these views to the public. Charities Services notified the Society that it did not consider the Board was placed to make a determination that its position on seabed mining is in the public interest, and accordingly, the Society does not have exclusively charitable purposes as required by the Act.
17. The Society provided substantive submissions on 25 February 2015 and 9 April 2015. In essence, the Society submitted that Charities Services' position is incorrect in law and fact, specifically:
 - The Society's main purpose is advancing education, and supporting local communities who are faced with the prospect of sea-bed mining, as set out in the Society's objectives 3(a) – (c).
 - The Society is opposed to non-essential seabed mining, not all seabed mining.
 - To the extent that the Society engages in advocacy, such as advocating for a moratorium on seabed mining, this is ancillary to its main purpose.
18. Even if the Society's advocacy is not ancillary, the Society argued by applying *Greenpeace SC* Charities Services should accept the Society's advocacy is charitable. The Society submitted its advocacy is directed towards the protection of the environment based on scientific evidence and environmental principles, which have long been accepted as being in the public benefit. Finally, the Society noted its advocacy is based on well-reasoned decisions of a government appointed decision making body which must be seen to be for the public benefit.

⁹ For example: <http://www.stuff.co.nz/business/better-business/69196138/kiwis-against-seabed-mining-group-takes-campaign-a-step-further> [last accessed 27/06/2016].

¹⁰ Specifically: Chatham Rock Phosphate website, <http://www.rockphosphate.co.nz/new-page-1/> [accessed 13/04/2016]; *New Zealand Energy Strategy 2011–2021 potential, Developing our energy and the New Zealand Energy Efficiency and Conservation Strategy 2011–2016* <https://www.eeca.govt.nz/assets/Resources-EECA/nz-energy-strategy-2011.pdf> [accessed 11/05/2016].

19. Charities Services notified the Society on 11 March 2015 of its position that the Society continued not to meet registration requirements. Specifically, Charities Services noted it did not consider the Society's purposes were educational, but rather promoted a point of view on seabed mining. As identified in the initial notice, Charities Services considered the Board was not in a position to make a determination that the Society's point of view on seabed mining is for the benefit of the public.
20. The Society provided further submissions on 9 April 2015. In that document, the Society argued its purpose was not to stop or cease seabed mining. It highlighted that its main activities had focussed on providing expert evidence to a decision making body identifying flaws in a resource consent application that if accepted may have led to environmental damage. It noted that in both cases, the decision maker agreed that the resource consent applications would fail to protect the marine environment. It also reiterated its points that it considered its advocacy was ancillary and that even if it was not ancillary, its advocacy was charitable, applying the *Greenpeace SC* decision.
21. Charities Services accepted in its follow up notice of 23 September 2016 that where activities were directed towards providing objective evidence to assist decision makers assessing environmental impacts in relation to seabed mining, this is capable of being charitable advocacy as described in the *Greenpeace SC* decision. However, Charities Services noted it considered the Society continued to have an independent purpose to promote its point of view that seabed mining was so environmentally damaging it should be prevented. Charities Services gave the Society the opportunity to separate out its activities that were capable of advancing charitable purposes into a separate organisation.
22. Charities Services has received no further response or submissions from the Society.
23. The Board considers information from the public domain produced by the Society is important to understand the context of the Society's activities.¹¹ The Board has considered all of the information Charities Services assessed in making its decision. In relation to materials from the CRP and TPP, the Board considers this information is particularly important in considering the wider context and consequences of the advocacy.¹²
24. The submissions of the Society have been considered in detail by the Board.

¹¹ This is consistent with the approach of the Supreme Court in *Greenpeace, SC* at [101]; and previous appeals, see for example: *Re Greenpeace of New Zealand Incorporated* [2011] NZHC 77 (*Greenpeace, HC*) at [71]-[72]; *In re Draco Foundation (NZ) Charitable Trust* HC WN CIV 2010-485-1275, 3 February 2011 ("*Draco*") at [39]; *New Zealand Computer Society Inc* HC WN CIV-2010-485-924, 28 February 2011 ("*Computer Society*") at [64].

¹² See *Greenpeace, SC* at [101-102].

B. Legal Framework for Registration Decision

25. Section 13 of the Act sets out the essential requirements for registration. Under section 13(1)(b) of the Act, a society qualifies for registration if it is established and maintained for exclusively charitable purposes and not for private pecuniary profit.
26. Section 5(1) of the Act defines charitable purpose as including every charitable purpose “whether it relates to the relief of poverty, the advancement of education or religion, or any other matter beneficial to the community”. This statutory definition adopts the well-established fourfold classification of charitable purpose at general law.¹³
27. Not all purposes which appear beneficial to the community will be charitable at law.¹⁴ To be charitable a purpose must advance a public benefit at law. That public benefit must also be within the spirit of the cases based on the Statute of Charitable Uses Act 1601 (**the Preamble**).¹⁵
28. First, the purpose must provide a benefit to the public or a sufficient section of the public. The assessment of whether a purpose provides a benefit focuses on the clearly identifiable consequences of the undertaking—benefits that are nebulous and remote, or simply ‘hoped for’, are excluded.¹⁶ This does not exclude all downstream benefits. Where a purpose seeks to advance education through research, for example, its public benefit will often not just lie in its end result, but the iterative process by which it carries out its research.¹⁷

¹³ This statutory definition adopts the general law classification of charitable purposes in *Commissioner for Special Purposes of Income Tax v Pemsel* [1891] AC 531 extracted from the preamble to the *Statute of Charitable Uses 1601* (43 Elizabeth 1 c 4) (“The Statute of Elizabeth”) and previous common law: *Greenpeace*, SC at [12],[15] and [17]; *Re Education New Zealand Trust* (2010) 24 NZTC 24,354 (“*Education New Zealand Trust*”) at [13]; *Draco* at [11].

¹⁴ *Greenpeace*, SC at [27].

¹⁵ The Statute of Elizabeth;

¹⁶ See discussion in *Latimer v Commissioner of Inland Revenue* [2002] 3 NZLR 195 at [32] - [37]. The courts have held that the downstream benefits of an entity’s activities do not serve to characterise the purpose of the entity. See for example *New Zealand Society of Accountants v Commissioners of Inland Revenue* [1986] 1 NZLR 147 at 153; *Travis Trust v Charities Commission* (2009) 24 NZTC 23,273 at [30]; *Queenstown Lakes Community Housing Trust* HC WN CIV-2010-485-1818, 24 June 2011 (“*QLCHT*”) at [68] – [76]; *Canterbury Development Corporation v Charities Commission* [2010] 2 NZLR 707 (“*CDC*”) at [67]; *Re The Grand Lodge of Antient Free and Accepted Masons in New Zealand* [2011] 1 NZLR 277 (HC) (“*Grand Lodge*”) at [59] – [60]

¹⁷ *Re the Foundation for Anti-Aging Research and the Foundation for Reversal of Solid State Hypothermia* [2016] NZHC 2328 [30 September 2016] (“*FAAR and FRSSH*”), at [66].

29. However, if a purpose is to benefit a private group, the consequential benefits to the public will not suffice.¹⁸ Any private benefits arising from an entity's activities must be a means of achieving an ultimate public benefit only and therefore be ancillary or incidental to it.¹⁹ Moreover, if a purpose is to promote an idea or cause, the focus of the enquiry into public benefit will be on the means the entity intends to use to advance the idea or cause.²⁰
30. If public benefit has been established, the second part of the test is whether the public benefit is within the spirit of the Preamble.²¹ The Board is bound to apply the law as declared by the courts. Purposes that relieve poverty, advance education, and advance religion are all presumed as being within the spirit of the Preamble, although this presumption can be rebutted.²²
31. For purposes under the fourth head, "any other matter beneficial to the community," this part of the test is to be considered by analogy to previous cases or by reference to legislation.²³ This is not by testing whether a purpose is identical to a previously accepted or declined charitable purpose.²⁴ Rather the test is whether the public benefit advanced by the purpose is sufficiently similar to reflect the reason the court acknowledged or declined public benefit in the first instance.
32. Finally, section 5(3) of the Act provides that the inclusion of a non-charitable purpose will not preclude registration if it is merely ancillary to a charitable purpose. Pursuant to section 5(4) of the Act, a non-charitable purpose is ancillary if the non-charitable purpose is:
- (a) ancillary, secondary, subordinate, or incidental to a charitable purpose of the trust, society or institution; and
 - (b) not an independent purpose of the trust, society or institution.

¹⁸ See for example *Institution of Professional Engineers New Zealand Incorporated v Commissioner of Inland Revenue* [1992] 1 NZLR 570 ("Professional Engineers") at 578; *Computer Society* at [42]; *Education New Zealand Trust* at [23]; *QLCHT* at [68]–[76]; *CDC* at [67]. Compare: *Commissioners of Inland Revenue v Oldham Training and Enterprise Council* (1996) STC 1218 ("Oldham"); *Travel Just v Canada (Revenue Agency)* 2006 FCA 343, [2007] 1 CTC 294 ("Travel Just").

¹⁹ See for example *Professional Engineers* at 578; *Computer Society* at [42]; *Education New Zealand Trust* at [23]; *QLCHT* at [68]–[76]; *CDC* at [67]. Compare *Oldham*; *Travel Just*.

²⁰ *Greenpeace*, SC at [102].

²¹ *Greenpeace*, SC at [18] and [27-31].

²² *Greenpeace*, SC at [27]; *Liberty Trust v Charities Commission* [2011] NZHC 577 at [100].

²³ *Greenpeace*, SC at [18] and [27-31].

²⁴ *Re Family First of New Zealand* [2015] NZHC 1493 [30 June 2015] ("Family First") at [86].

33. Determining whether a non-charitable purpose is ancillary includes a qualitative assessment of whether it is a means to advance the charitable purpose.²⁵ It also involves a quantitative assessment, focusing on the relative significance of the purpose as a proportion of the entity's overall endeavour.²⁶

Relevance of entity's activities in registration decision-making

34. Sections 18(3)(a)(i) and (ii) of the Act mandate that the Board and Charities Services take activities into consideration when determining whether an entity qualifies for registration under the Act.²⁷ Where an entity's stated purposes either are, or may be charitable, New Zealand courts have consistently taken activities into account in assessing whether an entity qualifies for registration under the Act.²⁸
35. While activities are not to be elevated to purposes,²⁹ reference to activities may assist, for example, to make a finding about:
- the meaning of stated purposes that are capable of more than one interpretation;³⁰
 - whether the entity is acting for an inferred or unstated non-charitable purpose;³¹
 - whether the entity's purposes are providing benefit to the public;³² and
 - whether a non-charitable purpose is within the savings provision at section 5(3) of the Act.³³

²⁵ For recent judicial comment on the qualitative test see *Greenpeace of New Zealand Incorporated* [2012] NZCA 533 ("*Greenpeace, CA*") at [62], [83] – [91].

²⁶ The quantitative requirement was applied by the High Court in *Greenpeace, HC* at [68]; *Computer Society* at [16]; *Education New Zealand Trust* at [43]-[44]; *Re The Grand Lodge of Antient Free and Accepted Masons in New Zealand* [2011] 1 NZLR 277 (HC) ("*Grand Lodge*") at [49]-[51]. The Board notes the Court of Appeal's observation in *Greenpeace, CA* at [92], including footnote 95.

²⁷ See also section 50(2)(a) of the Act in relation to registered entities.

²⁸ See for example: see *FAAR and FRSSH* at [88]; *Greenpeace, SC* at [14], [100-101]; *Plumbers, Gasfitters and Drainlayers Board v Charities Registration Board* [2013] NZHC 1986 at [52]; *Greenpeace, HC* at [71]-[72].

²⁹ See: *FAAR and FRSSH* at [87]; *McGovern v Attorney-General* [1982] Ch 321 ("*McGovern*") at 340 and 343; *Latimer v Commissioner of Inland Revenue* [2004] 3 NZLR 157 ("*Latimer, PC*") at [36]. Compare *Public Trustee v Attorney-General* (1997) 42 NSWLR 600 at 616; *Vancouver Society of Immigrant and Visible Minority Women v the Minister of National Revenue* [1999] 1 SCR 10 ("*Vancouver Society*").

³⁰ See: *Professional Engineers* at 575 (Tipping J).

³¹ *FAAR and FRSSH* at [88]; and *Greenpeace, SC* at [14].

³² See for example *Inland Revenue Commission v City of Glasgow Police Athletic Association* [1953] AC 380; *CDC* at [29], [32], [44], [45] - [57], [67], [84] - [92]; *QLCHT* at [57] - [67]; *Grand Lodge* at [59], [71]; *Computer Society* at [35] – [39], [60] and [68].

36. In relation to purposes to advocate for a cause or point of view, activities information is important in assessing how the entity wishes to pursue its end goal, and accordingly whether the purposes advance a charitable public benefit.³⁴

Characterisation of an entity's purposes

37. Once an entity's purposes are established as a matter of fact, the question of whether they are charitable is a question of law and involves an objective characterisation, rather than an assessment of the subjective intentions of the founders.³⁵ The Board is bound to apply the law as declared by the courts, and adopted in the Act.

C. The Charities Registration Board's Analysis

38. Taking into account the Society's stated purposes, and the Society's activities, the Board considers the Society has an independent purpose to advocate against seabed mining in New Zealand. The Board also notes the Society advances charitable purposes including education into seabed mining and its associated impacts, and advocacy to protect the environment through providing expert evidence to assist decision makers on environmental impacts in relation to seabed mining.
39. To summarise the discussion that follows, the Board considers the Society's purpose to advocate to prevent seabed mining in New Zealand is not charitable. Applying the *Greenpeace SC* decision, the Board is bound to consider both the ends the Society is seeking to achieve and the means and manner by which the Society is seeking to achieve the end. Given the potential consequences of preventing seabed mining until all environmental impacts can be understood and mitigated, the Board does not consider it can determine a charitable public benefit.
40. The Board does not consider the Society's purpose to advocate to prevent seabed mining in New Zealand is ancillary to its charitable purposes. Accordingly the Board does not consider the Society is qualified for registration.

³³ See for example: *FAAR and FRSSH* at [87]; *Greenpeace, SC* at [50]; *Greenpeace, CA* at [40], [48], [87] – [92], [99] and [102], [103].

³⁴ *Greenpeace, SC* at [103].

³⁵ *Molloy v Commissioner of Inland Revenue* [1981] 1 NZLR 688 (CA) ("*Molloy*") at 693.

C.1. Identification of purpose

41. In identifying the purpose of an applicant, the Board looks first to the stated purposes to determine if they are capable of being charitable. If they are, or may be, the Board determines whether the activities of the applicant are sufficiently connected to the identified charitable purposes, or indicative of a non-charitable purpose.³⁶
42. The Board first determined that the Society's stated purposes set out in clause 3 of the Rules were capable of being charitable.³⁷ These relate to education, and the protection of the environment, concerning sea-bed mining proposals. However, the stated purposes also include provision for advocacy and seeking to change legislation to protect the marine environment. The Board considers that this allows the Society to promote its view on sea-bed mining proposals.
43. To determine whether the Society's activities are consistent or supportive of the charitable purposes identified in its stated purposes, or merely ancillary to the identified charitable purpose, the Board considered the Society's activities.³⁸ The activities of the Society involve advocating to the public and decision makers about seabed mining proposals and the potential negative consequences of seabed mining, propagating information about those proposals and seabed mining, and advocating for a moratorium on non-essential sea-bed mining.
44. The Society has submitted its main purpose is educational, and that it does not have a purpose to oppose seabed mining. The Society considers its activities do not demonstrate it is acting for an inferred non-charitable purpose.³⁹
45. The Board has considered whether the Society has a purpose to advance education, protect the environment consistently with the case law or whether it instead acts for an unstated purpose to advocate against seabed mining in New Zealand.

C.2. The Society's purpose to advance education

46. One of the Society's submissions is that its primary purpose is advancing education into the impacts of seabed mining and supporting communities affected by seabed mining, and that its purpose of promoting political action relevant to the impacts of seabed mining is ancillary. The Board accepts aspects of the Society's activities advance education; however it considers that predominantly the Society promotes a point of view on seabed mining with an end of protecting the environment.

³⁶ *FAAR and FRSSH* at [87].

³⁷ *FAAR and FRSSH* at [88].

³⁸ See for example: *FAAR and FRSSH* at [88].

³⁹ Refer to the Society's letter of 9 April 2016, at [9-20].

C.2.1 Law on advancement of education

47. New Zealand law recognises that a purpose to advance education for the public benefit is a valid charitable purpose in law. Education may be advanced through formal tuition or training, and research that improves a useful branch of human knowledge⁴⁰ and is disseminated to the public.⁴¹ Further, it may include “information or training provided in a structured way for a genuinely educational purpose – that is, to advance the knowledge and abilities of the recipients – and not solely to promote a particular point of view.”⁴²
48. The advancement of education does not extend to activities that disseminate information but do not have any teaching or learning component.⁴³ Moreover, information must be sufficiently structured to ensure learning can be advanced. If a website is simply providing information available from other sources it will not qualify as education. Although it may be convenient for the public to bring information together from a range of sources, it may not have any independent educational value.⁴⁴ To qualify as an educational purpose, the website needs to provide unique and balanced information that advances learning in subjects of educational value.⁴⁵
49. The courts have held that a purpose to “educate people about a point of view in a manner that might more aptly be described as persuasion or indoctrination”⁴⁶ does not advance education in a charitable sense. There is a distinction between charitable advancement of education on the one hand, and “propaganda or cause under the guise of education”.⁴⁷ To “promote an attitude of mind” is not an educational purpose.⁴⁸

⁴⁰ See for example in *Re Shaw's Will Trusts* [1952] Ch 163.

⁴¹ *Re Besterman's Will Trust* (January 21, 1980, unreported) referred to in *McGovern* at 352-3. See also *Re Shaw's Will Trusts* [1952] Ch 163; *Taylor v Taylor* (1910) 10 CLR 218; *Re Hopkins' Will Trusts* [1965] Ch 669.

⁴² *Vancouver Society* at [169]; see also *Draco* at [42] - [43], [74].

⁴³ *Draco* at [41], and see also [76]. *Draco* adopted threshold requirements for education consistent with comparative case-law, and administrative interpretations of that law, see: In United Kingdom - *Re Shaw, Public Trustee v Day* [1957] 1 WLR 729 and Charities Commission for England and Wales, *The Advancement of Education for the Public Benefit* (December 2011) published at http://www.charity-commission.gov.uk/charity_requirements_guidance/charity_essentials/public_benefit/pbeduc.aspx#c at C4, C8, D2; In Canada - *Vancouver Society* at [171]; *Positive Action against Pornography v Minister for National Revenue* [1988] 2 FC 340 (“*Positive Action*”); *News to You Canada v Minister of National Revenue* [2011] FCA 192; Canada Revenue Agency, *Research as a Charitable Activity* published at <http://www.cra-arc.gc.ca/chrts-gvng/chrts/plcy/cps/rsrch-eng.html> at [11], [17].

⁴⁴ *Draco* at [51], see also [74], [77].

⁴⁵ The usefulness test was clarified in *FAAR and FRRSH* at [58], noting it is only designed to exclude “nonsensical” areas of research, especially in matters of science.

⁴⁶ *Vancouver Society* at [169], see also *Draco* at [54].

⁴⁷ *Re Collier (Deceased)* [1988] 1 NZLR 81 at 91. In the United Kingdom, see for example *Re Bushnell (deceased) Lloyds Bank Ltd and others v Murray and others* [1975] 1 All ER 721 as applied by *Public Trustee* at 608; *Southwood v Attorney-General* [2000] EWCA Civ 204

50. Finally, raising awareness of issues, or promoting debate and discussion of those issues, is not itself an educational purpose.⁴⁹ In *In re Draco Foundation (NZ) Charitable Trust*, the High Court held that the entity's purpose was to influence local or central government or other officials to a particular point of view, and that this did not fall within the charitable purpose to advance education.⁵⁰
51. Since this decision, the Supreme Court has clarified that promoting points of view, or publicising one side of a debate may be charitable.⁵¹ However, the Board considers this confirms the distinction between an organisation that advances education, and an organisation that promotes a cause. Both sides of a debate may consider their point of view is supported by research, and may commission research to support their point of view. However, disseminating this research does not transform a purpose to promote a cause into an educational purpose.⁵² Rather, the end of the predetermined view, and the policy goals promoted, need to demonstrate a public benefit similar to what has previously been accepted as charitable.⁵³

C.2.2 The Society's purpose and advancement of education

52. The Society submits its purpose is not opposing all seabed mining, rather opposing all non-essential seabed mining,⁵⁴ and that its position is based on principles of precaution and sustainability accepted as fundamental environmental principles referenced in international and domestic law.⁵⁵ Accordingly, its activities are primarily focussed on informing communities of the impact of seabed mining using relevant scientific knowledge and literature, and contributing to the administration of the law by providing scientific analysis of the risks of seabed mining. The Society has submitted its political purposes, particularly to institute a moratorium on seabed mining, should be properly considered as ancillary to this educational purpose.

48 (“*Southwood*”); *McGovern*. In Canada, see for example *Positive Action*; *Alliance for Life v Minister of National Revenue* [1999] 3 FCR 504; *Challenge Team v Revenue Canada* [2000] 2 CTC 352.

49 *Anglo-Swedish Society v Inland Revenue Commissioners* (1931) 16 TC 34 at 38, see also *Buxton v Public Trustee* (1962) 41 TC 235 at 242; *Re Hopkinson* [1949] 1 All ER 346 at 350.

50 *Greenpeace, CA* at [59].

51 *Draco* at [54].

52 *Greenpeace, SC* at [74].

53 See for example: *Southwood*, discussed in *Greenpeace, SC* at [97 to 102]; and the minority judgments in *Aid/Watch v Commissioner of Taxation* [2010] HCA 42 (1 December 2010) at [62] and [84] noted in *Greenpeace, SC* at [68] and [74].

54 *Greenpeace, SC* at [76] and [116].

55 Society's letter of 9 April 2015.

Resource Management Act 1991 and the *Exclusive Economic and Continental Shelf (Environmental Effects) Act 2012*; cited in letter of 9 April 2015.

53. Disseminating objective research on the environmental effects of seabed mining may qualify as an educational purpose. The Board acknowledges some of the Society's activities are capable of advancing an educational purpose. Working with schools, providing objective research to decision makers, and disseminating research is capable of being charitable, where this is balanced. For example: the Society has provided a colouring page for children to show the different types of marine wildlife.⁵⁶
54. However, the Board considers the Society's has an independent purpose to protect the environment through persuading the public and decision makers that seabed mining is so environmentally damaging it should be prevented. The name, mission statement and stated purposes of the Society; quality and tone of content on the website and Facebook page; and the quality and tone of the submissions made to decision makers support this assessment.
55. The Society's legal name is "Kiwis Against Seabed Mining", and the mission statement states the Society's objective is "to raise public awareness of current proposals to mine the New Zealand seabed and coastline, educate and inform the public as to the consequences of those proposals, and *ensure that current and future governments stop considering these and any future seabed mining operations.*" [emphasis added]
56. Given this, the Board considers the stated purposes should be read in light of this wording, and accordingly the Society's stated purposes of "inform[ing] the community of seabed mining proposals",⁵⁷ "rais[ing] public awareness of the consequences of seabed mining",⁵⁸ "seek[ing] legislative changes to protect and preserve the New Zealand marine environment",⁵⁹ "protect[ing] and preserv[ing]...marine coastal environments for future generations to enjoy",⁶⁰ and "advocat[ing] when requested by communities affected by seabed mining proposals,"⁶¹ indicate the Society is against seabed mining because of its impact on the environment.
57. The Board accepts Charities Services' assessment that information on the website argues that the potential for seabed mining is significant and environmentally damaging. The content and tone of the website seeks to persuade and influence readers to this point of view. Some aspects of the website may sufficiently advance education,⁶² however most of the pages are a

⁵⁶ <http://kasm.org.nz/resources/playground/> [accessed 27 June 2016].

⁵⁷ Clause 3(a) of the Society's rules document ("the Rules").

⁵⁸ Clause 3(b) of the Rules.

⁵⁹ Clause 3(e) of the Rules.

⁶⁰ Clause 3(g) of the Rules.

⁶¹ Clauses 3(h) of the Rules.

⁶² For example: the provision of submissions by the Society and the summary of the Environmental Protection Authority decision: <http://kasm.org.nz/latest/phosphate-mining-hearing-kasm-dscc-and-greenpeace-evidence/> [accessed 4 July 2016].

combination of opinion pieces expressing the Society's point of view and information from other sources that is not sufficiently structured to ensure learning is advanced.⁶³

58. In relation to the Society's other activities, the Society has not provided sufficient information that these are genuinely educational events, rather than promoting the Society's point of view.⁶⁴
59. The Society has accepted it does seek to advocate for a moratorium, and has argued this is an ancillary purpose. However, the Board considers the Society's activity to advocate for a moratorium on seabed mining can be characterised in most of its advocacy activities. For example: the information provided to decision makers in relation to the CRP resource consent application,⁶⁵ Extended Economic Zone Bill,⁶⁶ Resource Legislation Amendment Bill,⁶⁷ and William McNatty's Petition 2005/111 on behalf of the Society,⁶⁸ posit or imply that seabed mining is environmentally damaging, and systems should be put in place so that activities that pose environmental damage are prevented.

⁶³ See for example: Banners on the Beach – Say “No to Deep Sea Oil” <http://kasm.org.nz/inside-kasm/activities/archive/> [accessed 4 July 2016]; the template petition on the Society's website “I respectfully request...enacting legislation that prohibits iron sand mining of the seabed.” <http://kasm.org.nz/stopsandmining/assets/Template-KASM-Petition-Template.pdf> [accessed 4 July 2016].; <http://kasm.org.nz/latest/lets-rethink-this-whole-seabed-mining-thing/> [accessed 4 July 2016].; “We humans have imposed all kinds of hell on the natural world and our cousin species. Seabed mining, as proposed by TTR, is potentially among the worst of those hells.” <http://kasm.org.nz/latest/weve-done-our-best-and-now-its-up-to-the-epa-to-do-the-right-thing/> [accessed 4 July 2016].

⁶⁴ For example: the *Hands off our sand* video from the video galleries section of the Society's website <http://kasm.org.nz/galleries/video-galleries/> [accessed 4/06/2016].

⁶⁵ For example: Duncan Currie and Ruby G Haazen, Legal Submissions by KASM, Greenpeace and Deep Sea Conservation Coalition to the CRP Application for Consent (29/10/2014) at [6]; Submissions for KASM on the CRP application by Phil McCabe (29/10/2014) at [30].

⁶⁶ For example: by advocating for economic benefit never having priority over environmental effects (including potential environmental effects) at [15]; <https://www.parliament.nz/resource/0000181244> [accessed 29/11/2016].

⁶⁷ For example: by advocating applicants should be required to present a *prima facie* case that the application would be economically viable before proceeding, at [21]; https://www.parliament.nz/resource/en-NZ/51SCLGE_EVI_00DBHOH_BILL67856_1_A521402/d0549eb47a15021c48dec6d16e5fe4ab9f75333f [accessed 29/11/2016].

⁶⁸ Petition of 2005/11 of William McNatty on behalf of Kiwis Against Seabed Mining (KASM): “...current application of the Resource Management Act (RMA) 1991 to seabed mining activities is not sufficiently thorough, as not all applications come within the scope of the RMA. The petitioners have asked that no minerals permits be issued until a comprehensive oceans policy is formulated and implemented, and no permits be issued unless data can be produced to show that no environmental harm will be done to coastal marine ecosystems.” http://kasm.org.nz/stopsandmining/assets/Petition-DBSCH_SCR_4063_5956-Petition-of-William-McNatty.pdf [accessed 4/06/2016].

60. The Board does not accept the Society's position that its main purpose is educating and informing the public. The Board agrees the Society's name is not determinative, however it is part of an assessment of its activities, including the language on the website, Facebook page, its submissions to decision making bodies, and information available on its public meetings. Taking into account these activities holistically, the Board considers the Society advocates for the prevention of seabed mining in New Zealand to protect the environment. The Board considers that many of the Society's activities do not present both sides of an argument, but rather emotively and persuasively express the evidence supporting the position of the Society.
61. The Board does not consider the Society's activities reflect a purpose to advance education and inform the public. Rather, the Society promotes a point of view on seabed mining; "to protect the environment, we need to oppose any non-essential seabed mining." The Society has provided no information on any seabed mining that it would support, rather it supports the adoption of a precautionary approach that would prevent any seabed mining until "we have a clear understanding of the risks and impacts."⁶⁹

C.3. Promoting a point of view on seabed mining

62. The Board considers the main purpose of the Society is expressed in its mission statement "strongly opposing any non-essential seabed mining".⁷⁰ The stated purposes express the Society's intention to pursue legislative changes to protect and preserve the New Zealand marine environment against the potential damage of seabed mining, and advocate against seabed mining proposals.⁷¹ Although many of the Society's stated purposes indicate an educational purpose, the focus of the Society's activities is on promoting its point of view that seabed mining should be limited or prevented until all environmental impacts can be addressed.

⁶⁹ <http://kasm.org.nz/take-action/petition-timeout/> [accessed 18/02/2016].
⁷⁰ Letter from the Society of 9 April 2016 at [16].
⁷¹ Rules of the Society, Clause 3(e) and (h).

C.3.1. Law on purposes to advocate for a point of view

63. Before the Supreme Court decision of *Greenpeace SC*, a purpose to advocate for a point of view or to change law or policy would prevent registration, unless ancillary to a charitable purpose.⁷² The majority of the Supreme Court, however, found the appropriate question was not whether an entity had a political purpose but rather whether a purpose to advocate for a point of view was charitable, that is, it advances a public benefit within the spirit of the objects previously accepted as charitable.⁷³ The Supreme Court did not limit political advocacy to activity which is “political” in a narrow sense, but includes “advocacy of views more generally.”⁷⁴
64. Acknowledging that the circumstances in which advocating for a point of view will be shown to be charitable are likely to be uncommon,⁷⁵ the Supreme Court accepted some purposes may necessitate broad-based support and that advocacy may be charitable in some such circumstances.⁷⁶ In assessing whether an advocacy purpose advances charitable public benefit, the Supreme Court found the end that is advocated, the means promoted to achieve that end and the manner in which the cause is promoted should all be considered.⁷⁷
65. Specifically, where a charity promotes an abstract end, the focus in assessing charitable purpose should be on how that abstraction is to be furthered.⁷⁸ The Supreme Court noted that how an abstraction is to be furthered can often have wide consequences. All of the consequences of that choice, local and international, must be taken into account.⁷⁹ This is a balancing exercise, considering both benefits and detriments of the purpose in question.⁸⁰ The controversy of a view will not be determinative, but may help explain why a view cannot be assumed to serve the public benefit in the way the law regards as charitable.⁸¹ The assessment must also take into account the wider context, including public participation in processes and human rights values.⁸²

⁷² *Greenpeace, SC* at [59]; *Re Collier [1998] 1 NZLR 81*.

⁷³ *Greenpeace, SC* at [72-76]; [102].

⁷⁴ *Greenpeace, SC* at [65].

⁷⁵ See for example: *Greenpeace, SC* at [74], [101-102] and [116].

⁷⁶ *Greenpeace, SC* at [71].

⁷⁷ *Greenpeace, SC* at [76].

⁷⁸ *Greenpeace, SC* at [102].

⁷⁹ *Greenpeace, SC* at [98], [100] – [102].

⁸⁰ *National Anti-Vivisection Society v Inland Revenue Commissioners [1948] AC 31* at 47 and 49.

⁸¹ *Greenpeace, SC* at [75].

⁸² *Greenpeace, SC* at [103].

C.3.2. The Society's purpose and promoting a point of view on seabed mining

66. The Society submits even if its objectives and activities are not considered ancillary, these should be considered as charitable applying the *Greenpeace SC* decision.⁸³ The Society submits the Supreme Court acknowledged that environmentalism on its own is considered charitable.⁸⁴ The Society notes their approach to seabed mining is based on accepted environmental principles, and reasoned decisions of the Decision Making Committee in relation to the TTR application and the CRP application.⁸⁵ Accordingly, the Society considers its point of view, and particularly the promotion of a moratorium on non-essential seabed mining, must be seen to be for the public benefit.⁸⁶
67. The Board notes the Supreme Court distinguished between the end of an advocacy cause, and how an advocacy cause is to be achieved, in determining whether an entity advanced a charitable purpose.⁸⁷ In acknowledging a purpose directed towards protecting the environment is capable of being charitable, the majority stressed the means promoted to achieve that end and the manner in which the cause is promoted must also be considered in assessing whether the purpose is charitable.⁸⁸
68. The minority judgment in *Greenpeace SC* highlighted that purposes to protect the environment are closely intertwined with advocacy for causes.⁸⁹ The minority judgement noted in practice an approach that sought to exclude such "political" purposes from charity was similar to the approach of the majority judgment, which held the court would have no adequate means of judging the public benefit of those causes.⁹⁰ The Board does not consider the Supreme Court intended to accept a more general proposition that all purposes directed towards an organisation's point of view on what is best for the environment would be charitable.

⁸³ Refer to the letter of the Society of 9 April 2015 at [24-36].

⁸⁴ Refer to the letter of the Society of 9 April 2015 at [33] citing *Greenpeace, SC* at [71].

⁸⁵ Refer to the letter of the Society of 9 April 2015 at [35].

⁸⁶ Refer to the letter of the Society of 9 April 2015 at [36].

⁸⁷ *Greenpeace, SC* at [76]; [103]; [114-116].

⁸⁸ *Greenpeace, SC* at [76].

⁸⁹ *Greenpeace, SC* at [126-127].

⁹⁰ *Greenpeace, SC* at [126-127].

69. The question is not whether the ends justify the means, rather in making a decision to protect the environment an organisation may advocate for any number of policies some aspects of which may be demonstrably beneficial to the environment. However, the advancing of some policies will involve diverse consequences, and the Board may have no adequate means of judging the public benefit of those policies. Whether promoting the policies is in fact beneficial is a matter of opinion in which public benefit is not self-evident and which may not be capable of demonstration by evidence.⁹¹
70. Therefore, where an organisation promotes a policy (or policies) that they consider protects or improves the environment, the organisation must demonstrate that the policy will advance a charitable public benefit. In doing so, the organisation must establish that the wider consequences of promoting the policy will not prejudice the recognition of the policy as advancing a charitable public benefit within the scope of previous court decisions.
71. The Board considers the Society has a charitable end goal. The Society's stated purposes express intent to protect and preserve the New Zealand environment.⁹² Their purposes are also expressed as educational: raising public awareness about the consequences of seabed mining, informing the community of seabed mining proposals, being a vehicle for objective scientific and legal research endeavours, and creating opportunities for education and environmental and marine issues.⁹³ The Board considers causes directed towards the ends of environmental protection and education may be charitable, depending on the nature of the advocacy.
72. The Board also considers the manner in which the Society carries out activity is capable of being charitable. The Society's activities include participating in decision making, seeking expert opinions and analysis, commissioning and disseminating research, making media releases, and taking court action where appropriate. These activities are within the spirit of the public participation in decision making contemplated as potentially charitable by the Supreme Court in *Greenpeace SC*.⁹⁴

⁹¹ *Greenpeace, SC* at [101].

⁹² Clauses 3(b),(c),(e),(g), and (h).

⁹³ Clauses 3(a),(b), (d), and (k).

⁹⁴ *Greenpeace, SC* at [71] and [103].

73. However, the primary focus of the Society's advocacy is on seabed mining proposals, and promoting a point of view in relation to those proposals. The point of view, reflected in the language of the website⁹⁵ and submissions⁹⁶ is that seabed mining is an environmentally destructive industry that should be prevented in New Zealand. The Society has noted it is both seeking for the Government to change its position in relation to how the Government approaches seabed mining holistically,⁹⁷ and retain the status quo in relation to some aspects of the regulation of seabed mining.⁹⁸ The courts have confirmed that both

⁹⁵ The language of the website includes: "KASM is a vehicle to help coastal residents learn about any current and future proposals, and to illustrate the deep public opposition to these type of operations"; "our objectives are to raise public awareness of current proposals to mine the New Zealand seabed and coastline, educate and inform the public as to the consequences of those proposals, and ensure that current and future governments stop considering these and any future seabed mining operations[emphasis added]"; <http://kasm.org.nz/inside-kasm/about/>; see also: Banners on the Beach – Say "No to Deep See Oil" [sic] <http://kasm.org.nz/inside-kasm/activities/archive/>; the template petition on the Society's website "I respectfully request...enacting legislation that prohibits iron sand mining of the seabed." <http://kasm.org.nz/stopsandmining/assets/Template-KASM-Petition-Template.pdf>; http://kasm.org.nz/stopsandmining/assets/Petition-DBSCH_SCR_4063_5956-Petition-of-William-McNatty.pdf; <http://kasm.org.nz/latest/lets-rethink-this-whole-seabed-mining-thing/>; "We humans have imposed all kinds of hell on the natural world and our cousin species. Seabed mining, as proposed by TTR, is potentially among the worst of those hells." <http://kasm.org.nz/latest/weve-done-our-best-and-now-its-up-to-the-epa-to-do-the-right-thing/> [accessed 11/05/2016]

⁹⁶ The Society's submissions to Court on the CRP, TTR applications for consent and in relation to its petition, include: "KASM focuses solely on seabed mining...While KASM is focussed on the impact of seabed mining on the ocean environment, KASM is generally opposed to any unsustainable and damaging practices in the coastal and marine area"; "...KASM is calling for a moratorium on all seabed mining in New Zealand waters until we have a clear understanding of the risks and impacts..."; Duncan Corrie and Ruby Haazen, *Legal Submissions by KASM, Greenpeace and Deep Sea Conservation Coalition* (29/10/2014) at [6] Duncan Currie, *Opening Submissions for KASM, Greenpeace and the Deep Sea Coalition to the CRP Application for Consent* (26/09/2014) at [14]; "In October 2013 KASM launched a call for a Moratorium on Seabed Mining, which gained the support from a number of organisations including Forest & Bird, Greenpeace, Eco, Sea Shepherd, Surfing Taranaki, Surf Break Protection Society and the Green Party"; at [30] "...I respectfully ask the committee to consider the current state of the planet...the state of the world's oceans...and whether it is appropriate, in 2014 to consent to this activity? An activity that promises little more than further destruction and degradation of our life supporting marine environment." *Submissions for KASM on the CRP application by Phil McCabe* (29/10/2014); "...current application of the Resource Management Act (RMA) 1991 to seabed mining activities is not sufficiently thorough, as not all applications come within the scope of the RMA. The petitioners have asked that no minerals permits be issued until a comprehensive oceans policy is formulated and implemented, and no permits be issued unless data can be produced to show that no environmental harm will be done to coastal marine ecosystems." Petitions of 2005/11 of William McNatty on behalf of Kiwis Against Seabed Mining (KASM): available on www.kasm.org.nz [accessed 11/05/2016].

⁹⁷ See for example: the Society's suggested submissions for the new Resource Legislation Amendment Bill <http://kasm.org.nz/rma-submission/> [accessed 11 May 2015].

⁹⁸ See for example: Report of the Local Government and Environment Committee, Petition 2005/111 of William McNatty on behalf of Kiwis Against Seabed Mining Inc (KASM) and 15,113 others (2015) http://www.parliament.nz/en-nz/pb/sc/documents/reports/48DBSCH_SCR4063_1/petition-20050111-of-william-leslie-mcnatty-on-behalf [accessed 13/04/2016] ("the Society's petition"); "Right now are considering lengthy submissions by companies and lobbyists to weaken

advocating for the status quo and advocating for a change in position constitute advocacy purposes.⁹⁹ The focus for the Society is ensuring a consideration of social and environmental impacts is prioritised in decision making, particularly to ensure that seabed mining is prohibited until thorough research is undertaken to understand the potential implications of seabed mining.¹⁰⁰

74. The courts have accepted the protection of the environment is acceptable in relation to promoting afforestation, the making of domains or national parks and the promotion of a sustainable standard of living.¹⁰¹ By analogy, the Board has also previously recognised purposes to protect the quality of rivers, protect native species from pests or other threats, and other purposes directed at tangible environmental protection. Accordingly, purposes to promote a point of view in relation to improving or protecting the marine environment may be capable of being charitable.
75. However, the Board considers an organisation that seeks to stop or limit industrial activity which may threaten the environment may be distinguished from the previous environmental cases, when all the consequences are taken into account. In considering whether advocating for nuclear disarmament could be charitable, the Supreme Court looked to the means Greenpeace of New Zealand Incorporated had used to implement its end of promoting peace.¹⁰² It is accepted that New Zealand encouraging other nations to disarm their nuclear weapons may better maintain a peaceful world and protect the environment, Greenpeace advocated for New Zealand to walk away from the Nuclear Non-Proliferation Treaty, which has at its basis an acceptance of the use of nuclear power.¹⁰³ The Supreme Court considered the potential consequences of promoting nuclear disarmament, from local policy choices to changing New Zealand's approach in relation to Treaty agreements, and suggested there would be no adequate means of judging the public benefit of such promotion.¹⁰⁴
76. The Board considers the facts for the Society are similar. Opposing or prohibiting seabed mining may have wider economic and environmental consequences for New Zealand. If seabed mining is prevented until all impacts can thoroughly be assessed, a moratorium may be necessary, which may be detrimental to communities and businesses relying on funds or the products drawn from seabed mining. CRP in its submissions noted potential environmental benefits of using

the laws that govern our oceans so that they can start mining the seabed. That is simply unacceptable!" <http://kasm.org.nz/latest/lets-rethink-this-whole-seabed-mining-thing/> (26/05/2015).

⁹⁹ *Greenpeace, SC* at [75]; *Molloy* at 695-696.

¹⁰⁰ The Society's petition at 1-2.

¹⁰¹ *Re Bruce* [1918] NZLR 16 at 32; *Re Centrepont Community Growth Trust* [2000] 2 NZLR 325 at 338: "A standard of living which enhances and sustains a quality of life that is not exploitative of the environment or people and that is permanent, healthy and sustainable for future generations."

¹⁰² *Greenpeace, SC* at [100].

¹⁰³ *Greenpeace, SC* at [101].

¹⁰⁴ *Greenpeace, SC* at [100].

local phosphate, rather than importing it or using environmentally harmful alternative fertilisers.¹⁰⁵ In response to the petition submitted by William McNatty on behalf of the Society, the Local Government and Environment Committee considered “a blanket ban on [seabed minerals] exploitation is unjustified.”¹⁰⁶ The Board considers given the alternate points of view, in this case, the Board cannot determine a public benefit in preventing seabed mining.

77. The Board notes the Society's position that its point of view on seabed mining reflects an application of the precautionary principle which is, and has been, accepted by decision makers in relation to the litigation the Society is involved in.¹⁰⁷ However, the Board does not consider it is in a position to assess whether a moratorium on seabed mining would reflect an application of the precautionary principle accepted by the New Zealand government. We note the Supreme Court considered the application of a precautionary approach in *Sustain our Sounds Incorporated v The New Zealand King Salmon Company Limited*¹⁰⁸:

The secondary question of whether the precautionary approach requires an activity to be prohibited until further information is available, rather than an adaptive management or other approach, will depend on an assessment of a combination of factors:

- (a) the extent of the environmental risk (including the gravity of the consequences if the risk is realised);
- (b) the importance of the activity (which could in some circumstances be an activity it is hoped will protect the environment);
- (c) the degree of uncertainty; and
- (d) the extent to which an adaptive management approach will sufficiently diminish the risk and the uncertainty.

The overall question is whether any adaptive management regime can be considered consistent with a precautionary approach.

78. The Board considers the question of what approach the government should take towards seabed mining in the light of a precautionary approach is a complex question that requires in-depth consideration of the environmental risk of seabed mining, the importance of seabed mining, the degree of uncertainty, and the extent to which an adaptive management regime or another approach could sufficiently diminish the risk. We do not consider the Board is in a position to assess whether seabed mining itself is for the public benefit, or not.

¹⁰⁵ Chatham Rock Phosphate website, <http://www.rockphosphate.co.nz/new-page-1/> [accessed 13/04/2016].

¹⁰⁶ The Society's petition, 6.

¹⁰⁷ Refer to the Society's letter of 9 April 2015 at [36].

¹⁰⁸ *Sustain our Sounds Incorporated v The New Zealand King Salmon Company Limited* [2014] NZSC 40 at [129].

79. The Board acknowledges some advocacy in opposition to seabed mining may be charitable, where it can be demonstrated environmental impacts cannot be mitigated, and the potential wider consequences are minimal. In declining the CRP application, the Decision Making Committee noted “the proposal would create significant and permanent adverse effects on the environment which are incapable of being avoided, remedied or mitigated”¹⁰⁹. The Decision Making Committee was also not persuaded that reliance could be placed on the proposal’s economic benefits as a potential offsetting factor.¹¹⁰ Therefore in this case, the Board considers that the advocacy opposing seabed mining could be charitable, taking into account all of the consequences.
80. However, it is not possible for the Board to determine that all advocacy opposing seabed mining would necessarily result in a public benefit. In March 2015, the Society stated “its next phase of work is to have a moratorium placed on seabed mining in New Zealand waters.”¹¹¹ Although the Board accepts preventing seabed mining would protect the environment, the Board does not consider a charitable public benefit can be determined in a moratorium on seabed mining consistent with the Society’s submissions. The Board notes there may be an established public benefit in permitting seabed mining, analogous with case law on the promotion of industry.¹¹²
81. New Zealand’s Energy Strategy states an intention for New Zealand to “be a highly attractive global destination for petroleum exploration and production investment”, and notes “the Government will ensure regulatory settings maximise the return to New Zealanders while also promoting safety, preventing harm and requiring environmentally-responsible practices.”¹¹³ The Board considers there is not sufficient evidence in the public domain to establish a public benefit in prohibiting seabed mining by applying a strict application of the precautionary approach that the Society advocates for.

¹⁰⁹ Environmental Protection Authority, *Decision on Marine Consent Application, Chatham Rock Phosphate Limited, To mine phosphorite nodules on the Chatham Rise* (February 2012): http://www.epa.govt.nz/eez/EEZ000006/EEZ000006_CRP%20Final%20Version%20of%20Decision.pdf (“EPA Decision on CRP”) [accessed 13/04/2016].

¹¹⁰ EPA decision on CRP, [xvi].

¹¹¹ <http://kasm.org.nz/latest/lets-rethink-this-whole-seabed-mining-thing-2/> (3/3/2015) [accessed 22/04/2016].

¹¹² See for example: *Grain Growers Limited v Chief Commissioner of State Revenue* [2015] NSWSC 925; *Inland Revenue Commissioners v Oldham Training Enterprise Council* (1996) 69 TC 231 applied in New Zealand in *Canterbury Development Corporation v Charities Commission* [2010] 2 NZLR 707.

¹¹³ *New Zealand Energy Strategy 2011–2021 potential, Developing our energy and the New Zealand Energy Efficiency and Conservation Strategy 2011–2016* <https://www.eeca.govt.nz/assets/Resources-EECA/nz-energy-strategy-2011.pdf> [accessed 11/05/2016], page 7.

82. As identified by the Society, a number of seabed mining operations have been approved, and according to the Society “far higher levels of damage than predicted” have occurred.¹¹⁴ The Board notes decision making bodies, empowered with the statutory responsibility to weigh and consider environmental impacts, as well as wider consequences, has already decided these activities were acceptable.¹¹⁵ The Board does not consider it is in a position to make an assessment that advocacy against seabed mining activity approved by such a body would be a charitable public benefit.
83. The Board considers on the balance of benefits and detriments, it cannot determine a charitable public benefit in the Society’s point of view on prohibiting all seabed mining until environmental impacts can be identified and prevented. Existing political and legal processes are in place to minimise environmental and social impacts. The Board acknowledges the role of the Society in promoting participation in decision making processes, and identifying and disseminating the potential environmental impacts of seabed mining. However, the Board considers on balance that the wider consequences in prohibiting and opposing seabed mining are too varied to assess the Society’s advocacy against seabed mining as clearly advancing a charitable public benefit; and consider any public benefit is unlikely to be capable of demonstration by evidence.
84. As discussed above the Board notes that some of the activities of the Society are capable of being charitable.¹¹⁶ The Board is willing to consider an application that separates educational activity and activity that advocates through providing objective evidence to decision makers from the focus on opposing seabed mining.

D. The Society’s other submissions

85. The Society has stressed that it only seeks to prevent non-essential sea mining, not all sea mining. While the Board accepts that in its mission statement the Society has used the term “non-essential”, we have not identified the support of any seabed mining in its activities, and the rest of the language in the mission

¹¹⁴ <http://kasm.org.nz/seabed-mining/impacts/> [accessed 13/04/2016]; see specifically: <http://kasm.org.nz/seabed-mining/seabed-mining-new-zealand-case-studie/> [accessed 13/04/2016].

¹¹⁵ For example: Sand mining at Pakiri Beach was extended for a further 14 years by the Environment Court in 2006. In that case the Environment Court, despite a disagreement between experts, found that there would not be direct physical effects on the system at [342], and also examined whether a precautionary approach should be adopted, and decided against it, noting “to infer from the difference among the experts that scientific uncertainty or ignorance exists would not be warranted.” *Sea-Tow Limited & Anor v Auckland Regional Council* NzEnvC A066/2006, 30 May 2006 at [463-467]; discussed at <http://kasm.org.nz/seabed-mining/seabed-mining-new-zealand-case-studie/> [accessed 13/04/2016].

¹¹⁶ See above at [53] and [79].

statement,¹¹⁷ name of the organisation, and its activities appear to support the view that any seabed mining would so be harmful to the environment it should be prevented. The Board therefore does not consider the fact that the Society has used the term "non-essential" to be determinative in the assessment of whether the Society's purpose to promote a point of view on seabed mining advances a charitable public benefit.

E. Section 5(3)

86. As discussed above, the Board considers the Society has a non-charitable purpose to advocate against seabed mining.¹¹⁸ Applying the decision of the Supreme Court in *Greenpeace SC*, the Board does not consider this is a charitable purpose. However the Board accepts that some of the Society's activities to be charitable, specifically where the advocacy is focussed on providing expert, objective evidence to decision makers with the end goal of protecting the environment, and some of the educational matters on its website. Accordingly, the Board has considered whether the Society's non-charitable advocacy could be considered ancillary under section 5(3) of the Charities Act.
87. The legal definition of "ancillary" requires that: (i) the purpose is sufficiently connected to its dominant charitable purposes; and (ii) the activities directed to that purpose are incidental as a proportion of the organisation's overall endeavour. The question of whether a purpose is sufficiently connected is the extent to which it is necessary to engage in the activity to advance the group's charitable purposes.¹¹⁹ The question of whether a purpose is incidental is not whether there are a certain number of pages on the website, or the quantity of submissions. 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."¹²⁰

¹¹⁷ "...ensure that current and future governments stop considering these and any future seabed mining operations."

¹¹⁸ Refer to Section C.1. above.

¹¹⁹ *Greenpeace, HC* at [74].

¹²⁰ *Greenpeace, HC* at [73].

88. The Society submits its advocacy activities are ancillary to its educational purposes. Specifically, the Society noted from its engagement with the TTR and CRP applications, it was obvious more research is needed into the Exclusive Economic Zone of New Zealand before any seabed mining activities could proceed. It argued this was implicitly supported by the Decision Making Committees in both cases, and the expert evidence relied on in formulating their decision.¹²¹ The proportion of activity that is explicitly directed towards a moratorium appears to be only small part of the website. However, the Board does not consider advocating for a moratorium is a necessary means of either protecting the environment, nor educating the public on seabed mining issues, consistent with the previous cases.
89. Where the Society provides expert reports to decision makers, and the public, on the impacts of seabed mining, the Board considers they may advance charitable purposes. We accept this activity is a significant part of the Society's endeavour indicated by 71% of its expenditure in the financial year ending 31 March 2015. However, the financials from the previous four financial years indicate most of the expenses have been related to the promotional activity, including posters, stickers, t-shirts, web-design and meeting expenses.¹²²
90. Moreover, the Board considers the way in which the Society's activities are engaged in to "inform and educate" on seabed mining proposals have been aimed at advocating for the prevention of seabed mining. The Board notes that much of the material on the website replicates information available from other sources, and thus does not qualify as education.¹²³ Although much of the website conveys environmental risks of seabed mining to the public, including opinion pieces on the TTR and CRP decisions, it does so in order to support its position to advocate for the prevention of seabed mining, and we do not consider the information on the website can be separated from the advocacy purpose. The exceptions are specific examples of educational materials, but these are only a small part of the overall website.¹²⁴ In addition, the submissions of the entity to Court, other than the expert evidence, demonstrate the Society's points of view, and the submissions otherwise have advocated against seabed mining.¹²⁵

¹²¹ The Society's letter of 9 April 2015.

¹²² Kiwis Against Seabed Mining, Financial Statements for the Years Ending 31 March 2010-2014 [publically available on the Register of Incorporated Societies at www.societies.govt.nz].

¹²³ *Draco* at [54]; see section C2.2. above.

¹²⁴ For example: material that is likely to be accepted is material for school children to understand ocean life: <http://kasm.org.nz/resources/playground/> [accessed 29/09/2016]; and Currie D, "The Summary of the New Zealand Environmental Protection Authorities (EPA's) Decision on the Chatham Rock Phosphate Deep Sea Mining Application" <http://kasm.org.nz/stopsandmining/assets/Summary-of-NZ-Chatham-Rock-Seabed-Mining-Decision-1.pdf> [accessed 29/09/2016].

¹²⁵ See above at para [73].

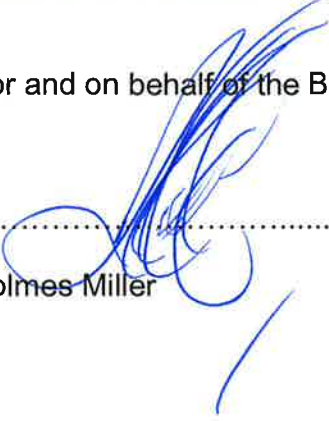
91. On the balance of the activities of the Society, the Board considers the Society has an independent purpose to promote a point of view where the charitable public benefit cannot be established.

F. Determination

92. Accordingly, the Board's determination is that the Society does not qualify for registration under the Act and the application for registration should be declined.

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

Signed for and on behalf of the Board


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Roger Holmes Miller

15th December 2016
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Date 