Case Comment: *Re Greenpeace of New Zealand Incorporated* [2014] NZSC 105 [6 August 2014]

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This has been a much awaited decision and marks the end of a long journey with regard to matters relating to political activities and charitable trusts, as well as considering illegal activities and charitable purpose.

For a charity to be recognised as charitable at law in New Zealand, and thus take advantage of the fiscal and social benefits of this recognition, an entity must apply to the Department of Internal Affairs – Charities[1] to register as charity. An entity must demonstrate that it falls under one of the four heads of charity, which find their history in the seminal case of *The Commissioners for Special Purposes of the Income Tax v Pemsel*[2] and now s 5(1) of the Charities Act 2005, which states:

> 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.

Therefore each purpose must be charitable, although, a non-charitable purpose will not automatically negate the overall charitable purpose of an entity so long as that purpose is ancillary to the charitable purpose of the entity; it should not be an independent purpose.[3] Section 5(3) of the Act gives an example of advocacy as being a non-charitable purpose. Advocacy of a particular view may be construed as "political", and up until this decision, it had long been held in New Zealand that that if an organisation has main or dominant purposes that are political in nature, then it will be denied charitable status, although it has been asserted that the political purpose doctrine has existed for longer than that.[4]

The rationale advanced to support the political purpose doctrine is that courts are unable to judge the public benefit of a purpose;[5] all purposes must have public benefit.[6]

The basis of the appeal to the Supreme Court was to consider the extent to which purposes that are political can be charitable, and that purposes or activities that are illegal or unlawful preclude charitable status.

In a split decision, the majority held that the development of a stand-alone doctrine of the exclusion of political purposes, which they acknowledged has been a relatively recent

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[1] Originally the Charities Commission, which was wound up as of 1 July 2012, and moved its core functions to the Department of Internal Affairs – Charities.

[2] *The Commissioners for Special Purposes of the Income Tax v Pemsel* [1891] AC 531 at 583.

[3] Charities Act 2005, s 5(3).

[4] *Bowman v Secular Society* [1917] AC 406 at 442; *Molloy v Commissioner of Inland Revenue* [1981] 1 NZLR 688 (CA); *Re Draco Foundation (NZ) Charitable Trust* (2011) 25 NZTC 20-032 (HC); *Re Collier (Deceased)* [1998] 1 NZLR 81.

[5] *Bowman v Secular Society* [1917] AC 406 at 442; Juliet Chevalier-Watts "The Law of Charity" (Wellington, ThomsonReuters, 2014) at Chapter 7 (publication forthcoming).

[6] Charities Act 2005, s (5).

development and based on little authority,[7] was neither necessary or beneficial.[8] In other words, s 5(3) of the Charities Act does not enact a political purpose exclusion. It provides that non-charitable purposes do not affect charitable purpose, so long as they are no more than ancillary, and the inclusion of "advocacy" in the legislation is merely an example of an ancillary non charitable purpose. However, if an object is the promotion of a cause that cannot be charitable because the attainment of the end promoted, or the means of the promotion itself does not have the requisite public benefit, then the entity will not qualify for registration as charitable.[9] On the matter of illegal activity, the Court unanimously held that an entity that had purposes properly characterised as illegal would not be charitable. However, illegal activities that are not deliberately undertaken or co-ordinated by the entity are unlikely to amount to a purpose and therefore may well not amount to a disqualifying purpose.[10] For the purposes of this case comment, the issue of political purposes will be the focus.

The majority of the Court asserted that it was difficult to reconcile supporting a blanket exclusion of political purposes when it was difficult to construct any adequate theories or principles to support such an approach.[11] Indeed, should such a restriction apply, then this would risk hindering the responsiveness of the law to changing circumstances of society.[12] Therefore the better approach, as suggested by the majority, is not a doctrine of exclusion of political purposes, but rather an acceptance that objects that may entail advocacy for the change in the law are simply a facet of whether purposes advance the public benefit in a way that is recognised to fall within the spirit and intendment of the Statute of Elizabeth 1601.[13]

It was noted however that perhaps most often advancement of causes will not be charitable as it is not possible to say whether or not views promoted would be of benefit in the way in which the law recognises as charitable, which echoed the dissenting views of Kiefel J in *Aid/Watch Inc v Commissioner of Taxation*,[14] a recent Australian High Court decision concerning political purposes and charitibility, where her Honour stated that "reaching a conclusion of public benefit may be difficult where the activities of an organisation largely involve the assertion of its views."[15] Therefore in the majority of the Supreme Court's view, whilst it may be accepted that there are circumstances in which advocacy of certain views may not be charitable, this does not justify a rule that all non-ancillary advocacy is properly characterised as non-charitable.[16]

The majority criticised the approach of the Court of Appeal, where that Court suggested that views that were generally acceptable may be construed as charitable, whilst highly

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[7] *Greenpeace of New Zealand Incorporated*, above n **, at [59] referring to paragraphs [32]-[47].
[8] *Greenpeace of New Zealand Incorporated*, above n **, at [59].
[9] *Greenpeace of New Zealand Incorporated*, above n **, at [116].
[10] *Greenpeace of New Zealand Incorporated*, above n **, at [109] – [112].
[11] *Greenpeace of New Zealand Incorporated*, above n **, at [69].
[12] *Greenpeace of New Zealand Incorporated*, above n **, at [70]-[71]; see also *Latimer v Commissioner of Inland Revenue* [2002] 3 NZLR 195 (CA); *Jackson v Phillips* (1867) 96 Mass 539, 14 Allen 539 (Mass SC).; Charities Act 2006 (UK), s 2(2)(h).
[13] *Greenpeace of New Zealand Incorporated*, above n **, at [72]; the Statute of Elizabeth 1601 (the Charitable Uses Act 1601) has long been repealed but its preamble set out a non-exhaustive list of charitable purposes. Contemporary charitable purposes find their history in this preamble.
[14] *Aid/Watch Inc v Commissioner of Taxation* [2010] HCA 42.
[15] *Greenpeace of New Zealand Incorporated*, above n **, at [73] citing *Aid/Watch Inc v Commissioner of Taxation* [2010] HCA 42 at [69].
[16] *Greenpeace of New Zealand Incorporated*, above n **, at [74].

controversial views would not. The majority concluded that such an approach would likely exclude much promotion of change and instead favour charitable status based on the majoritarian assessment and the status quo. An unpopular cause should not affect its charitable status, and therefore lack of controversy equally should not be determinative in assessing charitability.[17]

The majority concluded the Court of Appeal treating the lack of controversy in New Zealand about the goals of nuclear disarmament and the elimination of weapons of mass destruction as determinative of the question as to whether the promotion of these ends was charitable was not correct. The focus should have been on the manner of the promotion. Since the educational objects of Greenpeace are conducted through a distinct charitable trust, any educational matters relating to nuclear disarmament and eliminating weapons of mass destruction seems unlikely to be key to the promotional effort. The focus on direct action and advocacy on the entity's website might indicate the main means of promotion, but, a standalone object must be of public benefit. Indeed, whilst advocacy or similar conduct may be meet such public benefit requirements, such a finding will depend on the wider context. This wider context requires closer consideration than that which was brought to bear in the present case however.[18]

As a result, the majority concluded that the matter of the charitable nature of Greenpeace's purposes had not been considered on the correct basis. The Court of Appeal acknowledged that Greenpeace had made changes to its objects, which makes it necessary for Greenpeace to provide further evidence about its activities. This was the basis for returning the case to the Board of the Department of Internal Affairs – Charities. It is proper for the Board to assess charitable purpose in the first instance. Therefore, in the majority's view, the correct course of action is to remit the application for reconsideration in light of the changes made to Greenpeace's objects and the reasonings given by the Supreme Court.[19]

The dissenting Judges, however, did not concur with the determination of charitable purpose. They could not reconcile the notion that political activity could be charitable within the meaning of s 5(3) of the Act. Instead, their Honours determined that it was the intention of the legislature to codify this aspect of charity law because this section presupposes that advocacy is not charitable unless it is ancillary to that charitable purpose. Therefore, they could see no reason to depart from the ordinary language of s 5(3) of the Act.[20]

In conclusion therefore, the majority of the Supreme Court confirmed that a political purpose exclusion should no longer be applied in New Zealand because political and charitable purposes are not mutually exclusive in all circumstances. Section 5 of the Charities Act 2005 does not enact a political purpose exclusion with an exception if political activities are no more than ancillary. Rather it provides an exemption for non-charitable activities if they are ancillary. However, there is a continued requirement for dominant purposes to meet the

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[17] *Greenpeace of New Zealand Incorporated*, above n **, at [75]-[76].
[18] *Greenpeace of New Zealand Incorporated*, above n **, at [102]-[103].
[19] *Greenpeace of New Zealand Incorporated*, above n **, at [104].
[20] *Greenpeace of New Zealand Incorporated*, above n **, at [121] – [127].

public benefit test to ensure that they are charitable purposes.[21] In addition, illegal activities are not charitable purposes and therefore would disqualify an entity from obtaining registered charitable status. However, breaches of law that are not deliberately undertaken or co-ordinated by the entity are unlikely to amount to a purpose. Thus assessment of illegal purpose is a matter of fact and degree.[22]

This is a welcome case because it provides some clarity in New Zealand relating to political purposes and charitable purposes, which has been much needed. This then brings New Zealand charity law more in line with Australian charity law where the political purpose doctrine is no longer acknowledged.[23] Whilst there may be concerns that the *Greenpeace* decision will open the floodgates to registering as charitable entities that would not previously have been eligible for registration as charities, because of their political activities, it seems unlikely that this would happen. The decision still places heavy emphasis on the public benefit requirement, and as the majority of the Court pointed out, not all stand alone or dominant political purposes will be charitable, because the public benefit will not be ascertainable. Therefore, overall, this is a timely decision, that now provides more certainty in this particular aspect of charity law.

[21] *Greenpeace of New Zealand Incorporated*, above n **, at [3].
[22] *Greenpeace of New Zealand Incorporated*, above n **, at [111].
[23] *Aid/Watch*, above n **.