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WEEKLY COMMENT: FRIDAY 29 AUGUST 2014

1. In Weekly Comment 16 August 2013 I reviewed the Court of Appeal decision in *Re Greenpeace of New Zealand Incorporated* [2012] NZCA 533; (2012) 25 NZTC 20-153. Greenpeace appealed to the Supreme Court because it disagreed with the views expressed by the Court of Appeal relating to:

   (a) The nature and scope of the expression "charitable purpose" in New Zealand; and

   (b) The question of whether involvement by Greenpeace in an illegal or unlawful activity would be sufficiently material to preclude registration or justify deregistration.

2. The Supreme Court judgment was released on 6 August 2014: *Re Greenpeace of New Zealand Incorporated* [2014] NZSC 105. By a majority (Elias CJ, McGrath and Glazebrook JJ) the Supreme Court concluded that:

   (a) A "political purpose" exclusion should no longer be applied in New Zealand; instead the enquiry should focus on whether a purpose is of public benefit within the sense the law recognises as charitable.

   (b) Section 5 of the *Charities Act 2005* provides an exemption for non-charitable activities if ancillary and does not enact a political purpose exclusion with an exemption if political activities are no more than "ancillary".

   (c) The Court of Appeal's conclusion that an object "to promote nuclear disarmament and the elimination of weapons of mass destruction" was charitable was wrong.

   (d) Illegal activity may disqualify an entity from registration when it indicates a purpose which is not charitable even though such activity would not justify removal from the register of charities under the statute.

3. William Young and Arnold JJ dissented. In their view s. 5 of the *Charities Act 2005* does effectively enact a political purpose exclusion and "judges are usually not well-placed to determine whether the success of a particular cause would be in the public interest" [125]. However, they agreed with the third and fourth conclusions that the promotion of nuclear disarmament was not charitable and that illegal activity could disqualify an entity from registration.

4. The case is worth reviewing because it sets out and discusses the authorities in this difficult area of the law relating to charities and sets the precedent in New Zealand for a political purpose to not be excluded from being a charitable cause for that reason alone.

The discussion on there being no "political purpose exclusion"

5. In order to have charitable status, there must be a charitable purpose in the sense of coming within the spirit and intendment of the preamble to the *Statute of Charitable Uses Act 1601* (for a good discussion of what is involved in the preamble, refer to Blake Bromley's article *1601 Preamble: The State's agenda for charity*). In order to be within the "spirit and intendment" of the preamble, "one must find something charitable *in the same sense* as the recited purposes are charitable".

6. In 1891 Lord Macnaghten in *The Commissioners for Special Purposes of the Income Tax v Pemsel* [1891] UKHL 1 organised the cases into the classification which was adopted in earlier tax legislation in New Zealand and which is now expressed in s 5(1) of the *Charities Act 2005*: **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.

7. Greenpeace's appeal concerned the fourth category: any other matter beneficial to the community. In particular, Greenpeace argued that objects that are political are not excluded from being charitable under the law in New Zealand, and the only question is whether the purposes of an entity are charitable within the sense accepted by the common law. Additionally, it noted that the majority in the High Court of Australia, in *Aid/Watch Inc v Commissioner of Taxation* [2010] HCA 42, had gone further and treated contribution to public debate concerning charitable ends (in that case the relief of poverty abroad and education about poverty) as of public benefit and charitable in itself, while leaving open the question whether generating public debate in relation to other matters could also be charitable.

8. New Zealand has preferred the more traditional approach of requiring objects of benefit to the public still to be charitable within the spirit of the cases based on the "very sketchy list in the statute of Elizabeth": *National Anti-Vivisection Society v Inland Revenue Commissioners* [1947] UKHL 4 following *Morice v Bishop of Durham* [1805] EWHC Ch J80. This was the approach followed in *Latimer v Commissioner of Inland Revenue Revenue* [2002] NZCA 121. The majority in the Supreme Court noted at [29] that:

   "A single test may have the attraction of simplicity but loses the concept of charity which has always been essential. Identifying what is of public benefit without restriction to the kind of objects held to be charitable would set up a broad and less controlled assessment which could increase the entities entitled to charitable status. As was recognised in Canada by Iacobucci J when delivering the majority judgment of the Supreme Court in *Vancouver Society of Immigrant and Visible Minority Women v Minister of National Revenue* [1999] 1 SCR 10 at [200], adoption of a single test of "public benefit" would "constitute a radical change to the common law and, consequently, to tax law"."

9. Therefore, the Supreme Court disagreed with the Court of Appeal's acceptance that the promotion of peace (in the form of the promotion of nuclear disarmament) was capable of being a charitable purpose on its own, merely because such a view is generally acceptable in New Zealand.

10. The Supreme Court noted that the difficulty in treating a political purpose on its own as a charitable cause was explained as follows by Lord Bramwell, dissenting in the result in Pemsel:

    "… And I believe in all cases of propagandism there is mixed up a wish for the prevalence of those opinions we entertain, because they are ours."

11. However, the Supreme Court concluded that charitable purpose and political purpose are not mutually exclusive, and an exclusion of political purpose from being a charitable purpose is unnecessary.

12. The majority in the Supreme Court first discussed the political purpose exception as it has been applied to date in New Zealand, mainly in terms of the principal authority applied by the Court of Appeal: *Molloy v Commissioner of Inland Revenue* [1981] 1 NZLR 688(CA), which concerned a tax deduction claimed for a donation to the Society for the Protection of the Unborn Child. The Court held that a main object of the Society was political and, therefore, the application of its funds cannot be said to be principally for charitable purposes. They said:

    "In summary, the political purpose exclusion recognised to date in New Zealand excludes non-ancillary advocacy for or promotion of ends, even those charitable in themselves. A blanket exclusion of this sort means that advocacy (including by such means as litigation) can be undertaken by charitable organisations only when ancillary to charitable purpose, as was the conclusion of Ronald Young J in the recent High Court decision of *Re Draco Foundation (NZ) Charitable Trust* [2011] NZHC 368."

13. The majority in the Supreme Court discussed what actually amounts to a "political purpose". In *National Anti-Vivisection Society*, although concluding that promoting an end to vivisection was not for the public benefit, the House of Lords confined the political purpose exclusion to promotion of legislation "because the law would "stultify itself" if it could be held that a change in law was for the public benefit and the courts would be "usurping the function of the legislature" if they recognised a purpose to change the law as charitable."

14. The majority in the Supreme Court stated that there is no reason why there should be any distinction between promoting legislative change and promoting change in government policy, following Slade J in *McGovern v Attorney-General* [1982] Ch 321 (Ch). Furthermore, "in the circumstances of modern participatory democracy and modern public participatory processes in much administrative and judicial decision-making, there is no satisfactory basis for a distinction between general promotion of views within society and advocacy of law change (including through such available participatory processes). That was a point accepted by Strayer JA in *Human Life International In Canada Inc v Minister of National Revenue* [1998] 3 FC 202 (FCA)."

15. Having concluded that there is no real distinction that sets promotion of legislation apart from other types of advocacy, the majority concluded that there is no rule that excludes any type of advocacy. They recognised that:

    "… today advocacy for such ends as human rights or protection of the environment and promotion of amenities that make communities pleasant may have come to be regarded as charitable purposes in themselves, depending on the nature of the advocacy, even if not ancillary to more tangible charity. … In the present case the Board has accepted that Greenpeace's object to "promote the protection and preservation of nature and the environment" is charitable. Protection of the environment may require broadbased support

and effort, including through the participatory processes set up by legislation, to enable the public interest to be assessed. In the same way, the promotion of human rights (a purpose of the New Zealand Bill of Rights Act 1990, as its long title indicates) may depend on similar broad-based support so that advocacy, including through participation in political and legal processes, may well be charitable."

16. The Supreme Court are of the view that the better approach is not a doctrine of exclusion of "political" purpose but acceptance that an object which entails advocacy for change in the law is "simply one facet of whether a purpose advances the public benefit in a way that is within the spirit and intendment of the statute of Elizabeth I". However, they accept "that the circumstances in which advocacy of particular views is shown to be charitable will not be common".

17. The majority in the Supreme Court then discussed why s. 5(3) of the *Charities Act 2005* does not contain a general political purpose exclusion. Section 5(3) states:

    "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."

18. The majority stated at [57] that:

    "Section 5(3) is of general application to all ancillary purposes, with "advocacy" being given only as an illustration. The subsection is not expressed as an exclusion of advocacy from charitable purposes in all cases where it is more than ancillary, such as would enact a general political purpose exclusion. There is nothing in the structure and language of the provision or its legislative history to justify the words in parenthesis being treated as excluding any non-ancillary purpose, including advocacy or political activity which would otherwise properly be regarded as charitable…"

Nuclear disarmament and eliminating weapons of mass destruction is not charitable

19. The Supreme Court held that nuclear disarmament and eliminating weapons of mass destruction were not charitable and, therefore, whether the activities undertaken by Greenpeace are no more than ancillary to its charitable purposes will require further assessment.

20. First, the Supreme Court's view is that the promotion of peace has not been established by the authorities to be a charitable purpose: *Re Wilkinson (Deceased), Perpetual Trustees Estate and Agency Co of New Zealand Ltd v League of Nations Union of New Zealand* [1941] NZLR 1065 (SC) where Kennedy J held that the promotion of peace was not charitable, *Parkhurst v Burrill* 177 NE 39 (Mass 1917), an American case where the purposes were of general direct educational benefit and *Southwood v Attorney-General* [2000] EWCA Civ 204 (28 June 2000) where the English Court of Appeal expressed no criticism of *Parkhurst v Burrill* and concluded that the promotion of pacifism was not charitable.

21. Second, the Supreme Court disagreed with the Court of Appeals' assumption that the avoidance of the political purpose exclusion (on the basis that the objects were not controversial) made it unnecessary to consider more closely the manner of promotion. In *Southwood v Attorney-General* the focus in assessing charitable purpose is on how an abstraction such as "peace" or "nuclear disarmament" is to be furthered. The Supreme Court

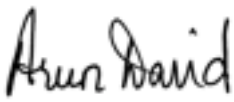
considered at [103] "that the promotion itself, if a standalone object not merely ancillary, must itself be an object of public benefit or utility within the sense used in the authorities to qualify as a charitable purpose".

22. The Supreme Court held that the matter of the charitable status of the purposes of Greenpeace has not been considered on the correct basis. The Court stated at [104] that:

"If it is concluded that the object of promoting nuclear disarmament and the elimination of weapons of mass destruction is not shown to be charitable, then the question whether the activities undertaken by Greenpeace are no more than ancillary to its charitable purposes will require further assessment by the chief executive and Board, as the Court of Appeal required."

23. In summary, the majority in the Supreme Court stated at [116] that:

"If the object of an entity is the promotion of a cause which cannot be assessed as charitable because attainment of the end promoted or the means of promotion in itself cannot be said to be of public benefit within the sense treated as charitable, the entity will not qualify for registration as charitable. That is because it will not be "established and maintained exclusively for charitable purposes". Even if an end in itself may be seen as of general public benefit (such as the promotion of peace) the means of promotion may entail a particular point of view which cannot be said to be of public benefit."



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