In the Supreme Court of New Zealand
I Te Kōti Mana Nui **SC 79/2020**

BETWEEN	**Attorney-General** Applicant
AND	**Family First New Zealand** Respondent

Submissions of the intervenor (Charity Law Association of Australia and New Zealand)

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1. The Charity Law Association of Australia and New Zealand (**CLAANZ**) submits that three arguments on fundamental aspects of charity law are relevant to this appeal:

    a. First, on the proper interpretive approach to discerning the purposes of an entity, it is only in rare cases that an entity will have a non-ancillary political advocacy purpose;

    b. Secondly, the factors to be taken into account in determining whether a political advocacy purpose satisfies charity law's public benefit requirement include benefits associated with the conduct of political advocacy itself, irrespective of the political objectives in question; and

    c. Thirdly, fiscal considerations should not influence decision-makers who must decide whether to recognise a purpose as charitable in law.

2. CLAANZ submits that in these areas New Zealand's charity law has grown confused or is insufficiently developed and is in need of authoritative clarification and restatement by this Court. This appeal offers a rare opportunity for the Court to provide much-needed clarity in respect of key elements of the legal framework within which New Zealand's charity sector, and the Charities Registration Board, must operate.

3. In addition, CLAANZ submits that withdrawing charity status from an entity because the entity engages in political advocacy may

constitute an impermissible interference with the right to freedom of political expression protected by s 14 of the New Zealand Bill of Rights Act 1990 (**NZBORA**).

Purposes, objects and activities

4. Section 13(1)(a) of the Charities Act 2005 (**NZ Charities Act**) provides that a trust qualifies for registration as a charity if, among other things, '*the trust is of a kind in relation to which an amount of income is derived by the trustees in trust for charitable purposes*'. Section 13(1)(b) of the NZ Charities Act provides that a society or institution qualifies for registration as a charity if, among other things, it is '*established and maintained exclusively for charitable purposes*'. Thus, the statutory test for whether an entity qualifies for registration turns on the character of the entity's purposes. This focus on purposes is unsurprising given that charity law developed historically in relation to purpose trusts, and that charitable trusts constituted the main exception to the general rule that purpose trusts were invalid and unenforceable in law.[1]

5. A key question that arises for decision-makers is how to discern the purposes of an entity. See Appendix. In this regard, CLAANZ submits that the orthodox approach is that set out in the judgment of Ellis J of the High Court in *Re The Foundation for Anti-Aging Research and*

[1] See *Vancouver Society of Immigrant and Visible Minority Women v Minister of National Revenue* [1999] 1 SCR 10 (***Vancouver Society***) at [144]. The traditional position in respect of non-charitable purposes was stated in *Morice v Bishop of Durham* (1804) 9 Ves Jun 399, 32 ER 65; (1805) 10 Ves Jun 522, 32 ER 947.

The Foundation of Solid State Hypothermia (***FAAR***).[2] The elements of that approach are as follows:

a. The decision-maker should look first to the stated objects of the entity (as set out, for example, in the trust deed or the constitution). Ascertaining the purposes of an entity is a matter of construction of the constituting document, akin to interpreting other documents such as contracts and statutes. Activities are only relevant in this context if the stated objects are unclear or if there is evidence of activities that displace or belie the stated objects.

b. If the objects are unclear, then the decision-maker may be able to draw inferences about the entity's purposes from extrinsic material, such as the entity's objects and activities taken together.

c. Having ascertained the purposes of the entity, the next question is whether those purposes are exclusively charitable.

d. If the objects clearly disclose only non-charitable purposes, then the decision-maker should conclude that the entity does not have charitable purposes and cannot be registered as a charity.

e. If the objects disclose some charitable and some non-charitable purposes, the decision-maker should consider whether the non-

[2] *The Foundation for Anti-Aging Research and The Foundation of Solid State Hypothermia* (2016) PRNZ 726.

charitable purposes are ancillary to the charitable purposes. If not, the decision-maker should conclude that the entity does not have charitable purposes and cannot be registered as a charity.

f. If the objects disclose charitable purposes, and/or any non-charitable purposes are merely ancillary to those charitable purposes, then the decision-maker should look to the current and proposed activities of the entity to inform the inquiry into registration.

g. If the activities are consistent with the stated purposes, then the decision-maker should conclude that the entity is eligible for registration as a charity.

h. If the objects disclose charitable purposes, and/or any non-charitable purposes are merely ancillary to those charitable purposes, and the activities are not consistent with those purposes, then this is properly considered a case of 'mission drift', and may indeed suggest a breach of legal duty,[3] but does not affect the characterisation of the entity as a charity in light of its purposes.

i. If inconsistent activities disclose unstated non-ancillary non-charitable purposes, then the decision-maker should conclude that the entity does not have only charitable purposes despite

[3] See Trusts Act 2019, ss 24 and 26; Companies Act 1993, s 134; Incorporated Societies Bill 15-1, clause 51.

its objects. This, however, would be an exceptional case in which activities are profoundly unaligned with objects and an entity's whole character is different from what was intended and expressed in the entity's constituent documents.

6. On this approach, an entity whose objects disclose charitable purposes would typically be eligible for registration as a charity, because in most cases an entity's activities are consistent with its objects and in all cases those who govern an entity are under legal duties to act in furtherance of the entity's objects.

7. Relevantly for the present appeal, this would usually be true of entities whose activities include political advocacy undertaken in furtherance of its objects. In *Re Greenpeace of New Zealand Inc* (***Greenpeace***), a majority of this Court stated that '*[a]dvancement of causes will often, perhaps most often, be non-charitable*'.[4] CLAANZ submits that it is difficult to reconcile this statement with the orthodox approach to discerning the purposes of an entity set out by Ellis J in *FAAR*. Where 'advancement of causes' consists of activities undertaken in furtherance of objects that disclose charitable purposes, those activities in no way impede a finding that the entity has charitable purposes.

8. Underscoring this proposition are statements of the Privy Council in *Latimer v The Commissioner of Inland Revenue*. Referring to cases

[4] *Re Greenpeace of New Zealand Inc* [2015] 1 NZLR 169 at [73].

where the pursuit of a charitable purpose generates benefits to a private class, their Lordships stated that:[5]

> *The distinction is between ends, means and consequences. The ends must be exclusively charitable. But if the non-charitable benefits are merely the means or the incidental consequences of carrying out the charitable purposes and are not ends in themselves, then charitable status is not lost.*

9. Indeed, Justice Glazebrook (writing extra-judicially) has suggested that political advocacy might be an especially effective means by which an entity can further its charitable purposes:[6]

> *The potential value of the contribution of charities to law reform should not be underestimated. Charities can offer unique perspectives from a range of sectors from environmental through to social welfare. As the article co-authored by Professor O'Connell puts it, advocacy and political engagement may be 'better conceptualised as an essential, and perhaps the most effective, method of achieving charitable purposes'.*

10. Under s 18(3) of the NZ Charities Act, the Chief Executive of the Department of Internal Affairs is required, when considering an application for registration as a charitable entity to have regard to '*the activities of the entity at the time at which the application is made*' and '*the proposed activities of the entity*'. This provision might be thought to call into question the orthodox approach to discerning purposes in light of objects and activities set out above. However, in *FAAR*, Ellis J made clear that the enactment of s 18(3) did not disturb that orthodox approach but rather reinforced it:[7]

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[5] *Latimer v The Commissioners of Inland Revenue* [2004] 3 NZLR 157 (PC) at [36].

[6] Dame Susan Glazebrook, 'A Charity in All but Law: The Political Purpose Exception and the Charitable Sector' (2019) 42 *Melbourne University Law Review* 632 at 656, citing Joyce Chia, Matthew Harding and Ann O'Connell, 'Navigating the Politics of Charity: Reflections on *Aid/Watch Inc v Federal Commissioner of Taxation*' (2011) 35 *Melbourne University Law Review* 353 at 366.

[7] *FAAR*, above n 2 at [86].

> *It seems unlikely that the enactment of s 18(3) was intended materially to change* [the orthodox] *position. In* Re Greenpeace *the Supreme Court said (at [14]) no more than that s 18(3) 'makes clear' that the purposes of an entity 'may be inferred from the activities it undertakes'. That seems wholly consistent with the dicta I have set out above. It is certainly not an indication that the Act was intended to wreak some fundamental change in approach or a move away from the fundamental 'purposes' focus of the charities inquiry.*

11. CLAANZ submits that the orthodox approach to discerning an entity's purposes in light of the entity's objects and activities should be restated and it should be confirmed that s 18(3) of the NZ Charities Act is entirely consistent with that orthodox approach.

12. If this Court adopts the approach outlined here, it may be necessary to revisit elements of the reasoning of the majority in *Greenpeace.* The following passage is of particular interest:[8]

> *Where an entity seeking charitable status has objects or conducts activities that involve promoting its own views or advocacy for a cause, it may be especially difficult to conclude where the public benefit lies and whether the object or activities come within the spirit and intendment of the preamble to the Statute of Charitable Uses.*

13. This passage appears to suggest that activities ought to be assessed for charitability. However, on the orthodox approach outlined above, in all cases, the inquiry must be into the purposes of an entity and whether the activities undertaken are consistent with the entity's charitable purposes. Whether activities are charitable or not is an irrelevant question in charity law. The same activity may be

[8] *Greenpeace*, above n 4 at [32]. See also *Family First New Zealand v Attorney-General* [2020] NZCA 366 (***Family First CA***) at [168] per Clifford and Stevens JJ (referring to 'non-charitable activity').

undertaken consistently with a charitable purpose or it may not, depending on the purpose for which the activity was undertaken.[9]

14. The inquiry into whether activities are charitable to which the majority referred in *Greenpeace* seems at odds with the orthodox approach in New Zealand law to discerning an entity's purposes. Such an inquiry is thus apt to generate confusion and inconsistency in the law. CLAANZ submits that the Court should now depart from it.

15. On the orthodox approach to discerning an entity's purposes, cases in which an entity has non-ancillary political advocacy purposes will be rare. Much more commonplace will be cases where an entity has charitable purposes and engages in political advocacy in furtherance of those charitable purposes.

The public benefit test

13 The test for determining whether a purpose is charitable in New Zealand law was set out by the Court of Appeal in *Latimer v Commissioner of Inland Revenue* (***Latimer CA***).[10] That test (the **charitable purpose test**) contains two elements:

a. Does the purpose operate for the public benefit?

[9] *Vancouver Society*, above n 1 at [152]-[153] per Iacobucci J (with whom Cory, Major and Bastarache JJ agreed).
[10] *Latimer v Commissioner of Inland Revenue* [2002] 3 NZLR 195 (CA) at [32].

b. If so, is the purpose charitable in the sense of falling within the spirit and intendment of the preamble of the Statute of Charitable Use 1601 (the **preamble**)?

14 In *Greenpeace*, this Court made clear that both elements of the charitable purpose test must be satisfied before a purpose may be considered charitable in law.[11]

15 In *Greenpeace*, this Court also made clear that the application of the two elements of the charitable purpose test demands recourse to the long record of judge-made law developing charity law's conception of public benefit and its understanding of what lies within the spirit and intendment of the preamble. In particular the Court confirmed that judge-made law informs the charitable purpose test notwithstanding the enactment of s 5(1) of the NZ Charities Act, which provides, in terms of the well-known taxonomy articulated by Lord MacNaghten in *Commissioners for Special Purposes of Income Tax v Pemsel*,[12] that '***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*'.[13]

16 For present purposes, CLAANZ wishes to address the Court on the first element of the charitable purpose test, which is the public

[11] *Greenpeace*, above n 4 at [27], [29], [30] and [113].
[12] *Commissioners for Special Purposes of Income Tax v Pemsel* [1891] AC 531.
[13] *Greenpeace*, above n 4 at [16]-[17].

benefit test. As was recognised by the Court of Appeal in *New Zealand Society of Accountants v Commissioner of Inland Revenue*, the public benefit test itself breaks down into two components. First, the purpose under scrutiny must have a sufficiently public character (the **public component**). Secondly, the purpose under scrutiny must generate benefit to the public (the **benefit component**).[14]

17 In some cases, the point of controversy is the public component of the public benefit test. In other cases, the point of controversy is the benefit component. It is in relation to the benefit component that, in CLAANZ's submission, New Zealand's charity law has grown particularly confused and unclear and authoritative guidance is now needed from this Court.

18 Where purposes fall within one of the first three 'heads' of charity articulated in s 5(1) of the NZ Charities Act – relief of poverty, advancement of education, and advancement of religion – benefit tends to be assumed or even presumed.[15]

19 In cases where purposes fall within the fourth 'head' of charity – '*any other matter beneficial to the community*' (to use the language of s 5(1) of the NZ Charities Act) within the spirit and intendment of the preamble – the benefit component of the public benefit test demands an inquiry informed by evidence and other fact finding

[14] *New Zealand Society of Accountants v Commissioner of Inland Revenue* [1986] 1 NZLR 147 (CA) at 152.
[15] *Greenpeace*, above n 4 at [27] n 57.

tools, including judicial notice,[16] leading to findings of fact applying the usual standard of civil proof.[17] Political advocacy purposes invariably fall under the fourth 'head' of charity, although as we have already submitted cases where entities have non-ancillary political advocacy purposes that must satisfy the charitable purpose test are properly seen as rare.

20 In the seminal English case of *National Anti-Vivisection Society v Inland Revenue Commissioners* (***NAVS***), Lord Wright emphasised that the factual inquiry into benefit in relation to purposes under the fourth 'head' is a broad one:[18]

> *It is arbitrary and unreal to attempt to dissect the problem into what is said to be direct and what is said to be merely consequential. The whole complex of resulting circumstances of whatever kind must be foreseen or imagined in order to estimate whether the change advocated for would or would not be beneficial to the community.*

21 The 'complex of resulting circumstances' to which Lord Wright referred is composed of the full range of social outcomes that might be occasioned by the purpose in view. Lord Wright's comments were made in the course of considering the application of the benefit component of the public benefit test to a non-ancillary political advocacy purpose. However, CLAANZ submits that the comments are

[16] For example, in the present case, in the setting of an inquiry into benefit, a majority of the Court of Appeal took judicial notice of 'the fact that by far the larger part of the social groups constituting families in contemporary New Zealand, at least in the nuclear family sense, are those based on civil or religious marriages between men and women': *Family First CA*, above n 8 at [146] per Clifford and Stevens JJ.

[17] *Molloy v Commissioner of Inland Revenue* [1981] 1 NZLR 688 (CA) at 695 (Somers J).

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

of general application and the need to engage in a holistic inquiry into benefit is present in every case arising under the fourth 'head'.

22 The holistic character of the inquiry into benefit in cases arising under the fourth 'head' is reflected in s 6(2) of Australia's Charities Act 2013 (**Australian Charities Act**), which is the only statutory provision in the common law world attempting to give detailed content to the benefit component of charity law's public benefit test. Under s 6(2), the decision-maker applying the benefit component is directed to '*have regard to all relevant matters'* including (s 6(2)(a)) '*benefits (whether tangible or intangible) (other than benefits that are not identifiable)*' and (s 6(2)(b)) '*any possible, identifiable detriment from the achievement of the purpose to the members of (i) the general public; or (ii) a section of the general public'*.[19]

23 At the same time, the cases make clear that in applying the benefit component of the public benefit test, decision-makers may take into account incidental benefits associated with the pursuit of a purpose.

24 For example, in *Re Resch's Will Trusts*, the Privy Council found that an organisation providing health care to fee-paying patients satisfied the public benefit test because the organisation relieved the burden of health care otherwise borne by the state, freeing up revenue to be

[19] Under the Australian Act, the four 'heads' of charity are replaced by 12 'heads' set out in s 12. Public benefit is presumed in relation to some of these 'heads': s 7. The benefit component spelt out in s 6 then applies to purposes falling within the balance of the 'heads' set out in s 12.

expended in other ways.[20] In the English case of *Neville Estates Ltd v Madden*, Cross J found public benefit in the purposes of a trust for a private synagogue, on the basis that *'some benefit accrues to the public from the attendance at places of worship of persons who ... mix with their fellow citizens'*.[21] A similar view was expressed in *Joyce v Ashfield Municipal Council*, an Australian case about whether a hall used for private worship services was used for charitable purposes. The New South Wales Court of Appeal held that the worship services, although conducted in private, had *'public value in improving the standards of believers in the world'* and were therefore of public benefit.[22]

25 In New Zealand, the Court of Appeal recognised incidental benefits in *Latimer CA*.[23] The Crown Forestry Rental Trust was established for the purpose of supporting Māori claimants before the Waitangi Tribunal. The Court of Appeal held that, in addition to direct and indirect benefits to the Māori claimants whose claims were facilitated by the Trust, there were incidental benefits to the New Zealand community because the Trust enabled full and final

[20] *Re Resch's Will Trusts* [1969] 1 AC 514 (PC). 'Relief of taxes' has been regarded as a type of charitable purpose since the time of the Statute of Elizabeth: *Attorney-General v Bushby* (1857) 24 Beav 299; 53 ER 373 per Sir John Romilly MR.
[21] *Neville Estates Ltd v Madden* [1962] 1 Ch 832 at 853. This statement received qualified approval in Charity Commission for England and Wales, *Preston Down Trust* (3 January 2014) at [51].
[22] *Joyce v Ashfield Municipal Council* [1975] 1 NSWLR 744 (CA) at 751-752 per Hutley JA. An appeal to the Privy Council was dismissed: *Ashfield Municipal Council v Joyce* [1978] AC 122 (PC).
[23] *Latimer CA*, above n 9 at [40], this point not in issue on appeal to the Privy Council: *Latimer PC,* above n 5.

settlements of Treaty of Waitangi claims and thereby averted 'social ferment'.[24]

26 In summary, then, the application of the benefit component of the public benefit test demands attention to the full range of consequences, including any incidental benefits, that might be occasioned by the pursuit of the purpose in question.

27 Turning, then, to the rare cases in which an entity has a non-ancillary political advocacy purpose arising under the fourth 'head', in *Aid/Watch Incorporated v Federal Commissioner of Taxation* (***Aid/Watch***), a majority of the High Court of Australia recognised incidental benefits in finding that the purpose of generating public debate about government delivery of foreign aid was a charitable purpose of public benefit.[25] Having found that political advocacy is an important element of the system of representative and responsible government established under the Australian Constitution, the majority stated that:[26]

> *it is the operation of these constitutional processes which contributes to the public welfare. A court administering a charitable trust for that purpose is not called upon to adjudicate the merits of any particular course of legislative or executive action or inaction which is the subject of advocacy or disputation within those processes.*

28 Of particular importance is the fact that, in this passage, the majority recognised that incidental benefits generated by the conduct of

[24] *Latimer CA*, above n 10 at [37].
[25] *Aid/Watch Incorporated v Federal Commissioner of Taxation* (2010) 241 CLR 539 per French CJ, Gummow, Hayne, Crennan and Bell JJ.
[26] *Aid/Watch*, above n 25 at [45] per French CJ, Gummow, Hayne, Crennan and Bell JJ.

political advocacy itself might justify a finding that a political advocacy purpose satisfies the benefit component of the public benefit test, irrespective of the political objective in question.

29 The reasoning in *Aid/Watch* is of great significance to cases raising non-ancillary political advocacy purposes in New Zealand. The *Aid/Watch* reasoning was grounded in aspects of the Australian constitutional system of government.[27] However, writing extra-judicially, Justice Stephen Kós has recently said that:[28]

> *It is … strongly arguable that the constitutional underpinning of the majority reasoning [in Aid/Watch] is not a distinguishing feature from New Zealand law, given the terms of both the New Zealand Bill of Rights Act 1990 and other elements of our supposedly "unwritten" constitution.*

30 Moreover, the general proposition that the conduct of political advocacy generates public benefit in liberal democracies such as New Zealand appears to have been acknowledged by a majority of the Court of Appeal in the present case:[29]

> *Finally, we recognise the point made by CLAANZ, of the public benefit associated with free speech and associated political discourse in a rule of law, liberal and democratic society such as New Zealand.*

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[27] Among the leading High Court of Australia authorities recognising an implied freedom of political communication in Australia's Constitution are *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106; *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1; *Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR 104; *Stephens v West Australian Newspapers Ltd* (1994) 182 CLR 211; *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520.

[28] The Hon Justice Stephen Kós, 'Murky Waters, Muddled Thinking: Charities and Politics', keynote address to the 2020 Charity Law, Accounting and Regulation Conference, 4 November 2020, available at https://www.courtsofnz.govt.nz/assets/speechpapers, at [14].

[29] *Family First CA*, above n 8 at [153] per Clifford and Stevens JJ.

31 It also seems to have informed dicta of Chilwell J in *Auckland Medical Aid Trust v Commissioner of Inland Revenue*:[30]

> *The historical path of charities is strewn with the great controversies of the past. … To my mind [the decided cases] establish that the advocates of causes involving intense moral issues ought not per se to be considered to be acting in a manner harmful to the public. There must be at least two sides to such controversies. The cases show that when the Courts take sides injustice may be the result. The controversy which has raged over the abortion and related issues in this country during periods relevant to this case was not in my judgment harmful to the public viewed objectively.*

32 Moreover, it may inform certain dicta of this Court in *Greenpeace*:[31]

> *Promotion of law reform of the type often undertaken by law commissions which aims to keep laws fit for modern purposes may well be properly seen as charitable if undertaken by private organisations even though such reform inevitably entails promotion of legislation.*

33 More specifically, the notion that the public benefit of political advocacy purposes is not a function of the political objectives advocated for is reflected in this passage from the judgment of Hammond J in *Re Collier*, which was referred to with approval by the majority of the Court of Appeal in the present case:[32]

> *I have to say that I have considerable sympathy for that viewpoint which holds that a Court does not have to enter into the debate at all; hence the inability of the Court to resolve the merits is irrelevant. Rather, the function of the Court ought to be to sieve out debates which are for improper purposes; and to then leave the public debate to lie where it falls, in the public arena.*

34 CLAANZ submits that the notion that non-ancillary political advocacy purposes might generate public benefit because the conduct of

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[30] *Auckland Medical Aid Trust v Commissioner of Inland Revenue* [1979] 1 NZLR 382 at 397.
[31] *Greenpeace*, above n 4 at [62].
[32] *Re Collier* [1998] 1 NZLR 81 at 90, cited with approval in *Family First CA*, above n 8 at [114] per Clifford and Stevens JJ.

political advocacy makes an important contribution to liberal and democratic government is one that has resonance in all liberal democracies irrespective of their particular constitutional arrangements. Indeed, political philosophers and constitutional scholars have argued powerfully and in general terms for the recognition of the public benefit of a culture of free political expression to any liberal democracy.[33]

35 CLAANZ submits that the following approach should be adopted when applying the benefit component of the public benefit test to the rare cases where non-ancillary political advocacy purposes are in view:

a. The 'whole complex of resulting circumstances' (to use the language of Lord Wright in *NAVS*) should be taken into account;

b. Incidental benefits, including those associated with the conduct of political advocacy itself irrespective of the political objectives in question, should be taken into account; and

c. Incidental benefits should include benefits to liberal and democratic government that flow from the conduct of political

[33] See Alexander Meiklejohn *Free Speech and its Relation to Self-Government* (Harper and Brothers, New York, 1948); Frederick Schauer *Free Speech: A Philosophical Inquiry* (Cambridge University Press, Cambridge, 1982) at ch 3; James W Nickel "Freedom of Expression in a Pluralistic Society" (1988-1989) 7 *Law and Philosophy* 281 at 289-290; Joseph Raz "Free Expression and Personal Identification" in *Ethics in the Public Domain: Essays in the Morality of Law and Politics* (Clarendon Press, Oxford, 1994) 146 at 151-153; Eric Barendt *Freedom of Speech* (2nd ed, Oxford University Press, Oxford, 2007) at ch 5.

advocacy against the backdrop of New Zealand's particular constitutional commitments.

36 CLAANZ submits that such an approach would articulate the constitutional commitments against which the public benefit of the conduct of political advocacy is to be understood. In this exercise, the fact that New Zealand is a bicultural and bijural jurisdiction is relevant. In particular, CLAANZ submits that this Court may wish to consider the implications of Tikanga for an understanding of the public benefit of the conduct of political advocacy and public debate more generally, a matter on which Justice Williams has written extra-judicially.[34]

37 Ehara mātou i te Māori. Nō reirá, kei te tino whakawhēuaua mātou ki te whakaaranga i ngā tikanga kia awhi ai i te whakamāramatanga o te painga o ngā iwi o te motu. Heoi anō, ki tō mātou nei whakaaro, ko te tautoko me te atawhai he mea nui ki roto i ngā kaupapa o ngā tikanga. Tērā pea, ka āwhina te Kōti i te taunakitanga o ngā pūkenga kia whakamārama ai i ngā piringa o ngā tikanga me te painga o ngā iwi o te motu nei.

38 We are not Māori and thus feel very diffident about putting forward Tikanga as a tool to assist the interpretation of public benefit.

[34] The Hon Justice Joseph Williams, 'Lex Aotearoa: An Heroic Attempt to Map the Maori Dimension in Modern New Zealand Law' (2013) 21 *Waikato Law Review* 1; The Hon Justice Joseph Williams, 'Pemsel in the Pacific', keynote address to the 2020 Charity Law, Accounting and Regulation Conference, 12 April 2019, available at http://www.charitylawassociation.org.au/events-nzconf2019.

However, advocacy and charity are an important part of what CLAANZ understand to be within the concept of Tikanga.[35] Expert evidence (pūkenga) might be needed to determine how Tikanga could assist to determine public benefit.

39 As Joseph notes,[36] '*the relationship between Tikanga Māori and the law is a developing one*', but the use of Tikanga to aid interpretation of what amounts to a public benefit and more widely what is charitable demonstrates the flexible nature of the common law and how changing mores of society are reflected in what is said to fall within the fourth 'head' of charity set out in s 5(1) of the NZ Charities Act.

40 A clear example is shown in *Latimer CA,* where the Court of Appeal interpreted the public component of charity law's public benefit test such that the purpose of providing assistance to claimants in the Waitangi Tribunal was charitable, thus reflecting the distinctive cultural circumstances of New Zealand society.[37] To that extent, there is precedent for doing the same in this case.

41 At the same time, an ideal framework would identify limits to the proposition that the conduct of political advocacy generates public benefit because of its contribution to liberal democracy in New

[35] See Philip Joseph, *Joseph on Constitutional and Administrative Law* (5th ed, Thomson Reuters, 2021) at 106-107.
[36] Ibid at 105.
[37] *Latimer CA*, above n 10 at [38]. In this way, the Court of Appeal departed from the traditional formulation of the public component set out in *Oppenheim v Tobacco Securities Trust Co Ltd* [1951] AC 297. This departure is now reflected in s 5(2) of the Charities Act 2005.

Zealand's constitutional order. Political advocacy likely to generate harms in light of liberal democratic values would seem to stand on the wrong side of that line. CLAANZ submits that examples might include advocacy that takes the form of hate speech, or advocacy that seeks to undermine democratic processes or institutions.[38] In this regard, it is noteworthy that s 11(a) of the Australian Charities Act provides that purposes that are '*unlawful or contrary to public policy*' are disqualifying and therefore not charitable.

42 The Australian Charities Act refers, by way of example, to public policy (or the Act defines public policy) in the form of '*the rule of law, the constitutional system of government of the Commonwealth, the safety of the general public and national security*'. The Act further says that '*Activities are not contrary to public policy merely because they are contrary to government policy*'.

43 CLAANZ submits that a framework for dealing with non-ancillary political advocacy purposes would provide guidance to decision-makers in cases where there are: (a) benefits associated with the conduct of political advocacy itself; and (b) harms associated with the political objective in question. The weighing of benefits and detriments in arriving at an overall conclusion when applying the benefit component of the public benefit test is well accepted in charity law, and such a weighing exercise was carried out in the

[38] See the discussion in Matthew Harding *Charity Law and the Liberal State* (Cambridge University Press, Cambridge, 2014) at 193-197.

seminal *NAVS* case.[39] Nonetheless, absent legislation, decision-makers would benefit from guidance on the factors to be taken into account in a weighing exercise where political advocacy in support of harmful political objectives is under consideration.

Fiscal considerations

44 In his submissions, the Attorney-General argues that an approach to the benefit component of the public benefit test such as that for which CLAANZ argues in these submissions would have wide fiscal ramifications and for that reason should be left to the Parliament.[40]

45 Concern that an overly accommodating approach to the charitable purpose test might have wide fiscal ramifications has been expressed from time to time in the case law. In *Vancouver Society*, fiscal considerations seemed to play a role in the decision of the Supreme Court of Canada not to abandon charity law's requirement that new types of charitable purpose be within the spirit and intendment of the preamble.[41] A similar caution was evident in the subsequent Supreme Court of Canada decision in *AYSA Amateur Youth Soccer Association v Canada Revenue Agency*.[42] And in *Greenpeace*, a majority of this Court referred to the possibility of '*significant fiscal consequences*' in affirming the need to find an analogy between a

[39] *NAVS*, above n 18 at 41-49 (per Lord Wright).
[40] Submissions of the Attorney-General at [116]-[126].
[41] *Vancouver Society*, above n 1 at [200].
[42] *AYSA Amateur Youth Soccer Association v Canada Revenue Agency* [2007] 3 SCR 217 at [27]-[28].

new type of charitable purpose and a type of purpose already held to be charitable.[43]

46 In CLAANZ's submission, recognition that the conduct of political advocacy might generate benefits to liberal and democratic government irrespective of the political objectives in question would not have wide fiscal ramifications in New Zealand. This is because, as submitted above at [16], on a proper analysis of how to discern the purposes of an entity in light of the entity's objects and activities, cases where an entity has non-ancillary political advocacy purposes that must satisfy the charitable purpose test are rare. Much more commonplace will be cases where an entity with charitable purposes engages in political advocacy in furtherance of those charitable purposes. In such cases, the question of the public benefit of political advocacy purposes does not arise.

47 Moreover, there is academic disagreement on the conceptual character of the tax treatment of entities with charitable purposes. For instance, in relation to the income tax exemption, while some scholars consider this a subsidy in the nature of a tax expenditure, others argue that conceptually it is a product of the application of rules defining the income tax base.[44] Similar arguments have been made in respect of the tax treatment of donors to entities with

[43] *Greenpeace*, above n 4 at [29]-[30].

[44] There is a comprehensive discussion of the main theoretical approaches to the income tax exemption, including base-definition approaches, in Rob Atkinson, 'Theories of the Federal Income Tax Exemption for Charities: Thesis, Antithesis and Synthesis' (1997) 27 *Stetson Law Review* 395 at 402-426.

charitable purposes.[45] If the tax treatment of entities with charitable purposes is understood as a matter of defining the tax base, then the decision to recognise a new type of purpose as charitable cannot be said to effect the redistribution of revenue entailed in a subsidy, even if in a general sense it has fiscal implications. If, on the whole, the current structure is necessary to sustain the sector, then the fact that individual activities might not be justifiably subsidised when viewed in isolation is tolerable.[46] Overbreadth might be the price we pay for the overall system.

48 In any event, CLAANZ submits that fiscal considerations should not influence decision-makers who must decide whether to recognise a new type of purpose as charitable in law. By enacting the NZ Charities Act, the Parliament has clearly expressed its intention in respect of the considerations that decision-makers should take into account when applying the charitable purpose test. In most respects, those considerations point decision-makers to the substantial body of judge-made law developing charity law's public benefit test and its understanding of what lies within the spirit and intendment of the preamble. The considerations do not, either in terms of the statute or in the extant judge-made law (save for the occasional expressions

[45] See David G Duff, 'The Tax Treatment of Charitable Contributions in a Personal Income Tax: Lessons from Theory and the Canadian Experience' in Matthew Harding, Ann O'Connell and Miranda Stewart (eds) *Not-for-Profit Law: Theoretical and Comparative Perspectives* (Cambridge University Press, Cambridge, 2014) 199 at 200-218.

[46] Miranda Perry Fleischer, 'Subsidising Charity Liberally' in Matthew Harding (ed), *Research Handbook on Not-for-Profit Law* (Edward Elgar, 2018) 418 at 433.

of concern described above) include fiscal considerations (which may in fact be positive when all factors are taken into account).

49 At the same time, the Parliament has designed tax statutes such as the Income Tax Act 2007 to incorporate judge-made law developing the charitable purpose test, through using the word 'charity' (and its cognates).[47] Where the Parliament has intended to depart from that general approach, it has legislated specific provisions decoupling the availability of particular tax treatment from the test of charitability.[48]

50 These facts suggest strongly that Parliament's intention is that decision-makers, including this Court, should not have regard to potential fiscal considerations when deciding whether to recognise a new type of purpose as charitable in law. In *Re Queenstown Lakes Community Housing Trust*, McKenzie J stated:[49]

> *For my part, I observe that Parliament has, in s 5 of the Act, seen fit to adopt the common law definition of charitable purpose. To the extent that Parliament has elsewhere legislated so that taxation consequences are determined by reference to charitable status, those consequences must follow the application of the common law principles which govern charitable status. The taxation consequences should not play a part in the application of those common law principles.*

[47] Where not otherwise defined in a statute, the word 'charity' carries its technical meaning derived from judge-made law, in accordance with the approach to statutory interpretation set out by Lord Macnaghten in *Pemsel* above n 12 at 580: '*[i]n construing Acts of Parliament, it is a general rule … that words must be taken in their legal sense unless a contrary intention appears*'. See also *Aid/Watch*, above n 25 at [23] per French CJ, Gummow, Hayne, Crennan and Bell JJ.

[48] For example, GST concessions are available to 'non-profit bodies', as that term is defined in section 2 of the Goods and Services Tax Act 1985.

[49] *Re Queenstown Lakes Community Housing Trust* [2011] 3 NZLR 502 (HC) at [78].

51 CLAANZ submits, with respect, that this is the correct approach and, as such, that fiscal considerations should not play a role in the charitable purpose test in New Zealand should be clearly and finally determined.

The right to freedom of political expression

52 However, withdrawal of charitable registration leads inevitably to withdrawal of fiscal benefits. Under New Zealand law, there seems no reason to doubt that entities, whether composed of natural persons or taking the form of legal persons, enjoy the right to freedom of political expression under s 14 of NZBORA.[50]

53 In the Court of Appeal, CLAANZ submitted that withdrawing charitable status from an entity because it engages in political advocacy might constitute an impermissible interference with the entity's right under s 14 of NZBORA. In response to this submission, a majority of the Court of Appeal stated that:[51]

> *We accept, of course, that removal of registration will have an effect on Family First financially. However, CLAANZ did not provide any evidence to suggest that its activities could not continue without the tax benefits it currently enjoys. Moreover, Family First did not advance this point as one of its 20 grounds of appeal. The issue was raised neither before the Board nor in the High Court. In these circumstances, we do not consider it is necessary to address this issue further.*

54 It is correct that there was no evidence on this point. However, as the Court stated, removal of registration will have a financial impact on

[50] In a recent journal article exploring NZBORA rights and political advocacy charities, Dr Jane Calderwood Norton of the University of Auckland draws this conclusion following a survey of the relevant law: Jane Calderwood Norton 'Charities and Freedom of Expression' [2019] *NZLJ* 174.

[51] *Family First CA*, above n 8 at [181] per Clifford and Stevens JJ.

any charity: Registered Charities pay no income tax in NZ and donors may make tax deductible donations (up to a certain limit) thus demonstrating that for all organisations charitable status has a significant fiscal benefit.

55 CLAANZ submits that withdrawing charitable status where an entity engages in political advocacy might, depending on the circumstances, constitute an impermissible interference with that entity's right under s 14 of NZBORA.

56 In *Re Greenpeace of New Zealand Incorporated*, the Court of Appeal suggested that, when considering when a right to freedom of political expression has been violated, a distinction should be drawn between suppressing political expression on the one hand, and denying a subsidy supporting political expression on the other hand.[52] Such a distinction has been drawn in the United States, in connection with the protections of the First Amendment to the United States Constitution. In the United States, only the former type of interference with political expression is impermissible; denying a subsidy to an entity does not violate its constitutionally protected right to free political expression.[53] If this distinction were to be adopted in New Zealand law, denying charitable status to an entity

[52] *Re Greenpeace of New Zealand Incorporated* [2013] 1 NZLR 339 (CA) at [59]-[60], citing *Human Life International v Minister for Inland Revenue* [1998] 3 FC 202 at 220-221 (FCA).
[53] *Regan v Taxation Without Representation* (1983) 461 US 540.

with non-ancillary political advocacy purposes would not violate that entity's right to free political expression under s 14 of NZBORA.

57 Nonetheless this is not the end of the debate. As we have noted above,[54] there is academic disagreement about the conceptual character of the tax treatment of registered charities: on one view, that treatment is best understood as the product of rules defining the tax base and is not appropriately regarded as a subsidy at all.

58 Moreover, the Canadian case of *Canada Without Poverty v Attorney-General of Canada* (***Canada Without Poverty***) bears on the question whether, and to what extent, the distinction to which the Court of Appeal alluded in *Greenpeace* should be maintained.[55] In *Canada Without Poverty*, E M Morgan J of the Ontario Superior Court of Justice declared unconstitutional a rule of the Canada Revenue Agency restricting the proportion of income a charitable entity may expend on political advocacy. A distinction between 'political activities' and 'charitable activities' drawn in s 149.1(6.2) of Canada's Income Tax Act RSC 1985 c. I (5th Supp) was also declared unconstitutional. The basis on which these provisions were declared unconstitutional was that they violated the guarantee of freedom of expression, including political expression, in s 2(b) of the Canadian Charter of Rights and Freedoms (**Charter**).[56]

[54] Paras [44] to [51].
[55] *Canada Without Poverty v Attorney-General of Canada* 2018 ONSC 4147.
[56] *Canada Without Poverty,* above n 54 at [70]-[72].

59 According to Canadian charity law, an entity with non-ancillary political advocacy purposes cannot be a charity. This rule was not disturbed by the decision in *Canada Without Poverty*. However, the Court reasoned that where an entity **has** charitable purposes, it is not open to the state, in light of protections in the Charter, to restrict that entity's pursuit of political advocacy activities in furtherance of its charitable purposes. Having provided a subsidy to the entity by recognising it as charitable, the state may not then wind back the subsidy because the entity engages in political advocacy. Once the subsidy is made available, winding it back in this way constitutes a suppression of constitutionally protected political expression.[57]

60 Dr Jane Calderwood Norton argues that winding back a subsidy extended to a charitable entity because that entity engages in political advocacy is different from denying a subsidy to an entity in the first place because it does not exist for a charitable purpose.[58] She says:

> *It is well-established that administrative decision-makers have to exercise their functions, powers, or discretions consistently with NZBORA unless the statutory language granting the power clearly require it to be exercised inconsistently (Drew v AG [2002] 1 NZLR 58 (CA)). See also NZBORA, s 3(b) and s 6). This means that a particular interpretation or application of a requirement that limits freedom of expression ought to be justifiable in terms of s 5 (Browne v Caniuest [2008] 1 NZLR 654 at [32]).*

61 The argument is not straightforward but nonetheless as Dr Calderwood Norton suggests:

[57] *Canada Without Poverty,* above n 54 at [47]-[48].
[58] Calderwood Norton, above n 50 at 175-176.

> *An NZBORA approach may require, however, that the decision-maker takes a more expansive view of benefit when assessing organisations engaged in advocacy and other political expression. This expanded view of benefit could look at the justifications that underpin political expression protection in the first place such as its role in ensuring democratic government. For example, advocacy organisations such as Aid/Watch that aim to ensure political participation and government accountability (values that underpin freedom of expression) could be seen to also provide a benefit for the purpose of charity law. Organisations, such as Canada Without Poverty, that aim to give a voice to marginalised groups in society, could also be seen as providing a benefit consistent with freedom of expression. Organisations that provide the public with information to ensure they are informed about proposed legislation and policy matters could also support democratic government although, as the courts have noted, an organisation that seeks to advocate for one side of a contentious issue might have a harder time demonstrating that they support this value. An organisation that seeks to take rights away from individuals or groups in society might have an even harder time showing that their purpose is beneficial.*

62 The issue in *Canada Without Poverty* is different from the issue that arises in the present case. Nonetheless, the reasoning in *Canada Without Poverty* is a reminder that the distinction between suppressing political expression and denying a subsidy supporting that expression is not beyond question.

63 CLAANZ submits that if a distinction between suppressing and subsidising political expression is to be drawn in New Zealand law in relation to entities with non-ancillary political advocacy purposes, then this should be done only after full consideration of the conceptual character of the tax treatment of registered charities and the reasoning in *Canada Without Poverty*. It should also be done mindful of: (a) the requirement that restrictions on NZBORA rights should conform to strict tests of necessity and proportionality; (b)

the principle that wherever an enactment can be given a meaning that is consistent with NZBORA rights, that meaning should be preferred to any other meaning; and (c) the fact that, under the *International Covenant on Civil and Political Rights*, to which New Zealand is a signatory, the state bears the burden of justifying any limitation on Convention rights.[59]

J Batrouney QC, Prof. M Harding and K Davenport QC
Counsel for the intervenor

9 June 2021

[59] See the discussion in Susan Barker, 'Advocacy by Charities: What is the Question?' (2020) 6 *Canadian Journal of Comparative and Contemporary Law* 1 at 54-56.