The presumption of charitability post-*Greenpeace*

Susan Barker, Director, CharitiesLaw Ltd, Wellington

on the current status of the presumption in New Zealand law

It is now almost three years since the Charities Commission was disestablished and its functions transferred to the Department of Internal Affairs — Charities Services and the Charities Registration Board (collectively referred to as "the charities regulator").

As expected, this restructure has not resolved the significant difficulties being experienced by the many hundreds, if not thousands, of good charities which are currently unable to gain or retain registered charitable status as a result of the narrow approach to the definition of charitable purpose that continues to be taken by the charities regulator.

An application of the presumption of charitability (described below) could provide a practical and helpful means of ameliorating these significant difficulties. However, the charities regulator has steadfastly refused to apply it: in decisions made under the Charities Act 2005, the presumption of charitability was notable by its absence (see for example the discussion in "The presumption of charitability" [2012] NZLJ 295).

This approach is surprising given that, prior to the advent of the Charities Act, the presumption of charitability was firmly part of New Zealand law (see *Morgan v Wellington City Corporation* [1975] 1 NZLR 416 (CA) at 419–420; *Auckland Medical Aid Trust v Commissioner of Inland Revenue* [1979] 1 NZLR 382 (SC) at 388; *Commissioner of Inland Revenue v Medical Council of New Zealand* [1997] 2 NZLR 297 (CA) at 310 per McKay J, and at 321 per Thomas and Keith JJ; *Re Collier (Deceased)* [1998] 1 NZLR 81 (HC) at 95; *Latimer v Commissioner of Inland Revenue* [2002] 1 NZLR 535 (HC) at [106]; *Latimer v Commissioner of Inland Revenue* [2002] 3 NZLR 195 (CA) at [13], [36] and [39]–[41]; and Laws of New Zealand *Charities* at [12], [13] and [44]).

In addition, the authorities have made it very clear that the Charities Act was not intended to change the law on the definition of charitable purpose (see, for example, *Re Greenpeace* [2014] NZSC 105, [2015] 1 NZLR 169 (*Greenpeace*) (SC) at [16]), of which the presumption of charitability is an important part.

With respect, the charities regulator's approach to the definition of charitable purpose appears to have overlooked direct New Zealand authority on the presumption of charitability. The approach of the charities regulator is also surprising when looked at in contrast to its approach to advocacy by charities: the charities regulator has adhered strictly to an alleged "political purposes exclusion", causing many good charities to be deregistered or declined registration for participating in New Zealand's democratic processes, even when such participation has occurred in good faith and in indisputable furtherance of their charitable purposes. The result has been described as a "bonfire of the charities", and has occurred on the basis of an interpretation by the charities regulator that has since been criticised by the Supreme Court as being strict, rigid, neither necessary nor beneficial, based on surprisingly little authority, and as obscuring proper focus on whether a purpose is charitable (*Greenpeace* (SC) at [59], [64], [69], [70]).

Prior to the decision of the Supreme Court in *Greenpeace* (SC), the Court of Appeal and High Court had recently reaffirmed the presumption of charitability in New Zealand law following the passing of the Charities Act. The Court of Appeal confirmed the presumption of charitability (referring to it as the "presumption of charitable status") in *Re Greenpeace New Zealand Incorporated* [2013] 1 NZLR 339 (CA) (*Greenpeace* (CA)) at [43], [72] and [81]. The High Court also noted the existence of the presumption in New Zealand law in *Plumbers, Gasfitters and Drainlayers Board v The Charities Registration Board* [2013] NZHC 1986 at [22] and [35], and in *Invercargill City Council v Attorney-General* [2014] 2 NZLR 127 (HC) at [28] and [31].

Since then, however, the Supreme Court has cast doubt on the presumption of charitability in New Zealand law, describing it as "single test" of public benefit that "loses the concept of charity" (*Greenpeace* (SC) at [29]). The Supreme Court described the traditional method of analogy to objects already held to be charitable (the analogy method) as "the safer policy" since charitable status has "significant fiscal consequences" (at [30]). The Supreme Court also stated it would "not be appropriate ... to abandon the analogical approach in favour of the view that benefit to the public presumptively establishes the purpose as charitable" (at [30]).

This article considers the position of the presumption of charitability in New Zealand law following the Supreme Court's decision.

WHAT IS THE PRESUMPTION OF CHARITABILITY?

First, it is important to be clear what is meant by a "presumption of charitability".

To begin with the statute, s 13 of the Charities Act provides that, in order to be eligible for registration as a charity, an entity's purposes must be charitable. Section 5 of the Charities Act defines "charitable purpose" by reference to the well-known 4 "heads" of charity: the relief of poverty, the advancement of education, the advancement of religion, or "any other matter beneficial to the community" (the latter being commonly known as "the 4th head").

In the context of determining whether a purpose is charitable, particularly in relation to the 4th head, the authorities establish that a 2-stage test is applied (see for example, *Greenpeace* (SC) at [29]):

(i) Is the purpose for the public benefit; and if so,

(ii) Is it charitable in the sense of coming within the spirit and intendment of the preamble to the Statute of Charitable Uses Act 1601 (43 Eliz c4) (the preamble).

The first limb, the "public benefit test", is not directly referred to in the statutory definitions of charitable purpose, but it is imported as a key element of the charitable purposes test through the medium of the common law.

Prior to the decision in *Greenpeace* (SC), it was clear that the second limb of this test could be satisfied in different ways, including by analogy or by means of a presumption of charitability, as described by Chilwell J in *Auckland Medical Aid Trust* (above) at 388:

> ... the purpose ... must be within the spirit and intendment of the statute, either directly or by analogy with decided cases ... or because *they are prima facie beneficial to the public and there is no ground for holding them outside the spirit and intendment of the preamble* (emphasis added).

There is no suggestion that these different ways of satisfying the second limb are mutually exclusive: a purpose that is charitable by analogy may also be charitable by means of the presumption. If there is a clear analogy, a decision-maker may find it more efficient to use that analogy than look to the presumption, as was the case in *Plumbers* (above) at [56]. However, use of the analogy method in an appropriate case does not constitute an abandonment of the presumption, just as use of the presumption in an appropriate case does not result in an abandonment of the analogy method. To the contrary, the analogy method and the presumption of charitability are, or were, alternative, co-existing means of establishing whether a purpose is within the spirit and intendment of the preamble.

Importantly, a purpose that is not charitable by analogy may nevertheless be charitable under the presumption of charitability. This proposition was described by Russell LJ in his seminal and often-cited extract from *Incorporated Council of Law Reporting for England and Wales v Attorney-General* [1972] Ch 73 at 88:

> ... when considering Lord Macnaghten's fourth category in *Pemsel* ... of 'other purposes beneficial to the community' (or ... 'objects of general public utility') the courts, *in consistently saying that not all such are necessarily charitable in law*, are in substance accepting that if a purpose is shown to be so beneficial or of such utility it is *prima facie charitable in law*, but have left open a line of retreat based on the equity of the Statute in case they are faced with a purpose ... which could not have been within the contemplation of the Statute even if the then legislators had been endowed with the gift of foresight into the circumstances of later centuries.
>
> In a case such as the present, in which in my view the object [the preparation and publication of law reports] cannot be thought otherwise than beneficial to the community and of general public utility, *I believe the proper question to ask is whether there are any grounds for holding it to be outside the equity of the Statute*: and I think the answer to that is here in the negative (emphasis added).

In other words, under the presumption of charitability, purposes that are beneficial to the public are *presumed* to be within the spirit and intendment of the preamble, and therefore to meet the second limb of the test for charitable purposes, in the absence of any ground for holding otherwise (that is, in the absence of any ground for holding that they are outside its spirit and intendment). Such beneficial purposes may therefore be charitable even in the absence of an analogy.

Whatever might be the status of Russell LJ's comments in other jurisdictions, they have been affirmed in New Zealand law many times (see for example *Morgan* (above) at 419–420, *Auckland Medical Aid Trust* (above) at 388, and *Medical Council* (above) at 310 and 321, to name only a few).

The presumption of charitabilty can be seen as a key mechanism by which the law of charities develops in response to change in social conditions. The importance of this principle is readily highlighted when one bears in mind that it used to be a charitable purpose to "gather firewood to burn witches at the stake". As the Supreme Court noted, the definition of charitable purpose is a "moving subject" (*Greenpeace* (SC) at [23] and [45]): a doctrine which would preclude without further assessment whether a particular purpose is charitable is inconsistent with the general principle of flexibility (*Greenpeace* (SC) at [64]).

In the writer's view, the presumption of charitability recognises that the essence of the preamble, and the heart of what is charitable, is benefit to the public. The presumption of charitability also recognises that the analogy approach has its limitations, as discussed below. Finally, the presumption of charitability arises in the context of an area of law that derives from an equitable jurisdiction.

MISCONCEPTIONS ABOUT THE PRESUMPTION OF CHARITABILITY

It is also important to be clear what the presumption of charitability is not.

The presumption of charitability does not mean that "every" purpose that is beneficial to the community will necessarily be charitable at law (see for example the comments of Russell LJ in the extract quoted above). To the contrary, the presumption of charitability holds that purposes that meet the public benefit test will be *presumed* to be charitable in the absence of a ground for holding that the purpose is not within the spirit and intendment of the preamble.

Many presumptions are rebuttable, including the presumption of charitability. At [31], the Supreme Court describes the presumption of charitability as rebuttable "if a purpose is treated as non-charitable in analogous cases" (see also [24], [26], and [80]). However, it is not clear why the Supreme Court sought to limit rebuttability of the presumption in this way. Grounds for holding that a purpose is not within the spirit and intendment of the preamble are not limited to situations of previous analogy. As noted by Russell LJ in the extract quoted above, the presumption leaves open "a line of retreat based on the equity of the Statute [of Elizabeth]". It is conceivable that a matter that has never previously been considered, and for which there is no analogous case, may

nevertheless give rise to a good reason why a particular purpose is not within the spirit and intendment of the preamble.

In addition, the presumption of charitability is not a "single test of public benefit". This appears to have been the submission of the charities regulator before the Supreme Court, based on submissions made before the Supreme Court of Canada in *Vancouver Society of Immigrant and Visible Minority Women v MNR* [1999] 1 SCR 10. However, and with respect, to characterise the presumption of charitability as a "single test of public benefit" is to mischaracterise the presumption.

The impact of Canadian jurisprudence

In the writer's experience, the charities regulator places a heavy emphasis on Canadian case law, in apparent preference to Australian and sometimes even New Zealand case law. This apparent deference to Canadian case law is perplexing, particularly given the markedly different statutory framework from which Canadian charities law jurisprudence derives (see for example the discussion in "The myth of charitable activities" [2014] NZLJ 304).

In *Vancouver Society of Immigrant and Visible Minority Women* the Supreme Court of Canada found, by a 4:3 majority, that the Vancouver Society of Immigrant and Visible Minority Women (the Society), an organisation focussed on assisting immigrants in integrating into Canadian society, did not qualify as a "charitable organisation" under Canadian income tax legislation. In response, the Society made an alternative submission before the Supreme Court of Canada that a "new, contextual approach" to charity should be adopted. This submission was described by the majority at [197] in the following terms:

> This new approach, which would be triggered only upon an organisation's failing to meet the traditional requirements, would be to ask whether the organisation is performing a "public benefit". There would be no fixed definition or categories of public benefit. Instead, the Court would consider a series of questions in making the determination, including whether the activities of the organisation are consistent with constitutional and *Charter* values, whether the activities complement the legislative goals enunciated by elected representatives, and whether they are of a type in respect of which government spending is typically allocated.

The majority of the Supreme Court of Canada rejected this approach as representing an "entirely new definition of charity" in Canada, that would constitute a "radical change" and that could have a "substantial and serious effect" on Canada's taxation system (at [200]).

It is not clear why the charities regulator in the *Greenpeace* case made reference to this decision of the Supreme Court of Canada in support of a proposition that strict adherence to a political purposes exclusion in New Zealand charities law was required. Greenpeace of New Zealand Incorporated had been granted leave to appeal paragraphs [55]–[68] and [96]–[97] of the Court of Appeal judgment (*Re Greenpeace of New Zealand Inc* [2013] NZSC 12). Neither the presumption of charitability, nor a "single test of public benefit", is mentioned in these paragraphs. Nor did Greenpeace base its argument on any such test, arguing instead for a "good old fashioned analysis, a public benefit test by analogy with the spirit of the Statute of Elizabeth, whatever that means" (*Greenpeace of New Zealand Incorporated* [2013] NZSC Trans 15 at 72).

However, and somewhat ironically, in the process of rejecting the charities regulator's submissions on the existence or desirability of a political purposes exclusion in New Zealand law, the Supreme Court appears to have been at pains to reject the public benefit test put forward by the appellant Society in *Vancouver Society of Immigrant and Visible Minority Women* in Canada. In so doing, the Supreme Court appears to have sought to dismiss a presumption of charitability in New Zealand law.

However, the approach put forward by the Society in its alternative submission in *Vancouver Society of Immigrant and Visible Minority Women* does not equate with a presumption of charitability as understood in New Zealand law. The Society's approach as set out above makes no reference to the seminal *Incorporated Council of Law Reporting* case, nor to the 2-stage test for the definition of charitable purpose and the alternative means of ascertaining whether a purpose is within the spirit and intendment of the preamble. Arguably, the approach put forward by the Society in *Vancouver Society of Immigrant and Visible Minority Women* would indeed constitute a "single test of public benefit", which may well constitute a "radical change" to Canadian law.

However, the Society's submission for a single "public benefit test" in Canadian charities law sheds no light on the presumption of charitability in New Zealand. As noted above, the presumption of charitability is not a single test of public benefit. It addresses the second limb of the 2-stage test for charitable purpose. The presumption of charitability does not lose the concept of charity but seeks to find it.

Further, the presumption of charitability has been firmly part of New Zealand for at least 40 years. Its continued application here would represent no change whatsoever, let alone one that might be described as "radical". To the contrary, to reject the presumption of charitability now would constitute a radical change in New Zealand law.

Further, even if Canadian jurisprudence did not recognise a presumption of charitability, as appears to be the case, such a position would not be binding in New Zealand.

Neither should it necessarily be persuasive. Canadian charities law jurisprudence has been the subject of much criticism (see for example: MC Cullity "The Myth of Charitable Activities" (1990) 10(1)1 Estate and Trusts Journal 7; and Mahood and Iler "Charity law blocks progress on issues facing Canadians" Toronto Star (7 March 2015) <www.thestar.com/opinion/commentary/2015/02/14/charity-law-blocks-progress-on-issues-facing-canadians.html>). Care should be taken before importing it into New Zealand.

THE ADVANTAGES OF THE PRESUMPTION OF CHARITABILITY

The development of the presumption of charitability appears to have derived, at least to some extent, from a recognition that the analogy approach has its limitations.

For example, the issue in the *Incorporated Council of Law Reporting* case was whether a purpose of the publication of reliable law reports was charitable under the 4th head. While the purpose was found to be clearly beneficial to the

public, a suitable analogy was apparently not readily available. In finding that the purpose was nevertheless charitable under the 4th head, Sachs LJ referred to the "artificiality" of the analogy approach, making the following comments at 94–95:

> ... I do not propose to consider the instant case on the basis of analogies. The analogies or "stepping stones" approach was rightly conceded on behalf of the Attorney-General not to be essential: its artificiality has been demonstrated in the course of the consideration of the numerous authorities put before us ...
> ... no useful purpose can be served by citation of specific authorities.

In describing the analogy approach as a "potential source of distortion" in charities law, A Parachin makes the following comments in "Common Misconceptions of the Common Law of Charity" (prepared for the conference on Defining, Taxing and Regulating Not-for-Profits in the 21st Century, Melbourne July 2012) at 5:

> The difficulty is that analogies on their own provide but an "imperfect guide". P C Hemphill illustrates the point as follows:
>
> > One can say that an egg is analogous to a football by reason of its shape. One can also say that an egg is analogous to baking powder by reason of its capacity to make cakes rise. One should, however, be a little wary of saying that baking powder is analogous to a football because they both share an attribute with an egg.
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> In a similar vein, N Brooks observes that "courts often find themselves three or four analogies removed from the preamble" and that "far-fetched analogy drawing could be multiplied one-hundred fold."

Parachin describes *Vancouver Regional FreeNet Association v MNR* [1996] 3 FC 80 as an example of "analogical reasoning gone wrong":

> This case concluded that the provision of free access to the internet — the information superhighway — was charitable on the basis of (among other things) a strained analogy to the repair of highways, a charitable purpose enumerated in the preamble to the Statute of Charitable Uses. With respect, the charitableness (or lack thereof) of the purposes under review in Vancouver Regional FreeNet has absolutely nothing to do with the charitableness of repairing public highways (footnotes omitted).

By contrast, the presumption of charitability appears to have developed as a means of finding the concept of charity in a way that is more "intellectually honest". As noted in 1998 by Hammond J in *Re Collier (Deceased)* at 95:

> ... in the public interest there should be an open recognition of a presumption, as opposed to a construction, in favour of charity. Such an approach is more intellectually honest; it is also based on sound policy.

The development of the law to the point of a presumption of charitability had been foreshadowed by the House of Lords in *Scottish Burial Reform and Cremation Society Ltd v Glasgow Corporation* [1968] AC 138 at 147:

> The preamble specifies a number of objects which were then recognised as charitable. But in more recent times a wide variety of other objects have come to be recognised as also being charitable. The courts appear to have proceeded first by seeking some analogy between an object mentioned in the preamble and the object with regard to which they had to reach a decision. And then they appear to have gone further and to have been satisfied if they could find an analogy between an object already held to be charitable and the new object claimed to be charitable. And *this gradual extension has proceeded so far that there are few modern reported cases where* a bequest or donation was made or an institution was being carried on for a clearly specified object which *was for the benefit of the public* at large and not of individuals, and yet the object was held *not* to be within the spirit and intendment of the Statute of Elizabeth I (emphasis added).

A proper application of the presumption of charitability could stem the current flow of good charities being deregistered or declined registration, at immeasurable detriment to the public. It would also honour the words of Dobson J in *National Council of Women of New Zealand Incorporated v Charities Registration Board* (2014) 26 NZTC 21,116 at [53]: the Charities Act is to be applied "to facilitate charitable works, not frustrate them".

An example of the difficulty currently being experienced can be found in the context of social housing.

Social housing

The Queenstown Lakes Community Housing Trust was established by the Queenstown Lakes District Council to assist with housing certain families in Queenstown. Queenstown is a tourist city that requires people to carry out work serving the tourist industry, such as working in bars and cleaning toilets. This work may not always be sufficiently well-paid to allow those who engage in it to afford housing in the expensive Queenstown area. However, the Queenstown community so badly needed people to carry out this work that the local Council established a trust, the Queenstown Lakes Community Housing Trust, to assist people into housing in Queenstown.

The Queenstown Lakes Community Housing Trust was registered as a charity with the Charities Commission (as it was then). However, it was then controversially deregistered in 2010, on the basis that assisting people to buy housing resulted in a private benefit.

The Trust's purposes may not be charitable under the 1st head (the relief of poverty). However, with respect they seem clearly charitable under the 4th head, under either the analogy test or the presumption of charitability.

The Trust's purposes seem clearly charitable by analogy with gifts for the benefit of a particular locality (such as *Re Tennant* [1996] 2 NZLR 633 (HC)) and/or Australian economic development cases (such as *Tasmanian Electronic Commerce Centre Pty Ltd v Commissioner of Taxation* [2005] FCA 439 and *Commissioner of Taxation v Triton Foundation* [2005] FCA 1319). The Trust's purposes also seem charitable under the presumption of charitability: the Trust's contribution to the social, economic, and environmental wellbeing of those living in the Queenstown area seems clearly for the public benefit, and there is no apparent reason for holding that it does not fall within the spirit and intendment of the preamble.

Further, it seems unlikely that the Council would have used ratepayers' money to establish a Trust for the purpose of conferring private benefits on individuals. Any private benefit is surely incidental to the true purpose: to benefit the

wider community by attracting and retaining the workers the community desperately needed. There is no requirement for public benefit to be direct (see for example Dr D Poirier *Charity Law in New Zealand* <www.charities.govt.nz/assets/Uploads/Resources/Charity-Law-in-New-Zealand.pdf>, at 4.1.1.3); and incidental private benefits are not inconsistent with charitable status (see for example *Latimer v Commissioner of Inland Revenue* [2004] 3 NZLR 157 (PC) at [35]).

Nevertheless, despite all of this authority, the charities regulator deregistered the Trust. The Queenstown Lakes Community Housing Trust appealed the deregistration decision to the High Court under s 59 of the Charities Act, but was unsuccessful (*Re Queenstown Lakes Community Housing Trust* [2011] 3 NZLR 502 (HC)): the Court essentially found that the private benefits to individuals were the purpose of the Trust, despite the Trust's clear and overwhelming public benefit (*Queenstown* at [73]).

With respect, the *Queenstown* decision raises questions about whether the framework of the Charities Act as it is currently being interpreted is providing charities with an effective means by which they can hold their regulator to account. The question whether a purpose will or may operate for the public benefit is a question of fact to be answered by forming an opinion on the evidence (see *Commissioner of Inland Revenue v Molloy* [1981] 1 NZLR 688 (CA) at 695). However, charities' ability to have an oral hearing of evidence, to establish that their purposes are charitable, appears to have been removed under the framework of the Charities Act as it is currently being interpreted (see *Foundation for Anti-Aging Research v Charities Registration Board* [2014] NZHC 1153 at [64]–[69] and [74]–[85]). This point is discussed elsewhere (see for example the discussion in Susan Barker "Appealing decisions of the charities regulator", paper prepared for the Auckland District Law Society seminar *Charity begins at ... developing perspectives on charity law*, 1 and 3 April 2014).

Although the presumption of charitability was alluded to in the decision (*Queenstown* at [49]), it was not applied in either reaching or upholding the deregistration decision. If the presumption of charitability had been applied, the result may well have been different.

Following the *Queenstown* decision, the charities regulator commenced a review of the charitable status of community housing providers, with a view to deregistering those it considers fall within the *Queenstown* ruling (see the commentary to the Taxation (Annual Rates for 2015–16, Research and Development, and Remedial Matters) Bill (7–1) at 63–64).

The Government did not agree with the charities regulator's decision to deregister the Queenstown Lakes Community Housing Trust, describing the decision as "arbitrary" (Michael Fox "Housing charity hit by tax bill" (28 May 2014) <www.stuff.co.nz/national/politics/10093399/Housing-charity-hit-by-tax-bill>). However, there was no clear mechanism by which the Government could appeal the High Court decision. Instead, the Government amended the law to provide social housing providers with their own specific income tax exemption: new section CW 42B *Community housing trusts and companies* was inserted into the Income Tax Act 2007 by the Taxation (Annual Rates, Employee Allowances, and Remedial Matters) Act 2014. New section LD 3(2)(ac) also specifically provides "community housing entities", as defined, with donee status.

The Government has also used $6 million of taxpayers' money to pay the Queenstown Lakes Community Housing Trust's income tax liability that arose as a result of the deregistration (Michael Fox, above).

Yet these measures have still not resolved the problem. Regulations under new section 225D of the Tax Administration Act 1994, defining who may be counted as beneficiaries or clients of community housing entities, and therefore who may be eligible for the new income tax exemption, are yet to be promulgated. This has caused further uncertainty for community housing entities, which has been exacerbated by new tax rules requiring deregistered charities to divest themselves of their net assets within 12 months of deregistration or pay tax on the balance. Section HR 12 of the Income Tax Act 2007 applies from 14 April 2014 (for charities that voluntarily deregister) or otherwise from 1 April 2015.

In response, the Government has proposed a further legislative "fix up": cl 264 of the Taxation (Annual Rates for 2015–16, Research and Development, and Remedial Matters) Bill (7-1), introduced into Parliament on 26 February 2015, proposes to defer application of the net assets tax rule in section HR 12 until 1 April 2017, for deregistered charities whose purposes or activities are "predominantly the provision of housing". The commentary on the bill says the deferral is needed "to provide more time for officials to finalise the eligibility requirements for the new tax exemption for community housing entities and for Charities Services to complete its review of the charitable status of community housing providers". This provision is proposed to have retrospective effect from 14 April 2014.

Interestingly, the *Queenstown* decision has been specifically considered but not followed in Australia (see *Chamber of Commerce and Industry of Western Australia (Inc) v Commissioner of State Revenue* [2012] WASAT 146). This indicates that another view of the law as it might apply to the facts of the Queenstown Lakes Community Housing Trust situation is clearly possible.

The expenditure of public funds from the Queenstown Lakes District Council to the Trust, together with the various legislative measures that have subsequently been taken by the Government to support the Trust, are surely clear indicators that the Trust's purposes operate for the public benefit and are charitable.

It is frustrating that such significant and, no doubt fiscally expensive, measures have had to be taken in response to a decision that could (and arguably should) have been decided differently.

The situation is also frustrating given that providing community housing entities with their own specific tax exemption in lieu of charitable registration appears to be a second-best option: while the income tax exemption is undoubtedly helpful and welcome, inability to access charitable registration means inability to access the other benefits that accompany registered charitable status, such as funding.

Habitat for Humanity describes the position this way ("Habitat welcomes Government housing reforms" (press release, 30 January 2015) <www.scoop.co.nz/stories/PO1501/S00131/habitat-welcomes-government-housing-reforms.htm>):

> ... another area of concern for Habitat and other providers of home ownership schemes is the ongoing uncertainty of tax exempt status which is currently under review. We would encourage the Government to also seek engagement with community providers on tax exemption as they are with housing reform as they are intrinsically linked.

> This issue is currently undermining housing reform discussions and creating great uncertainty by questioning the charitable nature of such work. Habitat operates as a charity around the globe and a change in status in New Zealand would be out of step with the global community.

It appears that this situation, and all its associated cost, could have been entirely avoided had the charities regulator simply applied the presumption of charitability that, prior to the Supreme Court decision in *Greenpeace* (SC), was firmly part of New Zealand law.

FISCAL CONSEQUENCES

The comments of the Supreme Court in *Greenpeace* (SC) appear to have been driven by a concern that recognising the presumption of charitability would have "fiscal consequences" (at [30]).

However, the writer respectfully submits that the concept of defining charity by reference to fiscal consequences is itself a source of difficulty. Adam Parachin puts it this way (above, at 20–21):

> A fiscal consequences test frames the potential for revenue loss as something inimical to the charitableness of a given purpose. Specifically, the prospect of tax revenue loss is treated under such a test as either conclusive, or at the very least highly persuasive, evidence that a given purpose departs from an idealised definition of charity. In answering the question 'what is legal charity?', a fiscal consequences test essentially says that charity is a cost to the public treasury that courts should minimise. But a projection of revenue losses will be speculative ... and will, in any event, offer absolutely nothing probative of whether the purpose under review is a charitable purpose ...
>
> Revenue loss is not an inadvertent consequence of income tax concessions for charities. The very purpose of these concessions is to provide charities with an indirect state subsidy. Since revenue loss is inherent in this state subsidy, it is not a reason to withhold charitable status so much as it is (ironically) the very reason to grant it ... Legal charity under a fiscal consequences test has a great potential to be distorted into nothing more than a cost to the public treasury.

There appears to be an assumption that interpreting the definition of charitable purpose in a manner more consistent with the community's expectations would result in a "widening" or a "liberalisation" of the definition. To the contrary, the interpretation taken by the charities regulator has arguably changed the law, by narrowing it significantly, despite the fact that it had no mandate to do so. The Select Committee considering the Charities Bill specifically recommended that the definition be left unchanged (see Charities Bill 2004 (108-2) (select committee report) at 3).

The writer submits that to ration the privileges of charity through unquantified references to "fiscal consequences" would indeed cause the definition of charitable purpose to become distorted; this phenomenon is arguably already being observed. Charities provide important services to the community that would otherwise fall to government to perform. Charities arguably perform such services more efficiently than government. In considering the "fiscal consequences" of various interpretations of the definition of charitable purpose, the benefits to the public that charities provide appear to have been overlooked, as has the loss to the public of those benefits if charities are forced to close through being unable to access funding due to an inability to gain registered charitable status. Similarly, the fiscal consequences involved in providing legislative fix-ups, such as those that followed the *Queenstown* decision, also appear to have been overlooked.

The net fiscal effect from interpreting the definition of charitable purpose in a manner more consistent with the community's expectations may in fact be positive. The point is that the empirical analysis has not been done.

Further, the charities regulator also has no mandate to take "fiscal consequences" into account in interpreting the definition of charitable purposes, as noted by Dobson J in *Queenstown* at [78]:

> ... Parliament has, in s 5 of the [Charities] 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.

With respect, the spectre of unquantified "fiscal consequences" that may not even arise is not a sound basis for a wholesale removal of the presumption of charitability.

THE PRESUMPTION OF CHARITABILITY FOLLOWING THE SUPREME COURT DECISION

The comments of the Supreme Court with respect to the presumption of charitability are *obiter*. They were not necessary to determine the appeal, do not appear to have been the subject of argument and, with respect, the Court appears to proceed on the basis of a mischaracterisation of the presumption itself.

As discussed above, irrespective of the position in other jurisdictions, the removal of the presumption of charitability would constitute a radical change to New Zealand law. It is curious that the Supreme Court would seek to make such a radical change to New Zealand charities law by a sidewind, without having heard argument on the point.

The presumption of charitability is an important principle of New Zealand charities law and an important protection for charities. Properly applied, it could resolve many of the issues currently causing controversy.

In the writer's view, the comments of the Supreme Court in *Greenpeace* (SC) do not and should not represent the final word on the status of the presumption of charitability in New Zealand. It is very important that the status of the presumption of charitability in New Zealand law is specifically addressed, and clarified, on the basis of full argument.

The scope for recognising new charitable purposes was considered in England and Wales in *RR 1a: Recognising New Charitable Purposes* (October 2001). In that document, the Charity Commission for England and Wales notes at [25] and [37] that:

> ... legal authorities suggest that analogy with specific purposes already accepted as charitable is not strictly needed but that a broader analogy with the kinds of purposes already accepted as charitable is sufficient ... We will adopt this approach where there is clear benefit to the public ...

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Circumstances where we could recognise new charitable purposes or organisations as charities might arise where: ... there are changes in social and economic circumstances and attitudes in society in general to the value of a particular activity or idea not previously recognised as charitable ...

Further, at A8 and A9:

> In ... *In Re Strakosh* [[1949] CH 529], Lord Green ... indicated that specific analogies were unnecessary by his statement that the public benefit "does not have to be in any way ejusdem generis with the recited purpose but it has to be charitable in the same sense".
>
> We would be in favour of taking this broad approach to the analogy issue, in the absence of a specific analogy, where there is clear benefit to the public.

It may be that this analysis effectively equates with the presumption of charitabilty as understood in New Zealand law. The extent to which a presumption of charitability applies or should apply in New Zealand law needs to be similarly properly considered and examined. ❐