IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

CIV-2013-485-3859
CIV-2013-485-3861
[2016] NZHC 2328

IN THE MATTER OF	Appeals against the decision of the Charities Registration Board, established under section 8 of the Charities Act 2005, declining the appellants' applications for registation as charitable entities under the Charities Act 2005
	RE THE FOUNDATION FOR ANTI-AGING RESEARCH AND THE FOUNDATION FOR REVERSAL OF SOLID STATE HYPOTHERMIA Appellants

CIV-2015-485-975

BETWEEN	THE FOUNDATION FOR ANTI-AGING RESEARCH AND THE FOUNDATION FOR REVERSAL OF SOLID STATE HYPOTHERMIA Applicants
AND	THE CHARITIES REGISTRATION BOARD First Respondent
	THE CHIEF EXECUTIVE OF THE DEPARTMENT OF INTERNAL AFFAIRS Second Respondent

Hearing:	16-17 May 2016
Counsel:	V E Casey and S D Barker for Applicants D Harris and A L Dixon for the First Respondent D J Perkins for Second Respondent
Judgment:	30 September 2016

RESERVED JUDGMENT OF ELLIS J

I direct that the delivery time of this judgment is
11 am on the 30th day of September 2016

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[1] The possibility of life after death is, perhaps, one of humanity's oldest preoccupations. Resurrection is at the heart of Christian ideology. And from Mary Shelley's *Frankenstein*, HG Welles' *When the Sleeper Wakes*, Oscar Wilde's *Picture of Dorian Gray*, Bram Stoker's *Dracula* to B grade zombie movies, the idea that death might somehow be defeated, has long since fascinated creative minds.

[2] The notion that such fiction might, in the future, become a reality is somewhat more recent. Cryonics first began to be thought about seriously in the 1960s. And while there are still many sceptics and detractors, the idea also undoubtedly has serious proponents. For example, in 2004 and 2005 some 62 scientists and academics from across the world put their names to an open letter which stated:

> Cryonics is a legitimate science-based endeavour that seeks to preserve human beings, especially the human brain, by the best technology available. Future technologies for resuscitation can be envisioned that involve molecular repair by nanomedicine, highly advanced computation, detailed control of cell growth, and tissue regeneration.
>
> With a view towards these developments, there is a credible possibility that cryonics performed under the best conditions achievable today can preserve sufficient neurological information to permit eventual restoration of a person to full health.

[3] That letter formed part of the material that was put before the New Zealand Charities Registration Board (the Board) when the Foundation for Anti-Aging Research (FAAR) and the Foundation for Reversal of Solid State Hypothermia (FRSSH) (collectively, the Foundations) both sought charitable status under the Charities Act 2005 (the Act). Similar organisations have been granted charitable status overseas.[1]

[4] But the Board formed the view that the Foundations' principal purpose was to fund cryonics research, which the Board defined as research into the cryopreservation and reanimation of people and that this object neither fell under one of the established heads of charity nor was for the benefit of the public. Charitable status was denied.

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1 For example the Life Extension Foundation is a United States s 50(c)(3) public charity.

[5] Both Foundations have appealed their respective decisions. Together, they also seek judicial review of aspects of the Board's processes.

Background: the Foundations and their stated purposes

FAAR

[6] FAAR was established by deed executed on 20 September 1999 and incorporated under the Charitable Trusts Act 1957 on 27 October 1999.

[7] The stated purposes of FAAR are set out in cl 3 of its trust deed as follows:

> (a) to establish and fund the operation of a non-profit making hospital (the Hospital) to treat ageing human beings with therapies that are substantiated by peer-review published scientific studies;
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> (b) to provide for funding of scientific research at the Hospital aimed at discovering medical therapies that will alleviate and eliminate degenerative diseases in human beings;
>
> (c) to provide other funding of scientific research projects outside the Hospital for the purpose of discovering medical therapies that will alleviate and eliminate degenerative disease in human beings;
>
> (d) to establish and support a facility to accept anatomical specimens for the purpose of conducting research aimed at reversing disease, senescence, traumatic injury and deanimation; and
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> (e) to support other non-profit organisations involved in conducting research aimed at reversing disease, senescence, traumatic injury and deanimation.

FRSSH

[8] FRSSH is the more recently established of the two organisations. It was established by deed executed on 14 July 2011 and incorporated under the Charitable Trusts Act 1957 on 13 September 2011. The stated purposes of FRSSH are set out in cl 3 of its trust deed. Clause 3.2.1 of the Deed states:

> The principal purpose of the Foundation shall be to fund scientific research. The fruits of the scientific research funded may be used for the general benefit of all of mankind, including individuals who may benefit from advancements in organ and tissue transplantation, regenerative medicine, genetic engineering, cloning, DNA transplant engineering, cell colony cloning, immunologic engineering, molecular engineering (nanotechnology) during their lifetime, and including deceased individuals who have been

placed into cryopreservation or individuals who have made legal arrangements to be placed into cryopreservation or who may wish to make legal arrangements to be placed into cryopreservation for the purpose of future reanimation.

...

[9] Clause 3.2.2 states:

The major focus in furthering research shall be:

i. The development of highly sophisticated methods of repair and/or regeneration of tissues damaged by disease, injury, aging and the cryopreservation process.

ii. The development of ultra-small cell repair machines capable of entering individual cells, especially brain cells, in order to make these cells fully functional again.

iii. The development of methods to regenerate or re-grow healthy cells, tissues, and organs to replace damaged or missing cells, tissues and organs.

iv. The development of methods to determine the biologic, physical, and chemical bases to revive, restore or reconstruct the identity of cryopreserved individuals.

[10] Clauses 3.3 to 3.11 then set out how this principal purpose will be achieved including funding research to restore cryopreserved individuals; funding research to develop appropriate medical protocols to carry out reanimation; funding research aimed at creating a 'database' of the identities of cryopreserved individuals for future use; funding research "directly" by grants or "indirectly" by developing scientific research organisations; emphasising research relating to repairing or reversing the effects of today's "primitive cryopreservation methods"; retaining the discretion to fund other research products in the future; intending to operate the Foundation in accordance with s 501(c)(3) of the United States Internal Revenue Code 1986, so long as no New Zealand laws are contravened; not engaging in any activities that are prohibited under the United States Internal Revenue Code; and not intervening or participating in any political campaign, in accordance with US tax law.

[11] FAAR and FRSSH are undoubtedly connected. They share a trustee and their objectives overlap. The principal distinction between them for present purposes is

that none of FAAR's written purposes involve funding research into the cryopreservation and reanimation of people.

The legal context

[12] At common law, charitable status was recognised on a case by case basis by analogy with previous decisions falling generally within the "spirit and intendment" of the preamble to the Statute of Charitable Uses 1601 (UK) 43 Eliz I cl 4.[2]

[13] Since charitable status carries with it the benefit of exemptions under income tax legislation, New Zealand authorities prior to the Act generally arose in the course of disputes with the Commissioner of Inland Revenue. Such disputes took their legal shape as objections or challenges under the Inland Revenue statutes, with the Commissioner taking the role of an active protagonist.

[14] Applications for registration as a charity are made under Pt 2 of the Act. The essential pre-requisites are found in s 13. Where the entity concerned is a trust, it must be of a kind "in relation to which an amount of income is derived by the trustees in trust for charitable purposes".[3] And the concept of charitable purpose is defined by s 5, which relevantly provides:

> **5 Meaning of charitable purpose and effect of ancillary non-charitable purpose**
>
> (1) In this Act, unless the context otherwise requires, **charitable purpose** includes every charitable purpose, whether it relates to the relief of poverty, the advancement of education or religion, or any other matter beneficial to the community.
>
> ...
>
> (3) 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.
>
> (4) For the purposes of subsection (3), a non-charitable purpose is ancillary to a charitable purpose of the trust, society, or institution if the non-charitable purpose is—

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2 *The Commissioners for Special Purposes of the Income Tax v Pemsel* [1891] AC 531 (HL).

3 Charities Act 2005, s 13(1)(a).

(a) ancillary, secondary, subordinate, or incidental to a charitable purpose of the trust, society, or institution; and

(b) not an independent purpose of the trust, society, or institution.

[15] The Supreme Court in *Re Greenpeace* held that the Act builds on the pre-existing common law understanding of charitable purpose.[4] So case law about that remains relevant and guides the interpretation and application of s 5.

[16] It is not in dispute that if an organisation's purposes fall within one or more of the first three s 5(1) heads (relief of poverty, the advancement of education or religion) then public benefit is generally presumed, although it may be rebutted. If it falls within the fourth, there is no such presumption, and the Court must consider whether the purposes are beneficial to the community or a sufficient section of it. There is also a requirement under the fourth head that charities fall within the general spirit and intendment of charities law. Analogy with existing cases is relevant.

The registration process under the Act

[17] The Board has functions, duties and powers relating to the registration and deregistration of charitable entities (s 8(3)). The Board is permitted to delegate its functions to the chief executive of the Department of Internal Affairs or any member of the Board (s 9(1)). But the receipt and processing of applications for registration is a function conferred explicitly upon the chief executive (s 10(c)).

[18] An application for registration must be made in the prescribed form and must be accompanied by a copy of the rules of the entity seeking registration (s 17). There are certain other formal requirements to be met although the application form itself is essentially a box-filling exercise with little substantive content. Rather, the main focus of the Board at the initial stage is on the applicant's purposes as revealed by its rules.

[19] As soon as practicable after receiving a properly completed application for registration, the chief executive must consider whether the entity qualifies for

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4 *Re Greenpeace of New Zealand Inc* [2014] NZSC 105, [2015] 1 NZLR 169 at [12].

registration (s 18(1)). The chief executive may request that further information or documents be supplied by the applicant (s 18(2)). And s 18(3) provides that, in considering an application, the chief executive must:

> (a) have regard to—
>
> (i) the activities of the entity at the time at which the application was made; and
>
> (ii) the proposed activities of the entity; and
>
> (iii) any other information that it considers is relevant; and
>
> (b) observe the rules of natural justice; and
>
> (c) give the applicant—
>
> (i) notice of any matter that might result in its application being declined; and
>
> (ii) a reasonable opportunity to make submissions to the chief executive on the matter.

[20] The chief executive then makes a recommendation that the Board should either grant or decline the application.[5] If the Board is satisfied the entity qualifies for registration, it must grant the application and direct the chief executive to register the entity.[6] No formal process is prescribed for the Board to follow but, if it proposes to decline an application, it must first be satisfied the chief executive has complied with s 18(3).[7] If the Board is not satisfied that an entity is qualified to be registered, the Board must give the chief executive the reasons for its decision and direct the chief executive to notify the entity of the Board's decision and the reasons for it.[8]

What the Board did here

The process

[21] It took more than 18 months for the Foundations' applications for registration to be determined. The applications were lodged in late 2011 and were declined in July 2013.

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5 Charities Act 2005, s 19(1).
6 Section 19(2).
7 Sections 19(3) and (5).
8 Section 19(4).

[22] On 26 April 2012, FRSSH was advised that its application might be declined. The reasons given were the lack of acceptance by the mainstream scientific community as to the feasibility of cryonic reanimation; the low public uptake over the last 45 years; the lack of evidence to show that its purposes were charitable; the high costs associated with the process of cryonics; and the lack of evidence of sufficient public benefit. On 9 May 2012, FAAR was also requested to provide further information so the chief executive could be satisfied that FAAR's activities were exclusively charitable.

[23] In response to these requests, both FAAR and FRSSH responded at length by letter. Various documents were provided. These materials focused on the proposed activities and purposes of both entities and the issue of public benefit. The correspondence continued. The chief executive maintained his view that the Foundations' purposes were not exclusively charitable and did not provide sufficient public benefit to qualify for registration.

[24] On 28 May 2013 the Foundations each separately submitted further information and analysis in support of their applications. This included a lengthy letter from a firm of United States attorneys attaching a list of relevant scientific journal papers and other exhibits. In addition, seven lengthy and detailed affidavits were provided by research scientists, senior scientists, scientific officers and executives involved in activities relevant to the Foundations' purposes. These were directed to the nature of the research being conducted, the extent to which the research was accepted in the scientific community, and the public benefits that could be expected from research to be undertaken using funding provided by the appellants. Many documents in support were attached to the affidavits.

The decisions

[25] At the conclusion of this process, the chief executive provided the Board with two reports covering the legal and factual issues to be considered, along with a recommendation that the applications be declined. The reports included reference to material that had not been submitted to him by the Foundations, namely:

(a) material from the Cryonics Institute website;[9] and

(b) a 2001 book that is available online entitled *Death To Dust: What Happens To Dead Bodies?* by Kenneth V Iserson.[10]

[26] The Board's subsequent two decisions dated 18 July 2013 are each a little over 30 pages in length. Essentially they adopt both the chief executive's recommendations and his reasoning.

[27] Because the two determinations are so similar, for the remainder of this judgment I will simply refer to the FAAR decision. The only point of departure between the two is that the FAAR decision contains the additional finding that FAAR's purposes includes the funding of cryonics research, despite that not being included as one of its written purposes.

[28] The key finding in both decisions is summarised by the Board in the following terms:[11]

> The Board has determined that the Foundation is not qualified to be registered as a charitable entity under the *Charities Act 2005* (the Act). The Board considers that the Foundation has an independent (non-ancillary) purpose that is not charitable at law, contrary to the registration requirements set out in section 13 of the Act and case law. We consider that the Foundation pursues an independent purpose to fund cryonics research (research into the cryopreservation and reanimation of people). This purpose does not advance education and or any other purpose that is charitable at law. Further, we are also not satisfied that the Foundation's purposes provide sufficient public benefit, which is a requirement for charitable status.
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> (footnotes omitted)

[29] I will refer to the impugned aspects of the decision in more detail later in this judgment.

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9 Cryonics Institute <www.cryonics.org>.

10 Kenneth V Iserson *Death To Dust: What Happens to Dead Bodies?* (2nd ed, Galen Press Ltd, Tucson, 2001) <www.galenpress.com/extras/extra32>.

11 *Registration decision: The Foundation for Reversal of Solid State Hypothermia* 2013-8, 18 July 2013 at 3 and *Registration decision: The Foundation for Anti-Aging Research* 2013-9, 18 July 2013 (Registration decision) at 3.

The right of appeal

[30] A person aggrieved by a decision of the Board may appeal to the High Court under s 59(1) of the Act. The powers available to the High Court in considering the appeal are set out in s 61:

> **61 Determination of appeal**
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> (1) In determining an appeal, the High Court may—
>
> (a) confirm, modify, or reverse the decision of the Board or the chief executive or any part of it:
>
> (b) exercise any of the powers that could have been exercised by the Board or the chief executive in relation to the matter to which the appeal relates.
>
> (2) Without limiting subsection (1), the High Court may make an order requiring an entity—
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> (a) to be registered in the register of charitable entities with effect from a specified date; or
>
> (b) to be restored to the register of charitable entities with effect from a specified date; or
>
> (c) to be removed from the register of charitable entities with effect from a specified date; or
>
> (d) to remain registered in the register of charitable entities.
>
> (3) The specified date may be a date that is before or after the order is made.
>
> (4) The High Court may make any other order that it thinks fit.
>
> (5) An order may be subject to any terms or conditions that the High Court thinks fit.
>
> (6) Nothing in this section affects the right of any person to apply, in accordance with law, for judicial review.

The grounds of appeal and review

[31] The Foundations submit that the Board was wrong in holding that:

(a) their purposes were not charitable as advancing education;

(b) their purposes were not charitable as relief of the aged and impotent;

(c) their purposes were not charitable as any other matter beneficial to the community; and

(d) FAAR had an independent (non-ancillary) purpose of funding cryonics research.

[32] The Foundations are also critical of the Board's reliance on material sourced from the internet. They say that it is not the role of the Board to determine the ultimate feasibility of novel scientific research; any genuine research that is publicly disseminated should meet the criteria. They also say that, because the Board wrongly concluded that FAAR had the same purposes as FRSSH, it failed to consider that application on its own merits.

[33] In their written submissions the Foundations said that the judicial review concern only becomes relevant if the Court upholds the Board's decision in the appeals. But in that event, the primary challenge to the process followed is that the relationship between the Board and the Department of Internal Affairs was too close, and the Board failed to act independently. The Foundations say that instead of taking its own view, as required by the Act,[12] the Board adopted a "governance" function whereby it merely approved the decision making process undertaken by Departmental staff.

[34] The application for review also challenges the adequacy of the information relied on by the Board, and the failure of the Board to hear from the Foundations directly.

Procedural matters

[35] Before turning to consider the merits of the issues raised by the proceedings it is necessary to say something about the way the hearing before me was conducted.

[36] Rule 20.9(2) of the High Court Rules provides that the impugned decision-maker is not to be named as a respondent to an appeal. Rule 20.17 nonetheless provides that, in general, such a decision-maker is entitled to be represented and

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[12] Charities Act 2005, s 8(4).

heard at the hearing of an appeal on all matters arising in it. So although the Board has a right to be heard in an appeal, it is not a party and (it follows) it would not itself be entitled to appeal the High Court's decision. It cannot be liable for costs.

[37] To the extent that the Board does choose to exercise its r 20.17 right, the authorities are clear that counsel should adopt a position of assisting the Court rather than taking a proactive role.[13] In *Secretary for Internal Affairs v Pub Charity*, the Court of Appeal made it plain that the proper course for decision-makers is to abide the decision of the court and not enter the fray.[14] Submissions should be confined to matters such as the Board's jurisdiction or the general administration of the relevant legislation.

[38] That said, however, in many cases involving appeals from tribunals or other decision-making bodies that form part of the Executive there will, naturally, be a contradictor other than the decision-maker itself. That is not the case here. As noted earlier, prior to the 2005 Act, the contradictor in charities cases was usually the Commissioner of Inland Revenue. At that time there was no separate registration or monitoring regime that gave rise to challenges such as the present.

[39] A rough and ready survey of the appeals against registration and deregistration decisions since 2005 indicates that practice has varied in terms of naming either the Charities Commission[15] or the Board as a respondent. But it seems that the Commission and the Board has routinely appeared and been heard in such appeals. For example in *National Council of Women v Charities Registration Board*, Dobson J noted:[16]

> [3] The CRB was not cited as a respondent to the appeal, but counsel for the CRB filed submissions and Ms Carrad spoke to them at the hearing. In the circumstances of this appeal, that was entirely appropriate and helpful to

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13 *Portage Licensing Trust v Auckland District Licensing Agency* (1997) 10 PRNZ 554 (HC).

14 *Secretary for Internal Affairs v Pub Charity* [2013] NZCA 627 at [27].

15 The Charities Amendment Act (No 2) 2012 disestablished the Charities Commission and transferred its functions to the chief executive of the Department of Internal Affairs and the Board. The substantive powers remain largely unchanged and the functions of the chief executive and the Board largely replicate those of the Charities Commission: *Re Greenpeace of New Zealand Inc* [2012] NZCA 533 (CA) at [2] and [35].

16 *National Council of Women v Charities Registration Board* [2014] NZHC 3200, [2015] 3 NZLR 72. Oddly, the intituling suggests that the Board *was* named as a respondent.

> provide a contradictor to the criticisms of the CRB's decision and conduct that were advanced on the appeal.

[40] It is not quite clear to me what the word "contradictor" means in this context. To the extent it involves actively defending its decision on appeal, it seems to me that it goes further than the orthodox approach I have outlined above. Ultimately, however, the extent of assistance provided will be a matter for the Judge who is hearing the appeal. But if there are wider public interest issues raised by an appeal, it may be that the preferable course would be for the Attorney-General (in his role as protector of charities) to be joined and to participate. [17]

[41] In the present case, the Board was (quite correctly) not named as a respondent in the appeals. At an early stage it indicated that it would exercise its right of appearance "to assist" the Court. Also at an early stage, however, the Foundations applied for a direction that the Attorney-General be served with the appeals. This was opposed by the Board. In his judgment dealing (inter alia) with the application Joseph Williams J said:[18]

> [70] The appellants argue that the proceeding should be served on the Attorney-General as protector or guardian of charities. The appellants argue that the appeals raise a number of issues that will potentially impact on New Zealand's charities law "well beyond the factual situation pertaining to the Foundations themselves". The appellants implicitly argue more broadly that the Attorney-General should always be served or named as a party.
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> [71] The Crown argues essentially that New Zealand Courts have, in the past, decided broad principles of charities law without appearance by the Attorney-General, and appellant charities, or aspiring charities, seem well able to marshal evidence and argument in support of their appeals.
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> [72] I agree with the appellants that the appeal does raise novel issues around the treatment of "new science" (I use that term neutrally) in charities law. I see no harm at all in directing that the appeal be served on the Attorney-General in light of the issues raised. Whether the Attorney-General wishes then to apply to intervene is a matter entirely for him.

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17 The Attorney-General has an historical function as protector of charities. In *Kaikoura County v Boyd* [1949] NZLR 233 (SC) the court said at 262: "it seems generally desirable that the Attorney-General should be part at least to any action concerning a charitable trust of substantial value for the benefit of the general public or a section of them". And under the Charities Act 2011 (UK) the Attorney-General's role in the hearing of charities cases has been expressly recognised.

18 *Foundation for Anti-Aging Research v Charities Registration Board* [2014] NZHC 1153.

[42] Williams J's statement at [71] must, in my respectful view, be read against the background that until relatively recently the Commissioner of Inland Revenue took an active "contradictor" role in such cases.

[43] As things transpired, the Attorney-General took no steps. But in the context of a subsequent case management conference (after the filing of the judicial review proceedings) the Board's position appears to have changed. The Court was advised that:

(a) the Board would abide the Court's decision on the judicial review but would "take an active role in opposing" the appeals; and

(b) the chief executive would defend the judicial review proceedings.

[44] The timetable then ordered included directions as to the filing of submissions by the Board and, a week or so before the hearing, the Board duly complied. The submissions were lengthy and detailed. I have no doubt that they were intended to assist the Court. But as Ms Casey submitted, the tenor of the submissions appeared to be that the Board recognised difficulties with important aspects of its reasoning in the impugned decisions but sought instead to advance fresh matters in support of them, inviting the Court to uphold them on that new basis.

[45] By way of example only, the Board's submissions raised the following matters for the first time:

(a) that public opinion on the benefits of the potential outcome of research is relevant to the question of charitable status and that the absence of consensus on the issue counts against such status;

(b) that cryonics research being undertaken in the United States must be illegal in New Zealand;

(c) that cryonics research being undertaken in the United States might be regarded as unethical in New Zealand; and

(d) that cryonics research being undertaken in the United States might be contrary to the principles of the Treaty of Waitangi or at odds with tikanga Māori.

[46] While the extent of engagement by counsel for the Board may have been well-meant, in my view it went too far. Unless expressly invited to assist in some other respect, the Board should confine its submissions to matters on which it can provide impartial assistance to the Court. If there are matters of wider public importance raised by an appeal then, as I have said, it seems to me that the Attorney-General should appear, not in order to defend the Board's decision (although he may coincidentally do so) but for the purpose of addressing those matters. What the Board should not do is advocate for either its impugned reasoning or the result. And it should not seek to defend its decision on expanded or new grounds.

[47] While the Court is able to and, in this case, does put those parts of the Board's submissions that crossed the line to one side, the Board's stance as a protagonist creates difficulty in terms of any final disposition of these appeals. In the event that the appeals are allowed, I agree with Ms Casey that the option of referring the matter back to the Board for further consideration would almost certainly be off the table.[19] The Court's confidence that the Board could bring an impartial mind to the matter has, necessarily, been dented by its advocacy at the hearing.

[48] But now I turn to the appeals themselves. The Foundations were required to establish that the income derived from their activities is or would be exclusively for charitable purposes.[20] I consider the relevant heads of charity below.

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19 See the discussion in *Fonterra Co-Operative Group Ltd v The Grate Kiwi Cheese Company Ltd* (2009) 19 PRNZ 824 (HC) at [19].

20 Except to the extent that any non-charitable purpose is merely ancillary to a charitable purpose.

The advancement of education

The Board's decision

[49] The Board concluded that the Foundations' purpose was to fund cryonics research and that that purpose does not advance education in a way that is charitable in law. It said:[21]

> Taking into account the information provided by the Foundation and the Court's view that it will readily be inclined to construe a trust for research as importing subsequent dissemination of the results, the Board is satisfied that the Foundation's research will be disseminated. However, we are not satisfied that the cryopreservation and reanimation research funded by the Foundation (and intended to be funded) meets the requirements of being a useful subject of study. Further, the Board is not satisfied that the Foundation meets the public benefit requirement.
>
> (footnotes omitted)

[50] Prior to that conclusion the Board had referred to *McGovern v Attorney-General* as setting out the relevant principles which govern whether entities established for research purposes are charitable at law.[22] Thus (the Board said) a trust for research will ordinarily qualify as a charitable trust only if:

(a) the subject-matter of the proposed research is a "useful" subject of study;[23]

(b) it is contemplated that knowledge acquired as a result of the research will be disseminated to others;[24] and

(c) the trust is for the benefit of the public, or a sufficiently important section of the public.

[51] The Board held that cryonics research is not a "useful" subject of study for four reasons:

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21 Registration decision, at 43.

22 *McGovern v Attorney-General* [1982] Ch 327 at 352-353.

23 Referring to *Re Collier* [1998] 1 NZLR 81 (HC) at 92; *Re Hopkins' Wills Trust* [1965] 1 Ch 669, [1964] 3 All ER 46 and *Re Shaw's Will Trusts* [1952] Ch 163.

24 Referring to *Re Shaw's Will Trusts*, above n 23; *Taylor v Taylor* (1910) 10 CLR 218 and *Re Hopkins' Will Trusts,* above n 23.

(a) cryonics research is not an "accepted academic discipline";

(b) the Foundations had not provided evidence to show that cryonics is "an area which education may cover" [25] in New Zealand and there is strong consensus in the research community that it is not;

(c) not all cryonic research facilities and providers consider that cryonics research is "current science"; and

(d) there is a lack in the mainstream scientific community as to the feasibility and benefit of the research.

[52] The third and fourth of these reasons appear from the Board's footnotes to be based on the material the chief executive had accessed from the internet.

[53] The Board accepted the dissemination requirement was met, saying that:[26]

> Taking into account the information provided by the Foundation and the Court's view that it will readily be inclined to construe a trust for research as importing subsequent dissemination of the results, the Board is satisfied that the Foundation's research will be disseminated.

[54] As far as public benefit is concerned, the Board accepted that it is to be assumed where educational purposes are established. Nonetheless, the Board then said that objective consideration was still required of whether there was a public benefit in this case. I will return to that point later.

The "usefulness" test

[55] I am inclined to accept Ms Casey's submission that the Board's acceptance that the Foundations have the aim of funding research into cryonics, and that the result of the research would be publicly disseminated is probably a sufficient basis upon which to allow the appeal. As I have said, the Board's submissions more or

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25 Referring to Wilberforce J's comments in *Re Hopkins,* above n 23, at 680: "the requirement is that, in order to be charitable, research must either be of educational value to the researcher or must be so directed as to lead to something which will pass into the store of communicable knowledge in an area which education may cover …".

26 Registration decision, at 48.

less acknowledged as much. But I think it is important, both by way of cross-check, and in order to try and identify the error in analysis, to consider the specific reasons given for the Board reaching a contrary view.

[56] A useful summary of the law in New Zealand as it relates to the "advancement of education" head of charities can be found in Hammond J's decision in *Re Collier*.[27] Although the discussion occurred in the context of a bequest to fund the publication of a book, it is nonetheless instructive. He said:

> ... there is the well-known case of *Re Hopkins' Will Trusts* [1965] Ch 669 in which there was a bequest to the Francis Bacon Society Inc for the purpose of 'Finding the Bacon-Shakespeare manuscripts'. Wilberforce J was prepared to uphold that bequest as educational research. He said at p 680 that, in order to qualify as such, "research must either be of educational value to the researcher or must be so directed as to lead to something which will pass into the store of educational material, or so as to improve the sum of communicable knowledge in an area which education may cover – education in this last context extending to the formation of literary taste and appreciation".
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> ...
>
> It seems to me that for a publication bequest of this kind to be upheld, it must first confer a public benefit, in that it somehow assists in the training of the mind, or the advancement of research. Second, propaganda or cause under the guise of education will not suffice. Third, the work must reach some minimal standard. For instance, in *Re Elmore, deceased* [1968] VR 390 the testator's manuscripts were held to be literally of no merit or educational value. That decision followed *Re Pinion, Decd* [1965] 1 Ch 85, in which case Harman LJ at p 107 thought there to be "no useful object to be served in foisting upon the public this mass of junk" at issue in that case. See also, *Re Delius, Decd* [1957] Ch 299.
>
> This third principle differs from the position in United States law. There, Courts do not substitute their subjective assessment for that of the testator, save in a case of clear irrationality (see eg *Eckles v Lounsberry* 111 NW (2d) 638 (1961) at p 642). The difficulty with the United States approach is that it overlooks the fundamental premise of charities law: that a public benefit must be conferred. How can there be a public benefit in the propagation of sheer nonsense?
>
> In reply, it may be said that the judicial approach in the British Commonwealth is arrogant, or censorious. The answer to that, I think, is that it is certainly permissible – and advisable – to bring before the Court expert evidence that a prospective work has at least some educative value or public utility to enable recognition of it. The principle operates as a floor below which a work cannot sink.

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[27] *Re Collier* [1998] 1 NZLR 81 (HC) at 91-92. That decision is referred to in the Board's determinations.

[57] The requirement that the relevant research "must be so directed as to lead to something which will pass into the store of educational material" is simply a different articulation of the dissemination requirement that was noted by the Board in its decisions (as I have recorded at [50] above).

[58] I agree with Ms Casey that what all the authorities make clear is that "usefulness" as that term is applied in the cases constitutes a minimal standard (as Hammond J said), designed only to exclude the "nonsensical" - areas of research and study that are demonstrably devoid of merit. While the concept of merit may raise more difficult, subjective, issues of "taste" where (for example) literature or art is the focus of an educational advancement analysis, I would think such difficulties are much less likely to arise in matters of science.[28] There may be some areas of research whose objects are so at odds with provable reality that purported scientific pursuit of them can be dismissed as nonsensical or an exercise in certain futility. Attempting to prove that the earth is flat might be one such endeavour. But absence of merit of that sort will be easy to establish (or refute) by reference to objective evidence.

[59] But as the oft-cited decision in *Hopkins* makes clear, research into matters that might be regarded by "mainstream" academics as being on the fringe are not excluded.[29] The existence of scientific or academic controversy in a particular area is far from determinative. Nor is an acknowledgement that the goals of the research might only be achieved in the relatively distant future. By way of example only, the Mars Society New Zealand Charitable Trust, whose purposes are to encourage and inspire space science and research leading to New Zealand's participation in the exploration and settlement of Mars, was registered as a charity on 3 July 2013.[30] The pursuit of such long term goals is likely to yield much useful knowledge along the way, regardless of whether the endpoint is ever achieved. And if the research

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28 The question of "taste" was directly discussed and had been the subject of expert evidence in *Re Pinion, Decd* [1965] 1 Ch 85.

29 *Re Hopkins,* above n 23.

30 Interestingly, the material relied on by the Board from the internet and quoted in the decisions says that both cryonics research and research aimed at achieving human habitation on Mars are examples of "future" rather than "current" science.

that will be undertaken in order to work towards such a goal is likely to advance the sum of human knowledge then the "usefulness" threshold will be met.[31]

[60] It seems to me that that is very much the case here. The evidence is that the proposed research is likely to lead to advances in areas such as organ transplant medicine, in vitro fertilisation, stem cell research, treatment of a range of diseases and disorders and enabling biodiversity.

[61] When usefulness is understood in that way it becomes readily apparent that the four indicators relied on by the Board are largely irrelevant. In the absence of clear evidence that cryonics research is "nonsense" and will not advance human knowledge, it matters not whether such research is presently "accepted academic discipline" or "current science" (whatever those terms may actually mean). And as far as being "an area which education may cover" in New Zealand I have no doubt that, as in any new or developing area of scientific endeavour, whatever knowledge the research yields will be taught as the research progresses. It is for that reason that future dissemination is regarded as implicit in the concept of research.[32]

[62] In my view the Board erred in its interpretation and application of the "usefulness" test.

Additional public benefit requirement

[63] As I have said, the Board recorded the Foundations' submission that if the "advancement of education" purpose is established, public benefit is presumed. But then it noted that in *Re New Zealand Computer Society Inc* MacKenzie J had stated:[33]

> ... For the first three heads of charity [which include advancement of education], public benefit is assumed to arise unless the contrary is shown. This does not mean, however, that existence of public benefit is a foregone conclusion. Rather, "the question whether a gift is or may be operative for

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31 I note that these views are consistent with guidance issued by the UK Charities Commission, which does not require usefulness in a practical sense, but merely in the sense "that it is capable of increasing knowledge, understanding and learning and is not nonsense."

32 This point was expressly made by Slade J in the *McGovern* case relied on by the Board, above n 22, at 352.

33 *Re New Zealand Computer Society Inc* (2011) 25 NZTC 20-033 (HC) at [13].

the public benefit is a question to be answered by the Court forming an opinion upon the evidence before it".

(footnotes omitted)

[64] The Board went on to say:[34]

> In light of these comments, the Board considers that, while the public benefit is assumed for educational purposes, an objective consideration is still required as to whether there is a public benefit.

[65] The Board was not satisfied that the Foundations' cryonics research provided sufficient public benefit. It said:[35]

> We note that the matter of cryopreservation and reanimation of people raises a number of ethical/moral questions. For example it raises questions relating to the meaning of death, immortality and what it means to be a human. Given the controversial nature of the research, it is not possible to conclude that it will be for the public benefit.
>
> The Courts have expressed a great deal of scepticism about the appropriateness of defining the purpose of a trust by reference to alleged downstream benefits. While we acknowledge that some of the research may provide benefits, we consider that any possible public benefits from the cryonics focused research are too downstream or remote from the Foundation's cryonics research focus and the possible funding of the Timeship[36] to meet the legal test for public benefit.
>
> ... Further, we consider that even if there were to be a benefit, it is not to a sufficient section of the public. While charities can charge fees for their services, the costs must not be so high as to prevent a sufficient section of the public benefiting. The costs associated with individual cryopreservation and reanimation services are prohibitive and would exclude the less well off.
>
> ...
>
> (footnotes omitted)

[66] Again, I accept Ms Casey's submission that there is error here, for the following reasons:

(a) there is no authority that research must be uncontroversial before it can be considered charitable. Stem cell research has, for example, been accepted as such;

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34 Registration decision, at 51.

35 At 53, 54 and 56.

36 In reference to the "Timeship facility" connected with the Stasis Foundation in the United States which when completed will carry out work in cryopreservation.

(b) even in advocacy cases (such as *Molloy v Commissioner* of *Inland Revenue*)[37] where the Courts in the past have said that they are ill placed to judge whether public benefit will result if the subject of the advocacy is controversial (in *Molloy*, a change to the abortion laws) the Supreme Court in *Re Greenpeace* has now made it clear that the presence or absence of controversy cannot be determinative;[38]

(c) the Board has conflated cryonics research, which does not raise any particular moral and ethical issues, with the distant goal of actual cryonics, which (it is acknowledged) does raise ethical questions;

(d) the Canadian case that is footnoted as authority for the proposition that the Courts are very sceptical about the "appropriateness of defining the purpose of a trust by reference to alleged downstream benefits" is not an advancement of education case.[39] It seems to me that research is an iterative process and its public benefit will often not just lie in its end result;

(e) the potential cost of actually delivering cryogenic services to users in the distant future can neither be relevant[40] nor known. The Foundations' purposes do not, in any event, include the provision of cryogenic services. The proper focus is on the research and the public benefit that research presumptively yields.

[67] The presumed public benefit involved in the proposed research is not rebutted by any of the matters relied on by the Board. On the contrary, the public benefit is readily apparent. In my view the Foundations' purposes are clearly charitable under the advancement of education head.

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37 *Molloy v Commissioner* of *Inland Revenue* [1981] 1 NZLR 688.

38 *Re Greenpeace*, above n 4, at [75].

39 *Amateur Youth Soccer Association v Canada (Revenue Agency)* 2007 287 DLR (4th) 4 (SCC).

40 Cost is not a prohibitive factor in finding sufficient public benefit: *The Independent Schools Council v The Charity Commission* [2011] UKUT 421 and *Scottish Burial Reform and Cremation Society Ltd v Glasgow Corporation* [1968] AC 138 at 147G.

Approach to evidence and the chief executive's ability to make his own inquiries

[68] Lastly, it is necessary to say something about the chief executive's ability to make his own inquiries in relation to an application.

[69] The starting point is that the onus is on an applicant to satisfy the Board that it has the relevant charitable purpose. And the beginning of the inquiry will always be an entity's stated purposes which, in the present case, were set out in some detail in the relevant trust deeds.

[70] But as noted earlier, s 18(2) confers on the chief executive the express power to ask an applicant to provide more information. He exercised that power on more than one occasion here. As a result, the Foundations provided a good deal of academic and scientific material in support of the applications. At least some of that material was annexed to sworn affidavits. And of course the content of the affidavits themselves was also relevant information.

[71] But it seems clear enough that the chief executive also obtained information about cryonics from the internet and that both he, and later the Board, relied on that information.[41] The issue that potentially arises is whether he was entitled to do so and, if so, whether there are any limits on that power.

[72] It is not ultimately necessary for the determination of the present appeals to decide whether or not the chief executive has any ability to rely on material that is not provided to him by an applicant. It is certainly arguable that he does not. The requirement in s 18(3)(iii) that he must have regard to "any other information that it considers is relevant" is plainly a reference to information that is perceived as relevant by the entity that is seeking charitable status.

[73] I do nonetheless have concerns about what happened here. Those concerns serve to underscore my primary conclusions. I therefore record that, to the extent that the chief executive may (contrary to my own preliminary view) have regard to

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41 The Foundations were given the opportunity to comment on the information but their objections to it were not accepted.

information from outside sources, it is unclear to me why he would do so. Even putting resourcing issues to one side, such an approach seems to me to be:

(a) likely to give rise to increased natural justice concerns and lead to justifiable demands for formal hearings and cross-examination; and

(b) fraught with danger, particularly where information is obtained from the internet.[42]

[74] As far as the latter point is concerned, the perils of the internet are legend. It is possible to obtain web support for almost any proposition one cares to name. Sorting the wheat from the chaff is difficult for anyone who is not already well versed in the subject matter. At the very least, there would need to be some assurance as to the reliability and quality of any such extraneous material.

[75] More fundamentally, making inquiries that are independent of an applicant seems to me to risk moving some way from the long-established orthodox analysis which focuses on establishing the purposes of the specific entity seeking charitable status. I consider the Board was wrong to put any store in the information obtained from the internet by the chief executive here.

Other heads of charity

[76] In light of my conclusions under the advancement of education head it is strictly unnecessary for me to consider whether the Foundations' purposes were charitable on some other basis. In my view, the advancement of education was the most obvious head of charity in the present case.

[77] For completeness, however, I record in relation to the second (relief of the aged and impotent) ground that I have some sympathy with the Board's position that the proposition that people who are legally dead can be said to be "aged and impotent" is a bridge too far. Moreover the relevant need against which relief is

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42 For example, in the present case the Foundations said that the author of the book relied on by the Board, Mr Iserson, is a medical doctor in Arizona with no apparent expertise in cryonics or related areas of medical or scientific research.

proposed to be provided by the Foundations is far from obvious. The types of need that are evident from the cases are all incidents of being a person who is alive, albeit elderly or somehow afflicted.[43] And nor is it clear how the pursuit by the Foundations of their purposes will relieve any relevant need that does exist. Even if funding research might eventually lead to medical discoveries that will assist people who are alive (but aged and impotent) that kind of "relief" seems to me to be all together too indirect and too contingent to qualify as charitable under this head.

[78] The third point on appeal related to the Board's conclusion that the Foundations' purposes were not charitable under the recognised fourth head grounds of protecting human life, promoting human health, and relief of human suffering and distress. I would be inclined to agree with the Foundations that this conclusion, which was also based on the proposition that cryonics only benefits those who are dead, may have been unduly narrow. I have already indicated my acceptance that medical advances (which may be capable of relieving suffering) are likely to fall out of the proposed research. But the pursuit of such advances would merely constitute an ancillary (charitable) purpose which is, perhaps, confirmatory of the Foundations' principal charitable purpose, namely funding scientific research.

[79] The Board's other finding under the fourth head (that the requisite public benefit is also absent) has already been discussed and rejected in relation to the advancement of education ground above.

FAAR's separate ground of appeal

[80] The Board found that FAAR's purposes included the funding of cryonics. It based that conclusion on two things. The first was that cryonics research was covered by the objects contained in cls 3(2)(d) and 3(2)(e) of the FAAR Trust Deed (funding scientific research "aimed at reversing diseases, senescence, traumatic injury and de-animation"). There is now no dispute that this is not correct; those things do not form part of cryonics. Accordingly, FAAR's stated purposes do not include the funding of cryonics.

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[43] For example in *DV Bryant Trust Board v Hamilton City Council* [1997] 3 NZLR 342 (HC) Hammond J held that the needs of the aged for fraternity, belonging, respect, mutual activities, interaction and security are real needs, the relief of which are charitable.

[81] The second matter relied on by the Board was information it had received from FAAR's counsel that:[44]

> The Foundation proposes to make "substantial grants" to the CMRF whose core purpose relates to cryopreservation and reanimation. The Life Extension Foundation currently supports the work of Critical Care Research and 21st Century Medicine. It is anticipated that the Foundation will also provide funding for the research funded by the Life Extension Foundation. These entities carry out research essential for cryopreservation and reanimation. 21st Century Medicine carries out research into cryobiology, however they also carry out research that will assist with cryonics and in 2007 they began research into whole body preservation. Critical Care Research will fund research into nanotechnology (which is needed for reanimation research to progress).
>
> (footnotes omitted)

[82] This finding gives rise to important questions about the relationship between charitable activities and purposes. Although not strictly necessary in light of my conclusion that funding cryonics research is itself a charitable purpose, I address it briefly, for completeness.

[83] As noted earlier, s 18(3) of the Act expressly requires the chief executive to consider an applicant's activities when arriving at a view on whether or not it should be registered.

[84] Prior to the enactment of the Act the relevance of an entity's activities when determining charitable status was summarised in this way in *Institution of Professional Engineers New Zealand Inc v Commissioner of Inland Revenue*:[45]

> It is clearly established that when one is considering the purpose or purposes for which an institution is established one must look first to its founding documents. In *NZ Society of Accountants & NZ Law Society v. Commissioner of Inland Revenue* ... Richardson J said:-
>
> > "The ascertainment of the purposes for which a statutory body is established is essentially a matter of construction of the relevant constituting legislation."
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> The same applies to bodies established by non legislative means. In *Royal College of Surgeons v National Provincial Bank Ltd* ... Lord Normand said that the decision in that case depended primarily on the construction of the

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44 Registration decision, at 32.

45 *Institution of Professional Engineers New Zealand Inc v Commissioner of Inland Revenue* [1992] 1 NZLR 570 (HC) at 572.

> constituent documents of the Royal College and particularly the charter granted by King George III in 1800.
>
> To the same effect is the decision of the Court of Appeal in *Molloy v. Commissioner of Inland Revenue* ..., but with the important additional proposition that where the constituting documents do not indicate with clarity the main or dominant objects of the body, reference may be made not only to the objects expressed therein but also to the activities of the body in question: ... . In this respect reference can also be made to the speech of Lord Reid in the *Royal College of Surgeons* case ... where His Lordship said:-
>
> > "If there were anything to show that the affairs of the college had been so conducted that the advancement of the interests of its members had become one of its main purposes, it may be that this would disentitle the college from pleading that it is a charity, but I do not find anything of that kind."
>
> His Lordship was therefore very clearly of the view that the actual operations of the body concerned were material and the focus of the Court is not inevitably confined to the founding documents.

[85] Thus an entity's activities were regarded as relevant only to the extent that the entity's constituent documents were unclear as to its purpose or where there was evidence of activities by an entity that displaced or belied its stated charitable purpose.

[86] It seems unlikely that the enactment of s 18(3) was intended materially to change this 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.

[87] As I think *Re Greenpeace* itself makes clear the critical question is whether an applicant's activities are sufficiently connected with the relevant charitable purpose, not whether the activity itself is charitable.[46] That was the whole basis for the Court's finding in that case that political activities may or may not be charitable, depending on their purpose. Apart from anything else, whether or not a particular

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46 *Re Greenpeace,* above n 4, at [74]. See also *Re Family First New Zealand* [2015] NZHC 1483, (2015) 27 NZTC 22-017 at [24].

activity is, itself, charitable can, in many cases, only be determined by reference to its purpose.

[88] In the present case, therefore, my own view is that the proper analysis would have been to begin by asking whether FAAR's stated purposes are charitable or not. If they are clearly not, then that is the end of the inquiry. If they are (or if the stated purposes are unclear), then the chief executive or the Board needed to consider what information it has about FAAR's present and proposed activities (and to consider requesting such information). Then, the question is whether those activities are consistent with or supportive of the identified charitable purpose. If they are, then there is no difficulty. If they are not, then it would need to be determined whether the activities can be said to be merely ancillary to the identified charitable purpose.

[89] That analysis does not, of course, fit with what happened here. The Board found that the identified activity was FAAR's principal purpose and that that activity/purpose was not charitable. In my view both the approach, and these conclusions, were wrong.

Judicial review

[90] As noted earlier, Ms Casey for the Foundations accepted in her written submissions the judicial review proceedings were moot if I found in their favour on the appeals. In oral submissions she resiled from that position somewhat on the basis that it would be useful to have the Court's view on some of the issues raised.

[91] The Court is not, of course, in the habit of giving advisory opinions and I am reluctant to do so. Some of the matters raised by the review proceedings have in any event been effectively dealt with above. I am reluctant to go further.

[92] Accordingly I do not propose to deal with the judicial review in this judgment. If the Foundations are adamant that a judgment is required (and that the issues are not moot) then Ms Casey is to file a memorandum explaining why and the Crown will have an opportunity to respond. Any such memorandum is to be filed within 15 working days of this judgment and any reply within a further 10 working days.

Conclusions

[93] As, I hope, the foregoing makes clear, I consider that the Board was wrong to hold that the purpose of funding cryonics research:

(a) was not useful;

(b) did not provide sufficient public benefit; and therefore

(c) was not charitable.

[94] I consider that funding such research falls squarely under the established "advancement of education" head of charity. The research more than meets the minimal usefulness threshold. As the Board appropriately acknowledged, the fruits of that research will be disseminated. There is a presumption that such research will be for the public benefit and that presumption was not rebutted here.

Remedies

[95] In terms of relief, I have spoken above about the difficulty in referring the matter back to the Board in the unusual circumstances of this case. There is, in any event, no need for me to do so. The Court is expressly empowered to substitute its own decision for that of the Board.[47]

[96] I note that of the four successful appeals under the 2005 Act:

(a) in two there have been references back;[48] and

(b) in two the Court substituted its own decision.[49]

[97] The two references back are explicable by the fact that the law relating to political advocacy and charitable purpose had been affected by the Supreme Court's

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47 Charities Act 2005, s 61(2)(a).

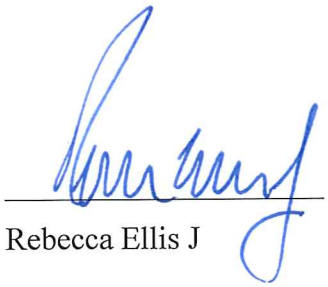
48 *Re Family First New Zealand,* above n 48 and *Re Greenpeace*, above n 4.

49 *Liberty Trust v Charities Commission* [2011] 3 NZLR 68 (HC) and *Plumbers, Gasfitters and Drainlayers Board v Charities Registration Board* [2013] NZHC 1986.

decision in *Re Greenpeace* subsequent to the Board's decisions. It made sense for the Board to be required to consider those cases afresh in light of those changes.

[98] In the present case, there has been no relevant change in the law. It has long been the case that a purpose of genuine research, the results of which will be disseminated, falls under the advancement of education head and is charitable in law.[50] The Board has simply made mistakes. No further information or analysis is necessary. I make orders that the Foundations are to be registered as charities under the Act with effect from the date of this judgment.

[99] As noted earlier, because the Board is not a party to these appeals there can be no order as to costs. If Ms Casey considers I am wrong about that she may submit a memorandum.



Rebecca Ellis J

Solicitors: Charities Law, Wellington for Applicant
Crown Law, Wellington for Respondents

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50 *Re Hopkins' Will Trusts,* above n 25.