

**IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY**

**I TE KŌTI MATUA O AOTEAROA
TE WHANGANUI-A-TARA ROHE**

**CIV 2018-485-418
[2020] NZHC 2993**

UNDER the Charities Act 2005

AND UNDER the Judicial Review Procedure Act 2016

IN THE MATTER OF an appeal and application for judicial review
of the Charities Registration Board's
decision to refuse the appellant's application
for registration as a charitable entity

BETWEEN GREENPEACE OF NEW ZEALAND INC
Applicant/Appellant

AND CHARITIES REGISTRATION BOARD
First Respondent

THE ATTORNEY-GENERAL
Second Respondent

On the papers

Counsel: D M Salmon and H A T Bush for Applicant/Appellant
P J Gunn, L Dittrich and K Laurensen for Second Respondent
No appearance for First Respondent (abides)

Judgment: 12 November 2020

**JUDGMENT OF MALLON J
(Date for charitable status)**

Introduction

[1] I refer to my judgment delivered on 10 August 2020 in which I determined that Greenpeace of New Zealand Inc (Greenpeace NZ) was entitled to be registered as a

charity under the Charities Act 2005.¹ In that judgment I granted leave for the parties to file submissions as to the date at which this status was to apply and on costs if these matters were not agreed upon.

[2] Pursuant to that leave, I received a joint memorandum from the parties. The joint memorandum advises that:

- (a) The parties have agreed that Greenpeace NZ's disbursements will be met by the Attorney-General and there is no issue as to costs. No determination is therefore sought from me about this.
- (b) The parties agree Greenpeace NZ's charitable status should be back-dated but disagree as to the date to which it should be back-dated. A determination is required on this issue.

The statutory power to back-date

[3] Section 20(1) of the Charities Act allows the Charities Board to direct that an entity is to be treated as having become a charitable entity at any time after the point when a properly completed application for registration is received. Section 20(2)(b) provides that this date cannot be "earlier than the time that the chief executive received a properly completed application for registration of the entity as a charitable entity." Section 20(3) provides the Board must be satisfied that the entity was qualified for registration as a charitable entity at all times during the period between the effective registration time and the time at which the entity becomes registered as a charity.

[4] Section 61(1) provides that on appeal the High Court may exercise any power that could have been exercised by the Board. Section 61(2) provides that, "[w]ithout limiting subsection (1), the High Court may make an order requiring an entity ... to be registered in the register of charitable entities with effect from a specified date". Section 61(3) provides that the specified date may be at a date that is before or after the order is made.

¹ *Greenpeace of New Zealand v Charities Registration Board* [2020] NZHC 1999.

The respective positions

[5] The parties agree that Greenpeace NZ qualified for registration prior to the Supreme Court's decision in *Re Greenpeace* because it confirmed what the law was once the Charities Act was enacted in 2005.² The reason why the parties have not been able to agree on the date to which its registration should be back-dated is because they take a different view on when the chief executive received a properly completed application for registration.

[6] Greenpeace NZ applied for registration on 19 June 2008. The Commission (as it then was) analysed the application. On 29 January 2009 it sent a notice to Greenpeace NZ advising that it might decline the application for reasons including that its winding up clause did not limit the distribution of surplus assets to charitable purposes. The Commission recommended that Greenpeace NZ add clauses to its constitution to prevent private pecuniary profit and amend the winding up clause to address the Commission's concern. On 24 September 2009 Greenpeace NZ advised the Commission that it had made those amendments to address the Commission's concern.

[7] The Attorney-General's position is that 24 September 2009 is the date on which a "properly completed" application was received. It submits it would be appropriate for the Court to make an order that Greenpeace NZ's registration is with effect from that date.

[8] Greenpeace NZ's position is that registration should be with effect from 30 June 2008. Greenpeace NZ submits that as of that date, with reference to its purposes and activities, it was established and maintained exclusively for charitable purposes. It submits it should not be deprived of being treated as having charitable status since that date, because of the theoretical and technical possibility that, if it had been wound up prior to 24 September 2009, surplus funds might have been distributed for non-charitable purposes. It submits it was plainly implied that surplus funds would be distributed for charitable purposes and, in any event, there would not have been

² *Re Greenpeace of New Zealand Inc* [2014] NZSC 105.

time to wind itself up and distribute funds for non-charitable purposes between June 2008 and 24 September 2009.

My assessment

[9] I consider what is meant by a “properly completed application” in s 20(2)(b) is answered by ss 17 and 18 of the Act. Section 17(1) provides that an application for registration “must” be in the form prescribed and be accompanied by certain things (a certificate that any officer of the entity is not disqualified from being an officer of a charity, a copy of the entity’s rules, the prescribed fee and any other prescribed information). Section 18(1) provides that the chief executive (formerly the Commission) “must, as soon as practicable after receiving a properly completed application for registration ... consider whether the entity qualifies for registration as a charitable entity”.

[10] In my view, “a properly completed application” as referred to in ss 18 and 20, is an application that meets the requirements of s 17. It is not about whether the entity qualifies as a charitable entity. That is a separate matter. Section 20(2)(b) enables the chief executive to back-date the registration of the entity to the date it received an application that complies with s 17. It allows an entity not to be disadvantaged by the time within which the Board makes its decision that the entity qualifies for registration.³

[11] The issue raised by the Attorney-General does not relate to compliance with s 17. Rather, it is a matter that concerns whether Greenpeace NZ qualified for registration as at the date of its application. That, too, is relevant to whether the application should be back-dated, but under s 20(3) rather than s 20(2).

[12] As to that, an entity qualifies for registration if, amongst other things, it is established and maintained “exclusively” for charitable purposes and “is not carried on for the private pecuniary profit of any individual”.⁴ The issue raised by the Commission concerned the following provision:

³ Discussed in *National Council of Women of New Zealand Inc v Charities Registration Board* [2014] NZHC 3200, [2015] 3 NZLR 72 at [37]-[40].

⁴ Charities Act 2005, s 13(b).

If upon the winding up of the Society there remains after the payments of its debts and liabilities a surplus of assets, the same shall not be distributed to members of the society but shall be given or transferred to some other association or associations institution or institutions that have objects similar to the objects of this society and which shall prohibit the distribution of its or their income and property among its or their members. ...

[13] The Commission's concern was that two organisations might have similar purposes, but one might be charitable and the other might be non-charitable.⁵ To meet this concern, Greenpeace NZ amended its rules to insert "are Charitable under the New Zealand law" after "... institutions that" and before "have objects similar to ...".

[14] Further, although ss 4, 5 and 20 of the Incorporated Societies Act 1908 ensured that no private pecuniary profit could be made, Greenpeace NZ's rules did not contain a provision preventing all forms of private pecuniary profit during the operation of the Society. The Commission suggested that Greenpeace NZ may wish to add a clause to this effect. Greenpeace NZ adopted the Commission's suggestion.

[15] I consider the changes Greenpeace NZ made to its rules were in the nature of "for the avoidance of doubt" amendments. It was implicit from Greenpeace NZ's status as an incorporated society and from its stated objects that any private pecuniary profit was not intended. That was reinforced by the winding up clause providing that any surplus assets would be distributed to an entity with similar objects and which prohibited the distribution of its income and property to its members. Similarly, it was implicit in its winding up clause that, if Greenpeace NZ's purposes qualified as charitable (as it contended and as it was ultimately determined), so too would the entity with "similar objects" to which any surplus assets would be distributed.

[16] This was confirmed by Greenpeace NZ's ready acceptance of amending its rules in the way the Commission suggested. Had Greenpeace NZ declined the Commission's suggestions, that may have indicated that Greenpeace NZ had a different view about whether a private pecuniary profit was available and how its winding up clause was to be interpreted. The amendments Greenpeace NZ was

⁵ A Charities Services Board memorandum dated 17 June 2016 further explained its concerns. It considered another entity's activities might render them non-charitable. Further, if another entity had some charitable purposes but other non-ancillary purposes, distributions could be made to that entity's non-charitable purpose.

content to make tidied up these matters in a way that provided greater certainty from the Commission's perspective, but they did not in a realistic sense alter Greenpeace NZ's purposes and its intended maintenance of those purposes.

[17] I therefore consider that Greenpeace NZ had both made a properly completed application in June 2008 (s 20(2)(b)) and from that date was qualified for registration as a charitable entity (s 20(3)). This means that the Board would have been authorised to back-date the application to 30 June 2008 and this Court can now exercise that power.

Result

[18] I order that Greenpeace NZ is to be treated as having become a charitable entity on 30 June 2008.

Mallon J