

Deregistration decision: Swimming New Zealand Incorporated (CC43297)

Executive Summary

1. The Charities Registration Board (the Board) has determined that Swimming New Zealand (SNZ) is no longer qualified for registration as a charitable entity and that it is in the public interest that it be removed from the Charities Register.¹
2. SNZ has submitted that it continues to qualify for registration and that it is established for charitable purposes to promote health and encourage water safety education.
3. The Board considers that SNZ no longer qualifies for registration as it is no longer established and maintained for exclusively charitable purposes, as required by section 13(1)(b) of the Charities Act 2005 (the Act). Specifically, we consider that SNZ has a mix of charitable and non-charitable purposes and that its non-charitable purposes are more than ancillary to its charitable purposes. In particular:
 - We recognise that SNZ has charitable purposes to promote public participation in swimming as a means by which public health is promoted and advance education in swim safe programmes;
 - We consider that SNZ also has a purpose to promote the sport of competitive swimming as an end in itself, and not as a means to advance valid charitable purposes. This purpose lies outside the scope of charity articulated by the courts in decisions binding on this Board, and recognised in section 5(2A) of the Act;
 - We consider that SNZ also has a non-charitable purpose to promote success in competitive swimming at an elite level; and
 - We consider that SNZ's non-charitable purposes are more than ancillary to its charitable purposes SNZ's promotion of swimming as a means to advance any valid charitable purpose.
4. The Board is satisfied that it is in the public interest that the SNZ be removed from the Charities Register.² The purposes of the Act include purposes to

¹ That is, the register established under section 21 of the Charities Act 2005 ("the Act") and published at <http://www.charities.govt.nz>.

promote public trust and confidence in the charitable sector, and the effective use of charitable resources.³ The Board considers that it would not promote these purposes if an entity that does not qualify for registration were allowed to remain on the Charities Register.

5. The Board's reasons for its decision are organised as follows:

- A. Background
- B. Legal framework for deregistration
- C. Law on promotion of sport and charity
- D. SNZ's charitable purposes
- E. SNZ's purpose to promote competitive swimming as an end in itself
- F. SNZ's to promote success in competitive swimming at an elite level
- G. SNZ's non-charitable purposes are more than ancillary
- H. SNZ's other submissions
- I. Public interest
- J. Determination

A. Background

6. SNZ was incorporated under the Incorporated Societies Act 1908 on 7 January 1983. It was registered as a charitable entity with an effective registration date of 30 June 2008. SNZ filed a notice of change with Charities Services on 29 October 2012. This notice of change advised of an amendment to SNZ's constitution (including an amendment to SNZ's stated purposes) dated July 2012. The July 2012 version of the constitution was updated with the Registrar of Incorporated Societies on 31 July 2012.
7. Since filing its notice of change, SNZ has further amended its constitution with the Registrar of Incorporated Societies on 2 November 2012 (that constitution is dated October 2012). Although the constitution dated October 2012 has not been provided by SNZ to Charities Services,⁴ this decision is made on the constitution dated October 2012 as this is the current legal rules of SNZ.⁵

² Section 32(1)(a) of the Act provides, 'The Board may direct that an entity be removed from the register if – (a) the entity is not, or is no longer, qualified for registration as a charitable entity.' Section 35(1) further provides that, if an objection to removal is received, the Board must not proceed with the removal unless satisfied that it is in the public interest to proceed with the removal.

³ See section 3(a) and (b) of the Act.

⁴ As required by section 40 of the Act.

⁵ Section 21 of the Incorporated Societies Act 1908 provides that the rules of the society take effect when registered by the Registrar of Incorporated Societies.

8. SNZ's stated purposes at clause 4 of the constitution are:

4.1 The primary Object of SNZ is to support the growth and performance of the sport of competitive swimming, from entry level club competitive swimmers to elite High Performance athletes.

4.2 To support its primary Object, SNZ has the further Objects to work with Regional Associations and Member Clubs and others to:

- a. encourage people to choose to participate in the sport of competitive swimming;
- b. identify and co-ordinate competitive talent at all levels (from within and outside of the competitive sport);
- c. develop and provide oversight of competitions and pathways from regional, to national, through to international level;
- d. provide coaching innovation and research and coach training, education and development;
- e. ensure training, education and development of athletes, team managers, officials and volunteers;
- f. develop intellectual property in respect of new competitive "products" including products to draw participants into competitive swimming;
- g. set policies and standards for the Sport;
- h. oversee the implementation of a Whole of Sport Plan;
- i. maintain a strong interest in, and input into policy associated with "Learn to Swim" and swim safe educational activities carried out by others;
- j. be the organisation that represents competitive swimming in, and for New Zealand; and
- k. fulfil its obligations to Drug Free Sport New Zealand in relation to doping controls and prohibited substances.

4.3 The Objects of SNZ are exclusively charitable and include the promotion of amateur sport for the pursuit of physical fitness and other purposes beneficial to the community and including the training, education and development of all those involved in the Sport. To the extent that any of the Objects are found to be non-charitable they are ancillary and secondary to the charitable Objects. Rules 4.1 and 4.2 are subject to this rule.

9. SNZ has filed annual returns, as required under the Act, for its financial years ending 30 June 2009, 2010, 2011 and 2012. SNZ also maintains a website and Facebook pages that document its activities.⁶
10. On 11 November 2013, after reviewing the amended purposes and activities of SNZ, Charities Services sent a notice of intention to remove SNZ from the Charities Register, on the grounds that it no longer qualifies for registration. The notice explained that Charities Services considered that SNZ is maintained for sports-promotion purposes that are not charitable in law; and its non-charitable purposes are not ancillary to charitable purposes.
11. On 14 January 2014, SNZ submitted a written objection to the notice of intention to remove. SNZ's submissions are discussed in parts D to H of this decision.
12. On 28 March 2014 Charities Services sent a response to SNZ outlining that, after considering SNZ's submission, Charities Services continued to consider that SNZ no longer qualifies for registration. The email provided a further opportunity for SNZ to provide any further submissions by 15 May 2014. No further submissions were received by 15 May 2014. A reminder was sent on 10 June 2014 which advised SNZ that a final decision would be made after 4 July 2014. Charities Services has not received a response.

B. Legal framework for deregistration

13. Section 50 of the Act provides that the Chief Executive of Charities Services may examine and inquire into any registered charitable entity, including into its activities and proposed activities, and its nature, objects and purposes.
14. Section 32(1)(a) of the Act provides that the Board may direct that an entity be removed from the register if the entity is not, or is no longer, qualified for registration as a charitable entity, provided that the entity has been given notice under section 33. Under section 35(1)(a) of the Act, if an objection to the removal of an entity from the register is received, the Board may proceed with the removal if it is satisfied that it is in the public interest to proceed with the removal and at least one ground for removal has been satisfied.
15. The power under section 32(1)(a) is to be exercised on the grounds set out in sections 32 and 35, and for the purposes of the Act as set out in section 3.⁷

⁶ <http://www.swimmingnz.org.nz/about-us/>; <https://www.facebook.com/pages/High-Performance-Swimming-New-Zealand/217739888313688>; <https://www.facebook.com/pages/High-Performance-Swimming-New-Zealand/217739888313688#!/SNZevents>.

⁷ *Greenpeace of New Zealand Incorporated* [2012] NZCA 533 ("*Greenpeace, CA*") at [34], [37], [38].

16. The essential requirements for registration as a charitable entity are set out in section 13 of the Act. Under section 13(1)(b) a society or institution cannot qualify for registration unless it is established and maintained exclusively for charitable purposes and not carried on for the private pecuniary profit of any individual.
17. Section 5(1) of the Act defines charitable purpose as including 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”. This statutory definition adopts the well-established fourfold classification of charitable purpose at general law.⁸
18. The fourth head of charity, described in section 5 of the Act as “any other matter beneficial to the public” has a specific meaning in law.⁹ It is not intended to indicate that all purposes that provide public utility qualify as charitable. In order to qualify as charitable under this head, the purpose must be both for the benefit of the community and beneficial in a way that the law regards as charitable. More particularly, the purpose must be within the spirit and intendment of the purposes set out in the Preamble to the Charitable Uses Act 1601 (the Statute of Elizabeth I)¹⁰ by analogy with previous common law authorities.¹¹
19. This two stage test for charitable purposes ‘beneficial to the community’ (requiring that a purpose be both beneficial to the community and within the spirit and intendment of the Preamble) is well-established in law.¹² Over the years, the courts have recognised many new charitable purposes that are substantially similar to those listed in the Statute of Elizabeth I, acknowledging that what is

⁸ This statutory definition adopts the general law classification of charitable purposes as stated in *Commissioner for Special Purposes of Income Tax v Pemsel* [1891] AC 531. See: *Greenpeace of New Zealand Incorporated* [2014] NZSC 105 (“*Greenpeace, SC*”) at [12],[15] and [17]; *In Re Education New Zealand Trust* HC Wellington CIV-2009-485-2301, 29 June 2010 (“*Education New Zealand Trust*”) at [13]; *In re Draco Foundation (NZ) Charitable Trust* HC WN CIV 2010-485-1275 [3 February 2011] at [11].

⁹ See generally Gino Dal Pont, *Charity Law in Australia and New Zealand* (2nd ed., Lexis Nexis Butterworths, 2010) at [11.3] – [11.8].

¹⁰ *Statute of Charitable Uses 1601* (43 Elizabeth 1 c 4). *Greenpeace SC* at [18], [27], [29] and [30].

¹¹ *Greenpeace SC* at [30] and [31]

¹² Refer *Queenstown Lakes Community Housing Trust* HC WN CIV-2010-485-1818 [24 June 2011] (“*Queenstown Lakes*”) at [48]; see also *Latimer v Commissioner of Inland Revenue* [2002] 3 NZLR 195 (“*Latimer, CA*”) at 208-209; *Travis Trust v Charities Commission* (2009) 24 NZTC 23,273 (“*Travis Trust*”) at [20] (Joseph Williams J); *New Zealand Society of Accountants v Commissioners of Inland Revenue* [1986] 1 NZLR 147 (“*Accountants*”) at 157 (Somers J); *Re Tennant* [1996] 2 NZLR 633 at 638). This is consistent with the approach taken in other jurisdictions, see for example *Re Jones* [1907] SALR 190 at 201; *Williams Trustees v Inland Revenue Commissioners* [1947] AC 447 at 455; *Scottish Burial Reform and Cremation Society v Glasgow Corporation* [1968] AC 138 at 146-148, 15; *Brisbane City Council v Attorney-General for Queensland* [1979] AC 411 at 422 (PC); *Incorporated Council of Law Reporting (QLD) v Federal Commissioner of Taxation* (1971) 125 CLR 659 at 667, 669; *Royal National Agricultural and Industrial Association v Chester* (1974) 48 ALJR 304 at 305.

accepted as a charitable purpose must change to reflect current social and economic circumstances.¹³

20. To be charitable at law a purpose must be for the public benefit.¹⁴ Public benefit must be expressly shown where the claimed purpose is under the fourth head of charity “any other benefit to the community”.¹⁵ Further, in every case, the benefit of the entity’s purposes must flow to the public or a sufficient sector of the public.¹⁶ If a purpose is to benefit a private group, the consequential downstream benefits to the public will not suffice.¹⁷
21. Section 5(3) of the Act provides that the inclusion of a non-charitable purpose will not preclude registration if it is merely ancillary to a charitable purpose. Pursuant to section 5(4) of the Act, a non-charitable purpose is ancillary if the non-charitable purpose is:
 - (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.
22. Determining whether a non-charitable purpose is ancillary includes a qualitative assessment of whether it is a means to advance the charitable purpose.¹⁸ It also

¹³ See for example the courts recognition of the provision of free internet: *Vancouver Regional FreeNet Association v MNR* [1996] 3 FC 880, 137 DLR (4th) 206, [1996] 3 CTC 1; (1996) 50 DTC 6440 and environmental protection: *Centrepoint Community Growth Trust* [2000] 2 NZLR 325.

¹⁴ Authorities include: *Oppenheimer v Tobacco Securities Trust Co Ltd* [1951] AC 297; *Verge v Somerville* [1924] AC 496; *Dingle v Turner* [1972] AC 601. See also: *Accountants* at 152-155; *Latimer, CA* at [32]; *Travis Trust* at [54], [55]; *Queenstown Lakes* at [30]; *Education New Zealand Trust* at [23].

¹⁵ *Canterbury Development Corporation v Charities Commission* HC WN CIV 2009-485-2133, 18 March 2010 (“CDC”) at [45].

¹⁶ See discussion in *Latimer, CA* at [32] - [37]. The courts have held that the downstream benefits of an entity’s activities do not serve to characterise the purpose of the entity: see *Accountants* at 153 (the “generalised concept of benefit” identified with the public satisfaction of knowing that the fund is there to safeguard and protect clients’ interests is too “nebulous and remote” to characterise the purpose of the fund); *Travis Trust* at [30] – [35] (holding that where the express purpose was to “support the New Zealand racing industry by the anonymous sponsor a group race known as the Travis Stakes”, the purpose was to support that single group race and not to support the racing industry or racing public as a whole). See to the same effect *Queenstown Lakes* at [68] – [76] (held that the purpose of the Trust was to provide housing for individuals not to advance the overall welfare of the community by enabling workers to stay in the area); *CDC* at [67] (primary purpose is the assistance of individual businesses and the “hope and belief” that the success of those businesses would increase the economic wellbeing of the Canterbury region does not establish public benefit as a primary purpose).

¹⁷ See for example *Institution of Professional Engineers New Zealand Inc v Commissioner of Inland Revenue* [1992] 1 NZLR 570 (“*Professional Engineers*”) at 578; *Re New Zealand Computer Society Inc* HC WN CIV-2010-485-924 [28 February 2011] (“*Computer Society*”) at [42]; *Education New Zealand Trust* at [23]; *Queenstown Lakes* at [68] – [76]; *CDC* at [67]. Compare: *Commissioners of Inland Revenue v Oldham Training and Enterprise Council* (1996) STC 1218 (“*Oldham*”); *Travel Just v Canada (Revenue Agency)* 2006 FCA 343, [2007] 1 CTC 294.

¹⁸ For recent judicial comment on the qualitative test see *Greenpeace, CA* at [62], [83] – [91].

involves a quantitative assessment, focusing on the relative significance of the purpose as a proportion of the entity's overall endeavour.¹⁹

Relevance of entities activities in registration decision-making

23. Section 50(2) permits the chief executive to examine and inquire into the activities and proposed activities when reviewing charitable entities.²⁰ Section 18(3)(a)(i) and (ii) of the Act requires that an entity's activities are taken into consideration when determining whether it qualifies for registration under the Act. The courts have confirmed that consideration of activities is a mandatory aspect of decision-making under the Act.²¹
24. Activities are not to be elevated to purposes,²² but reference to activities may assist, for example, to make a finding about:
- the meaning of stated purposes that are capable of more than one interpretation;²³
 - whether the entity is acting for an inferred or unstated non-charitable purpose²⁴
 - whether the entity's purposes are providing benefit to the public;²⁵ and
 - whether a non-charitable purpose is ancillary within the section 5(3) of the Act.²⁶

¹⁹ The quantitative requirement was applied by the High Court in *Re Greenpeace of New Zealand Incorporated* HC WN CIV 2010-485-829 [6 May 2011] ("*Greenpeace HC*") at [68]; *Computer Society* at [16]; *Education New Zealand Trust* at [43]-[44]; *Re The Grand Lodge of Antient Free and Accepted Masons in New Zealand* [2011] 1 NZLR 277 (HC) ("*Grand Lodge*") at [49]-[51].

²⁰ The Courts have also confirmed that consideration of activities is a mandatory aspect of decision-making under the Act. Refer *Greenpeace, CA* at [48] and [51]. See also the approach taken in the High Court in *CDC* at [29], [32], [44], [45] - [57], [67], [84] - [92]; *Queenstown Lakes* at [57] - [67]; *Grand Lodge* at [59], [71]; *Computer Society* at [35] - [39], [60] and [68]; *Greenpeace HC* at [75].

²¹ *Greenpeace SC* at [14]., See also the approach taken in the High Court in *CDC* at [29], [32], [44], [45] - [57], [67], [84] - [92]; *QLCHT* at [57] - [67]; *Grand Lodge* at [59], [71]; *Computer Society* at [35] - [39], [60] and [68]; *Greenpeace HC* at [75].

²² See: *McGovern* at 340 and 343; *Latimer v Commissioner of Inland Revenue* [2004] 3 NZLR 157 ("*Latimer, PC*") at [36]. Compare *Public Trustee v Attorney-General* (1997) 42 NSWLR 600 at 616; *Vancouver Society of Immigrant and Visible Minority Women v the Minister of National Revenue* [1999] 1 SCR 10.

²³ See *Professional Engineers* at 575 (Tipping J).

²⁴ *Greenpeace SC* at [14] "The purposes of an entity may be expressed in its statement of objects or may be inferred from the activities it undertakes, as s 18(3) of the Charities Act now makes clear". *Inland Revenue Commissioners v City of Glasgow Police Athletic Association* [1953] AC 380 ("*Glasgow Police Athletic Association*"); compare *Commissioner of Taxation of the Commonwealth of Australia v Word Investments Limited* [2005] HCA 55 at [25] (Gummow, Hayne, Heydon and Crennan JJ).

²⁵ See for example *Glasgow Police Athletic Association*; *CDC* at [29], [32], [44], [45] - [57], [67], [84] - [92]; *Queenstown Lakes* at [57] - [67]; *Grand Lodge* at [59], [71]; *Computer Society* at [35] - [39], [60] and [68].

25. In light of the above, we consider there is a statutory mandate supported by case law for the Board to consider an entity's current and proposed activities when determining whether it remains qualified for registration. In determining qualification for registration under the Act, substance must prevail over form, and an entity cannot qualify for registration, even if its stated purposes are exclusively charitable, if its activities belie its stated charitable purposes.²⁷

Characterisation of an entity's purposes

26. Once an entity's purposes are established as a matter of fact, the question whether they are charitable is a question of law.²⁸ The Board is bound to apply the law as declared by the courts and legislature, and adopted by the Act.
27. Determining whether an entity's purposes are charitable involves an objective characterisation, and a declaration in an entity's rules document that the entity's purposes are charitable in law will not be determinative.²⁹ Similarly, the subjective intentions of the individuals involved in a charity do not establish its charitable status.³⁰

C. Law on promotion of sport and charity

28. In New Zealand law, a purpose to promote sport is not itself a valid charitable purpose, but the promotion of amateur sport as a means to advance a valid charitable purpose or purposes may be charitable. In determining whether an entity's purpose is to promote sports as a means to advance a charitable purpose, the Board considers the entity's stated purposes, and the entity's activities. The Board considers whether the activities are a means to advance charitable purpose or charitable purposes, having regard to their direct (rather than downstream) consequences.

²⁶ See for example *Greenpeace, CA* at [40], [48], [87] – [92], [99] and [102], [103]. Earlier authorities to same effect include *Molloy v Commissioner of Inland Revenue* [1981] 1 NZLR 688 ("*Molloy*") at 693 and the authorities cited there.

²⁷ G E Dal Pont *Law of Charity* (LexisNexis Butterworth, Australia, 2010) at [2.12], [13.19], [13.20].

²⁸ *Molloy* at 693.

²⁹ *M K Hunt Foundation Ltd v Commissioner of Inland Revenue* [1961] NZLR 405 at 407; *CDC* at [56].

³⁰ G E Dal Pont *Law of Charity* (LexisNexis Butterworth, Australia, 2010) at [13.18], and see also the discussion at [2.8] – [2.11]. See for example *Latimer, PC* at 168; *Molloy* at 693; *Keren Kayemeth Le Jisroel Ltd v Inland Revenue Commissioners* [1932] AC 650 at 657 (Lord Tomlin), 661 (Lord Macmillan); *Oldham* at 251 (Lightman J).

C.1. Promotion of sport as an end in itself is not charitable

29. The position that sporting purposes lie outside the scope of charity derives from English authorities,³¹ approved and applied in New Zealand by the High Court.³²

30. In *Travis Trust v Charities Commission*, the Court explained that a purpose to promote sport may be charitable if the sport is promoted as a means to advance a valid charitable purpose or purposes:

A trust to promote racing could only be charitable in nature if its deeper purpose was the pursuit of some other objective, either in principle or, in accordance with charities jurisprudence, a charitable purpose in its own right within the spirit and intendment of the Statute of Elizabeth. Thus, if it could have been established that the true intention of the support for this race was the promotion of health, education or perhaps even animal welfare, it might have satisfied the test.³³

31. The general law position is recognised in section 5(2A) of the Act:

The promotion of amateur sport may be a charitable purpose if it is the means by which a charitable purpose referred to in subsection (1) is pursued.

32. The Board considers that section 5(2A) makes clear that promotion of amateur sports is only charitable if it is a means to pursue a charitable purpose. This is contrasted with a purpose to promote sports as an end itself, or as a means to pursue purposes that are not exclusively charitable.

33. The Board notes that in relation to sports and charity, New Zealand law accords with the approach taken by courts in comparable jurisdictions including Canada and Australia.

34. In *AYSA Amateur Youth Soccer Association v Canada (Revenue Agency)*³⁴ the Supreme Court of Canada rejected the idea that amateur sport that promotes physical health is prima facie charitable.³⁵ Instead, the Court noted that “the trend of the cases supports the proposition that sport, if ancillary to another recognised charitable purpose, such as education, can be charitable, but not sport in itself”.³⁶ The Court held that the AYSA was set up to promote soccer, and

³¹ *Re Nottage* [1895] 2 Ch 649 (CA); *Re Mariette* [1915] 2 Ch 284; *Inland Revenue Commissioners v McMullen* [1981] AC 884.

³² *Travis Trust*.

³³ *Travis Trust* at [59].

³⁴ 2007 SCC 42, [2007] 3 SCR 217.

³⁵ Contrast *Re Laidlaw Foundation* (1984) 13 DLR (4th) 491 (“*Re Laidlaw*”) at 505-506 (Dymond Surr Ct J).

³⁶ *AYSA Amateur Youth Soccer Association v Canada (Revenue Agency)* 2007 SCC 42 (“AYSA”), at [22].

any health benefits were simply consequences that did not establish the sports as a means to a charitable purpose.³⁷

35. The case law in Australia is to the same effect. In *Northern NSW Football Ltd*³⁸ the Court reviewed the authorities, and held that a purpose to promote and manage football in a region is not a charitable purpose. The Court rejected an “amalgam” of “the effects of playing football improving health and general wellbeing of the community” and “the improvement of health and general wellbeing of participants as a purpose”.³⁹ The Court held that the purpose of Northern NSW Football Limited was the promotion and management of football, and that this purpose was not charitable in law notwithstanding that benefit to communities may result.⁴⁰
36. The status of sports as charity has been modified by legislation in England and Wales, and Scotland. In England and Wales, legislation provides that “the advancement of amateur sport” is a charitable purpose.⁴¹ In Scotland, legislation provides that “the advancement of public participation in sport”⁴² is a charitable purpose.⁴³ The position in the United Kingdom therefore differs from the position in New Zealand, where the promotion of amateur sports is not charitable unless it is a means to advance charitable purposes.

C.2. Entities established to promote and manage a sport in a region or for a nation

37. The Board considers that, as a general proposition, bodies established to administer and manage a sporting code or discipline in a region or for a nation are likely to be established for the purpose of promoting sport as an ends in itself. As such, entities of this kind are likely to lie outside the scope of charity in New Zealand law, as reflected in section 5(2A) of the Act.
38. The Board notes that this position accords with the judgment of Australian and Canadian courts applying the general law test in *AYSA Amateur Youth Soccer Association v Canada (Revenue Agency)*⁴⁴ and *Northern NSW Football Ltd*.⁴⁵

³⁷ AYSA at [41].

³⁸ *Northern NSW Football Ltd v Chief Commissioner of State Revenue* [2011] NSWCA 51 (“*NSW Football*”).

³⁹ *NSW Football* at [24].

⁴⁰ *NSW Football* at [24].

⁴¹ *Charities Act 2011* (UK), s 3(1)(g).

⁴² *Charities and Trustee Investment (Scotland) Act 2005*, s 7(2)(h).

⁴³ In both jurisdictions, legislation preserves and applies the public benefit requirement for charitable status: *Charities Act 2011* (UK), s 4; *Charities and Trustee Investment (Scotland) Act 2005*, s 8.

⁴⁴ 2007 SCC 42, [2007] 3 SCR 217.

⁴⁵ [2011] NSWCA 51.

39. Alternatively, entities acting as regional or national governing bodies for a sport may be seen to promote sport as a means to a number of ends, which are not exclusively charitable. Relevantly, the promotion of sports for elite athletes does not provide sufficient public benefit to qualify as charitable in law,⁴⁶ and the promotion of sporting success is not itself a charitable aim.⁴⁷ An entity which is established with independent purposes to promote sport as a means to these ends will not fall within the scope of charity recognised in section 5(2A) of the Act.
40. As noted above at paragraph 36, the position on sports and charity in the United Kingdom differs from the position in New Zealand. In the United Kingdom, entities acting as district, regional, national or international governing or ruling bodies may have aims within the independent statutory charitable purpose (promotion of amateur sport).⁴⁸ However, even after the statutory recognition of the promotion of amateur sports as in itself a valid charitable purpose in England and Wales and Scotland, entities may encounter some difficulties establishing that they fall within the scope of the statutory charitable purpose. Governing bodies can fall outside the statutory purpose where they have an independent purpose to promote professional sports,⁴⁹ including by providing sports academies linked to professional clubs or concerned with the training of professional sportspersons.⁵⁰
41. Further, the Board notes that the Charities Commission for England and Wales maintains that the promotion of competitive success is not a valid charitable

⁴⁶ See discussion in registration decisions declining applications for registration of entities that promote sport for high performance athletes: Southern Zone of NZRL (SOU43893), Decision number 2013-4, 15 April 2013; NZ Snowboardcross (Nzs43490), Decision number 2012-2, 1 November 2012; Waikato Rowing Performance Centre Incorporated (THE41712), Decision number 2012-04, 5 April 2012.

⁴⁷ The Charities Commission for England and Wales emphasized this distinction in its publications prior to the introduction of the new statutory charitable purpose to advance amateur sport, see *Charitable Status and Sports* (2003), at [27] – [30]. Even after the introduction of the legislation, the regulator has advised that the promotion of sporting success as an independent aim does not lie within the scope of the statutory charitable purpose: *Consultation: The Advancement of Amateur Sport*, 28 February 2011, at [55] - [61].

⁴⁸ Charities Commission for England and Wales, *Consultation: The Advancement of Amateur Sport*, 28 February 2011, at [64].

⁴⁹ The statutory definition of charitable purpose is limited to the promotion of amateur sport. Charities Commission for England and Wales, *Consultation: The Advancement of Amateur Sport*, 28 February 2011, at [44] – [47] and [A26 –A28]; See also Her Majesty's Revenue and Customs "Community Amateur Sports Clubs: Detailed Guidance Notes" <http://www.hmrc.gov.uk/casc/casc_guidance.htm>, at [7.6]. The Office of the Scottish Charity Regulator notes that while provision for professional athletes may be allowed in some circumstances, it can raise issues of private benefit and appropriate use of assets: Office of the Scottish Charity Regulator "Meeting the Charity Test: Guidance for Applicants and for Existing Charities" (2011), at 6-7.

⁵⁰ Charities Commission for England and Wales, *Consultation: The Advancement of Amateur Sport*, 28 February 2011, at [61], [62], [63].

purpose under the statutory definition of charitable purpose that applies in England and Wales:

Where an organisation has the promotion of international success in a particular sport as a separate, free-standing aim then its aims will not be exclusively charitable ...⁵¹

The training of 'elite' sportspersons may be a legitimate means of advancing amateur sports or games for the public benefit ... [h]owever where an organisation is specifically directed towards the training of elite athletes for sporting success, the proof of that success or outcome is likely to be measured in terms of performance rankings, titles and medals...⁵²

We recognise that the competitive element in sports and games is an intrinsic and essential part of its appeal to players, whatever their level of skill. This is not an issue with regard to public benefit. It becomes an issue when an organisation's resources are geared towards the pursuit of excellence to the detriment of other either less skilled or less competitive members because in practice, benefits are being unreasonably restricted to a much narrower section of the public.⁵³

42. The Board has also previously rejected the argument that the benefit to spectators of watching elite level sport is one that lies within the scope of charity.⁵⁴
43. Thus, the Board considers that even if the promotion of amateur sport were a charitable purpose in its own right, entities that were established with an independent purpose to promote professional, sporting success for elite athletes, and/or sport as entertainment for spectators would not be established for exclusively charitable purposes.
44. Having regard to the New Zealand law recognised in section 5(2A), and comparative guidance from other jurisdictions, the Board considers that the following considerations will be relevant in assessing the status of entities established to govern and promote a sport in a particular region or nation:
 - a. The promotion of amateur sport as a means to advance charitable purposes, for the public benefit, is a charitable purpose in New Zealand law.

⁵¹ Charities Commission for England and Wales, *Consultation: The Advancement of Amateur Sport*, 28 February 2011, at [55].

⁵² Charities Commission for England and Wales, *Consultation: The Advancement of Amateur Sport*, 28 February 2011 at [59].

⁵³ Charities Commission for England and Wales, *Consultation: The Advancement of Amateur Sport*, 28 February 2011 at [A21].

⁵⁴ Charities Registration Board decision of 15 April 2013, declining the application for registration of the Southern Zone of the NZRL at [42] <http://www.charities.govt.nz/charities-in-new-zealand/legal-decisions/view-the-decisions/view/southern-zone-of-nzrl>.

- b. The promotion of sport (including amateur sport conducted on a not-for-profit basis) as an end in itself is not a valid charitable purpose in New Zealand law.
- c. The promotion of sport (including amateur sport conducted on a not-for-profit basis) as a means to the following ends is not a charitable purpose:
 - providing private pecuniary interests to players and others involved in the sport;
 - promoting sporting success for elite athletes;
 - providing entertainment and recreation to spectators at sports events.
- d. The down-stream benefits of advancing professional sports and sporting success for elite athletes do not themselves establish a purpose of advancing professional sports and sporting success for elite athletes as a charitable purpose in law.

45. .

D. SNZ's purpose to promote competitive swimming as an end in itself

- 46. The Board considers that the SNZ is established and maintained with a purpose of promoting success in competitive swimming as an end in itself. The Board considers that this conclusion is justified by reference to the constitution of SNZ.
- 47. First, clause 4.1 states: “[t]he primary object of SNZ is to support the growth and performance of the sport of competitive swimming, from entry level club competitive swimmers to *elite High Performance athletes*” [emphasis added]. This is not expressed to be a means to promote charitable purposes, and is expressed to be an end in itself.
- 48. Secondly, the “further” objects in clause 4.2(f), (g), (h) and (j) indicate a purpose to promote competitive swimming as an end in itself. They have a strong focus on participation in competitive swimming and the development of the sport of competitive swimming.
- 49. Finally, the primacy given to SNZ's governance and promotion of swimming at regional and national levels is seen throughout clause 6 (Members and Database), clause 8 (Regions and Regional Associations), clause 9 (Member Clubs). As discussed above, in part C.2 of this decision this is seen as a purpose to promote the sport itself.
- 50. The Board considers that SNZ's constitution shows that SNZ for the purpose of promoting the sport of competitive swimming as an end in itself.

E. SNZ's purpose to promote success in competitive swimming at an elite level

51. The Board also considers that, taking into account SNZ's stated purposes and activities, SNZ has a non-charitable purpose to promote success in competitive swimming at an elite level.
52. SNZ's stated purposes indicate a purpose to promote success in competitive swimming at an elite level. For example, clause 4.1 states that "[t]he primary object of SNZ is to support the growth and performance of the sport of competitive swimming, from entry level club competitive swimmers to *elite High Performance athletes* [emphasis added]". SNZ's "further" objects at clause 4.2 are also indicative of this focus. For example:
- 4.2(b) provides a purpose to identify and co-ordinate competitive talent;
 - 4.2(c) provides a purpose to provide oversight and pathways from regional, to national through to international level; and
 - 4.2(j) provides a purpose for SNZ to be the organisation that represents competitive swimming in and for New Zealand.
53. We also consider that many of SNZ's activities promote success in competitive swimming at an elite level. Viewed holistically we consider that SNZ's operation involves a significant investment in elite swimmers, coaches and events that constitutes an independent (free-standing) purpose to promote sporting success. In particular we note:
- SNZ's High Performance mission statement is "to create a sustainable high performance environment that systematically produces world class performances".⁵⁵ SNZ supports two High Performance Centres.
 - SNZ's expenditure on "High Performance Athlete/Coach Support", "High Performance International Team" and "High Performance Programmes/Other" constituted 41% of total expenses in year to 30 June 2008; 39% of total expenses in year to 30 June 2009; 45% of total expenses in year to 30 June 2010; 39% of overall expenditure in year to 30 June 2011; 41% of total expenses in year to 30 June 2012; 40% of expenses in year to 30 June 2013.⁵⁶

⁵⁵ http://www.swimmingnz.org.nz/uploads/files/HPC_Information_September_2013_FINAL.pdf [accessed 4 November 2013].

⁵⁶ Information is based on financial statements for years to 30 June 2008, 2009, 2010, 2011, 2012 and 2013.

- SNZ’s public statements highlight commitment to development of the sport and improving the success of New Zealand swimmers at international events.⁵⁷
 - SNZ has 6.5 staff employed to support high performance activities, including an elite development coach and a high performance coach.⁵⁸
54. SNZ has submitted that the funding for the high performance activities is derived solely from High Performance Sport NZ (HPSNZ) and is “ring-fenced” for this activity. SNZ also submits that the expenditure on the activity reflects the grant determined by HPSNZ. However, this does not permit a conclusion that the purpose to promote success at an elite level is a purpose of a different organisation rather than SNZ. The high performance activities are still an activity carried out by SNZ and SNZ receives funding for this purpose. As noted above at paragraph 54 SNZ’s expenditure on high performance activities has been consistently around 40% of all expenditure.
55. SNZ has also submitted that the elite swimming provides aspiration and improves standards of swimming for New Zealanders. SNZ’s submission assumes that the promotion of sport at an elite and professional level is necessarily a means to advance the amateur sport at the learner level. The Board does not consider that this stands as a general proposition. Offering a high level sporting event does not in itself provide spectators with a benefit that lies within the scope of charity (refer to paragraph 42 above). Any effect of the elite level activities in inspiring participation at the learner level is at best a ‘down-stream’ benefit that does not serve to bring promotion of professional or elite competitions within the scope of charity.
56. In light of the above, we consider that SNZ has a purpose to promote success in competitive swimming at an elite level.

F. SNZ’s non-charitable purposes are more than ancillary

57. The Board does not consider that the SNZ’s non-charitable purposes fall within the savings provision set out in section 5(3) of the Act.
58. Charities Services acknowledge that clause 4.3 states that SNZ’s objects are “exclusively charitable” and that if “any of the Objects are found to be non-charitable they are ancillary and secondary to the charitable Objects”. However, as discussed in paragraph 27 above, the courts do not accept that clauses that

⁵⁷ See for example: http://www.nzherald.co.nz/sport/news/article.cfm?c_id=4&objectid=11125986 [accessed 17/10/2013]

⁵⁸ Refer SNZ’s letter of 14 January 2014 at paragraph 3 and SNZ’s meeting minutes dated 23 April 2013.

purport to limit purposes to only charitable pursuits are sufficient to determine that an entity is exclusively.

SNZ's purpose to promote sport as an ends in itself is more than ancillary

59. We consider that the SNZ's purpose to promote sport as an end in itself, is pervasive and predominant and clearly outside of the savings provision set out in section 5(3) of the Act. The stated purposes are expressed as purposes to promote sport as an end of itself rather than as a means to any charitable purpose.

SNZ's purpose to promote success in competitive swimming at an elite level is more than ancillary

60. The Board considers that SNZ's purpose to promote success in competitive swimming at an elite level is neither qualitatively or quantitatively ancillary to SNZ's charitable purposes.
61. Considering the quantitative part of the ancillary assessment the Board considers that the support of high performance swimming and promotion of swimming success at an elite level are more than incidental. For example:
- Expenditure on high performance programmes, coaches and teams constitute a significant proportion of overall expenditure since 2008 (this expenditure has been consistently around 40% of total expenditure).⁵⁹
 - 6.5 of 24 staff are supporting high performance activities.⁶⁰
 - SNZ supports two high performance centres.
62. SNZ has submitted that the number of people that SNZ's high performance activities benefit is a lesser number than the number of people who benefit from SNZ's charitable purposes.⁶¹ We have taken this into account but for the reasons detailed above in paragraph 61, we consider that the support of high performance swimming and promotion of swimming success at an elite level are more than incidental on a quantitative assessment.

⁵⁹ See paragraph at paragraph 54.

⁶⁰ We note that SNZ have advised that 2 of those 6.5 are involved in education of coaches and swim teachers and that the 0.5 relates to safety resources for open water swimming. If these 2.5 staff are involved in up-skilling coaches and swim teachers for high performance swimmers and providing safety resources for high level open water swimming we would consider that these 2.5 staff are also contributing to high performance activities. Even if the 2.5 staff were involved only in the activities available to the general public this would still leave 4.5 of 24 staff involved at high level. Depending on the exact roles of the 2.5 staff, and assuming that the remaining staff have no role in relation to high performance activities, the proportion of staff involved in high performance activities is between 18.8% to 28.1%. This proportion is not insignificant.

⁶¹ Refer SNZ's letter of 14 January 2014 at paragraph 6.

63. Applying the qualitative part of the ancillary assessment, SNZ's promotion of sporting success cannot be seen as ancillary. This purpose is not a means to advance another charitable purpose. Further, as discussed above in part F of this decision, SNZ's focus on swimming success at an elite level is evident in its stated purposes and its activities.
64. The Board notes SNZ's submission that SNZ's purpose is to promote swimming as an amateur sport in New Zealand and that SNZ's promotion of elite and professional sports is a means to promote amateur entry level swimming and water safety in New Zealand.⁶² While we recognise the importance of water safety and swimming skills for the general public, we are not convinced by this submission, this does not mean that activities which focus on elite swimmers can be seen as a means to promote water safety and swimming skills for the general public (refer to paragraph 55 above).

Summary

65. In light of the above, we consider that SNZ's non-charitable purposes are more than ancillary to its charitable purposes. They therefore fall outside the savings provision in section 5(3) of the Act.

G. SNZ's charitable purposes

66. The Board recognises SNZ's purposes include some charitable purposes. For example SNZ's purposes include charitable purposes to promote public participation in swimming as a means by which public health is promoted and assisting other organisations to provide learn to swim and swim safe educational programmes.⁶³
67. SNZ's charitable purposes however are not determinative of its qualification for continued registration as the Board considers that its non-charitable purposes are more than ancillary to its charitable purposes as discussed in section F above.

H. SNZ's other submissions

68. We note that, in its letter of 14 January 2014, SNZ offered to consider amending the stated purposes at its Annual General Meeting in April 2014. However, SNZ has not provided any amendments to Charities Services. We consider that even if SNZ amended its stated purposes this would not necessarily mean that SNZ continues to qualify for registration. As above, in paragraphs 23 to 25, we must

⁶² Refer SNZ's letter of 14 January 2014 at paragraph 7.

⁶³ Swimming New Zealand constitution clause 4.2(i) and <http://www.swimmingnz.org.nz/education/> [accessed 4 November 2013]

also consider activities. We consider that SNZ's activities illustrate a non-charitable purpose to promote success in competitive swimming at an elite level (refer to part F above).

69. In its submissions, SNZ has drawn comparisons to Surf Life Saving and submitted that its high level swimming activities are comparable to Surf Life Saving activities. However, the Board must take a case by case approach with each application considering the specific wording of the applicant's rules document and the activities of the applicant. SNZ has also submitted that many participants in its activities are members of Surf Life Saving New Zealand and that SNZ's activities contribute to the essential skills of surf life savers.⁶⁴ While there may be common people involved in both organisations this is not enough to mean that is SNZ charitable. The Board considers that the link between the promotion of success in swimming competitions by SNZ and any lifesaving public safety benefits is tenuous to characterise SNZ's purposes as charitable.

I. Public Interest

70. Section 35(1) of the Act states that the Board must not proceed with the removal of an entity from the register unless the Board is satisfied that it is in the public interest to do so.
71. Section 10(h) of the Act obliges the chief executive to monitor charitable entities and their activities to ensure that they continue to be qualified for registration as charitable entities. The purposes of the Act include, in section 3(a), to promote public trust and confidence in the charitable sector. The Board considers that public trust and confidence in registered charitable entities would not be maintained if entities which did not meet the essential requirements for registration remained on the register.
72. Accordingly, the Board considers that it is in the public interest to remove SNZ from the register, as this will maintain public trust and confidence in the charitable sector.

J. Determination

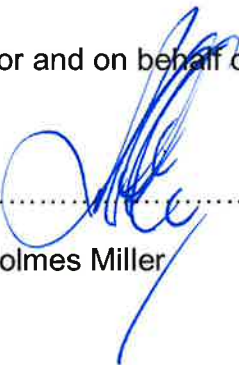
73. The Board determines that SNZ is not qualified for registration as a charitable entity because it is not established for exclusively charitable purposes as required by section 13(1)(b) of the Act. The Board considers that SNZ's main purpose is for sports promotion purposes that are not charitable. Further, SNZ's non-charitable purpose is not ancillary within section 5(3) of the Act.

⁶⁴ Refer SNZ's letter of 14 January 2014 at paragraph 8.

74. As SNZ has an independent (non-ancillary) non-charitable purpose, it is in the public interest to proceed with SNZ's removal from the Charities Register. The grounds for removal under section 32(1)(a) of the Act are satisfied in relation to SNZ.
75. The decision of the Board is therefore to remove SNZ from the register, pursuant to section 31 of the Act, with effect from 30 October 2014.

For the above reasons, the Board determines to deregister the SNZ as a charitable entity by removing it from the Register.

Signed for and on behalf of the Board


.....
Roger Holmes Miller


.....

Date