

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

CIV 2010-485-1275

UNDER THE CHARITIES ACT 2005

IN THE MATTER OF AN APPEAL FROM A DECISION OF
THE CHARITIES COMMISSION

IN RE DRACO FOUNDATION (NZ)
CHARITABLE TRUST

Appellant

Hearing: 2 February 2011

Counsel: M Boyd and L Carter for Appellant
P Gunn and D Consedine for Respondent

Judgment: 15 February 2011

JUDGMENT OF RONALD YOUNG J

Introduction

[1] The Draco Foundation (NZ) Charitable Trust (Draco) describes itself as a trust with the aim to raise awareness of and involvement in the democratic process amongst citizens, organisations and communities of New Zealand. In 2010 it applied to the Charities Commission to be registered as a charity. On 11 June 2010 the Commission wrote to Draco advising that it declined the application to be registered as a charitable entity. It gave reasons.

[2] This appeal challenges that decision. The appellant says:

- (a) that the primary purpose of Draco is charitable in that it is for the advancement of education and it is directed to a purpose beneficial to society, namely moral improvement for public benefit;
- (b) to the extent that any purposes and activities are political and/or propagandist those purposes and activities are ancillary to the main purpose of Draco.

Background

[3] The Trust Deed for Draco sets out the principles that Draco will abide by. It provides:

2. PRINCIPLES *MAATAAPONO*

2.1 The Trust is committed, in attaining its purposes, to:

- 2.1.1 transparency in all our dealings;
- 2.1.2 equity and fairness in how we treat all people and organisations;
- 2.1.3 integrity, honesty and credibility in all transactions.

[4] The Trust's purpose is:

3. PURPOSE *MAATAAPONO*

3.1 The purpose of the Trust will be the protection and promotion of democracy and natural justice in New Zealand. In particular the Trust will:

- 3.1.1 hold assets – both tangible and intangible – in perpetuity, to be kept in and used first and foremost for the purposes of achieving the purposes of the Trust;
- 3.1.2 raise funds, either through philanthropic or other means, or by subsidiary organisations, to purchase or lease assets, employ staff, market, promote, or otherwise assist the day-to-day operation of the Trust;
- 3.1.3 raise awareness of and involvement in the democratic process amongst the citizens, organisations, and communities of New Zealand;

- 3.1.4 undertake research and engage in public debate on the results;
- 3.1.5 provide training and education to communities;
- 3.1.6 from time to time, and at the sole discretion of the Trustees, support organisations with similar aims; and
- 3.1.7 provide any other support and assistance – or undertake any other business – consistent with this charitable purpose.

[5] In early March 2010 Draco made electronic application to the Charities Commission for registration as a charity. The Commission then sought further information related primarily to the activities of Draco, both past and future, and how they related to the purpose of Draco (cl 3 of the Trust Deed).

[6] On 6 April the Charities Commission wrote to Draco advising that their application for registration “might be declined”. The letter set out briefly why. It gave Draco the chance to submit to the Commission “any facts or arguments you wish the Commission to take into account”, before a final decision was made. The Commission confirmed that upon response it would take into account the further information and then make a final decision. Draco responded on 14 April and 21 April and provided further submissions to the Commission. On 11 June the Commission advised Draco that it was refusing the application. It set out its reasons in full.

Legal issues

[7] Section 59(1) of the Charities Act 2005 gives this right of appeal. Section 61 identifies the powers of this Court on appeal. It provides as relevant:

61 Determination of appeal

- (1) In determining an appeal, the High Court may—
 - (a) confirm, modify, or reverse the decision of the Commission or any part of it;
 - (b) exercise any of the powers that could have been exercised by the Commission 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—

- (a) to be registered in the register of charitable entities with effect from a specified date; or

...

- (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.

...

[8] The appeal is by way of rehearing and so I form my own view of the merits.¹ I acknowledge the Commission, as the adjudicative body being appealed from, is not a party to this appeal as such. However, given such appeals generally only involved the appellant the Commission has usefully taken the role of opposer.

[9] Sections 5 and 13 are the pivotal sections in the Charities Act 2005 governing the requirements for registration as a charity. Section 13(1) provides:

13 Essential requirements

- (1) An entity qualifies for registration as a charitable entity if,—
 - (a) in the case of the trustees of a trust, the trust is of a kind in relation to which an amount of income is derived by the trustees in trust for charitable purposes; and
 - (b) in the case of a society or an institution, the society or institution—
 - (i) is established and maintained exclusively for charitable purposes; and
 - (ii) is not carried on for the private pecuniary profit of any individual; and
 - (c) the entity has a name that complies with section 15; and
 - (d) all of the officers of the entity are qualified to be officers of a charitable entity under section 16.

¹ *Austin, Nichols & Co Inc v Stichting Lodestar* [2008] 2 NZLR 141 SC para [6].

[10] Section 5 defines charitable purpose in this way:

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—

- (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.

[11] It was common ground that the s 5 definition did not change the common law definition of charitable purpose provided for in *Commissioners for Special Purposes of Income Tax v Pemsel*.² The four categories of charitable purposes are; for the relief against poverty; the advancement of education; the advancement of religion; and other purposes beneficial to the community. In this case “the advancement of education” and “other matters beneficial to the community” are the two charitable purposes that are relevant.

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

[12] Thus to be registered as a charity Draco must satisfy this Court that:

- (a) it has a purpose of a charitable character;
- (b) it must be for the benefit of the public; and
- (c) it must be exclusively charitable.

[13] Despite the use of the word “exclusively” a body may have non-charitable purposes as long as they are ancillary to the charitable purpose.³

[14] I agree with Simon France J’s remarks in *Re The Grand Lodge of Ancient Free and Accepted Masons in New Zealand* that whether a purpose is ancillary involves a quantitative and qualitative assessment.⁴

Summary of reasons by the Commission

[15] The Commission’s analysis accepted that cls 3.1 and 3.1.3 may be charitable in that they may advance education or might be other purposes beneficial to the community. The Commission accepted cls 3.1.4 and 3.1.5 might advance education. They said that cls 3.1.1, 3.1.2, 3.1.6 and 3.1.7 were either powers or ancillary.

[16] The Commission considered (in relation to cls 3.1 and 3.1.3) Draco’s past activities and future planned activities in relation to those purposes. The Commission concluded that the clauses were not exclusively charitable under the advancement of education once it analysed what Draco was doing and proposed to do.

³ In the New Zealand context see *Institute of Professional Engineers of New Zealand Limited Inc v The Commissioner of Inland Revenue* (1992) 1 NZLR 570; ss 5(3) and (4) Charities Act 2005 ([13]).

⁴ *Re The Grand Lodge of Ancient Free and Accepted Masons in New Zealand* HC Wellington CIV 2009-485-2633, 23 September 2010.

[17] As to other matters beneficial to the community, again the Commission accepted that cls 3.1 and 3.1.3 could be charitable but concluded that what Draco did or proposed to do did not advance or enhance democracy objectively. Nor was the material on Draco’s website of particular educational value. The Commission concluded that Draco was not providing a public benefit because a main purpose was seeking change in the decision making of local and central government.

Facts

[18] To return to the facts of this case. I consider them in the context of whether Draco’s purpose(s) is/are of a charitable character, whether they are for the benefit of the public and thirdly whether Draco is exclusively charitable. These issues involve a consideration of Draco’s Trust Deed together with the activities it has undertaken and will undertake in the future.

[19] In its email response to the Commission’s enquiry regarding its activities and purpose Draco set out what activities it had undertaken in the previous 12 months, and identified the purpose of each in relation to cl 3 of the Trust Deed. Further, it identified the planned activities in the next 24 months and again related those to cl 3 of the Trust Deed. I set out in full Draco’s submission in this regard:

CURRENT ACTIVITIES (INCLUDING THE PAST 12 MONTHS)

Activity	Purpose
<ul style="list-style-type: none"> • Website: www.councilwatch.org.nz • Website: www.residents.org.nz 	<p>The purpose of the Trust will be the protection and promotion of democracy and natural justice in New Zealand</p>
<ul style="list-style-type: none"> • Sale of: merchandise, training materials, training courses, paid access to sections of website 	<p>3.1.2 raise funds, either through philanthropic or other means, or by subsidiary organisations, to purchase or lease assets, employ staff, market, promote, or otherwise assist the day-to-day operation of the Trust</p>

<ul style="list-style-type: none"> • Web activity, including providing free and easy-to-access information for the public • Organise conferences for community groups and individuals to discuss democracy and dialogue with central and local government agencies 	3.1.3 raise awareness of and involvement in the democratic process amongst the citizens, organisations, and communities of New Zealand
<ul style="list-style-type: none"> • Undertake sectoral research across all 85 local authorities and publish the results for free • Make public comment, through the internet and media, on the state of democracy in New Zealand 	3.1.4 undertake research and engage in public debate on the results
<ul style="list-style-type: none"> • Provide free resources online for citizens to establish residents associations in their local community 	3.1.5 provide training and education to communities

PLANNED ACTIVITIES (IN THE NEXT 24 MONTHS)

Activity	Purpose
<ul style="list-style-type: none"> • Sale of: merchandise, training materials, training courses, paid access to sections of website 	3.1.2 raise funds, either through philanthropic or other means, or by subsidiary organisations, to purchase or lease assets, employ staff, market, promote, or otherwise assist the day-to-day operation of the Trust
<ul style="list-style-type: none"> • Train and support a network of people across New Zealand (Local Government Advocates) to assist citizens to deal with their local Council, to build sustainable networks with Councils, and to assist the local government sector to better understand and communicate with communities 	3.1.3 raise awareness of and involvement in the democratic process amongst the citizens, organisations, and communities of New Zealand
<ul style="list-style-type: none"> • Deliver training and adult education programmes directly to community groups • Provide templates and training material to enable community groups to provide adult education to citizens 	3.1.5 provide training and education to communities

[20] In relation to this appeal the appellant identifies its key submissions as follows:

- (a) education in forms of government qualifies as charitable (see cl 3.1 and cl 3.1.3);

- (b) secondly, (alternatively) moral improvement is charitable under the fourth head of charitable purposes.⁵ Here, promotion of good citizenship and sound administration of the law covered by cls 3.1 and 3.1.3 come under this fourth head of charitable purposes;
- (c) any political purposes are ancillary and therefore allowable. The fact that some of the activities might be seen as political does not necessarily render a charitable purpose non-charitable. Thus, for example, any opinion piece contained in the material produced by Draco which is partisan does not nullify the essential charitable nature of Draco.

General observations

[21] Clauses 3.1 and 3.1.3 of the Trust Deed could be charitable purposes either through the advancement of education or for other purposes beneficial to the community.⁶ The holding of assets and raising of funds (cls 3.1.1, 3.1.2) are not charitable purposes as such.

[22] The purposes in cls 3.1.4, 3.1.5 and 3.1.6 could be charitable purposes if they were expressly tied to the primary purpose of Draco, being the protection and promotion of democracy and natural justice in New Zealand. However, they are not drafted in this way. In contrast 3.1.1 and 3.1.7 are tied to the charitable purpose expressed in 3.1. Given the current drafting Draco could therefore carry out the purposes in 3.1.4, 3.1.5 and 3.1.6 without regard to any charitable purpose. And it follows, therefore, Draco could exclusively carry out (and remain true to its Trust Deed) non-charitable activity.

⁵ ([14]).

⁶ ([4]).

Advancement of education

[23] The appellant's case is that its purpose and activities are for the advancement of education as illustrated by the material supplied to the Commission at the Commission's request.⁷

[24] No doubt the Commission sought this information from Draco to ensure the Commission could fulfil its obligations pursuant to s 18(3) of the Act. It provides:

18 Commission to consider application

...

- (3) In considering an application, the Commission 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 Commission on the matter.

[25] As to this material there are firstly, two websites, which are run by, and the content provided by, Draco. They are www.councilwatch.org.nz and www.residents.org.nz.

⁷ ([19]).

[26] Secondly, the sale of merchandise, training materials and training courses and paid access to sections of the website, as well as providing free and easy to access information for the public. The information for the public is essentially incorporated within the activities in the two websites mentioned above. There was no evidence provided, outside of the website, of any training materials or training.

[27] Thirdly, organising conferences for community groups and individuals to discuss democracy and “dialogue” with central and local government agencies.

[28] Fourthly, undertaking sectoral research across all 85 local authorities and publishing the results for free. The result of this research is contained in the material on both websites.

[29] Fifthly, to make public comment, through the internet and media, on the state of democracy in New Zealand. Currently this comment seems to be exclusively undertaken through the two websites.

[30] And finally, provide free resources online for citizens to establish residents associations in their local community. Again this appears to be available through the “residents” website.

[31] Thus the primary functions of Draco seem to be to run the two websites and the organisation of conferences.

Future activities

[32] As to the proposed future activities the first such activity, the sale of merchandise, is one of the activities said to be currently undertaken although as I have observed there is no evidence of this.⁸ The other three future activities relate to the training and support of people to assist them in dealing with their local council; to deliver training and adult education programmes; and to provide “templates and training” to enable the community to provide adult education to citizens.

⁸ ([19]).

[33] The sale of training material is not by itself advancement of education but primarily a way of funding the Trust. The training and support programmes and training material have no direct tie to the specific purposes of cl 3.1 or cl 3.1.3 of the Trust Deed. Although the training of individuals and provision of training material is said to raise awareness of the democratic process, there is nothing to suggest in the planned activity identified that in fact it will do so. Because the identified activities are so general it is difficult to understand what is proposed.

[34] The proposed programme seems to involve training people to assist people to “deal with their local council”. And further, “to build sustainable networks with councils”.

[35] These purposes are, as I have said, general, wide and vague. It is impossible to know precisely what is proposed. Simply delivering training and education programmes to community groups and providing material to those groups with no tie to cl 3.1 or cl 3.1.3 of the Deed leaves Draco free to provide such programmes outside any charitable purpose. Given the generality of the description Draco would be free to provide the services identified as much for non-charitable as charitable purposes. What is proposed is too vague to be confident it will be tied to any charitable purpose.

Discussion – Advancement of Education

[36] The appellant’s case is that its activities, both past and planned, which educate the public in “forms of government” and “encourage political awareness” are for the advancement of education and are therefore charitable. I keep in mind the observations of the authors of *Tudor on Charities*.⁹ They said in relation to the wider topic of human rights which encompasses Draco’s purposes:

⁹ J Warburton *Tudor on Charities* (9th ed, Sweet & Maxwell, London, 2003) at 2-106.

By analogy with the promotion of moral improvement, the Charity Commissioners have concluded that the promotion of human rights is a charitable purpose. Human rights are seen as fundamental to the proper functioning of society and respect for human rights is generally seen as a moral imperative. Human rights may be promoted in a number of ways and some specific purposes, such as the relief of need of those suffering from human rights abuses and advancing education of human rights, are clearly charitable under other heads. The acceptance of the wider purpose of the promotion of human rights as charitable does not mean, however, that the usual limitations can be ignored and, for example, any educational material must have educational value and not be propagandist. Similarly the limitation on political purposes applies. Thus an organisation whose purposes include seeking to change the law or government policy to enforce human rights in a foreign country which does not have human rights enshrined in its domestic law will not be charitable. Human rights cover a very wide spectrum and it must not automatically be assumed that a trust for the promotion of human rights in any jurisdiction will satisfy the requirement of public benefit even if the purpose is not political. The advancement of education of human rights as understood and practised in this country, for example, may not be for the overall public benefit of people living in a completely different culture.

[37] The appellant points to the extensive information on its website, relating as it does to rights and responsibilities under the law, as properly seen as advancement of education when considered by analogy with the law reporting cases.¹⁰

[38] I have had the opportunity of looking at the material provided from the “councilwatch” and “residents” websites. It provides some plain language descriptions of legal documents, and advice to citizens regarding their rights relating to their relationship with local and central government. The appellant says it provides the same kind of help to ordinary citizens that the publication of the law reports does for lawyers.

¹⁰ *Commissioner of Inland Revenue v New Zealand Council of Law Reporting* [1981] 1 NZLR 682 (CA) at 683, citing *Incorporated Council of Law Reporting for England and Wales v Attorney-General* [1972] Ch 73; [1971] 3 All ER 1029 and *Incorporated Council of Law Reporting of the State of Queensland v Federal Commissioner of Taxation* (1971) 125 CLR 659.

[39] A significant portion of the material on the websites is basic information about local authorities and government agencies brought together in one place. For example, it identifies residents' associations, citizen advice bureaus, local MPs and community law offices. It lists local authorities, councils and councillor's and suggests how a submission might be made by a citizen to them. It gives a brief overview of a citizen's rights and responsibilities including a summary of the Local Government Act and the powers of councils. It refers the enquirer to the Ombudsman's Office, the Auditor-General and the Minister of Local Government. There is a list of Parliamentarians. It also has editorial content, some of which is neutral, for example, a plain language précis of particular legal rights. Some editorial content is clearly partisan.

[40] I do not consider the analogy with the law reporting cases to the material on the appellant's websites as apt.

[41] As the Commission said in submissions the law cannot be administered without access to the reports of the decisions of the judges. What Draco has compiled (in part) is a very useful summary, helpfully gathered in one place, of information about local and central government and citizens rights and responsibilities together with extensive contact information of government organisations and employees. This information is already available to citizens in a variety of places. It does not have any independent educational value. It does have high convenience value. But it is essentially the provision of information. It does not provide unique material or provide otherwise unavailable essential material. It is in a completely different category to the content of law reports.

[42] As to the other part of the content, the editorial comment, this "plain language" material cannot be considered to be for the advancement of education. This material does inform the reader but it is material widely available from a number of sources and does no more than provide the opportunity for a visitor to the site to read it for themselves. In *Re Positive Action Against Pornography v Minister of National Revenue* the Canadian Supreme Court said:¹¹

¹¹ *Re Positive Action Against Pornography v Minister of National Revenue* 49 D.L.R. (4th), 74 (HEU).

The organisation's activities consisted largely of the presentation to the public of opinion and information about pornography. There was nothing in the record showing either formal training of the mind or the improvement of a useful branch of human knowledge as a result of the organisation's activities.

[43] At best it is the provision of material for self study. The "reader" can choose whether to access the material or not. This is not for the advancement of education.¹²

[44] The appellant says the Commission failed to consider the other activities undertaken or proposed to be undertaken by Draco as advancing education. Although I consider the Commission did adequately consider all activities, given this appeal is by rehearing I reconsider all activities. I have already considered the proposed activities of the Trust.¹³

[45] The appellant says the Commission neglected to take conference organisation and presentation into account and in particular the "Residents" conference it organised. As to the "Residents" conference, as I understand it, that conference was held in Wellington during 2010. The only material before the Commission and the material to be considered by me with respect to that conference is a draft programme.

[46] After a welcome by the Honourable Peter Dunn MP and a video presentation there were workshops entitled "Engaging with your Council", "Working alongside your community" and "Building stronger local democracy". In the afternoon there were sessions on "Understanding the law", "Organisational governance and management" and "Future issues – how will they affect residents?"

[47] The organisation and provision of a conference focussed on protection and promotion of democracy and natural justice and the raising of awareness of an involvement in the democratic process amongst the citizens, organisations and communities of New Zealand, could be a charitable purpose.

¹² *Vancouver Society of Immigrant and Visible Minority Women v Minister of National Revenue* [1999] 1 SCR 10.

¹³ ([29] to [32]).

[48] The difficulty is the paucity of information regarding the conference. There is simply not enough detail provided by Draco to conclude that the conference has educational value and charitable purpose. From the information provided it cannot be said that at the time the Commission considered the application the proposed conference, with the general topics identified, was either for the advancement of education or of general benefit to the community. I accept, as I have noted, that such a conference could have that purpose. Whether, however, organising one such conference in the course of the year means the purposes of Draco are exclusively charitable (within the meaning of exclusive in the context of charities law) is doubtful in any event.

[49] Further, beyond organising future “Residents” conferences there is nothing to suggest other conferences are planned. This rather places conference organisation and presentation at the periphery of Draco’s purposes.

[50] The other aspect of Draco’s activities is its research work. The only research identified by it was the publication of the response of local authorities from requests for information by Draco regarding senior managers’ salaries. Draco wrote to each local authority asking for the salaries of its senior managers. Most replied, some did not.

[51] While this is no doubt information of interest, particularly to rate payers, it is difficult to see it as research in the true sense of that word. Some of the information regarding senior manager salaries is already in the public domain. By itself I do not accept that this undertaking or similar undertakings could be seen as the advancement of education. It is essentially gathering information and making it available on a website for people to look at if they choose.

[52] I will return to my conclusions regarding advancement of education at the end of this judgment.

Partisan or political material

[53] The Commission considered that a significant amount of the material on the two websites was partisan amounting to “propaganda or cause under the guise of education”.¹⁴ It thus offended the rule that a trust for political purposes cannot be charitable.¹⁵ In *Molloy* the Court said:¹⁶

The foregoing principles have been recognised in many cases including in New Zealand *Re Wilkinson* [1941] NZLR 1065 and *Knowles v Commissioner of Stamp Duties* [1945] NZLR 522. But they do not assert that the mere existence of any such object or purpose ipso facto precludes recognition as a valid charity. To reach that conclusion the political object must be more than an ancillary purpose, it must be the main or a main object. If such purpose is ancillary, secondary, or subsidiary, to a charitable purpose it will not have a vitiating effect: see eg the *Royal North Shore Hospital* case (1938) 60 CLR 396; *National Antivivisection* case [1948] AC 31; [1947] 2 All ER 217, per Lord Simonds at 60, 63; 231, 232, per Lord Normand at 76; 239; the *Knowles* case [1945] NZLR 522, 528.

[54] Here much of the partisan material is an attempt by Draco to influence local or central government or other officials to a particular point of view. An example. The councilwatch website strongly advocated the prosecution of four regional councillors in Canterbury in an attempt to influence the decision making of the Auditor-General. In a democracy citizens are free to pursue such advocacy but the activity is essentially political and therefore not a charitable purpose. Publicising one side of a debate is not advancing education.

[55] A Canadian case has a similar flavour to the current situation. In *Action by Christians for the Abolition of Torture v The Queen in Right of Canada*, the Court concluded that attempts to sway the government by letter writing and other methods on contemporary issues was a political activity.¹⁷ This activity would be inconsistent with a charitable purpose unless it was non-partisan or ancillary to the charitable purpose of the organisation.

¹⁴ In *Re Collier (Deceased)* [1988] 1 NZLR 81 at 91.

¹⁵ *Bowman v Secular Security Ltd* [1917] AC 406 HC 9442 and *Molloy v Commissioner of Inland Revenue* [1981] 1 NZLR 688 (CA).

¹⁶ *Molloy*, above no 10, at 695.

¹⁷ *Action by Christians for the Abolition of Torture v The Queen in Right of Canada* (2002) 225 DLR 4th 99 (FC).

[56] The High Court of Australia recently considered political objects and charitable purposes in *Aid/Watch Incorporated v The Commissioner of Taxation*.¹⁸ The High Court noted that in Australia there is no general doctrine which excludes political objects from charitable purposes. The appellant says that the New Zealand courts should adopt the Australian approach as revealed in *Aid/Watch*. This would allow, the appellant says, Draco to pursue its “political” agenda through its advocacy on the website and elsewhere without running into the proposition that it did not have exclusively charitable purposes.

[57] In particular the appellant says that the Court in *Aid/Watch* made it clear that there is public benefit in the generation, by lawful means, of public debate. Given Draco’s purpose is to enhance and maintain communication between electors and legislators and executive officers, then this does contribute to the public welfare through public debate and is therefore charitable.

[58] The difficulty for the appellant in such an approach is that contrary to the law of Australia New Zealand does have, as part of its law, a general doctrine which excludes from charitable purposes, political objects.¹⁹

[59] I agree with the Commissioner that *Bowman* remains good law in New Zealand which I must follow. Currently, therefore where *Aid/Watch* cuts across the principles in *Bowman*, it cannot have application in the High Court of New Zealand.

[60] There may also be other reasons why the Australian High Court reasoning in *Aid/Watch* has no application to this case. That includes the proposition that *Aid/Watch* applies only to those cases where the charitable purpose involves relief of poverty. And secondly, that the decision in *Aid/Watch* is reliant upon Australian constitutional principles not applicable in New Zealand. However, given *Bowman* identifies the law in New Zealand, it is unnecessary to assess the strength of that reasoning.

¹⁸ *Aid/Watch Incorporated v The Commissioner of Taxation* [2010] HCA 42.

¹⁹ *Bowman, Molloy*; above no 10.

[61] The appellant accepts that some of the material on the sites are opinion pieces. It says, however, that this is simply an example of “ancillary means of furthering charitable purpose”. Publishing these opinions, it said, will provoke discussion and thereby enhance the knowledge of citizens of local and central government. The opinion pieces are, the appellant says, both quantitatively and qualitatively ancillary to the main charitable purpose. They are incidental to the main purpose of the websites and fall well below 30% of the educational material provided on the site.

[62] In terms of the quantity of opinion material on the website compared with other material, it is difficult to assess the relative column inches or numbers of words devoted to each. Given there are pages of entries identifying local and central government agencies, their addresses and contact telephone numbers, and employees, it may be that in that context the opinion content of the websites is below 30%. However, a more appropriate comparator is between the neutral and partisan editorial content.

[63] The editorial comment contains both neutral and partisan comment. The neutral and partisan editorial comment on the websites occupy similar space. The editorial content of the websites will naturally be of more interest and more prominently visible than the informational material I have mentioned.

[64] I reject the appellant’s claim that the opinion material is either quantitatively or qualitatively incidental to the main purpose of the websites. To the contrary I consider that measured both quantitatively and qualitatively the partisan opinion pieces have substantial and prominent places on the websites. They are not incidental but are one of the main purposes of the website.

[65] The neutral editorial items are mostly attempts in plain English to explain such statutes as the Local Government Act 2002, the Human Rights Act 1993 and the New Zealand Bill of Rights Act 1990. The partisan pieces are items about local government or central government issues. These are likely to be of the greatest interest to visitors to the sites. Few of the opinion pieces make any attempt to put both sides of the argument, they are overtly partisan.

[66] Further, in the section on the councilwatch site dedicated to journalists Draco says:

What we are trying to achieve – and this is a very long term version – is to provide a counter balance to the powers Councils wield in the name of ratepayers.

[67] I consider the expressions of opinion are essentially “propaganda” as understood in charities law. They present one side of a debate, the opinion writer’s view, on issues in the public arena which are essentially political.

[68] I am satisfied therefore that Draco’s partisan advocacy is a non-charitable purpose.

[69] The issue for me is whether this purpose together with any other non-charitable purpose are ancillary to any charitable purpose Draco may have (and therefore unobjectionable). If they are ancillary or incidental to a charitable purpose then this would not affect the essential charitable nature of Draco. However, if these purposes are not ancillary or incidental then Draco could not be registered under the Act.

[70] As I noted cl 3 of the Trust Deed, contains a number of purposes which may or may not be charitable depending upon how Draco actually functions.²⁰ Certainly the purposes of Draco allows it to solely carry out non-charitable purposes. This would in fact therefore allow Draco to commit all of its resources to non-charitable purposes. Self evidently these purposes could hardly be incidental or ancillary to a charitable purpose.

[71] I do not consider the political function of Draco to be ancillary or incidental to any charitable purpose. The political purpose is an important part of the content of both websites that Draco runs. Currently, and for the foreseeable future, these websites make up the vast majority of the concrete functions of Draco. These observations illustrate that the non-charitable purposes are not ancillary to the advancement of education or other purposes beneficial to the community (the

²⁰ ([21], [22]).

charitable purpose) but independent of it. Draco could, as I have noted, solely carry out the non-charitable purposes and be true to cl 3 of the Trust Deed.

[72] As to the fourth head of charitable purposes promoting good citizenship, I accept (as do the Commission) that the purposes in cl 3.1 and 3.1.3 could come within this head. For reasons previously given, however, I do not consider either the existing material or the proposed material can be considered as in fact promoting good citizenship. Further, any such charitable purpose is not for reasons given exclusively charitable.

Overall Assessment

[73] The essence of advancement of education is that learning must be passed on to others as the Commission in its submissions said.

[74] The guidelines published by the Charities Commission for England and Wales relating to advancement of education provide:

An organisation advancing education must provide positive, objective and informed evidence of educational merit or value where it is not clear. [...] A modern example might be a “wiki” site which might contain information about historical events but, if this information is not verified in any way, it would not be accepted as having educational merit or value without positive evidence. [...]

Mere blogging comprised of... uninformed opinion, on the other hand, is not likely to be of educational merit or value, where neither the subject matter nor the process is of educational merit or value. [...]

If the process is so unstructured that whether or not education is in fact delivered is a matter of chance, it will not be of educational merit or value.²¹

²¹ See the United Kingdom Charity Commission, “The Advancement of Education for the Public Benefit” (December 2008) United Kingdom Charity Commission
<http://www.charitycommission.gov.uk/Charity_requirements_guidance/Charity_essentials/Public_benefit/pbedu.aspx>.

[75] I adopt the observations of Iacobucci J in *Vancouver Society of Immigrant and Visible Minority Women v Minister of National Revenue* at 118:²²

... Simply providing an opportunity for people to education themselves such as by making available materials with which this might be accomplished but need not be, is not enough. Neither is “educating” people about a particular point of view in a manner that might more aptly be described as persuasion or indoctrination.

[76] And in the same case Gauthier J said:

I also agree with my colleagues (Iacobucci J) concern that in order to be educational under this head an organisation must pursue “actual teaching” or a “learning component”. However the Court must maintain as clearer boundary as possible between the charitable and non charitable purposes ... the more that purposes stray from traditional concepts of education the more difficult it will be to engage in the task of distinguishing charitable from non charitable.

[77] In this case the websites consist of the combination of informational material for the site visitor relating to local and national government and a series of opinion pieces many of which hold a particular point of view. These websites are the main focus of Draco’s attention. There is no evidence of educational or training material beyond that on the websites. The conference organisation material is too vague and generalised to reach a conclusion that it is for the advancement of education or for any other purpose beneficial to society.

[78] The non-charitable purposes, whether the partisan editorial material on the websites which has an important role, or the Trust Deeds authority for Draco’s non-charitable activities, are not incidental to any charitable purposes but major purposes themselves.

[79] I am satisfied, therefore, that what is being undertaken by Draco on the two websites is neither for the advancement of education nor for any other purpose beneficial to society (the fourth head of charitable purpose). Further, Draco is not exclusively charitable. Its partisan material is non-charitable and the non-charitable purposes in its Trust Deed are not ancillary to any charitable purpose.

²² *Vancouver Society of Immigrant and Visible Minority Women v Minister of National Revenue* [1999] 1 SCR 10; (1999) 169 DLR (4th) 34.

[80] For the reasons given, therefore, I agree with the Commission's conclusions. The Commission was correct not to register Draco as a charity. The appeal is dismissed.

[81] If the Commission seeks costs it should file a memorandum within 14 days. The appellant has a further 14 days to reply.

Ronald Young J

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