Outline of submissions of the Charity Law Association of Australia and New Zealand in support of application for leave to intervene

MAY IT PLEASE THE COURT:

1. The Charity Law Association of Australia and New Zealand (**CLAANZ**) wishes to address the Court on two issues relevant to this appeal:

    a. In determining whether a political advocacy organisation exists for a charitable purpose of public benefit, wider benefits flowing from the means and manner of its political advocacy, including from the fact of that advocacy itself, should be taken into account; and

    b. The question whether a political advocacy organisation exists for a charitable purpose of public benefit cannot be considered in isolation from the implications of its freedom of political expression.

Wider benefits

2. In order to be recognised as a charity in law, an organisation must exist for a charitable purpose of public benefit. This requires that the organisation's purpose fall within the equity of the preamble to the Statute of Charitable Uses 1601,[3] as interpreted by the courts.[4] It also requires that the organisation satisfy a public benefit test that has been developed incrementally by the courts over many years. The public benefit test has two components: an organisation's purpose must have a sufficiently public character; and its purpose must be demonstrated to generate benefit to the public.

3. In *R (Independent Schools Council) v Charity Commission for England and Wales*, the Upper Tribunal (Tax and Chancery Chamber) identified three types of benefit that might go to demonstrating that an organisation's purpose generates benefit to the public:[5]

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[3] Statute of Charitable Uses 1601 (UK) 43 Eliz I c 4

[4] *Re Greenpeace of New Zealand Incorporated* [2015] 1 NZLR 169 (SC), at [18].

[5] *R (Independent Schools Council) v Charity Commission for England and Wales* [2012] 2 WLR 100 (Upper Tribunal), [37].

a. **Direct benefits:** benefits to persons whose needs it is a purpose of the charity to relieve which are received by such persons as recipients of the main service which the charity provides;

b. **Indirect benefits:** benefits to persons whose needs it is a purpose of the charity to relieve which are received by such persons otherwise than as recipients of the main service which the charity provides;

c. **Wider benefits:** benefits other than direct and indirect benefits which are received by the community at large from the activities of the charity.

4. In cases where an organisation's purpose does not entail service provision, whether the organisation satisfies the benefit component of the public benefit test turns wholly on the existence or absence of wider benefits.

5. In some cases, courts recognise wider benefits because the purpose of an organisation is to provide non-excludable goods to the general public. In these cases, wider benefits flow directly from the pursuit of the organisation's purpose. For example, there is a long history of courts recognising as charitable organisations whose purposes entail improving or preserving an urban environment.[6] Another example is *Royal Choral Society v Inland Revenue Commissioners*, where Lord Greene MR found the Society to be charitable on the basis that it was *'established for the purpose of raising the artistic taste of the country'*.[7]

6. In other cases, courts recognise wider benefits even though the purpose of an organisation is not to provide non-excludable goods to the general public. In these cases, wider benefits flow incidentally from the pursuit of the organisation's purpose. For example, in Re Resch's Will Trusts, the Privy Council found that an organisation providing health care to fee-paying patients satisfied the public benefit test because the organisation relieved the burden of health care otherwise borne by the state, freeing up revenue to be expended in other ways.[8] In *Neville Estates Ltd v Madden*,

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[6] *West v Knight* (1669) 1 Ch Cas 134; 22 ER 729 (Sir Harbottle Grimston MR); *Howse v Chapman* (1799) 3 Ves Jr 542, 551; 31 ER 278 (Lord Loughborough LC); *Attorney-General v Heelis* (1824) 2 Aim & St 67-77; 57 ER 270 (Sir John Leach VC); *Monds v Stackhouse* (1948) 77 CLR 232 (High Court of Australia).

[7] [1943] 2 All ER 101 (Court of Appeal), 105. See also *Re Delius' Will* [1957] 1 All ER 854 (Roxburgh J).

[8] [1969] 1 AC 514 (PC). 'Relief of taxes' has been regarded as a type of charitable purpose since the time of the Statute of Elizabeth: *Attorney-General v Bushby* (1857) 24 Beav 299; 53 ER 373 (Sir John Romilly MR); *Monds v Stackhouse* (1948) 77 CLR 232 (High Court of Australia).

Cross J found public benefit in the purposes of a trust for a private synagogue, on the basis that *'some benefit accrues to the public from the attendance at places of worship of persons who ... mix with their fellow citizens'*.[9] A similar view was expressed in *Joyce v Ashfield Municipal Council*, an Australian case about whether or not a hall used for private worship services was used for charitable purposes. For the New South Wales Court of Appeal, the worship services, although conducted in private, had *'public value in improving the standards of believers in the world'* and were therefore of public benefit.[10]

7. The most significant instance of a court recognising incidental wider benefits in New Zealand is *Latimer v Commissioner of Inland Revenue*.[11] The Crown Forestry Rental Trust was established for the purpose of supporting Māori claimants before the Waitangi Tribunal. The Court of Appeal recognised that, in addition to direct and indirect benefits to the Māori claimants whose claims were facilitated by the Trust, there were incidental wider benefits to the New Zealand community because the Trust enabled full and final settlements of Treaty of Waitangi claims and thereby averted 'social ferment'.[12]

8. In summary, then, Courts recognise wider benefits when determining whether an organisation exists for a charitable purpose of public benefit. Courts do this both in cases where wider benefits flow directly from the pursuit of an organisation's purpose and in cases where wider benefits flow incidentally from that pursuit. Judicial decisions in which such incidental wider benefits have been recognised include the decision of the New Zealand Court of Appeal in the leading *Latimer* case.

9. In order to see how wider benefits might be dealt with in a case where an organisation exists for a political advocacy purpose, it is necessary to consider the reasoning of the Supreme Court in *Greenpeace*.[13] There, the majority stated that: *'assessment of whether advocacy or promotion of a cause or law reform is a charitable purpose depends on consideration of the end that is advocated, the means*

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[9] [1962] 1 Ch 832, 853. This statement received qualified approval in Charity Commission for England and Wales, *Preston Down Trust* (3 January 2014), [51].
[10] [1975] 1 NSWLR 744, 751-752 (Hutley JA). An appeal to the Privy Council was dismissed: *Ashfield Municipal Council v Joyce* [1976] 1 NSWLR 455.
[11] [2002] 3 NZLR 195 (CA) at [40], this point not in issue on appeal to the Privy Council: *Latimer v Commissioner of Inland Revenue* [2004] 3 NZLR 157 (PC).
[12] [2002] 3 NZLR 195 (SC), [37].
[13] [2015] 1 NZLR 169 (SC).

promoted to achieve that end and the manner in which the cause is promoted in order to assess whether the purpose can be said to be of public benefit.'[14]

10. In the inquiry into ends, means and manner that is required according to the majority in *Greenpeace*, courts should be alert to the various ways in which wider benefits might flow from the pursuit of the political advocacy purpose in question. If the political advocacy is in furtherance of some unquestionably beneficial law or policy change, then wider benefits might be demonstrated directly in light of the *'end that is advocated'*. However, the majority said in *Greenpeace* that *'Advancement of causes will often, perhaps most often, be non-charitable. That is for the reasons given in the authorities – it is not possible to say whether the views promoted are of benefit in the way the law recognises as charitable. Matters of opinion may be impossible to characterise as of public benefit either in achievement or in the promotion itself.'*[15]

11. In some cases, incidental wider benefits might be demonstrated in light of the means and manner in which political advocacy is carried out. In particular, incidental wider benefits might flow from the fact of political advocacy itself, irrespective of the end that is advocated. The majority in *Greenpeace* acknowledged this when they stated that advocacy for legislative change *'may well constitute **in itself** a public good which is analogous to other good works within the sense the law considers charitable'* (emphasis added).[16]

12. Similarly, in the case of *Aid/Watch Incorporated v Commissioner of Taxation*, a majority of the High Court of Australia recognised that incidental wider benefits may flow from the fact of political advocacy itself, irrespective of the end that is advocated.[17] Having found that political advocacy is an important element of the system of representative and responsible government established under the Australian Constitution, the majority stated that *'it is the operation of these constitutional processes which contributes to the public welfare. A court administering a charitable trust for that purpose is not called upon to adjudicate the merits of any particular course of legislative or executive action or inaction which is the subject of advocacy or disputation within those processes.'*[18]

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[14] [2015] 1 NZLR 169 (SC), [76] (Elias CJ, McGrath and Glazebrook JJ).
[15] [2015] 1 NZLR 169 (SC), [73] (Elias CJ, McGrath and Glazebrook JJ).
[16] [2015] 1 NZLR 169 (SC), [62] (Elias CJ, McGrath and Glazebrook JJ).
[17] (2010) 241 CLR 539 (Gummow, Hayne, Crennan and Bell JJ).
[18] (2010) 241 CLR 539, [45] (Gummow, Hayne, Crennan and Bell JJ).

13. *Aid/Watch* might be thought of limited relevance to New Zealand law given that the reasoning of the majority was grounded in aspects of the Australian constitutional system of government. It is submitted that this is not in fact the case, for the reasons set out below. Regardless, to the extent that the majority in *Aid/Watch* recognised incidental wider benefits flowing from the fact of political advocacy itself, *Aid/Watch* is of direct relevance to New Zealand law, given that the salience of incidental wider benefits was affirmed in Latimer and that the majority in *Greenpeace* recognised the possibility of a finding of public benefit resting on wider incidental benefits in a political advocacy case.

14. Applying the reasoning from *Greenpeace*, the key question is whether the ends, means and manner entailed in the pursuit of a political advocacy purpose generates wider benefits. In answering this question, the possibility of incidental wider benefits arising from the fact of political advocacy itself should not be excluded from the courts' consideration.

Freedom of political expression

15. A political advocacy organisation's freedom of political expression impacts in two ways on the question whether it exists for a charitable purpose of public benefit:

    a. To the extent that the organisation has a right to freedom of political expression protected by law, that right might constrain a decision-maker when the charitability of the organisation is in question; and

    b. Irrespective of any right to freedom of political expression that the organisation might enjoy, the value of its free political expression might figure in a determination of the public benefit of its purpose.

16. Under New Zealand law, there seems no reason to doubt that organisations, whether composed of natural persons or taking the form of legal persons, enjoy the right to freedom of political expression under s 14 of the New Zealand Bill of Rights Act 1990 (**NZBORA**).[19]

[19] In a recent journal article exploring NZBORA rights and political advocacy charities, Dr Jane Calderwood Norton of the University of Auckland draws this conclusion following a survey of the relevant law.

17. The real question is not whether charities enjoy rights to free political expression under NZBORA; it is whether denying or withdrawing charity status constitutes an impermissible interference with such rights. In *Re Greenpeace of New Zealand Incorporated*, the Court of Appeal suggested that a distinction should be drawn between suppressing political expression on the one hand, and denying a subsidy supporting political expression on the other hand.[20] Such a distinction has been drawn in the United States, in connection with the protections of the First Amendment to the United States Constitution. In the United States, only the former type of interference with political expression is impermissible; denying a subsidy to organisations does not violate their constitutionally protected right to free political expression.[21] Thus, if the distinction were to be adopted in New Zealand law, denying charity status to a political advocacy organisation would not violate that organisation's right to free political expression under NZBORA.

18. That said, the recent Canadian case of *Canada Without Poverty v Attorney-General of Canada* bears on the question whether, and to what extent, the distinction to which the Court of Appeal alluded in Greenpeace should be maintained.[22] In *Canada Without Poverty*, E M Morgan J of the Ontario Superior Court of Justice declared unconstitutional a rule of the Canada Revenue Agency (CRA) restricting the proportion of income a charitable organisation may expend on political advocacy. A distinction between 'political activities' and 'charitable activities' drawn in s 149.1(6.2) of Canada's Income Tax Act RSC 1985 c. I (5th Supp) was also declared unconstitutional. The basis on which these provisions were declared unconstitutional was that they violated the guarantee of freedom of expression, including political expression, in s 2(b) of the Canadian Charter of Rights and Freedoms (Charter).[23]

19. According to Canadian charity law, an organisation that exists for a political advocacy purpose cannot be a charity. This rule was not disturbed by the decision in Canada Without Poverty. However, E M Morgan J reasoned that where an organisation exists for a charitable purpose, it is not open to the state, in light of protections in the Charter, to restrict that organisation's pursuit of political advocacy activities in furtherance of its purpose. Having provided a subsidy to the organisation by

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[20] [2013] 1 NZLR 339 (CA), [59]-[60], citing *Human Life International v Minister for Inland Revenue* [1998] 3 FC 202, 220-221 (Canadian Federal Court of Appeal).
[21] *Regan v Taxation Without Representation* (1983) 461 US 540.
[22] 2018 ONSC 4147.
[23] 2018 ONSC 4147, [70]-[72].

recognising it as charitable, the state may not then wind back the subsidy because the organisation engages in political advocacy. Once the subsidy is made available, winding it back in this way constitutes a suppression of constitutionally protected political expression.[24]

20. As Dr Norton argues in her recent journal article, winding back a subsidy extended to a charitable organisation because that organisation engages in political advocacy is different from denying a subsidy to an organisation in the first place because it does not exist for a charitable purpose of public benefit.[25] Thus, the issue in *Canada Without Poverty* was different from the issue that arises in the present case. Nonetheless, the reasoning in *Canada Without Poverty* is a reminder that the distinction between suppressing political expression and denying a subsidy supporting that expression is not beyond question. If the distinction is to be adopted in New Zealand law, it is submitted that it should be done only after full consideration of the reasoning in *Canada Without Poverty*, and also the reasoning of the United States Supreme Court in *Citizens United v Federal Electoral Commission*, in which regulatory rules adversely affecting the ability of corporations to engage in political expression were found to be unconstitutional.[26]

21. A political advocacy organisation's freedom of political expression might impact in another way on the question whether it exists for a charitable purpose of public benefit. The value of the organisation's free political expression might figure in a determination of the public benefit of its purpose. This was the case in the Australian case of *Aid/Watch.* In *Aid/Watch*, a majority of the High Court of Australia recognised incidental wider benefits flowing from the fact of *Aid/Watch's* political advocacy, regardless of the content of that advocacy. According to the majority, understanding the character of these wider benefits was a matter of understanding the contribution that free political expression makes to the political culture on which the system of representative and responsible government set up by the Australian Constitution depends in important ways. In the case of *Aid/Watch,* the wider benefits of political advocacy were identified in light of Australian jurisprudence on the freedom of political communication implied into the Australian constitution.[27]

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[24] 2018 ONSC 4147, [47]-[48].
[25] Jane Calderwood Norton, 'Charities and Freedom of Expression' [2019] *New Zealand Law Journal* 174, 175-176.
[26] 558 US 310 (2010).
[27] (2010) 241 CLR 539, [43]-[45] (Gummow, Hayne, Crennan and Bell JJ).

22. New Zealand's constitutional arrangements are not the same as Australia's. CLAANZ is not aware of any constitutional jurisprudence referring to the importance of freedom of political communication to New Zealand's system of government. This is an area in which the law may need to develop. Nonetheless, it seems scarcely arguable that a culture of free political expression is not a significant public benefit in New Zealand in light of the country's political and legal commitments. Indeed, political philosophers and constitutional scholars have argued powerfully for the recognition of the public benefit of a culture of free political expression to any liberal and democratic system of government.[28]

23. Thus, CLAANZ submit that there is a strong argument that the purposes of political advocacy organisations are of public benefit because of the incidental wider benefits those purposes generate in the form of a contribution to the culture of free political expression on which liberal and democratic government depends. This argument aligns with the reasoning in *Aid/Watch* but it does not depend on the existence of the particular constitutional arrangements that influenced the majority of the High Court of Australia in that case.

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[28] See Alexander Meiklejohn, *Free Speech and its Relation to Self-Government* (Harper and Brothers, New York, 1948); Frederick Schauer, *Free Speech: A Philosophical Inquiry* (Cambridge University Press, Cambridge, 1982) ch 3; James W Nickel, 'Freedom of Expression in a Pluralistic Society' (1988-1989) 7 *Law and Philosophy* 281, 289-290; Joseph Raz, 'Free Expression and Personal Identification' in his *Ethics in the Public Domain: Essays in the Morality of Law and Politics* (Clarendon Press, Oxford, 1994) 146, 151-153; Eric Barendt, *Freedom of Speech* (2nd ed, Oxford University Press, Oxford, 2007) ch 5.