The myth of "charitable activities"

Susan Barker, CharitiesLaw Ltd, Wellington

questions whether activities can define purpose

In 1990, Canadian commentator MC Cullity QC argued that charity law is plagued by a "myth" of charitable activities (MC Cullity "The Myth of Charitable Activities" (1990) 10 Est & Tr J 7 at 7–8, 10 and 26).

At the time, there had apparently been an unusual degree of public attention paid in Canada to supposed restrictions on the activities of charitable bodies. Questions were being raised, for example, about charities' involvement in politics, fund-raising activities and commercial enterprises; charities were denied charitable status if their "activities" were not considered "charitable".

Cullity argued that the status of an entity as a charity, independently of statute, is not affected by the activities it actually performs. In fact, it is impossible to characterise activities in the abstract as either charitable or non-charitable. The question in each case should simply be whether the activity in question is a reasonable and prudent means of achieving the charitable purposes of the entity.

In other words, it is the ends, or purposes, not the means by which they are to be achieved, which determine whether an entity is charitable in law.

Cullity was writing in the context of the Canadian income tax legislation, which imposes prescriptive rules aimed at ensuring charities actually use their funds for charitable purposes. For example, s 149.1(1) of the Income Tax Act RSC 1985 c 1 (5th Supp) defines a charitable organisation as an organisation

> all the resources of which are devoted to charitable activities carried on by the organisation itself.

The registration of a charitable organisation can be revoked in Canada if the organisation fails to expend above a certain level (its "disbursement quota") on "charitable activities" (s 149.1(2) of the Canadian Income Tax Act). What constitutes a "charitable activity" is not defined. However, s 149.1(6.2) provides that, where an organisation devotes substantially all of its resources to "charitable activities", and part of its resources to political activities, the organisation can still be considered to be devoting "all" of its resources to charitable activities if those political activities are "merely ancillary and incidental to its charitable activities", and do not include support for a political party.

The requirement for charitable organisations in Canada to devote resources to "charitable activities" was considered by the Supreme Court of Canada in *Vancouver Society of Immigrant and Visible Minority Women v Minister of National Revenue* [1999] 1 SCR 10. In that case, the majority noted (at [144]) that the common law definition of "charitable" developed in the context of trust law, where a charitable purpose trust is an exception to the general rule that a trust for purposes is invalid: "Therefore the trust law question focuses on charitable purposes and not charitable activities". The majority considered (at [152]–[153]) that the focus on "charitable activities" rather than purposes was a problem with the standard in s 149.1(1):

> The difficulty is that the character of an activity is at best ambiguous; for example, writing a letter to solicit donations for a dance school might well be considered charitable, but the very same activity might lose its charitable character if the donations were to go to a group disseminating hate literature. In other words, it is really the purpose in furtherance of which an activity is carried out, and not the character of the activity itself, that determines whether or not it is of a charitable nature...
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> Unfortunately, this distinction [between purposes and activities] has often been blurred by judicial opinions which have used the terms "purposes" and "activities" almost interchangeably.

NEW ZEALAND

Unlike Canada, the corresponding New Zealand legislation contains no reference to "charitable activities". Under s 13(1) of the Charities Act 2005, an entity qualifies for registration as a charitable entity if its purposes are charitable.

Nevertheless, a myth of charitable activities appears to be plaguing New Zealand charities law as well: for many of the hundreds of charities that have so far been denied registration under the new Charities Act regime, the objection appears to have been to the entity's activities, rather than its purposes.

The source of the difficulty appears to be s 18(3) of the Charities Act, which requires that, in considering an application for registration, the charities regulator must "have regard to" the current and proposed activities of the entity.

The section is silent on what the charities regulator is required to have regard to these activities for. However, in the writer's view, it is critically important that that question be asked. In order to do so, it is necessary to consider the background context.

BACKGROUND

Prior to the establishment of a charities regulator under the Charities Act, it was common practice regime for entities to seek non-binding "letters of comfort" from the Inland Revenue Department as to whether they met the requirements of the charitable income tax exemptions (now ss CW 41 and CW 42 of the Income Tax Act 2007).

In terms of assessing whether an entity's purposes were charitable, this system was generally considered to be working well (see for example the First Reading of the Charities Bill (30 March 2004) 616 NZPD 12110). The problem sought to be addressed by the Charities Act was monitoring. Once a charity had received its non-binding letter of comfort from IRD (if indeed it had bothered to seek one at all), there

were few mechanisms to ensure that the charity actually acted in furtherance of its charitable purposes. Reporting requirements were minimal: while some income-generating charities might need to file a tax return, IRD's role was to ensure that income not entitled to an exemption was taxed, rather than to ensure the charitable sector was generally accountable to the public ((12 April 2005) 625 NZPD 19973-4). The concern was that neither IRD's audit function, nor the Attorney-General's ability to inquire into charities under s 58 of the Charitable Trusts Act 1957, were sufficiently countering involvement by some charities in tax avoidance, fraud and the like.

The problem had been articulated by Rev RM O'Grady, then Associate-General of the National Council of Churches, as follows (cited at (12 April 2005) 625 NZPD 19952):

> The public has no protection against charities in New Zealand. It would not be difficult for a skilled promotional person to raise $10,000 or more for almost any appeal one cares to name. Simply by national advertising and a small mailing to selected persons, any charity can get itself established in a few weeks.

The consequential risk of damage to public trust and confidence in all charities led the charitable sector to work for decades to see a system of charity regulation introduced to New Zealand, to "protect the integrity and reputation of the charitable sector" ((12 April 2005) 625 NZPD 19980). The establishment of the charities register, and the requirement for registered charities to file annual returns, was intended to improve the accountability and transparency of registered charities, and thereby increase public trust and confidence in the charitable sector (at 19973-4).

Section 18(3) of the Charities Act must be seen in this context: its intention was to ensure that charities, once registered, continued to act in furtherance of their charitable purposes. It was not intended to require that charities engage in "charitable activities", nor was it intended to alter the definition of "charitable purpose" itself. To the contrary, the Select Committee considering the Charities Bill made it clear that the definition of charitable purpose was not intended to be changed (Report of the Social Services Select Committee considering the Charities Bill 108-2 (17 December 2004) at 3). The High Court has also confirmed that the Charities Act "does not alter the scope of charitable purposes" (*Re Education New Zealand Trust* (2010) NZTC 24,354 (HC) at [13]).

APPROACH OF THE REGULATOR

However, the New Zealand charities regulator appears to have taken a different view of s 18(3). Correspondence from the charities regulator repeatedly states that applications for registration cannot be granted until the charities regulator "is satisfied that the activities of the entity are exclusively charitable".

Charities with ostensibly charitable purposes appear to be being denied registration on the basis of their activities. Four examples follow.

In *Re the Grand Lodge of Antient Free and Accepted Masons in New Zealand* [2011] 1 NZLR 277 (HC), a case clearly hampered by lack of evidence, the Grand Lodge was found not to be charitable on the basis of its activities, such as organising training seminars, "[n]one of [which] could be said to be charitable in its own right" (at [48]). The terms "purposes" and "activities" appear to be used interchangeably (at [47]–[54]), with the test for ancillary purposes in s 5(3) of the Charities Act being applied to the activities, and then found wanting for lack of evidence (at [49]).

Recent cases have sought to approach the issue of whether a purpose is "ancillary" by means of a quantitative and qualitative analysis (*Grand Lodge* at [49]–[51]). No authority is cited for the introduction of these tests into New Zealand charities law, and no mention is made in their introduction of fundamental equitable principles on which charities law is based. Application of the quantitative and qualitative tests appears to confuse the distinction between purposes and activities (see *Re Draco Foundation (NZ) Charitable Trust* (2011) 25 NZTC 20-032 (HC), at [61]–[71]; *Grand Lodge* at [49]–[54]; *Re New Zealand Computer Society Inc* (2011) NZTC 20,033 (HC) at [16] and [68]; and *Re Greenpeace New Zealand Inc* [2011] 2 NZLR 815 (HC) at [66]–[75]) and, with respect, does not appear particularly helpful. In the writer's view, a more helpful approach to the question of whether a purpose is "ancillary" is found in an analysis based on equitable principles. In addition, it is axiomatic that section 5(3), on its clear words, is directed to the question of whether purposes are ancillary, not activities.

At [71] of *The Grand Lodge of Masons*, the following conclusion is reached:

> Whilst I consider the overall aims of freemasonry could come within the fourth head of charity [other purposes beneficial to the community], there are substantial aspects of the implementation that are not for a charitable purpose. Nor are these activities ancillary, but rather are independent purposes.

With respect, if the purpose of freemasonry is charitable, and if the Grand Lodge's activities were reasonable and prudent means of furthering that purpose, then the nature of the objection to the entity's eligibility for charitable registration is not clear.

Draco was another case clearly hampered by lack of evidence. It concerned a trust for the purpose of "the protection and promotion of democracy and natural justice in New Zealand". To this end, cl 3.1 of the trust deed required Draco to: raise awareness of and involvement in the democratic process (cl 3.1.3), undertake research and engage in public debate on the results (cl 3.1.4), provide training and education (cl 3.1.5), and support organisations with similar aims (cl 3.1.6).

Although Draco's purposes appear clearly charitable on their face, the High Court upheld the charities regulator's refusal to register it as a charity. In the first instance, Draco's trust deed was interpreted narrowly, to find (at [22]) that Draco could:

> ...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.

This finding is surprising, as the subsidiary clauses appear clearly tied to the overriding charitable purpose on the wording of cl 3.1. With respect, this finding seems contrary to important principles of charity law, such as the principle of benign construction, recently confirmed by the Supreme Court in *Re Greenpeace of New Zealand Inc* [2014] NZSC 105 at footnote 2.

Nevertheless, having reached this finding, the purposes of Draco were then found not to be charitable on the basis of activities, including future activities, which were found wanting for lack of evidence (at [70] and [77]–[79]). In reaching this view, again, the terms "purposes" and "activities" appear to be used interchangeably (at [32]–[35] and [47]–[51]).

With respect, activities such as developing websites ([77]), the sale of training material ([33]), and the organising of a conference ([47]), are not "purposes" of Draco. They are activities. The question should be whether these activities are reasonable and prudent means of furthering Draco's charitable purpose, namely the protection and promotion of democracy and natural justice in New Zealand. It seems clear that they could.

The CDC case has also been considered but specifically not followed in Australia

In fact, it appears that all of Draco's activities were to be carried out in furtherance of charitable purposes, and were reasonable and prudent means of doing so. With respect, the denial of registered charitable status to Draco in that context is troubling.

Re Queenstown Lakes Community Housing Trust [2011] 3 NZLR 502 (HC) concerned a community's response to a housing affordability issue which was affecting the ability of employers in the area to attract and retain staff. Despite the clear benefit to the public, the purposes of the Queenstown Lakes Community Housing Trust were found not to be charitable under the Fourth Head of charity ("other purposes beneficial to the community") on the basis that the benefit to the public was achieved by means of assistance to private individuals.

This decision appears to have been reached on the basis of the reasoning in the *Canterbury Development Corporation v Charities Commission* [2010] 2 NZLR 507 (HC) case, and Australian authority, with the following comments at [67]:

> ...the proposition that assistance to business and industry can provide a public benefit which the law recognises as charitable was accepted. That proposition is clearly correct... The question is whether the particular form in which that assistance is provided falls within the fourth head of charity... The way in which the assistance is provided is an essential aspect of the inquiry into whether the purpose is charitable or not...
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> ...in a case involving assistance to business and industry which does confer a public benefit, the existence of that public benefit will not be sufficient to render the provision of assistance generally charitable per se. It will generally not be charitable if the assistance is provided to individual businesses in such a way that the benefit to the industry is derived through the individual businesses. That principle applies more widely. Any other form of public benefit which is capable of being charitable will not generally be charitable if the public benefit is achieved by means of assistance provided to individuals.

With respect, this reasoning cannot be correct. As noted by the Court of Appeal in *Hester v Commissioner of Inland Revenue* [2005] 2 NZLR 172 (CA) at 181, the carrying out of any charitable purpose is likely to be for the private benefit of someone. If non-charitable benefits are merely the means or the incidental consequences of carrying out charitable purposes, and are not ends in themselves, charitable status is not lost: incidental private benefits are not inconsistent with charitable status. The distinction between ends and means is fundamental in the law of charity (*Latimer v Commissioner of Inland Revenue* [2004] 3 NZLR 157 (PC) at [35] and [36]).

In the case of economic development charities such as the Canterbury Development Corporation, or a housing charity such as QLCHT, it is difficult to see how their purposes can be given effect to otherwise than through assistance to individuals or individual businesses. Such assistance is not necessarily inconsistent with charitable status, as Australian authorities have clearly shown (see for example, *Commissioner of Taxation v Triton Foundation* [2005] FCA 1319 and *Tasmanian Electronic Commerce Pty Ltd v Commissioner of Taxation* [2005] FCA 439).

The CDC case appears to have formed a platform from which many of the subsequent cases under the Charities Act have been decided. However, the CDC case has been the subject of a significant degree of criticism (see for example "Charity is a general public use" J Bassett [2011] NZLJ 60; "Moving the charitable goal posts" Mark von Dadelszen *NZLawyer*, issue 155, 11 March 2011; "Economic development—charitable?" Mark von Dadelszen *NZLawyer*, issue 156, 25 March 2011; "Charities Act review" S Barker and K Yesberg, *NZLawyer*, issue 157, 8 April 2011; "Charity and economic development" Dr M Gousmett, [2011] NZLJ 63; "Canterbury Development case" S Barker, [2010] NZLJ 248).

The CDC case has also been considered but specifically not followed in Australia (*Chamber of Commerce and Industry of Western Australia (Inc) and Commissioner of State Revenue* [2012] WAS 146 at [33] and [99]). That case concerned a Chamber of Commerce and Industry that devoted extensive resources to the provision of services to its members and to business generally. In finding that the entity nevertheless fell within the definition of "charitable organisation" as being "established or carried on for charitable purposes", the Tribunal made the following comments at [90] and [99]:

> The critical question for present purposes is not as to the nature of the activities, but rather as to the purpose for which those activities are carried on. Are the activities of [the Chamber of Commerce and Industry of Western Australia] directed to the purpose of promotion and industry, generally in Western Australia, as the applicant contends, or rather are the activities directed to serving the private interests of members or other businesses, as the Commissioner contends...
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> ...there is no doubt that the organisation plays a significant role in support for the business community generally, and its constitutional objects are directed to that end. In my view, provision of services to members is ancillary to, and possibly a necessary part of, fostering trade and commerce generally for the benefit of the wider community.

Notably, this finding was reached on the basis of some 4,000 pages of evidence (see [36]).

The decision in QLCHT has also been statutorily overridden by the Taxation (Annual Rates, Employee Allowances, and Remedial Matters) Bill, Act 2014. New s CW 42B of the Income Tax Act is arguably a clear demonstration that any private benefits are indeed outweighed by the overriding public benefit of QLCHT's purposes.

DISCUSSION

None of the four New Zealand charities mentioned above that were denied charitable registration (the Grand Lodge of Masons, Draco, QLCHT or CDC) fall within the category of charity that the new regime was intended to address: there is no mention in any of the respective judgments, or indeed any suggestion whatsoever, that any of those charities were involved in tax avoidance, or fraud, or money laundering, or had strayed from their constituting documents. To the contrary, they all appear to be good charities, with charitable purposes, denied registration on the basis of their activities, following an interpretation of s 18(3) which the writer submits is not correct.

activities do not determine whether those purposes are charitable in the first place

While the regulator's approach was upheld by the High Court in each of these cases, a key concern is whether the framework by which charities can challenge decisions of their regulator is providing an effective means by which charities can hold their regulator to account. This is particularly a concern in the context of evidence (see the discussion in "Appealing decisions of the charities regulator" S Barker, paper prepared for the Auckland District Law Society Seminar *Charity begins at...developing perspectives on charity law*, 1 and 3 April 2014).

Interpreting s 18(3)

In order to interpret s 18(3) correctly, it is essential to ask what the regulator is required to have regard to activities for. The inquiry as to whether an entity is eligible for registration under s 13(1) of the Charities Act is directed to whether the purposes of an entity are charitable, not its activities. Cullity's comments that the status of an entity is not affected by the activities it actually performs are equally applicable in New Zealand. The regulator is required to have regard to activities under s 18(3) primarily to ensure that those activities are being carried out consistently with, and in furtherance of, the entity's charitable purposes, not to establish whether the entity's purposes are charitable in the first place.

Section 18 needs to be seen in its context: as discussed above, a key policy rationale behind the Charities Act was that charities should be monitored (identified as a key deficiency of the former regime). To that end, the charities regulator was given the ability to deregister entities found not to be complying with their charitable purposes. The charities regulator was also given the ability to make that assessment at the point of registration, as the alternative — to register then deregister — would not make administrative sense: hence s 18(3)(a).

If an entity's activities are not being carried out consistently with, and in furtherance of, its purposes, the charities regulator is not obliged to register the entity, even if its purposes are charitable. However, those activities do not determine whether those purposes are charitable in the first place: in principle, activities are simply the means by which charitable purposes are carried out. Section 18 is directed to the charities regulator's monitoring function. It was never intended to be elevated to an amendment to the underlying common law regarding charitable purposes.

Has s 18(3) changed the definition?

Prior to the Charities Act, as a matter of law, the questions of what are an entity's purposes, and whether those purposes are charitable, were determined primarily on a construction of the entity's constituting documents (*Institution of Professional Engineers New Zealand Inc v Commissioner of Inland Revenue* [1992] 1 NZLR 570 (HC) at 572; *Latimer v Commissioner of Inland Revenue* [2002] 1 NZLR 535 (HC) at [36]; see also *The Laws of New Zealand — Charities* at [78] and *IRC v Oldham Training and Enterprise Institute* (1996) 60 TC 231 cited in CDC at [48]). As noted by the Privy Council in Latimer, whether the purposes of a trust are charitable depends on the legal effect of the language the settlor has used in the constituting document (at [29]).

Construction of the constituting documents was meant to be carried out benignly (*Kaikoura County v Boyd* [1949] NZLR 233 (SC and CA) at 261; *Re Collier (Deceased)* [1998] 1 NZLR 81 (HC) at 95; *Hadaway v Hadaway* [1955] 1 WLR 16 (PC) at 19. See also the comments of Dr Donald Poirier, *Charity Law in New Zealand*, June 2013, www.charities.govt.nz, at 3.2.1). Although the doctrine of benign construction in charities law may have derived from jurisprudence regarding the validity of charitable bequests, it clearly applies in charities law generally.

The legal position was that, where the terms of the entity's constituting document were clear, it was not necessary to refer to the activities of the entity in seeking to ascertain whether the purposes are charitable, other than within certain limited parameters. For example, where the constituting documents did not indicate with clarity the main or dominant objects of a body, reference may be made not only to the expressed objects, but also to the activities (*Molloy v Commissioner of Inland Revenue* [1981] 1 NZLR 688 (CA) at 693; *IPENZ* at 572, as discussed below). In other words, in a case of doubt the activities of the entity concerned could be examined as being explanatory of its stated objects (*IPENZ* at 581; see also *Latimer* (HC) at [43]).

Accordingly, while the focus of the decision-maker was "not inevitably confined to the founding documents" (*IPENZ* at 572), the approach to considering activities was not open-ended: only in so far as there was uncertainty on an examination of the constituting documents was it permissible to look and see what the entity actually does or has been doing in establishing whether purposes are charitable (*IPENZ* at 573).

Section 18(3) has not changed that position. If s 18 had been intended to change the law regarding charitable purposes, one would have expected the Legislature to have clearly said so. It did not.

As the Court of Appeal noted in *Greenpeace CA* at [40] and [48], s 18(3)(a) of the Charities Act requires the charities regulator to "have regard to" the current and proposed activities of an entity in considering an application for registration.

However, the Court of Appeal did not address the question of what the charities regulator is required to have regard to the activities of an entity for (other than to point out at [40] that the "maintained" wording in s 13(1)(b) reflects the regulator's monitoring function).

There is nothing in the *Greenpeace CA* decision to indicate that the Charities Act was intended to, or has, changed the law in respect of the parameters within which "activities" are to be considered.

At [48] of the *Greenpeace CA* decision, the Court of Appeal cites *Molloy* in support of the proposition that the position prior to the Charities Act was also "on consideration of all of the activities of an entity", and was not limited to the objects of an entity. However, with respect, the Court of Appeal in *Molloy* did not mandate an untrammelled consideration of activities. The Court in that case considered the objects of the organisation in question and stated at 693 that:

> The constitution does not indicate with clarity which, if any, are the main or dominant objects. In such cases it is well settled that reference is to be made not only to the expressed objects but as well to the activities of the society.

This reasoning was followed by the High Court in *IPENZ* at 572–3:

> It is clearly established that when one is considering the purpose or purposes for which an institution is established one must look first to its founding documents. In *New Zealand Society of Accountants v Commissioner of Inland Revenue* (1986) 9 TRNZ 727 at 728 Richardson J said:
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> The ascertainment of the purposes for which a statutory body is established is essentially a matter of construction of the relevant constituting legislation."
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> The same applies to bodies established by non-legislative means. In *Royal College of Surgeons of England v National Provincial Bank Ltd* [1952] AC 631 Lord Normand said that the decision in that case depended primarily on the construction of the constituting documents of the Royal College and particularly the charter granted by King George III in 1800.
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> To the same effect is the decision of the Court of Appeal in *Molloy*...but with the important additional proposition that where the constituting documents do not indicate with clarity the main or dominant objects of the body, reference may be made not only to the objects expressed therein but also to the activities of the body in question...
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> As has been seen the establishment of the purpose for which a body has been established is a matter of fact to be determined by first looking at the founding documents. In so far as there may be uncertainty on an examination of the relevant document or documents it is permissible to look and see what the body actually does or has been doing.

(See also: *Commissioner of Inland Revenue v New Zealand Council of Law Reporting* [1981] 1 NZLR 682 (CA) at 684, and *New Zealand Society of Accountants v Commissioner of Inland Revenue* [1986] 1 NZLR 147 (CA) at 148.)

In other words, in establishing whether an entity's purposes are charitable, there is not an untrammelled ability to inquire into activities.

This is also supported by Australian authorities: see *Attorney-General for New South Wales v The NSW Henry George Foundation Ltd* [2002] NSWSC 1128 (SC) at [59] and [94]); *Central Bayside General Practice Association Ltd v Commissioner of State Revenue* [2006] HCA 43; and *Public Trustee v Attorney-General of New South Wales* (1997) 42 NSWLR 600 at 617. These cases make it clear that if purposes are clearly defined in an entity's constituting document, one looks no further: only where circumstances point to an abandonment of the written constitution would an activities test be automatically adopted.

The comments of the Court of Appeal in the *Greenpeace CA* decision do not indicate any intention to depart from these pre-existing legal principles.

However, the decision in *Greenpeace CA* has been appealed to the Supreme Court, which has held, *Greenpeace SC* at [14], that section 18(3) of the Charities Act "makes clear" that the purposes of an entity "may be inferred from the activities it undertakes". In so holding, the Supreme Court appears to present an activities test as an option that may be utilised at will, ostensibly without making any reference to an entity's constituting document whatsoever. With respect, such a position is not supported by previous authority. Nor does the Supreme Court indicate that it is intending to change the law as to the appropriate parameters within which activities are to be regarded in determining whether purposes are charitable.

SUMMARY

In summary, the writer submits that the position in New Zealand, both before and after the Charities Act, is that there are two inquiries:

- are the entity's purposes charitable? This is primarily determined by analysis of the entity's constituting document. As a general principle, activities do not affect the analysis of whether the purposes are charitable, except within limited parameters of such as fundamental lack of clarity or abandonment;
- if the entity's purposes are charitable, s 18 then mandates a consideration of the entity's activities to ascertain whether they are, or will be, conducted in furtherance of the charity's stated charitable purposes. This is a question of fact, to be decided upon the evidence (*Molloy* at 693; *Royal College of Surgeons v National Provincial* at 661, cited with approval in *IPENZ* at 572).

Carrying out a particular activity in order to further an entity's charitable purposes does not elevate that activity to a charitable purpose in itself: in principle, activities do not determine or affect the analysis of whether purposes are charitable. Activities are merely the means by which charitable purposes are carried out. The extent to which activities are looked to in determining whether purposes are charitable is limited. Section 18 of the Charities Act was not intended to alter this position.

There is no such thing as a "charitable activity" in New Zealand charities law. ❐