

Dated: 11 September 2015

Deregistration decision: New Zealand Rowing Association Incorporated (CC40143)

Executive Summary

1. The Charities Registration Board (**the Board**) has determined that New Zealand Rowing Association Incorporated (**RNZ**) is no longer qualified for registration as a charitable entity and that it is in the public interest that it be removed from the Charities Register.¹
2. RNZ has submitted that it continues to qualify for registration. RNZ submits that there are health and social benefits from the participation in sport and that it has a focus on domestic rowing, in particular, for school children and university students.
3. The Board considers that RNZ no longer qualifies for registration as it is no longer established and maintained for exclusively charitable purposes, as required by section 13(1)(b) of the Charities Act 2005 (**the Act**). Specifically, we consider that RNZ has a mix of charitable and non-charitable purposes and that its non-charitable purposes are more than ancillary to its charitable purposes.
4. The Board acknowledges that part of RNZ's activities and purposes promote public participation in rowing as a means of promoting public health and advancing education and that these parts are charitable. We also acknowledge the international success in rowing being achieved by RNZ. By focussing on international success, RNZ is advancing independent purposes held to be non-charitable by the courts. In particular:
 - We consider that RNZ has a purpose to promote the sport of rowing as an end in itself, and not as a means to advance valid charitable purposes. This purpose lies outside the scope of charity articulated by the courts in decisions binding on this Board, and recognised in section 5(2A) of the Act.
 - Furthermore, we consider that RNZ has a non-charitable purpose to promote success in rowing at an elite level. This purpose provides benefits to a closed group of elite athletes that does not constitute a sufficient section of the public. The courts have held that any downstream effects from the promotion of elite sport, including the promotion of patriotism and inspiring participation in the sport, are too remote to be considered charitable.
5. Based on a range of factors, including the proportion of RNZ's spending that is directed at elite level rowing and the focus of RNZ's activities, the Board considers that RNZ's non-charitable purposes are more than ancillary to its charitable purposes.

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

6. The Board is satisfied that it is in the public interest that RNZ be removed from the Charities Register.² The purposes of the Act include purposes to promote public trust and confidence in the charitable sector, and the effective use of charitable resources.³ The Board considers that it would not promote these purposes if an entity that does not qualify for registration were allowed to remain on the Charities Register.
7. The Board's reasons for its decision are organised as follows:
 - A. Background
 - B. Legal framework for deregistration
 - C. Law on promotion of sport and charity
 - D. RNZ's charitable purposes
 - E. RNZ's purpose to promote rowing as an end in itself
 - F. RNZ's purpose to promote success in rowing at an elite level
 - G. RNZ's non-charitable purposes are more than ancillary
 - H. Public interest
 - I. Determination

A. Background

8. RNZ was incorporated under the Incorporated Societies Act 1908 on 31 October 1983. It was registered as a charitable entity with an effective registration date of 18 May 2009. RNZ filed a notice of change with Charities Services on 18 August 2014. This notice of change advised of an amendment to RNZ's constitution (including an amendment to RNZ's stated purposes) dated May 2014. The May 2014 version of the constitution was updated with the Registrar of Incorporated Societies on 21 August 2014.

9. RNZ's stated purposes at clause 3 of the constitution are:

3.1 The primary objects of RNZ are:

(a) To foster and promote the sport of rowing in New Zealand in all its forms and classifications and in particular:

- (i) competitive and recreational rowing amongst Clubs who are members of the Association;
- (ii) rowing within and amongst secondary schools and universities and their inclusion in the competition and development programmes promoted by RNZ and its Associations;
- (iii) and recreational Masters rowing;

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

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

- (iv) international competition amongst rowing nations and the participation therein by New Zealand crews;
 - (v) high performance programmes for rowers who aspire to participate in international competition;
 - (vi) adaptive rowing;
 - (vii) coastal rowing;
 - (viii) indoor rowing;
 - (ix) the recruitment, training and qualification of boat race officials to the standards required for the implementation of both RNZ and FISA's Rules of Racing;
 - (x) the recruitment, training and qualification of coaches to serve at school, club and national levels of the sport.
- (b) To ensure the sport of rowing is conducted in an environment free from the use of any performance enhancing substances or methods which are prohibited by the International Olympic Committee, the New Zealand Sports Drug Agency, RNZ or FISA;
 - (c) To facilitate the organisation and staging on an annual basis of the New Zealand Rowing Championships, the North and South Island Rowing Championships, the Interprovincial Representative Championships the New Zealand Masters Rowing Championships and, in conjunction with the New Zealand Secondary Schools Rowing Association and according to its Rules and Regulations, the New Zealand Secondary School Rowing Championships, the North and South Island Secondary Schools Rowing Championships;
 - (d) To maintain membership of FISA;
 - (e) To maintain membership of the New Zealand Olympic Committee;
 - (f) To foster and promote the relationship between RNZ and SNZ [Sport New Zealand], and the New Zealand Olympic Committee;
 - (g) To represent and promote the interests of Members;

3.2 Without detracting from the primary objects, the secondary objects of RNZ are:

- (a) To establish codes of conduct applicable to Members;
- (b) To formulate, adopt and implement such Rules and Regulations as may be deemed appropriate for the governance, management and operation of rowing in New Zealand including but not limited to:
 - (i) Rules of Racing;
 - (ii) Regulations for Regattas;
 - (iii) Directives for Race Officials;

- (iv) Directives for Courses;
 - (v) Prohibited Substances;
 - (vi) Water safety;
 - (vii) Competition safety;
 - (viii) National Selection.
10. RNZ has filed annual returns, as required under the Act, for its financial years ending 31 December 2009, 2010, 2011, 2012, 2013 and 2014. RNZ also maintains a website that documents its activities.⁴
 11. On 24 November 2014, after reviewing the amended purposes and activities of RNZ, Charities Services sent a notice of intention to remove RNZ from the Charities Register, on the grounds that it no longer qualifies for registration. The notice explained that Charities Services considered that RNZ is maintained for sports-promotion purposes that are not charitable in law; and its non-charitable purposes are not ancillary to charitable purposes.
 12. On 28 March 2015, RNZ submitted a written objection to the notice of intention to remove. RNZ's submissions are discussed in parts D to G of this decision.
 13. On 8 April 2015, Charities Services sent a response to RNZ outlining that, after considering RNZ's submission, Charities Services continued to consider that RNZ no longer qualifies for registration. The email provided a further opportunity for RNZ to provide any further submissions by 8 May 2015. RNZ provided further submissions on 1 May 2015 discussed in parts D to G of this decision.
 14. On 29 May 2015, Charities Services sent a request to RNZ for further information on its activities and advised RNZ that the matter would then be referred to the Board for a final decision as to whether RNZ continued to qualify for registration. In addition, Charities Services presented RNZ with the option of separating its charitable purposes and non-charitable purposes into two legal entities in order to maintain its charitable status for its charitable purposes. RNZ provided further submissions on 15 June 2015 discussed in parts D to G of this decision. RNZ also stated that it does not intend to separate into two legal entities.

B. Legal framework for deregistration

15. Section 50 of the Act provides that the Chief Executive of the Department of Internal Affairs may examine and inquire into any registered charitable entity, including into its activities and proposed activities, and its nature, objects and purposes.
16. Section 32(1)(a) of the Act provides that the Board may direct that an entity be removed from the register if the entity is not, or is no longer, qualified for registration as a charitable entity, provided that the entity has been given

⁴ <http://www.rowingnz.kiwi/> .

notice under section 33. Under section 35(1)(a) of the Act, if an objection to the removal of an entity from the register is received, the Board may proceed with the removal if it is satisfied that it is in the public interest to proceed with the removal and at least one ground for removal has been satisfied.

17. The power under section 32(1)(a) is to be exercised on the grounds set out in sections 32 and 35, and for the purposes of the Act as set out in section 3.⁵
18. The essential requirements for registration as a charitable entity are set out in section 13 of the Act. Under section 13(1)(b) a society or institution cannot qualify for registration unless it is established and maintained exclusively for charitable purposes and not carried on for the private pecuniary profit of any individual.
19. Section 5(1) of the Act defines charitable purpose as including every charitable purpose “whether it relates to the relief of poverty, the advancement of education or religion, or any other matter beneficial to the community”. This statutory definition adopts the well-established fourfold classification of charitable purpose at general law.⁶
20. To be charitable at law a purpose must be for the public benefit.⁷ Public benefit must be expressly shown where the claimed purpose is under the fourth head of charity, “any other benefit to the community”.⁸ Further, in every case, the benefit of the entity’s purposes must flow to the public or a sufficient sector of the public. If a purpose is to benefit a private group, the consequential downstream benefits to the public will not suffice.⁹

⁵ *Greenpeace of New Zealand Incorporated* [2012] NZCA 533 (“*Greenpeace, CA*”) at [34], [37], [38].

⁶ This statutory definition adopts the general law classification of charitable purposes as stated in *Commissioner for Special Purposes of Income Tax v Pemsel* [1891] AC 531. See: *Greenpeace of New Zealand Incorporated* [2014] NZSC 105 (“*Greenpeace, SC*”) at [12],[15] and [17]; *In Re Education New Zealand Trust* HC Wellington CIV-2009-485-2301, 29 June 2010 (“*Education New Zealand Trust*”) at [13]; *In re Draco Foundation (NZ) Charitable Trust* HC WN CIV 2010-485-1275 [3 February 2011] at [11].

⁷ Authorities include: *Oppenheimer v Tobacco Securities Trust Co Ltd* [1951] AC 297; *Verge v Somerville* [1924] AC 496; *Dingle v Turner* [1972] AC 601. See also: *New Zealand Society of Accountants v Commissioners of Inland Revenue* [1986] 1 NZLR 147 (“*Accountants*”) at 152-155; *Latimer v Commissioner of Inland Revenue* [2002] 3 NZLR 195 (“*Latimer, CA*”) at [32]; *Travis Trust v Charities Commission* (2009) 24 NZTC 23,273 (“*Travis Trust*”) at [54]-[55] (Joseph Williams J); *Queenstown Lakes Community Housing Trust* HC WN CIV-2010-485-1818 [24 June 2011] (“*Queenstown Lakes*”) at [30]; *Education New Zealand Trust* at [23].

⁸ *Canterbury Development Corporation v Charities Commission* HC WN CIV 2009-485-2133, 18 March 2010 (“*CDC*”) at [45].

⁹ See for example the discussion in *Latimer, CA* at [32] - [37]. The courts have held that the downstream benefits of an entity’s activities do not serve to characterise the purpose of the entity; *Queenstown Lakes* at [68] – [76] (held that the purpose of the Trust was to provide housing for individuals not to advance the overall welfare of the community by enabling workers to stay in the area); *CDC* at [67] (primary purpose is the assistance of individual businesses and the “hope and belief” that the success of those businesses would increase the economic wellbeing of the Canterbury region does not establish public benefit as a primary purpose).

21. The fourth head of charity, described in section 5 of the Act as “any other matter beneficial to the public” has a specific meaning in law.¹⁰ It is not intended to indicate that all purposes that provide public utility qualify as charitable. In order to qualify as charitable under this head, the purpose must be both for the benefit of the community and beneficial in a way that the law regards as charitable. More particularly, the purpose must be within the spirit and intendment of the purposes set out in the Preamble to the Charitable Uses Act 1601 (the Statute of Elizabeth I).¹¹
22. This two-stage test for charitable purposes ‘beneficial to the community’ (requiring that a purpose be both beneficial to the community and within the spirit and intendment of the Preamble) is well-established in law.¹² Over the years, the courts have recognised many new charitable purposes that are substantially similar to those listed in the Statute of Elizabeth I, acknowledging that what is accepted as a charitable purpose must change to reflect current social and economic circumstances.¹³
23. Section 5(3) of the Act provides that the inclusion of a non-charitable purpose will not preclude registration if it is merely ancillary to a charitable purpose. Pursuant to section 5(4) of the Act, a non-charitable purpose is ancillary if the non-charitable purpose is:
 - ancillary, secondary, subordinate, or incidental to a charitable purpose of the trust, society or institution; and
 - not an independent purpose of the trust, society or institution.
24. Determining whether a non-charitable purpose is ancillary includes a qualitative assessment of whether it is a means to advance the charitable purpose.¹⁴ It also involves a quantitative assessment, focusing on the relative significance of the purpose as a proportion of the entity’s overall endeavour.¹⁵

¹⁰ See generally Gino Dal Pont, *Charity Law in Australia and New Zealand* (2nd ed., Lexis Nexis Butterworths, 2010) at [11.3] – [11.8].

¹¹ *Statute of Charitable Uses 1601* (43 Elizabeth 1 c 4).

¹² Refer *Queenstown Lakes* at [48]; see also *Latimer*, CA at 208-209; *Travis Trust* at [20]; *Accountants* at 157 (Somers J); *Re Tennant* [1996] 2 NZLR 633 at 638). This is consistent with the approach taken in other jurisdictions, see for example *Re Jones* [1907] SALR 190 at 201; *Williams Trustees v Inland Revenue Commissioners* [1947] AC 447 at 455; *Scottish Burial Reform and Cremation Society v Glasgow Corporation* [1968] AC 138 at 146-148, 15; *Brisbane City Council v Attorney-General for Queensland* [1979] AC 411 at 422 (PC); *Incorporated Council of Law Reporting (QLD) v Federal Commissioner of Taxation* (1971) 125 CLR 659 at 667, 669; *Royal National Agricultural and Industrial Association v Chester* (1974) 48 ALJR 304 at 305.

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

¹⁴ For recent judicial comment on the qualitative test see *Greenpeace*, CA at [62], [83] – [91].

¹⁵ The quantitative requirement was applied by the High Court in *Re Greenpeace of New Zealand Incorporated* HC WN CIV 2010-485-829 [6 May 2011] (“*Greenpeace HC*”) at [68]; *New Zealand Computer Society Inc* HC WN CIV-2010-485-924 [28 February 2011] (“*Computer Society*”) at [16]; *Education New Zealand Trust* at [43]-[44]; *Re The Grand Lodge of Antient*

Relevance of entities' activities in registration decision-making

25. Section 50(2) permits the chief executive to examine and inquire into the activities and proposed activities when reviewing charitable entities. Section 18(3)(a)(i) and (ii) of the Act requires that an entity's activities are taken into consideration when determining whether it qualifies for registration under the Act. The courts have confirmed that consideration of activities is a mandatory aspect of decision-making under the Act.¹⁶
26. Activities are not to be elevated to purposes,¹⁷ but reference to activities may assist, for example, to make a finding about:
- the meaning of stated purposes that are capable of more than one interpretation;¹⁸
 - whether the entity is acting for an inferred or unstated non-charitable purpose;¹⁹
 - whether the entity's purposes are providing benefit to the public;²⁰ and
 - whether a non-charitable purpose is ancillary within the section 5(3) of the Act.²¹
27. In the light of the above, we consider there is a statutory mandate supported by case law for the Board to consider an entity's current and proposed activities when determining whether it remains qualified for registration. In determining qualification for registration under the Act, substance must prevail over form, and an entity cannot qualify for registration, even if its stated purposes are exclusively charitable, if its activities belie its stated charitable purposes.²²

Free and Accepted Masons in New Zealand [2011] 1 NZLR 277 (HC) ("*Grand Lodge*") at [49]-[51].

¹⁶ *Greenpeace*, SC at [14]., See also the approach taken in the High Court in *CDC* at [29], [32], [44], [45] - [57], [67], [84] - [92]; *Queenstown Lakes* at [57] - [67]; *Grand Lodge* at [59], [71]; *Computer Society* at [35] - [39], [60] and [68]; *Greenpeace HC* at [75].

¹⁷ See: *McGovern v Attorney-General* [1982] 1 Ch 321 at 340 and 343; *Latimer v Commissioner of Inland Revenue* [2004] 3 NZLR 157 ("*Latimer, PC*") at [36]. Compare *Public Trustee v Attorney-General* (1997) 42 NSWLR 600 at 616; *Vancouver Society of Immigrant and Visible Minority Women v the Minister of National Revenue* [1999] 1 SCR 10.

¹⁸ See *Institution of Professional Engineers v Commissioner of Inland Revenue* [1992] 1 NZLR 570 at 575 (Tipping J).

¹⁹ *Greenpeace* SC at [14] "The purposes of an entity may be expressed in its statement of objects or may be inferred from the activities it undertakes, as s 18(3) of the Charities Act now makes clear". *Inland Revenue Commissioners v City of Glasgow Police Athletic Association* [1953] AC 380 ("*Glasgow Police Athletic Association*"); compare *Commissioner of Taxation of the Commonwealth of Australia v Word Investments Limited* [2005] HCA 55 at [25] (Gummow, Hayne, Heydon and Crennan JJ).

²⁰ See for example *Glasgow Police Athletic Association*; *CDC* at [29], [32], [44], [45] - [57], [67], [84] - [92]; *Queenstown Lakes* at [57] - [67]; *Grand Lodge* at [59], [71]; *Computer Society* at [35] - [39], [60] and [68].

²¹ See for example *Greenpeace, CA* at [40], [48], [87] - [92], [99] and [103]. Earlier authorities to same effect include *Molloy v Commissioner of Inland Revenue* [1981] 1 NZLR 688 ("*Molloy*") at 693 and the authorities cited there.

²² G E Dal Pont *Law of Charity* (LexisNexis Butterworth, Australia, 2010) at [2.12], [13.19], [13.20].

Characterisation of an entity's purposes

28. Once an entity's purposes are established as a matter of fact, the question whether they are charitable is a question of law.²³ The Board is bound to apply the law as declared by the courts and legislature, and adopted by the Act.
29. Determining whether an entity's purposes are charitable involves an objective characterisation, and a declaration in an entity's rules document that the entity's purposes are charitable in law will not be determinative.²⁴ Similarly, the subjective intentions of the individuals involved in a charity do not establish its charitable status.²⁵

C. Law on promotion of sport and charity

30. In New Zealand law, a purpose to promote sport is not itself a charitable purpose, but the promotion of amateur sport as a means to advance a charitable purpose or purposes may be charitable (refer to paragraph 35 below). The Board acknowledges that sporting organisations have an important role in New Zealand. Sporting organisations focused on encouraging public participation in sport may advance charitable purposes, particularly the promotion of health and education.
31. In determining whether an entity's purpose is to promote sports as a means to advance a charitable purpose, the Board considers the entity's stated purposes, and the entity's activities. The Board considers whether the sporting activities are a means to advance charitable purpose or charitable purposes, having regard to their direct (rather than downstream) consequences.

C.1. Promotion of sport may be charitable if it is the means to a charitable end

32. The position that sporting purposes lie outside the scope of charity originated from *Re Nottage, Jones v Palmer*²⁶ (**Nottage**). In *Nottage*, Lindley LJ held that "the encouragement of mere sport" cannot be supported as charitable.²⁷ Where *Nottage* concerned yachting, subsequent court decisions on a range of different sports affirmed the decision and held that the promotion of sport and recreation as end in itself is not charitable.²⁸

²³ *Molloy* at 693.

²⁴ *M K Hunt Foundation Ltd v Commissioner of Inland Revenue* [1961] NZLR 405 at 407; *CDC* at [56].

²⁵ G E Dal Pont *Law of Charity* (LexisNexis Butterworth, Australia, 2010) at [13.18], and see also the discussion at [2.8] – [2.11]. See for example *Latimer, PC* at 168; *Molloy* at 693; *Keren Kayemeth Le Jisroel Ltd v Inland Revenue Commissioners* [1932] AC 650 at 657 (Lord Tomlin), 661 (Lord Macmillan); *Commissioners of Inland Revenue v Oldham Training and Enterprise Council* [1996] STC 1218 at 251 (Lightman J).

²⁶ *Re Nottage, Jones v Palmer* [1895] 2 Ch 649 ("Nottage").

²⁷ *Nottage* at 656.

²⁸ See *Re Clifford* [1912] 1 Ch 29; *Re Patten* [1929] 2 Ch 276; *Scottish Flying Club Ltd v Inland Revenue Commissioners* 1935 SC 817; *Re Peterborough Royal Foxhound Society v Commissioner for Inland Revenue* [1936] 2 KB 497; *Glasgow Police Athletic Association; Royal National Agricultural and Industrial Association v Chester* (1974) 48 ALJR 304; *Re Hoey* [1994] 2 Qd R 510, *Laing v Commissioner of Stamp Duties* [1947] NZLR 154.

33. While sport as an end in itself is not charitable, the courts have accepted if a purpose to promote sport can be characterised as advancing education it will be charitable. Therefore, purposes to promote sport within educational institutions from schools to universities have been held to be charitable.²⁹
34. New Zealand courts affirmed *Nottage* and subsequent decisions on sport in *Travis Trust v Charities Commission*³⁰ (**Travis Trust**). Williams J confirmed that sport itself is not charitable and explained that a purpose to promote sport may be charitable if the sport is promoted as a means to advance a charitable purpose or purposes:
- In the area of sport and leisure, the general principle appears to be that sport, leisure and entertainment for its own sake is not charitable but that where these purposes are expressed to be and are in fact the means by which other valid charitable purposes will be achieved, they will be held to be charitable. The deeper purpose of the gift or trust can include not just any of the three original Pemsel heads but also any other purpose held by subsequent cases or in accordance with sound principle to be within the spirit and intendment of the Statute of Elizabeth. In the areas of sport, the deeper purpose is usually health or education.³¹
35. The common law position is recognised in section 5(2A) of the Act:
- The promotion of amateur sport may be a charitable purpose if it is the means by which a charitable purpose referred to in subsection (1) is pursued.
36. Section 5(2A) was added to the Act on 25 February 2012³² due to uncertainty among sports organisations, community funding groups, and the legal community about the charitable status of amateur sport. As a result of this uncertainty, some organisations were reluctant to fund sport because of doubt about its charitable status. The addition to the Act was intended to clarify the meaning of charitable purpose in relation to amateur sport.³³
37. The Board considers that section 5(2A) makes clear that promotion of amateur sport is only charitable if it is a means to pursue a charitable purpose. This is contrasted with a purpose to promote sport as an end itself, or as a means to pursue purposes that are not exclusively charitable.
38. The Board notes that in relation to sport and charity, New Zealand law accords with the approach taken by courts in comparable jurisdictions including Canada and Australia.
39. In *AYSA Amateur Youth Soccer Association v Canada (Revenue Agency)*³⁴ (**AYSA**) the Supreme Court of Canada rejected the idea that amateur sport

²⁹ See *Re Mariette* [1915] 2 Ch 284; *Inland Revenue Commissioners v McMullen* [1981] AC 884; *Kearins v Kearins* [1957] SR (NSW) 286; *Nelson College v Attorney General* [1986] HC Nelson MN. 40/86.

³⁰ *Travis Trust*.

³¹ *Travis Trust* at [52].

³² By Section 5 of the *Charities Amendment Act 2012 (2012 No 4)*.

³³ *Statutes Amendment Bill (No 2) 271-2 (2011)*.

³⁴ 2007 SCC 42, [2007] 3 SCR 217.

that promotes physical health is prima facie charitable.³⁵ Instead, the Court noted that “the trend of the cases supports the proposition that sport, if ancillary to another recognised charitable purpose, such as education, can be charitable, but not sport in itself”.³⁶ The Court held that the AYSA was set up to promote soccer, and any health benefits were simply consequences that did not establish the sports as a means to a charitable purpose.³⁷

40. The case law in Australia is to the same effect. In *Northern NSW Football Ltd*³⁸ (***NSW Football***) the Court reviewed the authorities, and held that a purpose to promote and manage football in a region is not a charitable purpose. The Court rejected an “amalgam” of “the effects of playing football improving health and general wellbeing of the community” and “the improvement of health and general wellbeing of participants as a purpose”.³⁹ The Court held that the purpose of Northern NSW Football Limited was the promotion and management of football, and that this purpose was not charitable in law notwithstanding that benefit to communities may result.⁴⁰
41. The status of sports as charity has been modified by legislation in England and Wales, and Scotland. In England and Wales, legislation provides that “the advancement of amateur sport” is a charitable purpose.⁴¹ In Scotland, legislation provides that “the advancement of public participation in sport”⁴² is a charitable purpose. The position in the United Kingdom therefore differs from the position in New Zealand, where the promotion of amateur sport is not charitable unless it is a means to advance charitable purposes.
42. The Board notes recent commentary to amend the Act to expressly include amateur sport as a charitable purpose as in the United Kingdom⁴³ and that the Board’s current application of the law is correct but recommended adopting a broader definition of charitable purpose.⁴⁴
43. The Board further notes that in both the United Kingdom and New Zealand, the promotion of sport is considered charitable only if it is available to a

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

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

³⁷ *AYSA* at [41].

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

³⁹ *NSW Football* at [24].

⁴⁰ *NSW Football* at [24].

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

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

⁴³ Refer, for example, to Maria Clarke “Is sport charitable any more?” (2015) 862 *LawTalk* 29 (“*Clarke*”) and Mark Von Dadelszen “Is recreation charitable?” (2015) 868 *LawTalk* 32 (“*Von Dadelszen*”).

⁴⁴ Von Dadelszen at 33.

sufficient section of the public⁴⁵ and is closely associated with the promotion of health.⁴⁶

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

44. The Board considers that, as a general proposition, bodies established to administer and manage a sporting code or discipline in a region or for a nation are likely to be established for the purpose of promoting sport as an ends in itself. Furthermore, sport governing bodies may pursue other non-charitable purposes to promote the sport, for example, the promotion of sporting success at an elite level, administering elite events, and/or the support of elite athletes.⁴⁷ As such, entities of this kind are likely to lie outside the scope of charity in New Zealand law, as reflected in section 5(2A) of the Act.

45. The Board notes that this position accords with the judgments of Australian and Canadian courts applying the common law test in *AYSA* and *NSW Football*.

C.3. Entities which promote sporting success at an elite level

46. The promotion of sporting success is not itself a charitable aim⁴⁸ and the promotion of sports for elite athletes does not provide sufficient public benefit to qualify as charitable in law.⁴⁹ An entity with independent purposes to promote sport as a means to these ends will not fall within the scope of charity recognised in section 5(2A) of the Act.

47. The Board recognises competition is an integral part of sport and a key motivation for players to participate. Competition itself is not a problem for meeting the public benefit requirement. It is a problem when an organisation

⁴⁵ In both jurisdictions, legislation preserves and applies the public benefit requirement for charitable status: *Charities Act 2011* (UK), s 4; *Charities and Trustee Investment (Scotland) Act 2005*, s 8. See paragraph 49 of this paper.

⁴⁶ The United Kingdom legislation includes the promotion of health in the definition of amateur sport. In England and Wales, sport means sports or games which promote health by involving physical or mental skill or exertion (*Charities Act 2011* (UK), s 3(2)(d)). In Scotland, sport means sport which involves physical skill and exertion (*Charities and Trustee Investment (Scotland) Act 2005*, s 7(3)(c)). The Scottish definition of sport is to reflect the fact that the advancement of public participation in sport is included as a charitable purpose mainly because of the health benefits that it can provide (Office of the Scottish Charity Regulator, "Meeting the Charity Test: Guidance for applicants and for existing charities", (2011) at 6-7).

⁴⁷ The promotion of sporting success at an elite level and the support for elite athletes are discussed in paragraphs [46-52].

⁴⁸ The Charities Commission for England and Wales emphasised this distinction in its publications prior to the introduction of the new statutory charitable purpose to advance amateur sport, see *Charitable Status and Sports* (2003), at [27] – [30]. Even after the introduction of the legislation, the regulator has advised that the promotion of sporting success as an independent aim does not lie within the scope of the statutory charitable purpose: *Consultation: The Advancement of Amateur Sport*, 28 February 2011, at [55] - [61].

⁴⁹ See discussion in registration decisions declining applications for registration of entities that promote sport for high performance athletes: *Swimming New Zealand Incorporated* (CC43297), Decision number 2014-3, 30 September 2014, Southern Zone of NZRL (SOU43893), Decision number 2013-4, 15 April 2013; *NZ Snowboardcross* (NZS43490), Decision number 2012-2, 1 November 2012; *Waikato Rowing Performance Centre Incorporated* (THE41712), Decision number 2012-04, 5 April 2012.

promotes success in sports events by supporting elite athletes rather than a sufficient section of the public.

48. A purpose to support the training of elite athletes is not charitable as it provides benefits to a closed group. Elite athletes are any individuals, who are more talented or highly trained than others.⁵⁰ Elite may refer not only to professionals but also to athletes who do not receive payments. The primary issue is whether the support athletes receive is based on their ability to achieve sporting success. Elite athletes do not constitute a sufficient section of the public and the promotion of support for elite sport people will not meet the public benefit test.
49. As noted at paragraph 41, the position on sport and charity in the United Kingdom differs from the position in New Zealand. In the United Kingdom, entities acting as district, regional, national or international governing or ruling bodies may have aims within the independent statutory charitable purpose (promotion of amateur sport).⁵¹ Even after the statutory recognition of the promotion of amateur sport as in itself a valid charitable purpose in England and Wales and Scotland, entities may encounter some difficulties establishing that they provide a benefit to a sufficient section of the public. Governing bodies can fall outside the statutory charitable purpose where they have an independent purpose to promote professional sports,⁵² including by providing sports academies linked to professional clubs or concerned with the training of professional sportspersons.⁵³
50. Further, the Board notes that the Charities Commission for England and Wales maintains that the promotion of success is not a valid charitable purpose under the statutory definition of charitable purpose that applies in England and Wales:

Where an organisation has the promotion of international success in a particular sport as a separate, free-standing aim then its aims will not be exclusively charitable.⁵⁴

The training of 'elite' sportspersons may be a legitimate means of advancing amateur sports or games for the public benefit ... [h]owever where an organisation is specifically directed towards the training of elite athletes for

⁵⁰ Charities Commission for England and Wales, *Consultation: The Advancement of Amateur Sport*, 28 February 2011, at [60].

⁵¹ Charities Commission for England and Wales, *Consultation: The Advancement of Amateur Sport*, 28 February 2011, at [64].

⁵² The statutory definition of charitable purpose is limited to the promotion of amateur sport. Charities Commission for England and Wales, *Consultation: The Advancement of Amateur Sport*, 28 February 2011, at [44] – [47] and [A26 –A28]. The Office of the Scottish Charity Regulator notes that while provision for professional athletes may be allowed in some circumstances, it can raise issues of private benefit and appropriate use of assets: Office of the Scottish Charity Regulator "Meeting the Charity Test: Guidance for Applicants and for Existing Charities" (2011), at 6-7.

⁵³ Charities Commission for England and Wales, *Consultation: The Advancement of Amateur Sport*, 28 February 2011, at [61], [62], [63].

⁵⁴ Charities Commission for England and Wales, *Consultation: The Advancement of Amateur Sport*, 28 February 2011, at [55].

sporting success, the proof of that success or outcome is likely to be measured in terms of performance rankings, titles and medals...⁵⁵

We recognise that the competitive element in sports and games is an intrinsic and essential part of its appeal to players, whatever their level of skill. This is not an issue with regard to public benefit. It becomes an issue when an organisation's resources are geared towards the pursuit of excellence to the detriment of other either less skilled or less competitive members because in practice, benefits are being unreasonably restricted to a much narrower section of the public.⁵⁶

51. The Board notes that a decision by the Ontario High Court in *Re Laidlaw Foundation*⁵⁷ (**Laidlaw**) held that elite sporting events may promote health not only for the athletes competing but also the health of the spectators by providing an incentive for the public to participate in sport. However, this decision was rejected by the Supreme Court of Canada in *AYSA* and held to be anomalous and inconsistent with the public benefit requirement. The Court held that the fact that an activity or purpose happens to have a beneficial by-product is not enough to make it charitable.⁵⁸ *Travis Trust* affirmed the *AYSA* decision in New Zealand and stated that the *Laidlaw* decision was contrary to case law.⁵⁹ *Laidlaw* is also not part of the law in Australia.⁶⁰
52. The Board recognises that elite sporting events may be of value for the public.⁶¹ However, as discussed in paragraph 20, public benefit must be beneficial in a way that the law regards as charitable. Based on the decisions outlined in paragraph 51, the Board considers the benefit to spectators of watching elite level sport is too remote to lie within the scope of charity.⁶²

C.4. Assessing sporting purposes

53. Having regard to the New Zealand law recognised in section 5(2A), and comparative guidance from other jurisdictions, the Board considers that the following considerations will be relevant in assessing sporting entities (including the status of entities established to govern and promote a sport in a particular region or nation):
 - A. The promotion of sport (including amateur sport conducted on a not-for-profit basis) as an end in itself is not a charitable purpose in New Zealand law.

⁵⁵ Charities Commission for England and Wales, *Consultation: The Advancement of Amateur Sport*, 28 February 2011 at [59].

⁵⁶ Charities Commission for England and Wales, *Consultation: The Advancement of Amateur Sport*, 28 February 2011 at [A21].

⁵⁷ *Laidlaw*.

⁵⁸ *AYSA* at [41].

⁵⁹ *Travis Trust* at [50].

⁶⁰ *NSW Football Ltd* at [47].

⁶¹ In particular, the Board acknowledges the social and economic flow-on benefits described by Clarke at 30 and Von Daldelszen at 32.

⁶² See the Board decision of 15 April 2013, declining the application for registration of the Southern Zone of the NZRL at [42], [//www.charities.govt.nz/charities-in-new-zealand/legal-decisions/view-the-decisions/view/southern-zone-of-nzrl](http://www.charities.govt.nz/charities-in-new-zealand/legal-decisions/view-the-decisions/view/southern-zone-of-nzrl).

- B. The promotion of amateur sport as a means to advance charitable purposes, for the public benefit, is a charitable purpose in New Zealand law. Examples of charitable purposes usually advanced by sport are the promotion of health and the advancement of education. Others that may be acceptable include:
- the relief of the aged, disabled or others in charitable need; and
 - the promotion of the defence of the realm.⁶³
- C. The promotion of sport (including amateur sport conducted on a not-for-profit basis) as a means to the following ends is not a charitable purpose for the public benefit:
- providing private pecuniary interests to players and others involved in the sport;
 - promoting sporting success at an elite level; and
 - providing entertainment and recreation to spectators at sports events.
- D. The down-stream benefits of advancing professional sports or sporting success for elite athletes are not sufficient to establish a charitable public benefit. Any benefit to spectators, for example providing inspiration for the public to participate in amateur sport, from watching elite sports is too remote to be considered charitable.

D. RNZ's charitable purposes

54. The Board recognises some of RNZ's activities advance charitable purposes. Rowing is an established healthy activity,⁶⁴ which means the promotion of public participation in rowing can be seen as the means of promoting health. RNZ's promotion of public participation in school, university and club rowing is a means of advancing health.⁶⁵ RNZ's charitable purposes, are not determinative of its qualification for continued registration as the Board considers that its non-charitable purposes are a substantial part of its endeavour and cannot be determined as ancillary to its charitable purposes. These issues are discussed in more detail below.

E. RNZ's purpose to promote rowing as an end in itself

55. The Board considers that RNZ is established and maintained with a purpose of promoting rowing as an end in itself. The Board considers that this conclusion is justified by reference to the constitution of RNZ and the activities of the entity.

⁶³ *Re Gray* [1925] Ch 362.

⁶⁴ Competitive rowing has a MET value of 12.5. Refer to Ainsworth, Barbara E.; Haskell, William L.; Herrmann, Stephen D.; Meckes, Nathanael; Bassett, David R.; Tudor-Locke, Catrine; Greer, Jennifer L.; Vezina, Jesse; Whitt-Glover, Melicia C.; Leon, Arthur S. "2011 Compendium of Physical Activities: a second update of codes and MET values." (2011) *Medicine & Science in Sports & Exercise* Aug 43(8) 1575-81

⁶⁵ Refer to RNZ's letters of 28 March 2015 and 1 May 2015. We also consider that RNZ's promotion of rowing in schools and universities is advancing education. Refer to paragraph 33.

56. The primary object at clause 3.1(a) of RNZ's constitution is to foster and promote the sport of rowing in all of its forms. This is not expressed to be a means to promote charitable purposes, and is expressed to be an end in itself.
57. The following objects in the clauses below 3.1(a) and in 3.2 refer to organising and promoting participation in rowing events at domestic and international level for its own sake without referring to charitable purposes.
58. Finally, the primacy given to RNZ's governance and promotion of rowing at regional and national levels is seen throughout article 7 (Admission of New Members) article 35 (Local Associations), and article 36 (Clubs). As discussed above, in part C.2 of this decision this is seen as a purpose to promote the sport itself. The Board considers that RNZ's constitution shows that RNZ is for the purpose of promoting the sport of rowing as an end in itself. The fact the constitution does not directly refer to a charitable purpose alone would not prevent RNZ's registration. Section 5(2A) of the Act means that an entity may express a purpose to promote a sport, if in fact this is the means of advancing a charitable purpose. As stated in paragraph 54, we consider that the health benefits of participation in rowing are evident. However, in conjunction with RNZ's activities to promote success in rowing at an elite level (see section F), we consider that RNZ has a purpose to promote rowing as an end in itself.

F. RNZ's purpose to promote success in rowing at an elite level

59. The Board also considers that, taking into account RNZ's stated purposes and activities, RNZ has a non-charitable purpose to promote success in rowing at an elite level.
60. RNZ's stated purposes indicate a purpose to promote success in rowing at an elite level. Sub-clause 3.1(a)(iv) of RNZ's constitution states the object of participation of New Zealand rowing crews in international competition. Clause 3.1(a)(v) further states that one of the objects of RNZ is "high performance programmes for rowers who aspire to participate in international competition."
61. Furthermore 38.1 states RNZ member Local Associations and Clubs may establish Regional Performance Centres (**RPC**) "to provide a pathway for rowers to compete for selection in national representative crews, and to provide a high performance training environment for such rowers..." Clause 38.3 states that RPCs shall be eligible for financial support from RNZ.
62. We also consider that many of RNZ's activities promote success in rowing at an elite level. Viewed holistically we consider that RNZ's operation involves a significant investment in elite rowers, coaches and events that constitutes an independent (free-standing) purpose to promote success. In rowing In particular, we note:
 - RNZ's expenditure on "High Performance" constituted 77% of total expenses in years to 31 December 2013 and 2014; 79% of total expenses in year to 31 December 2012; 80% of total expenses in year to 31 December 2011(including "2010 World Rowing Championships Expenses"); 89% of total expenses in year to 31 December 2010 (including "2010 World Rowing Championships Expenses" and "Assets

Purchased for 2010 World Rowing Championships”); and 78% of total expenses in year to 31 December 2009 (including “2010 FISA World Championships expenses”).⁶⁶

- RNZ operates a High Performance programme including four Regional Performance Centres. RNZ’s website states that “(t)he High Performance programme of Rowing NZ is the entity that is focused solely on the identification, selection, training and delivering of athletes to international competition.”⁶⁷
- The minutes of the Annual General Meeting held 17 May 2014 included a high performance report highlighting the results of RNZ crews in 2013 at international rowing championships as well as planning for international rowing events. In particular, the minutes refer to high performance activities to ensure medal success at the Rio de Janeiro Olympic Games 2016.
- RNZ makes payments to elite athletes. In 2014, RNZ received \$1,515,205 in Performance Enhancement Grants (**PEG**), and other grants, from High Performance Sport New Zealand (**HPSNZ**) to provide financial support to elite athletes to enable them to train fulltime in order to achieve at an international level. PEG recipients receive between \$35,000 and \$60,000 per annum. RNZ also makes annual grants of \$500 each to athletes at the four Rowing Performance Centres to assist with training costs.⁶⁸

63. The Board considers that RNZ provides support for elite rowers who are professional athletes. These athletes receive payments from RNZ to train and compete in international rowing events. RNZ also provides support for an elite group of amateur rowers (rowers who do not receive payments). Both professional and amateur elite rowers receive exclusive access to coaching, training facilities and other support at RNZ’s Performance Centres. For the reasons outlined in paragraphs 47 to 48, the Board notes that RNZ provides support to rowers dependent on their ability to achieve success in international rowing. The Board considers that RNZ has an independent purpose to provide support for a closed group of elite athletes at the expense of public participation in rowing.
64. The Board further considers that RNZ’s support for elite athletes would likely prevent it from passing the public benefit test even under the United Kingdom approach.⁶⁹
65. RNZ has acknowledged that it is heavily involved in high performance rowing but has submitted that the international success in rowing increases the number of people participating in rowing.⁷⁰ RNZ’s submission assumes that

⁶⁶ See the financial statements submitted to Charities Services for years ending 31 December 2009 to 2014.

⁶⁷ http://www.rowingnz.kiwi/Category?Action=View&Category_id=90 [accessed 10 July 2015].

⁶⁸ Letter from RNZ to Charities Services dated 15 June 2015.

⁶⁹ Refer to paragraphs 49-50.

⁷⁰ Refer to RNZ’s letters of 28 March 2015 and 1 May 2015.

the promotion of sport at an elite level is necessarily a means to advance the sport at the learner level.

66. The Board acknowledges RNZ's success in high performance rowing and that this success has positive flow-on effects for the public. However, as discussed in paragraphs 51 to 52, the Board does not consider promoting sporting success at an elite level, or offering an elite sporting event, provides spectators with a benefit that lies within the scope of charity. Any effect of the elite level activities in inspiring public participation is at best a 'down-stream' benefit that does not serve to bring promotion of professional or elite competitions within the scope of charity.
67. RNZ has also submitted that all payments to athletes are funded through HPSNZ funding and these are administered only by RNZ on behalf of HPSNZ. However, this does not permit a conclusion that the purpose to promote success at an elite level is a purpose of a different organisation rather than RNZ. The payments to athletes are still an activity carried out by RNZ and RNZ receives funding for this purpose.
68. RNZ submitted as well that the objects have not changed from those when it was registered. However, based on information viewed at the time, the level of resources to support elite rowers appeared to be no more than ancillary to RNZ's charitable purposes. The Board notes that financial information on the expenditure of RNZ was not included in its application to be registered. The Board also notes the recent decision of *Re Family First New Zealand*,⁷¹ where the High Court did not accept that there had been a substantive legitimate expectation that the entity would not be deregistered as a charity unless there were material changes in circumstances from when it was registered.⁷²
69. In addition, the Board considers that the emphasis on high performance sports has increased for RNZ and Sport New Zealand. In 2006 Sport New Zealand (then called Sport and Recreation New Zealand) developed a new contestable investment strategy to ensure funds are directed towards those athletes and teams most likely to excel on the world stage.⁷³ Subsequently, HPSNZ was created in 2011 as a subsidiary of Sport New Zealand and funding has been increased for high performance sports.⁷⁴ RNZ has been targeted by HPSNZ to deliver programmes based on New Zealand rowers achieving success at international events. In December 2014, HPSNZ announced rowing, as one of three Tier 1 sports, will receive increased funding to win multiple medals at the Rio Olympics.⁷⁵
70. In light of the above, we consider that RNZ has a purpose to promote success in rowing at an elite level and this purpose has provided benefits to a closed group of elite athletes at the expense of public participation in rowing.

⁷¹ *Re Family First New Zealand* [2015] NZHC 1493 ("*Family First*").

⁷² Refer *Family First* at [95] to [100].

⁷³ Sport and Recreation New Zealand *Annual Report for the year ended 30 June 2008* (Wellington, 2009) at 28.

⁷⁴ Sport and Recreation New Zealand *Annual Report for the year ended 30 June 2011* (Wellington, 2012) at 6.

⁷⁵ <http://www.hpsnz.org.nz/news-events/investment-aimed-increasing-chances-success-rio> [accessed 10 July 2015].

G. RNZ's non-charitable purposes are more than ancillary

71. The Board does not consider that RNZ's non-charitable purposes fall within the savings provision set out in section 5(3) of the Act.

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

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

RNZ's purpose to promote success in rowing at an elite level is more than ancillary

73. The Board considers that RNZ's purpose to promote success in rowing at an elite level is neither qualitatively or quantitatively ancillary to RNZ's charitable purposes.
74. Considering the quantitative part of the ancillary assessment the Board considers that the support of high performance rowing and promotion of rowing success at an elite level are more than incidental. For example:
- RNZ makes significant payments towards elite rowing. Expenditure on high performance programmes and international competitions constitutes a significant proportion of overall expenditure since 2008 (this expenditure has been consistently above 75% of total expenditure).⁷⁶ In the financial statement for the year ending 31 December 2014, "High Performance Tour and Operating Costs" totalled \$6,441,677 of \$8,397,850 total expenses.
 - In the financial statement for the year ending 31 December 2014, RNZ made a total of \$1,557,205 in payments to athletes.
 - 9 of 16 staff are supporting high performance activities.⁷⁷
 - RNZ supports a High Performance programme including four regional performance centres.

75. The Board notes that RNZ's expenditure to promote public participation in rowing is significantly smaller than expenditure on elite activities. The financial statement for the year ending 31 December 2014, states that the total expense for "Sport Development" was \$328,085 while the total expense for "High Performance Tour and Operating Costs" was \$6,441,677.

76. RNZ submits that their activities in school, club and university rowing affect a much greater number of people than the high performance programme. RNZ states that 150 people travel internationally with representative teams. In contrast, in the 2014/15 domestic rowing season, 3009 people competed in school regattas, 1582 people in rowing for clubs, and 351 in the university

⁷⁶

See paragraph 63.

⁷⁷

http://www.rowingnz.kiwi/Category?Action=View&Category_id=523 [accessed 10 July 2015].

regatta. RNZ further states that including coaches, volunteers, and administrators the 2014/2015 domestic rowing activities involved over 5,000 people.

77. The Board acknowledges that the number of people involved in non-elite rowing activities is greater than the number of elite athletes. However, this is but one factor that the Board uses to assess whether a non-charitable purpose is ancillary. Determining whether a purpose is ancillary includes both a quantitative and qualitative assessment. The number of people involved in non-elite rowing, by itself, does not demonstrate RNZ's purpose to promote rowing success at an elite level is an ancillary purpose.
78. Applying the qualitative part of the ancillary assessment, RNZ's promotion of sporting success cannot be seen as ancillary. This purpose is not a means to advance another charitable purpose. Further, as discussed above in part F of this decision, RNZ's focus on rowing success at an elite level is evident in its stated purposes and its activities.

Summary

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

H. Public Interest

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

I. Determination

83. The Board determines that RNZ is not qualified for registration as a charitable entity because it is not established for exclusively charitable purposes as required by section 13(1)(b) of the Act. The Board considers that RNZ has purposes to promote rowing as an end in itself and to promote success in rowing at an elite level. Further, RNZ's non-charitable purposes are not ancillary within section 5(3) of the Act.

84. As RNZ has independent (non-ancillary) non-charitable purposes, it is in the public interest to proceed with RNZ's removal from the Charities Register. The grounds for removal under section 32(1)(a) of the Act are satisfied in relation to RNZ.
85. The decision of the Board is therefore to remove RNZ from the register, pursuant to section 31 of the Act, with effect from 9 October 2015.

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

Signed for and on behalf of the Board


.....
Roger Holmes Miller

11th SEPTEMBER 2015
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Date