

the ird, the charities regulator and the charity – the national council of women of new zealand incorporated “*push back*” to clarify the law, for itself and for others

by susan barker, director, charitieslaw ltd, wellington

1 On 22 July 2010, the National Council of Women of New Zealand Incorporated (“*the Council*”) was deregistered as a charity. The Charities Commission (as it was then) considered that the work the Council carried out advocating for its charitable purposes (such as making submissions on Parliamentary Bills and otherwise participating in the democratic process) meant that it had a “*political purpose*” and deregistered the Council on that basis. Ironically, the Council was contracted by Government to do the very work that led to its deregistration.

2 The deregistration of the Council was very controversial and widely considered to be incorrect as a matter of both fact and law. The charities regulator’s discretionary power to deregister was intended to be used only in the most extreme circumstances: there was shock and disbelief that a good charity of over 100 years’ standing could come to be deregistered, particularly for doing the very work it was contracted by Government to do.

Charities’ access to justice

3 Under the Charities Act 2005, the only mechanism for appealing a decision of the charities regulator is to file proceedings in the High Court (section 59). Such an appeal has to be filed within 20 working days of the date of the decision (even if the charity does not actually receive the decision until several days later). This is a very short timeframe for a modestly-resourced charity, run by a board of volunteers, to absorb a lengthy legal decision from the charities regulator, make a decision to commence proceedings in the High Court, ensure it was able to fund the cost of doing so, and find and instruct a lawyer.

4 Under section 59(2)(b) of the Charities Act, a charity may apply to the High Court for further time to file High

Court proceedings. In April 2012, the Council made the decision to challenge the deregistration decision, and approached the charities regulator to ask if they would support an application under section 59(2)(b) for leave to appeal the deregistration decision out of time. The charities regulator refused, indicating that a new application for charitable status would be required.

5 As an application for leave to appeal the deregistration decision out of time was clearly going to be opposed, exposing the Council to significant additional costs, the Council felt that its only practical option for seeking to have the deregistration decision overturned was to file a new application for registered charitable status. This it duly did on 10 September 2012.

6 Because appeals under the Charities Act are currently being interpreted as “*appeals on the record*”, charities have no automatic right to present evidence in Court unless that evidence was presented to the charities regulator before it made its decision. For this reason, the Council provided evidence in support of its application for registered charitable status as if it was preparing for a High Court trial. The application took a great deal of work to prepare, and the accompanying information had to be carried in to the charities regulator in a box. The Council fully expected that it would have to defend its application in the High Court.

7 However, on 15 April 2013, the charities regulator accepted the Council’s application for registered charitable status.

8 The Council has now been restored to the charities register, albeit under a new registration number (CC 49050). The effective date of the reregistration

is 10 September 2012, the date of the Council's reapplication for registered charitable status.

The effective date appeal

9 The Council had specifically asked the regulator to please backdate reregistration to 19 August 2010, the effective date of the deregistration decision. This would have allowed the Council to have continuous registration coverage for tax purposes, and would have put it beyond doubt that it remained exempt from income tax as a charity throughout the period of deregistration.

10 The charities regulator has the power to backdate the Council's reregistration to 19 August 2010. Under section 20(2)(b) of the Charities Act, the charities regulator may backdate registration to the date of "a" properly-completed application. The provision does not specify "which" properly-completed application. The Council filed its original properly-completed application for registration on 29 May 2008.

11 However, the charities regulator refused to backdate further than 10 September 2012. This meant that from 19 August 2010 to 10 September 2012 (*"the deregistration period"*), the Council was not officially registered as a charity.

12 Importantly, nothing about the Council's purposes, activities or rules, or the applicable law, had materially changed throughout the entire period. All that had changed was the charities regulator's jurisprudential view of the definition of charitable purpose as it applied to the Council. The Council was in fact eligible to be registered as a charity throughout the period of deregistration.

The tax challenge

13 Despite this, the Inland Revenue Department (*"IRD"*) has now sought to impose income tax on the Council for the period of deregistration.

14 As a result, the Council has had to file income tax returns, for the first time in over 100 years, for the 3 tax years involved in the deregistration period: 2011, 2012, and 2013. The Council has duly paid the income tax involved, but it has done so without prejudice to its position that it remained legally exempt from income tax as a *"tax charity"* throughout the deregistration period under section CW 41(5)(b) of the Income Tax Act 2007.

15 Under section CW 41(5)(b), a charity remains exempt from tax if it meets 3 tests:

- i it started, before 1 July 2008, to take reasonable steps in the process of preparing an application for registration under the Charities Act;

- ii it intends to complete that process; and

- iii it has not been notified by the Commissioner of Inland Revenue that it is not a *"tax charity"*.

16 The Council met all of these tests throughout the period of deregistration:

- i The Council started, before 1 July 2008, to take reasonable steps in the process of preparing an application for registration as a charitable entity under the Charities Act. The Council submitted its fully-completed application for registration as a charitable entity prior to that date, on 29 May 2008. The Commissioner has confirmed that making an application for charitable registration before 1 July 2008 meets this requirement (Transitional guidelines for charities, 7 August 2008, p2).
- ii The Council fully intended to complete the process of preparing its application for registered charitable status.
- iii Although the Council has received a letter asking that it pay income tax, it has never been formally notified by the Commissioner of Inland Revenue that it is not a tax charity.

17 Section CW 41(5)(b) is a transitional provision designed to address problems associated with the backlog of applications for registration that the Charities Commission was facing in 2008. The Charities Act had introduced a requirement that charities had to be registered with the Charities Commission by 1 July 2008 in order to continue to be eligible for the charitable exemptions from income tax. However, it rapidly became clear that the Charities Commission was not going to be able to deal with the backlog of all the applications for registration by that time. Section CW 41(5)(b) was inserted into the legislation in May 2008 to provide IRD with a *"limited discretion"* to preserve the income tax exempt status of charities that needed more time to complete the charitable registration process.

18 A year later, in May 2009, the backlog of applications for registration was still very large. Charities with a 31 March balance date, whose applications for registration had still not been determined, were faced with the question of whether they had to account for income tax in their financial statements for the year ended 31 March 2009. Significant pressure was placed on the Charities Commission to deal with the backlog. It appears that the Charities Commission began dealing with this pressure in May and June 2009 by simply registering

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charities, even if it had not reached a final view as to whether they were in fact eligible for registration, and identifying them for subsequent investigation.

19 The Council was one of those charities. The Charities Commission originally registered the Council in June 2009, but identified it for subsequent investigation at that time. The Council's original registration was therefore effectively only provisional (irrespective of whether the Charities Act specifically provides for provisional registrations) and was issued in response to significant pressure on the Charities Commission to deal with a backlog of applications. The Charities Commission's investigation into the Council commenced in September 2009, only a few weeks after the Council had been originally registered. The Charities Commission issued the Council with a notice of intention to deregister in April 2010, and deregistered the Council in July 2010.

20 The Council effectively appealed the deregistration decision in the only practical way it could, by reapplying for registered charitable status in September 2012. Its eligibility for registered charitable status was effectively only finally determined when this application was determined in April 2013.

21 The Council is therefore an example of a charity that *"needed more time to complete the registration process"* that it had begun in May 2008. The Council met all the requirements of the definition of *"tax charity"* throughout the period of deregistration as a matter of both form and substance. The Council is precisely the type of charity the transitional provision is intended to support.

22 IRD could have exercised its discretion not to impose income tax on the Council for that period.

23 But IRD refused.

Accountability

24 The question is whether all of this is appropriate and proportionate regulation of charities?

25 Both the charities regulator and IRD could have exercised their discretion under their respective pieces of legislation to take a more benevolent approach towards a charity affected by a deregistration decision that, with respect, should never have occurred. The Supreme Court recently confirmed in *Re Greenpeace New Zealand Incorporated* [2014] NZSC 105 at 3 that a *"political purpose"* exclusion should not be applied in New Zealand:

26 political and charitable purposes are not mutually exclusive in all cases; a blanket exclusion is

unnecessary and distracts from the underlying inquiry whether a purpose is of public benefit within the sense the law recognises as charitable.

27 If this is not appropriate and proportionate regulation, what can be done about it? In November 2012, the Government controversially and without consultation cancelled the promised post-implementation review of the Charities Act. It appears the only way to work through the parameters of the new regime established by the Charities Act, and the only way to hold the regulator(s) accountable for their decisions in the manner expected and necessary in a modern regulatory framework, will be by individual charities challenging decisions. The Council made the decision that it was important to *"push back"*, in the hope that the law might be clarified, not only for itself but for any other charities affected by the current approach.

28 The Council has accordingly appealed the decision of the charities regulator not to backdate its registration by filing proceedings in the High Court, as required by section 59 of the Charities Act. The Council has also filed notices of proposed adjustment against its 2011, 2012 and 2013 income tax returns, proposing that those returns be adjusted to nil, to reflect the fact that it was in fact exempt from income tax for those periods. Having followed the statutory disputes process mandated by the Tax Administration Act 1994, the Council has now filed challenge proceedings against IRD. The High Court was chosen as the forum specifically so that the challenge proceedings could be heard at the same time as the appeal against the charities regulator's decision not to backdate. There is a public interest in a charity being spared the expense of 2 trials in its efforts to seek a solution to 1 problem.

29 **The hearing has been set down for 26 and 27 November 2014 in the Wellington High Court. If you share the Council's concerns about aspects of the current regulation of charities, please support the Council. ■**

About the Author

Sue Barker is the director of Sue Barker Charities Law, a boutique law firm based in Wellington specialising in charities law and public tax law. In November 2013, the firm was voted New Zealand's boutique law firm of the year, and first runner-up for the Tax Law Firm of the Year Award, at the New Zealand Law Awards. Sue is also co-author of the text, *The Law and Practice of Charities in New Zealand*, published by LexisNexis in May 2013. Sue can be contacted at susan.barker@charitieslaw.co or +64 (0) 21 790 953 or PO Box 3065, Wellington 6140.

