

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

**CIV-2014-485-1017
[2014] NZHC 3200**

UNDER the Charities Act 2005

IN THE MATTER OF an appeal against a decision of the Charities Registration Board as to the date to which a successful application for reregistration may be backdated under section 20(2)(b) of the Charities Act 2005

BETWEEN THE NATIONAL COUNCIL OF WOMEN OF NEW ZEALAND INCORPORATED
Appellant

AND CHARITIES REGISTRATION BOARD
Contradictor

CIV-2013-485-10805

UNDER the Tax Administration Act 1994

IN THE MATTER OF section CW 41 of the Income Tax Act 2007

BETWEEN THE NATIONAL COUNCIL OF WOMEN OF NEW ZEALAND INCORPORATED
Plaintiff

AND THE COMMISSIONER OF INLAND REVENUE
Defendant

Hearing: 26-27 November 2014

Counsel: S D Barker for appellant/plaintiff
H M Carrad and S J Humphrey for Charities Registration Board
P D Marshall and R N Park for Commissioner of Inland Revenue

Judgment: 12 December 2014

RESERVED JUDGMENT OF DOBSON J

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Introduction

[1] The relief sought in both proceedings is to alleviate the adverse consequences for the appellant/plaintiff, the National Council of Women of New Zealand Inc (NCW), of being deregistered as a charity for a period of a little more than two years from 19 August 2010 to 10 September 2012.

[2] In the first proceeding (the appeal), NCW challenges a decision of the Charities Registration Board (CRB) that it does not have the statutory power to backdate the effect of the reregistration of NCW as a charity to the date on which it was deregistered, that is, 19 August 2010, rather than backdating only to 10 September 2012 when NCW’s second application for registration was filed.

[3] The CRB was not cited as a respondent to the appeal, but counsel for the CRB filed submissions and Ms Carrad spoke to them at the hearing. In the circumstances of this appeal, that was entirely appropriate and helpful to provide a contradictor to the criticisms of the CRB’s decision and conduct that were advanced on the appeal.

[4] In the broader sense of fairness, there is little scope for disputing that NCW deserved to be registered as a charity throughout the period in which it was deregistered. The view adopted by the CRB throughout has been that its powers do not extend as NCW contends. There is arguably an alternative means of achieving the same result, if the Court interprets its powers on an appeal as giving it wider powers to backdate registration decisions than the CRB has.

[5] In the challenge proceedings under the Tax Administration Act 1994, NCW disputes the decision of the Commissioner of Inland Revenue (the Commissioner) that the income of NCW was not exempt from income tax throughout the period of its deregistration because of that deregistration by CRB. The Commissioner accepts that if the reregistration of NCW as a charity is backdated to the date of its deregistration, then the basis for the assessments of income tax falls away and the liability to tax would no longer exist.

[6] NCW adopted a conservative approach to the tax liability triggered by its deregistration, and has paid the tax without prejudice to its challenge that the tax is not lawfully payable. The amount of tax for the part of the two years in issue in the challenge proceedings is some \$8,800.¹

The Charities Act 2005

[7] Section 3 of the Charities Act 2005 (the Act) specifies, as the first four of a larger number of purposes, the following:

3 Purpose

The purpose of this Act is—

- (a) to promote public trust and confidence in the charitable sector:
- (b) to encourage and promote the effective use of charitable resources:
- (c) to provide for the registration of societies, institutions, and trustees of trusts as charitable entities:

¹ NCW purportedly incurred a further similarly modest amount of income tax liability in the year following those to which the tax challenge relates. That year is not formally in issue, but it is recognised that the outcome of the challenge proceedings in respect of the other years would also apply to that year.

- (d) to require charitable entities and certain other persons to comply with certain obligations:

[...]

[8] Initially, the administration of the Act, and in particular the process for registering, monitoring and deregistering charitable entities, was vested in the Charities Commission (the Commission). The Commission was disestablished from 1 July 2012 and since then the Act has been administered by the CRB as a separate office within the Department of Internal Affairs.²

[9] In anticipation of the new regime for regulating charities that became the Act, relevant provisions in the Income Tax Act 2007 (the IT Act) were amended. The primary criterion for recognising income as exempt from income tax on the ground that it had been received by a charitable organisation became the registration of the entity as a charity under the Act. The application of that criterion was to apply from 1 July 2008. By then, it was subject to a transitional provision recognising that charities may have begun the process of seeking registration but not been able to complete the process by that date. I discuss the scope of that transitional provision below.³

NCW and its applications

[10] Deponents on behalf of NCW describing its background are justified in claiming that it has a long and proud history. NCW was originally established in 1896. Kate Sheppard, prominent in the campaign for women's suffrage, was its first president. It was formed as an incorporated society under the Incorporated Societies Act 1908 in 1959 and has continued as a national body to serve women's interests. The purposes as provided for in its present constitution are as follows:

1. To serve women, the family and the community at the local, national and international level.
2. To research the needs of women and the family.
3. To engage in education for women, that advances the betterment of women, the family and the community.

² Charities Amendment Act (No 2) 2012.

³ At [20]–[41].

4. To collect and redistribute information of service to the community.
5. To form a link with the National Councils of Women of other countries through the International Council of Women.

[11] The understanding of Shirley Payes, vice president of NCW, is that 69 other councils of women around the world are all registered as charities or enjoy the equivalent of that status.

[12] NCW lodged its initial application for registration with the Commission on 29 May 2008. On 4 June 2009, a decision was made that it be registered as a charity, backdated to 30 June 2008, being the day before the relevant tax provisions came into effect. That meant that NCW's previous exemption from income tax continued as before.

[13] The case for NCW is that the Commission had found itself overwhelmed by the number of applications, and that a decision had been made by the Commission to grant a substantial number of applications, subject to subsequently revisiting the entitlement of those entities to be registered as charities. Certainly, it is apparent that after registering NCW, the Commission undertook a review, including further correspondence with NCW. The Commission's investigation focused on the period from 1 April 2008 to 31 March 2009 by reference to NCW's annual return and financial report for that year.

[14] On 16 April 2010, the Commission sent NCW a notice of intention to remove it from the Register of Charities on the basis that NCW did not appear to be established and maintained exclusively for charitable purposes. A particular concern identified in that notice was that a purpose of NCW was political advocacy, and that component of its work could not be considered to be ancillary to other purposes that were themselves charitable.⁴ Despite submissions to the contrary, the Commission issued a decision deregistering NCW on 22 July 2010.

[15] NCW did not appeal to the High Court against the deregistration decision, as it was entitled to do. Affidavits filed in the present proceeding depose that NCW was "in a state of shock" at what it considered to be an unjust and unjustifiable

⁴ Charities Act 2005, s 5.

removal of its charitable status. A lack of funding is said to have precluded NCW taking legal advice on its options at the time.

[16] Instead, some two years later, NCW made a fresh application for registration. By that time, the Commission had been replaced by the CRB. The case for NCW is that, at the time it lodged its second application, its activities were materially indistinguishable from the nature of its activities at the time of the Commission's deregistration decision.

[17] The CRB issued its decision on the second application on 15 April 2013, determining that NCW did qualify for registration as a charitable entity. The decision traversed whether NCW had a political purpose that would disqualify it from registration. At the time, the challenge brought by the New Zealand Greenpeace entity against a decision that its political purposes disqualified it had been considered by the Court of Appeal, and leave to further appeal had been granted by the Supreme Court.⁵ The CRB concluded that the nature and activities undertaken by NCW that could be characterised as political did not come within the forms of political activity that disqualified it from having charitable purposes.⁶

[18] The CRB decision acknowledged a request from NCW that its registration be backdated to 19 August 2010, and responded to that in the following terms:⁷

Pursuant to section 20 of the Act, the Board may direct that an entity be given an effective registration date that is before the time at which the entity became registered as a charity. Section 20(2)(b) clearly states that an effective registration date must not be "earlier than the time that the chief executive received a properly completed application for registration of the entity as a charitable entity". The Board therefore directs that the effective registration date be the date of the NCWNZ's present application for registration, i.e. 10 September 2012.

⁵ *Re Greenpeace New Zealand Inc* [2012] NZCA 533, [2013] 1 NZLR 339. The Court of Appeal directed a reconsideration of the charitable status of Greenpeace's purposes, and the subsequent Supreme Court decision held that Greenpeace's purposes did not disqualify it from having charitable status: *Re Greenpeace of New Zealand Inc* [2014] NZSC 105, (2014) 26 NZTC 21-088.

⁶ CRB registration decision: *National Council of Women of New Zealand Incorporated*, Decision No 2013-8, 15 April 2013 at [42]–[49].

⁷ At [52].

[19] Accordingly, the first issue in the appeal is the scope of the CRB's powers to backdate a registration under s 20 of the Act.

Power to backdate

[20] Section 20 provides:

20 Board may backdate registration of entity as charitable entity

- (1) The Board may, if it thinks fit, direct the chief executive to register a notice in the register of charitable entities that specifies that an entity must be treated as having become registered as a charitable entity at a time (the effective registration time) that is before the time at which the entity actually became registered as a charitable entity.
- (2) However, the effective registration time must not,—
 - (a) in the case of a trust, society, or an institution referred to in section 73(1) of the Estate and Gift Duties Act 1968 created or established by a gift after the commencement of this section, be earlier than the time that the gift was made; and
 - (b) in any other case, be earlier than the time that the chief executive received a properly completed application for registration of the entity as a charitable entity.
- (3) Before the Board exercises its powers under subsection (1), the Board must be satisfied that the entity was qualified for registration as a charitable entity at all times during the period between the effective registration time and the time at which the entity actually became registered as a charitable entity.
- (4) If the Board exercises its powers under subsection (1) in relation to an entity, the entity must be treated as having become registered as a charitable entity at the effective registration time for the purposes of this Act, the Income Tax Act 2007, and the Estate and Gift Duties Act 1968.

[21] Ms Barker's first argument is that the scope of s 20(2)(b) is to be interpreted literally: the backdating power can go back to the date of receipt of any properly completed application for registration by the entity applying. In the present circumstances, NCW had lodged a properly completed application on 28 May 2008 so that the backdating power could, if the CRB considered it appropriate, have applied to any date after 28 May 2008.

[22] Supporting the CRB's narrower approach to its backdating power, Ms Carrad submitted that the words "a properly completed application" in s 20(2)(b) refer only

to the application that was then before the CRB. She pointed to provisions that sit alongside s 20 in the Act under the heading “Applications for registration”, and specifically that an application must be sent to the chief executive,⁸ who, “as soon as practicable after receiving a properly completed application for registration” is required to consider whether the entity qualifies for registration⁹ before recommending to the CRB that it either grant or decline the application. If the CRB is satisfied that the entity qualifies for registration it must grant the application.¹⁰

[23] The evident purpose of the backdating provision is to avoid disadvantaging an applicant by virtue of the length of time that might be taken to consider and determine a successful application for registration.¹¹ Ms Carrad argued that the wider interpretation contended for by Ms Barker would transform any second or subsequent application for registration by an entity into an appeal against an earlier deregistration decision when that was clearly not intended, particularly in light of the rights arising on an appeal from a deregistration decision.

[24] Ms Carrad also alluded to the relative unlikelihood that Parliament would have intended to attribute to the CRB any obligation to retrospectively vet an entity’s entitlement to charitable status any further back than the date on which an application currently before it had been lodged. It followed, on Ms Carrad’s analysis, that the backdating power had to be treated as relating to the application currently before the CRB. She submitted that more than an incidental use of the indefinite article would be needed to interpret the backdating power as going any further back than the lodging of any current application.

[25] The position of NCW may genuinely be anomalous. In terms of the structure within the Act for obtaining and retaining status as a registered charity, NCW’s solution would have been to appeal the deregistration decision. Ms Barker urged that the Court should not reject a purposive approach to interpreting the scope of

⁸ Charities Act 2005, s 17.

⁹ Section 18.

¹⁰ Section 19.

¹¹ See Social Services Committee *Charities Bill* (17 December 2004) at 7, where the majority of the Committee recommended amending the Bill to allow the Charities Commission to backdate the effective time of registration to “ensure that entities are not disadvantaged by any delays in processing a valid application”.

s 20(2)(b) to provide a fair solution, merely because NCW neglected to pursue a right of appeal when the deregistration was an unexpected shock at a time when NCW did not have the resources to retain lawyers for an appeal.

[26] Ms Carrad disputed that there could be any justification for an unduly liberal purposive approach to fashion a solution for NCW in the present circumstances, when the anomalous position was one it had brought on itself. She even suggested that, conceptually at least, it was not too late for NCW to pursue an appeal from the deregistration decision, given that the Court has an open-ended discretion to extend the time within which to bring such appeals. In addition, and assuming the limitation on the backdating power in s 20(2)(b) has been correctly applied by the CRB, a valid rationale arguably would exist for pursuit of an appeal so as to invoke a power that would overturn the deregistration decision from the date it came into effect.¹²

[27] The task of interpreting a statute is governed by s 5 of the Interpretation Act 1999, which provides as follows:

5 Ascertaining meaning of legislation

- (1) The meaning of an enactment must be ascertained from its text and in the light of its purpose.
- (2) The matters that may be considered in ascertaining the meaning of an enactment include the indications provided in the enactment.
- (3) Examples of those indications are preambles, the analysis, a table of contents, headings to Parts and sections, marginal notes, diagrams, graphics, examples and explanatory material, and the organisation and format of the enactment.

[28] Guidance from the Supreme Court on how the task is to occur is derived from its decision in *Commerce Commission v Fonterra Co-operative Group Ltd*, in the following terms:¹³

Even if the meaning of the text may appear plain in isolation of purpose, that meaning should always be cross-checked against purpose in order to observe the dual requirements of s 5. In determining purpose the Court must

¹² Charities Act 2005, s 61(2)(b).

¹³ *Commerce Commission v Fonterra Co-operative Group Ltd* [2007] NZSC 36, [2007] 3 NZLR 767 at [22].

obviously have regard to both the immediate and the general legislative context. Of relevance too may be the social, commercial or other objective of the enactment.

[29] Notwithstanding the literal meaning of the words “a properly completed application” contained in s 20(2)(b), I consider it unrealistic to attribute to Parliament a deliberate intention, when drafting the backdating power in s 20, to address the anomalous position that has now arisen. The reality is that Parliament would have been focusing on the powers needed to administer a scheme of registration to facilitate, and not frustrate, the management of charitable organisations, and to provide a means of addressing what would otherwise be the adverse consequences for charities of administrative delays within the regulator.

[30] Given that statutory purpose, the balance is between facilitating recognition of charities by registration in the widest circumstances that may apply, and creating a discretionary power of unwieldy breadth for the regulator. Without more, it can be assumed that orderly administration of a scheme such as for registration and regulation of charities would be designed to operate by reference to discrete applications. Any prospect that the regulator might be expected to retrospectively research the entitlement of a charity to be registered for a period prior to it having made the application that is before the regulator would potentially create administrative burdens disproportionate to any enhancement of the efficacy of the regulatory scheme.

[31] The rejoinder to this is that recognising the existence of such a discretionary power does not create an obligation for it to be used. In many situations, the CRB would not have a sufficient first-hand appreciation of the conduct of a charity in the period prior to receipt of a current application to enable it to validly confirm any greater extent of backdating. The position of NCW may also be anomalous in this respect in that the continuity of the same range of activities since it was deregistered is not seriously in dispute.

[32] The requirement in s 20(3) for the CRB to be satisfied that an entity qualified for charitable status for all of a backdated period is neutral as between the narrower and wider forms of backdating power being contended for s 20(2)(b). It might be

argued in support of the wider power to backdate that it was unnecessary to limit the backdating power to the date of receipt of the current application, when the relevant constraint on the extent of backdating was the period during which the CRB could be satisfied that the applicant was qualified to register as a charitable entity.

[33] On the other hand, Parliament may have contemplated that subs (3) provided for the circumstances in which it was appropriate to backdate only for part of the period since receipt of the current application. It would be consistent with that purpose for subs (3) to treat as unduly burdensome any power for the CRB to assess an entity's entitlement to be registered at any time prior to the receipt of the current application.

[34] Ms Barker submitted that the clear Parliamentary intention in providing the backdating power in s 20 was so that charities would not be disadvantaged by delays in the processing of applications. She next sought to argue that NCW had been disadvantaged in this way because of what she treated as the on-going delays in processing its original (29 May 2008) application. On that analysis, the legislative purpose for the backdating provision would not be met unless s 20(2)(b) was interpreted to enable backdating to the time of the original application. Ms Barker treated the application as having been dealt with in a way that significantly disadvantaged NCW.

[35] The difficulty with that approach is that it requires the initial registration of NCW as a charity to be treated as provisional or conditional in some respect so that the subsequent deregistration was a component of some less than unqualified registration in the first place. That is a forced and unrealistic characterisation of the facts. When NCW was first registered, there was no qualification to its registered status, either in fact or as a matter of the legal capacity of the then regulator to do any more than either register an entity as a charity, or to decline to do so. The letter of 5 June 2009 from the Commission to NCW was clearly expressed:

I am pleased to advise you of the success of your application to register National Council of Women of New Zealand Incorporated as a charitable entity.

[36] The arguments for NCW attempting to treat the second application as a continuation of the original one are also at odds with its somewhat discursive pleading in the statement of claim against the Commissioner. Paragraph 22 of that pleading alleged that NCW “had no practical option but to prepare a new application for registered charitable status”. Paragraph 23 of that statement of claim continues:¹⁴

... the letter accompanying the Council’s application for registered charitable status took literally hundreds of hours to prepare, and ran to some 74 pages which, together with supporting evidence, had to be carried into the [Department of Internal Affairs] in a box. None of the information was “new” and should all have been taken into account by the charities regulator in taking the extreme step of reaching a decision to deregister the Council.

...

[37] If the backdating power is seen as enabling the CRB to relieve a registrable charity of the adverse consequences of the CRB taking some time to process an application, then it is to authorise the CRB to give credit to the charitable entity for the period of time during which the CRB is responsible for reaching a positive decision on the application. On that basis, in the anomalous circumstances here, the period between the deregistration decision and NCW’s second application is certainly not a delay caused by the CRB in the same way as the period between the lodging of an application and the CRB arriving at its decision in respect of it.

[38] Plainly, the discretion provided for by the transitional provision was not intended to provide relief for the period between a deregistration decision (following an initial application and acceptance as a charitable entity) and a second application to the CRB.

[39] The CRB would only be attributed with responsibility for that longer period of time during which it was not seized of an application for registration if the CRB accepted that the deregistration decision was wrong, and that it was reasonable to expect NCW not to pursue the orthodox means of correcting a wrong decision, namely an appeal. That is not a reasonable attribution of responsibility to the CRB, and I am not persuaded that that aspect of the argument for NCW can advance its case.

¹⁴ Statement of claim in *The National Council of Women of New Zealand Inc v Commissioner of Inland Revenue* CIV-2013-485-10805, 19 December 2013.

[40] Ms Barker placed substantial reliance on numerous passages from the Parliamentary debates on the terms of the Bill. To a lesser extent, Ms Carrad also referred to the Parliamentary debates. With respect to counsel, I have not found anything in the various references cited to me which is sufficiently specific to the intended scope for the backdating power to justify reliance on them. At a more general level, the Parliamentary statements represent a cross-party commitment to creating a set of rules that would facilitate the registration and regulation of entities qualifying as charities. That cannot avail NCW beyond the general proposition that Parliament would want the powers interpreted in the way that helped deserving charities as much as possible. On its own, that is not enough to counter other consistent indications of a more confined scope of the power to backdate registrations.

[41] I am not persuaded that the interpretation NCW contends for s 20(2)(b) is correct. I am reinforced in that view because I consider the wider power contended for to be unnecessary for reasons I address next.

Alternative to CRB's backdating power – Court's powers on appeal

[42] On 10 June 2014, in an interlocutory judgment directing consolidation of the two proceedings and providing other directions, Clifford J raised the prospect that, independently of the extent of the CRB's backdating power under s 20, the Court on appeal might have a wider power to backdate under s 61 of the Act.¹⁵

[43] Section 61 provides for the scope of the Court's powers in determining an appeal:

61 Determination of appeal

- (1) In determining an appeal, the High Court may—
 - (a) confirm, modify, or reverse the decision of the Board or the chief executive or any part of it;
 - (b) exercise any of the powers that could have been exercised by the Board or the chief executive in relation to the matter to which the appeal relates.

¹⁵ *National Council of Women of New Zealand Inc v Charities Registration Board* [2014] NZHC 1297, (2014) 26 NZTC 21-075 at [29].

- (2) Without limiting subsection (1), the High Court may make an order requiring an entity—
 - (a) to be registered in the register of charitable entities with effect from a specified date; or
 - (b) to be restored to the register of charitable entities with effect from a specified date; or
 - (c) to be removed from the register of charitable entities with effect from a specified date; or
 - (d) to remain registered in the register of charitable entities.
- (3) The specified date may be a date that is before or after the order is made.
- (4) The High Court may make any other order that it thinks fit.
- (5) An order may be subject to any terms or conditions that the High Court thinks fit.
- (6) Nothing in this section affects the right of any person to apply, in accordance with law, for judicial review.

[44] Ms Barker’s alternative argument was that even if the CRB could not backdate to earlier than the date of filing of the current application, then the High Court on appeal had broader powers. Ms Barker submitted that those broader powers should be used, given what she characterised as the compelling merits of NCW’s position.

[45] Ms Carrad argued that the provisions of s 61 are not capable of a reasonable interpretation that affords any wider powers to the Court on appeal than those given to the CRB when it deals with applications to register charities.

[46] A conventional provision for the powers of the Court on appeal is that stipulated in s 61(1)(b), namely that the Court on appeal can do anything that the original decision-maker could have done. However, s 61 clearly goes beyond that simple formula for the scope of the Court’s powers. Because s 61(2) begins with the words “Without limiting subsection (1)”, the scope of the Court’s power cannot be confined to the power to do anything the CRB could have done in terms of s 61(1)(b). On their terms, the additional powers described in s 61(2)(a) to (d) cannot be read as intending no more than those forms of power that may be exercised by the CRB.

[47] On a literal application of the words, s 61(2)(a) empowers the Court to order that an entity be registered as a charity with effect from a specified date. Pursuant to subs (3), that may be a date before the order is made by the Court. There is a disconnect between the power in subs (3) and those in subs (1) that are distinguished by the words “Without limiting subsection (1)” at the start of subs (2). Accordingly, subs (2) does literally empower the Court to order NCW to be registered from the date of its deregistration.

[48] As Ms Carrad noted, the scope of backdating capacity in s 61(3) does not conform to the language in s 20(2)(b), so that there is no explicit constraint to the date that the CRB received a properly completed application.

[49] On the other hand, Ms Carrad questioned whether Parliament would intend to give wider powers to the Court, when the first instance decision-maker is intended to have a developed expertise and much closer opportunity to monitor the behaviour that might justify backdating. It would be logical for any error-correcting powers of the Court to mirror the scope of what could be done by the first instance decision-maker.

[50] Section 61(4) is not confined to the Court making any other order the CRB could have made, but rather any other order that the Court thinks fit. It has been treated as:¹⁶

... designed to allow the Court the widest possible scope to do what is necessary in light of the substantive conclusions reached in the appeal before the Court.

[51] Consistent with that observation, s 61(4) appears to free the Court from being limited to orders that could have been made by the CRB.

[52] I am satisfied that this is a provision affording wider powers to the Court on appeal than those granted by the Act to the original decision-maker. Once that point is reached, I am persuaded of the merits of the alternative argument for NCW. Ms Barker’s proposition was that NCW should be treated as having materially the same scope of activities and pursuit of its purposes in the period between

¹⁶ *Foundation for Anti-Aging Research v Charities Registration Board* [2014] NZHC 1153 at [41].

deregistration and reregistration, as was the case before and after that period. The point is confirmed, at least implicitly, in the affidavits in support of NCW's appeal. Ms Carrad was cautious not to positively endorse that proposition, however there is no realistic basis for doubting it.

[53] It is a situation in which a robust approach to the scope of the Court's powers is warranted. The Act is to be applied to facilitate charitable works, not frustrate them. As Ms Carrad suggested, a solution might have been achieved by NCW now seeking leave to appeal the deregistration decision out of time, in circumstances where it would have valid grounds to do so. Where the limited purpose for doing so would be to trigger the jurisdiction to backdate NCW's reregistration to the date of its deregistration, it is antithetical to the purposes of the Act to require all involved to do so.

[54] The consequence is that, on the view of the law applying to the permitted scope of charitable purposes since at least the reregistration decision, NCW was entitled to be registered throughout. The adverse consequences of being deprived of that include a liability for income tax, and the taint on its status which deponents on its behalf contend has continued, and has been substantial.

[55] Given the overall purpose of the Act to encourage and promote the effective use of charitable resources, an order extending the CRB's backdating order is justified. Accordingly, I order that NCW is to be registered as a charity from 19 August 2010.

The IRD challenge proceeding

[56] An order in the appeal effecting a backdating of registration to coincide with the deregistration is sufficient to resolve the challenge proceeding. In those circumstances, the Commissioner acknowledges that the basis for the assessment falls away and the tax paid by NCW is to be refunded, together with an amount calculated under the relevant statutory provisions for use of money interest (UOMI).

[57] However, in case I am found to have been wrong in making that order, and out of deference to the resources committed by the parties to the opposing arguments

in the challenge proceeding, it is appropriate to address the competing positions and express a view on them.

[58] In anticipation of the new regime for registration of charities under the Act, the taxing provisions addressing the position of charities in the IT Act were amended in provisions that became s CW 41. To have income of a charity recognised as exempt from income tax, the entity had to be a “tax charity”. Section CW 41(5) defined that expression in the following terms:

CW 41 Charities: non-business income

...

Definition

- (5) In this section and sections CW 42 and CW 43, tax charity means,—
- (a) a trustee or trustees of a trust, a society, or an institution, registered as a charitable entity under the Charities Act 2005;
 - (b) a trustee or trustee of a trust, a society, or an institution (the entity), that—
 - (i) has started, before 1 July 2008, to take reasonable steps in the process of preparing an application for registering the entity as a charitable entity under the Charities Act 2005; and
 - (ii) intends to complete the process of preparing an application described in subparagraph (i); and
 - (iii) has not been notified by the Commissioner that the entity is not a tax charity;
 - (c) a trustee or trustee of a trust, a society, or an institution, that is or are non-resident and carrying out its or their charitable purposes outside New Zealand, and which is approved as a tax charity by the Commissioner in circumstances where registration as a charitable entity under the Charities Act 2005 is unavailable;
 - (d) a person who is removed from the register, in the period starting with the day they are registered on the register and ending with the earlier of the following days:
 - (i) the day on which the person does not comply with the person's rules contained in the register;
 - (ii) the day of final decision.

[59] The transitional definition of a tax charity was introduced in a Remedial Matters component of a Taxation Bill in May 2008. Explanations for the transitional definition included the following from the Hon Peter Dunne, then Minister of Revenue:¹⁷

The bill also introduces transitional measures to provide greater tax certainty to organisations that encounter difficulty in completing their application for registration with the Charities Commission within the deadline, owing to circumstances that may be beyond their control. Under the bill's provisions the Commissioner of Inland Revenue is being given a limited discretion to protect their tax status in the meantime, provided they can prove that they started the application process before 1 July [2008] and that they intend to complete it. I want to emphasise that these transitional measures are intended to be used on a limited basis. They are not intended for organisations that are merely late in applying for registration. We do not want to see a situation where organisations that have submitted their applications in good faith, and that, for reasons beyond their control, find that the registration process has not been completed by 1 July, then discover that their tax-exempt status is at risk.

[60] In the same debate, the Hon Ruth Dyson commented on the transitional definition in the following terms:¹⁸

... It is a very limited discretion, and it is very important that charitable organisations that are considering registering, or are in the process of registering, with the commission recognise that the discretion is very limited. The provision gives the Commissioner of Inland Revenue discretion to ensure that an organisation that has started the application process to register as a charitable organisation before 1 July, and that intends to complete the application but for reasons beyond its control has not been able to do so, will not have its tax-exempt status nullified. So it is a very limited discretion. ...

[61] The Commissioner has taken the view that, during the period of deregistration, NCW did not come within either para (a) or (b) of the definition in subs (5). It follows that the Commissioner considered NCW was correct to account for income tax throughout the period in which it was deregistered, because that income was not exempt.

[62] NCW elected to pay the tax without prejudice to its entitlement to dispute that it was payable. It embarked on the dispute process under the Tax Administration Act by lodging a Notice of Proposed Adjustment, to which the Commissioner provided a Notice of Response. Thereafter, there was an agreement to truncate the

¹⁷ (29 May 2008) 647 NZPD 16263.

¹⁸ (29 May 2008) 647 NZPD 16269–70.

remaining steps in the dispute process, and NCW commenced proceedings in the High Court to pursue its challenge to the assessments.

[63] If NCW were not entitled to the order I have made backdating its reregistration to the date of its deregistration, then it would pursue relatively confined arguments of statutory interpretation, contending that it nonetheless remained within the definition of a tax charity throughout the period of its deregistration.

[64] In argument, Ms Barker accepted that NCW qualified as a tax charity under para (a) of the definition from 30 June 2008 (the date to which its registration was backdated when it was first granted) until 19 August 2010 (when NCW was deregistered as a charity).

[65] Thereafter, Ms Barker argued that NCW was a tax charity within the terms of para (b) of the definition. She argued that NCW had started to take reasonable steps in the process of preparing an application for registering NCW as a charity before 1 July 2008, and intended to complete the process of applying for registration. Although it had received a letter asking that it pay income tax, NCW had not been notified by the Commissioner that it was not a tax charity.

[66] The Commissioner rejected the breadth of interpretation of para (b) relied on by NCW. The Commissioner characterises the paragraph as a transitional provision that applies far more narrowly. First, subpara (i) relates to entities that were taking reasonable steps towards the completion of an application before 1 July 2008, but had not completed such an application and lodged it with the Commission. Secondly, subpara (ii) confined the initial category of entities to those that demonstrated an intention to complete the process (that was incomplete on 1 July 2008) by pursuing completion of that application. Thirdly, subpara (iii) excluded from that confined category entities that had been notified by the Commissioner that she treated that entity as not being a tax charity.

[67] The rationale for this approach to the scope of the transitional provision in para (b) is that an extension for entities not registered from 1 July 2008 was only

necessary in relation to entities that had not completed their application by the date on which the new criteria for exemption from income tax liability came into force. For all entities that had completed their application before 1 July 2008 (such as NCW), the position was protected by the power for the Commission to backdate the date of registration to the date on which the entity's application had been lodged.

[68] The Commissioner rejected the wider interpretation contended for by NCW because it did not accord with the statutory purpose of the transitional provision, given that NCW had done more than start the process of making application before 1 July 2008, and had indeed completed its application. Further, once NCW was registered, backdated to 30 June 2008, it could not bring itself within para (b) of the definition when clearly it was covered by (a) and the two forms of definition were intended to be mutually exclusive. Once it had qualified as a tax charity for a period under para (a), the structure of para (b) was clearly excluded: NCW could not claim that it intended to complete the process of preparing the application it had begun before 1 July 2008 when it had completed that application and received the positive answer it had sought.

[69] During the hearing, I indicated a provisional view that the "reasonable steps" contemplated by subpara (i) could include interactions between an applicant and the Commission after the application had been lodged. However, on reflection, such further steps cannot have relevance if the scope of applications to which the transitional provision relates is confined to those that are in the course of being prepared but which had not been lodged by 1 July 2008.

[70] There is an artificiality in the broader scope of para (b) that Ms Barker contended for. NCW cannot accurately be described as having taken reasonable steps in the process of preparing an application before 1 July 2008 when it had in fact completed and lodged the application prior to that date. Furthermore, it is artificial to treat NCW as having an intention to complete the process of preparing an application from 1 July 2008, when the product of that work was already lodged with the Commission.

[71] The argument is obviously advanced because of the anomalous position NCW has found itself in. From 4 June 2009, it was inarguably outside the scope of the transitional provision in para (b) because it was registered, backdated to 30 June 2008. Continuity of its entitlement to status as a tax charity under para (a) of the definition depended on its continued registration thereafter. If it subsequently became deregistered, then it was not entitled to assert continuing status as a tax charity unless and until it successfully appealed the deregistration decision, on terms backdating the reregistration to the date of deregistration.

[72] Given that structure, there are no circumstances in which it could reasonably be contemplated that the transitional provision in para (b) of the definition would be resurrected. Accordingly, I reject the interpretation of the definition of tax charity contended for on behalf of NCW and uphold that contended for by the Commissioner. It is not necessary to determine whether the Commissioner was required to notify NCW that its deregistration meant that it was no longer a tax charity or whether, in any case, notice in effect was given.

Commissioner's discretion?

[73] The alternative approach to the tax liability urged by Ms Barker was that in the event of any doubt about the scope of application of the transitional provision in s CW 41(5)(b), it was consistent with the purposes of the Act and the IT Act to exercise that discretion in favour of NCW, so as to recognise its status as a tax charity throughout the period of its deregistration.

[74] As Mr Marshall's submissions pointed out, the source of any such discretion was not specified in Ms Barker's submissions. The Commissioner's duty is to collect the correct amount of tax, the liability to tax having been imposed by the statute and the Commissioner's task being to exercise her statutory powers to quantify the liability and collect the largest net amount of tax revenue over time.

[75] Those obligations are spelt out in ss 6 and 6A of the Tax Administration Act 1994. The relevant provision in s 6A is as follows:

6A Commissioner of Inland Revenue

...

- (3) In collecting the taxes committed to the Commissioner's charge, and notwithstanding anything in the Inland Revenue Acts, it is the duty of the Commissioner to collect over time the highest net revenue that is practicable within the law having regard to—
- (a) the resources available to the Commissioner; and
 - (b) the importance of promoting compliance, especially voluntary compliance, by all taxpayers with the Inland Revenue Acts; and
 - (c) the compliance costs incurred by taxpayers.

[76] Criticisms of the Commissioner for not exercising a discretion in favour of NCW were addressed in the correspondence leading to these proceedings. In a letter from senior tax counsel at Inland Revenue to Ms Barker dated 20 August 2013, the Commissioner's position was stated as follows:

We are very sympathetic to the Council's position. However this does not change the fact that there is no discretion in section CW 41(5) to allow a care and management solution under section 6A of the Tax Administration Act 1994 for the Council along the lines proposed. The Council was not registered by DIA-Charities during the period at issue as the legislation dictates in order that it might claim tax exemption. To ignore this would amount to asking the Commissioner *either* to ignore the clear wording in the legislation *or* to read additional words into the legislation which are not there. In other words, the Commissioner must act "within the law". It is clear that section 6A doesn't allow this and the Commissioner cannot use this section to ignore or re-write the law.

[77] During argument, I tested Mr Marshall on the inefficiency of the Commissioner committing what must necessarily have been multiples of the extent of tax involved in defending the assessment. Ultimately, however, I accept the correctness of the Commissioner's position as articulated in the letter quoted above. The Commissioner does not have a discretion to disregard the law.

[78] Accordingly, if I am wrong in backdating the reregistration of NCW to the date it was deregistered, then I would dismiss NCW's tax challenge.

Result

[79] The relief sought in the appeal is granted. This Court has the power on appeal to make an order extending the backdating order previously made to the date of deregistration. I am satisfied that such an order is justified in the circumstances of this case. That outcome renders relief in the challenge proceedings unnecessary.

[80] I have also found that:

- (a) the relief sought by NCW is not within the scope of s 20(2)(b) of the Act;
- (b) during the period of deregistration, NCW did not come within either para (a) or (b) of the definition in CW 41(5) of the IT Act; and
- (c) it is not within the Commissioner's discretion to nonetheless treat NCW as a tax charity during the period of deregistration.

Costs

[81] The CRB was not formally a respondent to the appeal, but has taken a full role in defending its earlier decision, and in denying that the Court has any wider powers to alter the outcome. My provisional view is that NCW is entitled to costs and relevant disbursements against the CRB, which I would be minded to fix on a 2B basis.

[82] In terms of the challenge proceedings, NCW may be seen as having a win that is in effect by default so far as the Commissioner is concerned. On the issues on which NCW criticised the Commissioner's stance, NCW has failed. In those circumstances, my provisional view is that costs on that appeal ought to lie where they fall.

[83] I invite counsel to confer on costs issues in light of these provisional views. If agreement cannot be reached and if any party contends for a different outcome as to costs, then memoranda may be filed. That should be first by the party seeking a

different solution, and then by others adversely affected by that proposition. Such memoranda are to be filed within 15 and 20 working days respectively of issue of this judgment.

Dobson J

Solicitors:

Sue Barker Charities Law, Wellington for appellant/plaintiff

Crown Law, Wellington for Charities Registration Board and Commissioner of Inland Revenue