THE CHARITY LAW ASSOCIATION OF AUSTRALIA AND NEW ZEALAND IN CONJUNCTION WITH CHARTERED ACCOUNTANTS AUSTRALIA AND NEW ZEALAND

PERSPECTIVES ON CHARITY LAW, ACCOUNTING AND REGULATION IN NEW ZEALAND

A VIEW FROM THE BENCH

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[1] You'll see that the title of my talk today is "A view from the bench". But before I speak to you about the view, I thought I should begin with a bit of context about the "bench" itself.

[2] First, and as you may or may not know the High Court bench in NZ presently comprises (as of yesterday) 39 judges. Although the majority of us have previously been litigators of one sort or another, we have criminal lawyers who have done few, or no, civil cases. We have commercial litigators who have never done a jury trial. As well, we have had commercial practitioners who have never stepped foot inside a Courtroom. We have had academics. And just recently we have been joined by NZ's former Permanent Representative and Ambassador to the United Nations. So we are a varied bunch.

[3] Secondly, the High Court is a Court of general jurisdiction. We are all expected to do a bit of everything. None of us are or would want to be specialists. Variety is one of the pleasures of the job.

[4] When it comes to charities law, we then need to add into that generalist mix the fact that very few charities cases come our way. Before coming here today I did a rough and ready count of the number of substantive registration or deregistration appeals that have been determined since the passage of the 2005 Act and it seems to average out at about one a year, although as it happens I think the Family First appeal is being heard next week. So I guess that means that an individual High Court Judge has about a 3% chance of being assigned such a case in any given year and, indeed, in my nearly 9 years on the bench, I have dealt with only one such appeal. Added to that, though, are cases involving disputes over charitable bequests

in wills and under the Charitable Trusts Act and I have dealt with a few of these. By and large, though, they don't tend to raise what I would call charities law issues, strictly so-called.

[5] There are, I think, two preliminary points that arise from all of this. The first is that you are entitled to ask yourselves what I am doing here at all and I must say I have asked myself that question as well. And the second is a much wider question, perhaps, about whether or not there are impediments to charities disputes being litigated. I suspect that many of you will be better placed than I am to say whether the paucity of appeals is because the Board routinely gets it right or whether it is because many charitable or would-be charitable organisations simply do not have the wherewithal or, perhaps, the temperament, to engage in High Court litigation. Or maybe there are just not that many decisions in which the Board decline to register or deregister. I'm sure there are people here who could answer those questions. So the only other thing I will say about this is that if it *is* wholly or partly a question of cost, of time and money, then that must be cause for concern not only from an access to justice point of view, but also because it is through the courts (by which I mean not just the High Court but also the CA and the SC) that the law of charities – or more specifically the law of charitable purposes - is developed. And if one thing is clear from a survey of the cases in this area it is that the notion of charitable purposes need to be responsive to all sorts of changes in society, to changes in prevailing beliefs and mores, structural changes and changes in social policy and in tax policy. As Judges have often remarked, the proposition that 400 year old English ideas about what charity was, might still dictate important matters of social and fiscal policy today simply cannot be right.

[6] Now I've already referred to my lack of charities expertise and I want to reiterate that again now. I suspect everyone in this room knows a good deal more about that subject than I. But what I can, perhaps, do this afternoon is to offer a few observations that arise out of my limited exposure to this area of law as a result of my involvement in what I think is commonly referred to as the FAAR or the cryonics case. For anyone here who does not know, cryonics involves the freezing of people who have died in the hope or expectation that they will one day be able to be revivified. In my decision, I found that the Board had been wrong to refuse to register two organisations whose purposes were associated with funding research into cryonics and related matters and that those purposes did qualify as charitable under the advancement of education head.

[7] I do not, today, intend to focus on the substantive reasons for my decision; anyone who wants to it I'm sure can still read it on line. Rather, what I'm going to talk about are a couple of matters arising from it that I would suggest are of particular interest to Courts. The first relates to the question of evidence and the second relates to the question of parties. You will, I am sure, appreciate that the Court process is inherently concerned with matters of proof and also with ensuring that both sides of any dispute that it is required to determine are represented and argued.

[8] As far as evidence is concerned, the obvious starting point is that registration as a charity under the Act turns on an applicant being able to show the existence of a charitable purpose (as defined) and the existence of the requisite public benefit. Whether or not the purposes of a particular body fall within one of the four traditional heads of charity referred to in the s 5 definition is a mixed question of law and fact. And the existence or not of a public benefit is essentially a question of fact.

[9] The other main area in which evidence may be required is in relation to the specific obligation contained in s 18(3) of the 2005 Act, namely that in considering applications for registration regard must be had to the activities of the entity concerned. The point of that enquiry was something I talked about in the cryonics decision. It seems to me that *activities* are most likely to be relevant either where an applicant's founding documents or rules are unclear as to its purposes of where there is reason to believe that its activities are not consistent with its stated charitable purpose. But again, it is a matter that invites evidence.

[10] Ordinarily, Courts require facts to be established by proof. But it has long since been accepted that *some* truths in relation to charitable purposes and/or public benefit are self-evident and, so, do not *need* to be the subject of additional (or traditional) proof. As Lord Wilberforce said in the Scottish cremation decision, in some cases "the facts speak for themselves". And often those "facts" will simply be those which are to be found in the stated purposes of the entity concerned; the objects articulated in the entity's rules or founding documents – the trust deed or the constitution or whatever.

[11] And judicial notice may be taken of other matters, too, in lieu of evidence. For example, in the cremation case the Court noted that the fact of Parliament's involvement in, or regulation of, a particular activity may provide a guide as to whether the promotion of that activity is for

a public benefit. Perhaps an obvious example is an organisation whose object is to promote or protect one of the fundamental human rights that Parliament has recognised and confirmed in the NZBORA – by definition one would have thought that that was, at least *prima facie*, an endeavour intended to advance the public good.

[12] So on what occasion might further information or evidence be required? I can think of several. First, there are the cases where the usual facts do not so obviously speak for themselves. Cases where the stated purposes are unclear or where they are clear but potentially controversial. The cryonics case was, arguably an example of that kind of case, or at least that is what vexed the Board about it. And then there are cases involving entities whose purposes are what might be termed value laden. Family First is that sort of case.

[13] One of the main reasons why those kinds of case require evidence is, I think, because Judges today are, quite rightly, much more reluctant than their forebears simply to apply their own personal (or even majoritarian) ideas about what constitutes a charitable purpose or what might be of benefit to the public. That is particularly so in areas where notions of morality, matters of religion, questions of artistic taste or of scientific merit are at play. In the pluralistic society in which we now live such matters, and their value, are all properly regarded as inherently contestable. And given the flow on financial benefit that charitable status potentially yields it is right that these things *are* in fact contested. Conversely, those applying for registration are entitled to expect that such a contest will be fair and objective; that their applications will not be determined on the basis of subjective personal views or beliefs of the decision-maker. The analysis required can *only* be based on evidence.

[14] Perhaps a paradigm example of all of this in action is the Centrepoint case from 1985. As I'm sure you know the issue there was whether the Centrepoint Community Growth Trust (which we now know to have essentially been Bert Potter's cult) was entitled to charitable status such that it would be exempt from conveyance duty on land it had purchased under the Stamp and Cheque Duties Act. The purposes of the trust were, inter alia (quote) "to assist the efforts of our fellow man to advance the spiritual education and humanitarian teaching of all the messengers of god, and in particular of Herbert Thomas Potter; to establish centres for the teachings of the faith; to organise and conduct seminars and workshops to enable the participants to increase their spiritual awareness; to provide a counselling service for people in need of spiritual, psychological or emotional assistance".

[15] Rereading the High Court decision today one can see how evidence played a central role in the Court's analysis. Mr Justice Tompkins noted that the manner in which the trust had been operating was relevant to his inquiry, which was surely right. Evidence was called on behalf of the Trust about that from a number of witnesses, including Mr Potter. In relation to what much later turned out to be a critical issue – namely the Trust's attitude to sex and the children in its care, the Court said:

> There was considerable cross-examination of the witnesses concerning attitudes towards sex as practised by members of the trust and as taught by Mr Potter. There was also reference to aspects of sexual behaviour amongst the children at Centrepoint.
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> Concerning children, the attitude and Mr Potter's teaching is that children should be allowed to grow up from birth through adolescence having sexual experience appropriate to their own age level. Therefore behaviour of a sexual nature between children of any age should be accepted as normal and neither discouraged nor encouraged. Consistent with this approach children are allowed to play games with each other and if those games involve sexual playing and learning, then no restriction would be imposed. Although Mr Potter expresses the view that sexual freedom and sexual experimentation are moral not legal issues, it was not suggested that the attitudes to which I have referred are in any way illegal. They may be regarded by many of the wider community as immoral and therefore wrong. Mr Ruffin for the Commissioner, invited me to find that the attitude of members of the trust towards activities of a sexual nature by children is harmful to the children. It may well be so regarded by many people, but I am not prepared to hold, *without any evidence from qualified persons in support*, that it must necessarily be so. Just as some members of the community may regard this behaviour as harmful, I have no doubt that there are others - amongst them the members of the trust - who would regard this attitude towards sex amongst the young as beneficial.
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> …
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> I do not find the sexual attitudes of members of the trust to be significant in deciding the issue before the Court. Mr Ruffin, apart from suggesting possible detriment to children - a suggestion as I have indicated I am not prepared to accept without evidence to that effect - did not submit otherwise.

[16] There are a number of reasons why this decision is instructive. First it is, I think, a good example of the point I made earlier, namely that Judges today are no longer willing to base decisions about charitable purpose or public benefit on their own world view. I would suggest that a 19th century judge might simply have rejected out of hand and without evidence many of the propositions advanced on behalf of Mr Potter in that case. But secondly it arguably highlights the importance of evidence – not just for the would-be charity, but for the organ of state seeking to interrogate or oppose the conferment of charitable status. While one cannot be sure of the outcome had the Commissioner called expert evidence of his own, there would at

least have been some chance that the undoubtedly illegal and distinctly uncharitable practices of the Trust would have come to light much earlier than they did.

[17] So. What then does the 2005 Act say about evidence? The answer appears to be – well - nothing. In fact, the word evidence does not appear once in the Act. Rather, s 18 focuses on the provision of *information* to the Board. It is unspecific as to both the source or form of that information and as to whether or how such information might be tested. As noted in the cryonics decision there is arguably an implication that the information is limited to information that is provided by the applicant. In that respect the Charities Services website says that an applicant for registration will need to provide: "detailed information including charitable purpose, funding sources, activities and benefits". And s 18(2) also provides that *further* information may be requested from an applicant.

[18] Now I accept entirely that the registration system must be both simple and flexible enough to ensure that entities seeking to be registered are not put to unnecessary cost in the registration process. Equally, those determining the applications should not be bound to some formal process which may, in many cases, also be unnecessary. But I would suggest that the Act is deficient in not making it clear how other, less straightforward, cases are to be dealt with. How is the Board to interrogate the information it receives? Can the Board make his own inquiries? Surely it should be able to – it cannot reasonably be assumed that every applicant will necessarily provide impartial or full information about its purposes and activities. Again, Centrepoint comes to mind.

[19] If own motion inquiries are in fact initiated, of whom may they be made? Can expert assistance be sought on questions of science or artistic merit. Or on the kinds of psychological matters at issue in Centrepoint? I do not know if there is funding for that. Is it OK for the Board instead to resort to the internet (as it did, I think, in both the cryonics case and in Greenpeace)? If it is or if it does, how are the fruits of such searches to be tested? What quality control mechanisms are applied? Although the s 18 obligation to comply with natural justice would necessarily require that any information obtained from such a search be put to an applicant, does that mean that an oral hearing, in some cases, might be required? Speaking as someone who is required to determine disputes on a daily basis, the value of oral hearings in contested matters – and indeed their relative expedition, in comparison with having to receive

and digest dense written submissions with no direct or immediate ability to interrogate them – cannot be underestimated.

[20] All these questions are made more acute by the fact that the Act also says nothing about *how* information is to be provided – there is no requirement, for example, that it be sworn. Nor does the Act seem to make it an offence to provide false or misleading information in a registration context (although it does when the inquiry power is being exercised).

[21] Most or all of these questions did not have to be asked prior to the commencement of the 2005 Act. As I'm sure you all know, and as the Centrepoint case shows, it then largely fell to the Commissioner of Inland Revenue to determine charitable status and she had available to her the detailed statutory regime governing tax disputes in the Tax Administration Act to assist her in that endeavour.

[22] The Act's failure to grapple with the question of evidence at first instance also has direct ramifications for appeals, for two reasons. First, the quality of the initial registration decision is obviously important. Whether or not the quality of the first instance decision-making is facilitated by the existence of clear processes and procedural safeguards cannot help but influence a judge's starting point, in terms of whether the decision that is being appealed is more likely to be right than wrong. If the process below seems all a bit hazy or ad hoc - and it is difficult, for example, not to see a decision-maker sourcing factual material from the internet in that way - then the starting point is more likely to be one of scepticism than of deference.

[23] The second relates to the appellate process itself. The appeal right contained in s 59 is broad; it is not (for example) limited to questions of law. It is quite clear from Part 20 of the HCR that such appeals are to be by way of "rehearing". But that does not mean or permit a greenfields approach. Rehearings proceed on the basis of the record below which, part 20 assumes, will include the "evidence" that was presented to or heard by the first instance decision-maker. What the Court is supposed to make of unsworn "information" is not clear to me. As well, further evidence is only permitted on appeal in limited circumstances, with the leave of the Court. Although it seems that the High Court has taken a relatively liberal approach to granting leave in charities cases I would suggest that that is arguably wrong in principle. Absent some specific provision authorising that course there is simply no reason why appeals brought under s 52 should be approached differently from other Part 20 appeals.

[24] All of this can usefully be contrasted, I think, with the position under the Charities Act 2011 in the UK. While the Act suggests that the Charities Commission's registration decisions proceed, as here, on the basis of "information" that is required to be provided, the advice published by the UK Charities Commission specifically refer to the need for *evidence* (as opposed to information) in relation to matters where there is doubt or divergence of views. For example in its published guidance entitled The Advancement of Education for the Public Benefit it states:

> If it cannot be shown by evidence (or a consensus of objective and informed opinion) that a subject or process is capable of being educational, benefit will not be proved.

[25] And importantly (from a Judge's perspective) the appeal provisions in the Act make it quite clear that – firstly – the Tribunal which hears the appeals is requitred to determine the matter *afresh* and – secondly – that evidence *not* available at first instance can be taken into account.

[26] This mention of the position in the UK brings me to my second (and final) topic today which is the question of parties. As I've already mentioned, prior to 2005, it was the Commissioner of Inland Revenue who was the contradictor in charities cases; it was she who argued the other side in Court.

[27] Again, however, the 20015 Act does not deal with the issue of parties to appeals at all. Again that question is, presumably, to be determined by reference to the general approach articulated HCR. And again the HCR are clear, but arguably not apt. They say that absent some specific statutory provision, the decision-maker from whom an appeal is brought is *not* to be named as a respondent, although it does have a right to appear and be heard on an appeal.

[28] This position has at least two significant consequences.

[29] First, the decided cases make it plain that any appearance by the Board should only be for the purposes of assisting the Court, rather than actively seeking to defend its own decision. The decision is meant to speak for itself. In most appeals the fact that the decision-maker is not a party and cannot actively defend its decision will not matter. Usually there *will* be a contradictor to an appeal because usually the first instance dispute is between two parties, who

will also be the parties on appeal. But that is not so in a charities registration appeal and this, too, turned out to be a bit of an issue in the cryonics case.

[30] And secondly the Board's lack of party status means that it has no right of appeal from a High Court decision.

[31] There are, I think, some serious flow-on effects from these two points.

[32] As to the Board's inability to appeal, the desirability of that appears to me to be highly questionable. What if a High Court decision makes a finding of wider application which the Board considers cuts across or confuses established practice. The Board is undoubtedly bound by such a finding. Ought the Board not be able to take the matter higher?

[33] And as to the absence of a real contradictor, our Court system is fundamentally adversarial. In simplistic terms it is predicated on both sides of an argument being put to the Judge and the Judge deciding between them. Believe me there is nothing worse as a Judge than having to decide something where only one side has made submissions – something that we most often have to grapple with in the context of formal proofs or in cases involving lay litigants. What it means is that the Judge then has to try and figure out what the other side might be. That is because our job is to endeavour to apply the law and get the answer right, not just rubber stamp what one side says.

[34] So who could or should, then, fill this gap in the law as it stands? Sometimes the absence of a defendant or respondent will result in the Court appointing an amicus or counsel to assist; the cost of doing so is usually a cost borne by the Crown. Surely that should not be necessary.

[35] Now if the legislation specifically provided for it, then the Board *could* participate more actively; the 2011 Act in the UK requires that the Charities Commission be named as the respondent to all registration appeals. The Act therefore contemplates that the Commission *can* enter the fray. Presumably this is not seen as problematic because an appeal under that act effectively requires a de novo hearing and may involve new evidence. It makes sense that the Commission would not, then, simply be defending its own decision; it could genuinely be arguing the other side afresh.

[36] Another related point of note about the UK Act is that it provides that the Attorney-General can, him or herself, bring an appeal from a decision of the Commission or, indeed, refer a matter of his or her own motion to what is called the first tier Tribunal. The Act also contains express provisions permitting intervention by the Attorney in an existing appeal – either at the request of the charity or the Commission or of his or her own motion. And in terms of further appeals – to either the Upper Tribunal or to the Court of Appeal – the Act says that the Attorney (as well as the Commission) is *always* to be treated as having been a party to the first appeal.

[37] No doubt as a reflection of the gap I have identified in the New Zealand legislation, the Courts have taken to directing service on the Attorney-General of appeals under the 2005 Act. The Attorney-General of NZ is the protector of charities just as the Attorney-General of the United Kingdom is. But to my knowledge he has never then taken steps in such an appeal. I acknowledge that that may not be appropriate in ordinary cases – it is not the Attorney-General's job simply to fill a gap by acting as contradictor. But why he did not intervene, for example, in the Greenpeace litigation – where a change in the common law was clearly being signalled - is a mystery to me. Apart from anything else, intervention or participation by the Attorney-General sends quite a signal to the Court – that the matter at issue is important (which in Greenpeace it surely was) and is being taken seriously by the Crown.

[38] So that is it, really. My own rather selfish thoughts about how charities litigation might better be facilitated here and about what my own limited experience suggests are deficiencies in the present Act. The issues I have discussed may already be well known to you all. But I trust it does not hurt to reiterate them, particularly at time when, as I understand it, there is a pending review of the 2005 Act.