



APPEALING DECISIONS OF THE CHARITIES REGULATOR

Paper prepared for the Auckland District Law Society Seminar

CHARITY BEGINS AT...DEVELOPING PERSPECTIVES ON CHARITY LAW

1 and 3 April 2014

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INTRODUCTION

1. This paper is divided into 5 parts:
 - (a) First, we look at the development of the law of charities, to put the mechanism for appealing decisions of the charities regulator in context;
 - (b) then we look at the appeal mechanism itself: section 59 of the Charities Act 2005 (“**the Charities Act**”);
 - (c) then we consider how that statutory appeal mechanism is currently being interpreted,
 - (d) before looking at some issues with the statutory appeal right, both as it currently is and as it is currently being interpreted, together with some strategies for dealing with them;
 - (e) finally, we consider some developing perspectives.
2. First, a disclaimer: certain matters in this context are *sub judice*. What follows is therefore a discussion of general principle based on existing case law.
3. Also, for ease of reference, we have listed in Appendix B some of the abbreviated terms we have used in this paper.

THE DEVELOPMENT OF CHARITIES LAW

4. The definition of charitable purpose resides in the common law: while it is defined in statute (for example section 5 of the Charities Act and section YA 1 of the Income Tax Act 2007 (“**the Income Tax Act**”),) by reference to the 4 “heads” of charity, it is nevertheless an interpretative definition that draws on several centuries of case law. Reasonable minds can and do differ on the issue of what constitutes a charitable purpose.
5. Judicial consideration of the definition of charitable purpose is fundamentally important in interpreting whether any particular purpose is charitable. It is axiomatic that judicial consideration occurs through the mechanism of case law, that is, by individual charities challenging decisions of the charities regulator. Charities law cases are seldom, if ever, purely a discrete matter relevant only to the particular charity at issue: charities law cases interpret and develop charities law for the benefit of all those who look to, or are affected by, it for whatever reason. Charities law cases are truly “public interest litigation”.
6. It is also axiomatic that the definition of charitable purpose is not static. Concepts relating to charitable purposes generally, or to any particular kind, are constantly changing with changes in social and community attitudes (see *DV Bryant Trust Board v Hamilton City Council* [1997] 3 NZLR 342 at 348. See also *Centrepont Community Growth Trust v Commissioner of Inland Revenue* [1985] 1 NZLR 673, 679, citing *Inland Revenue Commissioners v McMullen* [1980] 1 All ER 588 at 884, 890, per Lord

Hailsham LC). Adam Parachin encapsulates the point as follows in “Common Misconceptions of the Common Law of Charity”, prepared for the conference on Defining, Taxing and Regulating Not-for-Profits in the 21st Century, Melbourne Law School, July 2012 at 22:

In 1923, the promotion of “good housewifery” through an annual award for the woman with the “best kept cottage” was held to be charitable (See *Re Pleasants, Pleasants v AG* (1923) 39 TLR 675). An evolving concept of charity allows charity law to move beyond such outdated and, to some, offensive purposes to include new charities better reflective of current social needs and values. It is assumed in the design of the system that as the meaning of charity evolves the new charities will beat out the old in the competition for annual donations.

7. However, unlike the Charity Commission for England and Wales, which has a number of quasi-judicial functions,¹ the New Zealand charities regulator appears to consider itself unable to develop the law of charities.² This means that the New Zealand law of charities will only develop through case law, that is, by individual charities challenging decisions of the charities regulator.
8. The interpretation of the definition of charitable purpose taken by the New Zealand charities regulator³ since the enactment of the Charities Act 2005 has been controversial.⁴ The Select Committee considering the Charities Bill had specifically recommended that the definition of charitable purpose be left unchanged (see Select Committee report, page 3). Despite this, many consider that the New Zealand charities regulator has indeed changed the law, narrowing the definition of charitable purpose significantly, causing hundreds of good charities to be denied registered charitable status.⁵
9. Some argue that the charities regulator has not in fact changed the law, but has

¹ See <http://www.charitycommission.gov.uk/about-the-commission/our-status/>.

² See for example the Charities Registration Board’s decision with respect to the Foundation for Anti-Aging Research, available at <http://www.charities.govt.nz/assets/docs/registration/declined/Foundation-for-Anti-Aging-Research.pdf>, page 13 paragraph 25: “The Board is bound to apply the law as declared by the Courts and the legislature.”

³ As expected, the approach to interpretation has not been materially affected by the disestablishment of the Charities Commission from 1 July 2012 and the transfer of its functions to the Department of Internal Affairs and the Charities Registration Board.

⁴ See for example the discussions in *Charity is a General Public Use*, J Bassett, [2011] NZLJ 60 at p62; *Moving the Charitable Goal Posts*, Mark von Dadelszen, NZLawyer magazine, issue 155, 11 March 2011 at 15 and 16; *Economic Development – Charitable?* Mark von Dadelszen, NZLawyer magazine, issue 156, 25 March 2011; *Charities Act Review*, S Barker and K Yesberg, NZLawyer magazine, issue 157, 8 April 2011 at 13; *Canterbury Development Case*, S Barker [2010] NZLJ 248 at 256; and *Charity and Economic Development*, Dr M Gousmett [2011] NZLJ 63 at 63.

⁵ See for example, Officials’ Issues Paper, *Clarifying the tax consequences for deregistered charities*, July 2013, http://taxpolicy.ird.govt.nz/sites/default/files/2013-ip-clarifying-tax-consequences-deregistered-charities_0.pdf, at page 10: as at November 2012, 3902, or approximately 15% of the 27,045 charities currently registered, have been deregistered since the charities register opened in February 2007. This figure does not include the many charities that have been declined registration (<http://www.charities.govt.nz/the-register/registration-decisions/>), or the many charities that will have been “burned off” by the process, and never made it on to the register at all. The threat of being deregistered or failing to obtain registration on the basis of fine legal distinctions that are by no means universally accepted is having a stymying and chilling effect throughout the New Zealand charitable sector.

simply applied more rigour to the process of considering whether an entity's purposes are charitable (see CAB SOC Min (12) 24/3 November 2012, paragraph 13).

10. However, the problem with the pre-Charities Act regime was not that the Inland Revenue Department's ("IRD's") approach to assessing whether purposes were charitable had lacked rigour. Where the previous regime had been found lacking was in *monitoring* those charities, to ensure that they continued to act in furtherance of those charitable purposes over time. This was the rationale for charities being required to submit annual returns under the new regime introduced by the Charities Act (Charities Act, section 41), and for the charities regulator being given specific power to inquire into charities (Charities Act, sections 50-55). This was also the reason the charities regulator was required to consider a charity's activities under section 18 of the Charities Act: so that such charities could be monitored to ensure they were continuing to act in accordance with their charitable purposes. The problem that was sought to be fixed by the new regime was monitoring, to address abuse of the privileges of charity by "bad" charities, not denial of entry to the regime by "good" charities.⁶
11. The charities regulator has argued in its defence that its decisions have been upheld by the Courts. As set out in Appendix A, of the 10 cases so far decided under the Charities Act, only 2 charities have been successful: Liberty Trust and The Plumbers, Gasfitters and Drainlayers Board.⁷
12. However, in fairness, this raises the question of whether the appeal right granted by section 59 of the Charities Act is providing an effective means by which charities can hold their regulator to account.
13. The original Charities Bill was introduced into Parliament on 23 March 2004, but was substantially rewritten at Select Committee stage in response to hundreds of submissions. National Party members of the Social Services Select Committee made the following comments in the Select Committee's report at page 20:

The consultation process was inadequate with the original [charities] bill and we have major concerns that the redrafted sections of the bill should have been made available for a further period of sector wide consultation. We all know the devil is in the detail and if the bill gets it wrong, as the first draft definitely did **the charitable sector will pay the price and we will see many charitable organisations close**. There is the possibility that there are a number of structural issues in the bill remaining unaddressed and without a further period of consultation with the sector it is difficult to fully identify these. [Emphasis added]

14. There are indeed a number of structural issues in the Charities Act as passed, and

⁶ See for example: Operational Statement OS 06/02 *Interaction of tax and charities rules, covering tax exemption and donee status*, paragraph 3; Charities Bill 108-1, tab 31, p1; Charities Bill – First Reading, NZPD Vol 616 30 March 2004, p12111, 12113, pp12116-12117; Charities Bill, NZPD Vol 625 12 April 2005, p 19952; *Canterbury Development Case*, S Barker [2010] NZLJ 248 at 250; *Moving the Charitable Goal Posts*, Mark von Dadelszen, NZLawyer magazine, issue 155, 11 March 2011 at 14; *Charities Act Review*, S Barker and K Yesberg, NZLawyer magazine, issue 157, 8 April 2011 at 11.

⁷ In the *Greenpeace* litigation, the Court of Appeal set aside the Charities Commission's decision declining to register Greenpeace as a charity, and ordered Greenpeace's application for registered charitable status to be referred back to the charities regulator for reconsideration in light of its judgment (*Re Greenpeace New Zealand Incorporated* [2013] 1 NZLR 339 (CA) ("**Greenpeace CA**"). The Court of Appeal's findings regarding the issues of advocacy and illegality are currently the subject of an appeal to the Supreme Court, as discussed in Appendix A.

many would argue that the New Zealand charitable sector is indeed paying the price. While some charities manage to survive non-registration, that is not always the case: many charities that are denied registration struggle to survive; they struggle to challenge decisions of the regulator in the framework as it is currently structured; they struggle to gain funding as busy funders rightly or wrongly restrict funding to registered charities only; they struggle with issues of confidence and credibility, as the reasons for having been rejected by their own regulator are difficult to communicate to their stakeholders. Many are indeed forced to close.

15. Increasingly, registered charitable status is the gateway to survival for a charity.
16. The problem will become even more acute if new tax provisions proposing to tax deregistered charities on the value of assets held come into force (they are proposed to come into force from as early as 1 April this year).⁸
17. All of this makes the interpretation of the definition of charitable purpose critically important: good charities with charitable purposes should be able to gain and retain charitable registration. In that regard, it is important that charities have an effective mechanism by which they can hold their regulator to account.

THE STATUTORY APPEAL RIGHT

18. The process set out in the Charities Act by which the charities regulator is to be held to account for its decisions is for charities to challenge those decisions in the High Court.
19. Sections 59-61 of the Charities Act relevantly provide as follows:

Appeals against decisions of Board

59 Right of appeal

- (1) A **person** who is aggrieved by a decision **of the Board** under this Act may appeal to the High Court.
- (2) An appeal under this section must be made by lodging a notice of appeal with the Registrar of the High Court in Wellington and with the Board within –
 - (a) **20 working days after the date of the decision**; or
 - (b) any further time **that the High Court may allow** on application made before or after the expiration of that period.
- (3) Every notice of appeal must specify –
 - (a) the decision or part of the decision appealed from; and
 - (b) the grounds of appeal in sufficient detail to fully inform the High Court and the Board of the issues in the appeal; and
 - (c) the relief sought.

60 High Court may make interim order pending determination of

⁸ See clause 19 of the Taxation (Annual Rates, Employee Allowances, and Remedial Matters) Bill, proposing to insert a new section CV 17 into the Income Tax Act. The Bill is currently before the Finance and Expenditure Select Committee, with its report due by 10 June 2014.

appeal

- (1) *At any time before the final determination of an appeal, the High Court may make an interim 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 remain registered in the register of charitable entities.*
- (2) *The specified date may be a date that is before or after the order is made.*
- ...
- (4) *An interim order may be subject to any terms or conditions that the High Court thinks fit.*
- ...

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; or*
 - (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.*
- (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;*
 - (b) *to be restored to the register of charitable entities with effect from a specified date;*
 - (c) *to be removed from the register of charitable entities with effect from a specified date;*
 - (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.***

20. The appeal right is therefore contained in section 59, with section 61 giving the High Court wide powers to make such orders as may be necessary to justly dispose of the

appeal.⁹

21. It can be seen that statutory appeal mechanism does not prescribe any procedure for dealing with evidence. As discussed below, this is of particular significance because the question of whether a purpose is charitable often turns on questions of fact. This can be seen from an analysis of the test for whether a purpose is charitable.

The charitable purposes test

22. The common law test for whether a purpose is charitable was set out by the Court of Appeal in *Latimer v Commissioner of Inland Revenue* [2002] 3 NZLR 195 (CA) ("**Latimer CA**")¹⁰ at [32] as follows:
- (i) Is the purpose for the public benefit; and if so,
 - (ii) Is it charitable in the sense of coming within the spirit and intendment of the preamble to the Statute of Charitable Uses Act 1601 (43 Eliz c4) ("**the preamble**").
23. The first limb, the "public benefit test", is not directly referred to in the statutory definitions of charitable purpose, but it is imported as a key element of the charitable purposes test through the medium of the common law.
24. The "public benefit test" comprises two parts: a "benefit" limb, and a "public" limb. It asks, firstly, whether the purpose is beneficial to the community, and secondly whether the class of persons eligible to benefit constitutes the public, or a sufficient section of the public.¹¹
25. With respect to the "benefit" limb, the question whether a purpose will or may operate for the public benefit "*is to be answered by forming an opinion on the evidence.*"¹²
26. The question of whether a purpose is beneficial to the community may be approached in 3 stages:¹³
- (a) There is no need for any proof of public benefit if, to use the words of Lord Wilberforce in *Scottish Burial Reform and Cremation Society Ltd v Glasgow Corporation* [1968] AC 138 (HL) ("**Scottish Burial Reform**") at 156, "*the facts speak for themselves*". In many classes of case, the existence of public benefit will be readily assumed and, in some cases, a purpose may be "*so manifestly*

⁹ See *Travis Trust v Charities Commission* (2009) 24 NZTC 23,273 (HC) ("**Travis Trust**") at [15] per Joseph Williams J.

¹⁰ This point not in issue on appeal, *Latimer v Commissioner of Inland Revenue* [2004] 3 NZLR 157 (PC).

¹¹ *New Zealand Society of Accountants v Commissioner of Inland Revenue* [1986] 1 NZLR 147 (CA) at 152. See also *The Commissioner of Taxation v The Triton Foundation* [2005] FCA 1319 at [21]-[22], and *Tasmanian Electronic Commerce Centre Pty Ltd v Commissioner of Taxation* [2005] FCA 439 at 50, referred to with approval in *Re Queenstown Lakes Community Housing Trust* [2011] 3 NZLR 502 (HC) ("**Queenstown Lakes**") at [63]-[67], and *Canterbury Development Corporation v Charities Commission* [2010] 2 NZLR 707 (HC) ("**CDC v Charities Commission**") at [42]-[43] and [61]-[65]. See also *Re Education New Zealand Trust* (2010) 24 NZTC 24354 (HC) ("**Education New Zealand Trust**") at [25].

¹² See *McGovern v Attorney-General* [1982] 1 Ch 321 at 333, *Molloy v Commissioner of Inland Revenue* [1981] 1 NZLR 688 (CA) at 695 and *Scottish Burial Reform and Cremation Society Ltd v Glasgow Corporation* [1968] AC 138 at 156 per Lord Wilberforce.

¹³ See *Latimer v Commissioner of Inland Revenue* [2002] 1 NZLR 535 (HC) ("**Latimer HC**") at [83].

beneficial to the public” that it would be “*absurd to call evidence on this point*”.¹⁴ The Court of Appeal decision in *Commissioner of Inland Revenue v Medical Council of New Zealand* [1997] 2 NZLR 297 (CA) is arguably an example of the application of this approach – there was no direct evidence before the Court that a benefit to the public arose from the maintenance of a Register of Medical Practitioners;¹⁵

- (b) Parliament’s involvement in, or regulation of, an activity may provide a guide as to whether the promotion of an activity is for a public benefit – again the *Scottish Burial Reform* case illustrates this;¹⁶
 - (c) On rare occasions, direct evidence of public benefit may be required.¹⁷
27. Public benefit has been described as having an elusive quality, not always open to sound reason, but “*often plainly recognised when it exists*”.¹⁸ The public benefit test is a key area of controversy in current interpretations of the definition of charitable purpose. In establishing whether their purposes are charitable, charities may and often do need to prove critical matters of fact.
28. In that regard, the importance of evidence should not be underestimated: cases are often “won and lost on the evidence”.

History of the statutory appeal right

29. In considering the appeal mechanism, and the importance of evidence in charities law cases, it is relevant to consider the history of the statutory appeal right, and where the jurisdiction has come from.
30. Prior to the introduction of the Charities Act, charities law cases often arose in the context of the income tax legislation, in particular whether an entity’s income was eligible for exemption under the charitable income tax exemptions (currently sections CW 41 and CW 42 of the Income Tax Act). An example of this is the *Latimer* litigation,¹⁹ in which the Privy Council ultimately found the income of the Crown Forestry Rental Trust to be exempt from income tax, on the basis that it was derived in trust for exclusively charitable purposes.
31. As was the case in *Latimer*, disputes arising under the income tax legislation fall to be determined under the statutory tax disputes process:²⁰ Part 4A of the Tax Administration Act 1994 (“**the Tax Administration Act**”) requires issues, facts, evidence and propositions of law to be thoroughly canvassed through notices of proposed adjustment, notices of response and statements of position, before a matter

¹⁴ See *McGovern v Attorney-General* [1982] 1 Ch 321 at 333, *Molloy v Commissioner of Inland Revenue* [1981] 1 NZLR 688 (CA) at 695 and *Scottish Burial Reform and Cremation Society Ltd v Glasgow Corporation* [1968] AC 138 at 156 per Lord Wilberforce.

¹⁵ See *Latimer HC* at [83].

¹⁶ *Scottish Burial Reform and Cremation Society Ltd v Glasgow Corporation* [1968] AC 138 at 150 and *Latimer HC* at [83].

¹⁷ See *Latimer HC* at [83].

¹⁸ *Strathalbyn Show Jumping Club Inc v Mayes & Ors* [2001] SASC 73 per Bleby J at [97].

¹⁹ *Latimer HC*, *Latimer v Commissioner of Inland Revenue* [2002] 3 NZLR 195 (CA) (“**Latimer CA**”) and *Latimer v Commissioner of Inland Revenue* [2004] 3 NZLR 157 (PC).

²⁰ See *Latimer HC* at [29]-[30].

even proceeds to litigation.²¹ Even then, only an *outline* of the facts and evidence are required,²² and if the matter does proceed to Court, evidence is not prevented from being adduced simply because it was not provided earlier:²³ even after a full disputes process, taxpayers are not restricted in the evidence they can produce in challenge proceedings to evidence that had been previously provided.²⁴ Taxpayers are also able to avail themselves of the processes of discovery and inspection in any such challenge.

32. Accordingly, in the pre-Charities Act regime, charities were entitled to a full hearing of evidence as part of the process of establishing that their purposes are charitable.²⁵
33. In the Charities Bill as originally introduced, appeals against decisions of the charities regulator were to be to the District Court, whose decision was to be final (see Charities Bill 108-1, pp38-41 (clauses 67-69)). Such an appeal would normally be conducted as a first instance *de novo* trial, which would include a full hearing of oral evidence if any party so insisted.²⁶
34. However, the original Charities Bill was substantially rewritten at Select Committee stage in response to hundreds of submissions.²⁷ With respect to appeals, submitters were concerned that to restrict appeals to the District Court, whose decision was to be final, would significantly impede the development of the common law of the definition of charitable purpose: submitters were concerned that charities should continue to have recourse to the highest court in the land on this important issue. Submitters were also concerned that as the definition of charitable purpose resides in equity, the High Court rather than the District Court, would be the most appropriate forum for hearing appeals in the first instance. The appeal mechanism was accordingly changed to the current formulation at select committee stage (see Charities Bill 108-2 pp63-67 and 13-14).
35. The final amendments to the Charities Bill were passed under urgency, without real consultation.²⁸ The comment was made that “*We do not really know what we are*

²¹ See the Tax Administration Act, sections 89A(1)(a), (b) and (d), 89F(2), 89G, 89M(4) and (6B), and 138G. See also Standard Practice Statement *SPS11/05: Disputes resolution process commenced by the Commissioner of Inland Revenue*, Tax Information Bulletin Vol 23 No 9 November 2011 pages 16-19, paras 5-7, 14-18, 237, 241, 262, and 269-281.

²² Refer section 89M(4) and (6) of the Tax Administration Act.

²³ The “evidence exclusion rule” in section 138G of the Tax Administration Act has since been renamed the “issues and propositions of law” exclusion rule.

²⁴ See also *Latimer HC* in particular paras [16], [24], [28]-[30], [52], [89], [97], and [132] for an example of this.

²⁵ It should be noted that IRD’s administration of the charitable income tax exemptions is not displaced: as a general rule, Charities Act registration is a necessary but not sufficient condition for eligibility for the income tax exemptions in sections CW 41 and CW 42 of the Income Tax Act.

²⁶ See *Shotover Gorge Jet Boats Ltd v Jamieson* [1987] 1 NZLR 437 (CA) (“**Shotover Gorge**”), considering section 5 of the Lakes District Waterways Authority (Shotover River) Empowering Act 1985, at 440, line 15: “*There can be no doubt that the District Court **was intended to hear the case de novo**, which would include a **full hearing of oral evidence if any party so insisted**. That is the normal way in which the District Court exercises its civil jurisdiction*”. [Emphasis added]

²⁷ See for example Charities Bill, NZPD Vol 625 12 April 2005, p19944: “*The committee received 753 submissions...there has been a virtual rewrite of the original bill*”.

²⁸ Charities Bill 108-2, p21 per Green Party members: “*It became obvious during the hearing of submissions that the bill – as tabled – was fundamentally flawed. Further it is very disappointing that an open and robust consultation process over the considerable changes to the bill was not undertaken...The bill as drafted presents a*

passing tonight or what the implications are".²⁹ However, no doubt comfort was taken from what is now section 61(4) of the Charities Act, which empowers the High Court to make "any order that it thinks fit" in the determination of an appeal. There is certainly nothing to indicate any intention on the part of the legislature that charities' ability to have a hearing of evidence was intended to be removed.

INTERPRETATION OF THE STATUTORY APPEAL RIGHT

36. However, consistently with the narrow approach taken to the definition of charitable purpose, the appeal right under section 59 of the Charities Act is also being interpreted very narrowly.
37. In *Canterbury Development Corporation & Ors v Charities Commission* [2010] 2 NZLR 707 (HC) ("**CDC v Charities Commission**"), Ronald Young J made the following comments at [104]-[107]:

[104] *In this appeal, the appellant and respondent both filed affidavits dealing with factual matters relevant to the applications. Further, the adjudicative body, the Commission, was named as a respondent in these proceedings.*

[105] *This is an appeal from a decision of the Commission. As such the relevant factual material before the Commission, when it made its decision, would typically be brought before this Court by an agreed bundle of documents. If either party wished to provide further factual material to the Court then this would ordinarily be by way of an application for leave to bring the evidence with the necessary justification (r 20.16(2)-(3) of the High Court Rules).*

[106] *It is clear from the material in the affidavits filed by the appellant that significant relevant factual material which was provided to the Court, was not provided to the Commission. Although in this case with the agreement of the respondent I accepted this material, this approach should not become habitual in appeals pursuant to s 59.*

[107] *The applicant for registration as a charity must ensure all relevant factual material is placed before the Commission prior to the Commission making its determination. On an appeal this material should form part of the bundle of documents provided to the High Court. Then leave would be required for any further evidence to be available for the appeal. The ordinary rules governing such evidence on appeals would then apply.*

38. In other words, his Honour held that appeals under the Charities Act fall within Part 20 *Appeals* of the High Court Rules, and are subject to HCR20.16, in particular. HCR20.16 provides as follows:

20.16 Further evidence

- (1) *Without leave, a party to an appeal may adduce further evidence on a question of fact if the evidence is necessary to determine an interlocutory application.*
- (2) ***In all other cases, a party to an appeal may adduce further evidence only with the leave of the court.***
- (3) *The court may grant leave only if there are **special reasons** for hearing the evidence. An example of a special reason is that the evidence relates to matters that have arisen after the date of the decision appealed against and that are or*

wide range of problems, many of which are still not addressed, including issues around...the inability to develop common law in relation to the sector because of limited appeal rights".

²⁹ Charities Bill, NZPD Vol 625 12 April 2005, p19981.

may be relevant to the determination of the appeal.

(4) *Further evidence under this rule must be given by **affidavit**, unless the court otherwise directs.*

39. This interpretation means that charities currently have no automatic right to adduce any evidence in an appeal under section 59, beyond that which was placed before the charities regulator before it made the decision being appealed. It should be noted that the comments of His Honour in this regard are *obiter*, and it does not appear that His Honour had the benefit of hearing any argument on this point before reaching this view.
40. This interpretation of the statutory appeal right was followed in *In Re Education New Zealand Trust* (2010) 24 NZTC 24,353 (HC) ("**Education New Zealand Trust**"), where Dobson J made the following comments at [58]-[63]:

[58] *After Counsel for the Trust and the Commission in the present appeal had agreed on a procedure for its preparation, including the filing of further evidence on behalf of the appellant and the prospect for evidence in reply on behalf of the Commission, Ronald Young J delivered his decision in [CDC v Charities Commission]. That judgment included the following observations about evidence in such appeals [citing paragraphs [105]-[107] of the judgment as set out above].*

[59] **Although it had no direct bearing on the present appeal, Mr Simpson filed supplementary submissions to urge that the approach suggested in the Canterbury Development Corporation decision is wrong and ought not to be followed.** *It was characterised as inconsistent with relevant authorities in New Zealand and Australia on the introduction of additional evidence in appeals from administrative bodies where the original decision-maker has not conducted any hearing. Further, it was said to ignore the limited procedures prescribed by the Act for the Commission when considering applications for charitable status. Factual material is only placed before the Commission by way of prescribed form, supplemented by additional information if specific requests are raised on behalf of the Commission. Mr Simpson is concerned at circumstances in which an applicant will only have an informed view of the factors counting against an application once the Commission has made its decision. In addition, the requirement for leave to adduce additional evidence was said not to give appropriate weight to the broad powers conferred on the Court by the Act.*

[60] *Mr Simpson cited decisions including Commissioner of Stamps v Telegraph Investment Co Pty Ltd [(1995) 133 ALR 130 (HCA)] in which the High Court of Australia recognised that decisions of administrative authorities may be of a character that should not confine the Court to materials that were before the authority, when the decision is challenged on appeal. Factors likely to suggest that additional evidence is appropriate are where there was no hearing at first instance, where the administrative body was not bound to apply the rules of evidence, where issues arise that are non-justiciable, or where the authority is not required to furnish reasons for its decision.*

[61] *In addressing these concerns, Mr Simpson raised the difficulties for modestly resourced and small charities, which might well arrive unwittingly at the point of rejection of an application, without appreciating the consequences of not having put to the Commission all possible materials that could advance its charitable status.*

[62] *In order to effectively address these separate concerns, it would be necessary to acknowledge that appeals from decisions of the Commission are either absolutely or presumptively entitled to an exemption from the provisions of r 20.16 of the High Court rules...*

[63] *For the Commission, Ms Warburton resisted any qualification to the position as directed in Canterbury Development Corporation. She submitted that it does no more*

than repeat the provisions of r 20.16, that appeals governed by that rule are routinely from administrative bodies that do not conduct hearings, and that the Commission’s process involves giving notice to an applicant where the Commission reaches a provisional view that an application for registration is likely to be declined. In the present case, the terms of that communication included the following:

You have the opportunity to submit to the Commission any facts or arguments you wish the Commission to take into account. The Commission will fully consider any submissions from you before it makes a final decision, which you will be notified of in writing. You also have the option to:

- *Amend your application; or*
- *Withdraw your application for registration.*

I am not satisfied that any absolute, or even presumptive, exemption from the provisions of r 20.16 is warranted as a matter of course in appeals from decisions of the Commission. *The sort of circumstances Mr Simpson cites as justifying a relaxation of the requirements of that rule can always be considered on an application for leave to adduce additional evidence, and there is no basis for concern that restrictions on the grant of leave would give rise to a breach of natural justice, or inadequacy of material to argue any given appeal. I am not persuaded that any procedure inconsistent with that directed in Canterbury Development Corporation is warranted.*

[Emphasis added]

41. This interpretation has been followed in subsequent Charities Act cases, including:
 - (i) *Re New Zealand Computer Society Inc* (2011) NZTC 20,033 (HC) (“**Computer Society**”) at [23]-[35], [64] and [79]-[80];
 - (ii) *Re Greenpeace New Zealand Incorporated* [2011] 2 NZLR 815 (HC) (“**Greenpeace HC**”) at [28]-[33];
 - (iii) *Liberty Trust v Charities Commission* [2011] 3 NZLR 68 (HC) (“**Liberty Trust**”) at [48]-[50]; and
 - (iv) *Re Queenstown Lakes Community Housing Trust* [2011] 3 NZLR 502 (HC) (“**Queenstown Lakes**”) at [24]-[26].
42. This means that appeals under section 59 are being interpreted as a “rehearing on the record”, rather than a first instance *de novo* trial. Importantly, however, apart from the comments in the *Education New Zealand Trust* case set out above, which might also be considered to be *obiter* because the matter had “no direct bearing” on the appeal, it does not appear that any argument has been heard, in any of the cases decided under the Charities Act so far, on the specific question of the nature of the appeal right under section 59, before the decision to follow *CDC v Charities Commission* on this issue and/or to apply HCR20.16 has been reached. This point is discussed further below.

ISSUES

43. There is deeply-held and very considered concern within the New Zealand charitable sector that the current, very narrow, approach being taken by the charities regulator to the definition of “charitable purpose” is not only legally challengeable in a number of respects, but is causing what might be described as a systematic deconstruction of the New Zealand charitable sector. The narrow approach obstructs, rather than assists, New Zealand communities in their efforts to respond to identified needs, and it is also placing New Zealand out of step with charity regulation internationally.

44. It also sits in sharp contrast to the many government statements about the importance of the charitable sector, and the support the government states that it wishes to give to the charitable sector.³⁰
45. But the interpretation of the definition of charitable purpose by the charities regulator is only one aspect of the problem. The means by which decisions of the charities regulator are challenged must also be considered. It is critically important for the New Zealand charitable sector, and all who are impacted by it, that New Zealand charities have an effective means of holding their regulator to account.
46. In that context, we consider some aspects of the section 59 appeal right that are causing difficulty.

Timing

47. Under section 59(2), charities have 20 working days to file High Court proceedings. They may apply for an extension of time to appeal, either before or after the expiration of that period, but such an application must also be made to the High Court.
48. The 20-working day period runs from the date of decision. If, as is often the case, the decision is not immediately communicated to the charity, this further reduces the time available within which a charity, often run by a board of volunteers, must absorb an adverse decision, find funding for and instruct a lawyer, and file High Court proceedings.
49. In practice, this is simply an impossible timeframe in many cases.

Cost

50. The requirement to file an appeal to the High Court also carries with it significant cost. Putting aside the cost of legal representation, filing fees alone are significant for a modestly resourced charity: \$540 to lodge an appeal and \$500 for an interlocutory application, such as an application to adduce further evidence (see <http://www.justice.govt.nz/services/court-fees/court-fees-and-charges>).
51. Charities are by nature litigation averse. Filing legal proceedings necessitates the expenditure of resources that would otherwise be devoted to their charitable purposes. Yet, unless cases are taken, the law of charities will not develop. This point was addressed in England and Wales as follows:³¹

The Charity Tribunal for England and Wales was created with the aim of providing charities with swift, low-cost access to justice. Experience had shown that it was simply too expensive for charities to challenge the decisions of their regulator (the Charity Commission) in the High Court. This was an unacceptable situation in administrative law terms and the paucity of cases meant that charity law was becoming rather out of date.

³⁰ See for example Operational Statement OS 06/02 *Interaction of tax and charities rules, covering tax exemption and donee status*, paragraph 2; Charities Bill – First Reading, NZPD Vol 616 30 March 2004, pp12108, 12116, and 12121; Charities Bill 108-2 p2; Charities Bill, NZPD Vol 625 12 April 2005, pp 19974, 19980, and 19985; *Re Collier (Deceased)* [1998] 1 NZLR 81 (HC) at 95: “Charitable bodies have always been distinctly important in socio-economic terms”, per Hammond J.

³¹ *Appealing the Regulator: Experience from the Charity Tribunal for England and Wales*, Judge Alison McKenna, Principal Judge, First-tier Tribunal (Charity), prepared for the conference on “Defining, Taxing and Regulating Not-for-Profits in the 21st Century”, Melbourne Law School, July 2012 at 1.

The Tribunal was therefore established by the Charities Act 2006 to address these issues.

52. The cost involved in filing proceedings in the High Court is a prohibitive factor that raises questions about New Zealand charities' access to justice.

Evidence

53. A consequence of the interpretation of section 59 that appeals under the Charities Act are conducted as a "rehearing on the record" rather than a first instance *de novo* trial, is that charities have no automatic right to adduce any evidence in Court that was not provided to the charities regulator before it made its decision.
54. Although it seems onerous for a charity to provide information in an application for registration, or in defending a proposal for deregistration, as if it were preparing for a High Court trial, this appears to be the current state of the law. This means that any evidence that the charity would like to have considered by a Court in a determination of whether its purposes are charitable needs to be provided to the charities regulator before its decision is made.
55. As there appears to be no opportunity for the charity to receive an oral hearing before the charities regulator,³² it appears that such evidence, including expert evidence,³³ would need to be provided by affidavit.
56. There may be a significant volume of such evidence. It may take a significant volume of material to prove, for example, that a purpose operates for the public benefit. In the case of *Chamber of Commerce and Industry of Western Australia (Inc) and Commissioner of State Revenue* [2012] WASAT 146, for example, some 4,000 pages of evidence were filed.³⁴
57. Given the importance of evidence to a determination of whether purposes are charitable, it is unsurprising that most of the cases taken under the Charities Act to date have involved procedural wranglings as to whether the charity concerned could adduce further evidence (see *CDC v Charities Commission* at [104]-[106]; *Education New Zealand Trust* at [58]-[63]; *Computer Society* at [23]-[25]; *Greenpeace HC* at [27]-[33]; *Liberty Trust* at [48]-[50]; *Queenstown Lakes* at [24]-[26]).³⁵
58. In the 2 post-*CDC v Charities Commission* cases where an application to adduce further evidence was not made, the charities concerned seem to have been particularly disadvantaged by lack of evidence (see *In Re Draco Foundation (NZ) Charitable Trust* (2011) 25 NZTC 20,032 (HC) ("**Draco**");³⁶ and *Re The Grand Lodge*

³² See for example *Re New Zealand Computer Society Inc* (2011) NZTC 20,033 (HC) ("**Computer Society**") at [32], where counsel for the charities regulator submitted, in support of its opposition to an application to adduce further evidence, that "it acted in accordance with the procedure set out in ss 31 to 36 of the Act, which does not require it to convene a hearing".

³³ Bearing in mind the code of conduct for expert witnesses in schedule 4 of the High Court Rules, see http://www.legislation.govt.nz/act/public/1908/0089/latest/DLM1817947.html?search=sw_096be8ed80cc38f3_exPERT_25_se&p=1&sr=19.

³⁴ *Chamber of Commerce and Industry of Western Australia (Inc) and Commissioner of State Revenue* [2012] WASAT 146, paragraph 36.

³⁵ The writer understands that in *The Plumbers, Gasfitters and Drainlayers Board v The Charities Registration Board* [2013] NZHC 1986 ("**Plumbers**") further evidence was adduced by consent.

³⁶ *In Re Draco Foundation (NZ) Charitable Trust* (2011) 25 NZTC 20,032 (HC) ("**Draco**") at [32]: "there is no evidence of this"; [33]: "Because the identified activities are so general it is difficult to understand what is proposed"; [35]: "It is impossible to know precisely what is proposed...What is proposed is too vague to be

of Antient Free and Accepted Masons in New Zealand [2011] 1 NZLR 277 (HC)³⁷).

59. In the one Charities Act case where an application to adduce further evidence was refused, the charity also appears to have been disadvantaged by lack of evidence (see *Computer Society* at [79]).
60. None of this sits well with section 3(b) of the Charities Act, under which a key purpose of the Charities Act is to “*encourage and promote the effective use of charitable resources*”.
61. Since these early cases, however, there has arguably been a trend towards a softening of the approach towards adducing further evidence.³⁸ Nevertheless, it does not appear to be widely appreciated that charities’ ability to have a hearing of evidence appears to be being effectively removed altogether: neither the Department of Internal Affairs (“**DIA**”) nor the Charities Registration Board (“**the Board**”) conducts a hearing before reaching a decision regarding a charity. This means that, under the interpretation of section 59 that it is strictly a “rehearing on the record”, charities’ ability to have a hearing of evidence has effectively been removed: charities are being required to prove important matters of fact in establishing that their purposes are charitable, and in seeking to develop New Zealand charities law for the benefit of all, without access to the time-tested mechanisms of our justice system by which matters of fact are established, such as the ability to have an oral hearing of evidence, and cross-examination. The conception of an appeal to the High Court under

confident it will be tied to any charitable purpose”; [48]-[49]: “*The difficulty is the paucity of information regarding the conference. There is simply not enough detail provided by Draco to conclude that the conference has educational value and charitable purpose. From the information provided it cannot be said that at the time the Commission considered the application the proposed conference, with the general topics identified, was either for the advancement of education or of general benefit to the community. I accept, as I have noted, that such a conference could have that purpose. Whether, however, organising one such conference in the course of the year means the purposes of Draco are exclusively charitable (within the meaning of exclusive in the context of charities law) is doubtful in any event. Further, beyond organising future “Residents” conferences, there is nothing to suggest other conferences are planned. This rather places conference organisation and presentation at the periphery of Draco’s purposes*”; and [77]: “*There is no evidence of educational or training material beyond that on the websites. The conference organisation material is too vague and generalised to reach a conclusion that it is for the advancement of education or for any other purpose beneficial to society*”. With respect, much of this reasoning also appears to confuse the distinction between purposes and activities, a distinction which in the writer’s view is a key source of difficulty in New Zealand charities law at present.

³⁷ *Re The Grand Lodge of Antient Free and Accepted Masons in New Zealand* [2011] 1 NZLR 277 (HC) at [49]: “*Factually, no information is provided as to what proportion of expenditure they represent*”, and at [54]: “*Nothing in the evidence satisfies that the non-charitable activities [sic] of the Grand Lodge could meet this description*”.

³⁸ The only occasion in which an application for leave to adduce further evidence in relation to a Charities Act appeal has so far been refused was in *Computer Society* at [35] (the comments in *Education New Zealand Trust* at [63] were apparently not made in relation to a specific application, see [59]: “*Although it had no direct bearing on the present appeal...*”). Since the cases of *Education New Zealand Trust* and *Computer Society* were decided, all applications for leave to adduce further evidence in Charities Act cases have been granted, see *Re Greenpeace New Zealand Incorporated* [2011] 2 NZLR 815 (HC) (“**Greenpeace HC**”) at [33], *Liberty Trust v Charities Commission* [2011] 3 NZLR 68 (HC) (“**Liberty Trust**”) at [50], and *Queenstown Lakes* at [25]. In the latter case, the High Court said at [25]: “*...I consider that the special nature of an appeal under the [Charities] Act justifies some relaxation of the usual tests of cogency, credibility, and freshness. I consider that the appropriate focus is whether the Court will be assisted by the evidence, and whether the [charities regulator] will have an adequate opportunity to respond to the new material in its submissions*”. [Emphasis added] A relaxation of the rule was also foreshadowed in *Commerce Commission v Woolworths Ltd* (2008) 12 TCLR 194 (CA), where the Court of Appeal said at 207: “*We recognise that where there has been neither a conference nor a draft determination (as in the present case), there may be slightly greater scope for the admission of new evidence on appeal*”. [Emphasis added]

section 59 of the Charities Act as an “appeal”, rather than as a first instance hearing, appears to be being interpreted to mean that these mechanisms are to be denied to charities altogether.

62. It would be normal to have an opportunity to give evidence orally in a case that seeks to determine whether purposes are charitable.³⁹ It is also normal to hear oral evidence in a trial of a proceeding involving disputed questions of fact.⁴⁰ It is not clear why such an important aspect of our justice system should be denied to charities.
63. Another key issue in the context of evidence, is that the charities regulator is not bound by the rules of evidence in reaching its decisions. A charity that has been denied registration will not necessarily know what evidence the charities regulator has considered, or not considered, or what weight it may have placed on any particular piece of evidence, in reaching its decision.
64. It is clear from the cases so far decided under the Charities Act that the charities regulator does carry out “web dredges” of the internet in reaching its decisions.⁴¹ The extent to which the charities regulator may have browsed through websites to extract information on which a decision is based may be unknown:⁴² charities routinely have no idea exactly what material may have been considered by the charities regulator, whether undue weight may have been placed on it, or what assumptions may have been made.⁴³ This “web-dredging” could easily result in the charities regulator finding and relying on material that is out of date, out of context, or simply incorrect.
65. Under section 59 as it is currently being interpreted, New Zealand charities are denied the opportunity to test any of the assumptions made by the charities regulator with respect to evidence, or decisions made regarding what material is considered, and what material is disregarded or overlooked. These factors severely restrict charities’ ability to prove matters of fact necessary to demonstrate that their purposes are charitable, or to hold their regulator to account for decisions that can effectively mean life or death to a charity.
66. There is also no certainty that information provided by a charity will be considered by the charities regulator before it reaches its decision. Resource constraints appear to be a significant factor in this regard.
67. A charity that has managed to marshal sufficient resources to bring a case to Court should be assisted to adduce all the evidence necessary to enable a proper examination of whether its purposes are charitable, for the sake not only of the particular charity concerned, but also for the development of charities law generally. There is nothing to be gained by placing obstacles in the way of reaching robust decisions as to whether an entity’s purposes are charitable. This is particularly the

³⁹ See for example *Latimer HC*, and *Chamber of Commerce and Industry of Western Australia (Inc) and Commissioner of State Revenue* [2012] WASAT 146.

⁴⁰ HCR 9.51, provides that disputed questions of fact arising at the trial of any proceeding must be determined on evidence given by means of witnesses examined orally in open court.

⁴¹ See for example *Greenpeace CA* at [31], [32] and [92].

⁴² See *Greenpeace HC* at [29].

⁴³ See for example *Computer Society* at [27] regarding the concern that the charities regulator was not bound by the rules of evidence and may have placed “undue weight on some of the evidence”. Related concerns are that the charities regulator may not have considered some of the evidence at all, or may have considered evidence that was not relevant, or did not in fact exist: see for example *Greenpeace HC* at [76], and *Greenpeace CA* at [100].

case given the particular nature of charities law, the entities which it affects, the inherent nature of charities as tending to be reluctant litigants and over-compliant citizens, and the way that charities law develops by individual charities bearing the burden of bringing appeals against decisions of the charities regulator. Evidence that would assist in the determination of whether purposes are charitable should be heard, facilitating the reaching of robust decision as to whether the purposes in any particular case are charitable, in the interests of all concerned.⁴⁴

68. This becomes particularly critical as the consequences of failure to gain registered charitable status become increasingly high.

The Official Information Act / discovery

69. On the issue of evidence, charities appealing decisions of the charities regulator under section 59 of the Charities Act should be aware that they will likely be asked to follow the standard directions for appeals in schedule 6 of the High Court Rules.⁴⁵ Unlike the procedures for a challenge to a decision by IRD, the standard directions for appeals under the Charities Act contain no provision for discovery.
70. However, that does not mean that discovery is precluded in Charities Act cases.
71. High Court Rule 8.5 provides that a Judge *must* make a discovery order for a proceeding unless he or she considers that the proceeding can be justly disposed of without any discovery. Such an order must be made at the first case management conference unless there is good reason for making the order later. A “proceeding” is defined in HCR1.3 as “*any application to the court for the exercise of the civil jurisdiction of the court other than an interlocutory application*”. This would appear to include an appeal under section 59 of the Charities Act.
72. Bearing in mind the importance of evidence, consideration should therefore be given to whether a discovery order should be sought.
73. Consideration should also be given to whether information should be requested under the Official Information Act (“**the OIA**”).
74. As discussed above, under the current interpretation of section 59, any further information consequently discovered or provided after the charities regulator has made its decision, will likely need to be the subject of an application to adduce further evidence under HCR 20.16 if it is to be produced in Court. In that context, however, HCR20.16(3) specifically gives as an example of a “special reason” for which an application should be granted “that the evidence relates to matters that have arisen after the date of the decision appealed against and that are or may be relevant to the determination of the appeal”. Despite this, there is no certainty that the charities

⁴⁴ Note the comments of the Court of Appeal in *Commerce Commission v Woolworths Ltd* (2008) 12 TCLR 194 (CA) at 206: “*While a de novo hearing will usually be “better” in terms of resolving the case at hand, a **general** policy of conducting appeals on this basis would have major resource and institutional implications – implications which have dissuaded appellate Courts in New Zealand and similar jurisdictions from adopting this approach when hearing appeals*”. [Emphasis added]. Such a cost argument further justifies an exception for charities: resources do not in fact appear to be being saved under the approach as currently being interpreted. Instead, time and resources are being expended arguing about whether evidence can be heard, instead of simply hearing the evidence and considering it. Further, in any event, the definition of charitable purpose is arguably one area where the “better” result reached by a de novo hearing is particularly justified, in the public interest.

⁴⁵ See <http://www.legislation.govt.nz/act/public/1908/0089/latest/DLM1817950.html>.

regulator will not oppose such an application in practice.

75. The Official Information Act is an important tool. The long title to the OIA states that it is:

An Act to make official information more freely available, to provide for proper access by each person to official information relating to that person, to protect official information to the extent consistent with the public interest and the preservation of personal privacy, to establish procedures for the achievement of those purposes, and to repeal the Official Secrets Act 1951.

76. The purposes of the OIA are set out in section 4 as follows:

The purposes of this Act are, consistently with the principle of the Executive Government's responsibility to Parliament,—

- (a) to increase progressively the availability of official information to the people of New Zealand in order—
- (i) to enable their more effective participation in the making and administration of laws and policies; and
 - (ii) **to promote the accountability of Ministers of the Crown and officials,—**
and thereby to enhance respect for the law and to promote the good government of New Zealand:
- (b) to provide for proper access by each person to official information relating to that person:
- (c) to protect official information to the extent consistent with the public interest and the preservation of personal privacy.

77. Under section 5, there is a “principle of availability”.

The question whether any official information is to be made available, where that question arises under this Act, shall be determined, except where this Act otherwise expressly requires, in accordance with the purposes of this Act and the principle that the **information shall be made available unless there is good reason for withholding it.**

78. In other words, the Official Information Act is intended to promote the accountability of officials, and proceeds on the basis that information should be made available unless there is a good reason for withholding it.
79. The charities regulator makes decisions regarding individual charities on matters that may mean life or death for that charity. As a matter of public policy, the charities regulator should therefore be held fully accountable for that decision.
80. Significantly, both the DIA and the Board are separately subject to the OIA: the Board is “the Board established by section 8 of the Charities Act”, which is listed in Part 2 of Schedule 1 of the Ombudsmen Act 1975. The DIA is listed in Part 1 of Schedule 1 of the Ombudsmen Act. They are accordingly both independently subject to the principle of availability enshrined in section 5 of the OIA, by virtue of the definitions of “organisation”, “department” and “official information” in section 2 of the OIA.

81. It is therefore possible for a charity to ask for: ⁴⁶
- (a) access to any specified official information;
 - (b) reasons for any decisions made about the charity;
 - (c) internal policies, principles, rules or guidelines; and
 - (d) meeting agendas and minutes of the Department of Internal Affairs - Charities Services and/or the Charities Registration Board, including those not open to the public.
82. Section 8(4) of the Charities Act requires the Board to act *independently* in exercising its powers under the Charities Act.⁴⁷ This means that the DIA cannot be “advisers” to the Charities Registration Board, and any attempt to withhold information on the grounds of professional legal privilege under section 9(2)(h) of the Official Information Act should be resisted in that context.
83. Although the Board is statutorily required to be independent, there are practical limitations on its independence. It seems clear that the DIA writes the Board’s decisions, which are then subject to only light editing by the Board. Further, it does not appear that the Board is adequately resourced to consider all the information a charity might provide in support of its application. As discussed above, a consequence of the interpretation of section 59 as a “rehearing on the record” is that charities are required to provide information to the charities regulator in support of their application as if they were preparing for a High Court trial. There might be a significant volume of this material, and in practice it appears that some of it is not even forwarded to the Board for its consideration before the Board makes the final decision.
84. A full analysis of the Official Information Act, and the interplay between the Official Information Act and discovery, is beyond the scope of this paper. The short point is that discovery and requests under the Official Information Act are important tools, and charities should consider them carefully in the context of any appeal.

Intituling

85. It is often said that justice is found in the interstices of procedure. In this regard, the intituling of any appeal under the Charities Act is a point that may need to be considered.
86. Rule 20.17 *Decision-maker entitled to be heard on appeal* of the High Court Rules provides that:
- The decision-maker is entitled to be represented and heard at the hearing of an appeal on all matters arising in it, unless –
- (a) the decision-maker is a District Court; or
 - (b) the court otherwise directs.
87. In the first case decided under the Charities Act, *Travis Trust v Charities Commission* (2009) 24 NZTC 23,273 (HC) (“**Travis Trust**”), Joseph Williams J made the following

⁴⁶ <http://www.justice.govt.nz/publications/global-publications/o/official-information-your-right-to-know>.

⁴⁷ See also the report of the Government Administration Committee on the Crown Entities Reform Bill, 30 March 2012, discussed in *The Law and Practice of Charities in New Zealand*, Barker, Gousmett and Lord, LexisNexis May 2013 at paragraph 4.48.

comments at [27]:

The Commission appeared in its own right on this appeal even though it was the first instance decider. While this is generally frowned upon, in the circumstances of this case, the assistance of counsel for the Commission was both necessary and valued. This arises from two circumstances particular to this appeal. The first was that there was **no other party adopting a position contrary to that of the appellant on this appeal. The absence of the usual tension between appellant and respondent can sometimes lead to poor decision-making and that should be avoided.** The second and more important reason is that this was the first appeal under the 2005 legislation and it was important that the court heard submissions properly contextualising the appeal within the 2005 reforms. For this purpose counsel for the Commission acted rather more as counsel assisting than as an adversary to the appellant. I am grateful particularly for that aspect of the contribution of counsel for the Commission.

88. Subsequently, in *CDC v Charities Commission*, Ronald Young J specifically held, *obiter*, that the charities regulator should not be named as a respondent in Charities Act proceedings. His Honour made the following comments in this regard at [108]-[111]:

[108] *An adjudicative body should not generally be named as a party to an appeal (r 20.17: Moonen v Broadcasting Standards Authority (1995) 8 PRNZ 335 (HC)). They are not a party to the proceedings. Given that proposition the proceedings may be better entitled as, Re (Name of the appellant).*

[109] *The second difficulty in an appeal pursuant to s 59 is the question – who is to be the opposer in such an appeal? There is only one party – the applicant for an order that it be registered as a charity. It is therefore difficult to see how anyone other than the Commission in most cases can be anything other than the opposer.*

[110] *In this case, the arrangement was that the Commission would appear and put the contrary argument to that of the appellant. However this is dressed up, effectively the Commission becomes the opposer. While less than ideal, there seems little option for anyone other than the Commission to be the opposer in a s 59 appeal.*

[111] *I therefore invite future appellants to ensure the entitling is as I have suggested, with service of the proceedings on the Commission who, in turn, in most cases is likely to be stuck with the role of opposer.*

[Emphasis added]

89. His Honour cited *Moonen v Broadcasting Standards Authority (1995) 8 PRNZ 335 (“Moonen”)* as authority for the proposition that Charities Act proceedings “may be better entitled as, *In Re (name of the appellant).*”

90. It does not appear that his Honour heard argument on this point prior to reaching this decision.

91. This form of intituling was adopted in *Draco*, where His Honour made a similar point at [8]:

I acknowledge the Commission, as the adjudicative body being appealed from, is not a party to this appeal as such. **However, given such appeals generally only involved the appellant, the Commission has usefully taken the role of opposer**

92. However, the position may have softened somewhat since the *obiter* comments in *CDC v Charities Commission* and *Draco*.

93. In *Computer Society*, MacKenzie J noted at [18] that:

The Commission has in this case adopted an active role on the appeal, in support of its decision. Because there would otherwise have been no argument against the

Society's submission, this has been **entirely proper**, and very helpful....

[Emphasis added]

94. In *Greenpeace HC*, Heath J made the following comments at [21]:

While [Counsel for the Charities Commission] advanced a number of points to support the Commission's decision, he made it clear that the Commission appeared solely as an "opposer" for the purpose of assisting this Court to determine the issues arising [footnote: *CDC v Charities Commission* at [108] and r20.17 of the High Court Rules]. **It is the absence of an affected party to argue against the appeal that justifies this course. Ordinarily, it is inappropriate for the tribunal from which an appeal is brought to be heard.** [footnote: *Attorney-General v Maori Land Court* [1999] 1 NZLR 689 (CA) at 695-696, where the Court of Appeal stated: "...we considered it is not appropriate to give leave to counsel to appear representing a Court where the argument (albeit on jurisdiction) is directed to the very issue which has been determined in the judgment under review and where full argument is available on both sides of the issue from the competing parties"...]

95. On appeal, the Court of Appeal stated in *Greenpeace CA* at [5]:

In the absence of an affected party to argue against the appeal, counsel for the Board appeared to assist the Court.

96. A consequence of intituling Charities Act proceedings as "*Re (Name of the appellant)*" is that the charities regulator would be specifically not named as a respondent.

97. However, in principle, the position of the charities regulator is different from the position of the Broadcasting Standards Authority in *Moonen*, which was adjudicating on a dispute between 2 opposing parties. As noted by the High Court in *Queenstown Lakes* at [25], an appeal under the Charities Act differs in form from most appeals governed by Part 20. The charities regulator is not determining a dispute between 2 opposing parties. The charities regulator effectively is itself the opposing party. There is also no formal hearing at which evidence is presented. As His Honour notes at paragraphs 109 and 110 of the *CDC v Charities Commission* decision, it is difficult to see how anyone other than the Charities Commission, now the Board, in most cases can be anything other than the opposer in Charities Act appeals:

However this is dressed up effectively [the charities regulator] becomes the opposer. While less than ideal there seems little option for anyone other than [the charities regulator] to be the opposer in a s 59 appeal.

98. It is interesting and possibly significant that in the only 2 Charities Act cases to date in which the charity concerned has been successful, *Liberty Trust v Charities Commission*, and *The Plumbers, Gasfitters and Drainlayers Board v The Charities Registration Board* [2013] NZHC 1986 ("**Plumbers**"),⁴⁸ the charities regulator is named as a respondent. Both these cases post-date the decision in *CDC v Charities Commission*.⁴⁹

99. While the charities regulator has been appearing in Charities Act cases "in order to assist the Court", in reality, as a practical matter, the charities regulator in fact appears adversarially in support of its decision, as noted in *Computer Society* at [18].

⁴⁸ Putting aside the Greenpeace litigation, which is currently the subject of appeal to the Supreme Court, as discussed in Appendix A.

⁴⁹ The writer understands that a subsequent application to amend the intituling in the *Plumbers'* case has been granted.

Arguably, the intituling should reflect that.

The Attorney-General

100. If the charities regulator in fact appears adversarially in Charities Act cases in support of its decision, the question arises of whether the Attorney-General should be involved in Charities Act cases to represent the wider public interest.
101. In many of the early British charities law cases, both the Attorney-General and the Commissioners of Inland Revenue were joined as parties, in addition to the Charity Commission.⁵⁰
102. If there is to be any reference to charities being denied registration on the basis of any “fiscal consequences”, arguably the involvement of IRD is required, as fiscal concerns are arguably not within the remit of the charities regulator.
103. In addition, the Attorney-General has an important role as the protector or guardian of charities.⁵¹ This role is well-established, and it is a mystery why the Attorney-General has not been joined as a party in any of the Charities Act cases to date.
104. Further, clause 7 of schedule 6 *Standard directions for appeals* of the High Court Rules

⁵⁰ See for example *Incorporated Council of Law Reporting for England and Wales v Attorney General & Ors* [1972] 1 Ch 73 at 83, 1032 and 1040; *Commissioners of Inland Revenue v White and Ors and Attorney-General* (1980) 55 TC 651 at 652, and *Hadaway v Hadaway* [1955] 1 WLR 16 (PC), where a finding by the Court of first instance that a will did not effectually create a charitable trust was appealed to the Court of Appeal by the Attorney-General. That appeal was allowed. The testator’s next of kin then appealed to the Privy Council, where the Attorney-General was represented along with the executor of the testator’s will, and the next of kin (see at 18). Note also that the role of the Attorney-General has now been codified in statute in England and Wales. In the Charities Act 2011 (UK), the Attorney-General has been given a specific power to refer points of law to a specialist charity tribunal in order to clarify the law for all concerned. The “Reference” procedure essentially invites the Tribunal to give an advisory opinion, and is intended to relieve individual charities of the burden of litigation. The Attorney General’s power to refer points of law to the Tribunal for clarification was used in *Independent Schools Council v Charity Commission for England and Wales* [2011] UKUT 21 (TCC) and *Charity Commission for England and Wales and Others v Her Majesty’s Attorney General* [2012] UKUT 20 (TCC) (the Professional Footballers’ Benevolent Fund case). See *Appealing the Regulator Appealing the Regulator: Experience from the Charity Tribunal for England and Wales*, Judge Alison McKenna, Principal Judge, First-tier Tribunal (Charity), prepared for the conference on “Defining, Taxing and Regulating Not-for-Profits in the 21st Century”, Melbourne Law School, July 2012 at pp at 2, 3 and 9.

⁵¹ See for example *Kaikoura County v Boyd* [1949] NZLR 233 (SC and CA) at 262: “Upon this appearing probable [that the relevant purposes were charitable], the Court considered that counsel for the Attorney-General, on behalf of the Crown, as protector of charities, should be given an opportunity of being heard on this question, and also upon the question of whether the Attorney-General should be made a party to the action...We feel we should add that it seems generally desirable that the Attorney-General should be a party at least to any action concerning a charitable trust of substantial value for the benefit of the general public or a section of them...”. See also *Wallis v Solicitor-General* (1902-1903) NZPCC 23 (PC) sitting on appeal from the Court of Appeal of New Zealand at 181-182: “It is the province of the Crown as *parens patriae* to enforce the execution of charitable trusts, and it has always been recognised as the duty of the law officers of the Crown to intervene for the purpose of protecting charities...”. See also *Inland Revenue Commissioners v McMullen* [1981] AC 1 (HL) at 887d and 893d; *McGovern & Ors v Attorney-General & Anor* [1982] 1 Ch 321 at 501j, 505h. In *Oppenheim v Tobacco Securities Trust Co Ltd & Ors* [1951] AC 297 (HL) at 301, the Attorney-General is recorded as appearing as *amicus curiae* at the invitation of their Lordships: “In the case of a charitable trust, there is no other proper plaintiff than the Attorney-General”. In *In re Shaw, deceased. Public Trustee v Day & Ors* [1957] 1 All ER 745 (ChD) the Attorney-General appeared as *parens patriae* “to uphold the trusts as being charitable trusts” at 736 lines 28-29. In *Dingle v Turner & Ors* [1972] AC 601 (HL), the House of Lords stated at 624: “As counsel for the Attorney-General remarked in the course of argument the law of charity is bedevilled by the fact that charitable trusts enjoy two quite different sorts of privilege. On the one hand, they enjoy immunity from the rules against perpetuity and uncertainty and though individual potential beneficiaries cannot sue to enforce them, the public interest arising under them is protected by the Attorney-General.”

asks the following question:

If the appeal involves a significant issue under the New Zealand Bill of Rights Act 1990, or an issue affecting New Zealand's international obligations or the Crown's obligations under the Treaty of Waitangi, **or an issue arising in the appeal is otherwise of significant public interest, the Judge may direct that the Solicitor-General be served with the notice of appeal and with documents subsequently filed in the appeal.** In other cases, the parties must advise the Judge whether they consider that an amicus curiae should be appointed.

[Emphasis added]

105. The charities regulator has a specific function to educate and assist charities under section 10(a) of the Charities Act. This raises the question of whether the charities regulator should be informing charities bringing an appeal under the Charities Act of the Attorney-General's *parens patriae* role and the charity's ability to request that the Attorney-General be served, in support of the public interest.
106. The absence of the involvement of the Attorney-General in Charities Act cases to date is not a reason for that absence to continue. The development of New Zealand charities law is too important to be left to individual charities, likely to be struggling to raise sufficient funds to bring an appeal to the High Court, apparently restricted in their ability to produce evidence and denied the ability to have an oral hearing, arguing "in the absence of an affected party"⁵² but in the face of a regulator that generally behaves adversarially in support of its own decision.
107. The involvement of the Attorney-General in Charities Act is essential in the public interest. In every Charities Act case, the question of whether the Attorney-General should be served should at least be asked.
108. Such an approach would not be unusual in England and Wales, from where New Zealand charities law has derived. In fact, England and Wales consider the involvement of the Attorney-General to be so important in charities law cases, they have enshrined it in their legislation.⁵³

New applications for registration

109. In the *CDC v Charities Commission* case, counsel for CDC sought the opportunity to amend CDC's constitution to try to bring itself within the definition of charitable entity.
110. His Honour Ronald Young J rejected that approach, making the following comments at [100]-[101]:

This would only be appropriate where a simple amendment(s) could be undertaken which could be shown to have little effect on the organisational structure...

⁵² *Greenpeace HC* at [21]; *Greenpeace CA* at [5].

⁵³ Section 318 of the Charities Act 2011 (UK) relevantly provides as follows:

"(2) The appropriate body may at any stage of the proceedings direct that all the necessary papers in the proceedings be sent to the Attorney-General.

(3) A direction under subsection (2) may be made by the appropriate body -

(a) of its own motion; or

(b) on the application of any party to the proceeding.

(4) The Attorney-General may -

(a) intervene in the proceedings in such manner as the Attorney-General thinks necessary or expedient; and

(b) argue before the appropriate body any question in relation to the proceedings which the appropriate body considers it necessary to have fully argued."

The other reason to reject such a possibility is that it would skew the legislative process for approval of charities. The legislation provides that the first body to consider the question is the Commission with the right of appeal de novo to the High Court. This Court would be very reluctant to give away the expertise of the Commission as the first adjudicative body.

111. Applying *CDC v Charities Commission*, the New Zealand Computer Society’s request to have the Court consider its amended constitution was also rejected by the Court.⁵⁴
112. In practical terms, this means that an entity wanting to make more than “simple amendments” to its constituting document must do so and then make a fresh application to the charities regulator. This approach may result in complicated tax implications for the charity, including the risk of losing the benefit of the transitional concessions available in section CW 41(5) of the Income Tax Act (to the extent that these may still be available). The charities regulator also appears to treat new applications for registration as though they relate to an entirely new charity.⁵⁵
113. This approach of requiring a charity that has already commenced appeal proceedings in the High Court to make a new application for registered charitable status will also put the entity to significant additional cost, uncertainty and delay, which can only distract the entity from its charitable work. This approach also seems inconsistent with the role of the Courts as the source of the common law on the definition of “charitable purpose”, and the purpose of the Charities Act to “encourage and promote the effective use of charitable resources” (section 3(b)).
114. In addition, if the reluctance expressed by His Honour to give away the expertise of the charities regulator is intended as a general deferral by the Courts to the expertise of the charities regulator, it is of concern: as discussed above, the province of the definition of charitable purpose is the common law. The development of New Zealand charities law would be stymied if entities felt the Courts would defer to the charities regulator. Reluctance by Courts to disturb decisions of the charities regulator would not be consistent with the role of the Courts as the source of the law on charitable purpose. It would also not be consistent with the need for charities to have an effective means of holding their regulator to account.
115. As noted by the New Zealand Productivity Commission in its March 2014 draft report, *Regulatory Institutions and Practices Inquiry*, the checks on regulation generally need to be stronger, and the Courts play an important role in that regard.⁵⁶
116. In the overall context, it does not seem unreasonable or inappropriate for a Court to consider amendments to an entity’s constituting document, rather than requiring it to make a separate application to the charities regulator.

⁵⁴ *Computer Society* at [72].

⁵⁵ See for example the National Council of Women of New Zealand Incorporated, which was controversially deregistered in 2010, and then reregistered in 2012. It now has two entries in the charities register, one in which it is recorded as deregistered, and one in which it is recorded as registered. Although the deregistered entry now includes a note that the charity is now registered, at the time of writing, the National Council of Women remains included in the list of deregistered charities without any reference to the fact that it is now reregistered, see: <http://www.charities.govt.nz/the-register/registration-decisions/deregistration/>.

⁵⁶ See http://www.slideshare.net/nzprocom/regulatory-institutions-and-design-draft-report?utm_source=slideshow02&utm_medium=ssemail&utm_campaign=share_slideshow, page 12.

Appeals by the charities regulator

117. The *Liberty Trust* decision is significant because it is the first case decided under the Charities Act where the charities regulator’s decision was overturned.
118. Speaking in a panel discussion at the conference on “Defining, Taxing and Regulating Not-for-Profits in the 21st Century”, held at Melbourne Law School, July 2012, Trevor Garrett, who was the Chief Executive of the Charities Commission at the time the *Liberty Trust* decision was delivered, mentioned that the Charities Commission had received legal advice at the time that it could not appeal that decision.
119. While the decision in *Liberty Trust* is welcome, it does not seem appropriate or in interests of the development of charities law in New Zealand for the charities regulator to be unable to appeal a decision when it considers an appeal is warranted.
120. No doubt such an approach also stems from a strict interpretation of the appeal right granted by section 59. However, it would be helpfully reconsidered.
121. In that context, it would be helpful for charities to be assisted financially in bringing or defending appeals, in the interests of developing charities law for the benefit of all. This point is discussed further below.

DEVELOPING PERSPECTIVES

The nature of the appeal right

122. As discussed above, beyond the *obiter* comments in *Education New Zealand Trust*, the interpretation of section 59 that it requires a rehearing on the record rather than a first instance *de novo* trial does not appear to have been the subject of full argument and *ratio decidendi* decision in any of the Charities Act cases that have been decided to date. It is fundamentally important that charities have an effective means of holding their regulator to account, and that their appeal right is not “whittled down”.⁵⁷
123. A different interpretation is possible. The nature and scope of the appeal right granted by section 59 of the Charities Act turns on the meaning to be given to that provision. That meaning must be ascertained from the text of the provision in the light of its purpose,⁵⁸ and the intention of the legislature.⁵⁹
124. It seems likely that, in enacting the appeal right in section 59, the legislature intended appeals against decisions of the charities regulator to be conducted as first instance *de novo* trials rather than as a rehearing on the record. The reasoning is as follows.
125. The cases have consistently held that appeals to the High Court, such as under section 59 of the Charities Act, are governed by the Supreme Court decision in *Austin, Nichols & Co Inc v Stichting Lodestar* [2008] 2 NZLR 141 (SC) (“**Austin Nichols**”).⁶⁰

⁵⁷ See *Shotover Gorge* at 440 per Cooke P.

⁵⁸ Interpretation Act 1999, section 5.

⁵⁹ See *Shotover Gorge Jet Boats Ltd v Jamieson* [1987] 1 NZLR 437 (CA) (“**Shotover Gorge**”) p442 lines 17-21; p440 lines 11-22; p442 lines 38-52; p443 lines 47-49; p444 lines 6-7. *Shotover Gorge* was cited with approval by the Supreme Court in *Austin Nichols* at 147 lines 1-7. See also *Moonen v Broadcasting Standards Authority* (1995) 8 PRNZ 335 (HC) (“**Moonen**”) p336 lines 17-19: “Essentially the question is one to be decided in the light of the intention underlying the Broadcasting Act 1989 and applicable Part X of the High Court Rules”.

⁶⁰ See *Travis Trust* at [15]; *Education New Zealand Trust* at [1] footnote 1; *Draco* at [8] footnote 1; *Greenpeace HC* at [60]; and *Plumbers* at [42].

126. The *Austin Nichols* case concerned an appeal to the High Court against a decision by the Commissioner of Trade Marks under the Trade Marks Act 1957. The Supreme Court made the following comments at [4]:

The appeal is **usually** conducted on the basis of the record of the court or tribunal appealed from unless, **exceptionally**, the terms in which the statute providing the right of appeal is expressed **indicate** that a **de novo hearing of the evidence is envisaged**. (An example of a right of appeal with that effect was that under the legislation considered by the Court of Appeal in [*Shotover Gorge*])

[footnote: where an appeal to the District Court under s 5 of the Lakes District Waterways Authority (Shotover River) Empowering Act 1985 was held to require de novo hearing].

[Emphasis added]

127. In other words, the Supreme Court held that there can be exceptions to the general rule that an appeal to the High Court is a rehearing on the record, and gave the *Shotover Gorge* case as an example. The *Shotover Gorge* case concerned a decision by the Lakes District Waterways Authority to grant an exclusive concession to Shotover Jet Ltd to use the Shotover River for jet boat rides for a specified period. A competing jet boat operator appealed against that decision. However, Shotover Jet delayed the hearing of that appeal by mounting a challenge to its scope. This was described by Cooke P (as he was then) at 438 as follows:

The claim advanced is, in short, that the appeal is not an appeal on the merits. It is contended that the District Court should not hear evidence and should restrict its inquiry to “one of review only”, treating the Authority’s decision as a discretionary one open to challenge on only limited grounds.

128. In rejecting this claim, the Court of Appeal considered the appeal right contained in section 5 of the Lakes District Waterways Authority (Shotover River) Empowering Act 1985 (“**the Shotover River Empowering Act**”), and made the following comments at 438-441:

...Neither the Act nor the bylaw prescribes any procedure for dealing with applications or matters relating to the exercise of the Authority’s power to reserve the use of the river. In this instance, the Authority conducted a **public hearing** at which the parties were represented by counsel and the Authority had counsel assisting. Apparently **cross-examination** was permitted...A fully reasoned decision was given. The evidence was recorded...

...the present case is concerned with an **unqualified statutory right of appeal** from an authority representing predominantly local bodies to a District Court...**There can be no doubt that the District Court was intended to hear the case de novo, which would include a full hearing of oral evidence if any party so insisted. That is the normal way in which the District Court exercises its civil jurisdiction.** There would of course be nothing to prevent the District Court, if the Judge saw fit and the parties agreed, treating all or part of the evidence taken before the Authority as evidence for the purposes of the District Court hearing. As regards at least some of the recorded evidence, that course might be convenient. It could be highly desirable to save costs and unnecessary repetition of the same point of view.

This kind of full appellate jurisdiction is valuable and quite common in New Zealand in planning and licensing fields. Without attempting an exhaustive list, I give as examples...milk-selling licensing...water right cases...town planning appeals...liquor licensing cases...and war pensions appeals.

In such cases, it is the duty of the appellate Court to reach its own independent findings and decision on the hearing which it hears or admits. It is entitled to give weight, if it sees fit, to the opinion of the tribunal appealed from, but it is in no way bound thereby.

... it is trite to say that all appeals are creatures of statute, and their scope likewise. Apart from cases of agreement between the parties, **hearings of appeals on the record of evidence taken below are usually so confined by the express terms of a statute.** No doubt there could also be a case of necessary implication. Neither situation exists here. **The whole tenor of s 5 of the local Act of 1985 points to a full rehearing de novo.** In Hammond at p728 this Court said that it was of some importance that **where a right of appeal has been conferred from an administrative body to a Court the nature of the rehearing to which the appellant is entitled should be made clear (as the Court there did) lest it be whittled down. The fact that the administrative body has acted judicially or "fairly and without bias" is no ground for whittling down the statutory right of appeal by an alleged process of interpretation.**

129. Casey J made the following comments at 442-443:

Appeal rights in respect of different authorities and tribunals depend very much on the meaning to be given to the particular statute conferring them. Here I think the intention is plain. The District Court is to have all the powers vested in it in its civil jurisdiction and that means the fullest power of hearing evidence and determining the case.

This was the approach taken by Jordan CJ in *Ex parte Australian Sporting Club, re Dash* (1947) SR (NSW) 283, involving mandamus proceedings requiring a Magistrate to proceed with the hearing of an appeal against the refusal of the Commissioner of Police to approve a motor vehicle race on a public street. There was provision in the Motor Traffic Act for an appeal against that decision to his Court, but he thought he could look only at the material placed before the Commissioner, because the Act did not provide that the appeal was to be a rehearing.

The Chief Justice said that where there is an appeal from one judicial tribunal to another, it may be either:

"...an appeal *stricto sensu* or an appeal by way of rehearing, in which latter case the jurisdiction exercised by the appellate tribunal is in part original; or the word may refer to an appeal from an executive authority to some other executive authority or to a Court. If such an appeal is to a Court, the jurisdiction which it exercises is not appellate but original"...

He concluded that the appeal was from a decision of an executive authority to a Court which *pro hac vice* was authorised to exercise a jurisdiction both executive and original. That being so, the Magistrate was not restricted to examining the material which the Commissioner had before him, but was entitled and required to consider such relevant material as the parties desired to produce...

With respect, I would hesitate to describe the District Court as exercising an original jurisdiction in the present case because the function conferred on it by the Authority's Act is clearly appellate. However, the approach taken by Jordan CJ indicates the way that function is **intended** to be exercised. **There being nothing in the Act or in the District Courts Act specifying the nature of such an appeal, or providing for the way it is to be heard, the intention can only be that it will proceed in the way that any other contested proceedings are dealt with in that jurisdiction. In practical terms, it will be a hearing de novo**, but with the ultimate onus on the appellant in the unlikely event of the case being evenly balanced at the end of the day, as the President has noted.

In this case there was a **full hearing before the Authority** and the need to call the

evidence again in the District Court may be seen as inflicting an unwarranted burden and expense upon the parties. Little may turn on credibility, and it may be possible for them to agree to all or part of the record being used, if the Judge thinks this satisfactory. **Of course, this would not preclude their right to tender further evidence if desired. Those responsible for this legislation might have opted for a narrower right of appeal had they foreseen the Authority carrying out its task in such close conformity with accepted judicial procedure. However, the appeal provision needed to take into account the possibility of the Authority acting without due regard to the need for a fair and impartial hearing. It has guarded against this by ensuring that such a hearing will be available in any event in the District Court.**

130. Bisson J made the following comments at 443-444:

...The nature of the appeal under [s 5 of the Lakes District Waterways Authority (Shotover River) Empowering Act 1985] first came before Jamieson DCJ in the District Court at Dunedin. He held that **where a decision is administrative as opposed to a judicial one, any appeal from that decision, unless otherwise stipulated, should be by way of a hearing de novo.** The appellant applied for a review by the High Court of that interlocutory decision. Williamson J was asked to decide:

“...whether the appeal is an appeal limited to the Authority’s decision only (appeal stricto sensu) or any appeal by way of rehearing but based on the record (a general appeal), or an appeal requiring a complete rehearing and involving an exercise of original jurisdiction (appeal de novo).”

After stating fully the various arguments advanced before him, Williamson J directed his consideration to **the statutory provisions creating the right of appeal, the form of the hearing before the Authority and the need for an effective right of appeal.** His conclusion was as follows:

“The right of appeal given in s 5 of the Lakes District Waterways Authority (Shotover River) Empowering Act 1985 is in a short form. It does not provide in a detailed manner for the procedure at the hearing or for all the matters ancillary to appeal. (See for example s 57E of the Milk Act 1967.)

Obviously the right of appeal conferred by s 5 is **meant to be an effective right.** It is a final right of appeal and the Court is empowered to make whatever order it thinks fit rather than an order related strictly to the terms of any decision made by the Authority. **In these circumstances, I am unable to see that any appeal, other than an appeal de novo, would be appropriate....**I am of the opinion that there is no presumption in favour of the decision of the Authority, although that decision is entitled to respect as part of the material before the Court hearing the appeal.

It follows that in general terms I agree with the decision of the District Court Judge.

I am also satisfied that by s 5 the District Court was **intended to hear the case de novo.** My reasons are that in the first place **the Act makes no provision for a “hearing” by the Authority.** It is a lay body with an administrative function...

The powers which the Authority may confer on itself under s 3(1)(a) must be exercised fairly and without bias (s 4). No procedure is prescribed. In this particular case the Authority was at pains to exercise its function fairly and without bias but that fact on this occasion cannot determine **the nature of the appeal rights which must in my view be governed by the wording of the statute.**

...I am of the opinion that the legislature provided in s 5 a right for any person aggrieved by any such bylaw to appeal to the District Court in its civil jurisdiction so as to ensure the “final” decision under s 5(4) is made following an **independent inquiry by a Court**

of law which by s 5(3) may make such order as it thinks fit. **Such an independent inquiry would entitle the appellant to a hearing do novo.** This so-called “appeal” is a statutory extension to the civil jurisdiction of the District Court, the powers of the Court as to procedure and otherwise being governed by the District Courts Act 1947 and the District Court Rules 1948. However, having regard to the evidence already given before the Authority, either in statement form or recorded, there may well be ways in which the hearing in the District Court can be shortened, particularly where credibility of a witness is not in issue.

131. Section 5 of the Shotover River Empowering Act is in almost identical terms to the appeal right contained in the Charities Bill as originally introduced:

Section 5 of the Lakes District Waterways Authority (Shotover River) Empowering Act 1985	Charities Bill as originally introduced
<p>5. Appeals against Authority’s decisions – (1) Any person aggrieved by any decision of the Authority made under any bylaws in force under section 3(1)(a) of this Act may, within 21 days after the date of the decision, or within such further time as the Court on application may allow, appeal against that decision to the District Court having civil jurisdiction nearest to the river.</p>	<p>67. Right of Appeal</p> <p>(1) A person may appeal to a District Court against the following decisions:</p> <p>(a) a decision of the Commission to refuse to register as a charitable entity – (i) that person; ...</p> <p>(c) a decision of the Commission to remove from the register of charitable entities – (i) that person;...</p> <p>(e) a decision to impose an administrative penalty against that person under section 65.</p> <p>(2) An appeal under this section must be made by giving notice of the appeal within –</p> <p>(a) 20 working days after the date on which notice of the decision was communicated to...(iii) the appellant; or</p> <p>(b) any further time that a District Court may allow on application made before or after the expiration of that period.</p>
<p>(2) For the purposes of hearing the appeal, the Court shall have all the powers vested in it in its civil jurisdiction.</p>	
<p>(3) On hearing the appeal the Court may make such order as it thinks fit, and every such order shall be binding on the parties.</p>	<p>69 Determination of appeal</p> <p>(1) In determining an appeal, a District Court may confirm or reverse the decision of the Commission....</p> <p>(4) The District Court may make any other order that it thinks fit.</p>
<p>(4) Every decision of a District Court under this section shall be final.</p>	<p>(6) The District Court’s decision in the determination of an appeal is final.</p>

132. The only difference between the two provisions which might possibly be material is

section 5(2) of the Shotover River Empowering Act, which provides that the District Court was to have all the powers vested in its civil jurisdiction for the purposes of hearing the appeal. However, in hearing an appeal against a decision of the charities regulator to decline or remove registration, surely the District Court would be exercising its civil jurisdiction. Whether an appeal against a decision to impose an administrative penalty under clause 67(1)(e) of the Charities Bill would be an exercise of civil jurisdiction may be less clear, and this may explain why a provision corresponding to section 5(2) was left out of the appeal right in the Charities Bill. However, the difference does not appear to be material, and the two provisions appear essentially identical.

133. The reasoning of the Court of Appeal in *Shotover Gorge*, approved by the Supreme Court in *Austin Nichols*, appears applicable to the appeal right granted in the Charities Bill as originally introduced: decisions of the charities regulator are administrative rather than judicial; the Charities Act makes no provision for a “hearing” by the charities regulator; the Charities Act does not expressly confine the hearing of the appeal to the record of the evidence taken below; full appellate jurisdiction is valuable and common in planning and licensing fields, of which decisions regarding charitable registration are arguably an example; there is a need for charities to have an effective right of appeal; the statutory appeal right should not be whittled down by an alleged process of interpretation.
134. This would mean that the appeal right granted by the Charities Bill as originally introduced was intended by the legislature to be a full *de novo* trial.
135. There is nothing in the legislative history to indicate that the legislature intended to resile from that view. As discussed above, the changes made to the appeal right at Select Committee stage were made under urgency without full consultation, and at no stage was an intention expressed that charities’ ability to have a hearing of evidence was to be removed altogether.
136. It seems appropriate that charities fall within the exception envisaged by the Supreme Court in *Austin Nichols*, as exemplified by *Shotover Gorge*.⁶¹ Such an interpretation would allow charities to have a trier of fact. There is no obvious difficulty in allowing the Board and the DIA to effectively “triage” the more straight-forward cases (which will no doubt form the vast majority), leaving the more difficult issues to be determined by the Court, and the law of charities to be developed, with the benefit of a full hearing of evidence. This seems a significantly better use of limited resources than reaching decisions without the benefit of a hearing of evidence, requiring the charity affected to appeal such decisions to the High Court, and then expend resources arguing over procedural matters in order that it might be able to prove its case, one that will very likely be of acute significance for the charity.
137. To allow Charities Act appeals to fall within the exception envisaged by the Supreme Court in *Austin Nichols* also seems consistent with the scheme of Part 20 *Appeals* of the High Court Rules, which appears to assume the first instance decision-maker will have held a hearing of evidence. For example, HCR 20.14 requires a copy of the transcript to be provided in the bundle on appeal. There is obviously no transcript in Charities Act cases because the charities regulator does not conduct a hearing.

⁶¹ See for example *The Law and Practice of Charities in New Zealand*, Barker, Gousmett and Lord, LexisNexis 2013, paragraphs 10.24 – 10.48.

138. The comments of High Court of Australia in *Commissioner of Stamps v Telegraph Investment Co Pty Ltd* (1995) 133 ALR 130 (HCA) at 464, discussed in *Education New Zealand Trust* at [60], are also illustrative:

Where a right of appeal is given to a court from a decision of an administrative authority, a provision that the appeal is to be by way of rehearing generally means that the court will undertake a hearing de novo, although there is no absolute rule to this effect...The nature of the proceeding before the administrative authority may be of such a character as to lead to the conclusion that it was not intended that the court was to be confined to the materials before the authority. **There may be no provision for a hearing at first instance** or for a record to be made of what takes place there. The authority may not be bound to apply the rules of evidence...In all these cases there may be ground for saying that an appeal calls for an exercise of original jurisdiction or for a hearing de novo.⁶²

139. This approach also seems more consistent with charity regulation internationally. Other comparable jurisdictions determine the issue of whether purposes are charitable on the basis of a hearing of evidence. See for example *Chamber of Commerce and Industry of Western Australia (Inc) and Commissioner of State Revenue* [2012] WASAT 146, in which 4,000 pages of evidence were filed (see paragraphs 3-6, 36, 35 and 60). England and Wales has even created a specialist Charities Tribunal, which aims to provide charities with a more accessible, cheap and user-friendly means of challenging decisions of the Charity Commission (thus forming part of its accountability framework as a modern regulator) and a forum for the development of new charities case law. There is also provision for the Attorney-General to refer cases to the Tribunal to relieve individual charities of the burden of litigation.⁶³
140. The position in Canada may be different. As the Supreme Court of Canada noted in *Vancouver Society of Immigrant and Visible Minority Women v Minister of National Revenue* [1999] 1 SCR 10 (Supreme Court of Canada) at [64]-[65]:

I wish to emphasise that the factual record in this appeal is very modest, as I suspect it is in the vast majority of cases involving an application for registration as a charitable organisation under the ITA [the Canadian income tax legislation]. This is so for at least two reasons. First, Revenue Canada's decision as to whether to register an applicant as a registered charity is a "strictly administrative function" and is made without a hearing...Although Revenue Canada may request written submissions and further information from an applicant, it is under no obligation to do so.

Second, s 180(3) of the ITA specifically provides that appeals taken to the Federal Court pursuant to s 172(3) of the ITA "**shall be heard and determined in a summary way**". As the Federal Court of Appeal recently observed...the effect of s 180(3) is that the Federal Court of Appeal "must therefore review the relevant questions of law and fact without the benefit of any findings of fact by a trial court and indeed without the benefit of any sworn evidence". The present appeal procedure has been cogently criticised elsewhere (see eg DW Smith "Tax appeal procedure for charities needs improving" (The National Vol 12, No 4, April 1985, at p21), and its failures are manifest in the present appeal. It is essential that these failures not be ascribed to the Society.

141. However, New Zealand contains no corresponding provision requiring appeals against

⁶² See also *Commissioner of Stamps v Telegraph Investment Co Pty Ltd* (1995) 133 ALR 130 (HCA) at 465, 474-475 and 481.

⁶³ See *Appealing the Regulator: Experience from the Charity Tribunal for England and Wales*, Judge Alison McKenna, Principal Judge, First-tier Tribunal (Charity), prepared for the conference on "Defining, Taxing and Regulating Not-for-Profits in the 21st Century", Melbourne Law School, July 2012 at pp 1, 2, 4-11, and 14.

decisions of the charities regulator to be “heard and determined in a summary way”, and, as the Supreme Court of Canada notes, the Canadian appeal procedure has been the subject of cogent criticism.

142. In a charity law context, it is in the best interests of everyone, not only the charities at issue but also the charities regulator and every other charity that will be affected by new charities law precedent, that the facts are fully stated and understood by all concerned. Charities should be assisted in that process for the good of all. Charities law cases are a public good, and everyone will benefit from developing charities law in the best way possible.

Facilitating appeals

143. As discussed above, the cost of bringing proceedings, and therefore developing the law of charities, is clearly a significant issue, raising the issue of charities’ access to justice.
144. Arguably, cost is a practical problem for which practical solutions should be explored.
145. Perhaps some form of internal review procedure, or a means of conducting oral hearings at the regulator level, could be formulated.
146. It would also be helpful to have some form of binding ruling procedure, similar to that contained in Part 5A of the Tax Administration Act, so that charities are able to gain certainty that a proposed course of action will not jeopardise their registered charitable status.
147. Perhaps a litigation fund could be established to support charities bringing cases. As almost any case brought by a charity on the definition of charitable purpose would be a “test case”, perhaps a form of test case procedure could be implemented, drawing on the experience of the tax test case procedure in sections 890 and 137 of the Tax Administration Act. Perhaps it could be clarified that charities bringing cases are effectively doing so on behalf of the community, and it should be made clear that they will not be subject to adverse awards of costs if unsuccessful. Perhaps it could even be made clear that charities may be awarded costs whatever the outcome of the litigation.
148. Given the extent to which the law of charities is a specialist legal area, consideration should be given to whether a specialist Charity Tribunal is needed. Resourcing constraints are understood, but the need for swift, low-cost access to justice for charities, which led England and Wales to establish a specialist Charity Tribunal, is equally applicable here. In New Zealand, the Legislation Advisory Committee indicates, in its guidelines on process and content of legislation (the “**LAC Guidelines**”, see <http://www2.justice.govt.nz/lac/>) at chapter 13 [279], that a specialist appellate body may be appropriate when the subject matter is particularly technical. The law of charities, which has been described as a “difficult and very artificial branch of the law”, replete with “illogicalities”,⁶⁴ must surely meet that threshold. Given that establishing a new tribunal may be a challenge in the current economic climate, perhaps charities could be given the option of appealing a decision of the charities regulator to an existing tribunal, such as the Taxation Review Authority (“**the TRA**”), in a similar manner to that applying to challenges to

⁶⁴ *Oppenheim v Tobacco Securities Trust Co Ltd* [1951] AC 297 (HL), at 307.

disputable decisions made by the Commissioner of Inland Revenue (see the definition of “hearing authority” in section 3, and section 138 of the Tax Administration Act). The TRA is designed to be a low cost, relatively informal means for determining disputes, with relaxed rules of evidence. Appeals from decisions of the TRA are made to the High Court. The TRA operates as a commission of inquiry (section 15, Taxation Review Authorities Act 1994) and given its experience in considering tax issues, it would seem an appropriate body to consider first instance appeals as to whether an entity’s purposes are charitable. It could sit as a “Charity Appeals Authority” when considering appeals under the Charities Act.

149. A Charity Appeals Authority would not necessarily utilise the tax disputes procedures in the Tax Administration Act when considering appeals under the Charities Act. However, elements of the tax disputes procedures, particularly regarding the pre-trial clarification of the issues in dispute and the manner in which evidence is treated, would be usefully considered in developing the best framework for a Charities appeal process.
150. The current tax disputes procedures are widely acknowledged to be under strain; some even go so far as to say they have failed and require redesign.⁶⁵ Consideration might therefore also be given to the case stated procedure that the current tax disputes procedures were brought in to replace. The tax case stated procedure, despite its faults, did allow taxpayers to exercise their “constitutional right to object”: seminal cases such as *Commissioner of Inland Revenue v Banks* [1978] 2 NZLR 472 (CA), that involved small amounts of tax but important points of principle, would never have been brought before the Courts if taxpayers had been required to mount full-scale litigation proceedings to object to or challenge a tax assessment. Given the unique nature of charities,⁶⁶ the case stated procedure should also be considered as a practical cost-effective option for developing the law of charity.
151. The New Zealand Productivity Commission noted in its March 2014 draft report, *Regulatory Institutions and Practices Inquiry*, that more than half of public sector chief executives consider that agencies often have to work with legislation that is outdated or not fit for purpose.⁶⁷ The appeal right in section 59 of the Charities Act as it is currently being interpreted is arguably not currently fit for purpose. It is in the interests of all concerned that this matter is addressed.

⁶⁵ See “Developments in Tax Disputes Procedure – Another Step Backwards...” Mike Lennard and Mark Keating, Auckland University Faculty of Commercial Law, 2012.

⁶⁶ See for example *Appealing the Regulator: Experience from the Charity Tribunal for England and Wales*, Judge Alison McKenna, Principal Judge, First-tier Tribunal (Charity), prepared for the conference on “Defining, Taxing and Regulating Not-for-Profits in the 21st Century”, Melbourne Law School, July 2012 at 13: “No other tribunal jurisdiction raises the issues that are raised in charity cases”.

⁶⁷ See http://www.slideshare.net/nzprocom/regulatory-institutions-and-design-draft-report?utm_source=slideshow02&utm_medium=ssemail&utm_campaign=share_slideshow, page 9.

APPENDIX A – SUMMARY OF CASES DECIDED UNDER THE CHARITIES ACT TO DATE

	Name	Date of decision	Issue	Evidence
1	<i>Travis Trust v Charities Commission</i> (2009) 24 NZTC 23,273 (HC)	3 December 2008	Declined registration	
2	<i>Canterbury Development Corporation & Ors v Charities Commission</i> [2010] 2 NZLR 707 (HC)	18 March 2010	Declined registration	Affidavits filed by both parties. Ronald Young J holds, <i>obiter</i> , at [104]-[111] that appeals under s 59 must proceed on the basis of the record below with applications to adduce further evidence being required under HCR20.16. It is not clear whether His Honour heard argument on this point before reaching this view.
3	<i>In Re Education New Zealand Trust</i> (2010) 24 NZTC 24,353 (HC)	29 June 2010	Declined registration	After counsel had agreed a process for filing further evidence, the decision in <i>CDC v Charities Commission</i> was delivered. Counsel for the charity argued the CDC approach was wrong and ought not to be followed. Dobson J, <i>obiter</i> , considered no exemption from HCR20.16 applies.
4	<i>Re The Grand Lodge of Antient Free and Accepted Masons in New Zealand</i> [2011] 1 NZLR 277 (HC)	23 September 2010	Declined registration	No application to adduce further evidence. Decision repeatedly makes reference to the lack of evidence.
5	<i>In Re Draco Foundation (NZ) Charitable Trust</i> (2011) 25 NZTC 20,032 (HC)	15 February 2011	Declined registration	No application to adduce further evidence. Decision repeatedly makes reference to the lack of evidence.
6	<i>Re New Zealand Computer Society Inc</i> (2011) NZTC 20,033 (HC)	28 February 2011	Deregistered following complaint	Application to adduce further evidence declined. <i>Computer Society</i> can perhaps be thought of as the low point on the issue of evidence.
7	<i>Re Greenpeace New Zealand Incorporated</i> [2011] 2 NZLR 815 (HC)	6 May 2011	Declined registration	Application to adduce further evidence, to put before the Court information that was available to the charities regulator at the time it made its decision but on which Greenpeace had no opportunity to make submissions on the conclusions drawn from its

				content, granted
	<i>Re Greenpeace New Zealand Incorporated</i> [2013] 1 NZLR 339 (CA) ⁶⁸	16 November 2012	Declined registration	
8	<i>Liberty Trust v Charities Commission</i> [2011] 3 NZLR 68 (HC)	2 June 2011	Deregistered following complaint	Application to adduce further evidence granted: “ <i>All of the material on the website should be regarded as evidence before the Charities Commission, not just those parts of the website which the Charities Commission regarded as relevant</i> ” at [50]
9	<i>Re Queenstown Lakes Community Housing Trust</i> [2011] 3 NZLR 502 (HC) ⁶⁹	24 June 2011	Deregistered following questions raised by an unsuccessful applicant for registration with apparently similar purposes	Application to adduce further evidence granted: “ <i>An appeal under the [Charities] Act differs in form from most appeals governed by Part 20. The Commission is not determining a dispute between parties. There is no formal hearing at which evidence is presented...the special nature of an appeal under the Act justifies some relaxation of the usual tests of cogency, credibility and freshness. I consider that the appropriate focus is on whether the Court will be assisted by the evidence, and whether the Commission will have an adequate opportunity to respond to the new material in its submissions</i> ” at [25].
10	<i>The Plumbers, Gasfitters and Drainlayers Board v The Charities Registration Board</i> [2013] NZHC 1986	8 August 2013	Deregistered following complaint	

⁶⁸ The aspects of the Court of Appeal decision relating to advocacy and illegality are the subject of an appeal to the Supreme Court. Leave to appeal to the Supreme Court was granted to Greenpeace on 8 March 2013 ([2013] NZSC 12). The hearing took place on 1 August 2013 and the decision of the Supreme Court is currently awaited.

⁶⁹ The Taxation (Annual Rates, Employee Allowances, and Remedial Matters) Bill proposes to insert new section CW 42B into the Income Tax Act 2007, which would provide a statutory income tax exemption for “community housing entities”. This would effectively be a statutory override of the *Queenstown Lakes* decision.

APPENDIX B – ABBREVIATIONS

In this paper, the following abbreviations are used:

Board: the Charities Registration Board, established under section 8 of the Charities Act;

Charities Act: Charities Act 2005;

Charities regulator: previously the Charities Commission, and now the Department of Internal Affairs – Charities Services and the Charities Registration Board;

Charities Services: the Department of Internal Affairs - Charities Services, Ngā Rātonga Kaupapa Atawhai;

DIA: Department of Internal Affairs;

Income Tax Act: Income Tax Act 2007;

IRD: Inland Revenue Department;

Tax Administration Act: Tax Administration Act 1994.

The following cases are given the following abbreviations:

- (a) *Austin, Nichols & Co Inc v Stichting Lodestar* [2008] 2 NZLR 141 (SC) ("**Austin Nichols**");
- (b) *Canterbury Development Corporation & Ors v Charities Commission* [2010] 2 NZLR 707 (HC) ("**CDC v Charities Commission**");
- (c) *In Re Draco Foundation (NZ) Charitable Trust* (2011) 25 NZTC 20,032 (HC) ("**Draco**");
- (d) *In Re Education New Zealand Trust* (2010) 24 NZTC 24,353 (HC) ("**Education New Zealand Trust**");
- (e) *Latimer v Commissioner of Inland Revenue* [2002] 1 NZLR 535 (HC) ("**Latimer HC**");
- (f) *Latimer v Commissioner of Inland Revenue* [2002] 3 NZLR 195 (CA) ("**Latimer CA**");
- (g) *Liberty Trust v Charities Commission* [2011] 3 NZLR 68 (HC) ("**Liberty Trust**");
- (h) *Moonen v Broadcasting Standards Authority* (1995) 8 PRNZ 335 (HC) ("**Moonen**");
- (i) *Re Greenpeace New Zealand Incorporated* [2011] 2 NZLR 815 (HC) ("**Greenpeace HC**");
- (j) *Re Greenpeace New Zealand Incorporated* [2013] 1 NZLR 339 (CA) ("**Greenpeace CA**");
- (k) *Re New Zealand Computer Society Inc* (2011) NZTC 20,033 (HC) ("**Computer Society**");
- (l) *Re Queenstown Lakes Community Housing Trust* [2011] 3 NZLR 502 (HC) ("**Queenstown Lakes**");

- (m) *Shotover Gorge Jet Boats Ltd v Jamieson* [1987] 1 NZLR 437 (CA) (“**Shotover Gorge**”);
- (n) *The Plumbers, Gasfitters and Drainlayers Board v The Charities Registration Board* [2013] NZHC 1986 (“**Plumbers**”);
- (o) *Travis Trust v Charities Commission* (2009) 24 NZTC 23,273 (HC) (“**Travis Trust**”).