


# ***TR 1999/D21 - Income tax and fringe benefits tax: charities***

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## Draft Taxation Ruling

### Income tax and fringe benefits tax: charities

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#### ***Preamble***

*Draft Taxation Rulings (DTRs) represent the preliminary, though considered, views of the Australian Taxation Office. DTRs may not be relied on by taxation officers, taxpayers and practitioners. It is only final Taxation Rulings that represent authoritative statements by the Australian Taxation Office of its stance on the particular matters covered in the Ruling.*

## What this Ruling is about

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### **Class of person/arrangement**

1. This Ruling applies to institutions and funds seeking to determine whether they are charities. It is relevant to whether their income is exempt under Division 50 of the *Income Tax Assessment Act 1997* (ITAA 1997) and whether they are rebatable employers under section 65J of the *Fringe Benefits Tax Assessment Act 1986* (FBTAA).

### **Summary of the Ruling**

2. This Ruling describes the circumstances in which an institution or fund will be considered charitable.
3. It explains how to determine whether the purpose of an institution or fund is charitable.
4. It also discusses the features that distinguish a charitable institution from a charitable fund.
5. This Ruling does not cover any other item of income tax exemption listed in Division 50 of the ITAA 1997. It does not consider any of the special conditions listed in section 50-5 of the ITAA 1997. It does not consider how section 65J of the FBTAA operates.

### **Definitions**

6. For the purposes of this Ruling the following key terms are used:

‘**charities**’ is used to describe both charitable institutions and charitable funds;

‘**charitable fund**’ is a fund established for public charitable purposes by will or instrument of trust;

‘**Statute of Elizabeth**’ is a reference to the preamble to the *Statute of Charitable Uses 1601 43 Eliz., c.4*. See paragraph 118 of this Ruling.

## Ruling

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### Charitable

7. A charitable institution is a body established and maintained for purposes that are charitable in the technical legal sense. For a fund to be established for ‘public charitable purposes’ its purposes must also be charitable in the technical legal sense.

### *Technical legal meaning*

8. For a purpose to fall within the technical legal meaning of ‘charitable’ it must be:

- beneficial to the community; and
- within the spirit and intendment of the Statute of Elizabeth.

9. The benefit of a charitable purpose need not be for the whole community; it may be for an appreciable section of the public. For a purpose of relieving poverty, those to benefit need not do so as members of the public.

### *Purposes within the spirit and intendment of the Statute of Elizabeth*

10. For a purpose to be within the spirit and intendment of the Statute of Elizabeth it must be within or analogous to purposes set out in the preamble to that Statute, or purposes that the courts have found to be charitable within the technical legal meaning. The decisions of courts outside Australia can be relevant where they are applying the technical legal meaning and are consistent with the approach of the Australian courts.

***Purposes which are not charitable****The purpose is to confer private benefits*

11. Purposes that are not charitable because they are not for the benefit of the public include purposes of gain or profit for private persons, promoting the common interests of persons in their private capacities, providing mutual benefits for persons in their private capacities, and conferring benefits on persons in their private capacities.

*The purpose is sporting, recreational or social*

12. Social, recreational and sporting purposes are not charitable. However, where such purposes are merely incidental to a purpose that is otherwise charitable, they need not prevent that purpose being charitable.

*The purpose is illegal or against public policy*

13. Purposes that are illegal or against public policy are not charitable.

*The purpose is political, lobbying or merely promotional*

14. Political, lobbying and promotional purposes are not charitable. While promotional purposes may use educational means we do not consider this sufficient to show a charitable purpose.

15. However, where political, lobbying or promotional purposes are merely incidental to a purpose that is otherwise charitable, they need not prevent that purpose being charitable.

*The purpose is governmental*

16. The purposes of government in carrying out its functions are not charitable. However, funding by government and establishment by statute can be consistent with a charitable purpose.

*The purpose is vague or has insufficient value for the community*

17. If the value or benefit of a purpose cannot be clearly identified or is insufficient the purpose is not charitable.

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## **Charitable institutions and charitable funds**

18. The income tax law distinguishes charitable institutions and charitable funds. Whether a charity has the character of an institution or a fund is a question of fact.

### ***Charitable institutions***

19. An institution is an establishment, organisation or association, instituted for the promotion of some object, especially one of public or general utility. It connotes a body called into existence to translate a defined purpose into a living and active principle. It may be constituted in different ways including as a corporation, unincorporated association or trust. However, it involves more than mere incorporation or trustees merely administering trust property in accordance with a trust deed. It does not include a structure controlled and operated by family members and friends.

### ***Charitable funds***

20. A fund mainly manages trust property, and/or holds trust property to make distributions to other entities or persons.

### ***Fringe benefits tax***

21. For rebatable employer status under paragraph 65J(1)(b) of the FBTAA the term ‘charitable institution’ includes charitable funds.

## **Determining the purpose of a particular charitable institution or fund**

### ***Charitable institution***

22. The purpose of a charitable institution is determined having regard to its constitution, any legislation governing its operation, its activities, history and control.

23. An institution is accepted as charitable if its dominant purpose is charitable. Any non-charitable purposes of the institution must be no more than incidental or ancillary to this dominant purpose.

### ***Charitable fund***

24. The purpose of a charitable fund is found by reference to the terms of its constitutive documents (primarily the instrument of trust or the will) and any relevant legislation.

25. For a fund to be established for public charitable purposes it is necessary that it be exclusively charitable. If the trustees of a fund can apply it for some purposes that are charitable and some that are not charitable, the fund is not established for public charitable purposes. Certain State legislation may validate a trust so that it can be applied only for charitable purposes.

## Date of effect

26. This Ruling applies to years commencing both before and after its date of issue. However, the Ruling does not apply to taxpayers to the extent that it conflicts with the terms of settlement of a dispute agreed to before the date of issue of the Ruling (see paragraphs 21 and 22 of Taxation Ruling TR 92/20).

## Explanations

### Guide

These Explanations cover:

- what are charitable purposes? paragraphs 27-53
- purposes that are not charitable - paragraphs 54-96
- what is the distinction between institutions and funds? paragraphs 97-102
- how do institutions and funds work out if their purposes are charitable? paragraphs 103-116.

### 1. Statutory provisions

27. The term 'charitable' is used in both the ITAA 1997 and the FBTAA. Section 50-5 of the ITAA 1997 exempts from income tax the ordinary and statutory income of charitable institutions and funds established for public charitable purposes by will or instrument of trust. Paragraph 65J(1)(b) of the FBTAA grants a rebate of tax to a charitable institution (other than an institution of the Commonwealth, a State or Territory) for fringe benefits tax purposes.

28. The ITAA 1997 and the FBTAA do not define charity or what purposes are charitable. However, in Australia, the courts have held that charitable is used in its technical legal sense derived from the law of charitable trusts rather than in its popular or ordinary sense.<sup>1</sup> The

<sup>1</sup> *Chesterman v. FC of T* (1925) 37 CLR 317; *Incorporated Council of Law Reporting (Qld) v. FC of T* (1971) 125 CLR 659.

term ‘public charitable purposes’ is also used in section 50-5 of the ITAA 1997 with respect to funds. This phrase is synonymous with ‘charitable purposes’ and requires the same element of public benefit.<sup>2</sup>

## **2. The essential characteristics of charitable purposes**

### **Guide**

A charitable purpose:

- intends benefit or value so as to be within or analogous to the purposes set out in the *Statute of Elizabeth* or to the purposes the courts have found to satisfy the technical and legal meaning of charitable - paragraphs 29-42; and
- is for the benefit of the community - paragraphs 43-53.

The Explanations also provide:

- types of purposes that are not charitable - paragraphs 54-96
- the purposes of the *Statute of Elizabeth* and a summary of court cases - paragraphs 117-141
- sample non-profit and dissolution clauses - paragraph 142.

29. The essential characteristic of a charitable purpose is that it is of recognised benefit to the community. This requirement - also called public benefit or social value - includes both that there is value or benefit and that the value or benefit is for the community. While the two requirements are not separate, they each have special features.

### **2.1 *Charity intends benefit or value***

30. The benefits or values intended by charitable purposes are of worth, advantage, utility, importance or significance. They can be tangible, like the accommodation provided by a hostel for the homeless, or intangible like the moral benefits derived from prevention of cruelty to animals.

31. The values or benefits are not limited to some finite or historical list. As new needs arise or community views change there can be an alteration in what purposes are charitable. In dealing with new issues, the courts have been open to developments in society and attitudes.

32. However, while it is necessary that a charitable purpose is of benefit or value, not every benefit or value can ground a charitable purpose. That is, not every purpose of benefit to the community is necessarily charitable.

<sup>2</sup> *Douglas v. FCT* (1997) 36 ATR 532 at 542.

*2.1.1 Spirit and intendment of the Statute of Elizabeth*

33. A purpose is only charitable if it is within the ‘spirit and intendment’ of the *Statute of Charitable Uses 1601* (the so-called ‘Statute of Elizabeth’).<sup>3</sup> This means that the purpose must be within or analogous to:

- purposes set out in the preamble to that Statute (paragraph 118 below); or
- purposes that the courts have found to satisfy the technical legal meaning of charitable.

34. The legal meaning of charitable has been developed by the courts of Australia and other countries, especially England and Wales, New Zealand and Canada. The decisions of these other countries provide guidance as long as they are not inconsistent with the approach of Australian courts. Case law, both Australian and overseas, has also developed on statutory extensions to the meaning of charitable or statutory codifications of the term. These decisions are likely to be of limited, if any, assistance. (For a discussion of the relevant case law see paragraphs 119 to 141).

35. There are five main groupings of benefit or value that the courts have recognised as capable of being charitable. They are purposes for the relief of poverty, the relief of the needs of the aged, the relief of sickness or distress, the advancement of religion, and the advancement of education. There are also many other charitable purposes, commonly referred to as ‘other purposes beneficial to the community’.<sup>4</sup>

36. If the particular purpose is not within the purposes set out in the preamble to the statute of Elizabeth or the purposes the courts have found to satisfy the technical legal meaning of charitable, the purpose must be reasonably analogous to or as extension of purpose that has been found charitable. That does not involve mechanical application of decided cases. It can involve a combination of:

- similarities or differences with purposes in the preamble or court decisions, including the development of judicial approaches in those decisions;
- those purposes in light of changes in society and circumstances, including movement in the law, attitudes and community consensus;

<sup>3</sup> *Royal National Agricultural and Industrial Association v. Chester* (1974) 48 ALJR 304 at 305-306.

<sup>4</sup> *Income Tax Special Commissioners v. Pemsel* [1891] AC 531.



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- the importance of the benefit or value for society, and how it sustains or enhances society; and
- the ways charitable purposes are related to the benefits and values they intend.

37. An illustration of how the courts have drawn analogies is shown by the decision in *Re Vancouver Regional FreeNet Association v. Minister of National Revenue* (1996) 137 DLR (4th) 206. In that case the association operated a free publicly accessible community computer facility, which allowed users access to the Internet. The court held that the association was established for charitable purposes. It was able to reach this conclusion by using an analogy with the provision of highways mentioned in the Statute of Elizabeth to reason that enabling access to the information superhighway was also charitable. Other factors that the court considered important and took into account included that information was the currency of modern life, the public benefit in the free exchange of information among members of the community, and the importance of information in the maintenance of democracy and in particular free speech.

38. Another example of a court using analogies is *Scottish Burial Reform and Cremation Society Ltd v. Glasgow City Corporation* [1967] 3 All ER 215. The case concerned a non-profit making company whose main purpose was the carrying out of cremation. It was held by the House of Lords to be a society established for charitable purposes. The court came to this conclusion by analysing decided cases which had used the 'repair of churches' mentioned in the preamble to decide that the maintenance of burial grounds in a church was charitable and that the maintenance of a cemetery extended from a churchyard was charitable. By a reasonable extension or analogy with these cases it was held that the company's purposes were charitable as they, too, were concerned with the disposal of the dead. The court also considered the necessity of disposal of the dead as evidenced by laws of Parliament.

39. However, it is not appropriate to use fanciful or unreal comparisons with decided cases or the preamble. For example, in *R v. Special Commissioners of Income Tax; ex parte The Headmasters' Conference* (1925) 10 TC 73, the Conference attempted to argue that its purposes were related to education and, therefore, it was charitable. The court found its prevailing purpose was protecting and improving the status, character and interests of persons engaged in the profession of education. Lord Hewart CJ (the other members of the Court delivering concurring judgments) said at 85:

'The argument if I follow it ... seems to be something like this: Education in some of its aspects is a charity; headmasters are connected with education; the Headmasters' Conference is connected with headmasters; therefore the Headmasters'

Conference is a charity. It is really a very old friend: some soldiers have red hair; this man has red hair; therefore this man is a soldier. In like manner it might be argued and with equal force a charity is for the good of mankind; all lawful trades and professions are for the good of mankind; therefore all lawful trades and professions are charities; and in that way - quite a pleasant way - the Income Tax under Schedule D might be abolished universally.’

### 2.1.2 *Aspects of benefit or value*

40. While purposes may be more or less beneficial when looked at from different points of view, a charitable purpose must be of benefit overall. The benefit must be real or substantial; it must not be negligible.<sup>5</sup> Nor can it be harmful on balance.

41. Relevant factors in deciding whether a purpose is of sufficient value are community consensus, general notions of value and expert evidence. Factors, and the weight given the factors, may vary with the type of purported benefit. The fact that a purpose is lawful and has many advocates is not sufficient to make it charitable. For example, political and lobbying purposes are not charitable (see further at paragraphs 78 to 90). However, a community consensus is not essential.<sup>6</sup>

42. If the particular circumstances indicate the purported benefit is in fact insufficient, the purpose is not charitable. For example, in *Re Pinion (deceased)*; *Westminster Bank Ltd. v Pinion* [1964] 1 All ER 890, the testator left some pictures painted by himself and some antique furniture, silver and china to the National Trust. It was argued that the articles in question possessed an educational value. However expert evidence showed that the items possessed little, if any, educational benefit to the community. The court held there was no charitable trust and commented that there was no ‘useful object to be served in foisting on the public this mass of junk’.<sup>7</sup> On the other hand, some benefits or values to the community are not scrutinised to such a degree. Thus spiritual benefits are not analysed to draw a distinction between one religion and another.<sup>8</sup>

<sup>5</sup> *Re Pinion* [1965] Ch 85; [1964] 1 All ER 890.

<sup>6</sup> *Everywoman’s Health Centre Society v. Minister of National Revenue* (1988) [1992] 2 FC 52 at 69.

<sup>7</sup> *Re Pinion* [1964] 1 All ER 890 at 894; and *Re Elmore (deceased)* [1968] VR 390.

<sup>8</sup> *Re Watson (deceased)* [1973] 3 All ER 678 at 688.

## **2.2 *Charity is for the benefit of the community***

43. A charitable purpose must be for the benefit of the community. Charity is altruistic and intends social value or utility. The benefit need not be for the whole community; it may be for an appreciable section of the public. It must not be to provide merely private benefits. For a purpose of relieving poverty those to benefit need not be a section of the public (see paragraphs 120 and 121).

44. In simpler situations an organisation's structures or objects can indicate whether it intends community benefit. For example, the running of a company for the profit of its shareholders is incompatible with a purpose of benefiting the public; the company is carried on for its owners, even if, as a consequence of its operations, the public receives some benefit. On the other hand, a trust simply for 'the benefit of the people of Maryborough' is clearly for the public benefit.

45. In other situations it is necessary to consider who is intended to benefit, the ways in which they are to benefit, and the nature of the benefit or value.<sup>9</sup> It can be a matter of fact and degree as to whether a purpose is for the public benefit.

46. Placing limits on those to benefit generally is incompatible with an intention of benefiting the public if the limits are by reference to some personal tie such as being members of a family or a group which is based on personal relationships to particular persons.<sup>10</sup> Likewise, for limits based on contractual relationships (for example, the employees of a particular employer<sup>11</sup>) and on membership of bodies that can admit or exclude members of the public.<sup>12</sup> In these situations, benefits are usually intended for people in their capacity as relatives, employees or members rather than as members of the public.

47. Limitation to large groups of the community - residents of a particular geographic area, the adherents of a particular religion, those following a particular calling or profession,<sup>13</sup> or sufferers of a particular disability or condition<sup>14</sup> - are consistent with the public requirement, unless the limits are incompatible with the nature of the benefit. For example, limiting access to a library to residents of a particular town could be for the public benefit, but limiting the use of a bridge to adherents of a particular religion would not.<sup>15</sup>

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<sup>9</sup> *Dingle v. Turner* [1972] AC 601; [1972] 1 All ER 878.

<sup>10</sup> *Re Compton* [1945] 1 All ER 198.

<sup>11</sup> *Oppenheim v. Tobacco Securities Trust Co. Ltd* [1951] AC 296; [1951] 1 All ER 31.

<sup>12</sup> *In Re Income Tax Acts (No 1)* [1930] VLR 211.

<sup>13</sup> *In Re Income Tax Acts (No 1)* [1930] VLR 211.

<sup>14</sup> *Thompson v. FCT* (1959) 102 CLR 315 at 321 per Dixon CJ.

<sup>15</sup> Viscount Simonds in *IRC v. Baddeley* [1955] 1 All ER 525 at 534.

48. Where the limits on access are imposed for the sake of better providing community value, they can be compatible with the public benefit requirement. Examples can include the enrolment procedures of schools, referral policies of medical clinics, and borrowing rules of libraries. Such limits can also be for the sake of the continuation and efficient administration of the charity.

49. The ways in which people are to benefit can help show whether a purpose is for the public benefit. It is unlikely that a purpose of conferring benefits on people merely by way of fee for services,<sup>16</sup> by way of contractual right,<sup>17</sup> through common action for mutual gain,<sup>18</sup> or as part of carrying on a particular business<sup>19</sup> is charitable. However, the charging of fees to members of the public is not likely, on its own, to be incompatible with public benefit.<sup>20</sup>

50. The purpose of providing a community benefit is the essential or dominant purpose of a charity. If the only benefits for the public are merely the consequences of pursuing purposes that are not charitable, there is not a charitable purpose. For example, the public may benefit from access to a grocery but that does not make the grocery a charity.

51. Because charities act for community benefit, it is practically inevitable that people benefit from them. Each person who benefits is likely to do so as a private person. However, such personal benefit is merely incidental to the carrying out of the charitable purpose. For example, while it is the individual students of a charitable school who are educated, those private benefits are merely incidental to the educational purpose.

52. In some situations a purpose that, if viewed in isolation, would be non-charitable, is charitable due to the degree of its integration with essential aspects of carrying out a charitable purpose. For example, a

<sup>16</sup> Comments of Rowlatt J in *IRC v. Society for the Relief of Widows and Orphans of Medical Men* (1926) 11 TC 1 at 22, as modified by comments of Peter Gibson J in *Joseph Rowntree Memorial Trust Housing Association v. Attorney-General* [1983] 1 All ER 288.

<sup>17</sup> *Doust v. Attorney-General* (1904) 4 SR (NSW) 577 (employee accident fund); *In Re Harris Scarfe* [1935] SASR 433 (employee superannuation fund).

<sup>18</sup> *Braithwaite v. Attorney-General* [1909] 1 Ch 510 (friendly society); *Re Trusts of Hobourn Aero Components Ltd's Air Raid Distress Fund* [1946] 1 All ER 501 (subscribers fund).

<sup>19</sup> *Re Producers Defence Fund* [1954] VLR 246 (assistance to rural producers especially with employment disputes); *The Corporation of Foreign Bondholders Corp. v. IRC* [1944] 1 All ER 420 (protection of foreign bondholders); *Re Davis (dec'd)*; *Watts v. Davis & Westralian Farmers Co-op Ltd* [1965] WAR 25 (assistance to co-operatives).

<sup>20</sup> *The Abbey, Malvern Wells v. Minister of Town and Country Planning* [1951] 2 All ER 154 (school charging fees for students); *Le Cras v. Perpetual Trustee Co Ltd, re Resch's Will Trusts* [1967] 3 All ER 915 (hospital charging fees).

superannuation fund established for a church's retired ministers has been accepted as charitable.<sup>21</sup> Its essential purpose was ensuring the long-term security for those who made a life-long commitment to propagate the church's doctrines. The personal benefits to the ministers were incidental to the charitable purpose.

53. The public requirement is further illustrated for different types of benefit by the court decisions summarised in paragraphs 119 to 141. Common situations where the public requirement is not met are discussed in more detail at paragraphs 55 to 70.

### **3. Purposes that are not charitable**

#### **Guide**

Types of purposes that are not charitable are:

- to confer private benefits - paragraphs 55-70
- sporting, recreational or social - paragraphs 71-76
- political, illegal, against public policy, or merely promotional - paragraphs 77-90
- governmental - paragraphs 91-92
- vague or of insufficient value to the community - paragraphs 93-96

54. Purposes are not charitable if they lack the required community benefit or are not within the spirit and intendment of the Statute of Elizabeth.

#### **3.1 *The purpose is to confer private benefits***

55. Leaving aside the relief of poverty (see paragraphs 120 and 121), a charitable purpose must be for the benefit of the community, or of a section of the community. This requirement is explained at paragraphs 43 to 53. Particular areas where there may be doubt as to whether an institution or fund is for the benefit of the community include: an organisation's non-profit status; the running of an organisation for the benefit of its members; the providing of benefits as part of a business-like or mutual arrangement; and providing benefits to people merely as customers, contributors or subscribers.

<sup>21</sup> *Presbyterian Church of New Zealand Beneficiary Fund v. Commissioner of Inland Revenue* [1994] 3 NZLR 363.

*3.1.1 Benefits for owners*

56. An organisation is not charitable if it is carried on for the purposes of profit or gain to particular persons including its owners or members. This is known as the non-profit requirement. If an organisation is carried on for the profit of its owners or members, it is carried on for their benefit and not for the benefit of the community. This is the case irrespective of the number of owners or members, or of whether charitable consequences flow from the organisation's activities. Thus, for example, a hospital operated to distribute dividends to private shareholders would not be a charitable institution despite it caring for the sick.

57. We regard an organisation as being non-profit where, by its constituent documents or by operation of law (for example, a statute governing an organisation), it is prevented from distributing its profits or assets for the benefit of particular persons while it is operating and on winding up. The organisation's actions must, of course, be consistent with this for indirect as well as direct gains. Paragraph 142 gives an example of wording that could be used in an organisation's constituent documents, subject to legal and other requirements applying to the particular organisation.

*3.1.2 Benefits for members*

58. If an organisation is set up, essentially, to advance the interests of its members it is not charitable. The members of such organisations do not, as members, constitute a section of the public in the relevant sense.<sup>22</sup> Professional or occupational associations are unlikely to be charitable.<sup>23</sup> (However, see paragraph 63 where an institution that was limited to practising civil engineers was held to be for the promotion of science.)

59. Where an organisation substantially limits itself to the provision of benefits to members, it is unlikely to satisfy the public benefit requirement. In each case it is a matter of considering and weighing the relevant indicators to find whether the purpose is for the public benefit and within the spirit and intendment of the Statute of Elizabeth.

60. Where, however, an organisation is, in fact, providing benefits primarily to the community and not substantially to members alone,

<sup>22</sup> *In re Income Tax Acts (No 1)* [1930] VLR 211.

<sup>23</sup> *Re Mason (dec'd)* [1971] NZLR 714 (law society); *Re Mead's Trust Deed; Briginshaw v. National Society of Operative Printers and Assistants* [1961] 2 All ER 836 (trade union); *Society of Writers to the Signet v. Commissioners of Inland Revenue* (1886) 14 Court Sess Cas (4th Series) 34 (law association); *Sulley (Surveyor of Taxes) v. Royal College of Surgeons, Edinburgh* (1892) 3 Tax Cas 178 (surgeons' association).

membership is unlikely to be a significant factor. If the only benefits to members are ancillary or incidental to a purpose of benefiting the community they do not jeopardise the charitable status of an organisation.

61. Benefits are ancillary benefits if they are conferred merely as a means to help carry out an organisation's charitable purpose. Incidental benefits accrue from the activities that give rise to the organisation's purpose. However, the greater the benefits received by members, the greater the concern is that the purpose is not to provide for the community, but to provide benefits mainly for members.

62. A purpose of providing benefits to members does not become charitable merely because a motivation of the organisation has some social value, or, as a consequence of the organisation's activities, some indirect benefit to the community occurs. Making members' services also available to paying customers (for example, to attend courses or use a library) does not cause a members' organisation to be charitable.

63. Where the benefits are primarily for the community the placing of limits on membership of an organisation is unlikely to be determinative. The nature of the organisation's purpose could itself explain limits on its membership. For example, in *Commissioners of Inland Revenue v. Forrest* [1890] 15 AC 334, an engineering association generally limited its membership to practising civil engineers. Nonetheless, it was held to be for the promotion of science as its activities promoted science and were not directed to advancing the members. Limiting membership to engineers was appropriate because they were the only persons possessing the knowledge and practical experience requisite for the efficient promotion of the purpose.<sup>24</sup>

64. Membership is not a significant factor if the 'membership' is merely analogous to the enrolment in a school.<sup>25</sup> That is:

- the 'members' are entitled only to the purportedly charitable services of the organisation;
- the 'members' are not entitled to participate in the management or control of the organisation, including voting for office-holders; and
- the terms of the 'membership' are essentially linked to the services being provided to the 'member'.

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<sup>24</sup> Similar considerations arose in *Royal Australasian College of Surgeons v. Federal Commissioner of Taxation* (1943) 68 CLR 436.

<sup>25</sup> *Greater Wollongong City Council v. Federation of New South Wales Police Citizens Boys' Clubs* (1957) 2 LGRA 54.

In these situations it is likely to be the nature of the benefit (including the services and terms) that most clearly indicates whether the purpose is charitable.

65. Where an organisation set up to advance its members' interests establishes an entity to carry out charitable activities, it is that entity - rather than the members organisation - that must be for the public benefit. The fact that the separate entity is controlled by the members' organisation does not necessarily prevent this. We accept that an entity set up by a members' organisation can be for the community benefit where the following conditions are satisfied:<sup>26</sup>

- the entity has a separate identity;
- its income and property are not to be appropriated for individuals or for the members organisation while it is carried on and on winding up;
- it is to provide charitable services; and
- the people to receive the services are not limited to members of the members organisation, and the availability of services is effectively made known beyond that membership.

### 3.1.3 *Where business-like benefits are conferred*

66. The court cases indicate that the advancement of industry, commerce or agriculture can be a charitable purpose,<sup>27</sup> but particular care is needed when business-like benefits are to be conferred. The benefit must be for the community or a section of the community and within the spirit and intendment of the Statute of Elizabeth. In *Inland Revenue Commissioners v. Oldham Training and Enterprise Council* (1996) 69 TC 231, the Council provided various services to businesses, persons intending to set up businesses and trainees. Its purposes were not wholly charitable because they extended to promoting the interests of individuals engaged in trade, commerce or enterprise and provided benefits and services to them.

67. In *Hadaway v. Hadaway* [1955] 1 WLR 16, the object of a proposed bank was primarily to assist the planters and agriculturalists of a region by way of loans at a rate of interest as low as was compatible with the proper operation of the bank. The purpose was

<sup>26</sup> *College of Law (Properties) Pty Ltd v. Willoughby Municipal Council* (1978) 38 LGRA 81; *Re Property Services Industry Training Advisory Board Ltd v. Federal Commissioner of Taxation* (1999) 41 ATR 1109; *Re Australian Institute of Management (Vic) and Commr of State Revenue (Vic)* 95 ATC 2179.

<sup>27</sup> *Commissioners of Inland Revenue v. Yorkshire Agricultural Society* [1928] 1 KB 611; *Crystal Palace Trustees v. Minister of Town and Country Planning* [1950] 2 All ER 857.



not charitable because it was not for the promotion of agriculture but for the benefit of individual planters.

68. In contrast, if any private benefits are merely incidental to the carrying out of a purpose it may be charitable. In *Commissioner of Inland Revenue v. White* (1980) 55 TC 651, an association's main objects were to advance and encourage craftsmanship in crafts ancient and modern. Its principal activities were the conversion and maintenance of two workshops for craftsmen including a clock maker, silversmith, bookbinder and diamond mounter. The craftsmen were not necessarily members of the association. The motive for this endeavour came about because of increasing pressure from property developers to convert areas traditionally occupied by some of the best craftsmen in the London area into office premises. The view of the founders of the association was that there would be considerable loss to the community if craftsmen were forced to leave the area. In the particular circumstances of the association, the court was able to find the association's purposes were charitable, with any benefits to the craftsmen merely incidental.

69. However, benefits are not incidental or ancillary merely because a motivation of the organisation has some social value (such as reducing unemployment) or, as a consequence of the organisation's activities, some social value is enhanced (such as improving productivity).

#### *3.1.4 Benefits provided to customers, contributors or subscribers*

70. An organisation that merely provides benefits to customers, contributors or subscribers in return for payment lacks the necessary public character. Examples of non-charitable purposes have included a company fund set up to remedy air-raid distress for employees who subscribed to it,<sup>28</sup> a company fund to which all employees subscribed for work injuries,<sup>29</sup> and a friendly society for girls educated at a particular school.<sup>30</sup>

### **3.2 The purpose is sporting, recreational or social**

71. A purpose that is essentially social in nature is not charitable. Examples in the cases are an institute to give social and other amenities to Welsh people in London,<sup>31</sup> a community centre providing

<sup>28</sup> *Re Trusts of Hobourn Aero Components Ltd's Air Raid Distress Fund* [1946] 1 All ER 501.

<sup>29</sup> *Doust v. Attorney-General* (1904) 4 SR (NSW) 577.

<sup>30</sup> *Braithwaite v. Attorney-General* [1909] 1 Ch 510.

<sup>31</sup> *Williams' Trusts v. Inland Revenue Commissioner* [1947] 1 All ER 513.

for the cultural and social needs of Latvians in Melbourne,<sup>32</sup> and a hostel for entertaining distinguished foreign visitors.<sup>33</sup>

72. This conclusion is not altered by the fact that those concerned with the working of an association have religious motives or sentiments.<sup>34</sup> Thus, a bequest for the establishment of a Roman Catholic boys club was not charitable.<sup>35</sup> The fact that the club may have been inspired by religious motives or frequented by persons of the same religion did not change its essential nature of being a social club. Another example is a Girls' Friendly Society for women and girls who accepted the Christian faith.<sup>36</sup>

73. A recreational or sporting purpose is not a charitable purpose. In the cases the following purposes have been not been accepted as charitable: a cup to encourage the sport of yacht racing,<sup>37</sup> associations for rowing, swimming and amateur athletics,<sup>38</sup> cricket,<sup>39</sup> breeding of pigeons for racing,<sup>40</sup> angling,<sup>41</sup> fox-hunting<sup>42</sup> and in relation to horse racing.<sup>43</sup> The purposes are not charitable, even though there might be elements of benefit to the community.

74. A sporting or recreational element does not detract from a charitable purpose if it is merely incidental<sup>44</sup>. In *Re Mariette; Marriette v. Aldenham School Governing Body* [1914-15] All ER Rep 794 a bequest was made to a school for the building of squash racket courts or fives courts. It was accepted as charitable on the ground that the development of body as well as mind was integral to the students' schooling. The sporting or recreational elements formed an integral part of the carrying on of the charitable purpose.

75. Sporting or recreational activities might also be incidental to rehabilitation and for promoting the efficiency of the armed forces.

<sup>32</sup> *Latvian Co-operative Society v. Commissioner of Land Tax (Vic)* (1989) 20 ATR 3641.

<sup>33</sup> *Re Corelli* [1943] 2 All ER 519.

<sup>34</sup> *Keren Kayemeth Le Jisroel Ltd v. Inland Revenue* [1932] AC 650 at 657.

<sup>35</sup> *Attorney-General (NSW) v. Cahill* [1969] 1 NSW 85.

<sup>36</sup> *Re Wilson's Grant; Fidelity Trustee Co Ltd v. Johnson* [1960] VR 514.

<sup>37</sup> *Re Nottage, Jones v. Palmer* [1895-9] All ER Rep 1203; 2 Ch 465.

<sup>38</sup> *Laing v. Commissioner of Stamp Duties* [1948] NZLR 154.

<sup>39</sup> *Re Patten; Westminster Bank v. Carlyon* [1929] All ER Rep 416.

<sup>40</sup> *Royal National Agricultural and Industrial Association v. Chester* (1974) 48 ALJR 304.

<sup>41</sup> *Re Clifford* [1912] 1 Ch 29.

<sup>42</sup> *Peterborough Royal Foxhound Show Society v. Commissioners of Inland Revenue* [1936] 1 All ER 813.

<sup>43</sup> *Re Hoey* [1994] 2 Qd R 510.

<sup>44</sup> *Lloyd v. FCT* (1955) 93 CLR 645 at 665.

However, any integration must be clear; it cannot be presumed<sup>45</sup>. We do not accept the argument that ordinary rifle and pistol clubs are charitable because they promote the defence of the nation. Their main purpose is sporting or recreational; any link to promoting the defence of the nation is too remote. We consider the decision in *Re Stephens, Giles v. Stephens* [1892] 8 TLR 792 - which held that a bequest to the National Rifle Association was charitable - is no longer applicable.

76. In a number of States in Australia legislation extends charitable status to the provision of recreational facilities: section 103(2) of the *Trusts Act 1973* (Qld); section 69C(1) of the *Trustee Act 1936* (SA); section 5(1) of the *Charitable Trusts Act 1962* (WA) and section 4(1) of the *Variation of Trusts Act 1994* (Tas). We do not accept that the meaning of ‘charitable’ for taxation purposes is extended by these provisions. To this extent we disagree with the views expressed by Adam J in *Re Mair* [1964] VR 529 at 534 that:

‘I think, just as English decisions themselves are of authority here on the question of what is charity, so English statute - the legislative declaration as to what is within the spirit and intendment of that statute - is of some force here also, in arriving at the ambit of this loose conception of charity in law.’

### **3.3 Purpose is political, illegal, against public policy, or merely promotional**

#### **3.3.1 Illegal or against public policy**

77. A purpose contrary to public policy is not charitable.<sup>46</sup> If a purpose is either unlawful or a lawful purpose is to be carried out by unlawful means it is also not charitable.<sup>47</sup> For example, a school for thieves might, in a sense, advance education, but it is not a charitable institution.<sup>48</sup>

#### **3.3.2 Political**

78. An institution or fund is not charitable if its dominant purpose is advocating a political party or cause, attempting to change the law or government policy, or promoting a particular point of view.

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<sup>45</sup> *IRC v. City of Glasgow Police Athletic Association* [1953] AC 380 at 391.

<sup>46</sup> *Re Lowin (deceased); Perpetual Trustee Co Ltd v. Robins* (1967) 85 WN (Pt 1) (NSW) 403 at 411.

<sup>47</sup> *Auckland Medical Aid Trust v. Commissioner of Inland Revenue* [1979] 1 NZLR 382 at 395.

<sup>48</sup> *Re Pinion (deceased)* [1964] 1 All ER 890 at 893.

79. However, if the institution or fund has a purpose that is otherwise charitable, the presence of political or promotional activity that is incidental need not detract from its charitable status.

80. A purpose of supporting a particular political party or its line is not charitable.<sup>49</sup> Thus, in *Re Hopkinson (deceased); Lloyds Bank Ltd v. Baker* [1949] 1 All ER 346 a bequest was for ‘education of men and women of all classes (on the lines of the Labour Party’s memorandum headed “A Note on Education in the Labour Party”) to a higher conception of social, political and economic ideas and values and of personal obligations of duty and service which are necessary for the realisation of an improved and enlightened social civilisation’. The Court’s interpretation was that:

‘Its perfectly legitimate and proper object is, in my judgement, to advance the cause of the Labour Party by improving its methods of propaganda and by increasing its electoral efficiency.’

This, however, was not charitable:

‘Political Propaganda masquerading - I do not use the word in any sinister sense - as education is not education....it is not charitable.’<sup>50</sup>

### 3.3.3 *Changing law or government policy*

81. An institution or fund whose purpose is to change the law or government policy is not charitable. This is so even if the subject matter of the change concerns the relief of poverty, education or religion.<sup>51</sup>

82. The courts have rejected such purposes as not charitable because they are political in nature:

‘... a trust for the attainment of political objects has always been held to be invalid, not because it is illegal, for everyone is at liberty to advocate or promote by any lawful means a change in the law, but because the Court has no means of judging whether a proposed change in the law will or will not be for the public benefit, and therefore cannot say that a gift to secure the change is a charitable gift.’<sup>52</sup>

<sup>49</sup> *Bacon v. Pianta* (1966) 114 CLR 634.

<sup>50</sup> See also *Bonar Law Memorial Trust v. The Commissioners of Inland Revenue* (1933) 17 TC 508.

<sup>51</sup> *Royal North Shore Hospital of Sydney v. Attorney-General (N.S.W)* (1938) 60 CLR 396 at 426.

<sup>52</sup> *Bowman v. Secular Society Ltd* [1917] AC 406 at 442 per Lord Parker.

83. Examples of purposes found not to be charitable in the cases are a voluntary euthanasia society,<sup>53</sup> a prohibition league whose purpose was the ‘abolition of the traffic in intoxicating beverages’ through legislative action,<sup>54</sup> and an anti-vivisection society whose main purpose was to replace the existing law with legislation prohibiting medical experiments on animals altogether.<sup>55</sup>

84. A purpose of seeking to maintain the existing law is also not charitable. In *Molloy v. Inland Revenue Commissioners (NZ)* (1977) 8 ATR 323<sup>56</sup> a society for protecting the unborn was held not to be established for charitable purposes. The court found the society’s objects were aimed at preventing abortion law reform and said that a purpose being aimed at frustrating an obvious political object must itself be a political object for charities law.<sup>57</sup>

85. A purpose of seeking changes to government policy or particular decisions of governmental authorities is also not charitable. Examples from the cases are the Amnesty International Trust whose purpose of securing the release of prisoners of conscience involved applying moral pressure to governments or authorities,<sup>58</sup> and a neighbourhood association whose activities involved campaigning on such issues as government cutbacks, transportation changes, conversion of areas into condominiums and improving roads.<sup>59</sup>

### 3.3.4 Promotional

86. An institution or fund which aims to promote a particular point of view or endeavours to convince the public of the correctness of such a view is not charitable. These views can be described as being ‘promotional’ in nature and irrespective of whether these views are espoused using educational means or have educational consequences the courts have refused to recognise them as beneficial to the community as it would involve granting or denying legitimacy to what are essentially ‘political’ views.

87. For example, in *Positive Action Against Pornography v. Minister of National Revenue* (1988) 49 DLR (4th) 74 the taxpayer’s objects were to ‘distribute educational material concerning the issue of

<sup>53</sup> *Re Collier* [1998] 1 NZLR 81.

<sup>54</sup> *Re Cripps; Cripps v. Hobart Temperance Alliance* [1941] Tas SR 19. See also *Knowles v. Commissioner of Stamp Duties* [1945] NZLR 522.

<sup>55</sup> *National Anti-Vivisection Society v. IRC* [1948] 2 All ER 217.

<sup>56</sup> On appeal *Molloy v. Commissioner of Inland Revenue* (1981) 12 ATR 93. See also *Human Life International in Canada Inc v. The Minister of National Revenue* (Court of Appeal, Ottawa March 18, 1998).

<sup>57</sup> *Molloy v. Inland Revenue Commissioner (NZ)* (1978) 8 ATR 323 at 328.

<sup>58</sup> *McGovern v. Attorney-General* [1981] 3 All ER 493.

<sup>59</sup> *N.D.G Neighbourhood Association v. Revenue Canada* 88 DTC 6279.

pornography'. To this end it produced an information kit which was distributed to the public upon request and had a 'strong anti-pornography bias'. It argued that, therefore, it was for the 'advancement of education'. This was not accepted by the Court of Appeal. Stone J said that 'there is simply the presentation to the public of selected items of information and opinion on the subject of pornography. That, in my view cannot be regarded as educational in the sense understood by this branch of the law'.<sup>60</sup> He also rejected it as charitable because its objects were primarily political.

### 3.3.5 *Political, lobbying or promotional activities which are merely incidental*

88. If a purpose is otherwise charitable its status is not affected by political, lobbying or promotional activities which are incidental to its charitable end.

89. An illustration of this principle is the decision of *Inland Revenue Commissioners v. Yorkshire Agricultural Society* [1927] All ER Rep 536. In this case an objection was taken against the charitable status of the society because one of its objects was to 'watch and advise on legislation affecting the agricultural industry'. This was rejected. Atkin LJ said, at 543:

'It is perfectly consistent with the main object of the society being one for the promotion of agriculture generally, that if that is its object, in order to carry out its object it should watch and advise on legislation affecting agriculture. Supposing a society formed for an admittedly charitable purpose, for the purpose of promoting education, or for the purpose of promoting the relief of the sick and poor, it appears impossible to suggest that it might not be well within the charitable objects of such a society to watch and advise on legislation, in the one case affecting education and in the other case affecting the relief of the sick and the poor.'

90. A further example of incidental 'political' objects is the decision of *Re Inman (deceased)* [1965] VR 238. In this case the testator directed part of his estate to a number of institutions including the Royal Society for the Prevention of Cruelty to Animals and an anti-vivisection society. The anti-vivisection society was not accepted as a charity as its main object was to secure the abolition of vivisection by demanding its prohibition by law. However, the RSPCA was accepted as a charity even though one of its objects involved the procuring of legislation. Gowans J said, at 242:

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<sup>60</sup> *Positive Action Against Pornography v. Minister of National Revenue* (1988) 49 DLR (4<sup>th</sup>) 74 at 80.

‘The general object is to prevent cruelty to animals ... None of the methods set out for the achievement of this object detracts from its character. It is true that one of these methods, viz, procuring such legislation as may be thought expedient, if taken alone, would be a political object and nothing more. But it is only a method of achieving the main or fundamental object, the prevention of cruelty to animals...’

### **3.4 *The purpose is governmental***

91. Governmental departments and organisations are unlikely to be charitable institutions. They are simply performing a governmental responsibility. In *Re Cain (deceased); The National Trustees Executors and Agency Co of Australia Ltd v. Jeffrey* [1950] VLR 382 a bequest was made in favour of the Children’s Welfare Department of the Victorian State Government. Dean J said at 387:

‘In my opinion if the present gift be construed as a gift for carrying on the ordinary activities of a Government department pursuant to a statute, the gift is not a gift for charitable purposes, even if the activities are such that if carried on by private persons they would be charitable. Such activities are simply part of the government of the country ... It is performing functions which Parliament, as a matter of public policy, has committed to it. It cannot whilst performing its statutory duties, have any greater claim to be charitable than the Railways Department, the Department of Public Works, or the Crown Law Department.’

92. In *Auckland Harbour Board v. Commissioner of Inland Revenue* [1959] NZLR 204 the Board argued that all its property and assets were held on charitable trust as its purposes were within the words ‘repair of ports’ and ‘havens’ in the preamble to the Statute of Elizabeth. Shorland J said, at 208:

‘The true concept of a Harbour Board, in my view, is not the narrow concept of a public body charged merely with the duty of the “repair of ports, havens ... [and] sea banks” or with duties truly analogous thereto; but the much broader concept of an elective public body charged with the duty of local government and control of a prescribed area of land and territorial waters defined in a Warrant issued under the hand of the Governor-General.’<sup>61</sup>

<sup>61</sup> See also *Waitemata County v Commissioner of Inland Revenue* [1971] NZLR 151.

### **3.5 *The purpose is vague or has insufficient value to the community***

93. A purpose which has insufficient value to the community is not charitable.<sup>62</sup> For example, where a testator set up a trust for the publication of his own literary works, it was not charitable as they failed to have any educational value to the community.<sup>63</sup>

94. Benefits that are too indirect for the community also do not qualify. *New Zealand Society of Accountants v. Commissioner of Inland Revenue* [1986] 1 NZLR 147 concerned statutory funds used to compensate people for money misappropriated by a solicitor or accountant. It was submitted that the community as a whole benefited from the existence of the fund in that as present or potential clients they all had the benefit of the knowledge that the fund was there as a safeguard and a protection of their interests. This was rejected by Richardson J who said there was not sufficient value to the community to find a charitable purpose. He said, at 153:

‘That peace of mind seems to me far too nebulous and remote to be regarded as a public benefit. Nor is it suggested that the existence of the fund tends to promote honesty and integrity on the part of those engaged in the public practice of law or accountancy, or that the purpose of the trust is the moral improvement of the community. The element of public benefit must arise if at all from the application of the fund for the purposes of the fund and I cannot see any basis for enlarging the community benefited beyond those persons entitled to claim from the fund.’

95. Any purpose that is vague or ambiguous fails to have sufficient certainty to be characterised as charitable. Thus, in *Inland Revenue Commissioners v. Baddeley* [1955] 1 All ER 525 land was conveyed to trustees for the moral, social and physical well-being of a community. It was held by the House of Lords that the trust failed for its vagueness and generality. Viscounts Simonds said (at 531):

‘The moral, social and physical well-being of the community, or any part of it, is a laudable object of benevolence and philanthropy, but its ambit is far too wide to include only purposes which the law regards as charitable.’

96. Other expressions that the cases have found too vague or imprecise include philanthropic purposes,<sup>64</sup> benevolent purposes,<sup>65</sup>

<sup>62</sup> *Re Hummeltenberg* [1923] All ER Rep 49.

<sup>63</sup> *Re Elmore (deceased)* [1968] VR 390.

<sup>64</sup> *Re MacDuff; MacDuff v. MacDuff* [1895-9] All ER Rep 154.

<sup>65</sup> *Attorney-General of New Zealand v. New Zealand Insurance Company* [1936] 3 All ER 888.



patriotic purposes,<sup>66</sup> and benefit, maintenance and advancement of youth.<sup>67</sup> Such problems with vagueness or ambiguity can be reduced by careful drafting and the specifying of how the purposes are to be carried out.

#### **4. Charitable institutions and charitable funds**

##### **Guide**

The Explanations distinguish charitable institutions and charitable funds.

##### **4.1 *Why the distinction matters***

97. For an organisation that is not established by will or instrument of trust to be treated as a charity for income tax purposes it must be a charitable institution. There can be situations where these sorts of entity do not qualify as institutions.

98. A charity that is established under a will or instrument of trust could be either a charitable institution or a charitable fund. This distinction has consequences for income tax exemption. Under section 50-5 of the ITAA 1997 there are different special conditions for income tax exemption for charitable institutions and charitable funds. Determining whether a particular charity is a fund or institution is a question of fact requiring a consideration of the relevant circumstances.

##### **4.2 *Distinction between charitable institutions and funds***

99. An institution - whether it is constituted as a company or trust or is in unincorporated form - generally connotes a body called into existence to translate a defined purpose as conceived in the mind of its founders into a living and active principle.<sup>68</sup>

100. Whether a particular entity is an institution is indicated by a range of factors including activities, size, permanence and recognition. An organisation is not an institution simply through incorporation<sup>69</sup> or forming of an association. The word institution has a meaning greater than a structure controlled and operated by family members and friends.<sup>70</sup> However, through growth in membership, activities and

<sup>66</sup> *Attorney-General v. National Provincial and Union Bank of England* [1924] AC 262.

<sup>67</sup> *Re Payne (dec'd)* [1968] Qd R 287.

<sup>68</sup> *Mayor of Manchester v. McAdam* [1896] AC 500 at 511; *YMCA v. FC of T* (1926) 37 CLR 351.

<sup>69</sup> *Pamas Foundation (Inc) v. DFCT* 92 ATC 4161.

<sup>70</sup> *Pamas Foundation (Inc) v. DFCT* 92 ATC 4161.

recognition a body may become an institution, even if it has evolved from a small group of people who were not an institution at an earlier stage.<sup>71</sup>

101. In contrast, a fund comprises trust property that is merely managed in accordance with a trust deed and/or held to make distributions to other entities or persons.<sup>72</sup> Not all trusts established for charitable purposes are funds. Some may be charitable institutions. This depends on the factual circumstances.

#### **4.3 *Fringe benefits tax***

102. The meaning to be given to the word institution always depends on the legislative context in which it is found.<sup>73</sup> For fringe benefits tax purposes, unlike income tax, the context of the legislation indicates that the word institution also includes funds. Therefore, a reference to charitable institution in paragraph 65J(1)(b) of the FBTA is wide enough to embrace a charitable fund.

### **5. Determining the purpose of a particular charitable institution or fund**

#### **Guide**

The sole or dominant purpose for which a charitable institution is established and operated is charitable.

A charitable fund is established solely for charitable purposes.

#### **5.1 *Charitable institutions***

103. For an institution to be a charitable institution its sole or dominant purpose must be charitable. If it has purposes which, when viewed in isolation, would not be charitable, they must be incidental or ancillary to the charitable purpose.

‘Such a body is a charity even if some of its incidental and ancillary objects, considered independently, are non-charitable.’<sup>74</sup>

104. If an institution has purposes that are not part of or incidental to a charitable purpose it is not a charitable institution. This is the case even if those purposes are secondary. For example, an

<sup>71</sup> *Christian Enterprises Ltd v. Commissioner of Land Tax (NSW)* (1968) 88 WN (Pt 2) (NSW) 112 at 120.

<sup>72</sup> *Commr of Land Tax (NSW) v. Joyce* (1974) 48 ALJR 432.

<sup>73</sup> *Minister of National Revenue v. Trusts and Guarantee Co Ltd* [1939] 4 All ER 149 at 155.

<sup>74</sup> *Congregational Union of NSW v. Thistlethwayte* (1952) 87 CLR 375 at 442 per Dixon CJ, McTiernan, Williams and Fullagar JJ.

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association set up to be a social club and to look after injured animals would not be a charitable institution even if it mainly cared for animals, with lesser attention given to the social club.

105. Finding an institution's sole or dominant purpose involves an objective weighing of all its features. They include its constitutive or governing documents, its activities, policies and plans, administration, finances, history and control, and any legislation governing its operation.

106. As these features can change over time, so can an institution's purpose. An institution's purpose at the time it was established is a relevant but not necessarily determinative factor. Accordingly, it is possible for an institution that was not charitable when founded to become a charitable institution, and vice versa.

107. The approach to finding whether an institution's purpose is charitable is illustrated by the High Court's decision in *Royal Australasian College of Surgeons v. FC of T* (1943) 68 CLR 436. At issue was whether the College was a scientific institution.<sup>75</sup> To determine whether the College's dominant purpose was advancing science the Court considered the objects in the College's constituent document and also its activities.

108. The objects set out in the constituent document were partly for the promotion of surgical knowledge and practice and partly for the promotion of professional interests. They were not exclusively for science. The principal activities included the holding of conferences of surgeons for the discussion and study of surgical matters and the dissemination of knowledge of surgery, the provision of a technical surgical library for the use of its members, the publication of surgical journals, the financing of surgical research, the conduct of examinations for admission to fellowship of the College, and the administration of funds for surgical research and for the award of scholarships to medical students.

109. In light of the activities, the objects that, in isolation, could have been to promote the professional interests of members, were incidental to the purpose of advancing science. Accordingly, it was apparent that the College's dominant purpose was for science, and any other purposes were merely incidental.

110. On the other hand, if those objects were not reducible to the scientific purpose, the College would not have been a scientific institution. Relevant features would include the matters discussed at paragraphs 55 to 70.

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<sup>75</sup> Under paragraph 23(e) of the *Income Tax Assessment Act 1936*.

**5.2 Charitable funds**

111. For a fund to be a charitable fund it must be established for public charitable purposes. The charitable purposes must be the only purposes for which it is established. If a fund can be applied for purposes that are not charitable it is not a charitable fund.<sup>76</sup> Any objects which, if viewed in isolation, would not be charitable, must be merely incidental to the charitable purposes.

112. Various State acts operate to save trusts that would otherwise be invalid as having both charitable and non-charitable purposes.<sup>77</sup> A trust to which the State legislation applies is construed and given effect as if no trust funds could be applied for a non-charitable purpose. The application of these provisions causes a trust to be exclusively charitable for taxation purposes,<sup>78</sup> so long as the valid purposes fall within the technical legal meaning of charitable.

113. Because the purpose of a charitable fund is found by reference to the terms of its constitutive documents and any relevant legislation, activities carried on by the trustees subsequent to establishment are not relevant.<sup>79</sup> Such activities are, however, relevant to income tax exemption because the fund must be applied for the purposes for which it was established.<sup>80</sup>

**5.3 Relationships that are not purposes of an institution or fund**

114. The charitable purpose must be the purpose of the charitable institution or charitable fund. It is not sufficient that the activities or purposes of the fund or institution merely have some relationship to a charitable purpose.

115. For example, a charitable effect or consequence flowing from an organisation's purposes is not sufficient to show a charitable purpose. The charitable pursuits must, themselves, characterise the organisation. In *General Nursing Council for England and Wales v. St. Marylebone Corporation* [1959] 1 All ER 325 the Council's main functions were to maintain a register of nurses and to prescribe examination and training to that end. It was argued that the '...conditions as to training and experience, imposed as a pre-requisite of registration make the council a charitable organisation, because

<sup>76</sup> *Compton v. Federal Commissioner of Taxation* (1966) 116 CLR 233.

<sup>77</sup> *Trusts Act 1973* (Qld) section 104; *Charitable Trusts Act 1993* (NSW) subsection 23(1); *Trustee Act 1936* (SA) subsection 69A(1); *Variation of Trusts Act 1994* (Tas) subsection 4(3); *Property Law Act 1958* (Vic) subsection 131(2); and *Trustees Act 1962* (WA) subsection 102(1).

<sup>78</sup> *Downing v. Federal Commissioner of Taxation* (1971) 125 CLR 185.

<sup>79</sup> *Douglas v. FCT* (1997) 36 ATR 532 at 538.

<sup>80</sup> Section 50-5 of the ITAA 1997.

these conduce to the advancement of the nursing of sick persons which is a charitable object'. Lord Keith (at 332) disagreed with this view noting that though it might be a consequence of the Council's activities it was not the purpose for which the Council was established.

116. The use of means that are commonly adopted by charities is not enough to show a charitable purpose. For example, in *Molloy v. Inland Revenue Commissioner of New Zealand* (1977) 8 ATR 323 the use of educational means - disseminating information for the public on the fundamental importance of human life - was not sufficient to show that the dominant purpose was educational rather than political - the preventing of any change in the penal sanctions controlling the procurement of abortion.

## **6. Statute of Elizabeth and court decisions**

### **Guide**

The Explanations provide the purposes in the preamble to the *Statute of Elizabeth*. They also provide an outline of cases on charities for:

- relief of poverty - paragraphs 120-121
- relief of needs arising from old age - paragraphs 122
- relief of sickness and distress - paragraphs 123-125
- advancement of education - paragraphs 126-134
- advancement of religion - paragraphs 135-140
- other charitable purposes - paragraphs 141

117. A purpose is only charitable if it is within the 'spirit and intendment' of the Statute of Elizabeth (see paragraphs 33 to 39). Charitable purposes are within or analogous to purposes in the preamble to the Statute of Elizabeth or to the court cases on charities.

### **6.1 Statute of Elizabeth**

118. The purposes in the Statute of Elizabeth are the relief of aged, impotent and poor people; the maintenance of sick and maimed soldiers and mariners, schools of learning, free schools and scholars in universities; the repair of bridges, havens, causeways, churches, sea banks and highways; the education and preferment of orphans; the relief of stock or maintenance of houses of correction; marriage of poor maids; supportation, aid and help of young tradesmen, handicraftsmen and persons decayed; the relief or redemption of prisoners or captives and the aid or ease of inhabitants concerning payment of fifteens, setting out of soldiers, and other taxes.

**6.2 Summary of court decisions**

119. Decisions of courts on the technical legal meaning of charitable are important in deciding whether a particular purpose is charitable. They can be used to draw analogies. The following discussion is not a substitute for the decisions themselves, but helps to give a feel for the range of charitable purposes and particular issues for different types of charity.

**6.2.1 Relief of poverty**

120. The relieving of poverty is a charitable purpose. The persons to benefit need not be destitute or on the border of destitution.<sup>81</sup> In Australia, those lacking the resources to obtain what is necessary for a modest standard of living in the Australian community may be accepted as suffering poverty.<sup>82</sup> To relieve poverty implies that the people in question have a need attributable to their condition which requires alleviating, and which those people could not alleviate or would have difficulty in alleviating by themselves.<sup>83</sup> The ways in which poverty can be relieved include providing money, accommodation,<sup>84</sup> legal or medical aid. The charging of fees need not be inconsistent with a purpose of relieving poverty.<sup>85</sup>

121. Purposes of relieving poverty have been accepted as charitable where those to benefit were poor relatives,<sup>86</sup> poor members of an association<sup>87</sup> and poor employees of an employer.<sup>88</sup> This is because, unlike other charitable purposes, the benefit does not need to be for the community or a section of the community: *Dingle v. Turner* [1972] 1 All ER 878.<sup>89</sup>

**6.2.2 Relief of the needs arising from old age**

122. A purpose of relieving the needs arising from old age is a charitable purpose unless there is a limitation which deprives it of that

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<sup>81</sup> *Re Gillespie (dec'd)* [1965] VR 402 at 406.

<sup>82</sup> *Ballarat Trustees Executors and Agency Co. v. FC of T* (1950) 80 CLR 350.

<sup>83</sup> *Joseph Rowntree Memorial Trust Housing Association Limited v. Attorney-General* [1983] 1 All ER 288 at 295.

<sup>84</sup> *Re Niyazi's Will Trusts* [1978] 1 WLR 910; [1978] 3 All ER 785.

<sup>85</sup> *Re Cottam; Midland Bank Executor and Trustee Co Ltd v. Huddersfield Corporation* [1955] 1 WLR 1299; [1955] 3 All ER 704.

<sup>86</sup> *Re Scarisbrick; Cockshott v. Public Trustee* [1951] Ch 622; [1951] 1 All ER 822.

<sup>87</sup> *Re Young; Westminster Bank Ltd v. Sterling* [1955] 1 WLR 1269; [1955] 3 All ER 689.

<sup>88</sup> *Dingle v. Turner* [1972] 1 All ER 878.

<sup>89</sup> As applied in Australia by *Re Hilditch (dec'd)* (1986) 39 SASR 469.

character.<sup>90</sup> Such relief can take many forms such as the provision of accommodation or nursing facilities, but it may also involve providing relief in the form of companionship, mutual activities and the security of community living to counter the effects of the isolation and loneliness of old age.<sup>91</sup> This purpose must also be for the public benefit. In *Re Mills (deceased)* (1981) 27 SASR 200 the testator left part of his estate for the construction of an eventide settlement for the descendants of his great grandparents. The bequest was held not to be charitable because the public did not benefit, only those who had a blood relationship with a particular person.

### 6.2.3 *Relief of sickness and distress*

123. A purpose of relieving sickness is a charitable purpose. Sickness usually connotes a disorder of health, an illness or an ailment, whether mental or physical and whether permanent or transient.

124. The following have been held to be a section of the public who are in need of relief from sickness and distress: the blind,<sup>92</sup> the deaf and dumb,<sup>93</sup> the mentally ill<sup>94</sup>, the sick<sup>95</sup>, the underprivileged<sup>96</sup> and the orphaned.<sup>97</sup> The types of institutions that are charitable because they provide relief to the sick include hospitals,<sup>98</sup> convalescent homes,<sup>99</sup> sanatoria<sup>100</sup> and dispensaries.<sup>101</sup>

125. It is necessary that any purpose of relieving sickness or distress must be for the benefit of the public. In *Waterson v. Hendon Borough Council* [1959] 2 All ER 760 a friendly society operated a hospital and other clinics for the benefit of its members. It was held by Salmon J not to be charitable because its purpose were not altruistic;

<sup>90</sup> *Hilder v. Church of England Deaconess' Institution Sydney Ltd* [1973] 1 NSWLR 506.

<sup>91</sup> *D V Bryant Trust Board v. Hamilton City Council* [1997] 3 NZLR 342.

<sup>92</sup> *Re Inman* (1965) VR 238.

<sup>93</sup> *Nunawading Shire v. Adult Deaf and Dumb Society of Victoria* (1921) 29 CLR 98.

<sup>94</sup> *Diocesan Trustees of Church of England in Western Australia v. Solicitor-General* (1909) 9 CLR 757.

<sup>95</sup> *Taylor v. Taylor* (1910) 10 CLR 218.

<sup>96</sup> *Salvation Army (Vic) Property Trust v. Ferntree Gully* (1952) 85 CLR 159.

<sup>97</sup> *Attorney General (NSW) v. Perpetual Trustee Co Ltd* (1940) 63 CLR 209.

<sup>98</sup> *Re Resch's Will Trusts; Le Cras v. Perpetual Trustee Co* [1969] 1 AC 514; [1967] 3 All ER 915.

<sup>99</sup> *IRC v. Trustees of Roberts Marine Mansions* (1927) 43 TLR 270.

<sup>100</sup> *Kytherian Association of Queensland v. Sklavos* (1958) 101 CLR 56.

<sup>101</sup> *Re Ford* [1945] 1 All ER 288.

the object of the members was not to do good to others but to themselves.<sup>102</sup>

#### 6.2.4 *Advancement of education*

126. An institution or fund whose purpose is the advancement of education for the public benefit is charitable. The conducting of schools, colleges and universities for general learning are well-known ways of advancing education. Schooling is not limited to the general education of the young and need not be academic. More specialised schooling has been treated as valid for the advancement of education. Examples include a farming training school,<sup>103</sup> training in aviation,<sup>104</sup> technical education,<sup>105</sup> training in the construction industry,<sup>106</sup> commercial education,<sup>107</sup> economic and sanitary science,<sup>108</sup> the arts of social intercourse,<sup>109</sup> the study of law,<sup>110</sup> a school of archaeology,<sup>111</sup> study of natural history,<sup>112</sup> scientific study of obstetrics and gynaecology<sup>113</sup> and a kindergarten.<sup>114</sup>

127. The support of the educational activities of charitable schools and colleges has also been accepted as charitable. Examples include the providing of scholarships,<sup>115</sup> professorships<sup>116</sup> and the support of a school's teachers.<sup>117</sup>

128. Purposes that, when viewed separately might not be educational, may be charitable where they are incidental to or integrated with a school or college's educational purposes and

<sup>102</sup> *Waterson v. Hendon Borough Council* [1959] 2 All ER 760 at 764.

<sup>103</sup> *Re Tyrie (dec'd)* [1970] VR 264.

<sup>104</sup> *Re Lambert (dec'd)* [1967] SASR 19.

<sup>105</sup> *Royal North Shore Hospital of Sydney v. A-G (NSW)* (1938) 60 CLR 396.

<sup>106</sup> *Barclay v. Treasurer of Queensland* 95 ATC 4496.

<sup>107</sup> *Re Koettgen's Will Trusts* [1954] Ch 252.

<sup>108</sup> *Re Berridge* (1890) 63 LT 470.

<sup>109</sup> *Re Shaw's Will Trusts* [1952] Ch 163.

<sup>110</sup> *College of Law (Properties) Pty Ltd v. Willoughby* (1978) 38 LGRA 81; *Smith v. Kerr* [1902] 1 Ch 774.

<sup>111</sup> *Re British School of Egyptian Archaeology. Murray v. Public Trustee* [1954] 1 All ER 887.

<sup>112</sup> *In re Benham* [1939] SASR 450.

<sup>113</sup> *McGregor v. Commissioner of Stamp Duties* [1942] NZLR 164.

<sup>114</sup> *Hixon v. Campbell* (1924) 24 SR (NSW) 436 and *Kindergarten Union of NSW Incorporated v. Waverley Municipal Council* (1960) 5 LGRA 365.

<sup>115</sup> *Re Weaver; Trumble v. Animal Welfare League of Victoria* [1963] VR 257; *Wilson v. Toronto General Trusts Corporation* [1954] 3 DLR 136.

<sup>116</sup> *Yates v. University College of London* (1875) LR 7 JL 438.

<sup>117</sup> *National Trustees Company v. A-G* [1902] ALR (CN) 5.



activities. Examples are a school or university's sporting programs<sup>118</sup> and facilities,<sup>119</sup> school excursions,<sup>120</sup> the students union set up by a medical college,<sup>121</sup> the setting up of a rose garden in a university,<sup>122</sup> a student loan fund<sup>123</sup> and a fund to help students on the death of a parent.<sup>124</sup>

129. However, it is not sufficient that purposes are related in some way to the activities of the school or college; they must be integrated with the educational purposes. For example, in *R v. Special Commissioners of Income Tax; ex parte The Headmasters' Conference* (1925) 10 TC 73 a professional association for headmasters was not accepted as being established for educational purposes only.

130. The enjoyment of the students is not inconsistent with a charitable purpose of education. Organisations for the young that have been accepted as educational include the boy scouts,<sup>125</sup> a police citizens boys club,<sup>126</sup> and a sea cadets branch.<sup>127</sup> While the education they provided was not for education's sake, instruction and training were central to their purposes and activities. The modes of such training were consistent with their particular educational purposes of forming the young according to modern ideas of education aimed at the development of both the mind and body.<sup>128</sup>

131. Education can also extend to the improvement of a useful branch of knowledge and its dissemination. Types of purposes that fall into this category may also be charitable as other purposes beneficial to the community. For example a geographical society,<sup>129</sup> a

<sup>118</sup> *IRC v. McMullen* [1980] 1 All ER 884; *Kearins v. Kearins* (1957) SR (NSW) 286.

<sup>119</sup> *Re Mariette; Mariette v. Aldenham School Governing Body* [1914-15] All ER 794.

<sup>120</sup> *Re Melody* [1918] 1 Ch 228.

<sup>121</sup> *London Hospital Medical College v. Inland Revenue Commissioners* [1976] 2 All ER 113. See also *Attorney-General v. Ross* [1985] 3 All ER 334.

<sup>122</sup> *McGrath v. Cohen* [1978] 1 NSWLR 621.

<sup>123</sup> *Guaranty Trust Company of Canada v. The Minister of National Revenue* [1967] SCR 133.

<sup>124</sup> *Education Fees Protection Society Inc v. Commissioner of Inland Revenue* [1992] 2 NZLR 115.

<sup>125</sup> *Boy Scouts Association, NSW Branch v. Sydney City Council* (1959) 4 LGRA 260; *Re Webber (deceased); Barclays Bank Ltd v. Webber* 1954] 1 All ER 712.

<sup>126</sup> *Greater Wollongong City Council v. Federation of NSW Police Citizen Boy's Club* (1957) 2 LGRA 54.

<sup>127</sup> *Lloyd v. Federal Commissioner of Taxation* (1955) 93 CLR 645.

<sup>128</sup> *Minahan v. Commr of Stamp Duties (NSW)* (1926) 26 SR (NSW) 480.

<sup>129</sup> *Beaumont v. Oliviera* (1869) LR4 Ch 309.

college of surgeons,<sup>130</sup> a zoological society,<sup>131</sup> an institute of civil engineers,<sup>132</sup> museums,<sup>133</sup> art galleries,<sup>134</sup> a national trust for places of historic interest and national beauty<sup>135</sup> and a conference promoting international co-operation.<sup>136</sup>

132. An educative purpose has been contrasted with purely studious occupation, the former being charitable, the latter not.<sup>137</sup> Also, the charitable advancement of education does not encompass education in the sense that all experience is educative.<sup>138</sup>

133. A purpose is not charitable for the advancement of education where it tends merely to increase the store of knowledge in society in ways that are not integrated with education. For example, in *Re Shaw (dec'd); Public Trustee v. Day* [1957] 1 All ER 745 the playwright G B Shaw had left funds to investigate a proposed 40 letter alphabet including its economic consequences, and to publish works using it so as to advance its adoption. In holding that there was no charity Harman J said at 753:

‘The research and propaganda enjoined by the testator seem to me merely to tend to the increase of public knowledge in a certain respect, namely, the saving of time and money by the use of the proposed alphabet. There is no element of teaching or education combined with this, nor does the propaganda element in the trusts tend to more than to persuade the public that the adoption of the new script would be “a good thing”, and that, in my view, is not education.’

134. The advancement of education does not include indoctrination with the merits of a cause.<sup>139</sup> Where a purpose is political, lobbying or promotional in nature it is not for the advancement of education even where it uses educational means or is involved in educational activities (see paragraphs 78 to 90).

<sup>130</sup> *Royal College of Surgeons of England v. National Provincial Bank Ltd* [1952] AC 631.

<sup>131</sup> *Re Lopes* [1931] 2 Ch 130.

<sup>132</sup> *Institution of Civil Engineers v. IRC* [1931] All ER Rep 454.

<sup>133</sup> *Re Allsop (dec'd); Gell v. Carver* (1884) 1 TLR 4.

<sup>134</sup> *Abbott v. Fraser* (1874) LR 6 PC 96.

<sup>135</sup> *Re Verrall* [1916] 1 Ch 100.

<sup>136</sup> *Re Koeppler's Will Trusts; Barclays Bank Trust Co plc v. Slack* [1985] 2 All ER 869.

<sup>137</sup> *Whicker v. Hume* [1843-60] All ER Rep 450.

<sup>138</sup> *Inland Revenue Commissioners v. Baddeley* [1955] 1 All ER 525 at 529.

<sup>139</sup> *Molloy v. Inland Revenue Commissioner (New Zealand)* (1977) 8 ATR 323.

*6.2.5 Advancement of religion*

135. The advancement of religion is a charitable purpose.<sup>140</sup> In this context religion involves belief in a supernatural being, thing or principle and acceptance of canons of conduct which give effect to that belief.<sup>141</sup> Religion is not confined to major religions such as Christianity, Islam and Judaism,<sup>142</sup> but also extends to Buddhism, Taoism, Jehovah Witnesses,<sup>143</sup> the Free Daist Communion of Australia<sup>144</sup> and Scientology.<sup>145</sup> The categories of religion are not closed.

136. To advance religion has been described in the following terms:

‘The promotion of religion means the promotion of spiritual teaching in a wide sense, and the maintenance of the doctrine on which it rests, and the observances that serve to promote and manifest it.’<sup>146</sup>

‘To advance religion means to promote it, to spread its message ever wider amongst mankind; to take some positive steps to sustain and increase religious belief; and these things are done in a variety of ways which may be comprehensively described as pastoral and missionary.’<sup>147</sup>

137. The purpose must be directly and immediately religious.<sup>148</sup> It may involve various ways of advancing religion:

‘The purpose may be executed by gifts for the support, aid or relief of clergy and ministers or teachers of religion, the performance of whose duties will tend to the spiritual advantage of others by instruction and edification; by gifts for ecclesiastical buildings, furnishings, ornaments and the like; by gifts to provide for religious services, for sermons, for music, choristers and organists, and so forth; by gifts to religious

<sup>140</sup> *Roman Catholic Archbishop of Melbourne v. Lawlor* (1934) 51 CLR 1 at 32-33.

<sup>141</sup> *The Church of the New Faith v. Commissioner of Pay-roll Tax (Vic)* 83 ATC 4652.

<sup>142</sup> *Re De Vedas* [1971] SASR 169.

<sup>143</sup> *Appeal of Frank Gundy* (1944) 61 WN (NSW) 102.

<sup>144</sup> *The Free Daist Communion of Australia Limited v. Comptroller of Stamps (Vic)* 88 ATC 2001.

<sup>145</sup> *Church of the New Faith v. Commissioner of Pay-roll Tax (Victoria)* (1983) 154 CLR 120.

<sup>146</sup> *Keren Kayemeth Le Jisroel Ltd v. IRC* [1931] 2 KB 465 at 477.

<sup>147</sup> Lush J in *Association of Franciscan Order of Friars Minor v. City of Kew* [1967] VR 732 at 733 quoting *United Grand Lodge of Free Masons v. Holborn Borough Council* [1957] 3 All ER 281 at 284.

<sup>148</sup> *Roman Catholic Archbishop of Melbourne v. Lawlor* (1934) 51 CLR 1 at 32-33 per Dixon J.

bodies, orders or societies, if they have in view the welfare of others.’<sup>149</sup>

138. Decisions that have found a charitable purpose of advancing religion include:

- *providing and maintaining facilities for worship:* building a church,<sup>150</sup> a gallery, organ seating and a bell in a church,<sup>151</sup> a window in a cathedral,<sup>152</sup> the erection of a tomb in a churchyard,<sup>153</sup> monuments in a church,<sup>154</sup> a church choir<sup>155</sup> and seating accommodation;<sup>156</sup>
- *supporting religious clergy:* maintaining sick and infirm priests,<sup>157</sup> assisting candidates for holy orders<sup>158</sup> and a fund to provide retirement annuities for pastors, evangelists and missionaries;<sup>159</sup>
- *missionary bodies:* the missionary establishment of a Christian body among heathen nations<sup>160</sup> and a church missionary society;<sup>161</sup>
- *religious associations:* the YMCA,<sup>162</sup> a religious retreat house open to the public,<sup>163</sup> a society for the promotion of the Gospel,<sup>164</sup> a sunday school association,<sup>165</sup> a Protestant alliance,<sup>166</sup> a religious

<sup>149</sup> *Roman Catholic Archbishop of Melbourne v. Lawlor* (1934) 51 CLR 1 at 32 per Dixon J.

<sup>150</sup> *Re Maclachlan; Maclachlan v. Maclachlan* (1900) 26 VLR 548.

<sup>151</sup> *Re Mitchner (dec'd); Union Trustee Co of Australia v. A-G (Cth)* [1922] St R Qd 39.

<sup>152</sup> *Muir v. Archdall* (1918) 19 SR (NSW) 10.

<sup>153</sup> *Re Pardoe; McLaughlin v. A-G* [1906] 2 Ch 184.

<sup>154</sup> *Re Barker (dec'd); Sherrington v. St Paul's Cathedral* (1909) 25 TLR 753.

<sup>155</sup> *Re Royce; Turner v. Wormald* [1940] 2 All ER 291.

<sup>156</sup> *Re Raine (dec'd); Walton v. A-G* [1956] 1 All ER 355.

<sup>157</sup> *Re Forster* [1938] 3 All ER 767.

<sup>158</sup> *Re Williams* [1927] 2 Ch 283.

<sup>159</sup> *Baptist Union of Ireland (Northern) Corporation Limited v Inland Revenue Commissioner* [1945] NILR 99.

<sup>160</sup> *Commissioners for Special Purposes of Income Tax v. Pemsel* [1891] AC 531.

<sup>161</sup> *Re Clergy Society* (1856) 2 K & J 615.

<sup>162</sup> *City of South Melbourne v. YMCA Melbourne* [1960] VR 709 and *Young Men's Christian Association of Melbourne v. Federal Commissioner of Taxation* (1926) 37 CLR 351.

<sup>163</sup> *Association of Franciscan Order of Friars Minor v. City of Kew* [1967] VR 732.

<sup>164</sup> *Re Maguire* (1870) LR 9 Eq 632.

<sup>165</sup> *R. v. Special Commissioners of Income Tax; ex parte Essex Hall* [1911] 2 KB 434.

<sup>166</sup> *Re Delmar Charitable Trust* [1897] 2 Ch 163.

community house<sup>167</sup> and a religious faith-healing movement.<sup>168</sup>

139. It is not enough that a purpose arises out of or has a connection with a faith, a church or a denomination. If the purpose is not directly and immediately religious it is not charitable. Social and sporting entities are not charitable even if membership is limited to believers in a particular religion (see paragraphs 71 to 76). Decisions that have found a purpose involving religion to not be charitable include:

- a gift for a private chapel in a house;<sup>169</sup>
- for a member of the clergy to use in ways that are not necessarily charitable;<sup>170</sup>
- founding a Catholic daily newspaper;<sup>171</sup> and
- a company purchasing land and property for a Jewish homeland.<sup>172</sup>

140. A purpose involving religion is not charitable if the public benefit is absent. For example, a scriptural college was not charitable where it was for the descendants of particular persons.<sup>173</sup> For communities that are established for religious purposes, it is necessary they bring some spiritual benefit to the community by a propagation or promotion of religion.<sup>174</sup> If spiritual benefits are restricted to family members or friends the necessary public benefit does not arise as there is not an advancement of religion beyond this closed group:<sup>175</sup>

‘There is, in truth, no “charity” in attempting to improve one’s own mind or save one’s own soul. Charity is necessarily altruistic and involves the idea of aid or benefit to others  
...’<sup>176</sup>

#### 6.2.6 Other charitable purposes

141. Many other purposes have been accepted by the courts as charitable. The following are groups of those decisions. In each case

<sup>167</sup> *Re Banfield (deceased); Lloyd’s Bank Ltd v. Smith* [1968] 2 All ER 276.

<sup>168</sup> *Re Le Cren Clarke (deceased); Funnell v. Stewart* [1996] 1 All ER 715.

<sup>169</sup> *Hoare v. Hoare* [1886-90] All ER Rep 553.

<sup>170</sup> *Dunne v. Byrne* [1911-13] All ER Rep 1105.

<sup>171</sup> *Roman Catholic Archbishop of Melbourne v. Lawlor* (1934) 51 CLR 1.

<sup>172</sup> *Keren Kayemeth Le Jisroel Limited v. Commissioners of Inland Revenue* [1932] AC 650.

<sup>173</sup> *Davies v. Perpetual Trustee Co. Ltd* [1959] AC 439.

<sup>174</sup> *Gilmour v. Coats* [1949] AC 426.

<sup>175</sup> *Yeap Cheah Neo v Ong Cheng Neo* (1875) LR 6 PC 381.

<sup>176</sup> *Re Delaney; Conoley v. Quick* [1902] 2 Ch 642 at 648-649. Cf the arrangement in *Rowston v. Commissioner of Land Tax* (1984) 15 ATR 366.

the public benefit requirement had also been satisfied. The list is not exhaustive:

- *public works and utilities*: a library,<sup>177</sup> a museum,<sup>178</sup> a public hall,<sup>179</sup> a showground,<sup>180</sup> a botanical garden,<sup>181</sup> a cremation service,<sup>182</sup> a concert hall<sup>183</sup> and a recreation area for the public;<sup>184</sup>
- *disaster relief*: relief for flood victims,<sup>185</sup> relief of distress caused by war<sup>186</sup> and a lifeboat institution;<sup>187</sup>
- *culture*: drama and acting,<sup>188</sup> music,<sup>189</sup> choral singing,<sup>190</sup> portrait painting,<sup>191</sup> organ music<sup>192</sup> and an orchestra endowment fund;<sup>193</sup>
- *scientific and scholarly research*: the advancement of scientific research generally,<sup>194</sup> the improving of natural knowledge and improvement and diffusing of geographical knowledge,<sup>195</sup> research in Egyptology and archaeology,<sup>196</sup> research into finding the ‘Bacon-

<sup>177</sup> *Abbott v. Fraser* (1874) LR 6 PC 96.

<sup>178</sup> *Re Gwilym* [1952] VLR 282.

<sup>179</sup> *Monds v. Stackhouse* (1948) 77 CLR 232.

<sup>180</sup> *Brisbane City Council v. A-G of Queensland* [1978] 3 All ER 30.

<sup>181</sup> *Townley v. Bedwell* (1801) 6 Ves 194.

<sup>182</sup> *Scottish Burial Reform and Cremation Society v. Glasgow Corporation* [1967] 3 All ER 215.

<sup>183</sup> *Re Henry Wood National Memorial Trust* [1966] 1 WLR 1601.

<sup>184</sup> *Burnside City Council v. Attorney-General of South Australia* (1992) 75 LGRA 145.

<sup>185</sup> *Re North Devon and West Somerset Relief Fund; Hylton (Baron) v. Wright* [1953] 2 All ER 1032.

<sup>186</sup> *Re Piper (dec'd)* [1951] VLR 42.

<sup>187</sup> *Re Clarke (deceased); Barcey v. Royal National Lifeboat Institution* [1923] All ER Rep 607.

<sup>188</sup> *Re Shakespeare Memorial Trust; Earl of Lytton v. A-G* [1923] All ER Rep 106.

<sup>189</sup> *Commissioners of Inland Revenue v. Glasgow Musical Festival Association* [1926] SC 920.

<sup>190</sup> *Royal Choral Society v. Commissioners of Inland Revenue* [1943] 2 All ER 101.

<sup>191</sup> *Perpetual Trustee Co. Ltd v. Groth* [1985] 2 NSWLR 278.

<sup>192</sup> *Re Levien (dec'd); Lloyds Bank Ltd v. Worshipful Company of Musicians* [1955] 3 All ER 35.

<sup>193</sup> *Re Municipal Orchestra Endowment Fund* (unreported, Queensland Supreme Court, 10 August 1999, Williams J).

<sup>194</sup> *Taylor v. Taylor* (1910) 10 CLR 218.

<sup>195</sup> *Beaumont v. Oliviera* (1869) 4 Ch App 309.

<sup>196</sup> *Re British School of Egyptian Archaeology; Murray v. Public Trustee* [1954] 1 All ER 887.

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Shakespeare' manuscripts,<sup>197</sup> research into the theory of education<sup>198</sup> and research into cancer;<sup>199</sup>

- *promoting industry, commerce and agriculture:* horticulture,<sup>200</sup> agriculture,<sup>201</sup> craftsmanship<sup>202</sup>, research into wheat<sup>203</sup> and prevention of disease in cattle or sheep;<sup>204</sup>
- *defence and public order:* promoting efficiency in the armed forces<sup>205</sup> and police forces,<sup>206</sup> caring for dependants of veterans,<sup>207</sup> promoting defence of the country from hostile aircraft<sup>208</sup> and a repatriation fund for the benefit of returned soldiers;<sup>209</sup>
- *protecting animals:* a home for lost dogs,<sup>210</sup> an institution providing a home for starving cats,<sup>211</sup> and the Royal Society for the Prevention of Cruelty to Animals.<sup>212</sup> The purpose must either help animals that are useful to the community or promote humane feelings in people by either caring for or preventing cruelty towards animals;<sup>213</sup>
- *environment:* preservation of native wild life both flora and fauna,<sup>214</sup> the improvement and protection of a river.<sup>215</sup> The purpose, however must not be political or lobbying in nature;<sup>216</sup>

<sup>197</sup> *Re Hopkins' Will Trusts* [1964] 3 All ER 46.

<sup>198</sup> *In the Estate of Schultz; Playford v. University of Adelaide* [1961] SASR 377.

<sup>199</sup> *Re Travis (deceased); Young v. Otago University* [1947] NZLR 382.

<sup>200</sup> *Re Pleasants; Pleasants v. A-G* (1923) 39 TLR 675.

<sup>201</sup> *IRC v. Yorkshire Agricultural Society* [1928] 1 KB 611.

<sup>202</sup> *Commissioner of Inland Revenue v. White* (1980) 55 TC 650.

<sup>203</sup> *Freeman v. A-G (NSW)* [1973] 1 NSWLR 729.

<sup>204</sup> *McGarvie Smith Institute v. Campbelltown Municipal Council* (1965) 11 LGRA 321.

<sup>205</sup> *Re Good* [1905] 2 Ch 60.

<sup>206</sup> *Chesterman v. Mitchell* (1923) 24 SR (NSW) 108.

<sup>207</sup> *Downing v. FC of T* (1971) 125 CLR 185.

<sup>208</sup> *In Re Driffill (deceased)* [1950] 1 Ch 92.

<sup>209</sup> *Verge v. Somerville* [1924] AC 496.

<sup>210</sup> *Re Douglas; Obert v. Barrow* [1886-90] All ER Rep 228.

<sup>211</sup> *Swift v. A-G (Ireland) (No 2)* [1912] 1 IR 133.

<sup>212</sup> *Re Inman (dec'd)* [1965] VR 238.

<sup>213</sup> *Murdoch v. Attorney-General (Tas)* (1992) 1 Tas SR 117.

<sup>214</sup> *Attorney-General (NSW) v. Sawtell* [1978] 2 NSWLR 200.

<sup>215</sup> *Kaikoura County v. Boyd* [1949] NZLR 233.

<sup>216</sup> *Re Boning* [1996] QSC 216.

- *indigenous persons*: aiding disadvantaged Aboriginals or Islanders,<sup>217</sup> developing radio and television programs relevant to native people and training native people as communication workers;<sup>218</sup>
- *moral improvement*: the study and dissemination of ethical principles,<sup>219</sup> promotion of temperance,<sup>220</sup> and an anthroposophical society;<sup>221</sup>
- *a locality or neighbourhood*: for the benefit of a city, town or district, for example, the beautification and advancement of a township.<sup>222</sup> However, a non-charitable purpose does not become charitable by limiting it to a locality. For example, a social club for the inhabitants of a particular town would not be charitable;<sup>223</sup> and
- *the whole community*: for the benefit of Australia.<sup>224</sup>

## **7. Non-profit**

142. Charities are not carried on for the profit or gain of their individual owners or members (see paragraphs 56 to 65). This is known as the non-profit requirement. A charity's constituent documents should show that it is non-profit. Subject to the legal and other requirements for particular organisations, examples of suitable clauses in constituent documents are:

### **Non-Profit Clause**

The assets and income of the organisation shall be applied solely in furtherance of the above-mentioned objects and no portion shall be distributed directly or indirectly to the members of the organisation except as bona fide compensation for services rendered or expenses incurred on behalf of the organisation.

<sup>217</sup> *Aboriginal Hostels Ltd v. Darwin City Council* (1985) 75 FLR 197 and *Flynn v. Mamarika* (1996) 130 FLR 218.

<sup>218</sup> *Native Communications Society of British Columbia v. MNR* [1986] 3 FC 471.

<sup>219</sup> *Barralet v. A-G* [1980] 3 All ER 918.

<sup>220</sup> *Re Hood. Public Trustee v. Hood* [1930] All ER Rep 215.

<sup>221</sup> *Re Price; Midland Bank, Executor and Trustee Co Ltd v. Harwood* [1943] 2 All ER 505.

<sup>222</sup> *Schellenberger v. Trustees Executors and Agency Co. Ltd* (1952) 86 CLR 454.

<sup>223</sup> *Williams' Trusts v. IRC* [1947] 1 All ER 513.

<sup>224</sup> *Commissioner of Stamp Duties (NSW) v. Way* (1951) 83 CLR 570.



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## Dissolution Clause

In the event of the organisation being wound up, any surplus assets remaining after the payment of the organisation's liabilities shall be transferred to another organisation with similar purposes.

Alternative words can be used provided the result is achieved that funds and assets of the organisation cannot find their way to particular persons, such as members or their associates or nominees.

## Your comments

143. We invite you to comment on this Draft Taxation Ruling. We are allowing 10 weeks for comments before we finalise the Ruling. If you want your comments to be considered, please provide them to us within this period.

**Comments by Date:** 3 March 2000  
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