


# ***TR 2005/D6 - Income tax and fringe benefits tax: charities***

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This document has been finalised by TR 2005/21.



## Draft Taxation Ruling

### Income tax and fringe benefits tax: charities

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Contents	Para
<b>What this Ruling is about</b>	<b>1</b>
<b>Date of effect</b>	<b>5</b>
<b>Ruling</b>	<b>7</b>
<b>Explanation</b>	<b>30</b>
<b>Your comments</b>	<b>209</b>
<b>Detailed contents list</b>	<b>210</b>

#### ***Preamble***

*This document is a draft for industry and professional comment. As such, it represents the preliminary, though considered views of the Australian Taxation Office. This draft may not be relied on by taxpayers and practitioners as it is not a ruling for the purposes of Part IVAAA of the **Taxation Administration Act 1953**. It is only final Taxation Rulings that represent authoritative statements by the Australian Taxation Office.*

## What this Ruling is about

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

1. This ruling sets out the Commissioner's views on the meaning of 'charitable institution' and 'fund established for public charitable purposes' for the purposes of:

- Division 50 of the *Income Tax Assessment Act 1997* (ITAA 1997), in particular items 1.1, 1.5, 1.5A and 1.5B of the table in section 50-5 of the ITAA 1997, which provides income tax exemption;
- Division 30 of the ITAA 1997, in particular item 1.1.6 of the table in subsection 30-20(1) of the ITAA 1997 dealing with charitable institutions that promote the prevention or control of diseases in humans, and item 4.1.4 of the table in subsection 30-45(1) of the ITAA 1997 dealing with public funds maintained by harm prevention charities, which provides for income tax deductions for gifts;
- subsection 57A(5) of the *Fringe Benefits Tax Assessment Act 1986* (FBTAA), which provides an exemption in relation to benefits provided by charitable institutions that promote the prevention or control of diseases in humans; and
- section 65J of the FBTAA, in particular whether the employer is a charitable institution for the purposes of being entitled to a rebate of fringe benefits tax as a rebatable employer;

and wherever used in the ITAA 1997, the FBTAA and the *Income Tax Assessment Act 1936* (ITAA 1936). The ruling applies to charitable institutions and charitable funds and persons who make gifts to charitable institutions.

## Summary of the Ruling

2. The Ruling deals with the following:
  - the circumstances in which an institution or fund will be considered charitable;
  - determining whether the purpose of an institution or fund is charitable;
  - the changes made by the *Extension of Charitable Purpose Act 2004*, in relation to child care, religious orders and self-help groups; and
  - the features that distinguish a charitable institution from a charitable fund.
3. This Ruling does not deal with the following:
  - other items of income tax exemption listed in Division 50 of the ITAA 1997;
  - the special conditions listed in the table in section 50-5 of the ITAA 1997;
  - the refund of excess imputation credits;
  - the operation of section 65J of the FBTAA;
  - aspects of health promotion charities and harm prevention charities other than whether they are charitable institutions; and
  - the endorsement processes for charities.

## Definitions

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

**'charity'** 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;

**'charitable institution'** is an institution established and maintained for charitable purposes;

**'harm prevention charity'** is a charitable institution whose principal activity is to promote the prevention or the control of behaviour that is harmful and abusive to human beings and which is on the register of harm prevention charities maintained under section 30-287 of the ITAA 1997;

**'health promotion charity'** is a charitable institution whose principal activity is to promote the prevention or the control of diseases in human beings, as provided for by item 1.1.6 of the table in subsection 30-20(1) of the ITAA 1997 and subsection 57A(5) of the FBTA;A;

**'Statute of Elizabeth'** is a reference to the preamble to the *Statute of Charitable Uses 1601 43 Eliz., c.4*. See paragraph 184 of this Ruling.

## **Date of effect**

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5. It is proposed that when the final Ruling is issued, it will apply both before and after its date of issue. However, the final Ruling will 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 final Ruling (see paragraphs 21 and 22 of Taxation Ruling TR 92/20).

6. Note, this Ruling provides that charitable funds will no longer be taken to be rebatable employers for the purposes of section 65J of the FBTA. However, as this involves a change in our approach, this will only apply from 1 July 2005.

## **Ruling**

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### **Charitable purpose**

7. A charitable institution is an institution 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 of charitable***

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

- beneficial to the community, or deemed to be for the public benefit by legislation applying for that purpose; and
- within the spirit and intendment of the Statute of Elizabeth, or deemed to be charitable by legislation applying for that purpose.

9. The benefit of a charitable purpose need not be for the whole community; it is sufficient that it is for an appreciable section of the public.

10. However, this public benefit requirement does not apply where the charitable purpose is the relief of poverty. Those who benefit from such a charity need not be a section of the public.

11. An institution is deemed by legislation<sup>1</sup> to be for the public benefit to the extent it is:

- an open and non-discriminatory self-help group; or
- a closed or contemplative religious order that regularly undertakes prayerful intervention at the request of members of the public.

### ***Spirit and intendment of the Statute of Elizabeth***

12. For a purpose to be within the spirit and intendment of the Statute of Elizabeth it must be the same as 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.

13. Charitable purposes are commonly grouped, following the terminology used in *The Commissioners for Special Purposes of the Income Tax v. Pemsel* [1891] AC 531; [1891-4] All ER Rep 28, as the 'four heads of charity':

- the relief of poverty;
- the advancement of education;
- the advancement of religion; and
- other purposes beneficial to the community.

### ***Deemed charitable purposes<sup>2</sup>***

14. The provision of child care services on a non-profit basis is deemed by legislation<sup>3</sup> to be a charitable purpose.

### ***Purposes which are not charitable***

*The purpose is to confer private benefits<sup>4</sup>*

15. Purposes that seek to benefit persons or entities in capacities other than as members of (a section of) the public are not charitable.

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<sup>1</sup> Section 5 of the *Extension of Charitable Purpose Act 2004*.

<sup>2</sup> See Explanation from paragraph 46.

<sup>3</sup> Section 4 of the *Extension of Charitable Purpose Act 2004*.

<sup>4</sup> See Explanation from paragraph 75.

*The purpose is sporting, recreational or social<sup>5</sup>*

16. Social, recreational and sporting purposes are not charitable. However, social, recreational and sporting activities that are merely incidental to a purpose that is otherwise charitable do not by themselves prevent that purpose being charitable.

*The purpose is illegal or against public policy<sup>6</sup>*

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

*The purpose is political or lobbying<sup>7</sup>*

18. Political and lobbying purposes are not charitable. While such purposes may use educational means, this is not sufficient to show a charitable purpose.

19. However, political or lobbying activities that are merely incidental to a purpose that is otherwise charitable do not by themselves prevent that purpose being charitable.

*The purpose is commercial<sup>8</sup>*

20. A purpose of carrying on a business or commercial enterprise as such is not charitable. This is the case even if the entity carrying on the enterprise is controlled by a charitable institution or its profits are ultimately applied for charitable purposes. However, a business or commercial enterprise that is merely incidental to the carrying out of a purpose that is otherwise charitable does not by itself prevent that purpose being charitable.

*The purpose is governmental<sup>9</sup>*

21. The purposes of government in carrying out its functions and activities 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<sup>10</sup>*

22. A purpose is not charitable if the value or benefit of the purpose cannot be clearly identified or it is insufficient.

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<sup>5</sup> See Explanation from paragraph 92.

<sup>6</sup> See Explanation from paragraph 99.

<sup>7</sup> See Explanation from paragraph 100.

<sup>8</sup> See Explanation from paragraph 125.

<sup>9</sup> See Explanation from paragraph 131.

<sup>10</sup> See Explanation from paragraph 133.

## **Charitable institutions and charitable funds<sup>11</sup>**

23. The 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*<sup>12</sup>**

24. 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, as explained in *Pamas Foundation (Inc.) v. DFC of T* 92 ATC 4161; (1992) 23 ATR 189.

### ***Charitable funds*<sup>13</sup>**

25. A fund is a pool of money or property that is set aside and managed by a trustee or trustees for the purpose of making distributions to other persons or entities, or for making the property available for its purposes, or both.

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

### ***Charitable institution*<sup>14</sup>**

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

27. An institution is accepted as charitable if its purpose is charitable. A charitable institution's purposes are wholly, solely and exclusively charitable. To the extent that any of a charitable institution's objects, activities and other features would (when viewed in isolation) be non-charitable, they must be no more than incidental or ancillary to the charitable purpose.

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<sup>11</sup> See Explanation from paragraph 137.

<sup>12</sup> See Explanation from paragraph 137.

<sup>13</sup> See Explanation from paragraph 137.

<sup>14</sup> See Explanation from paragraph 147.

**Charitable fund**<sup>15</sup>

28. 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.<sup>16</sup>

29. 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.

**Explanation****Guide**

These Explanations cover:

1. Statutory use of the concept of charity – paragraphs 30-31
2. The essential characteristics of charitable purposes – paragraphs 32-73
3. Purposes that are not charitable – paragraphs 74-136
4. The distinction between charitable institutions and funds – paragraphs 137-146
5. How to determine the purpose of an institution or fund – paragraphs 147-182
6. Statute of Elizabeth and court decisions – paragraphs 183-207

**1. Statutory use of the concept of charity**

30. The term 'charitable' is used in various contexts in both the ITAA 1997 and the FBTA. Sections 50-1 and 50-5 of the ITAA 1997 exempt from income tax the ordinary and statutory income of funds established for public charitable purposes by will or instrument of trust and charitable institutions. For fringe benefits tax purposes, subsection 57A(5) of the FBTA provides an exemption for health promotion charities, and section 65J of the FBTA grants a rebate of tax to a charitable institution. Gift deductibility under Division 30 of the ITAA 1997 is provided in respect of health promotion charities<sup>17</sup> and harm prevention charities.<sup>18</sup>

<sup>15</sup> See Explanation from paragraph 177.

<sup>16</sup> While the activities carried on by the trustees subsequent to establishment are not relevant to whether the fund is a charitable fund, they are relevant to income tax exemption. For income tax exemption the fund must be applied for the purposes for which it was established. See Explanation at paragraph 179.

<sup>17</sup> Item 1.1.6 of the table in subsection 30-20(1) of the ITAA 1997.

<sup>18</sup> Item 4.1.4 of the table in subsection 30-45(1) of the ITAA 1997.



31. The ITAA 1997 and the FBTAA do not define charity or what purposes are charitable. Australian courts have held that the tax legislation uses charitable in its technical legal sense derived from the law of charitable trusts rather than in its popular or ordinary sense.<sup>19</sup> The 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>20</sup>

## 2. The essential characteristics of charitable purposes

### Guide

A charitable purpose:

- intends benefit or value so as to be the same as or analogous to the purposes set out in the Statute of Elizabeth or to the purposes the courts have found to satisfy the technical legal meaning of charitable – paragraphs 32-49
- is for the benefit of the community – paragraphs 50-73

The explanations also provide:

- types of purposes that are not charitable – paragraphs 74-136
- the purposes of the Statute of Elizabeth and a summary of court cases – paragraphs 183-207

32. 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

33. 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.

<sup>19</sup> *Chesterman and others v. FC of T* (1925) 37 CLR 317; *The Incorporated Council of Law Reporting of the State of Queensland v. FC of T* (1971) 125 CLR 659.

<sup>20</sup> *Ashfield Municipal Council v. Joyce and others* (1977) 51 ALJR 117 at 121-122; *Douglas and others v. FC of T* 97 ATC 4722; (1997) 36 ATR 532 at 542.

34. The values or benefits are not limited to some closed 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.<sup>21</sup>

#### 2.1.1 *Spirit and intendment of the Statute of Elizabeth*

35. 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>22</sup>

36. 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>23</sup> This means that the purpose must be the same as or analogous to:

- purposes set out in the preamble to that Statute (paragraph 184); or
- purposes that the courts have found to satisfy the technical legal meaning of charitable.

37. In addition, by the *Extension of Charitable Purpose Act 2004*, the provision of child care services on a non-profit basis is taken to be a charitable purpose for all Commonwealth Acts.<sup>24</sup>

38. Apart from this legislative extension, 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 185-207).

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<sup>21</sup> *Attorney-General (NSW) v. Sawtell and another* [1978] 2 NSWLR 200.

<sup>22</sup> *The Royal National Agricultural and Industrial Association v. Chester and others* (1974) 48 ALJR 304; *Incorporated Council of Law Reporting of the State of Queensland v. FC of T* (1971) 125 CLR 659.

<sup>23</sup> *The Royal National Agricultural and Industrial Association v. Chester and others* (1974) 48 ALJR 304 at 305-306.

<sup>24</sup> See paragraph 46.

39. 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’. Charitable purposes are commonly grouped as the ‘four heads of charity’:

- the relief of poverty;
- the advancement of education;
- the advancement of religion; and
- other purposes beneficial to the community.<sup>25</sup>

40. 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 an extension of a purpose that has been found to be 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;
- 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.

41. An illustration of how the courts have drawn analogies is shown by the decision in *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 by operating a crematorium. 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 what was considered to be 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.

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<sup>25</sup> *The Commissioners for Special Purposes of the Income Tax v. Pemsel* [1891] AC 531; [1891-4] All ER Rep 28.

42. However, it is not appropriate to use fanciful or unreal comparisons with decided cases or the preamble. For example, in *Rex v. The Special Commissioners of Income Tax; (ex parte The Headmasters' Conference)*; *Rex v. The Special Commissioners of Income Tax (ex parte the Incorporated Association of Preparatory Schools)* (1925) 10 TC 73, the Conference failed in its argument that its purposes were related to education and, therefore, it was charitable. The court found its purpose included 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

43. 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>26</sup> Nor can it be harmful on balance.

44. 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 to 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 99-124). However, a community consensus is not essential in finding a charitable purpose.<sup>27</sup>

45. 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 and another* [1965] Ch 85; [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

<sup>26</sup> *Re Pinion (deceased); Westminster Bank Ltd v. Pinion and another* [1965] Ch 85; [1964] 1 All ER 890.

<sup>27</sup> *Everywoman's Health Centre Society (1988) v. Minister of National Revenue* [1992] 2 FC 52 at 68-9.

there was no 'useful object to be served in foisting on the public this mass of junk'.<sup>28</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>29</sup>

### 2.1.3 Non-profit child care services

46. The *Extension of Charitable Purpose Act 2004* provides that 'the provision of child care services on a non-profit basis' is a charitable purpose. This deeming applies, from 1 July 2004, in determining whether an institution or fund is charitable for the purposes of the ITAA 1997, the FBTA and other Commonwealth Acts.

47. Child care services include those of day care, long day care (full-time and part-time), casual care, before and after school hours care, vacation care, occasional care, and similar sorts of care. These services are not limited to pre-school-aged children.<sup>30</sup> The categorisation of services as child care under government programs would commonly be a strong indicator that they qualify as child care services for the purposes of the *Extension of Charitable Purpose Act 2004*. The provision of child care services includes matters that are merely incidental or ancillary to those services.

48. On the non-profit requirement, the Explanatory Memorandum to the Extension of Charitable Purpose Bill 2004 states it will not prevent the making of 'profits (or gains) or accumulating surpluses, provided those profits are not for the purpose of profit or gain to its individual members or distribution to its owners or members, or to any other person, either while operating or on winding up'.<sup>31</sup> The charging of fees for the child care services will normally be consistent with the non-profit requirement.

49. While the provision of child care services on a non-profit basis can be treated as a charitable purpose, it will be necessary for the entity to satisfy the other criteria for a charitable institution or fund. This includes the 'public benefit' requirement (see paragraph 50). For example, if the child care services were to be available only for children of employees of a particular employer, the difficulties discussed at paragraph 54 on public benefit would arise.

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<sup>28</sup> *Re Pinion (deceased); Westminster Bank Ltd v. Pinion and another* [1965] Ch 85; [1964] 1 All ER 890 at 894; and *Re Elmore (deceased)* [1968] VR 390.

<sup>29</sup> *In Re Watson (deceased); Hobbs v. Smith and others* [1973] 3 All ER 678 at 688.

<sup>30</sup> While it will not normally be necessary to distinguish child care services from education and health care, caring for children in a hospital or educating children in a school would not be the providing of child care services. Generally, where a non-profit entity provides both child care services and education (in, say, its pre-school), both purposes would be charitable – the child care under the *Extension of Charitable Purpose Act 2004* and the education under the 'second head' of charity.

<sup>31</sup> At paragraph 1.12 of the Explanatory Memorandum to the Extension of Charitable Purpose Bill 2004.

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

50. A charitable purpose must be for the benefit of the community.<sup>32</sup> Charity is altruistic and intends social value or utility. The benefit need not be for the whole community; it must be at least for an appreciable section of the public. It must not be to provide merely private benefits.

51. However, unlike other charitable purposes, the relief of poverty does not require a test of ‘public benefit’, such that those to benefit need not be a section of the public (see paragraphs 186 and 187).

52. 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.

53. 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>33</sup> It can be a matter of fact and degree as to whether a purpose is for the public benefit.

54. 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>34</sup> Likewise, for limits based on contractual relationships (for example, the employees of a particular employer)<sup>35</sup> and on membership of bodies that can admit or exclude members of the public.<sup>36</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.

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<sup>32</sup> By law, public benefit is deemed in relation to some religious orders and self-help groups. See paragraphs 62 and 66 respectively.

<sup>33</sup> *Dingle v. Turner and others* [1972] AC 601; [1972] 1 All ER 878.

<sup>34</sup> *Re Compton; Powell v. Compton* [1945] 1 All ER 198.

<sup>35</sup> *Oppenheim v. Tobacco Securities Trust Co. Ltd and others* [1951] AC 296; [1951] 1 All ER 31.

<sup>36</sup> *In Re Income Tax Acts (No 1)* [1930] VLR 211.

55. 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>37</sup> or sufferers of a particular disability or condition<sup>38</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>39</sup>

56. 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.

57. The ways in which people are to benefit can help show whether a purpose is for the public benefit. The charging of fees to members of the public for goods, services or other benefits that are provided for a purpose that is otherwise charitable is unlikely, on its own, to prevent the purpose being charitable.<sup>40</sup> However, if the purpose of the arrangement (rather than being an incident of carrying out a charitable purpose) is to confer benefits on people by way of fee,<sup>41</sup> by way of contractual right,<sup>42</sup> through common action for mutual gain,<sup>43</sup> or as part of carrying on a particular business,<sup>44</sup> then the

<sup>37</sup> *In Re Income Tax Acts (No 1)* [1930] VLR 211 at 223.

<sup>38</sup> *Thompson and another v. FC of T* (1959) 102 CLR 315 at 321 per Dixon CJ.

<sup>39</sup> Viscount Simonds in *Inland Revenue Commissioners v. Baddeley and others* [1955] 1 All ER 525 at 534 and see also *Dingle v. Turner and others* [1972] 1 All ER 878 at 889; [1972] AC 601.

<sup>40</sup> *The Abbey, Malvern Wells Ltd v. Minister of Town and Country Planning* [1951] 2 All ER 154 (school charging fees for students); *Le Cras v. Perpetual Trustee Co. Ltd and others*; *Far West Children's Health Scheme and others v. Perpetual Trustee Co. Ltd and others* [1967] 3 All ER 915 (hospital charging fees).

<sup>41</sup> Comments of Rowlatt J in *The Commissioners of Inland Revenue v. The Society for the Relief of Widows and Orphans of Medical Men and The Commissioners of Inland Revenue v. The Medical Charitable Society for the West Riding of Yorkshire* (1926) 11 TC 1 at 22, as clarified by comments of Peter Gibson J in *Joseph Rowntree Memorial Trust Housing Association Ltd and others v. Attorney-General* [1983] 1 All ER 288.

<sup>42</sup> *Doust v. Attorney-General* (1904) 4 SR (NSW) 577 (employee accident fund); *In Re Harris Scarfe Limited* [1935] SASR 433 (employee superannuation fund); *Over-Seventies Housing Association v. Westminster City Council* (1974) 21 RRC 48 (tenant's association).

<sup>43</sup> *Braithwaite v. Attorney-General* [1909] 1 Ch 510 (friendly society); *Re Trusts of Hobourn Aero Components Ltd's Air Raid Distress Fund*; *Ryan and others v. Forrest and others* [1946] 1 All ER 501 (subscribers fund); *Lord Nuffield as Ordinary Trustee of the Nuffield Foundation v. Commissioners of Inland Revenue*; *Trustees of the Nuffield Provident Guarantee Fund v. Commissioners of Inland Revenue* (1947) 28 TC 479 (mutual insurance association).

<sup>44</sup> *Re Producers' Defence Fund* [1954] VLR 246 (assistance to rural producers especially with employment disputes); *The Corporation of Foreign Bondholders v. Inland Revenue Commissioners* [1944] 1 All ER 420 (protection of foreign bondholders); *Re Davis (deceased)*; *Watts v. Davis & Westralian Farmers Co-operative Limited* [1965] WAR 25 (assistance to co-operatives).

purpose is unlikely to be charitable.<sup>45</sup> In these situations, even if the benefit is of a kind that is conventionally provided by charities, the purpose of providing that benefit in these situations would not be charitable.

58. The purpose of providing a community benefit is the essential purpose of a charity. If the benefits for the public are the consequences of pursuing purposes that are not charitable, it would not be a charity. For example, the public may benefit from access to a grocery but that does not make the grocery a charity.

59. Because charities act for community benefit, it is practically inevitable that people benefit from them. 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 the result or consequence of carrying out the educational purpose.

60. In some situations an object 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 students union of a medical college was accepted as a charity. Its objects were 'to promote, encourage and coordinate social, cultural and athletic activities amongst the members and to add to the comfort and enjoyment of the students'. While a 'club which provides athletic and social activities for its members is not, per se, charitable', the integration of the union in the educational purposes of the medical college gave it a charitable character. In light of all the facts, the union was found to be solely to further the educational purposes of the medical college, and the benefits it provided to students were merely incidental to that purpose.<sup>46</sup>

61. The public requirement is further illustrated for different types of benefit by the court decisions summarised in paragraphs 185 to 207. Common situations where the public requirement is not met are discussed in more detail at paragraphs 75 to 91.

### *2.2.1 Closed or contemplative religious orders*

62. An institution is taken to be for the public benefit to the extent it is 'a closed or contemplative religious order that regularly undertakes prayerful intervention at the request of members of the public'. This is provided for by section 5 of the *Extension of Charitable Purpose Act 2004*. It applies from 1 July 2004, in determining whether an institution is a charity for the purposes of the ITAA 1997, the FBTA and other Commonwealth Acts.

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<sup>45</sup> Purposes that fail to be charitable because of the conferring of private benefits are discussed from paragraph 75.

<sup>46</sup> *London Hospital Medical College v. Inland Revenue Commissioners and another* [1976] 2 All ER 113.



63. This deeming overcomes the effect of doubts about whether such orders are for the public benefit. The Explanatory Memorandum to the Extension of Charitable Purpose Bill 2004 states that in '*Gilmour v. Coats* [1949] AC 426 the House of Lords expressed the view that there is no proven or provable benefit to the community if the results of the contemplation are in no way communicated to the public'.<sup>47</sup> The intention of the deeming is that 'closed or contemplative religious orders that offer prayerful intervention to the public' will be taken to 'satisfy the public benefit test'.<sup>48</sup>

64. The ways in which members of the public can request the prayerful intervention are not specified in the law. They might range from formal mechanisms like a website portal, to letters and individual requests. The Explanatory Memorandum states that 'if the order prays for any members of the faith community who seek it, then they will be treated as satisfying the public benefit requirement'.<sup>49</sup>

65. This deeming does not affect whether such a religious order meets the other requirements to be a charitable institution. This has to be determined in the same way as for other organisations.

### 2.2.2 Self-help groups

66. An institution is for the public benefit to the extent it is an open and non-discriminatory self-help group. This is provided for by section 5 of the *Extension of Charitable Purpose Act 2004*. It applies from 1 July 2004, in determining whether an institution is a charity for the purposes of the ITAA 1997, the FBTA and other Commonwealth Acts.

67. *Definition.* An institution is an 'open and non-discriminatory self-help group' under subsection 5(2) of the *Extension of Charitable Purpose Act 2004* if:

- it is an association of individuals that has an open and non-discriminatory membership;
- it is established for the purpose of assisting individuals affected by:
  - a particular disadvantage or discrimination; or
  - a need, arising out of a particular disadvantage or discrimination, that is not being met;
- it is made up of, and controlled by, individuals who are affected by the disadvantage or discrimination;
- all of its criteria for membership relate to its purpose; and

<sup>47</sup> At paragraph 1.20 of the Explanatory Memorandum to the Extension of Charitable Purpose Bill 2004. Cf *Association of Franciscan Order of Friars Minor v. City of Kew* [1967] VR 732 and *Perpetual Trustee Co. Ltd v. Wittscheibe* (1940) 40 SR NSW 501.

<sup>48</sup> At paragraph 1.21 of the Explanatory Memorandum to the Extension of Charitable Purpose Bill 2004.

<sup>49</sup> At paragraph 1.23 of the Explanatory Memorandum to the Extension of Charitable Purpose Bill 2004.

- its membership is open to any individual who satisfies the criteria.

68. *Other requirements.* Being an open and non-discriminatory self-help group does not mean, on its own, that the organisation is a charitable institution. Section 5 of the *Extension of Charitable Purpose Act 2004* only deals with one aspect of being a charity, namely whether the public benefit requirement is met. It does not determine whether the organisation is for charitable purposes, or whether it is exclusively for those charitable purposes. Also, the definition does not cause an organisation to be an institution. These additional matters have to be determined in the same way as for other organisations. For example, a purpose of helping residents of a particular remote town to take skiing holidays would be unlikely to be charitable, irrespective of whether it qualified as an open and non-discriminatory self-help group. Also, a self-help group which had political or social objects and activities would not be a charity, if they were not merely incidental to charitable purposes. These further requirements are explained through this Ruling.

69. *Purpose.* To satisfy the statutory definition of ‘open and non-discriminatory self-help group’, the organisation must be established for the purpose of assisting individuals. They must be affected by a particular disadvantage or discrimination, or a need, arising out of a particular disadvantage or discrimination, that is not being met. While self-help groups are particularly common in the area of health (for example, for particular diseases or disabilities, or for particular treatments), the definition is not limited to them. The requirement of being in respect of ‘a particular disadvantage or discrimination’ can extend beyond health and disability. For example, such disadvantage or discrimination could flow from language difficulties in education, geographic isolation in relation to the arts, or cultural exclusion in relation to religion.

70. The assistance provided by the self-help group must be of a kind that is connected with the particular disadvantage, discrimination or unmet consequential need. Its purpose can not be to provide assistance with a matter that is not in the nature of, or only fancifully described as, a disadvantage, discrimination or unmet consequential need.

71. Moreover, while a self-help group may be taken to satisfy the public benefit requirement of being a charity pursuant to the *Extension of Charitable Purposes Act 2004*, the group must nevertheless have a purpose that is considered to be charitable in its technical legal sense. That is, the matter identified as the disadvantage or discrimination must be of a kind that is consonant with the general notion of charitable purpose.

72. *Membership.* The definition's membership requirements look to both the organisation's rules and also to its reality and substance in light of what actually occurs. That is, it is not sufficient for an organisation to have rules that are consistent with open and non-discriminatory membership. In addition to the rules of membership, it must also in reality operate in a manner that is consistent with having open and non-discriminatory membership.

73. Circumstances that would not, on their own, prevent an institution being an open and non-discriminatory self-help group include:

- membership fees, where the fees are reasonable;
- the expulsion of members, on legitimate grounds such as failure to pay membership fees or failure to comply with reasonable requirements;
- membership and control by family, friends, helpers or supporters of individuals directly affected by the particular disadvantage or discrimination;<sup>50</sup>
- different classes of membership, with different rights, where the differences are for the sake of and consistent with the purposes;<sup>51</sup>
- providing assistance to non-members; and
- the limitation of membership to people of a particular locality or condition, unless it was to exclude those who might otherwise reasonably participate.

### 3. Purposes that are not charitable

#### Guide

Types of purposes that are not charitable are:

- to confer private benefits – paragraphs 75-91
- sporting, recreational or social – paragraphs 92-98
- political, illegal, or against public policy – paragraphs 99-124
- commercial – paragraphs 125-130
- governmental – paragraphs 131-132
- vague or of insufficient value to the community – paragraphs 133-136

<sup>50</sup> For example, where the sufferers of a medical condition were children, their parents and carers could be the ones to control and be members of the group. That is, there is no requirement that the children themselves control the group or be its members.

<sup>51</sup> For example, the rules of a disease self-help group might have a class of members for sufferers of the disease, and a class for carers, with only the former being eligible to sit on the board. Or, one class might be for sufferers and carers who live in the locality and regularly attend meetings, and another for those who participate mainly by email and telephone.

74. Purposes are not charitable if they lack the required community benefit or are not within the spirit and intendment of the Statute of Elizabeth.<sup>52</sup>

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

75. Leaving aside the relief of poverty (see paragraphs 186 and 187), a charitable purpose must be for the benefit of the community, or of a section of the community. This requirement is explained at paragraphs 50 to 73. Particular features of an institution or fund that may raise doubt as to whether the public benefit requirement is satisfied include: an organisation's non-profit status; running an organisation for the benefit of its members; providing benefits as part of a business-like or mutual arrangement; and providing benefits to people merely as customers, contributors or subscribers.

#### **3.1.1 Benefits for owners**

76. 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 that is operated for the purpose of distributing dividends to its private shareholders would not be a charitable institution despite providing care for the sick.<sup>53</sup>

77. Organisations use various mechanisms to ensure they are not entitled to be carried on for the purposes of profit or gain to particular persons. The most common way is to include provisions in the constituent documents so that the organisation is prevented from distributing its profits or assets for the benefit of particular persons while it is operating and on winding up. These are commonly called the 'non-profit' and 'winding-up' or 'dissolution' clauses. The Tax Office does not prescribe any form of words, because different organisations will have various legal and other requirements, besides charity status, affecting them. There can be situations where, notwithstanding the absence of non-profit and dissolution clauses, the appropriate conclusion is that the organisation is non-profit. Examples are where a corporation is formed by statute and its provisions make the non-profit nature clear, or where a trust is established by deed or will providing that the property can be used for charitable purposes only.

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<sup>52</sup> This is subject, of course, to the legislative extension of charity (for non-profit child care and some self-help groups and religious orders) and to the public benefit requirement not applying to the relief of poverty.

<sup>53</sup> *Re Smith's Will Trusts; Barclays Bank Ltd v. Mercantile Bank Ltd and others* [1962] 2 All ER 563 at 567.

78. The organisation's actions must, of course, also be consistent with a prohibition of the organisation's funds and assets finding their way to particular persons such as members or their associates or nominees. Such distributions – whether made directly or by way of indirect means – are inconsistent with the organisation being non-profit.

### 3.1.2 Benefits for members<sup>54</sup>

79. 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>55</sup> Professional or occupational associations are unlikely to be charitable.<sup>56</sup> (However, see paragraph 84 where an institution that was limited to practising civil engineers was held to be for the promotion of science.)

80. Two situations where member benefits will be consistent with charity are:

- where the member benefits are no more than incidental or ancillary to the purpose of benefiting the community; and
- where the member benefits are provided by an open and non-discriminatory self-help group.

81. 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. 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.

82. Also, for abundant caution, organisations that fall within the definition of 'open and non-discriminatory self-help group' in the *Extension of Charitable Purpose Act 2004* are deemed to be for the public benefit (see from paragraph 66).

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<sup>54</sup> For open and non-discriminatory self-help groups, the *Extension of Charitable Purpose Act 2004* deems them to be for the public benefit. See paragraph 66.

<sup>55</sup> *In Re Income Tax Acts (No. 1)* [1930] VLR 211.

<sup>56</sup> *Re Mason (dec'd)* [1971] NZLR 714 (law society); *Re Mead's Trust Deed; Briginshaw and others v. National Society of Operative Printers and Assistants and another* [1961] 2 All ER 836 (trade union); *Society of Writers to Her Majesty's 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 173 (surgeons' association); *The Honourable Company of Master Mariners v. The Commissioners of Inland Revenue* (1932) 17 TC 298 (master mariners association); *Institution of Professional Engineers New Zealand Inc. v. Commissioner of Inland Revenue* [1992] 1 NZLR 570 (engineers association).

83. Leaving aside the two situations noted above, 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.<sup>57</sup> 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.

84. Where a purpose is primarily for the benefit of the community and not for the benefit of members, the placing of limits on membership of an organisation should not ordinarily preclude a finding that the organisation is charitable. The nature of the organisation's purpose could itself explain limits on its membership. For example, in *The 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' interests. 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>58</sup>

85. Membership benefits, alone, do not disqualify an institution from being charitable if the 'membership' is merely analogous to the enrolment in a school.<sup>59</sup> That is:

- the 'members' are entitled only to the 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'.

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.

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<sup>57</sup> Such situations can be contrasted with *Ziliani and another v. Sydney City Council* (1985) 56 LGRA 58 which concerned a council formed by agricultural show societies (which were themselves charities). The council provided a range of services to the member societies, protecting their interests, and operating services 'on a mutual and co-operative basis in respect of matters of uniform concern' to them including a rain protection scheme and an accident fund. The council was held to be a charity. Its integration in the charitable purposes of the member societies demonstrated its charitable purpose. The council was not operated to promote anyone's private, non-charitable, interests. See also paragraph 174.

<sup>58</sup> Similar considerations arose in *Royal Australasian College of Surgeons v. FC of T* (1943) 68 CLR 436.

<sup>59</sup> *Greater Wollongong City Council v. Federation of New South Wales Police Citizens Boys' Clubs* (1957) 2 LGRA 54.

86. 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. An entity set up by a members' organisation can be accepted as for the benefit of the community where the following conditions are satisfied:<sup>60</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*

87. The court cases indicate that the advancement of industry, commerce or agriculture can be a charitable purpose,<sup>61</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 *Commissioners of Inland Revenue v. Oldham Training and Enterprise Council* (1996) 69 TC 231,<sup>62</sup> 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 providing benefits and services to them.

88. In *Hadaway v. Hadaway and another* [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 not charitable because it was not for the promotion of agriculture but for the benefit of individual planters.<sup>63</sup>

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<sup>60</sup> *College of Law (Properties) Pty Ltd v. Willoughby Municipal Council* (1978) 38 LGRA 81; *Re Property Services Industry Training Advisory Board Ltd v. FC of T* (1999) 41 ATR 1109; *Re Australian Institute of Management (Vic) and Commissioner of State Revenue (Vic)* 95 ATC 2179.

<sup>61</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.

<sup>62</sup> See also *Pigs Marketing Board (Northern Ireland) v. Commissioners of Inland Revenue* (1945) 26 TC 319.

<sup>63</sup> There may be situations where the making of loans to businesses could be consistent with charity. For example, the activities of a charity, whose purpose was relieving the plight of the long-term unemployed, might include making low-interest loans to businesses to enable them to take on and train additional staff from the

89. In contrast, if any private benefits are merely incidental to the carrying out of a purpose it may be charitable. In *Commissioners of Inland Revenue v. White and others and Attorney-General* (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 found the association's purposes were charitable, with any benefits to the craftsmen merely incidental.

90. However, benefits will not be incidental or ancillary to a charitable purpose 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*

91. 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 savings bank run for the benefit of depositors,<sup>64</sup> a non-profit company operating a licensed hotel premises,<sup>65</sup> a company fund set up to remedy air-raid distress for employees who subscribed to it,<sup>66</sup> a company fund to which all employees subscribed for work injuries,<sup>67</sup> a company providing medical services to subscribers,<sup>68</sup> and a friendly society for girls educated at a particular school.<sup>69</sup>

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long-term unemployed, where they are not to replace existing staff, and the amount of the loan is to cover additional costs of the arrangement.

<sup>64</sup> *The Hobart Savings Bank and The Launceston Bank for Savings v. FC of T* (1930) 43 CLR 364 at 370.

<sup>65</sup> *Case No 92 12 TBRD 749* and cf *Renmark Hotel Inc v. FC of T* (1949) 79 CLR 10 where 'charity' was not argued before the High Court.

<sup>66</sup> *Re Trusts of Hobourn Aero Components Ltd's Air Raid Distress Fund; Ryan and others v. Forrest and others* [1946] 1 All ER 501.

<sup>67</sup> *Doust v. Attorney-General* (1904) 4 SR (NSW) 577.

<sup>68</sup> *Re Windsor Medical Services Inc* (1971) 2 OR 141.

<sup>69</sup> *Braithwaite v. Attorney-General* [1909] 1 Ch 510. See also *Cunnack v. Edwards* [1896] 2 Ch 679.



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

92. A purpose that is essentially social in nature is not charitable. Examples include an institute to give social and other amenities to Welsh people in London,<sup>70</sup> a community centre providing for the cultural and social needs of Latvians in Melbourne,<sup>71</sup> and a hostel for entertaining distinguished foreign visitors.<sup>72</sup>

93. This conclusion is not altered by the fact that those concerned with the workings of an association have religious motives or sentiments.<sup>73</sup> Thus, a bequest for the establishment of a Roman Catholic boys club was not charitable.<sup>74</sup> The fact that the club may have been inspired by religious motives or would be 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>75</sup>

94. A social element does not detract from a charitable purpose if it is merely incidental. In *Barralet and others v. Attorney-General and others* [1980] 3 All ER 918, a society whose objects were 'the study and dissemination of ethical principles and the cultivation of a rational religious sentiment' was held to be a charity because it advanced education and moral improvement in society. It conducted minor social activities similar to the social activities of the congregation of a parish church. These activities were described by Dillon J as ancillary, and he stated, 'At the highest it can be said that they serve, as with the parish church, to further the esprit de corps of the congregation, and this in turn helps to further the cultivation of the rational religious sentiment.'

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<sup>70</sup> *Trustees of Sir Howell Jones Williams' Trusts v. Inland Revenue Commissioners* [1947] 1 All ER 513.

<sup>71</sup> *Latvian Co-operative Society Limited v. Commissioner of Land Tax (Vic)* (1989) 20 ATR 3641.

<sup>72</sup> *Re Corelli (deceased); Watt and others v. Bridge and others* [1943] 2 All ER 519.

<sup>73</sup> *Keren Kayemeth Le Jisroel Limited v. Commissioners of Inland Revenue* [1932] AC 650 at 657.

<sup>74</sup> *Attorney-General v. Cahill and others* [1969] 1 NSW 85.

<sup>75</sup> *Re Wilson's Grant; Fidelity Trustee Co Ltd v. Johnson* [1960] VR 514.

95. A recreational or sporting purpose is not a charitable purpose. The following purposes have not been accepted as charitable: a cup to encourage the sport of yacht racing,<sup>76</sup> associations for rowing, swimming and amateur athletics,<sup>77</sup> cricket,<sup>78</sup> the sport of polo,<sup>79</sup> breeding of pigeons for racing,<sup>80</sup> angling,<sup>81</sup> fox-hunting<sup>82</sup> and for horse racing.<sup>83</sup> The purposes are not charitable, even though there might be elements of benefit to the community.

96. A sporting or recreational element does not detract from a charitable purpose if it is merely incidental.<sup>84</sup> In *Re Mariette; Mariette v. Aldenham School Governing Body* [1914-15] All ER Rep 794 bequests were made to a school for the building of squash racket courts or fives courts and to provide prizes for school athletics. These were 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.

97. Sporting or recreational activities might also be incidental to rehabilitation and for promoting the efficiency of the armed forces. However, any integration must be clear; it cannot be presumed.<sup>85</sup> The argument that ordinary rifle and pistol clubs are charitable because they promote the defence of the nation is not accepted. Their main purpose is sporting or recreational; any link to promoting the defence of the nation is too remote. The decision in *In Re Stephens; Giles v. Stephens* [1892] 8 TLR 792 – which held that a bequest to the English National Rifle Association was charitable because of the bequest's particular links to national defence – is not applicable to ordinary rifle and pistol clubs.<sup>86</sup>

98. In a number of States in Australia legislation extends charitable status to the provision of recreational facilities: section 103 of the *Trusts Act 1973* (Qld); section 69C of the *Trustee Act 1936* (SA); section 5 of the *Charitable Trusts Act 1962* (WA) and section 4 of the *Variation of Trusts Act 1994* (Tas). These provisions mirrored legislation enacted in England, namely the *Recreational Charities Act 1958* (Eng). Although it is recognised that the effect of interaction of these provisions with the taxation legislation is not without doubt, it is not accepted that the meaning of 'charitable' for Commonwealth

<sup>76</sup> *Re Nottage; Jones v. Palmer* [1895-9] All ER Rep 1203; [1895] 2 Ch 649. Also *Said v. Barrington* [2001] NSWSC 576 for trophies for youngsters sailing.

<sup>77</sup> *Laing v. Commissioner of Stamp Duties* [1948] NZLR 154.

<sup>78</sup> *Re Patten; Westminster Bank v. Carlyon* [1929] All ER Rep 416.

<sup>79</sup> *Strathalbyn Show Jumping Club Inc. v. Mayes and others* [2001] SASC 73.

<sup>80</sup> *Royal National Agricultural and Industrial Association v. Chester and others* (1974) 48 ALJR 304.

<sup>81</sup> *Re Clifford; Mallam v. McFie* [1911-13] All ER Rep 1284.

<sup>82</sup> *Peterborough Royal Foxhound Show Society v. Commissioners of Inland Revenue* [1936] 1 All ER 813.

<sup>83</sup> *Re Hoey* [1994] 2 Qd R 510.

<sup>84</sup> *Lloyd and another v. FC of T* (1955) 93 CLR 645 at 665.

<sup>85</sup> *Inland Revenue Commissioners v. City of Glasgow Police Athletic Association* [1953] AC 380 at 391.

<sup>86</sup> For the similar approach of the Charity Commissioners for England and Wales, see *Decisions of the Charity Commissioners* Vol. 1 (August 1993) 4-13.

taxation purposes is extended by them. The issue of how the term charity in a taxing statute would apply across jurisdictions with different meanings of charity arose in *The Commissioners for Special Purposes of the Income Tax v. Pemsel* [1891] AC 531; [1891-4] All ER Rep 28. A United Kingdom taxing statute, which provided concessions for charities, applied in England and also in Scotland. The meaning of charity in Scotland differed from that in England. The House of Lords held that the one meaning of charity would apply under the statute, and that it would not have a different meaning when applied in Scotland. In a similar way, the particular extensions made by the State Acts will not result in different meanings of 'charitable' for Commonwealth tax purposes.<sup>87</sup> The effect of these State extensions can be contrasted with the extensions made by the Commonwealth in the *Extension of Charitable Purpose Act 2004*. The extensions made by that Act – in relation to child care, religious orders and self-help groups – were enacted to apply for all Commonwealth Acts, which includes the ITAA 1997 and FBTAA. That is, they were intended to apply, and do apply, for Commonwealth tax purposes. Also, the fact that the Commonwealth has made extensions to the meaning of charity for all Commonwealth Acts (by the *Extension of Charitable Purpose Act 2004*) is consistent with the view that for those purposes the meaning is not determined by State law.

### **3.3 The purpose is political, illegal or against public policy**

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

99. A purpose contrary to public policy is not charitable.<sup>88</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>89</sup> For example, a school for thieves might, in a sense, advance education, but it is not a charitable institution.<sup>90</sup>

#### **3.3.2 Political**

100. An institution or fund is not charitable if its purpose is advocating a political party or cause, attempting to change the law or

<sup>87</sup> To this extent the Tax Office does not agree with the views expressed by Adam J in *Re Mair, deceased* [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 legislation – the legislative declaration as to what is within the spirit and intendment of that statute [the Statute of Elizabeth] – is of some force here also, in arriving at the ambit of this loose conception of charity in law.'

<sup>88</sup> *Perpetual Trustee Co (Ltd) v. Robins and others* (1967) 85 WN (Pt. 1) (NSW) 403 at 411. See also *Thrupp v. Collett (No. 1)* (1858) 53 ER 844; *Re MacDuff, MacDuff v. MacDuff* [1895-9] All ER Rep 154 at 162-3; *Re Pieper (deceased)*; *The Trustees Executors & Agency Co. Ltd v. Attorney-General (Vic.)* [1951] VLR 42.

<sup>89</sup> *Auckland Medical Aid Trust v. Commissioner of Inland Revenue* [1979] 1 NZLR 382 at 395.

<sup>90</sup> *Re Pinion (deceased)*; *Westminster Bank Ltd v. Pinion and another* [1964] 1 All ER 890 at 893; [1965] Ch 85.

government policy, or propagating or promoting a particular point of view.

101. However, if the purpose of an institution or fund is charitable, the presence of political or lobbying programs and activities will not detract from this status, provided that they are incidental to the charitable purpose.

102. The following comments on political purposes and activities are arranged under the headings:

- party political;
- changing law or government policy (paragraph 105);
- other ‘political’ purposes (paragraph 111); and
- political or lobbying activities which are merely incidental (paragraph 118).

### 3.3.2.1 Party political

103. A purpose of supporting a particular political party or its line is not charitable.<sup>91</sup> Thus, in *Re Hopkinson (deceased); Lloyds Bank Ltd v. Baker and others* [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 of the memorandum was that:

Its perfectly legitimate and proper object is, in my judgment, to advance the cause of the Labour Party by improving its methods of propaganda and by increasing its electoral efficiency.<sup>92</sup>

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>93</sup>

<sup>91</sup> *Bacon and another v. Pianta* (1966) 114 CLR 634.

<sup>92</sup> *Re Hopkinson (deceased); Lloyds Bank Ltd v. Baker and others* [1949] 1 All ER 346 at 349.

<sup>93</sup> *Re Hopkinson (deceased); Lloyds Bank Ltd v. Baker and others* [1949] 1 All ER 346 at 350. See also *Bonar Law Memorial Trust v. The Commissioners of Inland Revenue* (1933) 17 TC 508; *In Re Jones; Public Trustee v. Earl of Clarendon* (1929) 45 TLR 259 (Primrose League of the conservative cause held not to be a charity). While the English charity cases provide assistance with political situations, the US decisions take a different approach and so are unlikely to be relevant. See paragraph 38 on the use of foreign decisions.

104. The issue turns on *purpose*. Identifying and characterising a purpose or purposes can involve a weighing of different features. The mere fact that the subject matter of a purpose concerns politics does not mean that it is a political purpose. For example, the fact that education deals with political matters does not prevent it being charitable.<sup>94</sup> This can be so even where the motives for providing the education are political.<sup>95</sup> The fact that the subject matter of a purpose is controversial can be consistent with charity.<sup>96</sup> Also, the appropriate conclusion may be that the particular political programs and activities are in fact no more than incidental to the organisation's charitable purposes (see paragraph 118). That is, the political activities may be no more than a means of carrying out charitable purposes.

### 3.3.2.2 Changing law or government policy

105. 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>97</sup>

106. The courts have rejected such purposes (holding them to not be 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>98</sup>

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<sup>94</sup> For example in *Re the Trusts of the Arthur McDougall Fund; Thompson and others v. Fitzgerald and another* [1956] 3 All ER 867 the trust was for the advancement of education and learning in the art or science of government or political or economic science, and in forms of government and representative assemblies. Upon construction of the trust Upjohn J found it to be charitable as it encouraged study of methods of government and instruction of the public therein.

<sup>95</sup> See for example *Attorney-General (NSW) v. The NSW Henry George Foundation Ltd* [2002] NSWSC 1128. The issue of education and politics is discussed further at paragraph 117.

<sup>96</sup> *Public Trustee v. Attorney-General of New South Wales and others* (1997) 42 NSWLR 600 at 620; *Everywoman's Health Centre Society (1988) v. Minister of National Revenue* [1992] 2 FC 52 at 68-9.

<sup>97</sup> *The Royal North Shore Hospital of Sydney v. Attorney-General for New South Wales and others* (1938) 60 CLR 396 at 426. In obiter comments in *Public Trustee v. Attorney-General of New South Wales and others* (1997) 42 NSWLR 600 at 604-605, 607-608 and 619-620, Santow J discussed what alteration to law or policy might entail for scenarios involving broader changes.

<sup>98</sup> *Bowman and others v. Secular Society Limited* [1917] AC 406 at 442 per Lord Parker.

107. Examples of purposes found not to be charitable in the cases are those of a voluntary euthanasia society,<sup>99</sup> a prohibition league whose purpose was the ‘abolition of the traffic in intoxicating beverages’ through legislative action,<sup>100</sup> a proportional representation society<sup>101</sup> and an anti-vivisection society whose main purpose was to replace the existing law with legislation prohibiting medical experiments on animals altogether.<sup>102</sup>

108. A purpose of seeking to maintain the existing law is also not charitable. This is illustrated by *Molloy v. Inland Revenue Commissioner (NZ)* (1977) 8 ATR 323<sup>103</sup> where 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>104</sup>

109. 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>105</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>106</sup>

110. This is not to say that all activities associated with changing the law or government policy are necessarily inconsistent with charity. In light of the circumstances, the appropriate conclusion may be that the particular political programs and activities are in fact no more than incidental to the organisation’s charitable purposes. This means the political activities are no more than ways of carrying out the charitable purposes. Such an organisation would be charitable, as the examples from the cases illustrate from paragraph 118.

### 3.3.2.3 Other ‘political’ purposes

111. An institution or fund which aims to propagate or promote a particular point of view or endeavours to convince the public of the correctness of such a view is not charitable.

<sup>99</sup> *Re Collier (deceased)* [1998] 1 NZLR 81.

<sup>100</sup> *Re Cripps, deceased; Cripps v. The Hobart Temperance Alliance and others* [1941] Tas SR 19. See also *Knowles and another v. Commissioner of Stamp Duties* [1945] NZLR 522.

<sup>101</sup> Obiter comments in *Re the Trusts of the Arthur McDougall Fund; Thompson and others v. Fitzgerald and another* [1956] 3 All ER 867 at 869.

<sup>102</sup> *National Anti-Vivisection Society v. Inland Revenue Commissioners* [1947] 2 All ER 217.

<sup>103</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* [1998] 3 FC 202.

<sup>104</sup> *Molloy v. Inland Revenue Commissioner (NZ)* (1977) 8 ATR 323 at 328.

<sup>105</sup> *McGovern and others v. Attorney-General and another* [1981] 3 All ER 493.

<sup>106</sup> *NDG Neighbourhood Association v. Revenue Canada, Taxation Department* 88 DTC 6279.

112. However, if the purpose of an institution or fund is charitable, the presence of propagational or promotional programs and activities will not detract from this status, provided they are incidental to the charitable purpose.

113. In contrast, where the purpose is 'propagandistic' in nature,<sup>107</sup> irrespective of whether the views are espoused using educational means or have educational consequences, the courts have refused to recognise such purposes as beneficial to the community as it would involve granting or denying legitimacy to what are essentially 'political' views.

114. For example, in *Positive Action Against Pornography v. Minister of National Revenue* [1988] 2 FC 340 the taxpayer's objects were to 'distribute educational material concerning the issue of 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: '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>108</sup> His Honour also rejected it as charitable because its objects were primarily political.

115. Examples of other purposes that the courts have found not to be charitable are: a simplified spelling society;<sup>109</sup> a trust to establish a 40 letter alphabet;<sup>110</sup> a gift for the purpose of promoting and propagating the doctrines and teaching of socialism;<sup>111</sup> an organisation promoting a particular view of militarism and disarmament,<sup>112</sup> and a trust to promote the testator's own theories on medicine.<sup>113</sup>

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<sup>107</sup> Not using 'propaganda' in any pejorative sense, but in the sense of the charity cases, such as *Bonar Law Memorial Trust v. The Commissioners of Inland Revenue* (1933) 17 TC 508 and *Re Hopkinson (deceased); Lloyds Bank Ltd v. Baker and others* [1949] 1 All ER 346.

<sup>108</sup> *Positive Action Against Pornography v. Minister of National Revenue* [1988] 2 FC 340.

<sup>109</sup> *Trustees of Sir G B Hunter (1922) 'C' Trust v. Inland Revenue Commissioners* (1929) 14 TC 427.

<sup>110</sup> *Re Shaw (deceased); Public Trustee v. Day and others* [1957] 1 All ER 745.

<sup>111</sup> *Re Loney* [1953] 4 DLR 539.

<sup>112</sup> *Southwood v. A-G* (2000) 150 NLJ 1017.

<sup>113</sup> *Re Bushnell (deceased); Lloyds Bank Ltd and others v. Murray and others* [1975] 1 All ER 721.

116. While it is quite conceivable that the subject matter of these purposes could be dealt with in a charitable way,<sup>114</sup> the critical issue in those cases was whether the particular purposes were charitable. If, on the facts, a purpose was to advance education in respect of a particular alphabet or particular ideas, it could be charitable.<sup>115</sup> However, the propagandistic promotion of such ideas would not be charitable, and that was the situation in those cases.

117. Where an organisation's purposes are said to be educational, practical matters that can be relevant include the degree of objectivity involved,<sup>116</sup> the relationship to non-educational factors,<sup>117</sup> the 'tone and style' of the activities,<sup>118</sup> the degree of input from participants,<sup>119</sup> and the degree to which particular political views are presumed.<sup>120</sup> The undertaking of lectures, seminars, research, publishing, and the like will not on their own show an educational purpose. While such activities can be undertaken by charities, they can also be undertaken for non-charitable purposes.

#### 3.3.2.4 *Political or lobbying activities which are merely incidental*

118. If a purpose is otherwise charitable its status is not affected by political or lobbying activities which are incidental to its charitable end. While this is a clear principle, it is in the political field that the practical difficulties are particularly apparent in the court cases. Indeed, Dixon J said in *Royal North Shore Hospital of Sydney v. Attorney-General for New South Wales and others* (1938) 60 CLR 396 at 426:

The case law dealing with the distinction between charitable purposes and political objects is in an unsatisfactory condition ...

Nonetheless, several cases illustrate the simple principle.

<sup>114</sup> *The Royal North Shore Hospital of Sydney v. Attorney-General for New South Wales and others* (1938) 60 CLR 396 at 412 per Latham CJ.

<sup>115</sup> See, for example, the charities accepted in *Attorney-General (NSW) v. The NSW Henry George Foundation Ltd* [2002] NSWSC 1128 (education on the political ideas of Henry George) and *Re the Trusts of the Arthur McDougall Fund; Thompson and others v. Fitzgerald and another* [1956] 3 All ER 867 (education on proportional representation).

<sup>116</sup> *Public Trustee v. Attorney-General of New South Wales and others* (1997) 42 NSWLR 600 at 608.

<sup>117</sup> For example in *Attorney-General (NSW) v. The NSW Henry George Foundation Ltd* [2002] NSWSC 1128 the political context was found to be no more than a motive for the educational purposes.

<sup>118</sup> *Public Trustee v. Attorney-General of New South Wales and others* (1997) 42 NSWLR 600 at 621.

<sup>119</sup> For example, in *Re Koepler's Will Trusts; Barclays Bank Trust Co. plc v. Slack and others* [1985] 2 All ER 869 the trust fostered the input of participants.

<sup>120</sup> For example in *Re Bushnell (deceased); Lloyds Bank Ltd and others v. Murray and others* [1975] 1 All ER 721 the teaching of Socialised Medicine included demonstrating that 'the full advantage of Socialised Medicine can only be enjoyed in a Socialist State'. See also *Positive Action Against Pornography v. Minister of National Revenue* [1988] 2 FC 340 at paragraph 114.



119. In *Inland Revenue Commissioners v. Yorkshire Agricultural Society* [1927] All ER Rep 536 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 to me 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 poor.

120. 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:

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 further 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...

Similar comments were made in *McGovern and others v. Attorney-General and another* [1981] 3 All ER 493 at 509:

[T]he mere fact that trustees may be at liberty to employ political means in furthering the non-political purposes of a trust does not necessarily render it non-charitable.<sup>121</sup>

121. General comments on identifying and characterising an institution's purposes are provided at paragraph 147. The following comments are directed to particular aspects arising in relation to political matters.

122. The framing of constituent documents can assist in obviating concerns or doubts over the meaning, weight and importance of an organisation's political involvement. For example, an object to seek change to the law might be limited so that it could only be carried out in giving effect to a clearly charitable object. That is, the constituent documents could make it clear that any political activities are only permitted in so far as they are incidental to the charitable purposes.

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<sup>121</sup> Italics in original.

123. Of course, to be a charitable institution, such an organisation should act in conformance with its charitable purposes. Contrary activities cannot be ignored, and the reality of the situation could point to a different conclusion:

It is also possible that activities directed at political change may demonstrate an effective abandonment of indubitably charitable objects.<sup>122</sup>

Clear examples would include supporting a political party, seeking to persuade members of the public to vote for or against particular candidates or parties in an election for public office, participating in party political demonstrations, and distributing material designed to underpin a party political campaign. Consequently the organisation will not be a charitable institution – see paragraph 171.

124. On the other hand, an organisation that is clearly carried on for charitable purposes could participate in many ways in engagement with government,<sup>123</sup> in presenting its views to the public,<sup>124</sup> and in the democratic process.<sup>125</sup> Such activities would, of course, need to be for the sake of carrying out the charitable purposes and not for the sake of political ends. Factors such as the activities being proportionate to the charitable ends and not undermining them,<sup>126</sup> the reasonableness of the activities, the activities relying on evidence and not the merely emotive, the avoiding of falsehoods and distortions, and the expression of the activities in responsible ways, will help to confirm them as merely means in furtherance of the charitable purposes. Contrary factors will tend to the opposite conclusion.

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<sup>122</sup> *Public Trustee v. Attorney-General of New South Wales and others* (1997) 42 NSWLR 600 at 621.

<sup>123</sup> Examples can include providing members to sit on panels, forums and advisory boards organised by government, responding to invitations for input from government, providing material to ministers and authorities, and representing 'constituents' in their dealings with departments.

<sup>124</sup> Examples can include providing information on its own aims, activities and views, public comment on matters affecting it and its activities, analysis of how different policies or proposals would affect its purposes, and publishing objective research relevant to its purposes. It is particularly important that these public activities are wholly in furtherance of the charitable purposes, and are well-founded and reasoned, and not merely emotive or propagandistic.

<sup>125</sup> Examples can include organising petitions, promoting or opposing changes to the law, presenting its views of issues in an election, and analysing how election proposals will affect its work. In undertaking such political activities it is particularly important that they are wholly in furtherance of the charitable purposes, and are not for political ends.

<sup>126</sup> For example, the activities would not undermine the charitable ends, they would be reasonably expected to further those ends, and they would be proportionate in terms of the resources applied.

**3.4 The purpose is commercial**

125. If the purpose of a non-profit organisation is carrying on a commercial enterprise to generate surpluses, it is not charitable. In *Re Smith (deceased); Executor Trustee and Agency Co. of South Australia Ltd v. Australasian Conference Association Limited* [1954] SASR 151 a purpose of carrying on the manufacture and sale of vegetarian foods was contrasted with a charitable purpose:

On the one hand there is the establishment and conduct of sanitariums, hospitals &c., which is unquestionably a charitable purpose. But on the other hand there is the establishment and conduct of a business for the manufacture and sale of health foods, which prima facie is a commercial and not a charitable purpose ... The motive behind the establishment of the Health Food Company was no doubt religious and its profits were no doubt used exclusively in aid of its teachings, activities and purposes of a religious body, but according to the decision in Lawlor's case,<sup>127</sup> those considerations would not make the establishment and conduct of the Health Food Company a charitable purpose within the spirit of the Statute of Elizabeth.<sup>128</sup>

126. The motives of the promoters are not sufficient to convert a commercial purpose into a charitable purpose. Nor will the use of the profits from a commercial enterprise change it into the carrying out of a charitable purpose.<sup>129</sup> It is necessary to have regard to and weigh the various features and attributes in deciding whether the purpose is charitable.<sup>130</sup>

<sup>127</sup> *Roman Catholic Archbishop of Melbourne v. Lawlor and others; His Holiness the Pope v. National Trustees, Executors and Agency Company of Australasia and others* (1934) 51 CLR 1.

<sup>128</sup> *Re Smith (deceased); Executor Trustee and Agency Co. of South Australia Ltd v. Australasian Conference Association Limited* [1954] SASR 151 at 159-160. In this case the court did not need to apply these principles to make a finding on the general charitable character of the company involved, given its decisions on other aspects of the litigation.

<sup>129</sup> *Glebe Administration Board v. Commissioner of Pay-roll Tax (NSW)* 87 ATC 4825; (1987) 19 ATR 297, which concerned the question of whether an investment vehicle of a church was a religious institution, provides a useful discussion of the principles.

<sup>130</sup> Other areas of the law provide further examples of bodies carrying on 'commercial' activities which lacked the purpose required for the particular statutory category. For cases where bodies were not for the encouragement of sport see *Cronulla Sutherland Leagues Club Limited v. FC of T* 90 ATC 4215; (1990) 21 ATR 300 (providing social and licensed club facilities) and *North Suburban Club Inc v. FC of T* 99 ATC 2254; *Case [1999] AATA* 463 (1999) 42 ATR 1111 (providing gambling and social facilities).

127. In contrast to the carrying on of a commercial enterprise for profit, the charging of fees for services need not be inconsistent with charity,<sup>131</sup> and there is no bar on charities holding passive investments to further their charitable purposes. Nor is there any general rule that involvement in commercial operations will prevent an organisation from being charitable. If the carrying out of commercial operations is merely incidental to the carrying out of the charitable purpose the organisation will be charitable. Examples from the cases are a home for neglected boys that also provided training through its farm<sup>132</sup> and the promotion of temperance through the running of a canteen.<sup>133</sup> There are also examples from the cases in other areas of the law.<sup>134</sup>

128. In some circumstances the charitable purpose can only be carried on in a way that is commercial. Examples from the cases are the preparation and sale of law reports,<sup>135</sup> the manufacture and sale of animal vaccines,<sup>136</sup> and providing cremation services.<sup>137</sup>

129. Where a commercial entity operates for, or is owned by, a charity, it is not automatically charitable. It is the purpose of the entity itself, not of the owning charity, that must be determined.<sup>138</sup> It is not possible to merely attribute charitable status to an entity on the basis that it is associated with a charity.<sup>139</sup> Control, ownership, the use of surplus funds, or a trust relationship are not sufficient on their own to change a commercial entity into a charity. This does not mean that the extent of any relationship with a charity is irrelevant, but a simple 'look through' approach is not appropriate.<sup>140</sup>

<sup>131</sup> *Royal Choral Society v. Commissioners of Inland Revenue* [1943] 2 All ER 101; *Municipal Council of Sydney v. Salvation Army (NSW Property Trust)* (1931) 31 SR (NSW) 585; *The Abbey, Malvern Wells Ltd v. Minister of Town and Country Planning* [1951] 2 All ER 154 at 160.

<sup>132</sup> *Salvation Army (Victoria) Property Trust v. Fern Tree Gully Corporation* (1952) 85 CLR 159.

<sup>133</sup> *Trustees of the Dean Leigh Temperance Canteen v. Commissioners of Inland Revenue* (1958) 38 TC 315.

<sup>134</sup> Examples of the organised provision of social amenities and facilities being at least secondary to sporting purposes include *Terranora Lakes Country Club Limited v. FC of T* 93 ATC 4078; (1993) 25 ATR 294 and *St Marys Rugby League Club Limited v. FC of T* 97 ATC 4528; (1997) 36 ATR 281. While these cases illustrate the general weighing required, caution is needed as they permit secondary purposes which are not necessarily incidental or ancillary to the main purpose (see Taxation Ruling TR 97/22 at paragraph 42).

<sup>135</sup> *The Incorporated Council of Law Reporting of the State of Queensland v. FC of T* (1971) 125 CLR 659.

<sup>136</sup> *McGarvie Smith Institute v. Campbelltown Municipal Council* (1965) 11 LGRA 321.

<sup>137</sup> *Scottish Burial Reform and Cremation Society Ltd v. Glasgow City Corporation* [1967] 3 All ER 215.

<sup>138</sup> *Commr for ACT Revenue Collections v. Council of the Dominican Sisters of Australia* 91 ATC 4602; (1991) 22 ATR 213.

<sup>139</sup> *Theosophical Foundation Pty Ltd v. Commissioner of Land Tax (NSW)* (1966) 67 SR (NSW) 20.

<sup>140</sup> See Draft Taxation Ruling TR 2005/D7 Income tax: companies controlled by exempt entities.

130. It is therefore not possible to agree with the views expressed in the Taxation Board of Review decision in Case B122 (1952) 2 TBRD 613. In that case the trustees of a public park formed a club to operate a picture show business to raise revenue to improve the park. The Board of Review found that the club – which was an entity separate from the trust – was a charitable institution and therefore its income was exempt from tax. It is considered that the Board of Review failed to distinguish the purpose of the club from the motives behind its activities. The motives were clearly to provide funds for the park and there were no secondary or ulterior purposes in choosing to operate a picture show. However, the club's operations were wholly to conduct a business on commercial lines. Its purpose was not that of a charitable institution. The similar views expressed by Member McCaffrey in Case C56 (1953) 3 TBRD 297 also are disagreed with. These views are not consistent with the approach of the Full Federal Court in *Commr for ACT Revenue Collections v. Council of the Dominican Sisters of Australia* 91 ATC 4602; (1991) 22 ATR 213. The Full Federal Court confirmed that it is the purpose of the entity itself rather than its controller or sponsor that is determinative. The abovementioned Board of Review decisions are also inconsistent with the approach of the NSW Court of Appeal in *Glebe Administration Board v. Commissioner of Pay-roll Tax (NSW)* 87 ATC 4825; (1987) 19 ATR 297 where an investment vehicle of a church was held to not be a religious institution.

### **3.5 The purpose is governmental**

131. Governmental departments and organisations are unlikely to be charitable institutions. They are simply performing a governmental responsibility. In *In re Cain (deceased); The National Trustees Executors and Agency Co of Australasia Ltd v. Jeffrey* [1950] VLR 382 a bequest was made in favour of the Children's Welfare Department of the Victorian State Government. In discussing whether it was charitable, 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.

132. 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, in rejecting the Board as a charity, said, at 208-209:

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>141</sup>

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

133. A purpose that has insufficient value to the community is not charitable.<sup>142</sup> For example, where a testator set up a trust for the publication of his own literary works, it was not charitable as the works failed to have any educational value to the community.<sup>143</sup>

134. 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 considered 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.

<sup>141</sup> See also *Waitemata County v. Commissioner of Inland Revenue* [1971] NZLR 151.

<sup>142</sup> *Re Hummeltenberg; Beatty v. London Spiritualistic Alliance* [1923] All ER Rep 49.

<sup>143</sup> *Re Elmore (deceased)* [1968] VR 390.

135. Any purpose that is vague or ambiguous fails to have sufficient certainty to be characterised as charitable. Thus, in *Inland Revenue Commissioners v. Baddeley and others* [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. Viscount 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.

136. Other expressions that the cases have found too vague or imprecise include 'philanthropic' purposes,<sup>144</sup> 'benevolent' purposes,<sup>145</sup> 'patriotic purposes',<sup>146</sup> and 'benefit maintenance and advancement of youth'.<sup>147</sup> Such problems with vagueness or ambiguity can be reduced by careful drafting and specifying 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**

137. For income tax exemption, the requirements under section 50-5 of the ITAA 1997 are different for charitable institutions and for charitable funds. These different requirements are explained in Taxation Ruling TR 2000/11.

138. For an entity 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.

139. A charity that is established under a will or instrument of trust could be either a charitable institution or a charitable fund. Determining whether a particular charity is a fund or institution is a question of fact requiring a consideration of the relevant circumstances.

<sup>144</sup> *Re MacDuff; MacDuff v. MacDuff* [1895-9] All ER Rep 154.

<sup>145</sup> *The Attorney-General of New Zealand v. The New Zealand Insurance Company Ltd and others* [1936] 3 All ER 888.

<sup>146</sup> *Attorney-General v. National Provincial and Union Bank of England and others* [1924] AC 262; [1923] All ER Rep 123.

<sup>147</sup> *Re Payne (deceased)* [1968] Qd R 287.

140. Also, some tax concessions can only apply where the charity is a charitable institution. For example, the gift deductibility for health promotion charities under item 1.1.6 of the table in subsection 30-20(1) of the ITAA 1997, and the exempt fringe benefits under section 57A of the FBTA, require them to be charitable institutions. Gift deductibility in relation to harm prevention charities under item 4.1.4 of the table in subsection 30-45(1) also requires that the charity be a charitable institution. Likewise for rebatable employer status under subsection 65J(1) of the FBTA. Until now the Tax Office has taken an approach that charitable funds have been rebatable employers. From 1 July 2005 this approach will no longer apply and charitable funds will not be considered rebatable employers as if they were charitable institutions. The previous approach is inconsistent with the explanation in this Ruling about the distinction between charitable funds and charitable institutions.<sup>148</sup>

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

141. 'Fund' is not defined in the ITAA 1997 and takes its ordinary meaning. A fund is a pool, stock or store of assets. The dictionary meanings of fund include 'stock of money or pecuniary resources'<sup>149</sup> and 'stock or sum of money, esp. as set apart for a particular purpose'.<sup>150</sup> Accordingly, an entity established by will or instrument of trust will be a fund if it 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>151</sup>

142. These entities will not be institutions within the phrase 'charitable institution'. In *Trustees of the Allport Bequest v. FC of T* (1988) 88 ATC 4436; (1988) 19 ATR 1335 an organisation which was established by Act of Parliament was held to not be an institution where its sole activities were to manage trust property and apply the income by donating to such other charitable organisations and objects as it determined.<sup>152</sup> In *Commissioner of Land Tax for the State of New South Wales and others v. Joyce and others* (1974) 48 ALJR 432, four trustees whose only function was 'the management of trust property consistently with the trust deed and with the wish it expressed that the trust property should primarily be devoted to providing a meeting place for Christians' were found to not be an institution.<sup>153</sup> In *Minister of National Revenue v. Trusts and Guarantee Co Ltd* [1939] 4 All ER 149; [1940] AC 138 at 150 the Privy Council said:

<sup>148</sup> For periods before 1 July 2005, see also paragraph 6 on the date of effect of this Ruling.

<sup>149</sup> *The Macquarie Dictionary*, [Multimedia], version 5.0.0, 1/10/01.

<sup>150</sup> *Shorter Oxford English Dictionary*, 2002, 5<sup>th</sup> edn, Oxford University Press, Oxford.

<sup>151</sup> See *Associated Provident Funds Pty Ltd v. FCT* (1966) 10 AITR 290 at 312; 14 ATD 333 at 351 where it was said that in this context a fund means 'money (or investments) set aside and invested, the surplus income being capitalized'.

<sup>152</sup> *Trustees of the Allport Bequest v. FC of T* (1988) 88 ATC 4436; (1988) 19 ATR 1335 concerned the expression 'public benevolent institution', but its discussion of 'institution' is also relevant to the expression 'charitable institution'.

<sup>153</sup> See also *Douglas and others v. FC of T* 97 ATC 4722; (1997) 36 ATR 532.



The trust with which the present appeal is concerned is an ordinary trust for charity. It can only be regarded as a charitable institution ... if every such trust is to be so regarded, and this, in their Lordships' opinion, is impossible.

143. An institution generally connotes 'the body (so to speak) called into existence to translate the purpose as conceived in the mind of the founders into a living and active principle': *Mayor of Manchester v. McAdam (Surveyor of Taxes)* (1896) 3 TC 491 at 497; [1896] AC 500 at 511 per Lord Macnaghten.<sup>154</sup>

144. No particular structure is prescribed for charitable institutions. Some institutions take the form of corporations limited by guarantee, unincorporated associations or charitable trusts. An institution may be created by will.<sup>155</sup> The forming of an association and incorporation are not sufficient on their own.<sup>156</sup>

145. Whether a particular entity is an institution is indicated by a range of factors including activities, size, permanence and recognition. All relevant factors should be considered and whether an institution exists will depend on its particular facts. The Privy Council has provided some examples: '... the charitable institutions exempted are those which are institutions in the sense in which boards of trade and chambers of commerce are institutions, such, for example, as a charity organisation society, or a society for the prevention of cruelty to children.'<sup>157</sup> Institutions accepted by the High Court in this and related contexts have included a university and a university college,<sup>158</sup> a publisher of law reports,<sup>159</sup> a YMCA,<sup>160</sup> a Boys' Brigade,<sup>161</sup> a home for aged women,<sup>162</sup> and an association of surgeons.<sup>163</sup>

146. The word institution has a meaning 'greater than a structure controlled and operated by family members and friends': *Pamas Foundation (Inc) v. DFC of T* 92 ATC 4161; (1992) 23 ATR 189. In that case a corporation was not accepted as a religious institution where its membership was small and exclusive and the scale of its activities was relatively small. However, through growth in membership, activities and recognition a body may become an

<sup>154</sup> See also *The Young Men's Christian Association of Melbourne v. FC of T* (1926) 37 CLR 351.

<sup>155</sup> *Lemm v. FC of T* (1942) 66 CLR 399 at 409-410 per Williams J.

<sup>156</sup> *Pamas Foundation (Inc.) v. DFC of T* 92 ATC 4161; (1992) 23 ATR 189.

<sup>157</sup> *Minister of National Revenue v. Trusts and Guarantee Co Ltd* [1940] AC 138 at 149-150.

<sup>158</sup> *University of Birmingham and another v. FC of T* (1938) 5 ATD 63 (public educational institution).

<sup>159</sup> *The Incorporated Council of Law Reporting of the State of Queensland v. FC of T* (1971) 125 CLR 659 (charitable institution).

<sup>160</sup> *The Young Men's Christian Association of Melbourne v. FC of T* (1926) 37 CLR 351 (religious institution).

<sup>161</sup> *Maughan v. FC of T* (1942) 66 CLR 388 (public benevolent institution).

<sup>162</sup> *Lemm v. FC of T* (1942) 66 CLR 399 (public benevolent institution).

<sup>163</sup> *Royal Australasian College of Surgeons v. FC of T* (1943) 68 CLR 436 (scientific institution).

institution, even if it has evolved from a small group of people who were not an institution at an earlier stage.<sup>164</sup>

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

### Guide

The only purpose for which a charitable institution is established and operated must be charitable.

A charitable fund is established solely for charitable purposes.

### **5.1 Charitable institutions**

#### *5.1.1 Purpose*

147. For an institution to be a charitable institution its purpose must be charitable. It cannot exist or operate for any purpose which is not a charitable purpose. That is, a charitable institution's purposes are wholly and solely charitable.<sup>165</sup>

148. If an institution exists and operates for several purposes, all of them must be charitable. For example, a body which had one purpose of educating children for the public benefit, and also a purpose of providing shelter for the homeless poor would be a charitable institution – it exists and operates for two purposes and both of them are charitable.

149. However, if an institution exists or operates for any purpose that is not a charitable purpose, it will not be a charitable institution. This is the case even if its non-charitable purpose is secondary or minor.<sup>166</sup> For example, an association set up for two separate purposes – to look after injured animals for the benefit of the public, and to be a stamp-collecting club for its members – would not be a charitable institution even if it mainly cared for animals, with lesser attention given to the stamp-collecting.

<sup>164</sup> *Christian Enterprises Ltd v. Commissioner of Land Tax* (1968) 88 WN (Pt. 2) (NSW) 112 at 120.

<sup>165</sup> The cases use different expressions referring to a charity's charitable purpose. When characterising a charity as such, they refer to it being 'exclusively' charitable, or for charitable purposes 'only'. When contrasting a charitable purpose with incidental or ancillary objects, they talk of the charitable purpose as 'dominant', 'main', 'predominant', 'prevailing', 'essential' or 'dominating'. This latter terminology is not, however, used to imply that a charity can have secondary non-charitable purposes.

<sup>166</sup> In this respect charitable institutions are unlike some other categories of entities in tax law. For example, for an income tax exempt sports club under item 9.1(c) of the table in section 50-45 of the ITAA 1997, its main purpose must be the encouragement of a game or sport, but it could have an unrelated secondary purpose (see Taxation Ruling TR 97/22 at paragraph 42). In contrast, an institution that had an unrelated secondary purpose that was not charitable in its own right would not be a charitable institution.

150. Because a charitable institution is only for a purpose that is charitable, all of its activities will be solely and entirely to carry out or give effect to its charitable purpose. Of course, many of a charitable institution's activities and powers might, when viewed in isolation, be indistinguishable from those of a non-charity. Examples might be hiring staff, cleaning premises, insuring property, buying and selling assets, preparing and maintaining accounts, complying with regulatory requirements, conducting meetings, and so on. For a charitable institution, though, all of these things would be done only for the sake of, or in aid of, or in furtherance of, its charitable purpose. Accordingly, an institution's activities, powers and objects which, when viewed in isolation, would not be charitable, 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>167</sup>

As well as incidental and ancillary, other expressions used in the cases are 'subsidiary' and 'concomitant'. They all express the idea that the objects or activities are not the organisation's ends in themselves. They are only for the sake of, or in aid of, or in furtherance of, its charitable purposes.

151. Finding an institution's purpose involves an objective weighing of all its features. These include its constitutive or governing documents (memorandum and articles of association, trust deed, constitution, and so on), its activities, policies and plans, administration, finances, history and control, and any legislation governing its operation.

152. The features of an institution's constituent documents will be the starting point, and in normal situations will have the most weight (see paragraph 154). However, the constituent documents are not considered in isolation. 'And in order to ascertain what the purposes of an association are, the court is not limited to consideration of its rules or its constituent documents', as Lord Normand said in *Inland Revenue Commissioners v. City of Glasgow Police Athletic Association* [1953] 1 All ER 747 at 752.

153. The other features of an institution will usually have more or less weight depending on aspects of those documents, their relations to them, and other circumstances (see paragraph 162).

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<sup>167</sup> *Congregational Union of New South Wales v. Thistlethwayte and others*; *Burchmore and another v. Thistlethwayte and others* (1952) 87 CLR 375 at 442 per Dixon CJ, McTiernan, Williams and Fullagar JJ.

### 5.1.2 *Constitution and objects*

154. An institution's constitution, memorandum and articles of association, trust deed, or other constituent document will formally set out the reasons for which it is to exist and operate. Different documents will name these reasons differently – for example as 'objects' or 'purposes' or 'trusts'. In this Ruling they are described as objects.

155. The objects in an institution's constituent documents can strongly indicate whether it is for a charitable purpose only. For example the objects might clearly limit the institution to advancing education for the public benefit, or to caring for the poor, or for purposes accepted by the courts as being charitable. Where the constitution is solely for charitable purposes for the public benefit, and the institution gives effect to them wholly in a charitable way for the public benefit, it will be a charitable institution.

156. Even if an institution's objects are not, on their face, clearly limited to the pursuit of charitable purposes, it might in some circumstances still be a charitable institution. However, we encourage organisations to draft their objects to reflect their activities and real purposes. Having objects that are unambiguously charitable will greatly assist a non-profit institution in demonstrating that it is a charity. On the other hand, objects that require interpretation, or objects that produce apparent inconsistencies between other objects or powers require a more detailed consideration.

157. *Incidental 'non-charitable' objects.* Considered in isolation, some of an institution's objects might not be characterised as charitable. However, where the objects are merely incidental or ancillary to the charitable purposes the organisation might nonetheless be a charitable institution.

158. For example, in *Congregational Union of New South Wales v. Thistlethwayte* (1952) 87 CLR 375 the Union's objects included 'United action for the creation, maintenance and improvement of our educational, religious and philanthropic agencies' and 'The preservation of civil and religious liberty'. The High Court said 'these objects must be interpreted in the light of the constitution of the Union as a whole.'<sup>168</sup> When the constitution was considered as a whole, the Union could only pursue these ends to the extent they were for the advancement of religion. Accordingly, these objects did not prevent the Union from being charitable.

159. On the other hand, where a proper understanding of an organisation's constitution indicates its non-charitable objects are not merely incidental or ancillary, it will not be a charitable institution (see for example paragraph 87). This could occur, for example, where the constitution provides that each of the objects is to be construed independently of any other.<sup>169</sup>

<sup>168</sup> Per Dixon CJ, McTiernan, Williams and Fullagar JJ at 442.

<sup>169</sup> *Re Hargreaves* [1973] Qd R 448.

160. *Rules.* It is not only the objects that are relevant in finding an institution's purposes. Other provisions of the constituent documents that should also be considered include non-profit and winding up clauses,<sup>170</sup> and clauses governing who can benefit from the institution's activities and in what ways. Constituent documents often specify the powers an organisation can use to carry out its objects.<sup>171</sup> In some circumstances, these can assist in characterising the organisation's purposes.

161. *Legislation.* The rules and powers of organisations are sometimes affected by legislation. This legislation may assist in characterising the organisation.

### 5.1.3 Operations and activities

162. An institution's operations and activities can sometimes help confirm that, despite features which would be non-charitable if taken in isolation, it is in fact for charitable purposes only. On the other hand, the operations and activities of an institution can show that the substance and reality of its purposes are not charitable, despite the presence of features which would be charitable if taken in isolation.

163. That is, an institution's objects and constitution are not treated in isolation. As Lord Normand said in *Inland Revenue Commissioners v. City of Glasgow Police Athletic Association* [1953] 1 All ER 747 at 751-752 in finding the Association was not a charity:

I begin with the rules ... But it will not do to stop there... The question is what are the purposes for which the association is established, as shown by the rules, its activities and its relation to the police force and the public.

It is the reality and substance of the institution's purpose that must be determined.

164. Features that help indicate whether an institution's purpose is charitable include the policies and procedures which guide its operations; and the activities and operations that it actually performs, including the activities of the executive body, the uses and sources of funds and property, and the duties and tasks of employees, contractors and volunteers.

165. *Incidental non-charitable objects.* Where an institution has some objects which are not, on their face, charitable, its activities may assist in showing that the objects are merely incidental to charitable purposes.

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<sup>170</sup> See paragraphs 76-77.

<sup>171</sup> Such powers – for example, to sell land, to borrow money, to hire employees – will sometimes be described in constitutions as 'objects'. Where items listed as 'objects' are, when read in the context of the constituent documents as a whole, truly no more than powers to give effect to the purposes, they can be treated as powers and not as objects. The separation of objects from powers in the constituent document can assist clarity, and the subordinate role of the powers can be confirmed by some such introduction as 'Solely for the purpose of carrying out the company's objects, the company may ...'.

166. Such an approach 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>172</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. 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. 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 purpose was for science, and any other features were merely incidental.

167. *Non-incidental non-charitable objects.* Consideration of the documents, activities and circumstances of an institution may confirm that its non-charitable objects are in fact not incidental to any charitable purpose. In such situations it is not sufficient that the non-charitable objects are minor or secondary or rarely applied. To be charitable, an institution's purposes must be charitable, and its objects must be at least incidental or ancillary to such purposes. For example, if the objects in the *Royal Australasian College of Surgeons* case 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 75 to 91.

168. *Incidental activities.* Activities are considered in light of the other features of the institution. It may well be that activities which, if viewed in isolation, would seem inconsistent with charity, are merely incidental or ancillary to the institution's charitable purposes. Examples can be found at paragraphs 94, 119 and 127.

169. *'Charitable activities'.* Where an organisation's constituent documents show it is not for charitable purposes, it might nonetheless have activities that would be indistinguishable from those of a charity. On this basis the claim is sometimes made that the reality or substance of the organisation is charitable, and that its documentation should not be permitted to overturn this conclusion. The cases do not support such an argument. If it is clear from the constituent documents that an organisation is not for charitable purposes only, its activities cannot make it charitable. For example, an institution was set up for two separate purposes – caring in a public way for injured animals, and kayaking. Even if it undertook no

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<sup>172</sup> Under paragraph 23(e) of the ITAA 1936.

kayaking activities, the institution would nonetheless not be for charitable purposes only. The fact that all its present activities were caring for injured animals in a way consistent with charity, would not be sufficient to show it was a charitable institution.

170. *Statutory extension.* An institution's operations and activities are, of course, particularly relevant in applying the statutory extensions in respect of the provision of non-profit child care services,<sup>173</sup> self-help groups<sup>174</sup> and religious orders,<sup>175</sup> under the *Extension of Charitable Purpose Act 2004*.

171. *Inconsistent activities.* Where an institution's activities are inconsistent with it operating for charitable purposes only, it will not be a charitable institution. For example, where an institution with an unambiguously charitable constitution for the advancement of education operates solely to provide private benefits to its controllers, it will not be a charitable institution.<sup>176</sup> Likewise, an organisation set up to be an automotive public museum but that in fact operates as an off-road four-wheel drive club will not be a charitable institution.

#### 5.1.4 *Change*

172. As an institution's features can change over time, so can its 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. For example, an institution set up for two separate purposes – providing public education, and promoting pigeon racing<sup>177</sup> – might cease any involvement with pigeon racing, amend its constitution and operate solely to provide public education.

#### 5.1.5 *Peak bodies*

173. The same principles and considerations apply in determining the purpose of a peak or similar body set up by charities to further their common charitable endeavours. However, given the factual differences between them and the charities they work with, the following comments are provided.

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<sup>173</sup> See from paragraph 46.

<sup>174</sup> See from paragraph 66.

<sup>175</sup> See from paragraph 62.

<sup>176</sup> This will be the case notwithstanding that the institution's controllers continue to have obligations to carry out the charitable purposes.

<sup>177</sup> See paragraph 95: *Royal National Agricultural and Industrial Association v. Chester and others* (1974) 48 ALJR 304.

174. In *Ziliani and another v. Sydney City Council* (1985) 56 LGRA 58 a non-profit unincorporated association of show societies (which were themselves charities) was accepted as a charity. The association was set up to protect and promote the interests of the societies and to coordinate their activities. Its activities included providing material and assistance on judging, keeping societies informed of other societies' activities, and it operated services 'on a mutual and co-operative basis in respect of matters of uniform concern' including the provision of a rain protection scheme and an accident fund.

175. As this case illustrates, it is not necessary that a charity play a 'direct' role.<sup>178</sup> It shows that a purpose can be for the public benefit even where the organisation does not deal directly with members of the public.

176. When considering such bodies, support activities that are integral to the carrying out of the overall charitable purposes can be merely incidental. Examples of such activities could include accounting and legal services, project management, hiring and contracting, political representation, insurance and finance, provision of resources, and policy advice.<sup>179</sup>

## **5.2 Charitable funds**

177. 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>180</sup> Any objects which, if viewed in isolation, would not be charitable, must be merely incidental to the charitable purposes.<sup>181</sup>

<sup>178</sup> The notion of 'direct relief' arises for public benevolent institutions (see Taxation Ruling TR 2003/5), but it does not arise for charitable institutions. Examples of a charity playing an 'indirect' role include – besides *Ziliani and another v. Sydney City Council* – *Presbyterian Church of New Zealand Beneficiary Fund v. Commissioner of Inland Revenue* [1994] 3 NZLR 363 (a retirement plan for clergy) and *Re White's Will Trusts; Tindall v. Board of Governors of the United Sheffield Hospitals and others* [1951] 1 All ER 528 (a rest home for nurses).

<sup>179</sup> This is not to say that any organisation formed or controlled by charities will itself be a charity. The circumstances of such an organisation can show that its activities are not integrated in the pursuit of charitable purposes, that it is operating for other ends, that private benefits are not incidental, etc; see Draft Taxation Ruling TR 2005/D7 Income tax: companies controlled by exempt entities.

<sup>180</sup> *Compton and others v. FC of T* (1966) 116 CLR 233 at 248.

<sup>181</sup> See paragraphs 157-159.



178. Various State Acts operate to save trusts that would otherwise be invalid as having both charitable and non-charitable purposes.<sup>182</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>183</sup> so long as the valid purposes fall within the technical legal meaning of charitable.

179. 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>184</sup> In this respect, charitable funds are different to charitable institutions, for which the activities of the institution can be relevant in determining its purposes (see paragraphs 162 to 171). Nonetheless, the activities of a charitable fund are relevant to income tax exemption because the fund must be applied for the purposes for which it was established.<sup>185</sup> Accordingly, if a fund was not being applied for its charitable purposes (for example it was being used to provide private benefits to the trustee's family), it would continue to be a charitable fund but it would fail to qualify for income tax exemption.<sup>186</sup>

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

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

181. 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 these conduce to the advancement of the nursing of sick persons which is a charitable object'. Lord Keith (at 333-4) 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.

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<sup>182</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>183</sup> *Downing v. FC of T* (1971) 125 CLR 185.

<sup>184</sup> *Douglas and others v. FC of T* 97 ATC 4722; (1997) 36 ATR 532 at 538.

<sup>185</sup> Sections 50-5, 50-57 and 50-60 of the ITAA 1997.

<sup>186</sup> See Taxation Ruling TR 2000/11.

182. 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 (NZ)* (1977) 8 ATR 323 the use of educational means (disseminating information to the public on the fundamental importance of human life) was not sufficient to show that the purpose was educational rather than political (preventing 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 186-187
- relief of needs arising from old age – paragraph 188
- relief of sickness and distress – paragraphs 189-191
- advancement of education – paragraphs 192-200
- advancement of religion – paragraphs 201-206
- other charitable purposes – paragraph 207

183. A purpose is only charitable if it is within the ‘spirit and intendment’ of the Statute of Elizabeth (see paragraphs 36 to 42).<sup>187</sup> 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**

184. 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, ports, havens, causeways, churches, sea banks and highways; the education and preferment of orphans; the relief, 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.

<sup>187</sup> Also, the provision of child care services on a non-profit basis is treated as a charitable purpose by virtue of the *Extension of Charitable Purpose Act 2004*. See paragraph 46. There is also, of course, the public benefit requirement (where the purpose is not solely for the relief of poverty). This Act deems the public benefit requirement to be satisfied by some self-help groups and religious orders.

**6.2 Summary of court decisions**

185. Court decisions on the technical legal meaning of charitable are important in deciding whether a particular purpose is charitable. The decisions can be used to draw analogies. The following discussion is not a substitute for the decisions themselves. Using general principles drawn from the cases instead of the decisions themselves can, in some situations, tend to confuse as their consistency across various decisions is not always apparent.<sup>188</sup> Nonetheless, the discussion below provides a feel for the range of charitable purposes and the particular issues that arise for different types of charity.

**6.2.1 Relief of poverty**

186. The relieving of poverty is a charitable purpose. The persons to benefit need not be destitute or on the border of destitution.<sup>189</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>190</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>191</sup> The ways in which poverty can be relieved include providing money, accommodation,<sup>192</sup> legal or medical aid. The charging of fees need not be inconsistent with a purpose of relieving poverty.<sup>193</sup>

187. Purposes of relieving poverty have been accepted as charitable where those to benefit were poor relatives,<sup>194</sup> poor members of an association<sup>195</sup> and poor employees of an employer.<sup>196</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 and others* [1972] 1 All ER 878; [1972] AC 601.<sup>197</sup>

<sup>188</sup> As Lord Sterndale MR said in *In re Tetley; National Provincial and Union Bank of England Ltd v. Tetley* [1928] 1 Ch 258 at 266: 'As I have said, I, at any rate, am unable to find any principle which will guide one easily, and safely, through the tangle of the cases as to what is and what is not a charitable gift. If it is possible I hope sincerely that at some time or other a principle will be laid down.'

<sup>189</sup> *Re Gillespie (deceased)* [1965] VR 402 at 406.

<sup>190</sup> *Ballarat Trustees Executors and Agency Company Limited v. FC of T* (1950) 80 CLR 350.

<sup>191</sup> *Joseph Rowntree Memorial Trust Housing Association Ltd and others v. Attorney-General* [1983] 1 All ER 288 at 295.

<sup>192</sup> *Re Niyazi's Will Trusts* [1978] 1 WLR 910; [1978] 3 All ER 785.

<sup>193</sup> *Re Cottam's Will Trusts; Midland Bank Executor and Trustee Co. Ltd and another v. Huddersfield Corporation and others* [1955] 1 WLR 1299; [1955] 3 All ER 704.

<sup>194</sup> *Re Scarisbrick's Will Trusts; Cockshott v. Public Trustee and others* [1951] 1 All ER 822. Compare the decision of *In Re Niven (deceased)* (unreported Kennedy J, Supreme Court of Western Australia, 1936 of 1985) where a trust for any member of the family in need of assistance and support was held not to be for the relief of poverty.

<sup>195</sup> *Re Young's Will Trusts; Westminster Bank Ltd v. Sterling and others* [1955] 1 WLR 1269; [1955] 3 All ER 689.

<sup>196</sup> *Dingle v. Turner and others* [1972] 1 All ER 878; [1972] AC 601.

<sup>197</sup> As applied in Australia by *In Re Hilditch, deceased* (1986) 39 SASR 469.

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

188. A purpose of relieving the needs arising from old age is a charitable purpose unless there is a limitation which deprives it of that character.<sup>198</sup> The 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>199</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 benefited.

### 6.2.3 *Relief of sickness and distress*

189. 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.

190. The following have been held to be a section of the public who are in need of relief from sickness and distress: visually impaired people,<sup>200</sup> hearing or speech impaired people,<sup>201</sup> people suffering mental affliction<sup>202</sup>, people who are sick<sup>203</sup>, underprivileged people<sup>204</sup> and orphaned children.<sup>205</sup> The types of institutions that are charitable because they provide relief to the sick public include hospitals,<sup>206</sup> convalescent homes<sup>207</sup> and sanatoria.<sup>208</sup>

<sup>198</sup> *Hilder v. Church of England Deaconess' Institution Sydney Ltd and others* [1973] 1 NSWLR 506 at 511.

<sup>199</sup> *D V Bryant Trust Board v. Hamilton City Council* [1997] 3 NZLR 342.

<sup>200</sup> *Re Inman (deceased)* [1965] VR 238.

<sup>201</sup> *The President, Councillors and Ratepayers of the Shire of Nunawading v. The Adult Deaf and Dumb Society of Victoria* (1921) 29 CLR 98.

<sup>202</sup> *The Diocesan Trustees of Church of England in Western Australia v. The Solicitor-General; The Home of Peace for the Dying and Incurable v. The Solicitor-General* (1909) 9 CLR 757.

<sup>203</sup> *Taylor and another v. Taylor and others* (1910) 10 CLR 218.

<sup>204</sup> *Salvation Army (Victoria) Property Trust v. Fern Tree Gully Corporation* (1952) 85 CLR 159.

<sup>205</sup> *The Attorney General for New South Wales v. The Perpetual Trustee Company Limited and others* (1940) 63 CLR 209.

<sup>206</sup> *Le Cras v. Perpetual Trustee Co Ltd and others; Far West Children's Health Scheme and others v. Perpetual Trustee Co. Ltd and others* [1967] 3 All ER 915.

<sup>207</sup> *Inland Revenue Commissioners v. Trustees of Roberts Marine Mansions* (1927) 43 TLR 270.

<sup>208</sup> *Kytherian Association of Queensland and another v. Sklavos* (1958) 101 CLR 56.

191. It is necessary that any purpose of relieving sickness or distress must be for the benefit of the public. In *Waterson and others 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 purposes were not altruistic; 'the object of the members of the society is not to do good to others but to themselves.'<sup>209</sup>

#### 6.2.4 Advancement of education

192. 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>210</sup> training in aviation,<sup>211</sup> technical education,<sup>212</sup> training in the construction industry,<sup>213</sup> commercial education,<sup>214</sup> economic and sanitary science,<sup>215</sup> the arts of social intercourse,<sup>216</sup> the study of law,<sup>217</sup> a school of archaeology,<sup>218</sup> study of natural history,<sup>219</sup> scientific study of obstetrics and gynaecology<sup>220</sup> and a kindergarten.<sup>221</sup>

193. The support of the educational activities of charitable schools and colleges has also been accepted as charitable. Examples include providing scholarships and<sup>222</sup> professorships.<sup>223</sup>

<sup>209</sup> *Waterson and others v. Hendon Borough Council* [1959] 2 All ER 760 at 764.

<sup>210</sup> *Re Tyrie (deceased)* [1970] VR 264.

<sup>211</sup> *In re Lambert (deceased)* [1967] SASR 19.

<sup>212</sup> *The Royal North Shore Hospital of Sydney v. Attorney-General for New South Wales and others* (1938) 60 CLR 396.

<sup>213</sup> *Barclay & ors v. Treasurer of Queensland* 95 ATC 4496; (1995) 31 ATR 123.

<sup>214</sup> *Re Koettgen (deceased); Westminster Bank Ltd and another v. Family Welfare Association Trustees, Ltd and others* [1954] 1 All ER 581.

<sup>215</sup> *Re Berridge; Berridge v. Tume* (1890) 90 LT 55.

<sup>216</sup> *Re Shaw's Will Trusts; National Provincial Bank Ltd v. National City Bank Ltd and others* [1952] 1 All ER 49.

<sup>217</sup> *College of Law (Properties) Pty Ltd v. Willoughby Municipal Council* (1978) 38 LGRA 81; *Smith v. Kerr* [1902] 1 Ch 774.

<sup>218</sup> *Re British School of Egyptian Archaeology; Murray and others v. Public Trustee and others* [1954] 1 All ER 887.

<sup>219</sup> *In re Benham* [1939] SASR 450.

<sup>220</sup> *McGregor v. Commissioner of Stamp Duties* [1942] NZLR 164.

<sup>221</sup> *Hixon v. Campbell and others* (1924) 24 SR (NSW) 436 and *Kindergarten Union of NSW Incorporated v. Waverley Municipal Council* (1960) 5 LGRA 365.

<sup>222</sup> *Re Weaver; Trumble v. Animal Welfare League of Victoria* [1963] VR 257; *Wilson v. Toronto General Trusts Corporation et al* [1954] 3 DLR 136.

<sup>223</sup> *Dorothea Yates v. University College, London and C.T.D'Eyncourt* (1874-5) 7 AC 438.

194. 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 activities. Examples are a school or university's sporting programs<sup>224</sup> and facilities,<sup>225</sup> school excursions,<sup>226</sup> the students union set up by a medical college,<sup>227</sup> the setting up of a rose garden in a university,<sup>228</sup> a student loan fund<sup>229</sup> and a fund to help students on the death of a parent.<sup>230</sup>

195. 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 *Rex v. The Special Commissioners of Income Tax; (ex parte The Headmasters' Conference); Rex v. The Special Commissioners of Income Tax (ex parte the Incorporated Association of Preparatory Schools)* (1925) 10 TC 73 a professional association for headmasters was not accepted as being established for educational purposes only.

196. Enjoyment for 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>231</sup> a police citizens boys club,<sup>232</sup> and a sea cadets branch.<sup>233</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>234</sup>

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<sup>224</sup> *Inland Revenue Commissioners v. McMullen and others* [1980] 1 All ER 884; *Kearins v. Kearins* (1957) SR (NSW) 286.

<sup>225</sup> *Re Mariette; Mariette v. Aldenham School Governing Body* [1914-15] All ER Rep 794.

<sup>226</sup> *Re Mellody; Brandwood v. Haden* [1916-17] All ER Rep 324.

<sup>227</sup> *London Hospital Medical College v. Inland Revenue Commissioners and another* [1976] 2 All ER 113. See also *Attorney-General v. Ross and others* [1985] 3 All ER 334.

<sup>228</sup> *McGrath and another v. Cohen and others* [1978] 1 NSWLR 621.

<sup>229</sup> *Guaranty Trust Company of Canada v. The Minister of National Revenue* [1967] SCR 133.

<sup>230</sup> *Educational Fees Protection Society Inc v. Commissioner of Inland Revenue* [1992] 2 NZLR 115.

<sup>231</sup> *The Boy Scouts Association, NSW Branch v. Sydney City Council* (1959) 4 LGRA 260; *Re Webber (deceased); Barclays Bank Ltd v. Webber and others* [1954] 3 All ER 712.

<sup>232</sup> *Greater Wollongong City Council v. Federation of New South Wales Police Citizens Boys' Club* (1957) 2 LGRA 54.

<sup>233</sup> *Lloyd and another v. FC of T* (1955) 93 CLR 645.

<sup>234</sup> *Minahan and another v. Commissioner of Stamp Duties (NSW)* (1926) 26 SR (NSW) 480.

197. Education can also extend to the improvement of a useful branch of knowledge and its dissemination. Purposes that fall into this category may also be charitable as other purposes beneficial to the community. For example a geographical society,<sup>235</sup> a college of surgeons,<sup>236</sup> a zoological society,<sup>237</sup> an institute of civil engineers,<sup>238</sup> museums,<sup>239</sup> art galleries,<sup>240</sup> a national trust for places of historic interest and national beauty<sup>241</sup> and a conference promoting international cooperation.<sup>242</sup>

198. An educative purpose has been contrasted with purely studious occupation, the former being charitable, the latter not.<sup>243</sup> Also, the charitable advancement of education does not encompass education in the sense that all experience is educative.<sup>244</sup>

199. A purpose is not charitable for the advancement of education if it tends merely to increase the store of knowledge in society in ways that are not integrated with education. For example, in *Re Shaw (deceased); Public Trustee v. Day and others* [1957] 1 All ER 745 the playwright GB 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.

200. The advancement of education does not include indoctrination with the merits of a cause.<sup>245</sup> Where a purpose is political, lobbying or promotional in nature it is not for the advancement of education even if educational means are used or educational activities are involved (see paragraphs 99 to 124).

<sup>235</sup> *Beaumont v. Oliveira* (1868-9) 4 LR Ch App 309.

<sup>236</sup> *Royal College of Surgeons of England v. National Provincial Bank Ltd and others* [1952] 1 All ER 984.

<sup>237</sup> *Re Lopes; Bence Jones v. Zoological Society of London* [1930] All ER Rep 45.

<sup>238</sup> *Institution of Civil Engineers v. Commissioners of Inland Revenue* [1932] 1 KB 149.

<sup>239</sup> *In Re Allsop (deceased); Gell v. Carver* (1884) 1 TLR 4.

<sup>240</sup> *J.C. Abbott, J. Cowan and F. Torrance v. J. Fraser and others* (1874) LR 6 PC 96.

<sup>241</sup> *Re Verrall; National Trust for Places of Historic Interest or National Beauty v. Attorney-General* [1914-15] All ER Rep 546.

<sup>242</sup> *Re Koepler's Will Trusts; Barclays Bank Trust Co plc v. Slack and others* [1985] 2 All ER 869.

<sup>243</sup> *Whicker v. Hume* [1843-60] All ER Rep 450.

<sup>244</sup> *Inland Revenue Commissioners v. Baddeley and others* [1955] 1 All ER 525 at 529.

<sup>245</sup> *Molloy v. Inland Revenue Commissioner (NZ)* (1977) 8 ATR 323.

### 6.2.5 Advancement of religion

201. The advancement of religion is a charitable purpose.<sup>246</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>247</sup> Religion covers major religions such as Christianity, Islam, Judaism, Buddhism and Taoism, and also Jehovah Witnesses,<sup>248</sup> the Free Daist Communion of Australia<sup>249</sup> and Scientology.<sup>250</sup> The categories of religion are not closed.<sup>251</sup>

202. 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>252</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>253</sup>

203. The purpose must be directly and immediately religious.<sup>254</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 bodies, orders or societies, if they have in view the welfare of others.<sup>255</sup>

<sup>246</sup> *The Roman Catholic Archbishop of Melbourne v. Lawlor and others; His Holiness the Pope v. National Trustees, Executors and Agency Company of Australasia and others* (1934) 51 CLR 1 at 32-33.

<sup>247</sup> *The Church of the New Faith v. The Commissioner of Pay-roll Tax (Victoria)* (1983) 154 CLR 120.

<sup>248</sup> *Appeal of Frank Gundy* (1944) 61 WN (NSW) 102.

<sup>249</sup> *The Free Daist Communion of Australia Limited v. Comptroller of Stamps (Vic)* 88 ATC 2001.

<sup>250</sup> *The Church of the New Faith v. The Commissioner of Pay-roll Tax (Victoria)* (1983) 154 CLR 120.

<sup>251</sup> Murphy J in *The Church of the New Faith v. The Commissioner of Pay-roll Tax (Victoria)* (1983) 154 CLR 120 at 151.

<sup>252</sup> *Keren Kayemeth Le Jisroel Limited v. Commissioners of Inland Revenue* [1931] 2 KB 465 at 477.

<sup>253</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 and Accepted Masons of England v. Holborn Borough Council* [1957] 3 All ER 281 at 285.

<sup>254</sup> *The Roman Catholic Archbishop of Melbourne v. Lawlor and others; His Holiness the Pope v. National Trustees, Executors and Agency Company of Australasia and others* (1934) 51 CLR 1 at 32-33 per Dixon J.

<sup>255</sup> *The Roman Catholic Archbishop of Melbourne v. Lawlor and others; His Holiness the Pope v. National Trustees, Executors and Agency Company of Australasia and others* (1934) 51 CLR 1 at 32 per Dixon J.



204. Examples from the cases where a charitable purpose of advancing religion has been found include:

- *providing and maintaining facilities for worship*: building a church,<sup>256</sup> a gallery, organ seating and a bell in a church,<sup>257</sup> a window in a cathedral,<sup>258</sup> the erection of a tomb in a churchyard,<sup>259</sup> monuments in a church,<sup>260</sup> a church choir<sup>261</sup> and seating accommodation;<sup>262</sup>
- *supporting religious clergy*: maintaining sick and infirm priests,<sup>263</sup> assisting candidates for holy orders<sup>264</sup> and a fund to provide retirement annuities for pastors, evangelists and missionaries;<sup>265</sup>
- *missionary bodies*: the missionary establishment of a Christian body among heathen nations<sup>266</sup> and a church missionary society;<sup>267</sup> and
- *religious associations*: the YMCA,<sup>268</sup> a religious retreat house open to the public,<sup>269</sup> a Sunday school association,<sup>270</sup> a Protestant alliance,<sup>271</sup> a religious community house<sup>272</sup> and a religious faith-healing movement.<sup>273</sup>

<sup>256</sup> *In re Maclachlan; Maclachlan v. Campbell and others* (1900) 26 VLR 548.

<sup>257</sup> *Re Mitchner (deceased); Union Trustee Company of Australia and another v. Attorney-General for the Commonwealth of Australia and others* [1922] St R Qd 39.

<sup>258</sup> *Muir v. Archdall* (1918) 19 SR (NSW) 10.

<sup>259</sup> *Re Pardoe; McLaughlin v. Attorney-General* [1906] 2 Ch 184.

<sup>260</sup> *In re Sussanah D. Barker (deceased); Sherrington v. Dean and Chapter of St Paul's Cathedral and others* (1909) 25 TLR 753.

<sup>261</sup> *Re Royce; Turner v. Wormald and others* [1940] 2 All ER 291.

<sup>262</sup> *Re Raine (deceased); Walton v. Attorney-General and another* [1956] 1 All ER 355.

<sup>263</sup> *In Re Forster; Gellatly v. Palmer* [1939] 1 Ch 22.

<sup>264</sup> *In Re Williams; Public Trustee v. Williams* [1927] 2 Ch 283.

<sup>265</sup> *Baptist Union of Ireland (Northern) Corporation Limited v. The Commissioners of Inland Revenue* [1945] NILR 99.

<sup>266</sup> *The Commissioners for Special Purposes of the Income Tax v. Pemsel* [1891] AC 531; [1891-4] All ER Rep 28.

<sup>267</sup> *In the matter of the Clergy Society* (1856) 2 K & J 615.

<sup>268</sup> *City of South Melbourne v. Young Men's Christian Association of Melbourne* [1960] VR 709; *The Young Men's Christian Association of Melbourne v. FC of T* (1926) 37 CLR 351.

<sup>269</sup> *Association of Franciscan Order of Friars Minor v. City of Kew* [1967] VR 732.

<sup>270</sup> *The King v. Special Commissioners of Income Tax; ex parte Essex Hall* [1911] 2 KB 434.

<sup>271</sup> *In re Delmar Charitable Trust* [1897] 2 Ch 163.

<sup>272</sup> *Re Banfield (deceased); Lloyd's Bank Ltd v. Smith and others* [1968] 2 All ER 276.

<sup>273</sup> *Re Le Cren Clarke (deceased); Funnell and another v. Stewart and others* [1996] 1 All ER 715.

205. 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 92 to 98). Examples from the cases where a purpose involving religion was found to not be charitable include:

- a gift for a private chapel in a house;<sup>274</sup>
- a gift of the residue of an estate for a member of the clergy to use in ways that are not necessarily charitable;<sup>275</sup>
- founding a Catholic daily newspaper;<sup>276</sup> and
- a company purchasing land and property for a Jewish homeland.<sup>277</sup>

206. 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>278</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>279</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>280</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>281</sup>

<sup>274</sup> *Hoare v. Hoare* [1886-90] All ER Rep 553.

<sup>275</sup> *Dunne v. Byrne* [1911-13] All ER Rep 1105.

<sup>276</sup> *The Roman Catholic Archbishop of Melbourne v. Lawlor and others; His Holiness the Pope v. National Trustees, Executors and Agency Company of Australasia and others* (1934) 51 CLR 1.

<sup>277</sup> *Keren Kayemeth Le Jisroel Limited v. Commissioners of Inland Revenue* [1932] AC 650.

<sup>278</sup> *Beatrice Alexandra Victoria Davies v. Perpetual Trustee Co. (Ltd) and others* (1959) 59 SR (NSW) 112.

<sup>279</sup> *Gilmour v. Coats and others* [1949] 1 All ER 848; [1949] AC 426.

<sup>280</sup> *Yeap Cheah Neo and others v. Ong Cheng Neo* (1875) LR 6 PC 381;

*Ip Cheung-Kwok v. Sin Hua Bank Trustee Ltd and others* [1990] 2 HKLR 499.

<sup>281</sup> *In 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.

**6.2.6 Other charitable purposes**

207. Many other purposes have been accepted by the courts as charitable. The following are groups of those decisions. In each case the public benefit requirement had also been satisfied. The list is not exhaustive:

- *public works and utilities*: a library,<sup>282</sup> a museum,<sup>283</sup> a public hall,<sup>284</sup> a showground,<sup>285</sup> a botanical garden,<sup>286</sup> a cremation service,<sup>287</sup> a concert hall<sup>288</sup> and a recreation area for the public;<sup>289</sup>
- *disaster relief*: relief for flood victims,<sup>290</sup> relief of distress caused by war<sup>291</sup> and a lifeboat institution;<sup>292</sup>
- *culture*: drama and acting,<sup>293</sup> music,<sup>294</sup> choral singing,<sup>295</sup> portrait painting,<sup>296</sup> organ music<sup>297</sup> and an orchestra endowment fund;<sup>298</sup>
- *scientific and scholarly research*: the advancement of scientific research generally,<sup>299</sup> the improving of natural knowledge and improvement and diffusing of geographical knowledge,<sup>300</sup> research in Egyptology and archaeology,<sup>301</sup> research into finding the

<sup>282</sup> *J.C Abbott, J. Cowan and F. Torrance v. J. Fraser and others* (1874) LR 6 PC 96.

<sup>283</sup> *Re Gwilym, deceased* [1952] VLR 282.

<sup>284</sup> *Monds v. Stackhouse and others* (1948) 77 CLR 232.

<sup>285</sup> *Brisbane City Council and another v. Attorney-General of Queensland* [1978] 3 All ER 30.

<sup>286</sup> *Townley v. Bedwell* (1801) 6 Ves 195.

<sup>287</sup> *Scottish Burial Reform and Cremation Society, Ltd v. Glasgow City Corporation* [1967] 3 All ER 215.

<sup>288</sup> *In re The Henry Wood National Memorial Trust; Armstrong and others v. Moiseiwitsch and others* [1966] 1 WLR 1601.

<sup>289</sup> *Burnside City Council v. Attorney-General of South Australia* (1992) 75 LGRA 145.

<sup>290</sup> *Re North Devon and West Somerset Relief Fund Trusts; Hylton (Baron) and another v. Wright and another* [1953] 2 All ER 1032.

<sup>291</sup> *Re Pieper (deceased); The Trustees Executors & Agency Co. Ltd v. Attorney-General (Vic.)* [1951] VLR 42.

<sup>292</sup> *Re Clarke (deceased); Bracey v. Royal National Lifeboat Institution* [1923] All ER Rep 607.

<sup>293</sup> *Re Shakespeare Memorial Trust; Earl of Lytton v. Attorney-General* [1923] All ER Rep 106.

<sup>294</sup> *Commissioners of Inland Revenue v. The Glasgow Musical Festival Association* [1926] SC 920.

<sup>295</sup> *Royal Choral Society v. Commissioners of Inland Revenue* [1943] 2 All ER 101.

<sup>296</sup> *Perpetual Trustee Co. Ltd v. Groth and others* [1985] 2 NSWLR 278.

<sup>297</sup> *Re Levien (deceased); Loyds Bank Ltd v. Worshipful Company of Musicians and others* [1955] 3 All ER 35.

<sup>298</sup> *Re Municipal Orchestra Endowment Fund* [1999] QSC 200.

<sup>299</sup> *Taylor and another v. Taylor and others* (1910) 10 CLR 218.

<sup>300</sup> *Beaumont v. Oliveira* (1868-9) 4 LR Ch App 309.

<sup>301</sup> *Re British School of Egyptian Archaeology; Murray and others v. Public Trustee and others* [1954] 1 All ER 887.

- 'Bacon-Shakespeare' manuscripts,<sup>302</sup> and research into the theory of education;<sup>303</sup>
- *promoting industry, commerce and agriculture:* horticulture,<sup>304</sup> agriculture,<sup>305</sup> craftsmanship,<sup>306</sup> research into wheat<sup>307</sup> and prevention of disease in cattle or sheep;<sup>308</sup>
  - *defence and public order:* promoting efficiency in the armed forces<sup>309</sup> and police forces,<sup>310</sup> caring for dependants of veterans,<sup>311</sup> promoting defence of the country from hostile aircraft<sup>312</sup> and a repatriation fund for the benefit of returned soldiers;<sup>313</sup>
  - *protecting animals:* a home for lost dogs,<sup>314</sup> an institution providing a home for starving cats,<sup>315</sup> and the Royal Society for the Prevention of Cruelty to Animals.<sup>316</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>317</sup>
  - *environment:* preservation of native wild life both flora and fauna,<sup>318</sup> the improvement and protection of a river.<sup>319</sup> The purpose, however, must not be to lobby or be political in nature,<sup>320</sup>

<sup>302</sup> *Re Hopkins' Will Trusts; Naish and another v. Francis Bacon Society Incorporated and others* [1964] 3 All ER 46.

<sup>303</sup> *In the Estate of Schultz; Playford v. University of Adelaide and others* [1961] SASR 377.

<sup>304</sup> *In re Pleasants; Pleasants v. Attorney-General* (1923) 39 TLR 675.

<sup>305</sup> *Commissioners of Inland Revenue v. Yorkshire Agricultural Society* [1928] 1 KB 611.

<sup>306</sup> *Commissioners of Inland Revenue v. White and others and Attorney-General* (1980) 55 TC 651.

<sup>307</sup> *Freeman and others v. Attorney-General for New South Wales* [1973] 1 NSWLR 729.

<sup>308</sup> *McGarvie Smith Institute v. Campbelltown Municipal Council* (1965) 11 LGRA 321.

<sup>309</sup> *Re Good; Harrington v. Watts* [1904-7] All ER Rep 476.

<sup>310</sup> *Chesterman v. Mitchell* (1924) 24 SR (NSW) 108.

<sup>311</sup> *Downing v. FC of T* (1971) 125 CLR 185.

<sup>312</sup> *In Re Driffill (deceased); Harvey and another v. Chamberlain and others* [1950] 1 Ch 92.

<sup>313</sup> *Verge v. Somerville and others* [1924] AC 496.

<sup>314</sup> *Re Douglas; Obert and others v. Barrow* [1886-90] All ER Rep 228.

<sup>315</sup> *Swifte v. Attorney-General* [1912] 1 IR 133.

<sup>316</sup> *Re Inman (deceased)* [1965] VR 238.

<sup>317</sup> *Murdoch v. Attorney-General* (1992) 1 Tas SR 117.

<sup>318</sup> *Attorney-General (NSW) v. Sawtell and another* [1978] 2 NSWLR 200.

<sup>319</sup> *Kaikoura County v. Boyd* [1949] NZLR 233.

<sup>320</sup> *Re Boning* [1997] 2 Qd R 12.

- *indigenous persons*: aiding disadvantaged Aboriginals or Islanders,<sup>321</sup> developing radio and television programs relevant to native people and training native people as communication workers,<sup>322</sup>
- *moral improvement*: the study and dissemination of ethical principles,<sup>323</sup> promotion of temperance,<sup>324</sup> and an anthroposophical society,<sup>325</sup>
- *a locality or neighbourhood*: for the benefit of a city, town or district, for example, the beautification and advancement of a township.<sup>326</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>327</sup> and
- *the whole community*: for the benefit of Australia.<sup>328</sup>

## Previous Ruling

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208. This Draft Ruling replaces Draft Taxation Ruling TR 1999/D21, which is withdrawn on and from the issue date of this Draft Ruling. To the extent that our views in TR 1999/D21 still apply, they have been incorporated in this Draft Ruling.

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<sup>321</sup> *Aboriginal Hostels Ltd v. Darwin City Council* (1985) 75 FLR 197; *Flynn and others v. Mamarika and others* (1996) 130 FLR 218.

<sup>322</sup> *Native Communications Society of BC v. Minister of National Revenue* [1986] 3 FC 471.

<sup>323</sup> *Barralet and others v. Attorney-General and others* [1980] 3 All ER 918.

<sup>324</sup> *Re Hood; Public Trustee v. Hood* [1930] All ER Rep 215.

<sup>325</sup> *Re Price; Midland Bank, Executor and Trustee Co Ltd v. Harwood and others* [1943] 2 All ER 505.

<sup>326</sup> *Schellenberger v. The Trustees Executors and Agency Company Limited and another* (1952) 86 CLR 454.

<sup>327</sup> *Trustees of Sir Howell Jones Williams' Trusts v. Inland Revenue Commissioners* [1947] 1 All ER 513.

<sup>328</sup> *The Commissioner of Stamp Duties (New South Wales) v. Way and others* (1951) 83 CLR 570.

## Your comments

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209. We invite you to comment on this draft Taxation Ruling. Please forward your comments to the contact officer by the due date.

**Due date:** 24 June 2005  
**Contact officer:** Bernie Mackinnon  
**E-mail address:** nprulingsfeedback@ato.gov.au  
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## Detailed contents list

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210. Below is a detailed contents list for this Taxation Ruling:

	<b>Paragraph</b>
<b>What this Ruling is about</b>	<b>1</b>
Class of person/arrangement	1
Summary of the Ruling	2
Definitions	4
<b>Date of effect</b>	<b>5</b>
<b>Ruling</b>	<b>7</b>
Charitable purpose	7
<i>Technical legal meaning of charitable</i>	8
<i>Spirit and intendment of the Statute of Elizabeth</i>	12
<i>Deemed charitable purpose</i>	14
<i>Purposes which are not charitable</i>	15
<i>The purpose is to confer private benefits</i>	15
<i>The purpose is sporting, recreational or social</i>	16
<i>The purpose is illegal or against public policy</i>	17
<i>The purpose is political or lobbying</i>	18
<i>The purpose is commercial</i>	20
<i>The purpose is governmental</i>	21
<i>The purpose is vague or has insufficient value for the community</i>	22
Charitable institutions and charitable funds	23

<i>Charitable institutions</i>	24
<i>Charitable funds</i>	25
Determining the purpose of a particular charitable institution or fund	26
<i>Charitable institution</i>	26
<i>Charitable fund</i>	28
<b>Explanation</b>	<b>30</b>
1. Statutory use of the concept of charity	30
2. The essential characteristics of charitable purposes	32
2.1 <i>Charity intends benefit or value</i>	33
2.1.1 <i>Spirit and intendment of the Statute of Elizabeth</i>	35
2.1.2 <i>Aspects of benefit or value</i>	43
2.1.3 <i>Non-profit child care services</i>	46
2.2 <i>Charity is for the benefit of the community</i>	50
2.2.1 <i>Closed or contemplative religious orders</i>	62
2.2.2 <i>Self-help groups</i>	66
3. Purposes that are not charitable	74
3.1 <i>The purpose is to confer private benefits</i>	75
3.1.1 <i>Benefits for owners</i>	76
3.1.2 <i>Benefits for members</i>	79
3.1.3 <i>Where business-like benefits are conferred</i>	87
3.1.4 <i>Benefits provided to customers, contributors or subscribers</i>	91
3.2 <i>The purpose is sporting, recreational or social</i>	92
3.3 <i>The purpose is political, illegal or against public policy</i>	99
3.3.1 <i>Illegal or against public policy</i>	99
3.3.2 <i>Political</i>	100
3.3.2.1 <i>Party political</i>	103
3.3.2.2 <i>Changing law or government policy</i>	105
3.3.2.3 <i>Other ‘political’ purposes</i>	111
3.3.2.4 <i>Political or lobbying activities which are merely incidental</i>	118
3.4 <i>The purpose is commercial</i>	125
3.5 <i>The purpose is governmental</i>	131
3.6 <i>The purpose is vague or has insufficient value to the community</i>	133

4. Charitable institutions and charitable funds	137
4.1 <i>Why the distinction matters</i>	137
4.2 <i>Distinction between charitable institutions and funds</i>	141
5. Determining the purpose of a particular institution or fund	147
5.1 <i>Charitable institutions</i>	147
5.1.1 <i>Purpose</i>	147
5.1.2 <i>Constitution and objects</i>	154
5.1.3 <i>Operations and activities</i>	162
5.1.4 <i>Change</i>	172
5.1.5 <i>Peak bodies</i>	173
5.2 <i>Charitable funds</i>	177
5.3 <i>Relationships that are not purposes of an institution or fund</i>	180
6 Statute of Elizabeth and court decisions	183
6.1 <i>Statute of Elizabeth</i>	184
6.2 <i>Summary of court decisions</i>	185
6.2.1 <i>Relief of poverty</i>	186
6.2.2 <i>Relief of the needs arising from old age</i>	188
6.2.3 <i>Relief of sickness and distress</i>	189
6.2.4 <i>Advancement of education</i>	192
6.2.5 <i>Advancement of religion</i>	201
6.2.6 <i>Other charitable purposes</i>	207
<b>Your comments</b>	<b>209</b>
<b>Detailed contents list</b>	<b>210</b>

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**Commissioner of Taxation**

11 May 2005

*Previous draft:*

TR 1999/D21

*Related Rulings/Determinations:*TR 92/20; TR 97/22; TR 2000/11;  
TR 2003/5; TR 2005/D7*Subject references:*

- charities
- charitable institutions
- charitable funds
- fringe benefits tax
- income tax

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