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TO: Megan Jamieson, Senior Tax Counsel, Public Rulings

FROM: Gloria Yee, Senior Tax Counsel, Escalations & Advising

SUBJECT: Meaning of “benevolent, philanthropic or cultural” in s LD 3 Income Tax Act 2007 - ADV00064

TYPE: **Advising Report**

All legislative references are to the Income Tax Act 2007 (the Act) unless otherwise stated. The relevant legislative provisions are set out in full in Appendix 1.

1 SUMMARY

- 1.1 A person who makes a “charitable or other public benefit gift” and who meets the requirements of s 41A of the Tax Administration Act 1994 has a tax credit: s LD 1 Income Tax Act 2007. A monetary gift of more than \$5 is a “charitable or other public benefit gift” if it is made to a society, institution, association, organisation, trust or fund (an entity) that is described in s LD 3(3): s LD 3(1). To be an entity described in s LD 3(2)(a), (b), (c) or (d), the purposes of the entity must be “charitable, benevolent, philanthropic or cultural”.
- 1.2 From 1 April 2020 for a gift to an entity described in s LD 3(2)(a), (b), (c) or (d) to be a “charitable or other public benefit gift”, the entity must be on a list published by the Commissioner: s LD 3(1)(a).

Issues

- 1.3
1. The meaning of benevolent, philanthropic or cultural for the purposes of Part LD, which relates to the donations tax credit.
 2. What matters are relevant in determining whether an entity that is carried on, established or maintained for benevolent, philanthropic or cultural purposes is a donee organisation for the purpose of the donations tax credit.

Conclusion

- 1.4 There is a considerable overlap between the meaning of “charitable” (as defined in s YA 1) and the meaning of “benevolent”, “philanthropic” or “cultural” but a benevolent, philanthropic or cultural purpose is not necessarily a charitable purpose. A benevolent, philanthropic or cultural purpose would not be charitable even if it is beneficial to the community (has a public benefit) unless it is analogous to a purpose that has already been found to be a charitable purpose. Benevolent or cultural purposes are likely to be charitable purposes but philanthropic purposes could encompass purposes that are not analogous to purposes that are charitable. However, to be an entity for benevolent, philanthropic or cultural purposes, the carrying out of the entity’s purposes must

result in a public benefit (a benefit to New Zealand society as a whole). A summary of the reasons for this conclusion is set out below.

Role of the Charities Registration Board and the Commissioner

- 1.5 Currently there is no legislative requirement for entities to obtain the approval of the Commissioner to be treated as a donee organisation for the purposes of the donations tax credit regime. However, with effect from 1 April 2020:
- for a gift to an entity described in s LD 3(2)(a), (b), (c) or (d) to be a “charitable or other public benefit gift”, the entity must be on a list published by the Commissioner: s LD 3(1)(a). The entity cannot be published on the list if the entity is not an entity described in s LD 3(2)(a), (ab), (b), (c) or (d).
 - a gift to an entity described in s LD 3(a), (b), (c) or (d) is not a charitable or other public benefit gift” if, in the opinion of the Commissioner, the entity is eligible to be registered as a charitable entity under Charities Act 2005 and the entity is not registered as a charitable entity under that Act: s LD 3(3). An entity is eligible to be registered as a charitable entity under the Charities Act if its purposes are charitable purposes: s 13 Charities Act.
- 1.6 The Charities Registration Board, which replaced the Charities Commission, is responsible for determining whether an entity’s purposes are charitable purposes for income tax purposes: see s CW 41(5), definition of “tax charity” in s YA 1 and s LD 3(2)(ab). “Charitable purposes” for the purpose of the Charities Act has a similar meaning to the Income Tax Act definition. The Charities Commission and the Commissioner had entered into a relationship protocol agreement that sets out the expectation that Inland Revenue and the Charities Commission will always work together when considering an organisation’s charitable purposes and that a Crown Law opinion may be requested if they reach different interpretations: Tax Working Group’s Background paper on *Charities and the not-for-profit sector: background paper for session 13 of the Tax Working Group* (6 July 2018) p. 11.
- 1.7 Therefore, from 1 April 2020, in determining whether an entity is entitled to be treated as a donee organisation for the purpose of the donations tax credit, the Commissioner must consider:
- whether an entity is entitled to be registered as a charitable entity under the Charities Act; and
 - if it is determined that an entity’s purposes are not charitable (so that the entity is not eligible to be registered as a charitable entity under the Charities Act), whether the entity’s purposes are benevolent, philanthropic or cultural purposes.

Meaning of “benevolent”

- 1.8 The word “benevolent” has a similar meaning to the ordinary meaning of “charitable”, which relates to the provision of relief to people in need: *Chichester Diocesan Fund v Simpson* [1944] 2 All ER 60.
- 1.9 A benevolent purpose relates to the provision of aid to people who need help and who are unable to help themselves: *Australian Council of Social Service Inc v*

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Commissioner of Pay-roll Tax 85 ATC 4235; *Mines Rescue Board of New South Wales v FCT* (2000) ATC 4191; *Trustees of the Indigenous Barristers' Trust* (2002) ATC 5,055; *Commissioner of Pay-Roll Tax v Cairnmillar Institute* 92 ATC 4307; *Northern Land Council v Commissioner of taxes (NT)* (2002) ATC 5117.

- 1.10 The promotion of a sport is not a benevolent purpose within that meaning: *Northern NSW Football Ltd v Chief Commissioner of State Revenue* [2011] NSWCA 51. The relief of suffering by animals is also not a benevolent purpose as the concept of "benevolence" relates to the relief of need of human beings: *FCT v Royal Society for the Prevention of Cruelty to Animals Queensland Inc* 92 ATC 4441.
- 1.11 Benevolence is not limited to the provision of money, housing, food, medicine or other basic essentials. The provision of services to relieve distress may be benevolent: *Commissioner of Pay-Roll Tax v Cairnmillar Institute* 92 ATC 4307; *Northern Land Council v Commissioner of taxes (NT)* (2002) ATC 5117.
- 1.12 An entity that has a purpose of making a profit for its owners would not be carried on for benevolent purposes. However, the fact that a charge is made for the provision of assistance does not mean that an organisation would not be carried on for benevolent purposes. Benevolence is directed at the relief of need or distress, rather than the relief of poverty. See *Commissioner of Pay-Roll Tax v Cairnmillar Institute* 92 ATC 4307; *Northern Land Council v Commissioner of taxes (NT)*

Meaning of "philanthropic"

- 1.13 A philanthropic purpose relates to the promotion of the welfare of other human beings in general: *Re MacDuff* [1895-99] All ER Rep 154; *Residence "Joie de Vivre" Inc v Niagara Falls (City)* [1994] OJ No 749; *Rotary International v Commissioners of Customs & Excise* [1991] VATTR 177; *Hallé Concerts Society v Revenue and Customs Commissioners* [2016] UKFTT 294; *Wilson v Flowers* 58 NJ 250 (1971).
- 1.14 A philanthropic purpose is not limited to the provision of basic necessities. Schools, libraries, public art galleries and museums or the provision of free or subsidised concerts could be a philanthropic purpose: *Hallé Concerts Society v Revenue and Customs Commissioners* [2016] UKFTT 294. The term "philanthropic" does not include organisations directed at the care and welfare of animals, rather than human beings: *Kitchener-Waterloo and North Waterloo Humane Society v City of Kitchener* [1973] 1 OR 490.

Meaning of "cultural"

- 1.15 A cultural purpose relates to the arts and intellectual pursuits. "Cultural" means:
- "relating to the arts and to intellectual achievements": Concise Oxford Dictionary (12th ed);
 - "relating to the training, development and refinement of mind, tastes and manners": *Molloy v CIR* (1981) 5 NZTC 61,070);

- “of or relating to the artistic and intellectual aspects or content of human activity”: *Pooh-Bah Enterprises v Cook County* 905 N.E.2d 781 (2009).

1.16 The purpose of opposing a change in the law relating to abortion could not properly be described as cultural: *Molloy v CIR*. The activities that take place at an adult entertainment cabaret are not cultural activities: *Pooh-Bah Enterprises v Cook County*.

Charitable purposes

- 1.17 For income tax purposes, “charitable purposes” are “the relief of poverty, the advancement of education or religion or any other matter beneficial to the community”: definition of “charitable purpose” in s YA 1. This definition is based on the classification in *Pemsel’s* case [1891] AC 53, which in turn is based on the preamble to the Statute of Elizabeth (the Statute of Charitable Uses 1601).
- 1.18 To be a charitable purpose, being “any other matter beneficial to the community”, the purpose must be analogous to purposes already held to be charitable, being purposes that are within the “spirit and intendment” of the preamble to the Statute of Elizabeth: *Re Greenpeace of New Zealand Incorporated* (2014) 26 NZTC ¶21-088 paragraph 18.
- 1.19 The scope of the purposes that are regarded as analogous to purposes that are within the spirit and intendment of the preamble to the Statute of Elizabeth has evolved and continues to evolve: *DV Bryant Trust Board v Hamilton City Council* [1997] 3 NZLR 342; *Travis Trust v Charities Commission* (2009) 24 NZTC 23,273; *Re Greenpeace*; *Vancouver Society of Immigrant and Visible Minority Women v MNR* 99 DTC 5034.
- 1.20 To be a charitable purpose, a purpose must also be for a public benefit: *Re Greenpeace of New Zealand Incorporated* (2014) 26 NZTC ¶21-088 paragraph 29. Whether a trust is for a public benefit requires consideration of whether the purposes of the trust are such as to confer a benefit on the public or a section of the public and whether the class of persons eligible to benefit constitute the public or a sufficient section of it: *NZ Society of Accountants v CIR* (1986) 8 NZTC 5,205, p 5,212.
- 1.21 In the most recent cases in which the court has held that an entity is not entitled to be registered as a charity under the Charities Act, the court considered that, although the entity’s purpose is analogous to purposes that had been held to be charitable, its purpose was to provide a private benefit and any benefit to the public was remote, was not sufficient or was indirect: *Canterbury Development Corporation v Charities Commission* (2010) 24 NZTC 24,143; *Re the Grand Lodge of Ancient Free and Accepted Masons in New Zealand* (2010) 24 NZTC 24,590; *Re Education New Zealand Trust* (2010) 24 NZTC 24,354; *Re Queenstown Lakes Community Housing Trust* (2011) 25 NZTC ¶20-059; *Re Family First New Zealand* (2018) 28 NZTC ¶23-072.
- 1.22 Therefore, two issues arise in determining whether an entity is a charitable entity under the Charities Act: whether its purpose is charitable in nature (being analogous to purposes that are within the spirit and intendment of the preamble to the Statute of Elizabeth) and whether the benefit is public in nature:

Canterbury Development Corporation v Charities Commission (2010) 24 NZTC 24,143.

Benevolent, philanthropic or cultural purposes are not necessarily charitable purposes

- 1.23 Benevolent, philanthropic or cultural purposes are not necessarily charitable purposes: *Pemsel's case*; *Molloy*; *Attorney-General for New Zealand v Brown* [1917] AC 393; *Chichester Diocesan Fund v Simpson*; *Loggie Estate v McCauley* [1954] SCR 645.
- 1.24 It is possible that a purpose could be both a charitable purpose and a benevolent, philanthropic or cultural purpose. The relief of suffering, distress or misfortune is a benevolent purpose: *Australian Council of Social Service Inc v Commissioner of Pay-roll Tax*; *Commissioner of Pay-roll Tax v Cairnmillar Institute*; *Northern Land Council v Commissioner of Taxes*. The relief of human suffering or distress may be a charitable purpose, being a purpose beneficial to the community: *McGovern v Attorney-General* [1981] 3 All ER 493; *DV Bryant v Hamilton City Council* [1997] 3 NZLR 341. A philanthropic purpose could be a charitable purpose on the basis that it is a purpose that is for the benefit of the community. A cultural purpose may also be a charitable purpose (the advancement of education): *Royal Choral Society v Inland Revenue Commissioners* [1943] All ER 101; *Re Municipal Orchestra Endowment Fund* [1999] QSC 200.
- 1.25 To distinguish between a purpose that is both beneficial to the community (or benevolent) and charitable and a purpose that is beneficial to the community but is not charitable, it is necessary to consider whether the purpose is analogous to purposes that are within the spirit and intendment of the Statute of Elizabeth: *Travis Trust v Charities Commission* (2009) 24 NZTC 23,273 paragraph 19-20.
- 1.26 Therefore, there is a considerable overlap between the meaning of "charitable" (as defined in s YA 1) and the meaning of "benevolent", "philanthropic" or "cultural" but a benevolent, philanthropic or cultural purpose is not necessarily a charitable purpose. A benevolent, philanthropic or cultural purpose would not be charitable even if it is beneficial to the community (has a public benefit) unless it is analogous to a purpose that has already been found to be a charitable purpose.

Entity's activities must result in a benefit to New Zealand society

- 1.27 The meaning of a provision is to be ascertained from the text and in the light of its purposes: s 5(1) Interpretation Act. In determining purpose, the immediate and general legislative context must be considered: *Commerce Commission v Fonterra Co-operative Group Ltd* [207] 3 NZLR 767.
- 1.28 Section 5(2) of the Interpretation Act 1999 also permits any "indications provided in the enactment" to be considered in ascertaining the meaning of legislation. The examples of such indications include the headings to Parts and sections and the organisation and format of the enactment: s 5(3). The heading to s LD 1 is "tax credits for charitable or other public benefit gift". This suggests that whether or not an entity's purposes are charitable purposes, the purposes must be for a public benefit.

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- 1.29 To be an entity in paragraph (a) or (c) of s LD 3(2), the entity must not be carried on for the private pecuniary benefit of any individual. An entity that is carried on for the private pecuniary benefit of any individual would not be carried on for a public benefit: *Presbyterian Church of New Zealand Beneficiary Fund v CIR* (1994) 16 NZTC 11,183.
- 1.30 To be an entity described in paragraph (b) of s LD 3(2), the entity must be a public institution. An institution is public if its purpose is to benefit an appreciable section of the community. See *Maughan v FCT* (1942) 66 CLR 388, 397-398.
- 1.31 To be an entity described in s LD 3(2)(a), (b), (c) or (d), the entity's purpose must be for a public benefit. This view is consistent with the purpose of the donations tax credit regime, which was intended to encourage giving to charities or other non-profit organisations whose activities result in a benefit to New Zealand society, whether directly by providing assistance to people who are in need of assistance or by contribution to the improvement of society generally: Discussion Document on *Tax incentives for giving to charities and other non-profit organisations* (2006).
- 1.32 In the *Queenstown Lakes* case Mackenzie J held that a trust established to promote or provide housing through a shared ownership scheme was not a trust for charitable purposes because the means by which the claimed public benefit was achieved involved the provision of a private benefit to those who were assisted. The fact that people selected to participate in the scheme were selected because they contributed to the social, cultural, economic environmental wellbeing of those living within the Queenstown area did not confer on the community a sufficiently tangible and clearly defined benefit to be a public benefit.
- 1.33 Subsequently LD 3(2)(ac) was enacted to help promote home ownership to New Zealanders who would not otherwise be able to afford to buy a house and because it was not certain that entities involved in providing home ownership products to low-income households would have charitable status: Commentary on the Taxation (Annual Rates, Employee Allowances, and Remedial Matters) 2014. Therefore, the Government made a policy decision that the promotion of home ownership provided a public benefit that outweighs the provision of the private benefit to those to whom assistance is provided and that should be encouraged by providing a tax credit for gifts to fund the activities of community housing entities.
- 1.34 It is possible that some purposes that are not analogous to purposes already held to be charitable purposes could be benevolent, philanthropic or cultural purposes. A benevolent purpose (which relates to the relief of poverty or distress) or cultural purpose (being a purpose of advancing education) is likely to also be a charitable purpose but the word "philanthropic" could encompass a variety of ways of promoting the wellbeing of others that may not meet the test of charitable purpose. However, in my view, to be an entity for benevolent, philanthropic or cultural purposes, the carrying out of the entity's purposes must result in a public benefit (a benefit to New Zealand society as a whole).

Relevance of political purpose, illegal purpose or discrimination

- 1.35 The presence of political purpose may mean that the entity's purpose does not result in a public benefit, which the donations tax credit is intended to support.

An entity whose purpose is to support a particular political party would not be entitled to approved as a donee organisation: *Re Collier* [1998] 1 NZLR 81. However, in some circumstances, a political purpose in the sense of advocating for a cause would not disentitle an entity from approval: *Greenpeace*.

- 1.36 It would not be possible to establish that an illegal purpose or a purpose that involves discrimination on prohibited grounds has a public benefit: *Re Family First New Zealand* (2018) 28 NZTC ¶23-072. The prohibited grounds of discrimination are sex, marital status, religious belief, ethical belief, colour, race, ethnic or national origins, disability, age, political opinion, employment status, family status and sexual orientation: s 19 New Zealand Bill of Rights Act 1990; s 21 Human Rights Act 1993.

Recommendation

- 1.37 That Technical Standards be provided with a copy of this report for consideration in conjunction with the finalisation of their operational statement.

2. BACKGROUND

- 2.1 A person who makes a “charitable or other public benefit gift” and who meets the requirements of s 41A of the Tax Administration Act 1994 has a tax credit: s LD 1 Income Tax Act 2007. A monetary gift of more than \$5 is a “charitable or other public benefit gift” if it is made to a society, institution, association, organisation, trust or fund (an entity) that is described in s LD 3(2): s LD 3(1). The entities described in s LD 3(2) are:

- (a) a society, institution, association, organisation, or trust that is not carried on for the private pecuniary profit of an individual, and whose funds are applied wholly or mainly to charitable, benevolent, philanthropic, or cultural purposes within New Zealand:
- (ab) an entity that, but for this paragraph, no longer meets the requirements of this subsection, but only for the period starting on the day it fails to meet those requirements and ending on the later of—
 - (i) the day the entity is removed from the register of charitable entities under the Charities Act 2005:
 - (ii) the day on which all reasonably contemplated administrative appeals and Court proceedings, including appeal rights, are finalised or exhausted in relation to the person’s charitable status.
- (ac) a community housing entity, if the gift is made at a time the entity is eligible to derive exempt income under section CW 42B (Community housing trusts and companies):
- (b) a public institution maintained exclusively for any 1 or more of the purposes within New Zealand set out in paragraph (a):
- (bb) a Board of Trustees that is constituted under Part 9 of the Education Act 1989 and is not carried on for the private pecuniary profit of any individual:
- (bc) a tertiary education institution:

- (c) a fund established and maintained exclusively for the purpose of providing money for any 1 or more of the purposes within New Zealand set out in paragraph (a), by a society, institution, association, organisation, or trust that is not carried on for the private pecuniary profit of an individual:
- (d) a public fund established and maintained exclusively for the purpose of providing money for any 1 or more of the purposes within New Zealand set out in paragraph (a).

2.2 Technical Standards is in the process of completing an Operational Statement relating to the meaning of “charitable or other public benefit gift” and has asked us to consider the meaning of “benevolent, philanthropic or cultural” in the context paragraphs (a), (b), (c) or (d) of the definition of “charitable or other public benefit gift” in s LD 3(2).

3. ANALYSIS

Roles of the Charities Registration Board and the Commissioner

3.1 Currently there is no legislative requirement for entities to obtain the approval of the Commissioner to be treated as a donee organisation for the purposes of the donations tax credit. However, with effect from 1 April 2020:

- for a gift to an entity described in s LD 3(2)(a), (b), (c) or (d) to be a “charitable or other public benefit gift”, the entity must be on a list published by the Commissioner: s LD 3(1)(a). The entity cannot be published on the list if the entity is not an entity described in s LD 3(2)(a), (ab), (b), (c) or (d).
- a gift to an entity described in s LD 3(a), (b), (c) or (d) is not a charitable or other public benefit gift” if, in the opinion of the Commissioner, the entity is eligible to be registered as a charitable entity under Charities Act and the entity is not registered as a charitable entity under that Act: s LD 3(3). An entity is eligible to be registered as a charitable entity under the Charities Act if its purposes are charitable purposes: s 13 Charities Act.

This requirement is intended to ensure that all charitable organisations that can issue donation receipts for tax credit or deductions purposes are subject to the same reporting and regulatory requirements: Commentary to the Taxation (Annual Rates for 2018-19, Modernising Tax Administration and Remedial Matters) Bill 2018. Entities with charitable purposes that are currently on Inland Revenue’s approved donee list but that are not currently registered under the Charities Act must register under the Charities Act by 1 April 2020 if they wish to retain their donee status.

3.2 The Charities Registration Board, which replaced the Charities Commission, is responsible for determining whether an entity’s purposes are charitable purposes for income tax purposes: see s CW 41(5), definition of “tax charity” in s YA 1 and s LD 3(2)(ab). “Charitable purposes” for the purpose of the Charities Act 2005 has a similar definition to the Income Tax Act definition. Under s 5 of the Charities Act, “charitable purpose” includes every charitable purpose, whether it relates to the relief of poverty, the advancement of education or religion, or any other matter beneficial to the community.

- 3.3 The Tax Working Group's Background paper on *Charities and the not-for-profit sector: background paper for session 13 of the Tax Working Group* (6 July 2018) states that the Charities Commission and the Commissioner had entered into a relationship protocol agreement that sets out the expectation that Inland Revenue and the Charities Commission will always work together when considering an organisation's charitable purposes and that a Crown Law opinion may be requested if they reach different interpretations: p. 11.
- 3.4 Therefore, from 1 April 2020, in determining whether an entity is entitled to be treated as a donee organisation for the purpose of the donations tax credit, the Commissioner must consider:
- whether an entity is entitled to be registered as a charitable entity under the Charities Act; and
 - if it is determined that an entity's purposes are not charitable (so that the entity is not eligible to be registered as a charitable entity under the Charities Act), whether the entity's purposes are benevolent, philanthropic or cultural purposes.
- 3.5 As the words "benevolent", "philanthropic" and "cultural" are not defined in the Act, these words have their ordinary meaning.

Meaning of "benevolent"

- 3.6 The Concise Oxford Dictionary definition of "benevolent" reads as follows:

1. Well meaning and kindly 2 (of an organisation) serving a charitable rather than a profit-making purpose)

- 3.7 In *Pemsel's* case Lord Bramwell interpreted "benevolent" as meaning wishing good to others.

- 3.8 In *Chichester Diocesan Fund v Simpson* [1944- 2 All ER 60 Lord Wright said that the word "benevolent" was almost interchangeable with the ordinary meaning of "charitable":

"Benevolent," which is the other material term here, is also a word of wide connotation, and almost interchangeable with charitable. That the two words overlap to a very great extent is clear. Lord Herschel in *Pemsel's* case is careful to equate charity and benevolence even as the words are popularly used. He sums up, at p 572, that:

... the popular conception of a charitable purpose covers the relief of any form of necessity, destitution, or helplessness which excites the compassion or sympathy of men, and so appeals to their benevolence for relief. (p. 67)

The ordinary meaning of "charitable" relates to "affording relief to persons in necessitous or helpless circumstances, and in most instances, at all events, if required, gratuitously": *Swinburne v FCT* (1920) 27 CLR 377, 384. The ordinary meaning is not the same as the income tax meaning of "charitable", which is discussed below.

- 3.9 Under the Australian Income Tax Assessment Act 1997 a deduction is allowed for a gift to a "public benevolent institution". The expression "public benevolent institution" is regarded as a composite expression: *Perpetual Trustee Company*

Ltd v Commissioner of Taxation (1931) 45 CLR 224. This means that the interpretation of “public benevolent institution” is not determined by considering the meanings of the separate words forming the composite phrase: *Metropolitan Fire Brigades Board v FCT* 91 ATC 4052; *FCT v Launceston Legacy* 87 4635. However, in some Australian tax cases there is discussion of the meaning of “benevolent” in isolation or the concept of “benevolence”.

- 3.10 In *Australian Council of Social Service Inc v Commissioner of Pay-roll Tax* 85 ATC 4235 Priestley J considered that the word “benevolent” carried with it the idea of benevolence exercised towards persons in need, rather than benevolence exercised for the benefit of the community as a whole:

To me, the word “benevolent” in the composite phrase “public benevolent institution” carries with it the idea of benevolence exercised towards persons in need of benevolence, however manifested. Benevolence in this sense seems to me to be quite a different concept from benevolence exercised at large and for the benefit of the community as a whole even if such benevolence results in relief of or reduction in poverty and distress. Thus it seems to me that “public benevolent institution” includes an institution which in a public way conducts itself benevolently towards those who are recognisably in need of benevolence but excludes an institution, which although concerned, in an abstract sense, with the relief of poverty and distress, manifests that concern by promotion of social welfare in the community generally. (p. 4242)

- 3.11 In *Mines Rescue Board of New South Wales v FCT* (2000) ATC 4191 (which was upheld by the Full Federal Court [(2000) ATC 4580]) Hely J considered that the concept of “benevolence” involved an act of kindness, particularly the rendering of assistance voluntarily to those who are in need of help and who cannot help themselves:

30. ...the authorities import an underlying conception of “charity” or “gratuity” as the fundamental foundation for their understanding of “benevolence” in this context, a notion of benevolence which involves an act of **kindness**, or perhaps most particularly, the rendering of assistance **voluntarily** to those who, for one reason or another are in need of help and who cannot help themselves. [court’s emphasis]

- 3.12 In *Northern NSW Football Ltd v Chief Commissioner of State Revenue* [2011] NSWCA 51 Gzell J (with whom the other members of the court agreed) considered that the word “benevolent” connotes the provision of aid to those in need of that aid: paragraph 56. The court considered that the promotion of the game of football is not a benevolent purpose.

- 3.13 In *Trustees of the Indigenous Barristers’ Trust* (2002) ATC 5,055 the Federal Court considered that a public benevolent institution must relieve disadvantage or misfortune, rather than benefit a worthy community objective: paragraph 19. The court held that a trust established primarily to provide assistance for indigenous persons seeking to undertake a legal career was benevolent. The court noted that most indigenous persons in Australia could be described as disadvantaged generally, in particular in relation to education and the ability to take a place in the business and professional world and that the benefits provided by the trust were calculated to relieve that disadvantage: paragraph 22.

- 3.14 In *Commissioner of Pay-Roll Tax v Cairnmillar Institute* 92 ATC 4307 the Supreme Court of Victoria considered that an institution whose predominant purpose to make a profit for its owner would not have the character of benevolence because it was not “desiring to do good for others”. However, the court considered that, to qualify as a benevolent institution, it was not necessary to show that services

were provided only to those in financial need or without charge or for a small charge, as benevolence related to the relief of distress, rather than the relief of poverty:

The findings of the learned primary judge were that the service was predominantly the treatment of mental conditions or disability by psychotherapy and that these conditions were such as to arouse community compassion and so engender the provision of relief. Those findings were sufficient in my opinion to bring the respondent within the concept of public benevolent institution as described in the *Perpetual Trustee Case* and so demonstrate the element of benevolence.

It might well be said that the mere provision of a service for a fee to those requiring medical treatment would not, without more, be benevolent even though it involved relief of suffering. The hypothetical case was raised in argument of a medical clinic which charged fees for medical treatment which found their way to the doctors who owned the clinic, seeking to come within the exemption because they were relieving the suffering of their patients. Such a claimed exemption would however probably fail at the threshold because the clinic would have great difficulty in proving it was a public institution. Assuming however, that this could be overcome, it could not be said that such a service was a benevolent one for the predominant purpose of the institution was not to relieve distress but to make a profit for its owners. Moreover the institution could not have the necessary character of benevolence because it was not "desiring to do good for others". Rather its predominant aim was to make a profit or enrich those who directly or indirectly controlled it.....

It is no less benevolent to assist an AIDS sufferer because that person can afford to pay, for the issue here is not the relief of poverty but the relief of distress. The question of payment for services should not be approached on the basis that the making of a charge is prima facie inconsistent with benevolence. To do this is to make poverty in the nature of destitution an essential characteristic of benevolence. The authorities show no support for such an assumption. (p. 4311)

The court considered that this was consistent with cases that recognised that the fact that a charity charged for its service did not preclude a conclusion that it was a charity.

3.15 In *Northern Land Council v Commissioner of Taxes (NT)* (2002) ATC 5117 Mildren J in the Court of Appeal of the Northern Territory said that benevolence is not limited to the provision of money, housing, food, medicine or other basic essentials and that the provision of services to relieve distress may be benevolent, even if the services are not provided only to those in financial need or are not free: paragraph 23. In *Cairnmillar* it was held that the provision of psychotherapy to treat psychological disorders and abnormalities was benevolent.

3.16 In *FCT v Royal Society for the Prevention of Cruelty to Animals Queensland Inc* 92 ATC 4441 the Supreme Court of Queensland held that the RSPCA was not a public benevolent institution as its purposes concerned the relief of suffering animals, rather than the relief of needy human beings. The court accepted that the promotion of the RSPCA's object of the prevention of cruelty to animals ultimately benefitted human beings indirectly. Pincus J commented that the notion that people may not be harmed by carrying out or witnessing cruelty towards animals was "an eccentric one". However, the RSPCA's purpose was not the relief of the needy or underprivileged and was not directed towards relief of the human conditions that traditionally call for aid: p. 4449-4450.

3.17 The cases outlined above indicate that:

- a benevolent purpose relates to the provision of aid to people who need help and who are unable to help themselves, rather than benevolence exercised for the benefit of the community as a whole. The promotion of a sport is not a

benevolent purpose within that meaning. The relief of suffering by animals is also not a benevolent purpose as the concept of “benevolence” relates to the relief of the distress of human beings.

- benevolence is not limited to the provision of money, housing, food, medicine or other basic essentials. The provision of services to relieve distress is also benevolent.
- an entity that has a purpose of making a profit for its owners would not be carried on for benevolent purposes. However, as benevolence is directed at the relief of need or distress, rather than the relief of poverty, the fact that a charge is made for the provision of assistance does not mean that an organisation would not be carried on for benevolent purposes.

Meaning of “philanthropic”

3.18 The Concise Oxford Dictionary defines “philanthropy” as meaning “the desire to promote the welfare of others, especially through the donation of money to good causes”.

3.19 In *Re MacDuff* [1895-99] All ER Rep 154 Lindley LJ said that a philanthropic purpose must be a purpose that “indicates goodwill to mankind in general” (p. 157). Rigby J considered that the promotion of happiness of human beings is a philanthropic purpose:

The promotion of the happiness of mankind would no doubt be a philanthropic purpose and... the happiness of mankind is nearer in its meaning to that of the word philanthropic than any other. (p. 162)

3.20 In *Kitchener-Waterloo and North Waterloo Humane Society v City of Kitchener* [1973] 1 OR 490 the Ontario Court of Appeal considered that the word “philanthropic” meant a person who practices philanthropy (one who loves their fellow human beings and who exerts themselves for their wellbeing) and that the term “philanthropic” did not include organisations directed at the care and welfare of animals, rather than human life:

In our opinion, the primary question here is whether or not this was an incorporated institution conducted on philanthropic principles. The dictionary definition of philanthropy makes it clear that the term is confined to one who loves his fellowmen and exerts himself for their well-being -- that he was a friend or lover of mankind. The word philanthropic is confined to a person who practises philanthropy.

In view of the Legislature's use of this term, it is our opinion that it has restricted the section in its application in such a fashion as to exclude organizations such as the applicant which devotes its attention to the care and the welfare of animals rather than human life.

3.21 *Residence 'Joie de Vivre' Inc v Niagara Falls (City)* [1994] OJ No 749 concerned an organization whose purpose was to provide housing for older or disabled people. Most of its tenants were poor and the organisation aimed to select the neediest people for future occupancy. The Ontario Court of Justice considered that for an institution to be conducted on philanthropic principles, there must be a disposition to the well-being of fellow human beings. As the organisation catered for disadvantaged people and sought to serve those who were most disadvantaged, the court considered that the organisation operated on philanthropic principles:

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28. According to the Shorter Oxford Dictionary, this means that its principles must be “benevolent” or “humane” (that is to say there must be a “disposition to the well-being of ones fellow-men”). There is no issue that the Applicant operates on philanthropic principles regardless of the question of poverty. It caters to disadvantaged people and seeks to serve those who are most disadvantaged. Further its administration and operations are carried out for the most part, by volunteers.
- 3.22 In *United Way of Greater London v City of London* (1994) 80 DLR (3d) 422 the Middlesex County Court considered that the principles governing the operation of an organisation the whole idea of which was to lend aid to others were in the truest sense of the word “philanthropic”.
- 3.23 For VAT purposes a body that has objects in the public domain and that are of a philanthropic nature is not treated as carrying on a business merely because it receives subscriptions from its members that confer only the right to participate in its management and to receive reports on its activities. *Rotary International v Commissioners of Customs & Excise* [1991] VATTR 177 concerned an unincorporated association of Rotary Clubs in the UK (RIBI) that was the administrative unit of Rotary International in the UK. The Tribunal rejected the argument that RIBI’s objects were not philanthropic on the basis it merely carried out administrative and organisational functions. The Tribunal considered that it was necessary to consider why these functions were carried out. RIBI’s purpose was to promote the purposes of Rotary International and the objects of Rotary, which were:
- “To encourage and foster the ideal of service as a basis of worthy enterprise and, in particular, to encourage and foster:
- (1) The development of acquaintance as an opportunity for service.
 - (2) High ethical standards in business and professions; the recognition of the worthiness of all useful occupations; and the dignifying by each Rotarian of his occupation as an opportunity to serve society.
 - (3) The application of the ideal of service by every Rotarian to his personal business and community life.
 - (4) The advancement of international understanding, goodwill and peace, through a world fellowship of business and professional persons united in the ideal of service.”
- 3.24 The Tribunal interpreted the word “philanthropic” as meaning “benevolent, humane, actuated by love of one’s fellow man”. The Tribunal considered the objects of Rotary were philanthropic as its purposes were “redolent of a desire to promote the well-being of mankind by serving one’s fellow man”: p. 183.
- 3.25 In *United Grand Lodge of England v Commissioners for Revenue & Customs* [2015] UKUT 589 the Upper Tribunal upheld a decision of the First-Tier Tribunal, which distinguished the *Rotary* case on the basis that the Lodge’s purpose included fostering fellowship for its own sake and care for other freemasons as an aim in itself. In contrast, Rotary’s aim was to promote Rotary whose aim was to foster service and acquaintance as an opportunity for service to the community.
- 3.26 In *Hallé Concerts Society v Revenue and Customs Commissioners* [2016] UKFTT 294 (also a VAT case) the Tribunal held that as philanthropy (which meant goodwill towards mankind in general and the generous donation of money to good causes)

was not limited to helping poor people, “philanthropic” had a wider meaning than “charitable”:

118. The law report of *re MacDuff* includes reference to an exchange between Lindley LJ and counsel for the respondent where counsel was asked to suggest a purpose which would be philanthropic without being charitable. Counsel gave numerous examples, including a trust established for the purpose of supplying music as a source of recreation. He described philanthropic as “a very wide word and includes many things which are only for the pleasure of the world, and cannot be called charitable”. In his judgment, Lindley LJ went on to suggest purposes which might be philanthropic and not charitable: “purposes indicating goodwill to rich men to the exclusion of poor men. Such purposes would be philanthropic in the ordinary acceptance of the word – that is to say in the wide, loose sense of indicating goodwill towards mankind or a great portion of them; but I do not think they would be charitable”. Lopes LJ and Rigby LJ both gave illustrations of philanthropic gifts for the benefit of the rich or “moderately well-to-do” which would not be charitable.
119. It is notable that the current online edition of the Oxford English Dictionary also defines philanthropy as “*love of mankind; the disposition or active effort to promote the happiness and well-being of others; practical benevolence, now esp. as expressed by the generous donation of money to good causes*” (emphasis added). It seems to us that the term has come to have an even wider meaning than perhaps it once did. A charitable donation or act might now be described as philanthropic, although not every philanthropic act will be charitable. In that sense philanthropy has a much wider meaning than the legal term charity, which was clearly recognised in *re MacDuff*.
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123. Both counsel cautioned us against attempting any general definition of the word “philanthropic”. It is clear from the authorities quoted above that philanthropy includes “goodwill towards mankind in general”.

3.27 The Tribunal considered that the word “philanthropic” was not limited to the provision of basic necessities. The Tribunal held that the Society’s purpose of promoting the study, practice and knowledge of the art of music through concerts, educational programmes and community initiatives was philanthropic. Although the Society charged for admission to its concerts, the tickets were subsidised and were free in some cases and the Society did not seek to make a profit from concerts:

127. We do not consider that it is necessary to give the word philanthropic a restrictive meaning such that it only applies to what Mr Chapman described as “practical benevolence” involving the provision of basic necessities such as food or shelter.
128. The great philanthropists of the 19th Century focussed on private initiatives for public good, and in particular improving the quality of life of people in towns and cities. It seems to us that their philanthropy did not stop at building decent housing and sanitation for workers. It extended to schools, universities, parks and gardens, libraries, public art galleries and museums. It is difficult to see why art and literature should be distinguished from music in this context. If a wealthy benefactor wished to build or subsidise a library or a concert hall for the benefit of a town or city we would regard that as philanthropic. Likewise the setting up and funding of an orchestra to put on free or subsidised public concerts would also amount to philanthropy.
129. The Society does charge for admission to its concerts but as we have found the tickets are subsidised to a greater or lesser extent and in some cases are free. In 1974 total expenditure, principally orchestra costs, was approximately £525,000. Concert income was approximately £290,000. There were similar subsidies in subsequent years. No commercial operator could put on concerts with the same repertoire in the same way as the Society.

3.28 In *Wilson v Flowers* 58 NJ 250 (1971) the Supreme Court of New Jersey said that:

...the word “philanthropic” in its liberal sense, includes all acts of friendliness to mankind, whether conducive to the improvement of society or merely to enrichment and enjoyment: (p. 256)

- 3.29 Therefore, a philanthropic purpose relates to the promotion of the welfare of other human beings in general. Philanthropy is not limited to the provision of basic necessities. It could include schools, libraries, public art galleries and museums or the provision of free subsidised concerts. The term “philanthropic” does not include organisations directed at the care and welfare of animals, rather than human beings. A purpose of benefitting the members of an organisation as an aim in itself is not a philanthropic purpose. A philanthropic activity is motivated by altruism, rather than self-interest.

Meaning of “cultural”

- 3.30 The Concise Oxford Dictionary defines “cultural” as meaning “relating to the arts and to intellectual achievements”.
- 3.31 In *Molloy v CIR* (1981) 5 NZTC 61,070 the Court of Appeal said that “cultural” in the context of “s 84B of the Income Tax Act 1976 [now s LD 3(2)] had its ordinary dictionary meaning as relating to the training, development and refinement of mind, tastes and manners”: p. 61,072. The Court of Appeal considered that the purpose of opposing a change in the law relating to abortion could not properly be described as cultural: p. 61,078.
- 3.32 In *Pooh-Bah Enterprises v Cook County* 905 N.E.2d 781 (2009) the Supreme Court of Illinois interpreted “cultural” as meaning “of or relating to the artistic and intellectual aspects or content of human activity”. The court considered that the activities that take place at an adult entertainment cabaret were not within that definition.
- 3.33 Therefore, a cultural purpose relates to the arts and intellectual pursuits.

Charitable purposes

- 3.34 For income tax purposes, “charitable purposes” are “the relief of poverty, the advancement of education or religion or any other matter beneficial to the community”: definition of “charitable purpose in s YA 1. This definition is based on the classification in *Pemsel’s* case (which in turn is based on the preamble to the Statute of Elizabeth (the Statute of Charitable Uses 1601). (For the purpose of this report it is not necessary to consider paragraphs (a) and (b) of the definition of “charitable purposes”, which brings certain Maori organisations within the scope of charitable purposes.)
- 3.35 To be a charitable purpose, being “any other matter beneficial to the community”, the purpose must be analogous to purposes already held to be charitable, being purchases that are within the “spirit and intendment” of the preamble to the Statute of Elizabeth. In *Re Greenpeace of New Zealand Incorporated* (2014) 26 NZTC ¶21-088 the majority in the Supreme Court said:

[18] At common law, charitable status is recognised on a case by case basis, by analogy with previous common law authorities falling generally within the “spirit and intendment” of the preamble to the Statute of Charitable Uses 1601 (UK) 43 Eliz I c 4.³¹ Objects have been accepted to be charitable if they advance the public benefit in

a way that is analogous to the cases which have built on the preamble to the 1601 Act.³²

³¹ The expression, picked up by the subsequent cases, is that used by Sir William Grant MR in *Morice v Bishop of Durham* [1804] 9 Ves 399, (1804) 32 ER 659 (MR) (aff'd (1805) 10 Ves 522, 32 ER 947 (Ch)): "Those purposes are considered charitable, which that Statute enumerates, or which by analogies are deemed within its spirit and intendment ..."

³² *D'Aguilar v Guyana Commissioner of Inland Revenue* [1970] TR 31 (PC) at 33 per Lord Wilberforce; *Vancouver Society of Immigrant and Visible Minority Women v Minister of National Revenue* [1999] 1 SCR 10 at [44] per Gonthier J (dissenting).

3.36 The scope of the purposes that are regarded as analogous to purposes that are within the spirit and intendment of the preamble to the Statute of Elizabeth has evolved and continues to evolve. In *DV Bryant Trust Board v Hamilton City Council* [1997] 3 NZLR 342 Hammond J commented that charities law must take into account changing institutions and societal values and that there may be changes in what is considered to be charitable: p. 348. In *Travis Trust v Charities Commission* (2009) 24 NZTC 23,273 Joseph Williams J commented that the class of charitable purpose evolves over time and the courts have shown a willingness to develop or extend established ones: paragraph 52. In *Re Greenpeace* the majority in the Supreme Court also recognised the need for charities law to respond to the changing circumstances of society: paragraph 70. In *Vancouver Society of Immigrant and Visible Minority Women v MNR* 99 DTC Gonthier J in the Supreme Court of Canada commented that:

The *Pemsel* classification provides a framework within which the courts may adapt the law as those social needs change. [paragraph 36]

3.37 To be a charitable purpose, a purpose of relief of poverty, advancement of education or religion or other purpose beneficial to the community, the purpose must be for the benefit of the public: *Re Greenpeace of New Zealand Inc* (2014) 26 NZTC ¶21-088. In *NZ Society of Accountants v CIR* (1986) 8 NZTC 5,205 Richardson J said that for a trust to be for a public benefit, the purposes of the trust must be such as to confer a benefit on the public or a section of the public and whether the class of persons eligible to benefit constitute the public or a sufficient section of it: p 5,212.

3.38 In *South Australian Employers' Chamber of Commerce & Industry Inc v Commissioner of State Taxation* Blue J commented that the requirement that there must be a purpose to provide a public benefit, rather than to advance one's own interests, means that a charitable purpose is altruistic (benevolent or philanthropic):

128. As observed above the fact that a person's motive is not altruistic does not entail that his or her purpose is not charitable. In the middle ages, as observed above, the motive for many charitable acts was to benefit the benefactor's eternal soul but this did not prevent the purpose being charitable. For this reason it is often said that altruism does not form part of the legal concept of charity. However, when one turns to purpose, the requirement that the purpose be to provide public benefit as opposed to advancing one's own interests necessarily connotes that the purpose is altruistic.

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129. Thus in *In re Cranston, Webb v Oldfield*, [1898] IR 431 Fitz Gibbon LJ said:

The essential attributes of a legal charity are, in my opinion, that it shall be unselfish – i.e., for the benefit of other persons than the donor – that it shall be public, i.e., that those to be benefited shall form a class worthy, in numbers or importance, of consideration as a public object of generosity, and that it shall be philanthropic or benevolent – i.e., dictated by a desire to do good. (p. 315)

130. The reference to a charity being philanthropic or benevolent should be understood as a reference to the purpose of the charitable institution as opposed to the motives of those involved with the institution.

3.39 Two issues arise in determining whether an entity is a charitable entity under the Charities Act: whether its purpose is charitable in nature (being analogous to purposes that are within the spirit and intendment of the preamble to the Statute of Elizabeth) and whether the benefit is public in nature. In *Canterbury Development Corporation v Charities Commission* (2010) 24 NZTC 24,143 Ronald Young J said:

[40] It is common ground that the appellant must pass two tests before they can be registered under this head as a charity. I agree with the respondent's identification of the two stage test as:

Consisting firstly of falling within the spirit and intendment of the Statute of Elizabeth (often called the analogy test) and secondly meeting the public benefit requirement.

3.40 In *Travis Trust v Charities Commission* the High Court held that a trust for the purpose of providing the prize money for a horse race or supporting the Cambridge Jockey Club's race meetings failed to satisfy both tests. The court considered that the promotion of sports, leisure or entertainment could be a charitable purpose only if its deeper purpose was the pursuit of another charitable objective (such as the promotion of health or education or animal welfare). The court also considered that as the purpose of the trust was to fund a race for the benefit of a private club (which was not the community or an appreciable section of the community, the public benefit requirement was not met.

3.41 However, in the most recent cases in which the court has held that an entity was not entitled to be registered as a charity under the Charities Act the court considered that, although an entity's purpose was analogous to purposes that had been held to be charitable, its purpose was to provide a private benefit and any benefit to the public was remote, was not sufficient or was indirect: *Canterbury Development Corporation v Charities Commission* (2010) 24 NZTC 24,143; *Re the Grand Lodge of Ancient Free and Accepted Masons in New Zealand* (2010) 24 NZTC 24,590; *Re Education New Zealand Trust* (2010) 24 NZTC 24,354; *Re Queenstown Lakes Community Housing Trust* (2011) 25 NZTC ¶20-059; *Re Family First New Zealand* (2018) 28 NZTC ¶23-072.

3.42 Therefore, charitable purposes are the relief of poverty, the advancement of education or religion and other purposes beneficial to the community. A purpose must analogous to purposes already held to be charitable (purposes that are within the spirit and intendment of the Statute of Elizabeth on which the definition of "charitable purpose" is based) to be a charitable purpose on the basis that it is

beneficial to the community. To be a charitable purpose, the carrying out of the purpose must result in a public benefit.

Benevolent, philanthropic or cultural purposes are not necessarily charitable purposes

- 3.43 Benevolent, philanthropic or cultural purposes are not necessarily charitable purposes: *Pemsel's case* [1891] AC 53; *Molloy*; *Attorney-General for New Zealand v Brown* [1917] AC 393; *Chichester Diocesan Fund v Simpson*; *Loggie Estate v McCauley* [1954] SCR 645.
- 3.44 It is possible that a purpose could be both a charitable purpose and a benevolent, philanthropic or cultural purpose. The relief of suffering, distress or misfortune is a benevolent purpose: *Australian Council of Social Service Inc v Commissioner of Pay-roll Tax*; *Commissioner of Pay-roll Tax v Cairnmillar Institute*; *Northern Land Council v Commissioner of Taxes*. The relief of human suffering or distress may be a charitable purpose, being a purpose beneficial to the community: *McGovern v Attorney-General* [1981] 3 All ER 493; *DV Bryant v Hamilton City Council* [1997] 3 NZLR 341.
- 3.45 In *MacDuff Rigby LJ* considered that a purpose of advancing the happiness and the position in life of those who are not poor would not be charitable but would be a philanthropic intention, being “a very wide desire to improve the position of a large class of persons” (p. 161). In *DV Bryant Trust Board v Hamilton City Council* Hammond J noted that the fourth category in *Pemsel* had encompassed the promotion of industry, of a geographical area, of moral welfare or the preservation of the environment but the public benefit must also be clearly demonstrated:
- The fourth head of *Pemsel* is (necessarily) more diverse in the institutions or gifts which have been held charitable. It has encompassed things like the promotion of industry; or a geographical area; or moral welfare; and the preservation of the environment. The element of public benefit must be clearly demonstrated. (p. 350)
- In my view, a gift for the purposes mentioned by Hammond J could be a gift for philanthropic purposes, being a gift for the purpose of promoting the welfare of the community in general.
- 3.46 A cultural purpose may also be a charitable purpose (the advancement of education). In *Royal Choral Society v Inland Revenue Commissioners* [1943] All ER 101 it was held that the purpose of raising the artistic taste of the country is an educational purpose and was, therefore, charitable. In *Re Municipal Orchestra Endowment Fund* [1999] QSC 200 the Queensland Supreme Court held that a fund established for a public orchestra and a musical library was a charitable purpose (the advancement of education by raising the artistic taste and musical appreciation of the citizens of Brisbane or the advancement of musical education). David Brown (Senior Lecturer, Faculty of Law, Victoria University) considered that a broad view of education would cover most cultural purposes: *The Charities Act 2005 and the definition of Charitable Purposes* (2005) 21 New Zealand Universities Law Review 598, 624.
- 3.47 In *Travis Trust v Charities Commission* Joseph Williams J considered that to distinguish between a purpose that is both beneficial to the community (or

benevolent) and charitable and a purpose that is beneficial to the community but is not charitable, it is necessary to consider whether the purpose is analogous to purposes that are within the spirit and intendment of the Statute of Elizabeth:

[19] As Lord Macnaughten said in the *Pemsel* case:

“The object of that statute was merely to provide new machinery for the reaffirmation of abuses in regard to charities. But by a singular construction it was held to authorise certain gifts to charity which otherwise would have been void. And it contained in the preamble a list of charities so varied and comprehensive that it became the practice of the Courts to refer to it as a sort of index or chart.”

[20] From this his Lordship extracted the four heads of charity now codified in s 5(1) with the last and most problematic of them being “other purposes beneficial to the community, not falling under any of the preceding heads”.⁹ But, as Lord Bramwell said in the same case “certainly every benevolent purpose is not charitable”.¹⁰ So in a deft circumlocution of legal logic, we are required in considering what is beneficial to the community under the last of the *Pemsel* heads to look back to the “spirit and intendment” of the preamble to the Statute of Elizabeth to assist in dividing between those purposes that are both beneficial and charitable, and those that are beneficial but not charitable. To make the division, regard must be had to the particular words of the preamble and, it has now long been held, any cases in which purposes have been found to be within the spirit and intendment of the preamble by analogy. The 117 years since *Pemsel* have seen a steady encrustation of new analogous charitable categories by this means. These developments have been evolutionary rather than revolutionary.

3.48 Therefore, there is a considerable overlap between the meaning of “charitable” (as defined in s YA 1) and the meaning of “benevolent”, “philanthropic” or “cultural” but a benevolent, philanthropic or cultural is not necessarily a charitable purpose. A benevolent purpose (which relates to the relief of poverty or distress) is likely to also be a charitable purpose. A cultural purpose may be a charitable purpose on the basis that it is for the advancement of education. However, the word “philanthropic” could encompass a variety of ways of promoting the wellbeing of others that may not meet the test of charitable purpose. A benevolent, philanthropic or cultural purpose would not be charitable even if it is beneficial to the community (has a public benefit) unless it is analogous to a purpose that has already found to be a charitable purpose.

Entity’s activities must result in a public benefit (a benefit to New Zealand society)

3.49 The meaning of a provision is to be ascertained from the text and in the light of its purposes: s 5(1) Interpretation Act. In determining purpose, the immediate and general legislative context must be considered: *Commerce Commission v Fonterra Co-operative Group Ltd* [207] 3 NZLR 767.

3.50 Section 5(2) of the Interpretation Act 1999 also permits any “indications provided in the enactment” to be considered in ascertaining the meaning of legislation. The examples of such indications include the headings to Parts and sections and the organisation and format of the enactment: s 5(3) The heading to s LD 1 is “tax credits for a “charitable or other public benefit gift”. This suggests that whether or not an entity’s purposes are charitable purposes, the purposes must be for a public benefit.

- 3.51 To be an entity in paragraph (a) or (c) of s LD 3(2), the entity must not be carried on for the private pecuniary benefit of any individual. An entity that is carried on for the private pecuniary benefit of any individual would not be carried on for a public benefit. In *Presbyterian Church of New Zealand Beneficiary Fund v CIR* (1994) 16 NZTC 11,183 Heron J considered that “private” in the context of the phrase “not carried on for the private pecuniary profit of any individual” “connotes personal, without any overriding characteristic which is public”: p. 11,196.
- 3.52 To be an entity described in paragraph (b) of s LD 3(2), the entity must be a public institution. An institution is public if its purpose is to benefit an appreciable section of the community. See *Maughan v FCT* (1942) 66 CLR 388, 397-398.
- 3.53 In my view, to be an entity described in s LD 3(2)(a), (b), (c) or (d), the entity’s purpose must be for a public benefit. This view is consistent with the purpose of the donations tax credit regime.
- 3.54 The Discussion Document on *Tax incentives for giving to charities and other non-profit organisations* (2006) explains that the donations tax credit is intended to encourage giving to charities and other non-profit organisations who make a significant contribution to New Zealand society in almost every sphere of activity:
- 1.1 Charities and other non-profit organisations make a significant contribution to New Zealand society in almost every sphere of activity, from sports, recreation, arts, culture, and heritage to emergency and social services, health, education, conservation and the environment. There are an estimated 90,000 charities and other non-profit organisations operating in New Zealand; they vary in size, and many depend on the voluntary commitment of time and money of ordinary New Zealanders and businesses, as well as government funding.
 - 1.2. Giving to charities and other non-profit organisations by individuals and businesses takes several forms – whether it is a matter of donating money, goods and services or time. While the overall magnitude of this giving is unknown, cash donations to charities and other non-profit organisations by individuals each year, as reported on tax returns, is estimated at \$356 million, which represents about one-sixth of the expenditure of the non-profit sector.
 - 1.3 In New Zealand, charitable giving is encouraged by the availability of a tax rebate for individuals and by tax deductions for companies and Māori authorities, for cash donations they make to donee organisations.
- 3.55 The Discussion Document states that the reasons for promoting donations to charities or other non-profit organisations are that these organisations help the government to further its social objectives (such as increasing support to the disadvantaged members of society and fostering a more caring and cohesive society), their activities provide benefits to society, may be more responsive to social needs and may provide social assistance in a more efficient way than government programmes. The Discussion Document states:
- 1.13 Among the reasons that governments seek to promote charitable giving are:
 - Charities and other non-profit organisations help governments to further their social objectives, such as increasing support to the disadvantaged members of society and fostering a more caring and cohesive society.
 - Many of the activities of charities and other non-profit organisations provide wider benefits to society over and above the value of the benefits received by the recipient or supplier of the activity.
 - The activities of charities and other non-profit organisations may be more responsive to the needs of society than government programmes, since donors

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and charities can often respond more quickly to changing social needs. Also, the donations people make to such organisations provide an effective indicator of the extra goods and services people feel are needed.

- Because charitable activities use donated goods and volunteer labour they may be a more efficient way of providing social assistance than government

- 3.56 The donations tax credit has a significant cost in tax forgone. The Discussion Document notes that it was estimated (based on tax returns) that donations to charities and other non-profit organisations amounted to \$356 million: paragraph 1.2.
- 3.57 In the *Queenstown Lakes* case Mackenzie J held that a trust established to promote or provide housing through a shared ownership scheme was not a trust for charitable purposes. McKenzie J accepted that that purpose was a purpose that was beneficial to the community (the fourth category in *Pemsel*) because it was directed to the composition and social cohesion of a particular community. However, McKenzie J held that the trust's purpose was not charitable because the means by which the claimed public benefit was achieved involved the provision of a private benefit to those who were assisted. McKenzie J considered that the fact that people selected to participate in the scheme were selected because they contributed to the social, cultural, economic or environmental wellbeing of those living within the Queenstown area did not confer on the community a sufficiently tangible and clearly defined benefit to be a public benefit.
- 3.58 Subsequently LD 3(2)(ac) was enacted. Under s LD 3(2)(ac) community housing entities whose activities involve the provision of housing or housing assistance and that meet the requirements in s CW 42B would be an entity that qualifies for donee status: s LD 3(2)(ac). Section LD 3(2)(ac) was intended to help promote home ownership to New Zealanders who would not otherwise be able to afford to buy a house and because it was not certain that entities involved in providing home ownership products to low-income households would have charitable status: Commentary on the Taxation (Annual Rates, Employee Allowances, and Remedial Matters) 2014.
- 3.59 Therefore, the Government made a policy decision that the promotion of home ownership provided a public benefit that outweighs the provision of the private benefit to those to whom assistance is provided and that should be encouraged by providing a tax credit for gifts to fund the activities of community housing entities.
- 3.60 Therefore, in my view, for a gift to be a "charitable or other public benefit gift" on the basis that the gift is made to an entity whose purposes are benevolent, philanthropic or cultural, the carrying out of the entity's purposes must result in a public benefit (a benefit to New Zealand society as a whole). The donations tax credit is intended to support the activities of charities or other non-profit organisations that result in a benefit to New Zealand society, whether directly by providing assistance to people who are in need of such assistance or by contributing to the improvement of society generally.

Relevance of political purpose, illegal purpose and discrimination

- 3.61 We have been asked to consider whether a political or illegal purpose or a purpose that involves discrimination on prohibited grounds would be relevant in

considering whether an entity should be approved as a donee organisation for tax credit purposes. The prohibited grounds of discrimination are sex, marital status, religious belief, ethical belief, colour, race, ethnic or national origins, disability, age, political opinion, employment status, family status and sexual orientation: s 19 New Zealand Bill of Rights Act 1990; s 21 Human Rights Act 1993.

- 3.62 These issues have been considered in the context of determining whether the public benefit requirement was met in relation to charitable purposes. In my view, it would be appropriate to apply a similar approach when considering whether purposes that are benevolent, philanthropic or cultural but that are not charitable result in a public benefit.
- 3.63 In the *Greenpeace* case the majority in the Supreme Court noted that the label “political” has been used in a number of different senses including party political, controversial, law changing, opinion-moulding.
- 3.64 In *Re Collier* [1998] 1 NZLR 81 Hammond J said that a trust to support a political party is not a charitable trust because for public policy reasons it is thought undesirable for the advantages of charity to be conferred on trust which overtly secure a certain line of political administration and policy. Hammond J commented that this appeared to be the agreed position throughout the common law world. See p. 90.
- 3.65 In the *Greenpeace* case the majority in the Supreme Court considered that a political purpose (in the sense of advocacy for a cause) and a charitable purpose are not necessarily mutually exclusive and that an object that entails advocacy for a change in the law is “simply one facet of whether a purpose advances the public benefit in a way that is within the spirit and intendment of the statute of Elizabeth I”: paragraph 72. However, the court considered that the promotion of causes will often not be charitable because it is not possible to say whether the views promoted are of benefit to the public in a way that the law recognises as charitable: paragraph 73. Whether the views advocated for are generally accepted or highly controversial is not determinative: paragraph 75.
- 3.66 *Re Family First New Zealand* (2018) 28 NZTC ¶123-072 supports the view that an illegal purpose or a purpose that involves discrimination on prohibited grounds would not be in the public benefit. Simon France J considered that that Family First’s purposes of promoting the traditional family unit (including advocating for law changes to make divorce more difficult) and advocating for changes to legislation relating to smacking, abortion, censorship and prostitution were not in the public benefit. Simon France J considered that a purpose of favouring the traditional family unit over other types of families would be contrary to human rights law and there would be both fiscal and social costs if divorce was made more difficult and costly.
- 3.67 In my view, the presence of a political purpose may mean that the entity’s purpose does not result in a public benefit, which the donations tax credit is intended to support. An entity whose purpose is to support a particular political party would not be entitled to be approved as a donee organisation. However, in some circumstances, a political purpose in the sense of advocating for a particular point of view would not disentitle an entity from approval. It would not be

possible to establish that an illegal purpose or a purpose that involves discrimination on prohibited grounds has a public benefit.

4. CONSULTATION COMMENTS

- 4.1 The comments received on an earlier draft of this report are covered, as appropriate, in the "Analysis" section above. However, the main comments received, and my response to them, can be summarised as follows.
- 4.2 s 9(2)(g)(i) (Senior Tax Counsel, Technical Standards) agreed with the conclusions in this report.
- 4.3 s 9(2)(g)(i) (Customer Compliance Specialist, Small & Medium Enterprises) suggested that there should be more analysis on whether there is a public benefit where an entity's purposes include political purposes or an entity carries out illegal activities or the entity discriminates against persons. I consider that an illegal purpose or a purpose that involves discrimination of prohibited grounds would disentitle an entity from approval as a donee organisation and the presence of political purpose may mean that the entity is not entitled to be approved as a donee organisation. See paragraphs 3.61 to 3.67.
- 4.4 s 9(2)(g)(i) commented that the report should clarify the consequences where the Commissioner considers that an entity's purposes may be charitable but the entity has not applied for registration as a charitable entity under the Charities Act.
- 4.5 Susan Price (Director, Public Rulings) agreed with the conclusion in this report. She also suggested that the report clarify whether an entity does not have charitable purposes must apply to the Charities Registration Board before they can be approved as a donee organisation.
- 4.6 As discussed in paragraph 3.3 to 3.4, from 1 April 2020 an entity for charitable purposes cannot be treated or cannot continue to be treated as a donee organisation for the purpose of the donations tax credit unless the entity is registered as a charitable entity under the Charities Act. However, if it is clear that the entity does not have charitable purposes, the entity is not required to apply to be registered under the Charities Act.

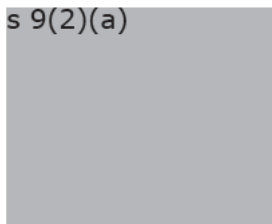
5. CROWN LAW PROTOCOL

- 5.1 I reviewed the list of "significant cases" specified on the Legal Services intranet site on 4 November 2019. The issues raised in this report are not relevant to any case listed.

6. RECOMMENDATION

- 6.1 That Technical Services be provided with a copy of this report for consideration in conjunction with the preparation of their operational statement.

s 9(2)(a)



Gloria Yee

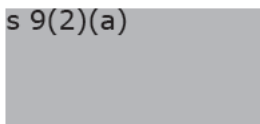
Senior Tax Counsel, Escalations & Advising

Date / /

Sign-Off

I agree with the conclusions set out above and the recommendations made.

s 9(2)(a)



Date / /

Megan Jamieson

Senior Tax Counsel, Public Rulings

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7. APPENDIX 1 – LEGISLATION

The legislative provisions relevant to this project are as follows.

Income Tax Act 2007

7.1 “Community housing entity” is defined in s CW 42B(2) as meaning:

...a trustee or company (the entity) whose activities involve the provision of housing or housing assistance (the activities), and—

- (aa) the entity is a registered community housing provider under the Housing Restructuring and Tenancy Matters Act 1992; and
- (a) the activities are not carried on for the private pecuniary profit of any individual; and
- (b) all profit is retained by the entity, or distributed or applied to—
 - (i) community housing entities that meet the requirements to derive exempt income under this section:
 - (ii) beneficiaries or clients of the entity;
 - (iii) tax charities;
 - (iv) persons to whom distributions would be in accordance with charitable purposes; and
- (c) no person with some control over the activities is able to direct or divert an amount derived from the activities to the benefit or advantage of,—
 - (i) if subparagraph (ii) does not apply, a person other than the entity except for a purpose of the entity or a charitable purpose:
 - (ii) if the entity (the operating entity) is carrying on the activities for or for the benefit of a community housing entity or charity (the controlling entity), a person other than the operating entity or the controlling entity except for a purpose of the operating entity or the controlling entity or for a charitable purpose.

7.2 Section LD 1 provides:

- (1) A person who makes a charitable or other public benefit gift in a tax year and who meets the requirements of section 41A of the Tax Administration Act 1994 has a tax credit for the tax year equal to the amount calculated using the formula in subsection (2).

7.3 Section LD 3 provides:

- (1) For the purposes of this subpart, a charitable or other public benefit gift—
 - (a) means a gift of money of \$5 or more that is paid to a society, institution, association, organisation, trust, or fund, described in subsection (2) or listed in schedule 32 (Recipients of charitable or other public benefit gifts) (the entity):
 - (b) includes a subscription of \$5 or more paid to an entity only if the subscription does not confer any rights arising from membership in that entity or any other society, institution, association, organisation, trust, or fund:
 - (c) does not include a testamentary gift.

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- (2) The following are the entities referred to in subsection (1)(a) and (b):
- (a) a society, institution, association, organisation, or trust that is not carried on for the private pecuniary profit of an individual, and whose funds are applied wholly or mainly to charitable, benevolent, philanthropic, or cultural purposes within New Zealand:
 - (ab) an entity that, but for this paragraph, no longer meets the requirements of this subsection, but only for the period starting on the day it fails to meet those requirements and ending on the later of—
 - (i) the day the entity is removed from the register of charitable entities under the Charities Act 2005:
 - (ii) the day on which all reasonably contemplated administrative appeals and Court proceedings, including appeal rights, are finalised or exhausted in relation to the person's charitable status.
 - (ac) a community housing entity, if the gift is made at a time the entity is eligible to derive exempt income under section CW 42B (Community housing trusts and companies):
 - (b) a public institution maintained exclusively for any 1 or more of the purposes within New Zealand set out in paragraph (a):
 - (bb) a Board of Trustees that is constituted under Part 9 of the Education Act 1989 and is not carried on for the private pecuniary profit of any individual:
 - (bc) a tertiary education institution:
 - (c) a fund established and maintained exclusively for the purpose of providing money for any 1 or more of the purposes within New Zealand set out in paragraph (a), by a society, institution, association, organisation, or trust that is not carried on for the private pecuniary profit of an individual:
 - (d) a public fund established and maintained exclusively for the purpose of providing money for any 1 or more of the purposes within New Zealand set out in paragraph (a).

7.4 Section LD 3(1) has been amended with effect from 1 April 2020 to read as follows:

- (1) For the purposes of this subpart, a charitable or other public benefit gift—
- (a) means a gift of money of \$5 or more that is paid to a society, institution, association, organisation, trust, or fund (the entity), if—
 - (i) the entity is described in subsection (2)(a), (ab), (b), (c), or (d), and the name of the entity is on the list published by the Commissioner under section 41A(14) to (16) of the Tax Administration Act 1994:
 - (ii) the entity is described in subsection (2)(ac), (bb), or (bc):
 - (iii) the name of the entity is listed in schedule 32 (Recipients of charitable or other public benefit gifts):
 - (b) includes a subscription of \$5 or more paid to an entity only if the subscription does not confer any rights arising from membership in that entity or any other society, institution, association, organisation, trust, or fund:

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- (c) does not include a testamentary gift.

7.5 Section LD 3(3), which takes effect from 1 April 2020, provides:

Despite subsection (2)(a), (b), (c), and (d), a society, institution, association, , organisation, trust, or fund is not a relevant entity for the purposes of subsection (1) if the society, institution, association, organisation, trust, or fund,—

- (a) is not a tax charity, because it is not registered as a charitable entity under the Charities Act 2005; and
- (b) in the opinion of the Commissioner, is eligible to be registered as a charitable entity under that Act.

7.6 “Charitable purposes” is defined in s YA 1 as follows:

charitable purpose includes every charitable purpose, whether it relates to the relief of poverty, the advancement of education or religion, or any other matter beneficial to the community, and—

- (a) the purpose of a trust, society, or institution is charitable under this Act if the purpose would meet the public benefit requirement apart from the fact that the beneficiaries of the trust, or the members of the society or institution, are related by blood:
- (b) a marae has a charitable purpose if—
 - (i) the physical structure of the marae is situated on land that is a Maori reservation referred to in Te Ture Whenua Maori Act 1993 (the Maori Land Act 1993); and
 - (ii) the funds of the marae are not used for a purpose other than the administration and maintenance of the land and of the physical structure of the marae, or are used for a purpose that is a charitable purpose

Charities Act 2005

7.7 Section 8 of the Charities Act 2005 provides:

- (1) In this Act, unless the context otherwise requires, **charitable purpose** includes every charitable purpose, whether it relates to the relief of poverty, the advancement of education or religion, or any other matter beneficial to the community.
- (2) However,—
 - (a) the purpose of a trust, society, or institution is a charitable purpose under this Act if the purpose would satisfy the public benefit requirement apart from the fact that the beneficiaries of the trust, or the members of the society or institution, are related by blood; and
 - (b) a marae has a charitable purpose if the physical structure of the marae is situated on land that is a Maori reservation referred to in Te Ture Whenua Maori Act 1993 (Maori Land Act 1993) and the funds of the marae are not used for a purpose other than—
 - (i) the administration and maintenance of the land and of the physical structure of the marae:
 - (ii) a purpose that is a charitable purpose other than under this paragraph.

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- (3) To avoid doubt, if the purposes of a trust, society, or an institution include a non-charitable purpose (for example, advocacy) that is merely ancillary to a charitable purpose of the trust, society, or institution, the presence of that non-charitable purpose does not prevent the trustees of the trust, the society, or the institution from qualifying for registration as a charitable entity.
- (4) For the purposes of subsection (3), a non-charitable purpose is ancillary to a charitable purpose of the trust, society, or institution if the non-charitable purpose is—
- (a) ancillary, secondary, subordinate, or incidental to a charitable purpose of the trust, society, or institution; and
 - (b) not an independent purpose of the trust, society, or institution.

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