TR 2011/D2 - Income tax and fringe benefits tax: charities

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Draft Taxation Ruling

Income tax and fringe benefits tax: charities

Contents Para

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What this Ruling is about

1. This draft Ruling sets out the Commissioner's views on the meaning of 'charitable' in the terms 'charitable institution ' and 'fund established for public charitable purposes' wherever those terms are used in the *Income Tax Assessment Act 1997* (ITAA 1997), the *Fringe Benefits Tax Assessment Act 1986* (FBTAA) and the *Income Tax Assessment Act 1936* (ITAA 1936). In particular, the Ruling considers the meaning of charitable for the purposes of:

- items 1.1,1.5,1.5A and 1.5B of the table in section 50-5 of the ITAA 1997, which provide income tax exemption for various entities;
- Division 30 of the ITAA 1997, which provides for tax deductions for gifts. 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;
  - item 4.1.4 of the table in subsection 30-45(1) of the ITAA 1997 dealing with public funds maintained by charitable institutions on the register of harm prevention charities;
  - item 4.1.5 of the table in subsection 30-45(1) of the ITAA 1997 dealing with a public fund established for charitable purposes solely to provide money for the relief of people in Australia in distress as a result of a disaster to which subsection 30-45(1A) or subsection 30-46(1) applies;

- item 4.1.6 of the table in subsection 30-45(1) of the ITAA 1997 dealing with a charitable institution providing short term care or rehabilitation to injured, sick and orphaned animals;
- item 4.1.7 of the table in subsection 30-45(1) of the ITAA 1997 being a charitable institution that would be a public benevolent institution (PBI) but for the fact it promotes the prevention or control of disease in human beings (but not as a principal activity) and/or it promotes the prevention or control of behaviour that is harmful or abusive to human beings (but not as a principal activity);

- section 207-115 of the ITAA 1997, which relates to refunds of excess imputation credits to certain exempt institutions;
- subsection 57A(5) of the FBTAA, which provides fringe benefits tax exemption in relation to benefits provided by employers that are health promotion charities endorsed under subsection 123D(1) of the FBTAA; and
- section 65J of the FBTAA, which provides for a rebate of fringe benefits tax to rebatable employers including endorsed charitable institutions.

2. It explains the Commissioner's view on:

- the features that distinguish a charitable institution from a charitable fund;
- the circumstances in which an institution or fund will be considered charitable;
- determining whether the purpose of an institution or fund is charitable; and
- the decisions of the High Court in *Central Bayside General Practice Association Ltd v. Commissioner of State Revenue* (2006) 228 CLR 168; [2006] HCA 43 (*Central Bayside*), *Federal Commissioner of Taxation v. Word Investments Limited* (2008) 236 CLR 204; [2008] HCA 55 *(Word Investments)* and *Aid/Watch Incorporated v. FC of T* [2010] HCA 42; 2010 ATC 20-227; (2010) 77 ATR 195 *(Aid/Watch*), and the decisions of the Federal Court in *Navy Health Limited v. Federal Commissioner of Taxation* (2007) 163 FCR 1; [2007] FCA 931 (*Navy Health*) and *Victorian Women Lawyers' Association Inc v. Federal Commissioner of Taxation* (2008) 170 FCR 318; [2008] FCA 983 (*Victorian Women Lawyers*).

3. It does not consider the following:

- aspects of Division 30 other than whether an institution is a charitable institution or whether a fund is established for charitable purposes;
- other items of income tax exemption listed in Division 50 of the ITAA 1997;
- the special conditions referred to in the table in section 50-5 of the ITAA 1997;
- other requirements for a refund of excess imputation credits for institutions covered by section 207-115 of the ITAA 1997;
- the application of section 65J of the FBTAA; or
- the endorsement processes for charities.

4. The Ruling applies to charitable institutions and charitable funds and persons who make gifts to charitable institutions and charitable funds.

Definitions

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

‘**charity**’ is used to describe both charitable institutions and charitable funds.

‘**charitable purpose**’. Charitable institutions can have more than one charitable purpose. The term ‘charitable purpose’ is commonly used in this draft Ruling to include multiple charitable purposes.

‘**public charitable purposes**’ is synonymous with ‘charitable purposes’. As such, although the term ‘public charitable purposes’ is used in section 50-5 of the ITAA 1997 in relation to funds, it is not considered separately in this draft Ruling.

‘**purpose**’ and ‘**objects**’ are used in this draft Ruling to distinguish between two different aspects of purpose. ‘Objects’ is used for written statements in the constituent documents (where they will have titles such as ‘objects’, ‘purposes’, ‘trusts’ or ‘aims’). ‘Purpose’ is used for the substance and reality, as judged in the light of the relevant circumstances (referred to in the cases as ‘purposes’, ‘objects’, ‘objectives’ and other similar terms).

'sole purpose' is used in this draft Ruling to mean the only or the 'main or predominant or dominant' purpose of an institution as described in paragraph 26 of this Ruling. It has been used because the only purposes a charitable institution can have are charitable purposes or purposes incidental or ancillary to charitable purposes. It also helps avoid misunderstandings that can arise because of different usages (especially in a taxation context) of various terms that have been used by the courts to describe the required purpose.

'**Statute of Elizabeth**' is a reference to the preamble to the *Statute of Charitable Uses 1601* 43 Elizabeth 1 c.4.

'**tax law**' is used in this draft Ruling to mean the ITAA 1936, the ITAA 1997 and the FBTAA.

Previous Rulings

6. This draft Ruling replaces Taxation Ruling TR 2005/21 Income tax and fringe benefits tax: charities. To the extent that the Australian Taxation Office (ATO) views in that Ruling still apply, they have been incorporated into this draft Ruling. A summary of the key differences between TR 2005/21 and this draft Ruling is provided at Appendix 3 to this draft Ruling.

Ruling

7. Tax law provides certain concessional tax treatments for charitable institutions and funds that are 'established for public charitable purposes' as specified in section 50-5 of the ITAA 1997. A charitable institution is an institution established and maintained for purposes that are charitable. For a fund to be 'established for public charitable purposes', its purposes must be charitable.

8. The word 'charitable' is not defined in the ITAA 1936, the ITAA 1997 or the FBTAA. The courts have determined that it does not bear its ordinary meaning but instead is given its technical legal meaning unless a contrary intention appears from the context in which it is used.[1]

[1] *Chesterman v. Federal Commissioner of Taxation* (1925) 37 CLR 317; *The Incorporated Council of Law Reporting of the State of Queensland v. Federal Commissioner of Taxation* (1971) 125 CLR 659; 71 ATC 4206; (1971) 2 ATR 515; *Central Bayside General Practice Association Ltd v. Commissioner of State Revenue* (2006) 228 CLR 168; [2006] HCA 43 (*Central Bayside*).

9. The decisions of the High Court and the Federal Court referred to in paragraph 2 of this draft Ruling have refined the factors previously thought to impose restrictions on entities claiming charitable status under the tax laws. As the majority of the High Court said in *Aid/Watch* citing Lord Wilberforce in *Scottish Burial Reform and Cremation Society v. Glasgow City Corporation* [1967] 3 All ER 215: '... the law of charity is a moving subject which has evolved to accommodate new social needs as old ones become obsolete or satisfied'.[2]

Technical legal meaning of charitable[3]

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

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

The technical legal meaning of charitable that is applied by Australian courts is one that has been developed by the courts of Australia and other countries with comparable jurisdictions. However, decisions from other countries will only be relevant if they are consistent with the approach of the Australian courts.

Charitable purposes – the spirit and intendment of the Statute of Elizabeth[4]

11. 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.

12. Charitable purposes are commonly grouped, following the terminology used in *The Commissioners for Special Purposes of Income Tax v. Pemsel* [1891] AC 531; [1891-1894] All ER Rep 28 (*Pemsel*), 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.

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[2] *Aid/Watch Incorporated v. FC of T* [2010] HCA 42; 2010 ATC 20-227; 77 ATR 195 (*Aid/Watch*) at paragraph 18.
[3] See Explanation from paragraph 96 of this Ruling.
[4] See Explanation from paragraph 100 of this Ruling.

Summaries of various court decisions on the four heads of charity are in Appendix 2 to this draft Ruling, beginning at paragraph 292.

Deemed charitable purposes[5]

13. Where State legislation extends charitable status to various purposes, those purposes are not, as a result, also deemed to be 'charitable' for Commonwealth taxation purposes. Only Commonwealth legislation that is intended to apply, and does apply, for Commonwealth taxation purposes will have this effect.

14. The *Extension of Charitable Purpose Act 2004* has deemed the provision of child care services on a non-profit basis, and the provision of a rental dwelling under the National Rental Affordability Scheme by an entity that is endorsed as exempt from income tax,[6] to be charitable purposes.[7]

Beneficial to the community[8]

15. A purpose is beneficial to the community if:

- it offers a benefit that is real and of value, either tangible or intangible; and
- that benefit is for the public.[9]

16. 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]

17. However, the public benefit requirement does not apply where the charitable purpose is the relief of poverty.[11]

18. The notion of what is beneficial to the public is not limited to a closed or historical list. As needs are satisfied, new needs arise or community views change, what constitutes a purpose that is beneficial to the community can change as well.

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[5] See Explanation from paragraph 107 of this Ruling.
[6] The provision of the rental dwelling has effect as a charitable purpose only during the relevant incentive period (subsection 4A(2) *Extension of Charitable Purpose Act 2004*).
[7] Sections 4 and 4A of the *Extension of Charitable Purpose Act 2004.*
[8] See Explanation from paragraph 117 of this Ruling.
[9] *Downing v. Federal Commissioner of Taxation* (1971) 125 CLR 185; 71 ATC 4164; (1971) 2 ATR 472.
[10] See, Kenny J in *Commissioner of Taxation v. The Triton Foundation* (2005) 147 FCR 362; [2005] FCA 1319 at paragraph 22: 'The public may, however, include a section of the public'.
[11] *Dingle v. Turner* [1972] AC 601; [1972] 1 All ER 878.

Deemed public benefit[12]

19. The public benefit requirement is also satisfied if, under Commonwealth legislation, an institution is deemed to have a purpose that is for the public benefit.

20. Commonwealth legislation has deemed the purpose of the following institutions to be for the public benefit:

- closed or contemplative religious orders that regularly undertake prayerful intervention at the request of members of the public; and
- open and non-discriminatory self-help groups.[13]

21. An institution will not be a charitable institution simply because Commonwealth legislation deems it to have a purpose that is for the public benefit. The institution still has to be able to show that its purpose, determined by reference to relevant features and circumstances (see paragraphs 29 – 31 of this Ruling) is charitable in the technical legal sense.

Charitable institution or fund[14]

22. Tax law distinguishes between charitable institutions and charitable funds. Whether a charity has the character of an institution or a fund is a question of fact.

Charitable institution[15]

23. An institution is an establishment, organisation or association, instituted for the promotion of some object, especially one of public or general utility[16]. 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, and does not include a structure controlled and operated by family members and friends.[17]

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[12] See Explanation from paragraph 136 of this Ruling.
[13] Section 5 of the *Extension of Charitable Purpose Act 2004*.
[14] See Explanation from paragraph 149 of this Ruling.
[15] See Explanation from paragraph 151 of this Ruling.
[16] *Stratton v. Simpson* (1970) 125 CLR 138 at 157-158.
[17] See *Pamas Foundation (Inc) v. Commissioner of Taxation* (1992) 35 FCR 117; 92 ATC 4161; (1992) 23 ATR 189.

24. Trustees whose only function is the management of a trust fund consistent with the terms of a trust deed will not qualify as a charitable institution.[18] Some additional quality or function that gives the trust, when regarded as a whole, the character of an establishment, organisation or association instituted for the promotion of an object is required – for example, the carrying on of activities or the provision of services relevant to the charitable purpose.[19] However, a trust that does not qualify as an institution could still satisfy the requirements for a charitable fund.

Charitable purpose[20]

25. An institution is charitable if:

- its only, or its 'main or predominant or dominant' purpose is charitable in the technical legal sense;[21] and
- it was established and is maintained for that charitable purpose.[22]

In this draft Ruling, we typically refer to the required purpose as the 'sole purpose' of the institution because a charitable institution cannot have an independent non-charitable purpose (regardless of how minor that independent non-charitable purpose may be).[23]

'Main or predominant or dominant' purpose[24]

26. A purpose is the 'main or predominant or dominant' purpose of an institution if any other purpose the institution has is no more than incidental or ancillary to that purpose.[25]

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[18] See, *Commissioner of Land Tax for the State of New South Wales v. Joyce & Ors* (1974) 132 CLR 22; (1974) 5 ATR 32*; Stratton v. Simpson* (1970) 125 CLR 138.
[19] T*rustees of the Indigenous Barristers' Trust v. Federal Commissioner of Taxation* (2002) 127 FCR 63; [2002] FCA 1474 at paragraph 31.
[20] See Explanation from paragraph 157 of this Ruling.
[21] See *Federal Commissioner of Taxation v. Word Investments Limited* (2008) 236 CLR 204; [2008] HCA 55 *(Word Investments)* at paragraph 17*; Congregational Union of New South Wales v. Thistlethwayte* (1952) 87 CLR 375 at paragraph 19.
[22] *Word Investments* (2008) 236 CLR 204; [2008] HCA 55 at paragraph 34.
[23] *Stratton v. Simpson* (1970) 125 CLR 138.
[24] See Explanation from paragraph 161 of this Ruling.
[25] See *Word Investments* (2008) 236 CLR 204; [2008] HCA 55 at paragraph 17; *Stratton v. Simpson* (1970) 125 CLR 138 at 159.

'Incidental or ancillary' purpose[26]

27. A purpose is incidental or ancillary[27] to a charitable purpose if it tends to assist, or naturally goes with, the achievement of the charitable purpose. It does not mean a purpose that is minor in quantitative terms.[28]

28. A purpose is not incidental or ancillary if it is an end in itself, or of substance in its own right, or if it might happen to further a charitable purpose.

Finding purpose[29]

29. The enquiry as to purpose is a holistic one. It is the substance and reality of the institution's purpose that must be determined.

30. The objects or objectives in the constituent documents of an institution, and the activities by which those objects or objectives are achieved, are the main factors to be considered in determining the purpose of the institution.

31. However, if the objects or objectives in the constituent documents of an institution indicate it has a sole[30] purpose which is charitable, but its activities or other relevant factors indicate the substance and reality is to the contrary, the institution will not be charitable. Other relevant factors can include:

- other elements in the constituent documents of the institution such as its powers, rules, not for profit and winding up clauses, and clauses governing who can benefit from the institution's activities and in what ways;
- how the institution is operated;
- any legislation governing its operation;
- the circumstances in which it was formed;
- its history; and
- its control.

[26] See Explanation from paragraph 164 of this Ruling.
[27] The terms 'subsidiary', 'subordinate' and 'concomitant' are sometimes used in place of 'incidental or ancillary' – see, for example, *Congregational Union of New South Wales v. Thistlethwayte* (1952) 87 CLR 375 and *Royal Australasian College of Surgeons v. Federal Commissioner of Taxation* (1943) 68 CLR 436; (1943) 7 ATD 289.
[28] *Navy Health Limited v. Federal Commissioner of Taxation* (2007) 163 FCR 1; [2007] FCA 931at paragraph 65.
[29] See Explanation from paragraph 169 of this Ruling.
[30] See paragraph 5 of this Ruling.

32. Where the constituent documents of an institution indicate it has been established solely for a charitable purpose, it can be charitable even if its activities are not intrinsically charitable. In these circumstances, the enquiry centres on whether it can be said that the activities are carried on in furtherance of the institution's charitable purpose.[31]

33. If the constituent documents of an institution indicate it does not have a sole[32] purpose which is charitable:

- it cannot be charitable even if some or all of its activities are charitable in nature;
- it is not charitable simply because it uses means that are commonly used by charities, for example educational means; and
- the fact that charitable consequences may result from its activities does not mean that it is charitable. For example, an institution cannot be characterised as charitable simply because it provides financial or other support to a charity.

34. Objects in the constituent documents of an organisation will be accepted as powers rather than objects where, in the context of the constituent documents as a whole, it is clear they were intended to be no more than powers to give effect to the purpose of the organisation. Whether items referred to as objects in the constituent documents of an organisation are truly objects or simply powers is a question of fact.[33]

35. Where charities establish a peak or similar body to further their common charitable endeavours, the same principles and considerations apply in determining the purpose of that body as would apply to any entity.

36. In characterising an institution, consideration has to be given not only to the purpose for which it was established, but also the purpose for which it continues to be conducted.[34]

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[31] *Word Investments* (2008) 236 CLR 204; [2008] HCA 55; *Royal Australasian College of Surgeons v. Federal Commissioner of Taxation* (1943) 68 CLR 436; (1943) 7 ATD 289.
[32] See paragraph 5 of this Ruling.
[33] See *Word Investments* (2008) 236 CLR 204; [2008] HCA 55 at paragraphs 20 – 24.
[34] See *Cronulla Sutherland Leagues Club Limited v. Commissioner of Taxation* (1990) 23 FCR 82 at 95; 90 ATC 4215 at 4225; (1990) 21 ATR 300 at 312; *Commissioner of Taxation v. The Triton Foundation* (2005) 147 FCR 362; [2005] FCA 1319; *Word Investments* (2008) 236 CLR 204; [2008] HCA 55 at paragraph 34.

Power to accumulate[35]

37. A charitable institution with a power to accumulate profits can still be charitable, as long as the profits are being accumulated in order to augment the funds available to effect the institution's charitable purpose.

38. However, an institution that accumulates most of its profits over a number of years will need to be able to show that this accumulation is still consistent with it having a charitable purpose. Considerations that can influence whether such an institution continues to have a charitable purpose include whether funds that are to be applied to its charitable purpose have been identified, and if so when and how they are to be applied.[36]

Charitable fund[37]

39. The words 'fund' and 'charitable fund' are not statutorily defined for the purposes of the tax law, so they take their ordinary meaning.

40. A charitable fund is a fund established for public charitable purposes by will or instrument of trust.

41. The charitable purposes must be the only purposes for which the fund is established. If a fund can be applied for purposes that are not charitable it is not a charitable fund.[38] Any objects which, if viewed in isolation, would not be charitable, can only be incidental or ancillary to the charitable purposes.

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

43. The activities carried on by the trustees subsequent to establishment are not relevant to whether a fund has a charitable purpose. However, they are relevant to income tax exemption. For income tax exemption, a fund must be applied for the purposes for which it was established.[39]

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[35] See Explanation from paragraph 202 of this Ruling.
[36] See *Word Investments* (2008) 236 CLR 204; [2008] HCA 55 at paragraph 22.
[37] See Explanation from paragraph 206 of this Ruling.
[38] *Compton and Ors v. Federal Commissioner of Taxation* (1966) 116 CLR 233 at 248.
[39] *Douglas and Ors v. Federal Commissioner of Taxation* (1997) 77 FCR 112 at 119; 97 ATC 4722 at 4727; (1997) 36 ATR 532 at 538; Taxation Ruling TR 2000/11 Income tax: endorsement of income tax exempt charities.

Purposes which are not charitable[40]

44. Purposes will not be charitable if they lack the required public benefit or are not within the spirit and intendment of the Statute of Elizabeth. The following paragraphs identify situations where purposes are not charitable.

The purpose is to confer private benefits

Distributions to owners or members[41]

45. An institution that carries out its activities for the private profit or benefit of its owners or members is not charitable as it cannot satisfy the public benefit requirement. This will be the case even if charitable consequences flow from the institution's activities, or the motivation of the institution has some social value.

46. However, where the objects of an institution are charitable, the fact that it can distribute surpluses to owners or members in furtherance of those objects does not as a matter of course preclude the institution from satisfying the public benefit requirement. An institution that can distribute surpluses to its owners or members can still satisfy the public benefit requirement if:

- its sole[42] purpose is charitable;
- its constituent documents allow it to distribute its surplus or profit to another entity or entities in order to effect that sole charitable purpose; and
- the owners or members who can receive distributions (in accordance with the terms of the constituent documents) are themselves charitable entities that have the same charitable purpose as the institution itself.

In these circumstances, a distribution of surplus to the owners or members of the institution would not result in a private benefit to them.

Benefits for members[43]

47. An institution set up to advance the interests of its members in their capacity as members cannot be charitable as it cannot satisfy the public benefit requirement. The members of such institutions do not, as members, constitute a section of the public in the relevant sense, and the benefits derived by the members are, as a result, private in nature.

[40] See Explanation from paragraph 212 of this Ruling.
[41] See Explanation from paragraph 212 of this Ruling.
[42] See paragraph 5 of this Ruling.
[43] See Explanation from paragraph 226 of this Ruling.

48. However, an institution that benefits its members can still be charitable where:

- the member benefits are simply incidental or ancillary to the purpose of benefiting the community;[44] or
- the institution is an open and non-discriminatory self-help group that is deemed to have a purpose that is for the public benefit under the *Extension of Charitable Purpose Act 2004.*[45]

49. Where the purpose of an institution is for the benefit of the community, placing limits on the membership will not preclude a finding that its purpose is charitable.

50. Where an institution that is set up to advance its members' interests establishes a separate entity to carry out charitable activities that separate entity can still be charitable. It is the separate entity that must be for the public benefit. The fact it is established and controlled by the members' institution does not prevent it from being charitable.[46]

Business-like benefits are conferred[47]

51. The advancement of industry, commerce or agriculture can be a charitable purpose, but the business-like benefits that are conferred must be for the community or a section of the community and within the spirit and intendment of the Statute of Elizabeth.

52. An institution that simply provides benefits to customers, contributors or subscribers in return for payment lacks the necessary public character.

Incidental or ancillary private benefits[48]

53. The existence of private benefits that are merely incidental or ancillary to a public benefit will not by itself affect the classification of a purpose as charitable.

The purpose is social, recreational or sporting[49]

54. A purpose that is social in nature is not charitable, even if motivated by charitable sentiments or results in a benefit to the community.

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[44] *Victorian Women Lawyers' Association Inc v. Federal Commissioner of Taxation* (2008) 170 FCR 318; [2008] FCA 983.
[45] Section 5 of the *Extension of Charitable Purpose Act 2004.*
[46] See Explanation from paragraph 232 of this Ruling.
[47] See Explanation from paragraph 235 of this Ruling.
[48] See Explanation from paragraph 238 of this Ruling.
[49] See Explanation from paragraph 242 of this Ruling.

55. Recreational or sporting purposes are also not charitable, regardless of motivation or the benefits to the community that can result.

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

The purpose is illegal[50]

57. Purposes that are illegal are not charitable.

The purpose is commercial[51]

58. A purpose of carrying on a business or commercial enterprise to generate a surplus where that purpose is an end in itself is not charitable.

59. However, commercial or business-like activities can be compatible with a charitable purpose. An institution undertaking commercial or business-like activities can be charitable if:

- its sole[52] purpose is charitable and it carries on a business or commercial enterprise to give effect to that charitable purpose. In these circumstances it does not matter that the activities themselves are not intrinsically charitable;[53]
- it has a business or commercial purpose that is simply incidental or ancillary to its charitable purpose;
- its activities are intrinsically charitable but they are carried on in a commercial or business-like way; or
- it holds passive investments to receive a market return to further its charitable purpose.

60. An institution carrying on a business or commercial enterprise will not be charitable simply because it is controlled by another institution that is charitable. It is the purpose of the entity itself which must be charitable.

The purpose is governmental[54]

61. The purposes of government in carrying out its functions and activities are not charitable.

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[50] See Explanation from paragraph 248 of this Ruling.
[51] See Explanation from paragraph 250 of this Ruling.
[52] See paragraph 5 of this Ruling.
[53] *Word Investments* (2008) 236 CLR 204; [2008] HCA 55 at paragraph 26.
[54] See Explanation from paragraph 256 of this Ruling.

62. This does not mean that an institution cannot be charitable if in carrying out its purpose it has the effect of helping to achieve government policy. As long as the institution independently carries out its purpose, it can still be charitable.[55]

63. Government funding of an institution does not mean the institution cannot be charitable. If the sole[56] purpose of the institution is charitable, the fact that it is substantially funded by government will not affect its characterisation as a charitable institution.[57]

64. However, if an institution is funded by government in order to give effect to government policy, and carries out its functions in order to discharge a responsibility of government, its sole[58] purpose will not be charitable.

The purpose is vague, has insufficient value or is of indeterminable value for the community[59]

65. A purpose that is vague or ambiguous cannot be characterised as a charitable purpose.

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

Purposes which may be charitable in certain circumstances

Political purposes[60]

67. There is no general doctrine in Australia which excludes a charity from having political purposes.[61]

68. Following the High Court's decision in *Aid/Watch*:

- an entity can be charitable if it has a purpose (including a sole[62] purpose) of generating public debate with a view to influencing legislation, government activities or government policy in relation to subject matters that come within one or more of the four heads of charity, as long as the ends to be achieved are not inconsistent with the rule of law and the established system of government;

[55] See *Central Bayside* (2006) 228 CLR 168; [2006] HCA 43 at paragraph 40.
[56] See paragraph 5 of this Ruling.
[57] See *Central Bayside* (2006) 228 CLR 168; [2006] HCA 43 at paragraph 39.
[58] See paragraph 5 of this Ruling.
[59] See Explanation from paragraph 264 of this Ruling.
[60] See Explanation from paragraph 270 of this Ruling.
[61] *Aid/Watch* 2010 ATC 20-227; 77 ATR 195; [2010] HCA 42 at paragraph 48.
[62] See paragraph 5 of this Ruling.

- whether generating public debate to influence legislation, government activities or government policy where the subject matter lies beyond existing heads of charity can be a charitable purpose under the fourth head will be decided on a case by case basis. Arguably, all government activity or policy is intended to be 'beneficial to the community' but this does not mean generating public debate about any government activity or policy will be charitable. The subject matter to which the debate is directed will still need to either come within the spirit and intendment of the preamble to the Statute of Elizabeth (and this is usually established by analogy to existing charitable purposes) or be deemed charitable by legislation applying for that purpose (see paragraph 10 of this draft Ruling). However, it is expected that the subject matter of many areas of government activity or policy would fall under one of the first three heads of charity or the already established charitable purposes under the fourth head, and where they do, a purpose of generating public debate about that activity or policy will be charitable. Examples of purposes that have been held to be charitable under one of the four heads of charity are in Appendix 2 from paragraph 292 of this Ruling;
- an entity does not necessarily have to present a balanced position in order to be considered an entity with a purpose of generating public debate: it could express a singular point of view about a subject matter that comes within one of the four heads of charity; and
- direct lobbying of parliamentarians does not of itself have the element of public debate which was essential to the decision in *Aid/Watch*. Therefore, it will be more difficult for an institution with an independent purpose of direct lobbying in relation to government activities or policy about subject matters related to one of the four heads of charity to show that such a purpose will be beneficial to the community under the fourth head of *Pemsel.*

69. Political parties and activities associated with political parties such as electioneering are not charitable.

70. However, if the purpose of an organisation is otherwise charitable, its status will not be affected by non-charitable political activities that are no more than incidental to its sole[63] charitable purpose.

[63] See paragraph 5 of this Ruling.

Examples

71. Each of the examples below addresses the application of particular principles in determining whether an entity is a charitable institution for the purposes of income tax exemption. However, it is important to note that in order to qualify for any of the tax concessions that are available to charitable institutions, the institution must also be endorsed under the relevant endorsement provisions (for example a charitable institution seeking income tax exemption must be endorsed as exempt from tax under Subdivision 50-B of the ITAA 1997). The endorsement provisions are not considered in the examples or the Ruling.

Example 1 – Institution

72. *Ex Trust is established to acquire and maintain a hall for the purpose of leasing it to various religious organisations within the community. To this end, a hall is acquired by the trustees of Ex Trust and let at commercial rates. The trustees themselves manage the property, and as part of this function they do minor repair work on the hall, prepare books of account, and organise hiring of the hall. They claim exemption from income tax for the trust on the basis that the trust is a charitable institution.*

73. The trust is not an institution. The only function of the trustees is to acquire and manage the hall in accordance with the terms of the trust deed – they have no other role. The fact that the organisations that hire the hall are religious organisations does not alter this outcome: Ex Trust is not involved in the operation of these organisations, but simply provides a facility that they can use. As Ex Trust is not an institution, it cannot be a 'charitable institution'.

Example 2 – Purposes beneficial to the community

74. *Women Engineers is a not for profit organisation with objects that provide for the development, advancement and promotion of females in various fields of engineering. The organisation also seeks to address the disadvantages experienced by females in engineering. Whilst membership of the organisation is limited to tertiary qualified female engineers, the purpose of advancing females in engineering is a purpose that is beneficial to the community as it is aligned to current social norms aimed at eliminating gender discrimination (as evidenced by anti-discrimination legislation) and is charitable in its technical legal sense.*

Example 3 – Incidental or ancillary to a charitable purpose

75. *Women Engineers (as in Example 2) also has in its objects the provision of a professional and social network for women engineers. In furtherance of this object, Women Engineers holds several social functions during the year that enable its members to network and meet with corporate leaders in various fields of engineering invited to those functions.*

76. Whilst these social functions benefit the members of Women Engineers, these benefits are considered incidental or ancillary to its charitable purpose. These particular social functions are in aid of, or furtherance of its charitable purpose of advancing and promoting women engineers in various fields of engineering and so Women Engineers has a charitable purpose.

Example 4 – Independent non-charitable purposes – not incidental or ancillary to a charitable purpose

77. *B Insured Ltd is a not for profit company limited by guarantee. Its object is the provision of health insurance services at a discounted family rate to current serving members of the Australian Defence Forces (ADF), recognising that the health care of active members of the ADF are provided by the ADF. B Insured Ltd can also offer health insurance services to the general public at market rates. It has actively sought business from the general public and it has established a market share.*

78. The purpose of providing health insurance services at the discounted family rate to current serving members of the ADF is beneficial to the community. This is on the basis that this object, by providing aid, comfort and encouragement to serving members and their families by relieving them of the concerns of extensive medical costs, benefits the safety and security of the country by promoting the efficiency of the ADF, and therefore is charitable in its technical legal sense. However, the provision of insurance services generally will not be beneficial to the community and therefore will not be charitable.

79. In this instance, B Insured Ltd's provision of insurance services generally is an independent non-charitable purpose which is not incidental or ancillary to its charitable purpose.

Example 5 – Commercial activities in furtherance of a charitable purpose

80. *S Enterprises Ltd has a purpose of encouraging the Christian faith by promoting or conducting evangelistic services and other religious gatherings, bible study for children and the production and distribution of evangelistic literature. S Enterprises Ltd itself does not undertake any of these activities. Instead, its objects state it is to carry on a commercial activity (selling musical instruments and recordings) to generate funds for S Campaigners, an unincorporated association that is an endorsed charity established for the advancement of religion. S Campaigners conducts religious services and other religious events.*

81. The fact that S Enterprises Ltd raises funds by commercial means will not detract from it being considered a charitable institution. Its commercial activities are merely a means to give effect to its charitable purpose.

Example 6 – Commercial activities not in furtherance of a charitable purpose

82. *Catering Pty Ltd is a catering company established for the profit of its shareholders. It is contracted by various charities at market rates to supply hot meals to the clients of those charities, being the disadvantaged and homeless in a particular region. Whilst the activities undertaken by Catering Pty Ltd are similar to those of a charity, its activities are carried on to generate a profit for shareholders and are not in furtherance of a charitable purpose.*

Example 7- Accumulation of profits consistent with charitable purpose

83. *S Enterprises Ltd's (as in Example 5) constitution contains a clause enabling its directors to reserve profits in order to maintain the company's property, to meet contingencies or for any other reason consistent with its charitable purpose. S Enterprises Ltd retains all of its profits for several years to finance an evangelical event which is scheduled to be held at the end of that period of accumulation.*

84. The accumulation of profits by S Enterprises Ltd to finance the scheduled evangelical event is consistent with its charitable purpose of encouraging the Christian faith.

Example 8 – Accumulation of profits not consistent with charitable purpose

85. *AAA Ltd's constituent documents indicate its purpose is the relief of poverty in Australia. They also contain a power enabling the company to retain profits. AAA Ltd operates retail food stores so that any profit made can be paid to charitable institutions. After several years whilst the stores have made profits, no funds have been transferred to any charitable institution and all profits have been retained. Minutes of Directors meetings of AAA Ltd for the relevant year indicate that profits are to be retained for expansion of the stores for at least a few more years and no plans have been made for any transfer of funds to be used for charitable purposes. In these circumstances the accumulation of profits is not consistent with charitable purposes in the relevant year.*

Example 9 – Surplus from commercial activities with surplus paid to member that is an endorsed charitable institution

86. *Q Limited is an institution that has as its purpose the advancement of the welfare of vision impaired young adults. Its objects include operating a transport service for the general public to raise funds for Q Vision Impaired Association (an endorsed charitable institution). Q Vision Impaired Association is the sole member of Q Limited and the constitution of Q Limited provides that no other members can be added.*

87. Q Limited is being operated for the charitable purpose of advancing the welfare of vision impaired adults. Its charitable status does not change because it pays its surplus to Q Vision Impaired Association.

Example 10 – Governmental purposes

88. *The constituent documents of Outback Foundation (Outback) state that its object is to provide specialist medical assistance to improve health in regional Australia.*

89. In line with a new government initiative aimed at improving regional health, the government entered into agreements to provide funding to Outback and other similar organisations, in addition to building up existing public facilities. As part of its agreement, Outback and other funding recipients must report periodically to the government for general governance purposes, as required in other government grant situations.

90. The provision of funding by the government enables Outback to advance its purpose of improving regional health care. Neither the periodical reporting requirements, nor the fact that Outback's purpose is shared by the government, mean that Outback is carrying out its activities on behalf of the government. Outback is still independently carrying out its own objects. Outback's existing charitable purpose of improving regional health care did not change into a governmental purpose when the government developed and implemented its new initiative.

Example 11 – Generating public debate

91. *Sports for All Incorporated (SFA Inc) has been established to promote the aim of obtaining more funding for professional sport so as to ensure that Australia is a leading force in international sporting competition. SFA Inc researches the effect of government funding programs on sporting achievements, publicises its reports and lobbies government. Although SFA Inc is generating public debate in the sense referred to in Aid/Watch it is not in relation to a subject matter which comes within one of the four heads of charity and therefore is not charitable in the technical legal sense*.

Date of effect

92. When the final Ruling is issued, it is proposed to apply both before and after its date of issue. However, the 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 Ruling (see paragraphs 75 to 77 of Taxation Ruling TR 2006/10).

Commissioner of Taxation
11 May 2011

Appendix 1 – Explanation

This Appendix is provided as information to help you understand how the Commissioner's preliminary view has been reached. It does not form part of the proposed binding public ruling.

93. The terms 'charity' and 'charitable' are used in various contexts in both the ITAA 1997 and the FBTAA. 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.[64] For fringe benefits tax purposes, subsection 57A(5) of the FBTAA provides an exemption for health promotion charities, and section 65J of the FBTAA grants a rebate of tax to a charitable institution. In addition, gift deductibility under Division 30 of the ITAA 1997 is provided in respect of various charities.

94. However, neither the ITAA 1936, the ITAA 1997 nor the FBTAA define these terms.

95. In the absence of a definition of 'charitable' in the legislation, the courts have periodically confirmed that it bears its technical legal meaning, rather than its ordinary or popular meaning, unless the context indicates otherwise. For example, in *Central Bayside* Gleeson CJ, Heydon and Crennan JJ said there is a general rule that, when used in a statute, the word 'charitable' bears its technical legal meaning unless otherwise indicated, and that:

> The general rule just mentioned has been accepted as the law in this country at least since the decision of the Privy Council in *Chesterman* v. *Federal Commissioner of Taxation* (1925) 37 CLR 317; [1926] AC 128; (1925) 32 ALR 9.[65]

[64] Although the term 'public charitable purposes' is used in section 50-5 of the ITAA 1997 with respect to funds, the phrase is synonymous with 'charitable purposes' and requires the same element of public benefit (*Ashfield Municipal Council v. Joyce and Ors* (1977) 51 ALJR 117 at 121-122; *Douglas and Ors v. Federal Commissioner of Taxation* (1997) 77 FCR 112 at 124; 97 ATC 4722 at 4731; (1997) 36 ATR 532 at 542).

[65] *Central Bayside* (2006) 228 CLR 168; [2006] HCA 43 at CLR 178 footnote 28; HCA paragraph 18 footnote 6.

Guide	
This Explanation covers:	
The Technical legal meaning of charitable	from paragraph 96
Charitable institution or fund	from paragraph 149
Charitable institution	from paragraph 151
Charitable fund	from paragraph 206
Purposes which are not charitable	
The purpose is to confer private benefits	from paragraph 212
The purpose is social, recreational or sporting	from paragraph 242
The purpose is illegal	from paragraph 248
The purpose is commercial	from paragraph 250
The purpose is governmental	from paragraph 256
The purpose is vague, has insufficient value or is of indeterminable value for the community	from paragraph 264
Purposes which may be charitable in certain circumstances	
Political purposes	from paragraph 270

Technical legal meaning of charitable

96. The ordinary meaning of charitable involves the concept of relief from poverty.[66]

97. The technical legal meaning of charitable is as defined in the statement of categories of charity in *Pemsel* 'by reference to the spirit and intendment of the preamble to the *Statute of Charitable Uses 1601* (Statute of Elizabeth).[67]

98. The technical legal meaning of charitable that is applied by Australian courts is one that has been developed by the courts of Australia and other countries with comparable jurisdictions. However, in *Word Investments* the High Court noted that the 'primary relevant line of authority' is that which is concerned with paragraph 23(e) of the ITAA 1936, the predecessor to sections 50-5, 50-50 and 50-110 of the ITAA 1997.[68]

[66] See *Chesterman v. Federal Commissioner of Taxation* (1925) 37 CLR 317.
[67] See *Central Bayside* (2006) 228 CLR 168; [2006] HCA 43 at CLR 178 footnote 28; HCA paragraph 18 footnote 6.
[68] *Word Investments* (2008) 236 CLR 204; [2008] HCA 55 at paragraph 17.

99. A purpose will come within the scope of the technical legal meaning of charitable if it is:

- within the spirit and intendment of the Preamble to the Statute of Elizabeth, or deemed to be charitable by legislation applying for that purpose (the charitable purpose requirement); and
- beneficial to the community, or deemed to be for the public benefit by legislation applying for that purpose (the public benefit requirement).[69]

Charitable purposes – the spirit and intendment of the Statute of Elizabeth

100. While it is necessary that a charitable purpose is of benefit or value, not every benefit or value can support the finding of a charitable purpose. That is, not every purpose that is of benefit to the community is necessarily charitable.[70]

101. To be charitable, a purpose must be within the 'spirit and intendment' of the Preamble to the *Statute of Charitable Uses 1601* (the 'Statute of Elizabeth').[71] This means that the purpose 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 satisfy the technical legal meaning of charitable.

102. The purposes in the Preamble to 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.

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[69] *The Royal National Agricultural and Industrial Association v. Chester and Ors* (1974) 48 ALJR 304; *Commissioner of Taxation v. The Triton Foundation* (2005) 147 FCR 362; [2005] FCA 1319.
[70] *The Royal National Agricultural and Industrial Association v. Chester and Ors* (1974) 48 ALJR 304; *The Incorporated Council of Law Reporting of the State of Queensland v. Federal Commissioner of Taxation* (1971) 125 CLR 659; 71 ATC 4206; (1971) 2 ATR 515.
[71] *The Royal National Agricultural and Industrial Association v. Chester and Ors* (1974) 48 ALJR 304 at 305-306.

103. These charitable purposes are commonly grouped, following the terminology used in *Pemsel*,[72] as the 'four heads of charity' being:

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

104. If a 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.[73] 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.

105. 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 sole[74] 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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[72] *The Commissioners for Special Purposes of the Income Tax v. Pemsel* [1891] AC 531; [1891-4] All ER Rep 28.

[73] See for example the discussion in *Commissioner of Taxation v. The Triton Foundation* (2005) 147 FCR 362; [2005] FCA 1319 at paragraphs 32 and 33, and in *Victorian Women Lawyers* (2008) 170 FCR 318; [2008] FCA 983 at paragraphs 147 and 148.

[74] See paragraph 5 of this Ruling.

106. However, it is not appropriate to use fanciful or unreal comparisons with decided cases or the Preamble to the Statute of Elizabeth. 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 Headmasters' Conference failed in its argument that its purposes were related to education and that, 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.

Deemed charitable purposes

107. State legislation that extends charitable status to various purposes does not affect the meaning of 'charitable' for Commonwealth taxation purposes. Only Commonwealth legislation that is intended to apply, and does apply, for Commonwealth taxation purposes will have this effect.

108. For example, some States have enacted legislation that 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 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 *Pemsel*. 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.

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 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.

109. The provision of child care services on a non-profit basis, and the provision of a rental dwelling under the National Rental Affordability Scheme by an entity that is endorsed as exempt from income tax, have been deemed to be charitable for the purposes of Commonwealth legislation.[75]

Child care services

110. The *Extension of Charitable Purpose Act 2004* states 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 FBTAA and other Commonwealth Acts.

111. 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.[76] 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.

112. 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'.[77] The charging of fees for the child care services will not be inconsistent with the non-profit requirement.

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[75] Sections 4 and 4A of the *Extension of Charitable Purpose Act 2004.*

[76] 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.

[77] At paragraph 1.12 of the Explanatory Memorandum to the Extension of Charitable Purpose Bill 2004.

113. 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 10 of this draft Ruling). For example, if the child care services were to be available only for children of employees of a particular employer, the difficulties discussed from paragraph 212 of this draft Ruling on private benefits would arise.

National Rental Affordability Scheme dwelling

114. The provision of a rental dwelling is deemed to constitute a charitable purpose if it is provided by an entity that is:

- endorsed as exempt from income tax under section 50-105 of the ITAA 1997
- an approved participant in the National Rental Affordability Scheme; and
- an 'allocation' (that is, the allotment of an entitlement to receive an incentive if certain conditions are satisfied) in relation to the dwelling has been made during the establishment phase of the Scheme.[78]

115. The provision of the dwelling has effect as a charitable purpose only during the incentive period for the allocation.[79]

116. The deeming provision applies from 1 July 2008.

Beneficial to the community

117. Charity is altruistic and intends social value or utility. An 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 – has two aspects: there has to be a value or benefit, and that value or benefit has to be for the community. Although the two aspects are not separate, they each have special features.

118. For a purpose to be beneficial to the community, it must offer a value or benefit that is of worth, advantage, utility, importance or significance. The value or benefit can be either tangible (such as accommodation provided by a hostel for the homeless) or intangible (like the moral benefits derived from prevention of cruelty to animals).

[78] Section 4A of the *Extension of Charitable Purpose Act 2004.*
[79] Subsection 4A(2) *Extension of Charitable Purpose Act 2004*.

119. 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.[80] Nor can it be harmful on balance.

120. Relevant factors in deciding whether a purpose is of sufficient value include community consensus, general notions of value and expert evidence. For example, in *Victorian Women Lawyers*, an association with the principal purpose of removing barriers and increasing opportunities for women in the legal profession in Victoria was accepted as a charitable institution. Having regard to the social norms reflected in anti-discrimination legislation in particular, the Association's purpose was considered to be beneficial to the community.[81]

121. The 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. A community consensus is not essential in finding a charitable purpose.[82]

122. 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 Anor* [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 there was no 'useful object to be served in foisting on the public this mass of junk'.[83] On the other hand, some benefits or values to the community are not scrutinised to such a degree. For example, spiritual benefits are not analysed to draw a distinction between one religion and another.[84]

123. The benefit need not be for the whole community, but it must be at least for an appreciable section of the public. It must not be to provide merely private benefits.

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[80] *Re Pinion (deceased); Westminster Bank Ltd v. Pinion and Anor* [1965] Ch 85; [1964] 1 All ER 890.
[81] *Victorian Women Lawyers* (2008) 170 FCR 318; [2008] FCA 983 at paragraph 148.
[82] *Everywoman's Health Centre Society (1988) v. Minister of National Revenue* [1992] 2 FC 52 at 68-9.
[83] *Re Pinion (deceased); Westminster Bank Ltd v. Pinion and Anor* [1965] Ch 85; [1964] 1 All ER 890 at 894; *Re Elmore (deceased)* [1968] VR 390.
[84] *In re Watson (deceased); Hobbs v. Smith and Ors* [1973] 3 All ER 678 at 688.

124. However, unlike other charitable purposes, the relief of poverty does not require a test of 'public benefit'. As long as the purpose is the relief of poverty, but not the relief of poverty of particular poor persons, it can be charitable even if the benefit is not public. For example, in *Dingle v. Turner* [1972] AC 601; [1972] 1 All ER 878, the House of Lords said at AC 623; All ER 888 that the dividing line between a charitable trust and a private trust 'lies where the Court of Appeal drew it in *In re Scarisbrick's Will Trusts; Cockshott v. Public Trustee and Ors* [1951] Ch. 622', which was that it 'depended on whether as a matter of construction the gift was for the relief of poverty amongst a particular description of poor people [charitable] or was merely a gift to particular poor persons, the relief of poverty among them being the motive of the gift [private]'.[85]

125. An entity's structure or objects will sometimes clearly indicate whether it intends community benefit. For example, the running of a company for the private 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.[86] On the other hand, a trust for 'the benefit of the people of Maryborough' is for the public benefit as the people of Maryborough would constitute a section of the public.

126. Where an entity's structure or objects do not clearly indicate whether it intends community benefit, it will be necessary to consider who it is intended to benefit, the ways in which they are to benefit, and the nature of the benefit or value.[87] It can be a matter of fact and degree as to whether a purpose is for the public benefit.

127. 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.[88] Likewise, for limits based on contractual relationships (for example, the employees of a particular employer)[89] and on membership of bodies that can admit or exclude members of the public.[90] 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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[85] *Dingle v. Turner* [1972] AC 601 at 617; [1972] 1 All ER 878 at 883.
[86] Subject to the discussion from paragraph 214 of this Ruling regarding distributions to owners or members that are themselves charitable.
[87] *Dingle v. Turner* [1972] AC 601; [1972] 1 All ER 878.
[88] *Re Compton; Powell v. Compton* [1945] 1 All ER 198.
[89] *Oppenheim v. Tobacco Securities Trust Co. Ltd and Ors* [1951] AC 296; [1951] 1 All ER 31.
[90] *In re Income Tax Acts (No 1)* [1930] VLR 211.

128. 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,[91] or sufferers of a particular disability or condition[92] – 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.[93]

129. 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.

130. 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.[94] 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,[95] by way of contractual right,[96] through common action for mutual gain,[97] or as part of carrying on a particular business,[98] then the

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[91] *In re Income Tax Acts (No 1)* [1930] VLR 211 at 223.

[92] *Thompson and Anor v. Federal Commissioner of Taxation* (1959) 102 CLR 315 at 321 per Dixon CJ.

[93] Viscount Simonds in *Inland Revenue Commissioners v. Baddeley and Ors* [1955] 1 All ER 525 at 534 and see also *Dingle v. Turner and Ors* [1972] AC 601 at 625; [1972] 1 All ER 878 at 889.

[94] *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 Ors; Far West Children's Health Scheme and Ors v. Perpetual Trustee Co. Ltd and Ors* [1967] 3 All ER 915 (hospital charging fees).

[95] 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 Ors v. Attorney-General* [1983] 1 All ER 288.

[96] *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).

[97] *Braithwaite v. Attorney-General* [1909] 1 Ch 510 (friendly society); *Re Trusts of Hobourn Aero Components Ltd's Air Raid Distress Fund; Ryan and Ors v. Forrest and Ors* [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).

[98] *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.[99] 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.

131. The purpose of providing a public 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 supermarket but that does not make the supermarket a charity.

132. Because charities act for the benefit of the public, 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. Similarly, in *Victorian Women Lawyers* the fact that members themselves may have benefited from the activities of the Association did not adversely affect the charitable purpose because the activities of the Association were 'plainly directed to the larger object and in many cases to a larger audience'.[100]

133. 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.[101]

[99] Purposes that are not charitable because private benefits are conferred are discussed from paragraph 212 of this Ruling.
[100] *Victorian Women Lawyers* (2008) 170 FCR 318; [2008] FCA 983 at paragraph 149.
[101] *London Hospital Medical College v. Inland Revenue Commissioners and Anor* [1976] 2 All ER 113.

134. Values or benefits are not limited to a closed or historical list. What constitutes a purpose that is beneficial to the community can change over time as needs are satisfied, new needs arise or views change. For example, in *Attorney-General (NSW) v. Sawtell and Anor*[102] the Supreme Court of New South Wales considered whether a bequest to organisations promoting the preservation of wildlife constituted a valid charitable trust. Holland J concluded that it did, saying at 205:

> ... the question whether a particular purpose is for the benefit of the community is necessarily a question of the time at which it has to be answered, because it is the knowledge, ideas, hopes, pleasures, needs, burdens and woes of a given society which determine where the welfare of its members lies and these things change over the years, sometimes with remarkable rapidity.

135. The public requirement is further illustrated for different types of benefit by the court decisions summarised from paragraph 292 in Appendix 2 to this Ruling.

Deemed public benefit

136. Institutions that have been deemed by legislation to have a purpose that is for the public benefit are:

- closed or contemplative religious orders that regularly undertake prayerful intervention at the request of members of the public; and
- open and non-discriminatory self-help groups.[103]

Closed or contemplative religious orders

137. 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 FBTAA and other Commonwealth Acts.

[102] [1978] 2 NSWLR 200.
[103] *Extension of Charitable Purpose Act 2004*.

138. 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'.[104] 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'.[105]

139. 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'.[106]

140. 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 institutions.

Self-help groups

141. An institution is for the public benefit to the extent that 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 FBTAA and other Commonwealth Acts.

142. 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;

[104] 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.

[105] At paragraph 1.21 of the Explanatory Memorandum to the Extension of Charitable Purpose Bill 2004.

[106] At paragraph 1.23 of the Explanatory Memorandum to the Extension of Charitable Purpose Bill 2004.

- all of its criteria for membership relate to its purpose; and
- its membership is open to any individual who satisfies the criteria.

143. Being an open and non-discriminatory self-help group does not mean, on its own, that the institution 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 institution is charitable, and it 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. These additional requirements are explained throughout this draft Ruling.

144. To satisfy the statutory definition of 'open and non-discriminatory self-help group', the institution must be established for the purpose of assisting individuals. The individuals 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.

145. 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.

146. 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 charitable in its technical legal sense. That is, the matter identified as the disadvantage or discrimination must be of a kind that is consistent with the meaning of charitable purpose.

147. The requirement of open membership looks to both the institution's rules and also to its reality and substance in light of what actually occurs. That is, it is not sufficient for an institution 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.

148. 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;[107]
- different classes of membership, with different rights, where the differences are for the sake of and consistent with the purposes;[108]
- 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.

Charitable institution or fund

149. The distinction between an institution and a fund is a significant one for the purposes of the tax provisions affecting charities, as the conditions for exemption under section 50-5 of the ITAA 1997 are different,[109] some tax concessions can only apply where the charity is a charitable institution,[110] and the features and circumstances that are taken into account in determining the purpose of a fund are not as extensive as those for determining the purpose of an institution.

150. The characterisation of a charity as an institution or a fund is a question of fact.

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[107] 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.

[108] 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. Alternatively, 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.

[109] These are explained in Taxation Ruling TR 2000/11.

[110] 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 FBTAA, 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.

Charitable institution

151. In *Stratton v. Simpson* (1970) 125 CLR 138, Gibbs J considered the meaning of 'institution' and said at 157-158:

> In its ordinary sense 'institution' means 'an establishment, organisation, or association instituted for the promotion of some object, especially one of public utility, religious charitable, educational etc' (The Shorter Oxford English Dictionary). It means, as was said in Mayor etc of Manchester v. McAdam, 'an undertaking formed to promote some defined purpose...' or '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'. Although its meaning must depend on its context, it would not ordinarily connote a mere trust'.

152. No particular structure is prescribed for charitable institutions. Some institutions take the form of corporations limited by guarantee, unincorporated associations or charitable trusts. A testator can found and endow an institution by their will.[111] The forming of an association and incorporation are not sufficient on their own.[112]

153. However, an institution is more than 'a structure controlled and operated by family members and friends': *Pamas Foundation (Inc) v. Commissioner of Taxation* (1992) 35 FCR 117; 92 ATC 4161; (1992) 23 ATR 189 (*Pamas*). In *Pamas* 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 institution, even if it has evolved from a small group of people who were not an institution at an earlier stage.[113]

154. Whether an institution exists will depend on the circumstances. Relevant factors include an entity's activities, size, permanence and recognition.

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[111] *Lemm v. Federal Commissioner of Taxation* (1942) 66 CLR 399 at 409-410 per Williams J.
[112] *Pamas Foundation (Inc.) v. Commissioner of Taxation* (1992) 35 FCR 117; 92 ATC 4161; (1992) 23 ATR 189.
[113] *Christian Enterprises Ltd v. Commissioner of Land Tax* (1968) 88 WN (Pt. 2) (NSW) 112 at 120.

155. Although an institution 'need not be a body corporate, and need not be restricted to bricks and mortar',[114] it must possess a quality or function which can justify it being categorised as an institution as opposed to, say, a 'mere trust'[115]. For example, a trust that simply provides money in order for charitable services or activities to be carried out by others is not an institution.[116] Nor is a trust where the role of the trustees is 'simply to apply the income of the trust in providing gifts and donations to such public charitable objects as they, in their discretion, determine'.[117] In *Commissioner of Land Tax (NSW) v. Joyce and Ors* (1974) 132 CLR 22; (1974) 5 ATR 32, 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 not to be an institution.[118] On the other hand, a trust that can be identified as carrying on activities or providing services relevant to its charitable purpose could be an institution[119]. Where a trust is not a charitable institution because the only function of the trustees is to manage trust property in accordance with the terms of a trust deed, the trust could still qualify as a charitable fund.

[114] *Trustees of the Indigenous Barristers' Trust v. Federal Commissioner of Taxation* (2002) 127 FCR 63; [2002] FCA 1474 at paragraph 26. See also *The Young Men's Christian Association of Melbourne v. Federal Commissioner of Taxation* (1926) 37 CLR 351 where Higgins J said at 361: 'The existence of a distinctive building is not, I think, essential to the word 'institution'.'

[115] See Stephen J in *Commissioner of Land Tax for the State of New South Wales v. Joyce and Ors* (1974) 132 CLR 22 at 32; (1974) 5 ATR 32 at 39-40; *Sargeants Charitable Foundation v. Chief Commissioner of State Revenue* 2005 ATC 4632; [2005] NSWSC 659 at paragraph 25.

[116] See *Trustees of the Indigenous Barristers' Trust v. Federal Commissioner of Taxation* (2002) 127 FCR 63; [2002] FCA 1474 and *Re SIM Australia as trustee for SIMAID Trust and Federal Commissioner of Taxation* [2007] AATA 1443; 2007 ATC 2243; (2007) 66 ATR 908; .

[117] *Trustees of the Allport Bequest v. FC of T* 88 ATC 4436 at 4441; (1988) 19 ATR 1335 at 1341.

[118] See also *Douglas and Ors v. Federal Commissioner of Taxation* (1997) 77 FCR 112; 97 ATC 4722; (1997) 36 ATR 532.

[119] See *Trustees of the Indigenous Barristers' Trust v. Federal Commissioner of Taxation* (2002) 127 FCR 63; [2002] FCA 1474 at paragraph 31.

156. The Privy Council provided some examples of what could constitute an institution: '... the charitable institutions exempted are those which are institutions in the sense in which boards of trade and chambers of commerce are institutions, such as, for example, a charity organisation society, or a society for the prevention of cruelty to children.'[120] Institutions accepted by the High Court in this and related contexts have included a university and a university college,[121] a publisher of law reports,[122] a YMCA,[123] a Boys' Brigade,[124] a home for aged women,[125] and an association of surgeons.[126]

Charitable purpose

157. For an institution to be a charitable institution, its only or its 'main or predominant or dominant' purpose (commonly referred to in this draft Ruling as its 'sole purpose') must be charitable, in the technical legal sense[127] and it cannot have any independent non-charitable purposes.

158. An institution with non-charitable purposes that are simply incidental or ancillary to a charitable purpose (as opposed to independent of it) can be charitable.[128]

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[120] *Minister of National Revenue v. Trusts and Guarantee Co Ltd* [1940] AC 138 at 149-150.
[121] *University of Birmingham and Anor v. Federal Commissioner of Taxation* (1938) 60 CLR 572; (1938) 5 ATD 63 (public educational institution).
[122] *The Incorporated Council of Law Reporting of the State of Queensland v. Federal Commissioner of Taxation* (1971) 125 CLR 659; 71 ATC 4206; (1971) 2 ATR 515 (charitable institution).
[123] *The Young Men's Christian Association of Melbourne v. Federal Commissioner of Taxation (*1926) 37 CLR 351 (religious institution).
[124] *Maughan v. Federal Commissioner of Taxation* (1942) 66 CLR 388 (public benevolent institution).
[125] *Lemm v. Federal Commissioner of Taxation* (1942) 66 CLR 399 (public benevolent institution).
[126] *Royal Australasian College of Surgeons v. Federal Commissioner of Taxation* (1943) 68 CLR 436; (1943) 7 ATD 289 (scientific institution).
[127] See *Word Investments* (2008) 236 CLR 204; [2008] HCA 55 at paragraph 17.
[128] See *Congregational Union of NSW v. Thistlethwayte* (1952) 87 CLR 375 at 442; *Word Investments* (2008) 236 CLR 204; [2008] HCA 55 at paragraph 17.

159. If an institution exists or operates for any independent purpose that is not a charitable purpose, it will not be a charitable institution even if its non-charitable purpose is secondary or minor in nature. For example, in *Navy Health*[129] a health fund established for armed services personnel and their dependants was not charitable because membership was also available to civilians. Jessup J said at paragraph 71:

> That such a group of persons, numerically minor though they were in the overall scheme of the applicant's operations, should be within the cohort of persons whom the applicant benefited does, in my view, demonstrate that the applicant had as an object the provision of health benefits to persons who fell outside the *Downing* principle. This object could not be described as ancillary or incidental in the sense explained above. The object was, I consider, a substantive and free-standing one on its own.

160. The assessment as to purpose is an ongoing one. In *Word Investments,* the High Court confirmed that in characterising an institution, consideration has to be given to the purpose for which it continues to be conducted, not just the purpose for which it was established.[130]

Main or predominant or dominant purpose

161. The courts have used various terms to explain the required purpose of a charitable institution. The terms used are not uniform and misunderstandings can arise.

162. When describing the character of a charitable institution, it is sometimes referred to as being 'exclusively' charitable, or for charitable purposes 'only', because it has no independent non-charitable purposes. When comparing charitable purposes with incidental purposes, the cases also refer to the charitable purpose as the 'dominant', 'main', 'predominant', 'prevailing', 'essential' or 'dominating' purpose. In *Word Investments* the High Court said at paragraph 17 (with reference to its decision in *Royal Australasian College of Surgeons v. Federal Commissioner of Taxation*[131]):

> In examining the objects [of an institution], it is necessary to see whether its main or predominant or dominant objects, as distinct from its concomitant or incidental or ancillary objects, are charitable.

[129] *Navy Health Ltd v. Federal Commissioner of Taxation* (2007) 163 FCR 1; [2007] FCA 931.
[130] *Word Investments* (2008) 236 CLR 204; [2008] HCA 55 at paragraph 34.
[131] (1943) 68 CLR 436; (1943) 7 ATD 289

163. Expressions like 'dominant' and 'main' can have different meanings in different legal contexts. In the context of the law relating to charities, it means that any other purposes are no more than 'incidental, subservient and ancillary, only lawfully to be pursued as conducive to promoting' the dominant purpose.[132] As explained in paragraph 157 the 'main or predominant or dominant purpose' is referred to as the 'sole purpose' in this draft Ruling to avoid confusion.

'Incidental or ancillary' purpose

164. As noted in paragraph 158 of this draft Ruling, a charitable institution may have purposes which, when viewed in isolation would be non-charitable, but which are only incidental or ancillary to its charitable purpose.

165. In the decision of the Federal Court in *Navy Health* Jessup J said at paragraph 65:

> When the courts have described objects of an institution as ancillary, incidental or concomitant to a main object, they have not meant that the lesser object was merely a minor one in quantitative terms. Rather, they have required that object not be of substance in its own right, but only to be something which tends to assist, or which naturally goes with, the achievement of the main object.

166. For the purposes of this draft Ruling, 'incidental or ancillary' means for the sake of, or in aid of, or in furtherance of, an institution's charitable purpose. It does not mean minor in quantitative terms. As long as these other purposes are wholly incidental or ancillary to fulfilling or furthering the institution's charitable purpose so that they are, in reality, only aspects of the charitable purpose, they will not affect the charitable status of the institution.[133]

167. Determining whether a purpose is incidental or ancillary involves questions of degree, judgment, proportion, impression and weight. It is not enough that the purpose might happen to further a charitable purpose: it must be genuinely for the sake of, in aid of, or in furtherance of, the charitable purpose.

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

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[132] *Stratton v. Simpson* (1970) 125 CLR 138 at 148 per Windeyer J.

[133] See *Congregational Union of New South Wales v. Thistlethwayte and Ors (*1952) 87 CLR 375 at 442 per Dixon CJ, McTiernan, Williams and Fullagar JJ; *Navy Health* (2007) 163 FCR 1; [2007] FCA 931; *Commissioner of Taxation v. The Triton Foundation* (2005) 147 FCR 362; [2005] FCA 1319.

Finding purpose

169. Finding an institution's purpose involves an objective weighing of all its features. These can include its constituent or governing documents, its activities, policies and plans, administration, finances, history and control, and any legislation governing its operation.[134]

Objects in constituent documents

170. An institution's constituent documents 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 draft Ruling, for consistency, they are described as objects.

171. The objects in the constituent documents of an institution and its activities which give effect to those objects are the starting point in determining whether an institution is charitable, and will commonly have the most weight. In *Word Investments*, the High Court said at paragraph 17:

> ... there is no reason to suppose that the tests laid down in the s 23(e) line of cases no longer apply in relation to the 1997 Act to companies like Word, which state objects in a memorandum. That is, it is necessary to examine the objects, and the purported effectuation of those objects in the activities, of the institution in question.

172. The objects in an institution's constituent documents can strongly indicate whether it is for a sole charitable purpose. That is, in expressing what an institution's purpose is, the most apt description will commonly be that found in the institution's objects. 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 states that the institution is solely for charitable purposes and the institution gives effect to them wholly in a charitable way for the public benefit, it will be a charitable institution.

173. Considered in isolation, some of an institution's objects might not be characterised as charitable. However, where the non-charitable objects are merely incidental or ancillary to its charitable purpose the institution can still be a charitable institution.

[134] For example, *Tasmanian Electronic Commerce Centre Pty Ltd v. Commissioner of Taxation* (2005) 142 FCR 371; [2005] FCA 439 and *Commissioner of Taxation v. The Triton Foundation* (2005) 147 FCR 362; [2005] FCA 1319.

174. 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.'[135] 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.

175. However, where a proper understanding of an institution's constitution indicates its non-charitable objects are independent rather than incidental or ancillary, it will not be a charitable institution. This could occur, for example, where the constitution provides that each of the objects is to be construed independently of any other, [136] although even in these instances, if the objects state a charitable purpose when read as a whole, those that taken separately are beyond that purpose may be read down as being within it.[137]

176. Where non-charitable objects are in fact independent of, rather than incidental or ancillary to, a charitable purpose, the fact that the non-charitable objects are minor or secondary or rarely applied is irrelevant. To be charitable, an institution's sole[138] purpose must be charitable, and any non-charitable objects can only be incidental or ancillary to this purpose.

177. 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 will be treated as powers and not objects.[139] For example, in *Word Investments* the company's memorandum of association contained a series of clauses listing what the High Court referred to as its purposes. Many of these had a religious focus, but others did not – for example, one subclause provided: 'To carry on any business or activity which may seem to the Company capable of being conveniently carried on in connection with the objects for which this Company is established'.

178. The High Court grouped the various clauses into two groups, concluding that when those in the first group were read as a whole 'each of them on its true construction states a charitable purpose', whilst those in the second group – including the clause quoted in paragraph 177 of this Ruling – did not amount to purposes. It said that 'the former can truly be described as purposes, while the latter are not to be construed as purposes at all, but rather as powers' and noted that the 'radical difference' between the matters listed in the first group and those listed in the second confirmed this view.

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[135] Per Dixon CJ, McTiernan, Williams and Fullagar JJ at CLR 442.
[136] *Re Hargreaves* [1973] Qd R 448.
[137] *Word Investments* (2008) 236 CLR 204; [2008] HCA 55 at paragraph 20.
[138] See paragraph 5 of this Ruling.
[139] See for example *Word Investments* (2008) 236 CLR 204; [2008] HCA 55 at paragraph 19.

Relevance of activities

179. It is also necessary to consider the activities of the institution. Where an institution has some objects which are not, on their face, charitable, its activities can help establish if these objects are simply incidental or ancillary to a charitable purpose rather than independent non-charitable objects.

180. For example, in *Royal Australasian College of Surgeons v. Federal Commissioner of Taxation* (1943) 68 CLR 436;(1943) 7 ATD 289, the issue was whether the College was a scientific institution.[140] The High Court considered the objects in the College's constituent document and its activities in order to determine whether the College's dominant purpose was advancing science. The objects were partly for the promotion of surgical knowledge and practice and partly for the promotion of professional interests. Its activities included holding conferences for surgeons to discuss and study surgical matters, providing a technical surgical library for members, publishing surgical journals, financing surgical research, conducting examinations for admission to fellowship of the College, and administering funds for research and 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 determined to be incidental to the dominant purpose of advancing science.

181. Where the constituent documents of an institution indicate it has a charitable purpose, it does not matter that its activities may not be intrinsically charitable. The enquiry in these circumstances centres on whether it can be said that the purpose of the institution is charitable and the activities that it carries on are carried on in furtherance of that charitable purpose rather than those activities being an end in themselves.

182. For example, in *Word Investments* a company at various times carried on an investment business and a funeral business to provide funds to another charitable institution to enable that other institution to undertake charitable activities. The High Court found that the company that carried on those businesses was itself a charitable institution. It said that the company was charitable because its purpose was charitable, and that it was simply using its powers to employ commercial methods to raise money for that charitable purpose:

> ... Word has only one group of objects – a group of objects of advancing religious charitable purposes. All other 'objects' which may seem to be outside that group are on their true construction either objects within that group, or powers to carry out objects within that group.[141]

[140] Under former paragraph 23(e) of the ITAA 1936.
[141] *Word Investments* (2008) 236 CLR 204; [2008] HCA 55 at paragraph 19.

183. This does not mean that an entity that carries on a commercial enterprise will be charitable simply because it gives some or all of its profits to a charitable institution.[142] The enquiry is always centred on whether the sole[143] purpose of the donor entity is charitable.

184. Nor does it mean that once an entity that carries on a commercial enterprise has been accepted as charitable, it will always be charitable. Its operations and circumstances could subsequently evolve in such a way that it would no longer be possible to say that this is the case. This could occur, for example, where profits from its commercial activities are continuously applied to further expand its business operations rather than to give effect to its charitable purpose so that, in effect, its commercial activities become an end in themselves rather than a means by which its objects are achieved.[144]

185. Where the purpose of an institution that carries on a commercial enterprise and gives its profits to other charitable institutions is charitable, the Commissioner will accept that the profits given to the other charitable institutions are applied for charitable purposes unless the institution knows or ought to have known that the institutions will misapply them or has misapplied them.[145]

186. Where the constituent documents of an institution indicate its purpose is charitable, but it undertakes activities that are inconsistent with it operating for its charitable purpose only, it will not be a charitable institution. For example, where an institution with a clearly charitable constitution for the advancement of education operates solely to advance the education of its controllers, it will not be a charitable institution. 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. On the other hand, activities that may be inconsistent with charity but are isolated or insignificant, or the unauthorised activities of an employee, should not affect the charitable status of an institution. As these examples illustrate, the issue is always whether – in substance and reality – the institution's purpose is charitable.

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[142] See *R v. The Assessors of the Town of Sunny Brae* [1952] 2 SCR 76.
[143] See paragraph 5 of this Ruling.
[144] Similar considerations arise where profits are accumulated – see the Explanation at paragraphs 202 - 204 of this Ruling.
[145] *Word Investments* (2008) 236 CLR 204; [2008] HCA 55.

187. Where an institution'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 institution 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 institution is not for charitable purposes only, its activities cannot make it charitable. For example, if an institution was set up for two separate purposes – caring in a public way for injured animals, and operating a boarding kennel for dogs – it would not be for charitable purposes only, even if it undertook no boarding kennel activities. 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.

188. Similarly, an institution is not charitable simply because it uses means that are commonly adopted by charity. 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.

189. A charitable effect or consequence flowing from an institution's purpose is also not, by itself, sufficient to show a charitable purpose. 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.

190. However, the 'natural and probable' consequence of objects and activities can help establish the purpose of an institution or fund. In *Word Investments*[146] the High Court said at paragraph 38 that 'the charitable purposes of a company can be found in a purpose of bringing about the natural and probable consequence of its immediate and expressed purposes, and its charitable activities can be found in the natural and probable consequence of its immediate activities'. This reflected the observations of MacDermott J in *Baptist Union of Ireland (Northern) Corporation Ltd v. Commissioners of Inland Revenue* (1945) 26 TC 335 at 348 that 'the charitable purpose of a trust is often, and perhaps more often than not, to be found in the natural and probable consequences of the trust rather than in its immediate and expressed objects'.

[146] (2008) 236 CLR 204; [2008] HCA 55

Other factors

191. Other factors may also be important. As a practical matter, the importance of factors beyond the objects in the constituent documents of an institution and its activities will vary with the circumstances.

192. Elements (other than the objects) in the constituent documents that can assist in determining an institution's purpose and should also be considered include the not for profit and winding up clauses, clauses governing who can benefit from the institution's activities, and clauses setting out powers such as the power to accumulate funds.

193. Operational 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.

194. An institution's operations and activities are relevant in applying the statutory extensions in respect of self-help groups[147] and religious orders[148] under the *Extension of Charitable Purpose Act 2004*, but not the provision of non-profit child care services[149] or the provision of rental accommodation under the National Rental Affordability Scheme by an entity that is endorsed as exempt from tax[150] (as these are deemed to be charitable purposes).

Purpose of a peak or similar body

195. 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. That is, the cases do not specify different principles for peak or similar bodies. It is recognised, though, that there will be factual differences between them and the charities they work with.

196. In *Ziliani and Anor v. Sydney City Council (Ziliani)*[151] a non-profit unincorporated association of show societies (which were themselves charities) was accepted as a charity. Its sole[152] purpose was considered to be the promotion of agriculture which is beneficial to the community and within the spirit and intendment of the Preamble to the Statute of Elizabeth, even though:

- its objects included activities of providing material and assistance on judging, keeping societies informed of other societies' activities; and

[147] See from paragraph 141 of this Ruling.
[148] See from paragraph 137 of this Ruling.
[149] See from paragraph 110 of this Ruling.
[150] See from paragraph 114 of this Ruling.
[151] (1985) 56 LGRA 58.
[152] See paragraph 5 of this Ruling.

- 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.[153]

Its other activities were considered ancillary and incidental to its charitable purpose.

197. To a similar end, in *Social Ventures Australia Limited v. Chief Commissioner of State Revenue* [2008] NSWADT 331 the New South Wales Administrative Decisions Tribunal held that a body whose objects were to 'improve the management and operational performance and to enhance the long term viability of charitable organisations by... providing educational mentoring and support services to charitable organisations' was itself a charitable institution. In reaching its decision, the Tribunal noted at paragraphs 49 and 50 that:

> the Applicant in this matter has in its constitution clear charitable purposes and carries out its activities directly with other public charities. The Applicant has been created by well-known public charities with objects to benefit charitable ventures. There are no private individuals or entrepreneurs as beneficiaries. All funds, other than those used to pay staff and other proper expenses of the Applicant are utilised for charitable purposes. It does not carry out any commercial activities for the whole community at large or in the 'abstract'. ...[t]he Applicant's activities are essentially to ensure that public charities function efficiently and effectively to help those in need and the disadvantaged. That must satisfy the requirement of benefit to the community or the public.

198. These cases illustrate that it is not necessary that a charity play a 'direct' role.[154] They show that a purpose can be for the public benefit even where the institution does not deal directly with members of the public. Also, the interrelation of the peak body and its members can help show a commonality of purposes, notwithstanding the different ways the bodies pursue them. In *Ziliani*, the objects of the association were viewed in light of the overall activities of the societies in characterising the association itself as a charity. For many peak bodies there will be a similar degree of integration and commonality of purpose.

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[153] *Commissioners of Inland Revenue v. Yorkshire Agricultural Society* [1928] 1 KB 611.

[154] 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 Anor 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 Ors* [1951] 1 All ER 528 (a rest home for nurses).

199. When considering peak and similar bodies, support activities that are integral to the carrying out of the overall charitable purposes can be merely ancillary and 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.[155]

Purpose may change over time

200. 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.[156] In *Word Investments,* the High Court make it clear that an assessment as to purpose requires consideration of the purpose for which an institution is conducted at the time of the assessment, not just when it was established. The Court said at paragraph 34 (quoting in part from *Cronulla Sutherland Leagues Club Limited v. Commissioner of Taxation* (1990) 23 FCR 82; (1990) 21 ATR 300; 90 ATC 4215):

> To avoid doubt in future, it should be noted that it would not be enough that the purpose or main purpose of an institution were charitable if in fact it ceased to carry out that purpose... provisions in the legislation exempting tax on annual income, have 'a periodic operation'; the statute 'directs the inquiry to a particular time, namely the year of income so that consideration must be given not only to the purpose for which the [institution] was established but also the purpose for which it is currently conducted'.

201. 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[157] – might cease any involvement with pigeon racing, amend its constitution and operate solely to provide public education and so become eligible to become a charitable institution.

Power to accumulate

202. An institution can be charitable even though it has a power to accumulate profits.

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[155] 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, et cetera; see Taxation Ruling TR 2005/22 Income tax: companies controlled by exempt entities.

[156] *Tasmanian Electronic Commerce Centre Pty Ltd v. Commissioner of Taxation* (2005) 142 FCR 371; 2005 ATC 4219; (2005) 59 ATR 10.

[157] *The Royal National Agricultural and Industrial Association v. Chester and Ors* (1974) 48 ALJR 304.

203. In *Word Investments* the High Court said at paragraph 22:

> a power to retain profits conferred on directors of a company which has charitable purposes cannot negate its character as a charitable institution. Its exercise, while it may delay the moment when assets are applied to charitable purposes, also increases the chance that more assets will eventually be so applied.

204. This does not mean that excessive or indefinite accumulation is acceptable. The charitable status of an institution for tax purposes is a year by year assessment. An institution that accumulates a significant proportion of its profits over a number of years needs to be able to show on a year by year basis that accumulation is still consistent with it having a charitable purpose

205. Relevant considerations include whether the institution has identified when and how its profits are to be applied to its charitable purpose and, if accumulation is to continue for an extended period, the reasons for this. An institution that accumulates all or most of its profits for a number of years may find it difficult to sustain that it is truly established for a charitable purpose.

Charitable fund

206. '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'[158] and 'a stock of money, esp. one set apart for a purpose'.[159] 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.[160]

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[158] *The Macquarie Dictionary*, [Multimedia], version 5.0.0, 1/10/01.
[159] *Australian Oxford Dictionary*, 1999 Oxford University Press, Melbourne Australia.
[160] See *Associated Provident Funds Pty Ltd v. FC of T* (1966) 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'.

207. These entities will not be institutions within the phrase 'charitable institution'. In *Trustees of the Allport Bequest v. FC of T* 88 ATC 4436; (1988) 19 ATR 1335 an organisation which was established by Act of Parliament was held not to be an institution where its only activities were to manage trust property and apply the income by donating to such other charitable organisations and objects as it determined.[161] In *Commissioner of Land Tax for the State of New South Wales v. Joyce and Ors* (1974) 132 CLR 22; (1974) 5 ATR 32, 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 not to be an institution.[162] 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:

> 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.

208. For a fund to be a charitable fund it must be established for charitable purposes. The charitable purposes must be the only purposes for which it is established. If a fund's deed allows it to be applied for purposes that are not charitable it is not a charitable fund.[163] Any objects (as distinct from powers) which, if viewed in isolation, would not be charitable, must be either able to be read down so as to be within one or more of the charitable objects or merely incidental to the charitable purposes of the fund.

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[161] *Trustees of the Allport Bequest v. FC of T* 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'.

[162] See also *Douglas and Ors v. Federal Commissioner of Taxation* (1997) 77 FCR 112; 97 ATC 4722; (1997) 36 ATR 532.

[163] *Compton and Ors v. Federal Commissioner of Taxation (*1966) 116 CLR 233 at 248.

209. The purpose of a charitable fund is found by reference to the terms of its constituent documents and any relevant legislation. Because of this, the activities carried on by the trustees subsequent to establishment are not relevant to establishing whether a fund is a charitable fund.[164] In this respect, charitable funds are different to charitable institutions as the activities of an institution can be relevant in determining its purpose. Nonetheless, the activities of a charitable fund are relevant for the purposes of income tax exemption because the fund must be applied for the purposes for which it was established.[165] Accordingly, if a fund is not being applied for its charitable purposes (for example it is 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.[166].

210. Each of the Australian States regulates the operation of trusts in their jurisdiction through Trust legislation. All jurisdictions have legislation which in effect 'severs' any non-charitable purposes from a mixed purpose trust to leave a valid charitable trust in respect of charitable purposes only.[167] These trusts are generally able to access Commonwealth taxation concessions on a basis of being endorsed as charitable funds (as long as the funds are applied only to the charitable purposes).

211. New South Wales, Victoria and South Australia also have legislation which in effect saves a trust which would otherwise be non-charitable because it has non-charitable Deductible Gift Recipient (DGR) purposes as well as charitable purposes (not all DGRs are charitable in the legal sense – for example, public hospitals are not charitable). Although these trusts are valid under state trust law they are not charitable for the purposes of Commonwealth taxation law. However, they can generally be endorsed as Income Tax Exempt funds[168] and if they are they will have access to Commonwealth taxation concessions.

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[164] *Douglas and Ors v. Federal Commissioner of Taxation* (1997) 77 FCR 112 at 119; 97 ATC 4722 at 4727; (1997) 36 ATR 532 at 538.
[165] Sections 50-5, 50-57,50-60 and 50-72 of the ITAA 1997.
[166] See Taxation Ruling TR 2000/11.
[167] *Charities Act 1978 (Vic)* section 7M; *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); *Trustees Act 1962 (WA)* subsection 102(1).
[168] An income tax exempt fund (ITEF) is a non-charitable fund established by will or instrument of trust solely for the purpose of providing money, property or benefits to income tax exempt deductible gift recipients (DGRs) or establishing DGRs. Refer to item 4.1 of section 50-20 of the ITAA 1997.

Purposes which are not charitable

The purpose is to confer private benefits

212. Leaving aside the relief of poverty (see paragraph 124 of this draft Ruling), a charitable purpose must be for the benefit of the community, or a section of the community. This requirement is explained from paragraph 117 of this draft Ruling. Particular features of an institution or fund that may raise doubt as to whether the public benefit requirement is satisfied include: where the owners or members of an institution can receive distributions from the institution; where the institution is run for the benefit of its members; where benefits are provided as part of a business-like or mutual arrangement; and where benefits are provided to people who are simply customers, contributors or subscribers.

213. However, the existence of private benefits that are merely incidental or ancillary to a public benefit will not by itself affect the charitable classification of a purpose.

Distributions to owners or members

214. An institution is not charitable if it is carried on for the purpose of private profit or gain to particular persons including its owners or members. This is known as the not for profit requirement. If an institution is carried on for the private 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 whether charitable consequences flow from the institution'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.[169]

215. The distinction between private profit and public benefit was commented on by Else Mitchell J in *McGarvie Smith Institute v. Campbelltown Municipal Council* [1965] NSWR 1641. In the course of considering whether the fact that the Institute sold vaccines it developed as a result of its research into animal disease meant it could not be charitable, he noted that many charitable institutions engaged in commercial transactions and said at 1647:

> Each such institution, provided it is carrying out one of the four classes of public purposes which are regarded as charitable in a legal sense, is none the less a charity and the fundamental reason why it is so treated is that there is no element or prospect of private profit. This, of course, is simply another way of saying that the trust or institution which is charitable has been created or established not with private persons or entrepreneurs as beneficiaries but with the object of benefiting the public generally; in other words the objects of the trust or institution are purposes, not persons.

[169] *Re Smith's Will Trusts; Barclays Bank Ltd v. Mercantile Bank Ltd and Ors* [1962] 2 All ER 563 at 567.

216. Institutions use various mechanisms to ensure they are not entitled to be carried on for the purposes of private profit or gain. The most common way is to include clauses in the constituent documents that prevent the institution from distributing its profits or assets for the benefit of particular persons while it is operating and on winding up (commonly called the 'non-profit' or 'not for profit' clauses). The courts have tended to regard these clauses as an essential aspect of the constituent documents.

217. For example, in *Cremation Society of Australia Ltd v. Commissioner of Land Tax (NSW)* [1973] 2 NSWLR 704 (*Cremation Society*), the Supreme Court of New South Wales considered whether a company limited by shares was exempt from land tax under the *Land Tax Management Act 1956 (NSW).* The legislation exempted land owned used and occupied for a public cemetery or crematorium from land tax. The company conducted a crematorium on land that it owned. In support of its contention that it operated a public crematorium, the company argued that there was no element of private profit in the conduct of its activities: although it was a company limited by shares, all its shares were held by a company limited by guarantee whose memorandum of association stated that dividends received could not be applied or distributed for any purpose other than the provision for the benefit of the public of cremation facilities. The Supreme Court did not accept that this meant there was no element of private profit in the activities of the Cremation Society of Australia Ltd. Else-Mitchell J said at 195:

> ... in the absence of some provision in the memorandum or articles of association of the appellant or the declaration of some trust by it or its directors In respect of the subject land, I am unable to accept the submission that the element of private gain has been excluded. The fact that the appellant is a company with a share capital which makes profits and distributes those profits as dividend to its shareholder must...be predominant and the restrictions on the dividends in the hands of the shareholder must be disregarded as irrelevant

218. In the decision of the Supreme Court of South Australia in *Repromed Pty ltd v. Lucas and Anor* (2000) 76 SASR 575 (*Repromed*), one of the issues considered by Debelle J was whether an incorporated proprietary company was an employer that provided health services 'otherwise than for the purpose of profit or gain'. He referred to *Theosophical Foundation Pty Ltd v. Commissioner of Land Tax* (1966) 67 SR(NSW) 70, where Sugerman JA had considered the meaning of the phrase 'not carried on for pecuniary profit' for the purpose of land tax exemption. Debelle J considered that the intent and meaning of the expression 'otherwise than for the purpose of profit or gain' was the same as 'not carried on for pecuniary profit' and at paragraph 35 referred with approval to Sugerman JA's comments that:

> The object is to accord exemption to those… whose profits, if any, are applied to the advancement of their objects and cannot find their way into the pockets of individuals. For instance, it is not, I think, required that a club, in order to gain exemption, should be carried on at a loss as regards its trading activities with its members or the paid services which it renders them, or should refrain from such activities and from charges to its members and rely for its support entirely upon membership subscriptions and donations.[170]

219. Debelle J concluded that an employer could not satisfy the requirement that it provide health services other than for the purpose of profit or gain if its constituent documents did not provide that profits could not find their way into pockets of individuals. Repromed Pty Ltd's constituent documents did not contain this constraint, so it could not satisfy this requirement. It did not matter that in the circumstances of the case, the ultimate beneficiary was in fact an educational institution.

220. Following the decisions in cases such as *Cremation Society* and *Repromed*, the constituent documents of a charitable institution should in most cases include appropriate clauses to constrain private profit. The ATO does not prescribe any form of words for this, because different institutions will have various legal and other requirements, besides charity status, affecting them.

221. In limited circumstances, it may be accepted that an institution is not for private profit even if its constituent documents do not contain these clauses. Examples are where a corporation is formed by statute and its provisions make the not for private profit nature clear, or where a trust is established by deed or will providing that the property can be used for charitable purposes only.

222. An institution's actions must be consistent with a prohibition on the institution's funds and assets finding their way to particular persons such as owners, their associates or nominees, or members, in a private capacity. Such distributions – whether made directly or by way of indirect means – are inconsistent with the institution not being carried on for the purpose of private profit or gain.

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[170] *Theosophical Foundation Pty Ltd v. Commissioner of Land Tax* (1966) 67 SR(NSW) 70 at p 85

223. However, distributions of profits (or the potential for distributions of profits) from a commercial activity to owners or members will not always result in a private benefit to the owner or member. In *Word Investments* the High Court concluded that a company limited by guarantee that gave its profits to a Christian missionary organisation and other similar organisations was a charitable institution. The recipients were not actually members of the company, but were closely related. The High Court held that an institution could be charitable even where it did not engage in charitable activities itself but instead made profits that were directed to charitable institutions which did engage in charitable activities. It said that no distinction should be drawn between a company limited by guarantee with charitable objects that operated two divisions to effect its charitable purpose, and a company limited by guarantee that had the same objects and made the same profits as the first but gave those profits to other organisations which spent them on those objects.[171]

224. On the basis of the decision in *Word Investments*, critical questions in circumstances similar to those considered in that case are whether the institution has charitable as opposed to purely commercial objects, and whether the application or distribution of profits is in furtherance of those charitable objects. The fact that the recipient could be an owner or member of the institution does not alter the characterisation of the institution as long as:

- the sole[172] purpose of the institution making the distribution is charitable;
- its constituent documents allow it to distribute its surplus or profit to another entity or entities in order to effect that sole[173] charitable purpose; and
- its constituent documents restrict potential recipients of the surplus or profit to charitable entities that have the same charitable purpose as the institution itself.

In these circumstances, the Commissioner will accept that the distribution of profit is not for the private benefit of the members or owners but for the benefit of the public generally.[174]

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[171] *Word Investments* (2008) 236 CLR 204; [2008] HCA 55 at paragraph 37.
[172] See paragraph 5 of this Ruling.
[173] See paragraph 5 of this Ruling.
[174] As charitable organisations with a company structure are commonly public companies limited by guarantee, it is likely that this position will have limited application, particularly given that the *Corporations Act 2001* has been amended to provide that a company limited by guarantee that is incorporated on or after 28 June 2010 cannot pay dividends to its members (section 254SA of the *Corporations Act 2001*). As pointed out by the High Court in *Federal Commissioner of Taxation v. Cappid Pty Ltd* (1971) 127 CLR 140; 71 ATC 4121;(1971) 2 ATR 319 companies limited by shares which are trading for profit are generally carried on for the purpose of the profit or gain of their owners (CLR at 155; ATC at 4124; ATR at 323).

225. However, as noted at paragraph 183 of this draft Ruling, an institution that carries on commercial activities will not be charitable simply because it distributes some or all of its profits to an entity that is a charitable institution.[175] For example in both *Cremation Society* and *Repromed*, the non-profit character of the ultimate recipient of the profits did not determine the character of the entity itself.

Benefits for members

226. If an institution is set up to advance the interests of its members it is not charitable. The members of this type of institution do not, as members, constitute a section of the public in the relevant sense.[176] Professional or occupational associations are unlikely to be charitable,[177] but this is not invariably the case.[178]

227. 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; or
- where the member benefits are provided by an open and non-discriminatory self-help group.

[175] See also *Commissioner for ACT Revenue Collections v. Council of the Dominican Sisters of Australia* 91 ATC 4602; (1991) 22 ATR 213. *Cremation Society of Australia Ltd v. Commissioner of Land Tax (NSW)* [1973] 2 NSWLR 704.
[176] *In re Income Tax Acts (No. 1)* [1930] VLR 211.
[177] *Re Mason (deceased)* [1971] NZLR 714 (law society); *Re Mead's Trust Deed; Briginshaw and Ors v. National Society of Operative Printers and Assistants and Anor* [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).
[178] See paragraph 231 of this Ruling.

228. 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 institution.[179] Benefits are ancillary benefits if they are conferred merely as a means to help carry out an institution's charitable purpose.[180] Incidental benefits may accrue from the activities undertaken to carry out the institution'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.

229. Because a charitable institution that falls within the definition of 'open and non-discriminatory self-help group' in the *Extension of Charitable Purpose Act 2004* is deemed to be for the public benefit, the fact that its members are likely to benefit in more than an ancillary or incidental way will not affect the charitable status of the institution.

230. Leaving aside the two situations noted in paragraph 227 of this Ruling, a purpose of providing benefits to members does not become charitable merely because a motivation of the institution has some social value, or, as a consequence of the institution's activities, some indirect benefit to the community occurs.[181] Making members' services available to paying customers (for example, to attend courses or use a library) does not cause a members' organisation to be charitable.

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[179] In *Victorian Women Lawyers* (2008) 170 FCR 318; [2008] FCA 983 , French J stated at paragraph 149 that the '...activities of the association, including the social and networking functions, may have benefited members. They were, however, plainly directed to the larger object and in many cases to a larger audience, the legal profession in Victoria. They were in aid of the principal objective...'.

[180] Bona fide remuneration for services provided (say, as an employee, contractor, office-holder or consultant) would not, of course, be inconsistent with a charitable purpose. Also, there may be a common charitable purpose among an organisation and its members. For example in *Ziliani* (1985) 56 LGRA 58 a council was 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.

[181] Situations such as these can be contrasted with *Ziliani*; see paragraph 196 of this Ruling.

231. 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 institution is charitable. The nature of the institution'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. [182] Similarly, in *Victorian Women Lawyers*, an association with the principal purpose of removing barriers and increasing opportunities for women in the legal profession in Victoria was accepted as a charitable institution, even though eligibility for ordinary membership of the association was restricted to persons admitted to practice or Law graduates.

232. Where an institution that is set up to advance its members' interests establishes an entity to carry out charitable activities, it is that entity, rather than the members' institution, that must be for the public benefit. The fact that the separate entity is established and controlled by the members' institution does not prevent this.

233. In re *Australian Institute of Management (Vic) and Commissioner of State Revenue (Vic)* 9 VAR 222; 95 ATC 2179, the Victorian Administrative Appeals Tribunal considered whether a training college established by the Australian Institute of Management (Vic) to carry out the educational activities the Institute had previously undertaken was established for educational purposes or as a support organisation for the benefit of its members. The constitution of the College provided that the affairs of the College were to be managed by a Committee of Trustees appointed by the Institute, comprised of office bearers of the Institute. In concluding that the College was established for educational purposes, the Tribunal considered factors such as the availability of the College's services to non-members, the objects of the College, the extent to which additional benefits available to members were actually used, and the Institute's access to the College's income and property. In *College of Law (Properties) Pty Ltd v. Willoughby Municipal Council* (1978) 38 LGRA 81 a College that conducted pre and post admission courses for the legal profession was accepted as having charitable purposes even though the College benefited solicitors who were all (at the time) members of the Law Society of NSW, had been established pursuant to a resolution of the Law Society of New South Wales, and had a director and a board of governors appointed by the Law Society.

[182] Similar considerations arose in *Royal Australasian College of Surgeons v. Federal Commissioner of Taxation* (1943) 68 CLR 436; (1943) 7 ATD 289.

234. Based in the reasoning the cases referred to in paragraph 233 of this Ruling, an entity established by an institution set up to advance its members interests can be accepted as being for the benefit of the community where:

- it has a separate identity to the members' institution;
- its income and property are not to be appropriated for individuals or for the members' institution while it is carried on or upon winding up;
- its activities are charitable; and
- the services it provides are not limited to members of the members' institution, and the availability of those services is effectively made known beyond that membership.

Business-like benefits are conferred

235. Decisions of various courts indicate that the advancement of industry, commerce or agriculture can be a charitable purpose,[183] 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 Preamble to the Statute of Elizabeth. In *Commissioners of Inland Revenue v. Oldham Training and Enterprise Council* (1996) 69 TC 231,[184] 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.

236. In *Hadaway v. Hadaway and Anor* [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.[185]

[183] *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.

[184] See also *Pigs Marketing Board (Northern Ireland) v. Commissioners of Inland Revenue* (1945) 26 TC 319.

[185] 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 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.

237. An institution 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,[186] a non-profit company operating a licensed hotel premises,[187] a company fund set up to remedy air-raid distress for employees who subscribed to it,[188] a company fund to which all employees subscribed for work injuries,[189] a company providing medical services to subscribers,[190] and a friendly society for girls educated at a particular school.[191]

Incidental or ancillary private benefits

238. Private benefits that are merely incidental to the carrying out of a charitable purpose will not detract from the charitable purpose. In *Commissioners of Inland Revenue v. White and Ors 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.

239. In *Victorian Women Lawyers*[192], the fact that members of the association may have benefitted from some of its activities did not prevent it from being accepted as a charitable institution. French J said at paragraph 149:

> The activities of the association, including the social and networking functions, may have benefited its members. They were, however, plainly directed to the larger object and in many cases to a larger audience, the legal profession in Victoria. They were in aid of the principal objective.

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[186] *The Hobart Savings Bank and The Launceston Bank for Savings v. Federal Commissioner of Taxation* (1930) 43 CLR 364 at 370.
[187] *Case No 92* 12 TBRD 749 and cf *Renmark Hotel Inc v. Federal Commissioner of Taxation (*1949) 79 CLR 10 where 'charity' was not argued before the High Court.
[188] *Re Trusts of Hobourn Aero Components Ltd's Air Raid Distress Fund; Ryan and Ors v. Forrest and Ors* [1946] 1 All ER 501.
[189] *Doust v. Attorney-General* (1904) 4 SR (NSW) 577.
[190] *Re Windsor Medical Services Inc* (1971) 2 OR 141.
[191] *Braithwaite v. Attorney-General* [1909] 1 Ch 510. See also *Cunnack v. Edwards* [1896] 2 Ch 679.
[192] See paragraph 228 of this Ruling.

240. Another example of incidental benefits is provided by *Commissioner of Taxation v. The Triton Foundation* 147 FCR 362; [2005] FCA 1319 (*Triton)* where the Foundation's main object was 'the promotion of a culture of innovation and entrepreneurship'. As well as broader programs (in schools, publicity and media exposure, self-assessment tools for inventors, and seminars), the Foundation was also 'visibly assisting innovators to commercialise their ideas'. Particular applicants selected by the Foundation could receive 'resource-intensive help' with commercialisation. However, the Court was satisfied that the services were available to the public without discrimination, and selection of inventors 'who were likely to be the best exemplars of innovation' was rational in keeping with the Foundation's main object of promoting an innovative and entrepreneurial culture 'to the public at large'.[193]

241. However, benefits will not be incidental or ancillary to a charitable purpose merely because a motivation of the institution has some social value (such as reducing unemployment) or, as a consequence of the institution's activities, some social value is enhanced (such as improving productivity).

The purpose is social, recreational or sporting

242. A purpose that is essentially social in nature is not charitable. Examples of institutions that have been held to have a purpose that is essentially social in nature are an institute to give social and other amenities to Welsh people in London,[194] a community centre providing for the cultural and social needs of Latvians in Melbourne,[195] and a hostel for entertaining distinguished foreign visitors.[196]

243. This conclusion is not altered by the fact that those concerned with the workings of an association have religious motives or sentiments.[197] Thus, a bequest for the establishment of a Roman Catholic boys club was not charitable.[198] 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.[199]

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[193] See also *Tasmanian Electronic Commerce Centre Pty Ltd v. Commissioner of Taxation* (2005) 142 FCR 371; 2005 ATC 4219; (2005) 59 ATR 10.
[194] *Trustees of Sir Howell Jones Williams' Trusts v. Inland Revenue Commissioners* [1947] 1 All ER 513.
[195] *Latvian Co-operative Society Limited v. Commissioner of Land Tax (Vic)* 3 VAR 242; 89 ATC 2042; (1989) 20 ATR 3641.
[196] *Re Corelli (deceased); Watt and Ors v. Bridge and Ors* [1943] 2 All ER 519.
[197] *Keren Kayemeth Le Jisroel Limited v. Commissioners of Inland Revenue* [1932] AC 650 at 657.
[198] *Attorney-General v. Cahill and Ors* [1969] 1 NSWR 85.
[199] *Re Wilson's Grant; Fidelity Trustee Co Ltd v. Johnson* [1960] VR 514.

244. A social element does not detract from a charitable purpose if it is merely incidental. In *Barralet and Ors v. Attorney-General and Ors* [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.

245. A recreational or sporting purpose is also not a charitable purpose, even if it may result in some benefit to the community. The following purposes have not been accepted as charitable: a cup to encourage the sport of yacht racing,[200] associations for rowing, swimming and amateur athletics,[201] cricket,[202] the sport of polo,[203] breeding of pigeons for racing,[204] angling,[205] fox-hunting[206] and for horse racing.[207] The purposes are not charitable, even though they may result in elements of benefit to the community.[208]

246. A sporting or recreational element does not detract from a charitable purpose if it is merely incidental.[209] 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.

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[200] *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.
[201] *Laing v. Commissioner of Stamp Duties* [1948] NZLR 154.
[202] *Re Patten; Westminster Bank v. Carlyon* [1929] All ER Rep 416.
[203] *Strathalbyn Show Jumping Club Inc. v. Mayes and Ors* [2001] SASC 73.
[204] *The Royal National Agricultural and Industrial Association v. Chester and Ors* (1974) 48 ALJR 304.
[205] *Re Clifford; Mallam v. McFie* [1911-13] All ER Rep 1284.
[206] *Peterborough Royal Foxhound Show Society v. Commissioners of Inland Revenue* [1936] 1 All ER 813.
[207] *Re Hoey* [1994] 2 Qd R 510.
[208] See for example *Chief Commissioner of State Revenue v. Northern NSW Football Ltd (RD*) [2010] NSWADTAP 28.
[209] *Lloyd and Anor v. Federal Commissioner of Taxation (*1955) 93 CLR 645 at 665.

247. Sporting or recreational purposes and 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.[210] 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.[211]

The purpose is illegal

248. If a purpose is either unlawful or a lawful purpose is to be carried out by unlawful means it is not charitable.[212] For example, a school for thieves might, in a sense, advance education, but it is not a charitable institution.[213]

249. The issue turns on purpose. The mere fact that an institution or its employee has breached a law would not, in itself, show that the institution has a non-charitable purpose. Instances of illegality in relation to occupational health and safety, employee entitlements and regulatory requirements would be unlikely to point towards a non-charitable purpose. Toward the other extreme would be a planned and coordinated campaign of violence.[214]

The purpose is commercial

250. If an institution has a purpose of carrying on a commercial enterprise to generate surpluses as an end in itself, it cannot be charitable. In re *Smith (deceased); Executor Trustee and Agency Co. of South Australia Ltd v. Australasian Conference Association Limited* [1954] SASR 151 (*Re Smith (deceased)*) a purpose of carrying on the manufacture and sale of vegetarian foods was contrasted with a charitable purpose:

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[210] *Inland Revenue Commissioners v. City of Glasgow Police Athletic Association* [1953] AC 380 at 391.
[211] For the similar approach of the Charity Commissioners for England and Wales, see *Decisions of the Charity Commissioners* Vol. 1 (August 1993) 4-13.
[212] *Auckland Medical Aid Trust v. Commissioner of Inland Revenue* [1979] 1 NZLR 382 at 395.
[213] *Re Pinion (deceased); Westminster Bank Ltd v. Pinion and Anor* [1964] 1 All ER 890 at 893; [1965] Ch 85.
[214] For examples, see our document *Charities – if unlawful actions occur* at www.ato.gov.au/nonprofit.

> On the one hand there is the establishment and conduct of sanatoriums, 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,[215] 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.[216]

251. The motives of the founders of an organisation could be relevant to determining its purpose, but will not be sufficient to convert what is, in light of all the other circumstances, simply a commercial purpose into a charitable purpose.[217]

252. *Re Smith (deceased)* was considered by the Full Federal Court in *Federal Commissioner of Taxation v. Word Investments Ltd* (2007) 164 FCR 194; [2007] FCAFC 171.[218] Allsop J (Stone J agreeing) distinguished the facts In re *Smith (deceased)* from those the Full Federal Court were considering. He noted in particular that the Court In re *Smith (deceased)* had accepted that the relevant memorandum provided for both charitable and non-charitable purposes whereas Word Investments Limited had only one purpose and that was a charitable purpose. Allsop J said at paragraph 27:

> There was no doubt that the motive behind the establishment of the healthy food company was religious ...There was no doubt that the profits were, in fact, used exclusively in aid of the teachings , activities and purposes of a religious kind. But the purposes...included all the purposes – the charitable purposes (building hospitals and sanatoriums) and the non-charitable purposes (manufacturing and selling health foods). The memorandum did not restrict the use of the profits to the charitable purposes. Ligertwood J saw the governing instrument as permitting activities (that is purposes) wider than those which were capable of being characterised as charitable.

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[215] *The Roman Catholic Archbishop of Melbourne v. Lawlor and Ors; His Holiness the Pope v. National Trustees, Executors and Agency Company of Australasia and Ors* (1934) 51 CLR 1.

[216] *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.

[217] See the comments of Beaumont J in *Cronulla Sutherland Leagues Club Limited v. Commissioner of Taxation* (1990) 23 FCR 82 at 116; 90 ATC 4215 at 4243; (1990) 21 ATR 300 at 331 and *Re Smith (deceased); Executor Trustee and Agency Co. of South Australia Ltd v. Australasian Conference Association Limited* [1954] SASR 151 at 159-160.

[218] The decision In re *Smith (deceased)* was not considered by the High Court in the subsequent appeal (*Word Investments* (2008) 236 CLR 204; [2008] HCA 55).

253. However, the conduct of activities which could be described as commercial or business-like can be compatible with a charitable purpose.

254. The issue turns on purpose.[219] An institution undertaking commercial or business-like activities can still be charitable if:

- the sole[220] purpose of the institution is charitable and it carries on a commercial enterprise to generate surpluses in order to further that charitable purpose. For example, in *Word Investments* the High Court accepted that a company had the charitable purpose of advancing religion even though it carried on an investment business and a funeral business. The High Court concluded that the company carried out its business activities to further its charitable purpose, rather than as an end in itself. The fact that the activities undertaken by the institution were not intrinsically charitable did not affect the characterisation of the institution as charitable;
- the commercial operations are merely incidental to the carrying out of the charitable purpose. Examples from the cases are a home for neglected boys that also provided training through its farm[221] and the promotion of temperance through the running of a canteen;[222]
- the activities undertaken by the institution are themselves intrinsically charitable but are being carried on in a way that is commercial. Examples from the cases are the preparation and sale of law reports,[223] the manufacture and sale of animal vaccines,[224] and providing cremation services;[225] or
- the institution holds passive investments to receive a market return to further its charitable purposes.[226]

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[219] See from paragraph 169 of this Ruling for factors relevant to determining purpose.
[220] See paragraph 5 of this Ruling.
[221] *Salvation Army (Victoria) Property Trust v. Fern Tree Gully Corporation* (1952) 85 CLR 159.
[222] *Trustees of the Dean Leigh Temperance Canteen v. Commissioners of Inland Revenue* (1958) 38 TC 315.
[223] *The Incorporated Council of Law Reporting of the State of Queensland v. Federal Commissioner of Taxation* (1971) 125 CLR 659; 71 ATC 4206; (1971) 2 ATR 515.
[224] *McGarvie Smith Institute v. Campbelltown Municipal Council* (1965) 11 LGRA 321.
[225] *Scottish Burial Reform and Cremation Society Ltd v. Glasgow City Corporation* [1967] 3 All ER 215.
[226] See *Word Investments* (2008) 236 CLR 204; [2008] HCA 55 at paragraph 22.

255. 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.[227] It is not possible to merely attribute charitable status to an entity on the basis that it is associated with a charity.[228] 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 (which ignores the features and circumstances of the relevant institution itself) is not appropriate.[229]

The purpose is governmental

256. Government departments, bodies and organisations are unlikely to be charitable institutions. They are simply performing a governmental responsibility. For example, In re *Cain (deceased); The National Trustees Executors and Agency Co of Australasia Ltd v. Jeffrey* [1950] VLR 382, a bequest made in favour of the Children's Welfare Department of the Victorian State Government was not 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.

257. More recently, a number of cases have considered whether a body performing functions on behalf of government could be a public benevolent institution. Although a charity is not synonymous with a public benevolent institution[230], similar considerations apply in determining whether a body performing government functions could be charitable. [231]

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[227] The relevant principles are usefully developed, albeit in the context of pay-roll tax, in *Commissioner for ACT Revenue Collections v. Council of the Dominican Sisters of Australia* 91 ATC 4602; (1991) 22 ATR 213. In *Word Investments,* the fact that the company gave its profits to closely related charities did not determine the company's status: instead, the High Court analysed the purpose of the company itself. An example under the Canadian income tax law is *Alberta Institute on Mental Retardation v. The Queen* [1987] 3 FC 286 where a fund-raising corporation had been set up by an association helping the mentally handicapped.

[228] Discussion of a claim to effectively attribute the character of associated bodies is provided in the land tax case of *Theosophical Foundation Pty Ltd v. Commissioner of Land Tax (NSW)* (1966) 67 SR (NSW) 20.

[229] See Taxation Ruling TR 2005/22 Income tax: companies controlled by exempt entities. It should be noted that the franking credit provisions in Part 3-6 of the ITAA 1997 may apply In relation to taxable for-profit companies, to provide a 'no-tax' result between the company and its charity owner.

[230] See Taxation Ruling TR 2003/5 - *Income tax and fringe benefits tax: public benevolent institutions.*

[231] See the comments of Kirby J in *Central Bayside* (2006) 228 CLR 168; [2006] HCA 43 at paragraph 133.

258. For example, in *Metropolitan Fire Brigades Board v. Federal Commissioner of Taxation* (1990) 27 FCR 279; 91 ATC 4052; (1990) 21 ATR 1137, it was held that the Metropolitan Fire Brigades Board of Queensland was not a public benevolent institution. At FCR 280; ATC 4,054; ATR 1139 Wilcox, Spender and Pincus JJ said:

> It is true that ordinary citizens and those organised into volunteer fire brigades (the existence of such brigades being recognised in the Fire Brigades Act) do some work of the same kind, as a matter of civic duty. That does not detract from the appellant's status as a body constituted, funded and controlled by government and performing functions on behalf of government. The notion that such a body fulfils the description 'public benevolent institution' seems a novel one.

259. The principle that a body performing functions on behalf of government could not be a public benevolent institution was applied in *Mines Rescue Board of New South Wales v. Federal Commissioner of Taxation* (2000) 101 FCR 91; 2000 ATC 4580; (2000) 45 ATR 85 and *Ambulance Service of New South Wales v. Federal Commissioner of Taxation* (2003) 130 FCR 477; 2003 ATC 4674; (2003) 53 ATR 391.

260. However, the fact that an organisation provides services which may have the effect of helping to achieve government policy objectives will not of itself indicate that the purpose of the organisation is governmental rather than charitable.

261. In *Central Bayside* the High Court considered whether a company established to help general practitioners work together to improve patient care was excluded from being a 'charitable body' for the purposes of state payroll tax exemption because of its relationship with government. The Commissioner of State Revenue (Vic) had denied the company exemption from payroll tax because he considered that it was so much under the control and influence of the government that it was actually furthering the objectives of government, rather than pursuing its own purposes.

262. In concluding that the company was a charitable organisation, the High Court considered whether the extent of governmental control and influence was such that the company was carrying out the government's purposes rather than its own. It said at paragraph 41:

> To carry out the object of the taxpayer might be said to assist the achievement of government policy, but it did not follow that the taxpayer's object had changed from improving patient care and health to achieving government policy. The taxpayer's object of improving patient care and health continued; all that happened was that it had seen entry into a beneficial agreement with the government as a means of achieving that object. Even if, by fulfilling its own purpose, the taxpayer performed 'the work or function of government', that did not prevent it from being a charitable body.

263. Where the sole[232] purpose of an institution is charitable, the fact that it relies substantially on government funding to pursue its charitable purpose does not detract from its characterisation as charitable.[233]

The purpose is vague, has insufficient value or is of indeterminable value for the community

264. 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 Ors* [1955] 1 All ER 525, land was conveyed to trustees for the moral, social and physical well-being of a community. The House of Lords held 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.

265. Other expressions that the cases have found too vague or imprecise include 'philanthropic' purposes,[234] 'benevolent' purposes,[235] 'patriotic purposes',[236] and 'benefit maintenance and advancement of youth'.[237]

266. A purpose that has insufficient value to the community is not charitable.[238] 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.[239]

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[232] See paragraph 5 of this Ruling.
[233] See for example *Central Bayside* (2006) 228 CLR 168; [2006] HCA 43 where the company was charitable even though more than 90% of its funding came from Commonwealth Government grants. Callinan J also noted at paragraph 181 that 'The appellant in this case was entirely voluntarily established. It is not, and has never been, part of a government department. It does not owe its existence to a statute. It is quite separate from government. It is a matter entirely for it whether it seeks government funds or subsidisation'.
[234] *Re MacDuff; MacDuff v. MacDuff* [1895-9] All ER Rep 154.
[235] *The Attorney-General of New Zealand v. The New Zealand Insurance Company Ltd and Ors* [1936] 3 All ER 888.
[236] *Attorney-General v. National Provincial and Union Bank of England and Ors* [1924] AC 262; [1923] All ER Rep 123.
[237] *Re Payne (deceased)* [1968] Qd R 287.
[238] *Re Hummeltenberg; Beatty v. London Spiritualistic Alliance* [1923] All ER Rep 49.
[239] *Re Elmore (deceased)* [1968] VR 390.

267. Benefits that are too indeterminate 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.

268. However, in *Triton* Kenny J considered the status of a foundation established to promote innovation and entrepreneurship in Australia and rejected the Commissioner's submission that the foundation's objects were too vague and imprecise and the benefit to the community (as distinct from individual investors) too remote. She said:

> Triton's objects and activities are designed, broadly speaking, to promote commercial activity of a particular kind, which Governments at State and Commonwealth levels apparently regard as beneficial, in various ways, to the inhabitants of their States and Australia. They are, moreover, of a kind that the law recognises as charitable.

269. If it cannot be determined whether or not a purpose will promote the public benefit, the purpose will not be charitable. For example, in *Southwood v. Attorney General* [2000] WTLR 1199; (2000) 150 NLJ 1017 the English Court of Appeal held that a trust for the advancement of education of the public on the subject of militarism and disarmament was not charitable because it could not be determined whether the trust's object of securing peace by demilitarisation promoted the public benefit. The Court noted that 'there are differing views as to how best to secure peace and avoid war', and that 'the court is in no position to determine that promotion of the one view rather than the other is for the public benefit'.

Purposes which may be charitable in certain circumstances

Political purposes

270. Organisations with a political purpose which is more than incidental and ancillary to a charitable purpose have been held by the Courts to not satisfy the technical legal meaning of 'charity'. This is referred to as the 'political purposes doctrine'. The rationale is that a Court is unable to determine whether such a purpose satisfies the public benefit requirement of a charity.

271. In *McGovern & Ors v. Attorney –General and Anor* [1981] 3 All ER 493, which considered whether Amnesty International was a charity, Slade J defined political purposes broadly to include:

- furthering the interests of a particular political party;
- procuring changes in the laws of the country or a foreign country;
- procuring a reversal of government policy in the country or a foreign country; and
- procuring a change in particular decisions of government authorities in the country or a foreign country.

272. In finding that Amnesty International was not a charitable organisation, Slade J emphasised the inability of the court as a matter of evidence to judge whether a proposed change to the law is for the public benefit and the court should not usurp the functions of the legislature.

273. Until the High Court's decision in *Aid/Watch* it was generally accepted that 'the political purposes doctrine' applied in Australia. In *Aid/Watch* the High Court considered whether an organisation whose purpose was to ensure that foreign aid was delivered in a particular way, and which aimed to influence government to this end, could be charitable. The organisation was concerned with promoting the effectiveness of Australian and multinational aid provided in foreign countries by means of improved investment programs, projects and policies. It researched 'generally in partnership with people that are recipients of aid and non-government organisations; it brought the issues it identified to light by publicly releasing the research reports and it campaigned for changes to the ways in which aid was delivered through media releases and public events designed to influence relevant agencies to alter the way aid programs are administered'.

274. The Full Court of the Federal Court had concluded that the organisation's concern with the effectiveness of aid delivery was clearly aimed at the relief of poverty, but that its attempts to persuade the government to its point of view and to bring about a change in government activity and policy was political activity, behind which was a political purpose. As a result, it held the organisation could not be charitable.[240]

275. On appeal, the High Court reversed this decision. The majority decided that 'in Australia there is no general doctrine which excludes from charitable purposes 'political objects' and has the scope indicated in England by *McGovern v. Attorney–General'.*[241]

276. The rejection of the 'political purposes doctrine' by the majority was based on the inconsistency between the doctrine and the system of law in Australia provided for by the Constitution. The provisions of the Constitution mandate a responsible and representative system of government. The majority of the High Court stated that:

> Communication between electors and legislators and the officers of the executive and between electors themselves on matters of government is 'an indispensable incident' of that constitutional system.[242]

277. They stated at paragraph 45:

> The system of law which applies in Australia ...postulates for its operation the very 'agitation' for legislative and political changes of which Dixon J spoke in *Royal North Shore Hospital*....It is the operation of these constitutional processes which contributes to the public welfare. A court administering a charitable trust for that purpose is not called upon to adjudicate the merits of any particular course of legislative or executive action or inaction which is the subject of advocacy or disputation within those processes.

278. The majority accepted the submissions of Aid/Watch Incorporated that the generation by it of public debate as to the best methods for the relief of poverty by the provision of foreign aid had two characteristics indicative of its charitable status.

279. The first characteristic was that its activities were apt to contribute to the public welfare, being for a purpose beneficial to the community within the fourth head identified in *Pemsel.*

280. The second characteristic was that '...whatever else be the scope today in Australia for the exclusion of 'political objects' as charitable, the purposes and activities of Aid/Watch do not fall within any area of disqualification for reasons of contrariety between the established system of government and the general public welfare'.[243]

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[240] *Federal Commissioner of Taxation v. Aid/Watch Inc* (2009) 178 FCR 4423.
[241] *Aid/Watch* 2010 ATC 20-227; 77 ATR 195; [2010] HCA 42 at paragraph 48.
[242] *Aid/Watch* 2010 ATC 20-227; 77 ATR 195; [2010] HCA 42 at paragraph 44.
[243] *Aid/Watch* 2010 ATC 20-227; 77 ATR 195; [2010] HCA 42 at paragraph 46.

281. The majority concluded that 'the generation by lawful means of public debate, in the sense described earlier in these reasons, concerning the efficiency of foreign aid directed to the relief of poverty, itself is a purpose beneficial to the community under the fourth head of charity'.[244] For this reason they found it unnecessary to rule on the submissions of the Commissioner that the Full Court should have found that the main or predominant objects of Aid/Watch Incorporated were too remote from the relief of poverty or advancement of education under the first or head second heads of *Pemsel.*

282. The majority did not consider it necessary to decide whether the encouragement of public debate about **any** government activity could be charitable under the fourth head in *Pemsel*. They said at paragraph 48:

> It also is unnecessary for this appeal to determine whether the fourth head encompasses the encouragement of public debate respecting activities of government which lie beyond the first three heads (or the balance of the fourth head) identified in *Pemsel*...

283. Whether generating public debate about a particular government activity or policy that lies beyond existing heads of charity can be a charitable purpose under the fourth head will be decided on a case by case basis. Arguably, all government activity or policy is intended to be 'beneficial to the community' but this does not mean generating public debate about any government activity or policy will be charitable. The subject matter of the debate will still need to either come within the spirit and intendment of the preamble to the Statute of Elizabeth (and usually established by analogy to existing charitable purposes) or be deemed charitable by legislation applying for that purpose (see paragraph 10 of this draft Ruling). However, it is expected that the subject matter of many areas of government activity or policy would fall under one of the first three heads of charity or the already established charitable purposes under the fourth head, and where they do, a purpose of generating public debate about that activity or policy will be charitable. Examples of purposes that have been held to be charitable under one of the four heads of charity are in Appendix 2 from paragraph 292 of this Ruling.

284. More generally, they also confirmed that there could be instances where, as Dixon J said in *The Royal North Shore Hospital of Sydney v. Attorney- General (NSW)*[245], purposes that might otherwise seem to come within one of the four heads in *Pemsel* do not contribute to the public welfare, but said that this would be:

> by reason of the particular ends and means involved, not disqualification of the purpose by application of a broadly expressed 'political objects' doctrine.[246]

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[244] *Aid/Watch* 2010 ATC 20-227; 77 ATR 195; [2010] HCA 42 at paragraph 47.
[245] (1938) 60 CLR 396
[246] *Aid/Watch* 2010 ATC 20-227; 77 ATR 195; [2010] HCA 42 at paragraph 49.

285. The use of illegal means such as bribery to achieve an end, and ends that are against public policy (for example the promotion of anarchy) are examples of 'ends and means' that would disqualify a purpose on the basis that it does not contribute to the public welfare.

286. Following the decision in *Aid/Watch*, an entity with a purpose of generating public debate regarding government policy, activities or legislation directed towards subject matters that come within one of the four heads of charity can still be charitable.[247] This is on the basis that public debate on these matters is itself beneficial to the community under the fourth head and therefore a charitable purpose.

287. An entity that promotes a particular point of view may still be considered to be 'generating public debate' in the sense referred to by the High Court

288. The majority of the High Court did not provide specific guidance on whether direct lobbying of parliamentarians would fall within 'generating public debate' or whether that concept is limited to more indirect activities of educating and persuading the public. However, it will be more difficult for an institution with an independent purpose of direct lobbying of parliamentarians to be able to show that such lobbying will be beneficial to the community on a similar basis to that referred to in paragraph 283 of this Ruling and therefore charitable. Direct lobbying does not in itself have the element of public debate which was essential to the majority decision in *Aid/Watch*.

Party political

289. The decision in *Aid/Watch* has not changed the view that political parties and activities directly associated with political parties such as electioneering are not charitable. As Dixon J said in *The Royal North Shore Hospital of Sydney v. Attorney- General (NSW)*:[248]

> ... where funds are devoted to the use of an association of persons who have combined as a political party or otherwise for the purpose of influencing or taking part in the government of the country, it is evident that neither the good intentions nor the public purposes of such a body can suffice to support the trust as charitable.

Political or lobbying activities which are merely incidental

290. If the purpose of an organisation is otherwise charitable, its status will not be affected by non-charitable political activities that are no more than incidental to the charitable end. [249]

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[247] This assumes that any other purposes the entity has are either charitable or no more than incidental or ancillary to a charitable purpose.
[248] 60 CLR 396 at 426.
[249] See for example *Victorian Women Lawyers' Association v. Federal Commissioner of Taxation* (2008) 170 FCR 318; 2008 ATC 20-035; (2008) 70 ATR 138

291. For example an institution with a sole[250] charitable purpose could seek to persuade members of the public to vote for or against particular candidates or parties in an election for public office, or distribute material designed to underpin a party political campaign, provided the activity was no more than incidental to its sole[251] charitable purpose.

[250] See paragraph 5 of this Ruling.
[251] See paragraph 5 of this Ruling.

Appendix 2 – Court decisions on the 'four heads of charity'.

This Appendix provides a summary of various court decisions on the technical legal meaning of charitable.

Summary of court decisions

292. 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 intended as 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.[252] Nonetheless, the discussion below provides an indication as to the range of purposes that have been accepted as charitable, and the sort of issues that can arise for different types of charity.

Relief of poverty

293. The relieving of poverty is a charitable purpose. The persons to benefit need not be destitute or on the border of destitution.[253] 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.[254] 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.[255] The ways in which poverty can be relieved include providing money, accommodation,[256] legal or medical aid. The charging of fees need not be inconsistent with a purpose of relieving poverty.[257]

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[252] 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.'

[253] *Re Gillespie (deceased)* [1965] VR 402 at 406.

[254] *Ballarat Trustees Executors and Agency Company Limited v. Federal Commissioner of Taxation* (1950) 80 CLR 350.

[255] *Joseph Rowntree Memorial Trust Housing Association Ltd and Ors v. Attorney-General* [1983] 1 All ER 288 at 295.

[256] *Re Niyazi's Will Trusts* [1978] 1 WLR 910; [1978] 3 All ER 785.

[257] *Re Cottam's Will Trusts; Midland Bank Executor and Trustee Co. Ltd and Anor v. Huddersfield Corporation and Ors* [1955] 1 WLR 1299; [1955] 3 All ER 704.

294. Purposes of relieving poverty have been accepted as charitable where those to benefit were poor relatives,[258] poor members of an association[259] and poor employees of an employer.[260] 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 Ors* [1972] 1 All ER 878; [1972] AC 601.[261]

Relief of the needs arising from old age

295. 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.[262] 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.[263] 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.

Relief of sickness and distress

296. 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.

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[258] *In re Scarisbrick's Will Trusts; Cockshott v. Public Trustee and Ors* [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.

[259] *Re Young's Will Trusts; Westminster Bank Ltd v. Sterling and Ors* [1955] 1 WLR 1269; [1955] 3 All ER 689.

[260] *Dingle v. Turner and Ors* [1972] 1 All ER 878; [1972] AC 601.

[261] As applied in Australia by *In re Hilditch, deceased (*1986) 39 SASR 469.

[262] *Hilder v. Church of England Deaconess' Institution Sydney Ltd and Ors* [1973] 1 NSWLR 506 at 511.

[263] *D v. Bryant Trust Board v. Hamilton City Council* [1997] 3 NZLR 342.

297. 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,[264] hearing or speech impaired people,[265] people suffering mental affliction[266], people who are sick[267], underprivileged people[268] and orphaned children.[269] The types of institutions that are charitable because they provide relief to the sick public include hospitals,[270] convalescent homes[271] and sanatoria.[272]

298. It is necessary that any purpose of relieving sickness or distress must be for the benefit of the public. In *Waterson and Ors 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.'[273]

[264] *Re Inman (deceased)* [1965] VR 238.
[265] *The President, Councillors and Ratepayers of the Shire of Nunawading v. The Adult Deaf and Dumb Society of Victoria* (1921) 29 CLR 98.
[266] *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.
[267] *Taylor and Anor v. Taylor and Ors* (1910) 10 CLR 218.
[268] *Salvation Army (Victoria) Property Trust v. Fern Tree Gully Corporation* (1952) 85 CLR 159.
[269] *The Attorney General for New South Wales v. The Perpetual Trustee Company Limited and Ors (*1940) 63 CLR 209.
[270] *Le Cras v. Perpetual Trustee Co Ltd and Ors; Far West Children's Health Scheme and Ors v. Perpetual Trustee Co. Ltd and Ors* [1967] 3 All ER 915.
[271] *Inland Revenue Commissioners v. Trustees of Roberts Marine Mansions* (1927) 43 TLR 270.
[272] *Kytherian Association of Queensland and Anor v. Sklavos* (1958) 101 CLR 56.
[273] *Waterson and Ors v. Hendon Borough Council* [1959] 2 All ER 760 at 764.

Advancement of education

299. 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,[274] training in aviation,[275] technical education,[276] training in the construction industry,[277] commercial education,[278] economic and sanitary science,[279] the arts of social intercourse,[280] the study of law,[281] a school of archaeology,[282] study of natural history,[283] scientific study of obstetrics and gynaecology[284] and a kindergarten.[285]

300. The support of the educational activities of charitable schools and colleges has also been accepted as charitable. Examples include providing scholarships[286] and professorships.[287]

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[274] *Re Tyrie (deceased)* [1970] VR 264.
[275] *In re Lambert (deceased)* [1967] SASR 19.
[276] The *Royal North Shore Hospital of Sydney v. Attorney-General for New South Wales and Ors* (1938) 60 CLR 396.
[277] *Barclay & ors v. Treasurer of Queensland* 95 ATC 4496; (1995) 31 ATR 123.
[278] *Re Koettgen (deceased); Westminster Bank Ltd and Anor v. Family Welfare Association Trustees, Ltd and Ors* [1954] 1 All ER 581.
[279] *Re Berridge; Berridge v. Tune (*1890) 90 LT 55.
[280] *Re Shaw's Will Trusts; National Provincial Bank Ltd v. National City Bank Ltd and Ors* [1952] 1 All ER 49.
[281] *College of Law (Properties) Pty Ltd v. Willoughby Municipal Council* (1978) 38 LGRA 81; *Smith v. Kerr* [1902] 1 Ch 774.
[282] *Re British School of Egyptian Archaeology; Murray and Ors v. Public Trustee and Ors* [1954] 1 All ER 887.
[283] *In re Benham* [1939] SASR 450.
[284] *McGregor v. Commissioner of Stamp Duties* [1942] NZLR 164.
[285] *Hixon v. Campbell and Ors* (1924) 24 SR (NSW) 436 and *Kindergarten Union of NSW Incorporated v. Waverley Municipal Council* (1960) 5 LGRA 365.
[286] *Re Weaver; Trumble v. Animal Welfare League of Victoria* [1963] VR 257; *Wilson v. Toronto General Trusts Corporation et al* [1954] 3 DLR 136.
[287] *Dorothea Yates v. University College, London and C.T.D'Eyncourt (*1874-5) 7 AC 438.

301. Objects and activities 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[288] and facilities,[289] school excursions,[290] the students union set up by a medical college,[291] the setting up of a rose garden in a university,[292] a student loan fund[293] and a fund to help students on the death of a parent.[294]

302. However, it is not sufficient that those objects or activities 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.

303. 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,[295] a police citizens boys club,[296] and a sea cadets branch.[297] 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.[298]

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[288] *Inland Revenue Commissioners v. McMullen and Ors* [1980] 1 All ER 884; *Kearins v. Kearins* (1957) SR (NSW) 286.
[289] *Re Mariette; Mariette v. Aldenham School Governing Body* [1914-15] All ER Rep 794.
[290] *Re Mellody; Brandwood v. Haden* [1916-17] All ER Rep 324.
[291] *London Hospital Medical College v. Inland Revenue Commissioners and Anor* [1976] 2 All ER 113. See also *Attorney-General v. Ross and Ors* [1985] 3 All ER 334.
[292] *McGrath and Anor v. Cohen and Ors* [1978] 1 NSWLR 621.
[293] *Guaranty Trust Company of Canada v. The Minister of National Revenue* [1967] SCR 133.
[294] *Educational Fees Protection Society Inc v. Commissioner of Inland Revenue* [1992] 2 NZLR 115.
[295] *The Boy Scouts Association, NSW Branch v. Sydney City Council* (1959) 4 LGRA 260; *Re Webber (deceased); Barclays Bank Ltd v. Webber and Ors* [1954] 3 All ER 712.
[296] *Greater Wollongong City Council v. Federation of New South Wales Police Citizens Boys' Club* (1957) 2 LGRA 54.
[297] *Lloyd and Anor v. Federal Commissioner of Taxation* (1955) 93 CLR 645.
[298] *Minahan and Anor v. Commissioner of Stamp Duties (NSW)* (1926) 26 SR (NSW) 480.

304. 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,[299] a college of surgeons,[300] a zoological society,[301] an institute of civil engineers,[302] museums,[303] art galleries,[304] a national trust for places of historic interest and national beauty[305] and a conference promoting international cooperation.[306]

305. An educative purpose has been contrasted with purely studious occupation, the former being charitable, the latter not.[307] Also, the charitable advancement of education does not encompass education in the sense that all experience is educative.[308]

306. 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 Ors* [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.

307. The advancement of education does not include indoctrination with the merits of a cause.[309] .

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[299] *Beaumont v. Oliveira* (1868-9) 4 LR Ch App 309.
[300] *Royal College of Surgeons of England v. National Provincial Bank Ltd and Ors* [1952] 1 All ER 984.
[301] *Re Lopes; Bence Jones v. Zoological Society of London* [1930] All ER Rep 45.
[302] *Institution of Civil Engineers v. Commissioners of Inland Revenue* [1932] 1 KB 149.
[303] *In re Allsop (deceased); Gell v. Carver* (1884) 1 TLR 4.
[304] *J.C. Abbott, J. Cowan and F. Torrance v. J. Fraser and Ors* (1874) LR 6 PC 96.
[305] *Re Verrall; National Trust for Places of Historic Interest or National Beauty v. Attorney-General* [1914-15] All ER Rep 546.
[306] *Re Koeppler's Will Trusts; Barclays Bank Trust Co plc v. Slack and Ors* [1985] 2 All ER 869.
[307] *Whicker v. Hume* [1843-60] All ER Rep 450.
[308] *Inland Revenue Commissioners v. Baddeley and Ors* [1955] 1 All ER 525 at 529.
[309] *Molloy v. Inland Revenue Commissioner (NZ)* (1977) 8 ATR 323.

Advancement of religion

308. The advancement of religion is a charitable purpose.[310] 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.[311] Religion covers major religions such as Christianity, Islam, Judaism, Buddhism and Taoism, and also Jehovah Witnesses,[312] the Free Daist Communion of Australia,[313] Scientology,[314] and indigenous religions. The categories of religion are not closed.[315]

309. 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.[316]
>
> 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.[317]

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[310] *The Roman Catholic Archbishop of Melbourne v. Lawlor and Ors; His Holiness the Pope v. National Trustees, Executors and Agency Company of Australasia and Ors* (1934) 51 CLR 1 at 32-33.
[311] *The Church of the New Faith v. The Commissioner of Pay-roll Tax (Victoria)* (1983) 154 CLR 120.
[312] *Appeal of Frank Gundy* (1944) 61 WN (NSW) 102.
[313] *The Free Daist Communion of Australia Limited v. Comptroller of Stamps* (Vic) 88 ATC 2001.
[314] *The Church of the New Faith v. The Commissioner of Pay-roll Tax (Victoria)* (1983) 154 CLR 120.
[315] Murphy J in *The Church of the New Faith v. The Commissioner of Pay-roll Tax (Victoria)* (1983) 154 CLR 120 at 151.
[316] *Keren Kayemeth Le Jisroel Limited v. Commissioners of Inland Revenue* [1931] 2 KB 465 at 477.
[317] 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.

310. The purpose must be directly and immediately religious.[318] 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.[319]

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

- **providing and maintaining facilities for worship:** building a church,[320] a gallery, organ seating and a bell in a church,[321] a window in a cathedral,[322] the erection of a tomb in a churchyard,[323] monuments in a church,[324] a church choir[325] and seating accommodation;[326]
- **supporting religious clergy:** maintaining sick and infirm priests,[327] assisting candidates for holy orders[328] and a fund to provide retirement annuities for pastors, evangelists and missionaries;[329]
- **missionary bodies:** the missionary establishment of a Christian body among heathen nations[330] and a church missionary society;[331] and

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[318] *The Roman Catholic Archbishop of Melbourne v. Lawlor and Ors; His Holiness the Pope v. National Trustees, Executors and Agency Company of Australasia and Ors* (1934) 51 CLR 1 at 32-33 per Dixon J.
[319] *The Roman Catholic Archbishop of Melbourne v. Lawlor and Ors; His Holiness the Pope v. National Trustees, Executors and Agency Company of Australasia and Ors (*1934) 51 CLR 1 at 32 per Dixon J. The examples provided are not an exhaustive list. Other ways religious charities might advance religion include publishing and selling their religious books and periodicals, providing aids to pastors to help carry out their pastoral missions, and operating conference centres to facilitate training, retreats and seminars for their religious projects.
[320] *Re Maclachlan; Maclachlan v. Campbell and Ors* (1900) 26 VLR 548.
[321] *Re Mitchner (deceased); Union Trustee Company of Australia and Anor v. Attorney-General for the Commonwealth of Australia and Ors* [1922] St R Qd 39.
[322] *Muir v. Archdall* (1918) 19 SR (NSW) 10.
[323] *Re Pardoe; McLaughlin v. Attorney-General* [1906] 2 Ch 184.
[324] *In re Sussanah D. Barker (deceased); Sherrington v. Dean and Chapter of St Paul's Cathedral and Ors (*1909) 25 TLR 753.
[325] *Re Royce; Turner v. Wormald and Ors* [1940] 2 All ER 291.
[326] *Re Raine (deceased); Walton v. Attorney-General and Anor* [1956] 1 All ER 355.
[327] *In re Forster; Gellatly v. Palmer* [1939] 1 Ch 22.
[328] *In re Williams; Public Trustee v. Williams* [1927] 2 Ch 283.
[329] *Baptist Union of Ireland (Northern) Corporation Limited v. The Commissioners of Inland Revenue* [1945] NILR 99.
[330] *The Commissioners for Special Purposes of the Income Tax v. Pemsel* [1891] AC 531; [1891-4] All ER Rep 28.
[331] *In the matter of the Clergy Society* (1856) 2 K & J 615.

- **religious associations:** the YMCA,[332] a religious retreat house open to the public,[333] a Sunday school association,[334] a Protestant alliance,[335] a religious community house[336] and a religious faith-healing movement.[337]

312. 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 227 to 232 of this draft Ruling). 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;[338]
- a gift of the residue of an estate for a member of the clergy to use in ways that are not necessarily charitable;[339]
- founding a Catholic daily newspaper;[340] and
- a company purchasing land and property for a Jewish homeland.[341]

[332] *City of South Melbourne v. Young Men's Christian Association of Melbourne* [1960] VR 709; *The Young Men's Christian Association of Melbourne v. Federal Commissioner of Taxation* (1926) 37 CLR 351.
[333] *Association of Franciscan Order of Friars Minor v. City of Kew* [1967] VR 732.
[334] *The King v. Special Commissioners of Income Tax; ex parte Essex Hall* [1911] 2 KB 434.
[335] *In re Delmar Charitable Trust* [1897] 2 Ch 163.
[336] *Re Banfield (deceased); Lloyd's Bank Ltd v. Smith and Ors* [1968] 2 All ER 276.
[337] *Re Le Cren Clarke (deceased); Funnell and Anor v. Stewart and Ors* [1996] 1 All ER 715.
[338] *Hoare v. Hoare* [1886-90] All ER Rep 553.
[339] *Dunne v. Byrne* [1911-13] All ER Rep 1105.
[340] *The Roman Catholic Archbishop of Melbourne v. Lawlor and Ors; His Holiness the Pope v. National Trustees, Executors and Agency Company of Australasia and Ors* (1934) 51 CLR 1. This was not to say, of course, that no newspaper could be religious and charitable. Rather, in the case there was no evidence that the proposed newspaper was to advance religion.
[341] *Keren Kayemeth Le Jisroel Limited v. Commissioners of Inland Revenue* [1932] AC 650.

313. A purpose involving religion is not charitable if the public benefit is absent.[342] For example, a scriptural college was not charitable where it was for the descendants of particular persons.[343] 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.[344] 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:[345]

> 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 ...[346]

Other charitable purposes under the 'fourth head' of charity

314. To qualify as a charitable institution under the fourth head, an institution must have a purpose that is both beneficial to the community and within the spirit and intendment of the preamble to the Statute of Elizabeth.[347] The following are cases where the Courts have accepted that the purposes are charitable under the fourth head of charity. The cases have been grouped into broad categories only to provide guidance on the range of purposes that have been considered under the fourth head. Each case must depend on its own facts, and the list is not exhaustive.

- **public works and utilities:** a library,[348] a museum,[349] a public hall,[350] a showground,[351] a botanical garden,[352] a cremation service,[353] a concert hall[354] and a recreation area for the public;[355]

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[342] Legislation deems some religious orders to be for the public benefit; see paragraph 125 of this Ruling.
[343] *Beatrice Alexandra Victoria Davies v. Perpetual Trustee Co. (Ltd) and Ors* (1959) 59 SR (NSW) 112.
[344] *Gilmour v. Coats and Ors* [1949] 1 All ER 848; [1949] AC 426.
[345] *Yeap Cheah Neo and Ors v. Ong Cheng Neo* (1875) LR 6 PC 381; *Ip Cheung-Kwok v. Sin Hua Bank Trustee Ltd and Ors* [1990] 2 HKLR 499.
[346] *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.
[347] See in particular paragraph 101 of this Ruling.
[348] *J.C Abbott, J. Cowan and F. Torrance v. J. Fraser and Ors* (1874) LR 6 PC 96.
[349] *Re Gwilym, deceased* [1952] VLR 282.
[350] *Monds v. Stackhouse and Ors (*1948) 77 CLR 232.
[351] *Brisbane City Council and Anor v. Attorney-General of Queensland* [1978] 3 All ER 30.
[352] *Townley v. Bedwell* (1801) 6 Ves 195.
[353] *Scottish Burial Reform and Cremation Society, Ltd v. Glasgow City Corporation* [1967] 3 All ER 215.
[354] *In re The Henry Wood National Memorial Trust; Armstrong and Ors v. Moiseiwitsch and Ors* [1966] 1 WLR 1601.
[355] *Burnside City Council v. Attorney-General of South Australia* (1992) 75 LGRA 145.

- **anti-discrimination:** working to remove barriers arising from gender based discrimination against women's' participation and advancement in the legal profession;[356]
- **disaster relief:** relief for flood victims,[357] relief of distress caused by war[358] and a lifeboat institution;[359]
- **culture:** drama and acting,[360] music,[361] choral singing,[362] portrait painting,[363] organ music[364] and an orchestra endowment fund;[365]
- **scientific and scholarly research:** the advancement of scientific research generally,[366] the improving of natural knowledge and improvement and diffusing of geographical knowledge,[367] research in Egyptology and archaeology,[368] research into finding the 'Bacon-Shakespeare' manuscripts,[369] and research into the theory of education;[370]

[356] *Victorian Women Lawyers' Association v. Federal Commissioner of Taxation* (2008) 170 FCR 318; [2008] FCA 983.
[357] *Re North Devon and West Somerset Relief Fund Trusts; Hylton (Baron) and Anor v. Wright and Anor* [1953] 2 All ER 1032.
[358] *Re Pieper (deceased); The Trustees Executors & Agency Co. Ltd v. Attorney-General (Vic.)* [1951] VLR 42.
[359] *Re Clarke (deceased); Bracey v. Royal National Lifeboat Institution* [1923] All ER Rep 607.
[360] *Re Shakespeare Memorial Trust; Earl of Lytton v. Attorney-General* [1923] All ER Rep 106.
[361] *Commissioners of Inland Revenue v. The Glasgow Musical Festival Association* [1926] SC 920.
[362] *Royal Choral Society v. Commissioners of Inland Revenue* [1943] 2 All ER 101.
[363] *Perpetual Trustee Co. Ltd v. Groth and Ors* [1985] 2 NSWLR 278.
[364] *Re Levien (deceased); Lloyds Bank Ltd v. Worshipful Company of Musicians and Ors* [1955] 3 All ER 35.
[365] *Re Municipal Orchestra Endowment Fund* [1999] QSC 200.
[366] *Taylor and Anor v. Taylor and Ors* (1910) 10 CLR 218.
[367] *Beaumont v. Oliveira* (1868-9) 4 LR Ch App 309.
[368] *Re British School of Egyptian Archaeology; Murray and Ors v. Public Trustee and Ors* [1954] 1 All ER 887.
[369] *Re Hopkins' Will Trusts; Naish and Anor v. Francis Bacon Society Incorporated and Ors* [1964] 3 All ER 46.
[370] *In the Estate of Schultz; Playford v. University of Adelaide and Ors* [1961] SASR 377.

- **promoting industry, commerce and agriculture:** horticulture,[371] agriculture,[372] craftsmanship,[373] research into wheat,[374] prevention of disease in cattle or sheep,[375] adoption of electronic commerce,[376] and promotion of a culture of innovation and entrepreneurship;[377]
- **defence and public order:** promoting efficiency in the armed forces[378] and police forces,[379] caring for dependants of veterans,[380] promoting defence of the country from hostile aircraft[381] and a repatriation fund for the benefit of returned soldiers;[382]
- **protecting animals:** a home for lost dogs,[383] an institution providing a home for starving cats,[384] and the Royal Society for the Prevention of Cruelty to Animals.[385] The purpose must either help animals or promote humane feelings in people by either caring for or preventing cruelty towards animals;[386]
- **environment:** preservation of native wild life both flora and fauna,[387] the improvement and protection of a river,[388] and the Australian Conservation Foundation;[389]

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[371] *In re Pleasants; Pleasants v. Attorney-General* (1923) 39 TLR 675.
[372] *Commissioners of Inland Revenue v. Yorkshire Agricultural Society* [1928] 1 KB 611.
[373] *Commissioners of Inland Revenue v. White and Ors and Attorney-General* (1980) 55 TC 651.
[374] *Freeman and Ors v. Attorney-General for New South Wales* [1973] 1 NSWLR 729.
[375] *McGarvie Smith Institute v. Campbelltown Municipal Council* (1965) 11 LGRA 321.
[376] *Tasmanian Electronic Commerce Centre Pty Ltd v. Commissioner of Taxation* (2005) 142 FCR 371; 2005 ATC 4219; (2005) 59 ATR 10.
[377] *Commissioner of Taxation v. The Triton Foundation* (2005) 147 FCR 362; [2005] FCA 1319.
[378] *Re Good; Harrington v. Watts* [1904-7] All ER Rep 476.
[379] *Chesterman v. Mitchell* (1924) 24 SR (NSW) 108.
[380] *Downing v. Federal Commissioner of Taxation* (1971) 125 CLR 185; 71 ATC 4164; (1971) 2 ATR 472.
[381] *In re Driffill (deceased); Harvey and Anor v. Chamberlain and Ors* [1950] 1 Ch 92.
[382] *Verge v. Somerville and Ors* [1924] AC 496.
[383] *Re Douglas; Obert and Ors v. Barrow* [1886-90] All ER Rep 228.
[384] S*wifte v. Attorney-General* [1912] 1 IR 133.
[385] *Re Inman (deceased)* [1965] VR 238.
[386] *Murdoch v. Attorney-General* (1992) 1 Tas SR 117. In *Perpetual Trustees Tasmania Ltd v. The State of Tasmania* [2000] TASSC 68 Slicer J made obiter comments that 'The rationale that in order to be charitable the terms of a trust must be of benefit to humankind can be accepted when the prevention of cruelty to animals, the prevention of the destruction of species, imbalance within the environment with the attendant harm to animals, are matters which enhance the life of humans.'.
[387] *Attorney-General (NSW) v. Sawtell and Anor* [1978] 2 NSWLR 200.
[388] *Kaikoura County v. Boyd* [1949] NZLR 233.
[389] Note that this is a decision of the Victorian Civil and Administrative Tribunal in *Australian Conservation Foundation Inc v. Commissioner of State Revenue* [2002] VCAT 1491.

- **indigenous persons:** aiding disadvantaged Aboriginals or Islanders,[390] developing radio and television programs relevant to native people and training native people as communication workers;[391]
- *moral improvement*: the study and dissemination of ethical principles,[392] promotion of temperance,[393] and an anthroposophical society;[394]
- *peace and human rights*: research into the observance of human rights,[395] and working for the elimination of war;[396] and
- *a locality or neighbourhood*: for the benefit of a city, town or district, for example, the beautification and advancement of a township.[397] 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.[398]

[390] *Aboriginal Hostels Ltd v. Darwin City Council* (1985) 75 FLR 197; *Flynn and Ors v. Mamarika and Ors* (1996) 130 FLR 218.
[391] *Native Communications Society of BC v. Minister of National Revenue* [1986] 3 FC 471.
[392] *Barralet and Ors v. Attorney-General and Ors* [1980] 3 All ER 918.
[393] *Re Hood; Public Trustee v. Hood* [1930] All ER Rep 215.
[394] *Re Price; Midland Bank, Executor and Trustee Co Ltd v. Harwood and Ors* [1943] 2 All ER 505.
[395] Obiter comments in *Webb v. O'Doherty* [1991] TLR 68.
[396] *Re Blyth* [1997] 2 Qd R 567 at 579-581.
[397] *Schellenberger v. The Trustees Executors and Agency Company Limited and Anor (*1952) 86 CLR 454.
[398] *Trustees of Sir Howell Jones Williams' Trusts v. Inland Revenue Commissioners* [1947] 1 All ER 513.

Appendix 3 – Comparison table

315. This Appendix provides a summary of the key differences between Taxation Ruling TR 2005/21 *Income and Fringe benefits tax: charities* and draft Taxation Ruling TR 2011/D2.

Note: it does not include editorial changes that have not altered the position explained in TR 2005/21, and changes that have been made to ensure that all conclusions of law are stated in the Ruling section.

TR 2005/21	TR 2011/D2
Paragraph 4 Contains a number of key terms used in the Ruling and their meaning.	**Paragraph 5** The terms 'harm prevention charity' and 'health promotion charity' have been removed from the definition paragraph as they are no longer considered significant for the purposes of the Ruling. The term 'charitable fund' has been removed as it is specifically defined at paragraph 39. The following new key terms have been added: • charitable purpose • public charitable purposes (drawn from the Explanation in TR 2005/21 – paragraph 31) • 'purpose' and 'objects' (drawn from the Explanation in TR 2005/21 – paragraph 159) • sole purpose • tax law
Paragraph 6 Advises of a change in approach from 1 July 2005 on the issue of whether charitable funds are taken to be rebatable employers for the purposes of section 65J of the FBTAA.	**No equivalent** The Commissioner's position on this has now been in operation for 5 years and the change referred to no longer requires specific mention.
Paragraphs 10 and 51 Where the charitable purpose is the relief of poverty, the public benefit requirement does not apply.	**Paragraph 124** This paragraph has been added to explain the relief of poverty exception to the public benefit requirement.

TR 2005/21	TR 2011/D2
Paragraph 14 The provision of child care services on a non-profit basis is deemed by legislation to be a charitable purpose.	**Paragraphs 14 and 114 -116** The provision of a rental dwelling under the National Rental Affordability Scheme is also deemed by legislation to be a charitable purpose.
Paragraphs 18-19 and 102–127 Political and lobbying purposes cannot be charitable	**Paragraphs 67-70 and 270–291** Following the decision in *Aid/Watch* there is no general doctrine in Australia which excludes a charity from having political purposes. An entity can be charitable if it has a purpose of generating public debate with a view to influencing legislation, government activities or government policy in relation to subject matters that come within one or more of the four heads of charity, as long as the ends to be achieved are not inconsistent with the rule of law and the established system of government. Whether generating public debate about a particular government activity or policy that lies beyond existing heads of charity can be a charitable purpose under the fourth head will be decided on a case by case basis. A charitable organisation's status is not affected by non-charitable political activities that are no more than incidental to the charitable end.
Paragraphs 20 and 128-129 A purpose of carrying on a business or commercial enterprise as such is not charitable. 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.	**Paragraphs 59, 181 – 184, and 253-254** The charitable status of an institution will not be affected by it carrying on a business or commercial enterprise to give effect to its charitable purpose (*Word Investments*).

TR 2005/21	TR 2011/D2
Paragraph 24 Trustees who simply administer trust property in accordance with a trust deed do not constitute an institution.	**Paragraphs 24 and 155** The Ruling maintains the position in TR 2005/21 but now specifies that in order for a trust to be considered an institution, some additional quality or function that gives the trust, when regarded as a whole, the character of an establishment organisation or association instituted for the promotion of an object, is required. An Example has been included at paragraphs 72 – 73.
Paragraphs 26 and 162 – 163 The purpose of a charitable institution is determined having regard to its constitution, any legislation governing its operation, its activities, history and control. Finding the purpose of an institution involves an objective weighing of all its features. The features of its constituent documents will be the starting point, and in normal situations will have the most weight.	**Paragraphs 29 – 31 and from 168** Whilst the purpose enquiry is an holistic one, the objects or objectives in the constituent documents of an institution, and its activities which give effect to those objects, are the main factors to be considered (following decisions such as that of the High Court in *Word Investments*).
Paragraph 27 Summarises the circumstances in which an institution will be accepted as charitable	**Paragraphs 25 and 36** The Ruling now makes it clear that the institution has to be both established and maintained for the relevant charitable purpose.
No equivalent	**Paragraphs 32 and 181 -183** An institution can be charitable even if its activities are not intrinsically charitable (*Word Investments*).
No equivalent	**Paragraphs 34 and 177 – 178** Items listed as objects in the constitutional documents of an organisation are sometimes no more than powers (*Word Investments*).

TR 2005/21	TR 2011/D2
No equivalent	**Paragraphs 37-38 and 202- 204** An institution with the power to accumulate funds can still be charitable.
Paragraphs 76 and 78 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. Distributions of funds and assets to persons such as members are inconsistent with the institution being not for profit.	**Paragraphs 46 and 214 – 225** An institution that carries out its activities for the private profit or benefit of its owners cannot be charitable. However, where the objects of an institution are charitable, the fact that it can distribute surpluses to owners or members in furtherance of those objects does not as a matter of course preclude it from being charitable, as long as certain conditions are met.
No equivalent	**Paragraphs 71– 91** Examples
Paragraphs 135-136 Government purposes are not charitable	**Paragraphs 62 – 64 and 256- 263** Although government purposes are not charitable, where the sole purpose of an institution is charitable, neither the fact that its services may have the effect of helping to achieve government policy objectives, nor the fact that it may rely substantially on government funding, will detract from its characterisation (*Central Bayside*). An institution that has a purpose that is the same as a government purpose can still be charitable, as long as it independently carries out its purpose.
Paragraph 153 The meaning of incidental or ancillary.	**Paragraphs 27 – 28 and 164-168** The meaning of incidental or ancillary is discussed by reference to the Federal Court's decision in *Navy Health* and *Triton*.

TR 2005/21	TR 2011/D2
No equivalent	**Paragraph 190** The 'natural and probable' consequences of the objects and activities of an institution can help establish its purpose *(Word Investments*)

Appendix 4 – Your comments

316. You are invited to comment on this draft Ruling. Please forward your comments to the contact officer by the due date.

317. A compendium of comments is also prepared for the consideration of the relevant Rulings Panel or relevant tax officers. An edited version (names and identifying information removed) of the compendium of comments will also be prepared to:

- provide responses to persons providing comments; and
- publish on the ATO website at www.ato.gov.au.

Please advise if you do not want your comments included in the edited version of the compendium.

Due date:	**24 June 2011**
Contact officer:	**Kathy Riley**
Email address:	**kathy.riley@ato.gov.au**
Telephone:	**(08) 8208 1086**
Facsimile:	**(08) 8208 1898**
Address:	**Australian Taxation Office** **91 Waymouth Street** **ADELAIDE SA 5000**

Appendix 5 – Detailed contents list

318. The following is a detailed contents list for this draft Ruling:

References

Previous draft:

Not previously issued as a draft

Related Rulings/Determinations:

TR 2000/11; TR 2003/5;
TR 2005/22; TR 2006/10

Previous Rulings/Determinations:

TR 2005/21

Subject references:

- Charitable organisations
- Charitable trusts
- Charities
- FBT charitable institutions and the promotion and prevention of disease in humans
- Fringe benefits tax
- Health promotion charities
- Income tax
- Income tax exempt charities
- Public benevolent institutions

Legislative references:

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- Corporations Act 2001 254SA
- Extension of Charitable Purpose Act 2004 4
- Extension of Charitable Purpose Act 2004 4A
- Extension of Charitable Purpose Act 2004 4A(2)
- Extension of Charitable Purpose Act 2004 5
- Extension of Charitable Purposes Act 2004 5(2)
- FBTAA 57A
- FBTAA 57A(5)
- FBTAA 65J
- FBTAA 123D(1)
- ITAA 1936 23(e)
- ITAA 1997 Div 30
- ITAA 1997 30-20(1)
- ITAA 1997 30-20(1) item 1.1.6
- ITAA 1997 30-45(1)
- ITAA 1997 30-45(1) item 4.1.4
- ITAA 1997 30-45(1) item 4.1.5
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- ITAA 1997 Subdiv 50-B
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- ITAA 1997 50-5
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- ITAA 1997 50-5 item 1.5A
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Case references:

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- Ambulance Service of New South Wales v. Federal Commissioner of Taxation (2003) 130 FCR 477; 2003 ATC 4674; (2003) 53 ATR 391
- Appeal of Frank Gundy (1944) 61 WN (NSW) 102
- Ashfield Municipal Council v. Joyce and Ors (1977) 51 ALJR 117

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- Attorney-General v. Cahill and Ors [1969] 1 NSWR 85
- Attorney-General v. National Provincial and Union Bank of England and Ors [1924] AC 262; [1923] All ER Rep 123
- Attorney-General v. Ross and Ors [1985] 3 All ER 334
- Auckland Medical Aid Trust v. Commissioner of Inland Revenue [1979] 1 NZLR 382
- Australian Conservation Foundation Inc v. Commissioner of State Revenue [2002] VCAT 1491
- Ballarat Trustees Executors and Agency Company Limited v. Federal Commissioner of Taxation (1950) 80 CLR 350
- Baptist Union of Ireland (Northern) Corporation Ltd v. Commissioners of Inland Revenue (1945) 26 TC 335; [1945] N Ir LR 99
- Barclay & ors v. Treasurer of Queensland 95 ATC 4496; (1995) 31 ATR 123
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- Beatrice Alexandra Victoria Davies v. Perpetual Trustee Co. (Ltd) and Ors (1959) 59 SR (NSW) 112
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- Commissioner of Land Tax for the State of New South Wales v. Joyce and Ors (1974) 132 CLR 22; (1974) 5 ATR 32
- Commissioner of Taxation v. The Triton Foundation (2005) 147 FCR 362; [2005] FCA 1319
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- Crystal Palace Trustees v. Minister of Town and Country Planning [1950] 2 All ER 857
- Cunnack v. Edwards [1896] 2 Ch 679
- D v. Bryant Trust Board v. Hamilton City Council [1997] 3 NZLR 342
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- Everywoman's Health Centre Society (1988) v. Minister of National Revenue [1992] 2 FC 52
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- Re Banfield (deceased); Lloyd's Bank Ltd v. Smith and Ors [1968] 2 All ER 276
- Re Benham [1939] SASR 450
- Re Berridge; Berridge v. Tune (1890) 90 LT 55
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- Re British School of Egyptian Archaeology; Murray and Ors v. Public Trustee and Ors [1954] 1 All ER 887

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- Re Douglas; Obert and Ors v. Barrow [1886-90] All ER Rep 228
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