Land, Rights, Laws: Issues of Native Title

NativeTitle Research Unit

Editor: Cynthia Ganesharajah **Volume 4**

November 2009 **Issue Paper No. 4**

'The Family Connection when a Charity is for the Advancement of Indigenous Peoples: Australia and New Zealand compared'

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Abstract

In both Australia and New Zealand various tax concessions are granted to entities that are considered 'charitable' or 'charities'. For example, in Australia s 50-1 of the Income Tax Assessment Act, 1997 (Cth) provides that the income of certain entities (which includes Australian charitable entities) is exempt from income tax. In New Zealand there are similar provisions in the Income Tax Act 2007 (NZ).

In order to be considered a charity under the general law the aims of the organisation must be for the public benefit or the benefit of a section of the public. The case law provides that this restriction is not met where the organisation is aimed at assisting members of the one family, in other words where the beneficiaries are connected through blood. Such a restriction can pose problems for Australian Indigenous groups, particularly land rights or native title claimants who are defined by a family or blood connection. In New Zealand several legislative amendments have been enacted to extend the meaning of charitable purpose and overcome this restriction.

This paper compares the Australian and New Zealand situations and considers the question of whether or not Australia should follow a similar path to New Zealand.

INTRODUCTION

The Australian tax system grants a variety of tax concessions to what are termed 'charities'. For example s 50-1 of the *Income Tax Assessment Act, 1997* (Cth) (the AITA) provides that the income of Australian charitable entities is exempt from income tax, supplies of accommodation by charities at less than market value are exempt from the goods and services tax and public benevolent institutions (a subset of charities) are eligible for certain fringe benefits tax exemptions. In New Zealand charities are also exempt from income tax under the *Income Tax Act 2007* (NZ) (the NZITA). These tax concessions can provide significant financial advantages to an entity that is able to claim this charitable status. There is, however, no definition of 'charity' in either the Australian or New Zealand legislation. Consequently the courts and the taxing authorities have relied on the common law for guidance on this issue. This is despite the fact that in 2001 there was an Australian Federal Government report recommending a statutory definition.[1]

Under the common law for a purpose to be charitable it must be for the benefit of the public or a significant section of the public (with the exception of charities for the relief of poverty).[2] As the original concept of 'charity' and 'charitable' was established for the purposes of income tax exemption by the English courts over 100 years ago[3] the interests of Indigenous people were not contemplated. This paper considers the application of the common law definition of charity to entities for the benefit of Australian Indigenous peoples and their Maori counterparts. It discusses in particular how the courts have applied the requirement of public benefit to such entities and how the common law provides that an organisation cannot attain charitable status if the beneficiaries are linked through a personal relationship such as family. This has serious consequences for holders of native title who are part of the same family grouping. In New Zealand the tax legislation has been amended to overcome this problem and it is suggested that the Australian Government consider amending Australian tax legislation.

I. 'CHARITY' AS A LEGAL CONCEPT

Although the words 'charity' and 'charitable' have a common or everyday meaning[4] for the purposes of revenue they have a technical legal meaning which has been developed over many centuries by the English and Australian Courts.[5] The Preamble to the *Charitable Uses Act 1601*[6] set out a list of what were considered charitable purposes at that time which included relief of the aged, impotent and poor, maintenance of sick and maimed soldiers and mariners and schools and scholars in universities. This list was never meant to be exhaustive[7] and of course the rights of Indigenous peoples were not a consideration.

By 1891 the English courts (in *Pemsel's* case) had formulated the concept of a charitable purpose as a purpose that should (a) be for the public benefit and (b) fall within one of the following categories:

- for the relief of poverty;
- for the advancement of education;
- for the advancement of religion; or
- for other purposes beneficial to the community.[8]

The classification of charitable purpose into these four areas has since been consistently used in judicial considerations.[9] Subsequent Australian cases have largely affirmed the principle that for an organisation to be

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[1] Australian Government, *Report of the Inquiry into the Definition of Charities and Related Organisations*, Charities Definition Inquiry, Australian Government, June 2001.
[2] *Re Compton; Powell v Compton* [1945] 1 Ch 123 (Lord Greene MR).
[3] *Commissioner for Special Purposes of Income Tax v Pemsel* [1891] AC 531, 583 (Lord Macnaghten).
[4] *Commissioners for Special Purposes of Income Tax v Pemsel* [1891] AC 531, 583 (Lord Macnaghten).
[5] For example refer *Commissioners for Special Purposes of Income Tax v Pemsel* [1891] AC 531, 583 (Lord Macnaghten); *Re Hilditch deceased* (1986) 39 SASR 469, 475 (O'Loughlin J); *Alice Springs Town Council v Mpweteyerre Aboriginal Corporation* (1997) 139 FLR 236, 251-252 (Mildren J).
[6] 43 Eliz I c4.
[7] H Picarda, *The Law and Practice Relating to Charities*, LexisNexis Butterworths, UK, 3rd ed, 1999, p 72. See also, F M Bradshaw, *The Law of Charitable Trusts in Australia,* Butterworths, Sydney, 1983, p 2.
[8] *Income Tax Special Purposes Commissioners v Pemsel* [1891] All ER Rep 28, 55; [1891] AC 531, 583.

charitable it must not only fall within one of the four divisions discussed in *Pemsel's* case, but it must also be founded for the benefit of the public.[10] The exception to this is a line of cases that indicate that charities for the relief of poverty do not need to satisfy such a strict test of public benefit.[11]

II. THE APPLICATION OF THE PUBLIC BENEFIT TEST IN AUSTRALIA

In Australia, to fall within the requirement of public benefit the purpose of the charity must satisfy two aspects. Initially the object must convey an actual public benefit and secondly, it must be of benefit to the community or a sufficient section of the community.[12] Each of these elements will be discussed at a general level as well as in the context of native title and land rights.

Element 1: A Real or Substantial Public Benefit

In order to have an actual public benefit the entity's objectives must result in a real or substantial benefit although it is not limited to what is purely material.[13] For example, at common law the purposes of a group of cloistered and contemplative nuns was not considered charitable as the benefit of prayer and the example of pious lives was too vague and incapable of proof to be a benefit (although this has now been amended by statute).[14] Additionally, an entity is not for the benefit of the public if its aims are contrary to public policy,[15] unlawful or for a lawful purpose that is to be carried out by unlawful means.[16] Although it might be arguable that a school for thieves or criminals advances education it would not be for the public benefit.[17]

Organisations established for the advancement of Indigenous peoples may have a wide variety of objectives ranging from providing education, housing or other welfare services to establishing land rights and native title. Although an organisation established to enhance and promote traditional Indigenous culture can fall within the category of being a charity, in order to meet charitable status the benefit being provided must be a real and substantial benefit to the public.

The cultural, economic and legal disadvantage of Australia's Indigenous people has been recognised in a number of judicial decisions[18] and the furtherance of land rights for Indigenous people is seen by many as a means of overcoming these disadvantages.[19] In *Toomelah Co-operative Ltd v Moree Plains Shire Council*[20] the applicant was a community advancement society established under the *Co-operation Act 1923* (NSW). Although the case did not deal directly with an organisation established to manage native title interests Stein J stated that he considered the promotion of land rights as falling within the fourth and possibly the first (relief of poverty) charitable categories established by *Pemsel's* case.

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[9] For example *Salvation Army (Victoria) Property Trust v Shire of Fern Tree Gully* (1952) 85 CLR 159, 173; *Ashfield MC* v *Joyce* (1976) 10 ALR 193.

[10] *Re Compton; Powell v Compton* [1945] 1 Ch 123; *Gilmour v Coats* [1949]AC 426; *Dingle v Turner and others* [1972] 1 All ER 878; Applied in Australia in *Re Hilditch deceased* (1986) 39 SASR 469.

[11] *Oppenheim v Tobacco Securities Trust Co Ltd* [1951] 1 All ER 31, 33, 35 (Lord Simonds); *Dingle v Turner* [1972] 1 All ER 878, 888 (Lord Cross of Chelsea).

[12] Picarda, above n7, p 20.

[13] G Dal Pont, *Charity Law in Australia and New Zealand*, Oxford University Press, Melbourne, 2000, pp 14-15.

[14] *Gilmour v Coats* [1949] All ER 848, 855 (Lord Simonds). Now amended in Australia under s 5 *Extension of Charitable Purpose Act 2004* (Cth).

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

[16] *Auckland Medical Aid Trust v Commissioner of Inland Revenue* [1979] 1 NZLR 382, 395.

[17] *Re Pinion (deceased*); *Westminster Bank Ltd v Pinion and another* [1965] Ch 85, 105 (Harman LJ).

[18] See *Re Mathew* [1951] VLR 226, 232; *Re Bryning* [1976] VR 100; *Aboriginal Hostels Ltd v Darwin City Council* (1985) 75 FLR 197, 211.

[19] For example see A E Woodward, *Report of the Aboriginal Land Rights Commission*, Government Printer, Canberra, 1973, [769].

[20] (1996) 90 LGERA 48, 59.

In *Dareton Local Aboriginal Council v Wentworth Council*[21] the applicant was a local Aboriginal Land Council constituted under the *Aboriginal Land Rights Act 1983* (NSW). The powers of the Council included acquiring, holding and disposing of land vested in or acquired by the Council, and the protection of interests of Aboriginal people in relation to this land. The court stated that a trust for the advancement of Australian Indigenous people would generally be charitable as being beneficial to the community (the fourth *Pemsel* category). The Court considered that the Council's functions of making claims for Crown land and protecting Aboriginal interests in the Council's land were arguably charitable. However the final purpose of the Council, 'such other functions as are conferred under this Act or any other Act' was not a charitable purpose and therefore the Council was held not to be a charity.[22]

Although there is no case directly on the point that the claiming or managing of native title interests is a real or substantial benefit within the charity law concept the cases discussed above indicate a willingness by the courts to hold that entities for the benefit of Australian Indigenous peoples are charitable. Thus, it appears, the courts are assuming a tangible public benefit exists.

Element 2: The Benefit must be for the Public or a Section of the Public

As well as being of actual benefit to the public in a charitable sense a charitable purpose must also benefit the community or an appreciable section of the community.[23] Whilst this section of the public can be small it should not be 'numerically negligible'.[24] The test requires that the beneficiaries are linked by some criteria other than personal relationships. Assistance to family members to complete their schooling might be a charitable thing to do but there is no community benefit, whereas donating money to an organisation which assists disadvantaged persons in gaining an education has a public benefit. Satisfaction of this requirement is generally accepted for the first three *Pemsel* categories of charitable purpose but the issue is often contentious where the charitable purpose in question falls within the fourth *Pemsel* heading.

There are two ideas behind this limitation. One is based on the tax concessions that arise when a trust or other entity gains charitable status. Lord Greene MR makes several references to the tax free status of charities in his comments in the leading English authority *Re Compton, Powell v Compton*[25] as the rationale for restricting charities to those that benefit the public as does Lord Cross in the subsequent authority *Dingle v Turner.*[26] The incentive for tax avoidance would be high if a parent could establish a charitable trust in favour of their family thus gaining income tax exemption on income that would be used for the family's benefit and support in any event.

The second rationale is that the ideal of charity requires altruism or a benefit wider than ones family.[27] The public benefit requirement does not mean that the entire public must somehow benefit but if the benefit is for a section of the public that section must be in some way significant and not defined by family relationships or a contract of employment.[28] For example, an institution for the benefit of a specific family living in an area will not be charitable, however, an institution for the benefit of all persons in the area will be for the public benefit, as the quality which links the group is not their personal relationship but their physical location.[29] As theoretically anyone can move to a particular location the section of the public benefited is not restricted by something outside their control such as a family or employment relationship.

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[21] (1995) 89 LGERA 120.
[22] (1995) 89 LGERA 120, 125-6.
[23] *Verge v Somerville* [1924] AC 496, 499; *Oppenheim v Tobacco Securities Trust Co Ltd* [1951] AC 297, 305 (Lord Simonds).
[24] *Oppenheim v Tobacco Securities Trust Co Ltd* [1951] AC 297, 306 (Lord Simonds); *Aboriginal Hostels Ltd v Darwin City Council* (1985) 75 FLR 197, 209 (Nader J).
[25] [1945] 1 All ER 198, 205, 206.
[26] [1972] 1 All ER 878, 889.
[27] *Yeap Cheah Neo and others v Ong Cheng Neo* (1875) LR 6 PC 381; *Ip Cheung-Kwok v Sin Hua Bank Trustee Ltd and others* [1990] 2 HKLR 499.
[28] Dal Pont, above n13.
[29] *Re Compton; Powell v Compton* [1945] 1 Ch 123; *Verge v Somerville* [1924] AC 496, 499.

The groups that may make native title claims in Australia vary depending on many factors including the extent of the claim and the region in which it is made.[30] Often, in order to satisfy the requirements of the *Native Title Act 1993* (Cth) and make a claim for traditional ownership the group defines themselves through descent from a common ancestor.[31] It is when this group decides to form an entity that can gain charitable trust status that problems arise. On the one hand the beneficiaries of the entity (the traditional owners) are all related through blood; on the other hand the purposes of this entity will often fall within one or more of the *Pemsel* charitable categories. [32]

The public benefit restriction therefore creates tension when a charitable trust structure is used by native title claimants who are defined by their family relationship. This has been identified in the current research as causing concern to traditional owners and preventing them gaining the taxation benefits of charitable status.[33]

III. CHARITIES FOR THE RELIEF OF POVERTY

One important exception to the rule that a charity must be for the benefit of the public or a section of the public is a charity that is for the relief of poverty. Lord Greene MR confirmed in *Re Compton; Powell v Compton* [34] that there is no requirement of public benefit where the charitable object is for the relief of poverty.[35] This approach has been upheld in subsequent cases.[36]

There are two main reasons usually given for this exception.[37] In *Re Compton; Powell v Compton* Lord Greene MR considered that because the exception had been in existence for many generations and that many trusts had been founded with the exception in mind it was too late for the principle to be overturned.[38] Secondly, he recognised a special quality in gifts for the relief of poverty that put them in a class by themselves. The relief of poverty may be of such benefit to the community that this outweighs the fact that the relief is confined to family members.[39] Consequently a trust for the relief of poor relations or poor employees has been held to be charitable[40] although a trust for the education of relations or employees would not have been.[41]

This exception was confirmed in respect of Australian Indigenous people in the 1997 decision of *Alice Springs Town Council v Mpweteyerre Aboriginal Corporation*.[42] In this case the Northern Territory Court of Appeal held that the aim of the corporation of assisting needy Aboriginal people fell within a trust for the relief of poverty and that therefore there was no public benefit requirement.[43]

The case law does not mean that charitable trusts can be established for close and **specifically named** family members. Case law and legal scholars indicate that a public benefit is still required for charities for the relief of poverty, however, unlike other charitable purposes, a much narrower group of persons may be considered as a section of the public.[44]

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[30] For a general discussion refer J Grace 'Claimant Group Descriptions: Beyond the Strictures of the Registration Test', *Land, Rights, Laws: Issues of Native Title,* vol.2, no.2, 2000.
[31] Section 190B(5) *Native Title Act 1993* (Cth); Grace, above n30, 1.
[32] F Martin, 'Prescribed Bodies Corporate under the *Native Title Act 1993* (Cth); Can they be Exempt from Income Tax as Charitable Trusts?', *University of New South Wales Law Journal*, vol.30, no.3, 2007, pp 713-730. See also, Native Title Payments Working Group, *Native Title Payments Working Group Report*, Australian Government, 2008, p 9.
[33] Ibid.
[34] [1945] 1 Ch 123.
[35] *Re Compton; Powell v Compton* [1945] 1 Ch 123, 130-131.
[36] For example, *Dingle v Turner* [1972] AC 601, 622-625 (Lord Cross); *Re Hobourn Aero Components Limited's Air Raid Distress Fund* [1946] 1 Ch 194, 203-207 (Lord Greene MR); *Re Scarisbrick* [1951] 1 Ch 622, 649-652 (Jenkins LJ).
[37] Dal Pont, above n13, p 121.
[38] *Re Compton; Powell v Compton* [1945] 1 Ch 123, 131.
[39] *Re Compton; Powell v Compton* [1945] 1 Ch 123, 131.
[40] *Gibson v South American Stores* [1950] Ch 177.
[41] *Oppenheim v Tobacco Securities Trust Co Ltd* [1951] AC 297; *Re Compton; Powell v Compton* [1945] 1 Ch 123, 131.
[42] (1997) 139 FLR 236.
[43] (1997) 139 FLR 236, 252.
[44] P S Atiyah 'Public Benefit in Charities', *Modern Law Review*, no.21, 1958, p 148; Dal Pont, above n13, p 122; *Re Scarisbrick* [1951] 1 Ch 622, 650-651.

In the context of trusts for the relief of poverty the other main issue is ensuring that the ultimate beneficiaries satisfy the legal criterion of 'poverty'.[45] For the purposes of charity law 'poverty' is not the equivalent of 'destitution'[46] and is aimed at a situation where a person is unable to sustain a modest standard of living.[47] In Australia many Indigenous people would be considered to fall within this class of beneficiaries where for example, they have incomes below the Australian average.[48]

Holding Native Title Interests and the Relief of Poverty

The above discussion leads to an analysis of whether or not an entity that maintains or manages the interests in land of Australian traditional owners can be considered charitable when having its object as the 'relief of poverty'. If the entity falls within this first category of charitable purpose established under *Pemsel's* case then a strict public benefit test will not apply.

With regard to trusts for the aid of Australian Indigenous people generally the courts have stated in several cases that 'Australian Aborigines are notoriously in this community a class which, generally speaking, is in need of protection and assistance'.[49] In *Alice Springs Town Council v Mpweteyerre Aboriginal Corporation*[50] the Court accepted that a purpose of providing land, housing and other community facilities to needy Aboriginal people was for the relief of poverty and therefore charitable,[51] and in *Northern Land Council v Commissioner of Taxes* Thomas J stated that 'Aboriginal persons are disadvantaged by being dispossessed of their land which has placed them in a position of destitution, helplessness and distress'.[52] His Honour went on to say that the restoration and management of traditional Aboriginal land for the benefit of Aboriginal people addressed the disadvantaged position of these people and was a benevolent purpose therefore finding that the Council was a public benevolent institution (PBI) within the meaning of that term in the *Pay-roll Tax Act 1978* (NT).[53] In reaching its conclusion that the Northern Land Council was a PBI the Court of Appeal discussed the meaning of charity as they considered that PBIs are charities although they fall within a narrower category.[54] Justice Thomas then concluded:

> the restoration and management of traditional Aboriginal land for the benefit of Aboriginal people addresses the disadvantaged position of Aboriginal people arising from dispossession and homelessness…The restoration of land, and with it the promotion of cultural and spiritual integrity, have been recognised as benevolent purposes (*Toomelah Co-operative Ltd v Moree Plains shire Council* (1996) 90 LGERA 48 at 59).[55]

The comments in the case are therefore relevant and persuasive although they are not exactly on point. In *Toomelah Co-Operative Ltd v Moree Plains Shire Counci*[56] the applicant was a community advancement society under the *Co-operation Act 1923* (NSW). The applicant owned various houses which it rented to needy Aboriginal families. One of its objects was the promotion of land rights and other legal and cultural rights of the Aboriginal community. The Court specifically stated that this was a charitable purpose under either the first or fourth *Pemsel* heading.[57]

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[45] Dal Pont, above n13, pp 112-113.
[46] *Trustees of Mary Clark Home v Anderson* [1904] 2 KB 645, 655 (Channell J); *Flynn v Mamarika* (1996) 130 FLR 218, 223 (Martin CJ).
[47] *Ballarat Trustees Executors and Agency Co v Federal Commissioner of Taxation* (1950) 80 CLR 350, 385 (Kitto J).
[48] *Flynn v Mamarika* (1996) 130 FLR 218, 223 (Martin CJ).
[49] *Re Mathew* [1951] VLR 226, 232; *Aboriginal Hostels Ltd v Darwin City Council* (1985) 75 FLR 197, 211; Approved in *Tangentyre Council Inc v Commissioner of Taxes* 90 ATC 4352, 4357 (Angel J); A similar statement was made in *Maclean Shire Council v Nungera Co-operative Society Ltd* (1994) 84 LGERA 139, 144 (Handley JA).
[50] 139 FLR 236.
[51] 139 FLR 236, 252 (Mildren J).
[52] [2002] NTCA 11, [84].
[53] [2002] NTCA 11, [75].
[54] [2002] NTCA 11.[15].
[55] [2002] NTCA 11. [75].
[56] 90 LGERA 48, 59.
[57] 90 LGERA 48, 53.

Although no case is directly on point the comments discussed above indicate strong arguments that as Australian Indigenous people are generally recognised as being in need a trust for the benefit of a family group of Indigenous people may fall within the relief of poverty heading. One author's private discussions with the Australian Taxation Office (ATO) have confirmed this to be their understanding however for a trust falling solely within the relief of poverty heading the ATO limits the purposes for which the trust income is distributed to financial assistance and medical payments. As the trust is for the relief of poverty all beneficiaries must be 'unable to obtain a modest standard of living' as required by the case law.

It is arguable that these and other similar cases discussed have established that the holding and management of native title interests on behalf of Australian Indigenous people is considered to be of benefit to the public and that this purpose falls under either the first, 'relief of poverty', or fourth, 'other purposes beneficial to the community', categories of charitable purposes established by *Pemsel's* case.[58]

IV. THE PUBLIC BENEFIT TEST IN NEW ZEALAND

For many years New Zealand followed the approach taken in Australia as to what constituted a public benefit for determining whether an organisation could obtain charitable status. The New Zealand Court of Appeal in *Molloy v Commissioner of Inland Revenue*[59] stated that the definition of charitable purpose in the tax legislation does not alter or enlarge the legal meaning of charity. The court specifically accepted the four headings of charitable purpose established under *Pemsel's* case. The court also held that, with the exception of a trust for the relief of poverty, to be charitable in law a trust must be established for the benefit of the community or a sufficiently important class of the community, rather than for the benefit of private individuals. This requirement is in addition to the objects of the charity falling within one of the four heads established in *Pemsel's* case and is known as the public benefit test.[60] That a charity must benefit a section of the public and not a group of individuals related either through blood or a contract such as a contract of employment or insurance was confirmed in the subsequent case of *New Zealand Society of Accountants v Commissioner of Inland Revenue*.[61]

In the case *Arawa Maori Trust Board v Commisioner of Inland Revenue*[62] it was decided that members of a Maori tribe and their descendants did not meet the public benefit requirement of being a sufficient section of the community so that the trust's purpose was not classified as charitable. The decision led to the enactment of section 24B of the *Maori Trusts Boards Act 1955* (NZ) (MTBA) which deems income from the trusts of Maori Trust boards exempt from taxation because they have a charitable purpose where their purpose falls within the list of purposes set out in the MTBA. The Inland Revenue Department (IRD) of New Zealand also issued a ruling[63] explicitly stating that income derived by a Maori Trust Board would receive exempt status as a charity as long as all the other elements necessary for a charitable trust to exist were present.

The Public Benefit Test and Maori land

The New Zealand IRD interpretation of the amendments to the MTBA recognised the intention of Parliament to give trusts established by the MTBA charitable status in particular circumstances. It also raised the wider issue of the status of other trusts or organisations that had been established for charitable purposes for the benefit of Maori, and the application of the common law 'public benefit' test to these entities.

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[58] Martin, above n32.
[59] [1981] 1 NZLR 688.
[60] [1981] 1 NZLR 688, 695 (Somers J); Also refer Refer Public Binding Ruling BR Pub 97/8 (rewritten as BR Pub 08/02 and formerly 01/07), reproduced in CCH, New Zealand IRD Rulings and Statements, p 11.
[61] [1986] 1 NZLR 147.
[62] *Arawa Maori Trust Board v Commisioner of Inland Revenue* (1961) 10 MCD 391.
[63] Refer Public Binding Ruling BR Pub 97/8 (rewritten as BR Pub 01/07), reproduced in CCH, New Zealand IRD Rulings and Statements.

The concept of charity is of particular relevance to the Maori peoples' ownership of traditional land. The *Maori Land Act 1993* (NZ) (MLA) governs the ownership and management of Maori land and according to Te Puni Kokiri[64] takes into account Maori needs and attitudes towards land. The main purpose of the MLA is to assist in the retention of Maori land (comprising Maori customary land and Maori freehold land) in Maori ownership.[65] The MLA generally governs the ownership of Maori land (especially restrictions on its transfer) and its management. Maori land has been estimated to be around 5.6 per cent of New Zealand's total land area of 26.9 million hectares with the largest concentrations in the central and eastern regions of the North Island.[66] Under s 245 of the MLA the trustees of any trust established under the Act can 'apply to the Maori Land Court for an order that they hold any part of the trust's income on trust for such charitable purposes as are specified in the Court order'.[67]

However, s 245 does not deem any income derived by an approved trust exempt as charitable for the purposes of the New Zealand taxation legislation. This was a major problem for Maori organisations established under the MLA who wanted to undertake charitable activities for the benefit of their members and ultimately led to the reforms around 'public benefit' that have taken place in New Zealand.

The 2001 Review by the New Zealand Government of Maori Organisations

In August 2001 the New Zealand government released a discussion document examining the taxation of Maori organisations in general and 'Maori authorities' in particular. A 'Maori authority' is defined in tax legislation and subject to a specific tax regime granting concessional tax treatment. A 'Maori authority' may or may not engage in charitable activity.[68] There had been no revision of rules for taxing the income of Maori organisations since 1952. This meant that these provisions did not reflect the various changes that had taken place in Maori organisations or, more importantly, the role such entities play in facilitating Maori economic development. Nor did these rules incorporate the major reforms that had occurred in tax within New Zealand over the previous 50 years. In addition, Maori groups had repeatedly applied to the Government for the tax laws to be reviewed because the rules relating to Maori organisations were considered outdated and constrained their economic and social development.[69]

One area that was discussed in the review was how aspects of the law of charities, such as the 'public benefit test' applied to Maori organisations seeking exemption from tax on the grounds of charitable status. The main concern for Maori organisations (including marae)[70] that wished to use the 'charitable' tax exemption was that they usually failed

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[64] Te Puni Kōkiri (Ministry of Māori Development) is the Crown's principal adviser on Crown-Māori relationships. It also guides Māori public policy by advising the Government on policy affecting Māori wellbeing and development.

[65] Maori land has three recognised land tenure categories: 1. Maori freehold; 2. Maori customary land; and 3. Maori general land: Te Puni Kokiri (Ministry of Maori Development), *What is Maori Land*, Te Puni Kokiri, viewed 17 April 2009, www.tpk.govt.nz/en/services/land/maori.

[66] Te Puni Kokiri (1996) Table 1 Distribution of Maori Land by Maori Land Court District found in Kingi, Tanira 'Maori landownership and land management in New Zealand, Institute of Natural Resources, Massey University www. ausaid.gov.au/publications/pdf/MLW_VolumeTwo_CaseStudy_7.pdf.

[67] Section 245(2) (a) and (b) MLA.

[68] New Zealand Inland Revenue Department, *Taxation of Maori Organisations: A Government Discussion Document*, Policy Advice Division, New Zealand Inland Revenue Department, 2001. While the document looked at all Maori organisations particular reference was made to 'Maori authorities'. A Maori authority is defined in s OB 1 of the *Income Tax Act 1994* (NZ) (the previous legislation) as an organisation that elects under s HI 3 to be a Maori authority and which meets certain criteria in the tax legislation. Such an organisation receives favourable income tax treatment. Maori authorities can be companies or trusts that hold assets under the MLA or the *Maori Fisheries Act*; or mandated iwi organisations created by the Crown to hold land or other assets as a result of Treaty of Waitangi settlements or under the MLA (s HI 2 of the 1994 Act).

[69] For example: The four-year rule forced Maori authorities to distribute their income before a four-year deadline to avoid double taxation rather than being able to reinvest the income in the authority; there was a need to keep a register of beneficiaries and there whereabouts which posed a costly and burdensome requirement on a Maori authority; a Maori authority who made a charitable distribution was only allowed a deduction for up to 5% of its assessable income: New Zealand Inland Revenue Department, above n68.

[70] A meeting place for the Maori community. An area of land set aside for the use of hapū or iwi, with communal buildings on it, such as a meeting house and dining hall. Generally defined as a symbolic home for a kin-based group and made up of three elements that function together – land, community and whare tipuna (ancestral houses). Many marae are registered in accordance with the MLA as Māori Reservations. See Glossary of Terms in A Puttnam, *Marae Taxing Issues*, New Zealand Inland Revenue Department, September 2004.

to meet the common law 'public benefit test'. Despite the fact that Maori organisations provided benefits of a charitable nature to iwi and hapu[71] they often did not qualify for an exemption because their benefit extended to a group of persons connected by blood ties, rather than the general public.

New Zealand Legislative Change to the Public Benefit Test

The introduction of the *Taxation (Annual Rates, Maori Organisations, Taxpayer Compliance and Miscellaneous Provisions) Act 2003* (NZ) changed the position for Maori organisations. These changes involved modernising the specific rules that apply to Maori organisations and individuals who derive distributions from them; clarifying the status and tax treatment of a 'Maori authority'; allowing Maori organisations to claim deductions for gifts of money to organisations with 'approved donee status' or to Maori associations; liberalising the 'public benefit' requirement inherent in the concept of charitable purpose with regard to blood ties; and removing barriers for bodies that administer marae to allow, in certain circumstances, an exemption from income tax.

The legislation introduced a new section into the taxation legislation to extend the meaning of charitable purpose which has application to all charitable organisations including Maori. This section states:

> OB 3B(1) [Public benefit requirement]
>
> Despite the definition of charitable purpose in section OB 1, the purpose of a trust, society or institution is a charitable purpose under this Act if the purpose would satisfy the public benefit requirement apart from the fact that the beneficiaries of the trust, or the members of the society or institution, are related by blood.

There is also a specific exemption applying to marae which grants them charitable status where they meet the test for charitable purpose or the funds are used for the administration and maintenance of the land and the physical structure of the marae.

Charitable purposes is defined by a restatement of the common law as established in *Pemsel's* case. The introduction of the new provision clearly enables Maori organisations and marae in particular that have charitable purposes to circumvent the 'public benefit' requirement if the entity's beneficiaries are part of a family grouping. .[72]

The tax legislation applies equally to Maori and non-Maori entities but is particularly relevant to iwi-based or hapu-based entities since some of these engage in charitable activity. In determining whether an entity benefits the public or an appreciably significant section of the public, the IRD states that certain factors should be considered such as the:

a) nature of the entity;

b) activities it undertakes;

c) potential beneficiary class;

d) relationship (degree of connection) between the beneficiaries; and

e) number of potential beneficiaries.[73]

Thus the income tax legislation in New Zealand has extended the definition of charitable purpose so that provided an organisation falls within one of the *Pemsel* categories and satisfies the public benefit test (apart from the blood relationship) it is able to achieve charitable status.

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[71] Traditional Maori tribal hierarchy and social order made up of hapu (kin groups) and whanau (family groups) having a founding ancestor and territorial (tribal) boundaries. See Glossary in New Zealand Inland Revenue Department, above n68.

[72] Prior to 2003 the general policy was to treat marae committees as non profit bodies and apply the mutuality principle. However there were some problems with this situation because the lack of charitable status made grant money from community trusts unavailable; see D Brown, 'The Charities Act 2005 and the Definition of Charitable Purposes', *New Zealand Universities Law Review*, vol.21, 2005, p 620.

[73] *Tax Information Bulletin*, vo.15, no.5, May 2003, pp 59-60.

V. LEGISLATIVE CHANGE IN AUSTRALIA

In 2001 the Australian Government published a report recommending a definition of charitable purpose.[74] The report listed what it considered should fall within this definition and although it did not refer specifically to entities for the advancement of Australian traditional owners it did include 'the promotion of community development to enhance social and economic participation', 'the promotion and fostering of culture; and the care, preservation and protection of the Australian heritage' as charitable purposes.[75] The report, however, also recommended that the public benefit requirement should continue to apply and that it should not apply where there is a family relationship.[76] It further recommended that the public benefit test should apply in cases where the charitable purpose is for the relief of poverty, in other words rejecting the traditional English common law approach and applying an even stricter test. Although these recommendations were not implemented[77] it does indicate a much narrower approach than that taken in New Zealand and one that has not considered the issue from the perspective of Australia's traditional owners who are struggling to engage in social and economic participation.

It is argued that Australia follow the New Zealand approach and enact legislation to specifically allow kinship groups to be charitable providing the group is a significant class and the objects of the organisation fall within one of the *Pemsel* charitable purpose heads. The Australian courts consider an organisation as charitable when its objects are to obtain and maintain native title interests and consider that such a role falls within either the relief of poverty or other purposes beneficial to the community heading. The public benefit limitation is unnecessary when these groups are in reality benefiting the community through maintaining their spiritual and cultural connection with their traditional lands. Removing the public benefit limitation for traditional owners would also recognise the important role they play as a significant cultural minority in modern Australian society.

CONCLUSION

For an entity to gain charitable status its aims must have a public benefit. This benefit must be tangible and must benefit the community or a sufficient section of the community. In other words it must not be of benefit to a group defined through family relationships no matter how numerous the group. Furthermore, the aims or purposes of the organisation should fall within one of the categories established in *Pemsel's* case.

There have been a number of cases that deal with entities established for the purpose of attaining and managing native title interests on behalf of Australian Indigenous people and whether or not these entities can gain the tax benefits that flow from charitable status. The authors argue that an organisation aimed at establishing and/or maintaining land rights for Australia's Indigenous population is charitable as either for the relief of poverty or for other purposes beneficial to the community. It has not always been clear from the cases, however, which category the entity has fallen into. The case law also requires that the organisation is for the public benefit or the benefit of a section of the public however this test is less strict if the charitable purpose of the organisation is relief of poverty.

If the organisation is considered to be a charity for the relief of poverty it is strongly arguable that its objects could be restricted to members of only one family or beneficiaries who are related by blood ties and that this would not disqualify it from being a charity for income tax purposes. The entity would need to be careful to establish that the gift was not intended to be for private individuals but was actually for the relief of poverty amongst a class of persons *in need*, although very narrowly defined.[78]

If on the other hand, the entity is considered charitable under the fourth category it must also fulfill the public benefit requirement. A description of beneficiaries as those Aboriginal people living in a certain area would suffice but not a description that limits them by means of their family ties. This could create difficulties in situations where land rights

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[74] Charities Definition Inquiry, *Report of the Inquiry into the Definition of Charities and Related Organisations*, Charities Definition Inquiry, Australian Government, 2001, p 15.
[75] Ibid.
[76] Ibid 14.
[77] Except to the extent that self-help groups and contemplative orders of nuns are specifically stated to be charitable under the *Extension of Charitable Purpose Act 2004* (Cth).
[78] Dal Pont, above n13, p 122.

belong to a group of Indigenous people by virtue of their membership of a family or clan that is defined by blood ties or descent from common ancestors as for example, is required by the *Native Title Act 1993* (Cth).

On the other hand the New Zealand legislative change to the public benefit restriction has removed barriers for Maori organisations to use their assets and income for charitable purposes despite benefiting members who have a blood-tie. It acknowledges that within New Zealand the traditionally restrictive way of viewing public benefit was limiting the ability of Maori organisations to work with their people and demonstrates a willingness by Parliament to support the idea that the concept of charitable purpose is evolving and should reflect changes in social circumstances within a society.

It is hoped that the Australian Government will be influenced by the developments in New Zealand and consider changing the taxation legislation here in order to recognise the valuable contribution that Indigenous organisations make to economic and social development. This contribution is just as important as the contribution made by many charities that benefit main-stream Australians. These charities are recognised and their work encouraged through significant tax concessions and such recognition should also be available to Australian Indigenous organisations.

ISBN 9780855757076
ISSN 12360316

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