



WEEKLY COMMENT: WEDNESDAY 4 JULY 2012

1. The income tax exemptions for non-business income of charities (section CW 41) and business income of a charitable trust that carries out its charitable purposes in New Zealand (section CW 42) apply only if a charitable trust is a “tax charity”. A tax charity (in relation to a trust that is a charitable trust) is a trustee of a trust registered as a charitable entity under the Charities Act 2005. For more details refer to paragraph 39 onwards in the *Trusts* section.
2. Until 30 June 2012 the responsibility for registering charities rested with the Charities Commission. The Charities Amendment Act (No 2) 2012 which came into force on 1 July disestablished the Charities Commission and replaced it with a Charities Registration Board which now has the responsibility for registration and deregistration of charitable entities. The other functions of the Charities Commission are now the responsibility of the Chief Executive of the Department of Internal Affairs (“DIA”).
3. All the Charities Commission’s work in progress will be carried on and completed by the Chief Executive of the Department of Internal Affairs (“DIA”) or the Board established under section 8 of the Amendment Act, the Charities Registration Board.
4. While briefly describing the changes that have taken place, I thought I would take the opportunity to review the meaning of “charitable purpose”, as discussed in some recent cases, given its importance in obtaining registration and a tax exemption.

Why the change ?

5. The State Services Minister first announced the changes on 11 August 2011. The changes are part of the Government’s decisions to reduce the number of government agencies. The disestablishment of the Charities Commission and the transfer of the work to the DIA was estimated to save the Government \$2.032 million in the four years from 2012/13, with \$300,000 of estimated transition costs in 2011/12.
6. At the time, the Minister warranted that decisions on charity registrations would remain independent from Ministers through a statutorily independent board in the Department of Internal Affairs.

Who are the board members ?

7. Under section 8 of the Amendment Act, a Board is established comprising 3 members appointed by the Minister. On 29 June the Community and Voluntary Sector Minister announced the members:
 - Roger Miller, a Wellington lawyer and registered trustee, who is the chair of the Board;

- Caren Rangi, a chartered accountant and audit specialist from Napier; and
 - KiriKaiahi Albert, a Wellington lawyer with experience in taxation, treaty settlements and iwi governance.
8. Under Schedule 1, clause 5, a member of the Board holds office for 3 years unless a shorter period is stated in the notice of appointment.

Division of duties

9. The Amendment Act provides for a clear delineation of functions between the Board and the Chief Executive (of the DIA).
10. The Board is concerned with *registration and deregistration of charitable entities*. In performing these functions the Board is not subject to direction from the Minister. The Board can delegate its duties to the Chief Executive, but it remains responsible for its functions under the Act.
11. The Chief Executive of the DIA is responsible for all of the other functions that were previously the responsibility of the Charities Commission, including:
- Processing registration applications and referring them to the Board;
 - Referring proposals for deregistration to the Board;
 - Supplying information and documents for Inland Revenue purposes;
 - Monitoring and promoting compliance with the Charities Act 2005 and taking prosecutions for offences against the Act;
 - Providing information about compliance with the Act and monitoring compliance with the registration requirements;
 - Maintaining the register of charitable entities and processing annual returns; and
 - Stimulating and promoting research into matters affecting charities.
12. Based on this division of functions, the Commission's registration, education, monitoring and investigation teams will carry out their work as part of the DIA. There will be no substantive changes for registered charities or applicants for registration arising from the transition to the new structure. Access to information about charities on the Charities Register and all the education guidance developed for charities will continue to be available on the website www.charities.govt.nz.

What is a charitable purpose

13. A review of the Charities Act 2005 — including the legal definition of “charitable purpose” — is scheduled to be completed in 2015, and will be overseen by the DIA. The current common law definition of “charitable purpose” established by the courts and applied by the Commission remains as the legal test for whether an organisation is charitable or not.
14. In *Liberty Trust v Charities Commission* [2011] NZHC 577, (2011) 25 NZTC ¶20-054, Mallon J stated:
- “[52] ... the meaning of charitable purpose is not its natural and ordinary meaning, but its legal or technical meaning. That point was made in *Special Commissioners of Income Tax v Pemsel* [1891] AC 531 at 583 a 19th Century decision of the House of Lords in which Lord

McNaghten set out the four categories of charitable purposes from which the charitable purposes described in our Charities Act derives.”

15. These four categories were recently set out by Simon France J *Re the Grand Lodge of Antient Free and Accepted Masons in New Zealand* (2010) 24 NZTC 24,590. He stated:

“[9] In order to be a charity, a body must exist only for charitable purposes. There are two aspects to that statement — first, it must exist for charitable purposes, and second, those charitable purposes must be its only purposes. Third, the carrying out of those exclusively charitable purposes must confer a public benefit.

[10] There are four recognised charitable purposes:

- a) the advancement of religion;
- b) the advancement of education;
- c) the relief of poverty;
- d) other matters beneficial to the community....”

The advancement of religion

16. The advancement of religion was considered *Liberty Trust*. Mallon J stated:

“[53] Trusts which have the purpose of advancing religion are viewed as having a charitable purpose in law (with the consequence that they qualify for the legal and fiscal concessions granted to charities). As to why “advancement of religion” is one of the four categories of charitable purposes, in *Roman Catholic Archbishop of Melbourne v Lawlor* (1934) 51 CLR 1 (HCA) at 33 this was said to be because the “law has found a public benefit in the promotion of religion as an influence upon human conduct.”

17. Liberty Trusts’s main activity was a mortgage lending scheme, funded largely by donations, which made interest free loans to its donors and others. Liberty Trust maintained that its lending scheme advances religion, which is a charitable purpose by teaching, through action, financial principles derived from the Bible. The Charities Commission’s view was that teaching financial principles derived from the Bible was at best conducive to religion but did not advance religion. It considered that the main purpose of Liberty Trust, through its lending scheme, was to provide private benefits for its members. As such the Charities Commission considered that Liberty Trust was not exclusively for charitable purposes. The issues were whether Liberty Trust “advances” religion and whether it meets the “public” benefit test.

18. The Charities Commission argued that Courts have held that mutual benefit arrangements are not charitable. In *Re Hobourn Aero Components Limited’s Air Raid Distress Fund* [1946] 1 Ch 194 and *Re Harris Scarfe Ltd* [1935] SASR 433 the Court held that a scheme whereby members put money into a fund from which they could get payments when in need was not charitable. This is because the mutual benefit arrangements “stamp the whole transaction as one having a personal character, money put up by a number of people, not for the general benefit, but for their own individual benefit”. [*Re Hobourn Aero Components Limited’s Air Raid Distress Fund*]

19. In *Liberty Trust*, Mallon J discussed “advancement” and “public benefit”:

[58] I have not been referred to any New Zealand decision which discusses what is meant by the “advancement” of religion as a charitable purposes. Both parties referred to *United Grand Lodge of Ancient Free and Accepted Masons of England v Holborn Borough Council* [1957] 1 WLR 1080 at 1090, which defined “advancing” religion as meaning “to promote it, to spread its message ever wider among mankind; to take some positive steps to sustain and increase religious belief.” This was said to be able to be done “in a variety of ways which may be comprehensively described as pastoral and missionary....

[99] It is accepted that in order to have a charitable purpose the entity must be carrying out its purposes for the benefit of the public. This means that the entity must confer a “benefit” and that it does so in respect of the public or a sufficient section of it. The position at common law is that, in the context of advancement of religion, public benefit is assumed.”

20. Mallon J found that Liberty Trust had a charitable purpose:

[121] I consider that the scheme is set up and operated for religious purposes. It is a scheme which in conception and operation is closely linked to the faith its promoters subscribe to. The Christian faith is promoted in all the literature associated with the scheme... I consider that, although individual contributors may contribute to the scheme to receive a private benefit (ie a loan), that private benefit is part and parcel of Christian living (as propagated by Liberty Trust). Overall the scheme is a religious one.

[122] ... the scheme is open to everyone. In terms of the private/public benefits it is difficult to distinguish it from a mass in a Church which is open to the public. A mass in a church may have more ready acceptance as being of a religious nature and for religious purposes than a mortgage scheme that is set up as an example of the Bible’s message but that is not the point. On the evidence before me this mortgage scheme is a public example of what is intended to be a Christian approach to money and part of propagating the Christian faith.”

The advancement of education

21. In *In re Education New Zealand Trust* [2010] NZHC 1097, (2010) 24 NZTC 24,354 the issue was whether The Education New Zealand Trust had the charitable purpose of the advancement of education. Dobson J stated:

“[16] Decided cases acknowledge a broad approach to what constitutes an educational purpose... in the United Kingdom and New Zealand... organisations involved in law reporting... are organised in not for profit forms. In *Incorporated Council of Law Reporting for England and Wales v A-G* [1972] 1 Ch 73, the Court of Appeal upheld the entitlement of a law reporting body to register as a charity....

[19] Proceedings on the same issue in New Zealand produced the same result. In *C of IR v New Zealand Council of Law Reporting* [1981] 1 NZLR 682 (1981), 5 NZTC 61,053, the Court of Appeal confirmed that the New Zealand Council of Law Reporting has an exclusively charitable purpose in publishing and selling law reports.

[21] ... *Educational Fees Protection Society Inc v C of IR* [1992] 2 NZLR 115, (1991) 13 NZTC 8,203, considered the charitable status of an incorporated society, the first object of which was to maintain a fund enabling continuation of the payment of fees for children at private schools in the event of the death of a parent. There, it was accepted that the incorporated society was for the advancement of education... notwithstanding that the scheme had the features of a business arrangement, likened to a life insurance scheme.

[22] Accordingly, *the authorities suggest that any meaningful connection with the provision of education is likely to qualify a purpose as being for the advancement of education.* One observation cited... that suggests boundaries to this purpose was that of Iacobucci J in *Vancouver Society of Immigrant and Visible Minority Women v Minister of National Revenue* (1999) 169 DLR (4th) 34 at 114, [171] where it was observed:

[T]he threshold criterion for an educational activity must be some legitimate, targeted attempt at educating others whether through formal or informal instruction, training, plans of self study, or otherwise.

[23] The next requirement is that the carrying out of the purposes of a charitable entity provides benefits that accrue to the public.

[24] It is well-settled that on the first three specific heads of charitable purpose, public benefit is assumed to arise unless the contrary is shown.

[25] The analysis of whether benefits of a trust will accrue to the public is treated as involving a two-fold test. First, are the purposes of the trust such as to confer a benefit on the public or a section of the public? Secondly, do the class of persons eligible to benefit constitute the public or a sufficient section of it?

[26] It may be that the further an entity's purpose is away from the core of educational purposes, that it becomes relatively easier to rebut the presumption that requisite public benefit arises." (emphasis added)

22. The Education New Zealand Trust undertook co-ordinated promotional activities to attract international students to New Zealand. The Charities Commission accepted that the Trust came within the advancement of education head of charitable purpose, but the Commission was not satisfied that there was the requisite public benefit. The Commission maintained that the primary benefits of promoting, encouraging and developing international education and training were likely to accrue to the educational institutions in New Zealand, which receive the resulting foreign students and the fees that such students pay.
23. The Trust promoted both for-profit and not-for-profit educational institutions. Dobson J found that the promotion of for-profit element was sufficiently major for the Trust not to have the requisite element of public benefit, and its purpose was therefore not charitable.

The relief of poverty

24. In *Canterbury Development Corporation v Charities Commission; Canterbury Development Corporation Trust v Charities Commission; CEDF Trustee Limited as Trustee of the Canterbury Economic Development Fund v Charities Commission* (2010) 24 NZTC 24,143 one of the issues was whether there was a charitable purpose of the relief of poverty. The CDC argued that its work in assisting businesses to prosper created jobs and therefore benefited the unemployed. Ronald Young J stated:

"[25] ... It is common ground that relief of poverty does not require the relief of those who are destitute [*DV Bryant Trust Board v Hamilton City Council* [1997] 3 NZLR 342 (HC)]."

[26] The relief of unemployed can be a charitable purpose within the relief of poverty ground [*IRC v Oldham Training and Enterprise Council* (1996) 69 TC 231 at 249]."

25. The judge found that although the unemployed could be one of the ultimate beneficiaries of the CDC's work, none of the CDC's activities were directly focused on the creation of

employment for the unemployed, and rejected the claim that relief of poverty was a charitable purpose of CDC.

26. In *Educational Fees Protection Society Incorporated v Commissioner of Inland Revenue* (1991) 13 NZTC 8,203 the taxpayer operated a scheme, the basic purpose of which was to ensure that the education of a child at a school entering into an agreement with the taxpayer could continue unaffected by the death of a parent. One of the grounds argued was that the Society fell within the head of relief of poverty. Gallen J stated:

“Mr Wilson argued in any event that the scheme could be categorised as charitable as being for the relief of poverty. He founded this submission on comments of Lord *Evershed* MR in *Re Coulthurst Deed Coutts and Company v Coulthurst and Another* [1951] 1 Ch 661 where the Master of the Rolls accepted that poverty did not mean destitution. Mr Wilson also drew attention to the fact that in the same case Lord *Evershed* stated that a class of widows and orphaned children is a class which directs one's mind to the idea of the relief of poverty. Mr Wilson contended that on the basis of dictionary definition, a child who had lost one parent could be categorised as an orphan and that under those circumstances since the children who were entitled to be beneficiaries of the trust could properly be described as orphans, it was not unreasonable to regard help to such persons as being for the relief of poverty. The significance of this argument is that the element of public benefit need not be established in respect of those purposes which are classified as charitable as being for the relief of poverty. He drew attention to the fact that in correspondence the Commissioner had accepted that the education and preferment of orphans was a charitable purpose, but rejected that as a basis for categorisation in this case because it was the contention of the Commissioner that there was no sufficient section of the community involved to satisfy the requirements of public benefit. Mr Wilson draws attention to the fact that it is not necessary in respect of such a classification to meet that requirement.

I am satisfied however that this contention cannot succeed.

I accept that the status as an orphan may lead to some presumption which could be significant in appropriate cases, that after all is what Lord *Evershed* said, but it is also clear from a considerable line of cases that although there may in some cases be an element of relief of poverty, unless that is the purpose of the fund, it will not qualify and it could not be said to be the purpose here since the advances are made regardless of the need of the particular child or his or her family. I do not think in this case the trust could possibly be categorised as being for the relief of poverty.”

27. [As noted earlier, Gallen J found that the Society was charity on the grounds of advancement of education.]

Other matters beneficial to the community

28. In *Re the Grand Lodge of Antient Free and Accepted Masons in New Zealand* the Grand Lodge sought to bring itself within this fourth head of matters beneficial to the community. Simon France J stated:

“[11] The fourth head of charity requires that the purposes for which the charity exists are purposes that are conceptually beneficial to the public,² and are purposes that fall within the spirit and intent of the purposes listed in the Preamble to the Statute of Elizabeth. This last requirement needs explanation.

[12] The Statute of Elizabeth (the Charitable Uses Act) was passed in 1601. It was the first attempt to legislate in the area, and its preamble has come to define the scope of this fourth

head of charity. What is required is to consider its spirit and intent, and assess the present case against that, particularly by having regard to other decisions that have been made over the years in relation to this head of charity. The matters covered have gradually extended over the years by this process of analogy. The Preamble reads:

...some for Relief of aged, impotent and poor People; some for Maintenance of sick and maimed Soldiers and Mariners, Schools of Learning, Free Schools and Scholars in Universities; some for Repair of Bridges, Ports, Havens, Causeways, Churches, Sea Banks and Highways; some for Education and Preferment of Orphans, some for or towards Relief, Stock, or Maintenance for Houses of Correction, some for Marriages of poor Maids, some for Supportation, Aid and Help of young Tradesmen, Handicraftsmen and Persons decayed, and others for Relief or Redemption of Prisoners or Captives, and for Aid or Ease of any poor inhabitants concerning the Payments of Fifteens, setting out of Soldiers and other Taxes...

29. Simon France J described freemasonry as follows:

“[1] Freemasonry is a non-profit organisation. Its membership is limited to men over the age of 21. They come together to promote and advance virtues which the membership consider integral to the development of a person’s character. These include good citizenship, morality, charity, compassion, brotherly love and a belief in a supreme architect of heaven and earth.

[2] The assets of freemasonry are held at two levels. First, individual groups, known as Craft Lodges, may own their own building and other assets. Second, there is an overarching body, the Grand Lodge, which is responsible for the administration and governance of freemasonry in New Zealand. This body holds the bulk of the assets and receives the bulk of the income. It receives annual payments from Craft Lodges, and generally runs freemasonry.”

30. However, in *Re the Grand Lodge* Simon France J found the public benefit was too remote:

“[56] As a starting point, I consider that the general purposes and principles of freemasonry are capable of qualifying under the fourth head of charity. They present at least as compelling a case as other organisations which have come under this head. These include: a society whose objects are the study and dissemination of ethical principles and the cultivation of a rational religious sentiment (*Barralet v Attorney-General* [1980] 3 All ER 918 (Ch) at 922f) a trust set up to advance the teachings of Rudolph Steiner (*Re Price* [1943] 2 All ER 505 (Ch)) a trust for promoting temperance (*Re Hood* [1931] 1 Ch 240) and a gift for the furtherance of religious and mental improvement (*In Re Scowcroft* [1898] 2 Ch 638).

[57] In *United Grand Lodge of Ancient Free and Accepted Masons v Holborn Borough Council* [1957] 3 All ER 281 the Court identified the purposes of freemasonry as to:

promote and advance those virtues which every Freemason is charged to cultivate: good citizen, honest work, morality and wisdom, brotherly love, compassion, charity to the poor and belief in a supreme architect of heaven and earth.

[58] In my view that description illustrates that by analogy the purposes could come with the fourth head.

[59] However the way the purposes are given effect to means charitable status is unavailable. Freemasonry is inward looking, and its funds and organisation exist primarily

for its members. It is a membership limited to men aged over 21. It does not proselytize. It seeks to achieve its aims by making its members better people.

[60] Whilst ultimately there may be a public benefit in this, it is too remote. “

A handwritten signature in black ink that reads "Arun David". The signature is written in a cursive, slightly slanted style.

Arun David, Director, DavidCo Limited