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Title: The Public Benefit of Charities for Indigenous Peoples: A Divergence between Western Approaches and Indigenous Culture in Australia and New Zealand

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Introduction

A major issue for Native Title Groups under the *Native Title Act 1993* (Cth) and Traditional Owners under the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) that wish to use a charitable structure is the interpretation of the public benefit requirement.1 The common law poses a legal barrier to the establishment of charities for the benefit of Native Title Groups and Traditional Owners who are defined in accordance with their traditional cultures and practices which often involves family relationships.2 New Zealand followed the common law on this issue until it reviewed the taxation of Maori organisations in 2001 and subsequently amended the law relating to charities.

1 See Fiona Martin, ‘Prescribed Bodies Corporate under the Native Title Act 1993 (Cth); Can they be Exempt from Income Tax as Charitable Trusts?’ (2007) 30(3) *University of New South Wales Law Journal* 713-730; Australian Taxation Office, *Income Tax and Fringe Benefits Tax: Public Benevolent Institutions*, TR 2003/5, 4 June 2003. This ruling provides that family or contractual connections amongst beneficiaries mean that the entity fails the public benefit test. It also states that ‘The number of people in the group may be relevant but is not determinative’ [81].

2 Eg Traditional Aboriginal owners under the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) are defined through descent from a common ancestor, s 3.
In 2011 the Australian Government announced a consultation of the general community regarding a statutory definition of charity.³ This comes at the same time as the Government has introduced a new legislative body, the Australian Charity and Not-for-Profit Commission (ACNC) to regulate the charity and Not-for-Profit (NFP) sector.⁴ The consultation has now progressed to the Government announcing that it will enact a legislative definition. It has announced that draft legislation will be publicly available in the second half of 2012.⁵ This is therefore an opportune moment for the Australian Government to follow the lead of New Zealand and recognise the difficulties faced by indigenous peoples that are holders of traditional land and that wish to establish charities.

2 Indigenous Australians and the Public Benefit Test for Charities

2.1 The Benefit must be for the Public or a Sufficient Section of the Public


⁴ Australian Government, Australian Charities and Not-for-Profits Commission: Implementation Design: Discussion Paper, 9 December 2011. All charities will be required to register with the ACNC. Once registered, a charity will be accepted by the Australian Taxation Office for the purposes of income tax exemption. The Australian Government has implemented a taskforce for the ACNC with an interim Commissioner. It will commence 1 October 2012 http://acnctaskIdforce.treasury.gov.au/content/Content.aspx?doc=about.htm.

⁵ Australian Government, Office for the Not-for-Profit Sector, Events: Anticipated Government Consultations.
The legal concept of charity carries with it an altruistic or public benefit concept. This has been said to stem from the very nature of ‘charity’. 6 As early as the late eighteenth century the English courts considered that for a gift to be charitable it must be of general public benefit. 7 Lord Simonds in Williams’ Trustees v Inland Revenue Commissioners 8 said that ‘a trust in order to be charitable must be of a public character. It must not be merely for the benefit of particular private individuals.’ 9 This public benefit ideal clearly takes the concept of ‘charity’ outside the everyday or popular meaning as it indicates a purpose that must somehow add to or advantage the community rather than individuals. More recently the status and benefits afforded charities have been seen as a social covenant between the charities and society. Charities bring public benefit and in return are accorded high levels of trust and confidence and the considerable benefits of charitable status. 10 Not only do charities enjoy significant tax benefits but they are also able to access many government grants that are not available to other NFPs, 11 as well as volunteers’ time and donors’ money.


7 Jones v Williams (1767) 2 Amb 651.


9 Ibid 457.


11 For example, under the grant system of the Sidney Myer Foundation grants are only made to entities that are endorsed as charities by the Australian Taxation Office. This is common in other countries as well see David Brown, ‘The Charities Act 2005 And the Definition of Charitable Purposes’ (2005) New Zealand Universities Law Review 598, 620.
From a tax policy perspective the benefits are rationalised on the basis that through benefiting the community charities are taking on a quasi-governmental role. It would therefore be inappropriate to tax charities as they are providing what are recognised as essential and/or worthwhile services to the community.\(^\text{12}\) However where the services or benefits are to a family then the concern is that private individuals might take advantage of the favourable tax position available to charities for what is essentially a private purpose.\(^\text{13}\) Lord Greene certainly considered the tax advantages of charities a strong consideration when deciding that a trust for the education of descendants of a named person was really a family trust and not charitable as it was not for the benefit of the community.\(^\text{14}\)

Although charities are required to have a charitable purpose charitable status is still consistent with allocating benefits, including financial benefits, to a class of persons that the charitable purpose is designed to assist or support.\(^\text{15}\) Furthermore, the public benefit test can still be met where there is a limited class of beneficiaries as the case law has accepted that a ‘sufficient section of the public’ will suffice.\(^\text{16}\) The rationale is that not all


\(^{13}\) \textit{Re Compton} [1945] Ch 123, 136; \textit{Perpetual Trustee Co (Ltd) v Ferguson} (1951) 51 SR (NSW) 256, 263 (Sugerman J)

\(^{14}\) \textit{Re Compton} [1945] Ch 123, 136.


\(^{16}\) \textit{Dingle v Turner} [1972] 1 All ER 878, 888 (Lord Cross); \textit{Oppenheim v Tobacco Securities Trust Co Ltd} [1951] AC 297.
charities are for the benefit of the entire community. Charitable purposes are often motivated by the need to assist a section of the community with special needs or disadvantages. As Manisty J stated:

On the one hand it is said that whether the charity is “public” depends on whether it is universal, and that if the objects are confined to a particular class the charity is deprived of its public character. I cannot accept that argument. If that were so, what would become of charities unquestionably public, as the many institutions for the deaf, dumb, and blind?

The Chief Justice of the High Court of Australia in 1959 expressed it clearly in Thompson v Federal Commissioner of Taxation when he said that the public benefit test can be determined ‘by reference to locality, to conditions of people, to their disabilities, defects or misfortunes and by reference to many other attributes of men and things, yet the trusts may retain their ‘public’ character’.

This raises the question of how the courts have determined which characteristics or factors should be taken into account in determining whether or not a charitable purpose is also for the benefit of a ‘sufficient section of the public’. When we consider the legal narrative a number of factors appear to be relevant. These may be summarised as: the requirement that the potential beneficiaries must not be numerically negligible; whether or not the organisation is open to the whole community; the potential beneficiary class; the nature of the entity; the activities it undertakes; and the relationship (degree of

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18 Hall v The Urban Sanitary Authority of the Borough of Derby (1885) 16 QBD 163, 171.

The reference to the relationship between beneficiaries is to some connection through either family or by contract. Such a requirement impacts disadvantageously on entities for indigenous Australians where the beneficiaries are defined through family or clan relationships. Even though these entities meet all the other requirements for charitable status they may fail the public benefit test due to the close family relationships of their beneficiaries. This is particularly the case where the entity in question holds traditional land for a family or ‘clan’ of indigenous Australians.

Earlier cases also confirm this view. A Privy Council decision of 1875 relating to a trust for the observance of religious services for the testatrix and her late husband was held not to be charitable on the basis that there was no public benefit. The religious services were only open to and in respect of family members. In fact the cases referring to this limitation on the public benefit can be traced back to at least the 18th century.

In 1945 in Re Compton, Powell v Compton the English Court of Appeal refused to find a public benefit in a trust to educate the descendents of three named persons, as the

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20 Verge v Somerville [1924] AC 496,499; Oppenheim v Tobacco Securities Trust Co Ltd [1951] AC 297, 306 (Lord Simonds); Australian Taxation Office, Income Tax and Fringe Benefits Tax: Charities, TR 2011/4, 12 October 2011, [142]. This ruling states at [142] that ‘Limiting the number of people who can benefit can also be consistent with the public benefit requirement unless the number is numerically negligible’; Australian Taxation Office, Income Tax and Fringe Benefits Tax: Public Benevolent Institutions, TR 2003/5, 4 June 2003. This ruling provides that family or contractual connections amongst beneficiaries means that the entity fails the public benefit test however it also states that ‘The number of people in the group may be relevant but is not determinative’ [81]; New Zealand Inland Revenue Department, Tax Information Bulletin, Vol 15 No 5 (May 2003) 59-60.

21 Yeap Cheah Neo v Ong Cheng Neo [1875] LR PC 381, 396.

22 Jones v Williams (1767) 2 Amb 651, 652 (Lord Camden).

23 [1945] Ch 123.
beneficiaries were defined by reference to a purely personal relationship to those persons. It was considered ‘in its nature a private or family benefaction’. Lord Greene MR expressed the public benefit principle:

they do not enjoy the benefit, when they receive it, by virtue of their character as individuals but by virtue of their membership of their specified class. In such a case the common quality which unites the potential beneficiaries into a class is essentially an impersonal one. It is definable by reference to what each has in common with the others, and that is something into which their status as individuals does not enter. Persons claiming to belong to the class do so not because they are AB, CD and EF but because they are poor inhabitants of the parish. If, in asserting their claim, it were necessary for them to establish the fact that they were individuals AB, CD and EF, I cannot help thinking that on principle the gift ought not to be held to be a charitable gift, since the introduction into their qualification of a purely personal element would deprive the gift of its necessary public character.

This family connection limitation applies in Australia. In *Davies v Perpetual Trustee Co Ltd* the Privy Council was required to determine whether a trust for the education of descendants of Presbyterians from Northern Ireland who were alive on 21 January 1897 and who had settled in the Colony (Australia) was charitable. The Privy Council held that even though the purpose of the trust was charitable as it was for the advancement of education there was no public benefit as the class of persons to be benefitted were defined through their descent from certain ancestors. In other words, there was a family relationship that defined the recipients of the charitable benefit. This meant that there was no public benefit. This principle has also been applied in respect of indigenous Australians. In *Aboriginal Hostels Ltd v Darwin City Council* (‘Aboriginal Hostels’) Justice Nader of the Supreme Court of the Northern Territory confirmed that in order to

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24 Ibid 128.

25 Ibid 129-130.

26 (1959) 59 SR (NSW) 112.

27 (1985) 75 FLR 197.
be a charity the Aboriginal Hostels Limited had to benefit a section of the community that was not defined through family relationships. His Honour stated that ‘[t]he character that marks the potential beneficiary must not be a relationship to a particular person or persons such as one of blood or employment’.  

3.1 The New Zealand Experience

3.1.1 The Income Tax Exemption for New Zealand Charities

The Income Tax Act 2007 (NZ) (ITANZ) provides that business and non-business income of trustees of charitable trusts and societies and institutions with exclusively charitable purposes is exempt from income tax provided that certain other requirements are met. The jurisprudence surrounding the legal concept of charity is mainly found in the case law dealing with this income tax exemption. However a statutory definition of charitable purpose was incorporated into the ITANZ and subsequently the Charities Act 2005 (NZ) (Charities Act) was enacted which includes a statutory definition of charity. The definition of charitable purpose in s YA 1 ITANZ is essentially a restatement of the common law with an important exception relating to family relationships which was included in 2003. Section YA 1 states:

Charitable purpose includes every charitable purpose, whether it relates to the relief of poverty, the advancement of education or religion, or any other matter beneficial to the community, and – (a) the purpose of a trust, society, or institution is charitable under this Act if the purpose would meet the public benefit requirement apart from the fact that the beneficiaries of the trust, or the members of the society or institution are related by blood. (Author’s emphasis).

28 (1985) 75 FLR 197, 209.
29 ITANZ ss CW41 and 42.
The background to this amendment is found in the context of uncertainty regarding the New Zealand common law about the application of the public benefit test, the review of the taxation of Maori organisations and a general review of the law relating to charities. Prior to these developments the case law in respect of the legal concept of charity had essentially followed the common law of England and Australia. In 1981 the New Zealand Court of Appeal\textsuperscript{30} confirmed that the reference in the New Zealand tax legislation to charitable purpose was in effect the legal meaning of charity as established by the English and Australian cases.\textsuperscript{31} Justice Somers stated on behalf of the Court that reference in the income tax legislation to ‘charitable’ was a reference to a purpose that fell within one or more of the four headings in \textit{Commissioners for Special Purposes of Income Tax v Pemsel}\textsuperscript{32} (\textit{Pemsel’s Case})\textsuperscript{33} and that in addition any charitable purpose must be of benefit to the public (at least for headings two, three and four).\textsuperscript{34} That New Zealand followed the traditional English common law concept of charity for tax purposes was confirmed by the Inland Revenue Department (IRD) in 1997.\textsuperscript{35}

\textsuperscript{30} New Zealand’s highest court.
\textsuperscript{32} [1891] AC 531.
\textsuperscript{33} \textit{Molloy v Commissioner of Inland Revenue} [1981] 1 NZLR 688, [9].
\textsuperscript{34} Ibid [22].
\textsuperscript{35} Inland Revenue Department, \textit{Maori Trust Boards: Declaration of Trust for Charitable Purposes made under Section 24B of the Maori Trust Boards Act 1955}, BR Pub 97/8 (rewritten as BR Pub 01/07 and 08/02), 10-11.
The issue of the public benefit of charities for Maoris came before the court system in 1961. In *Arawa Maori Trust Board v Commissioner of Inland Revenue* (the ‘Arawa Case’) the Court held that members of a Maori tribe and their descendants did not meet the public benefit requirement of being a sufficient section of the community and consequently the trust’s purpose was not classified as charitable. Magistrate Donne made the following comments to explain his reasoning:

Now, the beneficiaries of the appellant Board are “the members of the Arawa Tribe and their descendants”...To qualify as an Arawa one must trace one’s ancestry to someone living in a defined area. The area is fixed and accepted by anthropologists as being exclusively populated by the members of the Arawa Tribe from the time of its landing in New Zealand up to 1840. In my view, therefore, the nexus between the beneficiaries is “their personal relationship to the several propositi”, ie to certain persons living in the defined area prior to 1840...I am satisfied that the beneficiaries here are a “fluctuating body of private individuals” and for that reason also hold that the trust administered by the appellant is not a charitable one.

There was no appeal from this decision. It did however lead to the amendment of the *Maori Trusts Boards Act 1955* (NZ) (MTBA) to deem income from the trusts of Maori Trust Boards exempt from taxation as income from a trust for charitable purposes where the trust falls within the list of purposes set out in the MTBA. The IRD subsequently issued a ruling confirming that income derived by a Maori Trust Board

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37 Ibid 396.
38 Maori Trust Boards are established under the MTBA to manage assets for the general benefit of their members, see Inland Revenue Department, Policy Advice Division, Glossary of Taxation of Maori Organisations, A Government Discussion Document, August 2001.
39 MTBA s 24B was inserted by s 3(1) of the *Maori Trust Boards Amendment Act 1962* (NZ). It states that any Board may declare that it holds property on charitable trust and when it does any income arising shall be deemed to be income of a charitable trust for income tax purposes.
would be considered charitable and therefore exempt from income tax as long as all the other elements necessary for a charitable trust were present.\textsuperscript{40} The income tax law was not however amended and other Maori organisations and entities that had charitable purposes were still subject to the public benefit requirement.

This case shows that in 1961 the New Zealand courts were following the English common law. It also indicates the move by the New Zealand Parliament to amend the law where its application to Maori charities was not in accordance with the Government’s intention to benefit them in a way that was also income tax exempt.

### 3.2 Subsequent New Zealand Judicial Criticism of the Public Benefit Test

In 1986 in \textit{New Zealand Society of Accountants v Commissioner of Inland Revenue} (the ‘\textit{Society of Accountants Case}’)\textsuperscript{41} the New Zealand Court of Appeal held that two fidelity funds were not charities. The funds were established to compensate people whose money was stolen by either an accountant or solicitor who had undertaken work for them. The Court held that each fund was not charitable on the grounds that the claimants were beneficiaries because of their contractual relationship with the defaulting accountant or solicitor rather than as a section of the community, thus failing the public benefit requirement.\textsuperscript{42} In coming to this conclusion however, Richardson J made several

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\begin{itemize}
\item \textsuperscript{40} Inland Revenue Department, \textit{Maori Trust Boards: Declaration of Trust for Charitable Purposes made under Section 24B of the Maori Trust Boards Act 1955-Income Tax Consequences} BR Pub 01/07.
\item \textsuperscript{41} \citeyear{1NZLR148}.
\item \textsuperscript{42} \textit{New Zealand Society of Accountants v Commissioner of Inland Revenue} \citeyear{1NZLR148}.
\end{itemize}
comments indicating agreement in principle with Lord Cross in *Dingle v Turner*. In this case Lord Cross had expressed concern about the application of the public benefit test for charities and had criticised the distinction in the cases between personal and impersonal relationships when determining the validity of a charitable trust. His Lordship made obiter comments that the real test should be the purpose of the trust.

Justice Richardson echoed these sentiments when he stated that in determining public benefit the purpose of the trust must be considered and that some trusts may still be charitable even though the class of beneficiaries is private. The other judges agreed that the funds were not charitable however they did not make any comments on the correctness or otherwise of Lord Cross’s comments.

In the later case of *Educational Fees Protection Society Inc v Commissioner of Inland Revenue* (the ‘*Educational Fees Society Case*’) Gallen J also expressed doubts on the strict application of the public benefit requirement. He stated ‘perhaps the best way of dealing with the matter now is to pose the question following the approach adopted by Lord MacDermott [in *Oppenheim’s* case], ‘is the trust substantially altruistic in character?’

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43 [1972] 1 All ER 878.
44 Ibid 889.
45 Ibid.
46 [1986] 1 NZLR 148, [17]-[18].
48 Ibid [35]-[36].
In a subsequent case the Court of Appeal cast doubt on the English idea that there could be no public benefit in benefitting one’s family in the case of Maori, although finding that the trust in question was not charitable for other reasons.\textsuperscript{49} The case, \textit{Latimer v Commissioner of Inland Revenue}\textsuperscript{50} involved income from the Crown Forestry Rental Trust, being interest on money that this trust invested and whether or not it was exempt from income tax on the basis that the trust was charitable. The background to this case is that in 1989 the New Zealand Government was finding it difficult to dispose of certain forestry assets, including tree crops and fixtures, in view of the fact that a number of Maori had asserted land claims over the area where the assets were located. Agreement was ultimately reached between the Government and various Maori representative bodies. The agreement provided that the Crown sell the existing tree crop and other forestry assets together with a licence for the purchaser to use the land for a commercially realistic period in return for rental for the use of the land. The rental income was invested and the interest on this amount made available to assist Maori in preparing, presenting and negotiating claims before the tribunal established to deal with Maori land claims (the Waitangi Tribunal). Provision was also made in the agreement for any remaining rental to be paid to Maori who had made successful land claims and that any final surplus on the winding up of the trust was to be paid to the Crown.

\textsuperscript{49} \textit{Latimer v Commissioner of Inland Revenue} [2002] NZCA 121 [38]. This case was ultimately heard by the Privy Council which held that the income from the trust in question was exempt from income tax on another basis. The issue of whether or not the specific trust to assist Maoris make land rights claims was charitable was not argued see [2004] UKPC 13, [28].

\textsuperscript{50} \textit{Latimer v Commissioner of Inland Revenue} [2002] NZCA 121.
The Court of Appeal held that the Trust’s first purpose, assisting Maori to provide the Waitangi Tribunal with additional material so that it would be able to make fully informed decisions, leading in turn to the settlement of long standing disputes between Maori and the Crown was charitable.51 This was on the basis that such a purpose would promote racial harmony and was therefore of general benefit to the New Zealand community.52 However the second purpose, the surplus income going to the Crown, was not charitable and therefore the trust failed the charitable purpose test on the grounds that all purposes must be charitable.53

In coming to this conclusion the Court considered the public benefit requirement. Justice Blanchard delivered the judgment of the Court and made the comment that when the English House of Lords laid down a requirement that no class of beneficiaries could be related this was in the context of the English family and not tribal or clan connections established through historical lineage.54 His Honour went on to quote with approval Lord Cross’s comments in *Dingle v Turner* that the purpose of the trust is really the crucial test.55 He then decided that in the context of this trust the family Maori groupings (iwi and hapu56) were a section of the public.57

51 Ibid [40].
52 Ibid [40].
53 Ibid [55]-[56].
54 Ibid [38].
55 Ibid [38].
56 Iwi is a term for the traditional Maori tribal hierarchy and social order made up of hapu (kin groups) and whanau (family groups) having a founding ancestor and territorial or
The decision was appealed to the Privy Council. At this stage the Commissioner for Inland Revenue accepted that the purpose of assisting Maori claimants to pursue their claims was charitable and therefore there was no argument on this point and no discussion by the Privy Council.\textsuperscript{58}

\subsection*{3.3 The `Public Benefit’ Test and Maori land}

The amendment to the MTBA and judicial comment discussed above highlighted the broader question of the status of other Maori trusts or organisations. It was clear that Maori entities established for charitable purposes for the benefit of Maori families would not meet the common law `public benefit’ test.\textsuperscript{59} This issue became particularly important in view of the relatively large amounts of land held by Maoris, both under customary law and freehold title\textsuperscript{60} and the legislative governance over this land. It is also

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\item tribal boundaries. Hapu is a subtribe or kin group linked by a common ancestor. See Inland Revenue Department, Policy Advice Division, \textit{Taxation of Maori Organisations}, A Government Discussion Document, Glossary of Terms (August 2001).
\item \textit{Latimer v Commissioner of Inland Revenue} [2002] NZCA 121, [38].
\item \textit{Latimer v Commissioner of Inland Revenue} [2004] UKPC 13, [28].
\item Maori Land is estimated to be 1.5 million hectares or about 6 per cent of the total land area of New Zealand. See Controller and Auditor-General, \textit{Part 2: Maori Land – What is it and how is it administered?} (2004). In 1996 Maori Land was estimated to be around
\end{itemize}
important to note that Maori people are New Zealand’s First Nation\textsuperscript{61} and a significant cultural minority estimated at around 15 per cent of the total population.\textsuperscript{62}

The *Te Ture Whenua Maori Act 1993/Maori Land Act 1993* (NZ) (the MLA) governs the ownership and management of Maori land.\textsuperscript{63} It consolidates and reforms Maori land law and replaces the *Maori Affairs Act 1953* (NZ) and various amendment acts. Its introductory statement is that it is an act established to reform the laws relating to Maori land in accordance with its Preamble. The Preamble confirms the special significance to Maori of land and that the MLA is to promote the retention of land by Maori and facilitate its occupation, development and utilisation for their benefit. The MLA governs the ownership and management of Maori land.\textsuperscript{64} Under the MLA, Maori companies and trusts control around 64 per cent of Maori Land.\textsuperscript{65} The Act establishes a Maori Land

\textsuperscript{61} A term commonly used to refer to the indigenous peoples of a country see Fiona Martin, Brad Morse and Barbara Hocking, ‘The Taxation Exemption of Canadian Indians as Governments and Individuals: How Does this Compare with Australia and New Zealand?’ (2011) 40 *Common Law World Review* 119, 120.

\textsuperscript{62} *Latimer v Commissioner of Inland Revenue* [2002] NZCA 121, [37].

\textsuperscript{63} MLA Preamble. Maori land is defined in MLA s 4 as ‘Maori customary land and Maori freehold land’.


\textsuperscript{65} Ibid 138.
Court and allows for land to be held on trust for Maori with the income used for their benefit.\textsuperscript{66}

The concept of community benefit is of particular relevance to the Maori Peoples’ ownership of traditional land.\textsuperscript{67} Furthermore, 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’. Under Part 12 of the MLA the Maori Land Court has exclusive jurisdiction to constitute five different types of trusts in respect of Maori land and general land owned by Maori. The trusts are focussed on enabling Maori land to be developed and efficiently used by or for the beneficial owners. The general aim is to restrict the further fragmentation of Maori land titles by limiting the rights of succession, inheritance and alienation in certain cases.\textsuperscript{68} The Maori Trustee (or other trustee as determined under the MLA) holds the legal title in the land and the individual Maori beneficiaries of the trust retain beneficial ownership of the land in a similar manner to a trust created under the common law.\textsuperscript{69}

With the exception of kai taikia trusts (guardianship situations) the trust income may be applied in accordance with s 218 and in fact the land, money and other assets of puea

\textsuperscript{66} MLA parts 1 and 12.


\textsuperscript{68} MLA ss 211-217.

\textsuperscript{69} \textit{Maori Trustee Act 1953} (NZ) s 39 together with the \textit{Maori Trustee Amendment Act 2009} (NZ) ss 16-17.
and whenua topu trusts must be held in accordance with this provision. Section 218 sets out a list of what is considered community purposes towards which the trust income or assets can be used. Many of the purposes fall within the traditional concept of ‘charitable purpose’, for example, the promotion of health, education and vocational training. Several others are outside this concept such as the establishment of meeting halls or houses and recreational areas and loans for farming. The final provision s 218 (2)(d) ‘such other or additional purposes as the trustees with the approval of the Court from time to time determine’ would probably fail the charitable purpose test on the grounds that it is too broad and would also allow for a change in purpose.

Whenua topu trusts are specifically constituted for the benefit of iwi or hapu. The iwi (tribes) form the structure of Māori society. Within each iwi are many hapu (clans or descent groups), each of which is made up of one or more whanau (extended families). The bond that holds them together is one of kinship, both with a founding ancestor and

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70 MLA s 212(6) states that the income of putea trusts shall be held for Maori community purposes, or for such Maori community purposes as the Court may specify either in the constitution of the trust or on application at any time thereafter, and shall be applied by the trustees in accordance with s 218 of the MLA; MLA s 216 (5) provides for whenua topu trusts and is in similar terms except that its income is held for the general benefit of members of the iwi or hapu named in the court order.

71 Commissioners for Special Purposes of Income Tax v Pemsel [1891] AC 531 (general charitable purposes); Inland Revenue Commissioner v McMullen [1981] AC 1 (education); Re Tyrie (deceased) [1970] VR 264 (vocational training); 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 (health).


with the many members of their iwi, hapū and whānau.\textsuperscript{74} These trusts are therefore legislatively enacted for the benefit of Maori tribes and family groups.

Despite the fact that s 245 of the MLA empowered Maoris to establish charitable trusts this did not mean that such trusts were income tax exempt. As a consequence of the enactment of the MLA in 1993 the IRD published a Tax Information Bulletin clarifying its position in respect to trusts declared ‘charitable’ by the Maori Land Court. The Bulletin stated that when determining whether a trust under s 245 of the MLA was charitable for the purposes of the ITANZ the IRD applied the common law.\textsuperscript{75} The Bulletin went on to state that charitable trusts established under s 245 of the MLA faced two problems when attempting to gain charitable status under the ITANZ. First, the purposes listed in s 218 had to be charitable purposes and some were not. The second issue identified that trusts established for whānau (family) would not be accepted by the IRD (unless they were for the relief of poverty which is an exception to the test at common law\textsuperscript{76}) as they are inherently private and therefore fail the public benefit test.\textsuperscript{77}

\textbf{3.4 New Zealand Legislative Change to the ‘Public Benefit’ Test}

\textsuperscript{74} New Zealand Government, \textit{The Encyclopedia of New Zealand}, Tribal Organisation; See Inland Revenue Department, Policy Advice Division, \textit{Taxation of Maori Organisations, A Government Discussion Document, Glossary of Terms} (August 2001)

\textsuperscript{75} Inland Revenue Department, Tax Information Bulletin Vol 5, No 7 (Dec 1993) \textit{Maori Land Act 1993-Tax Implications 5}.

\textsuperscript{76} \textit{Dingle v Turner} [1972] 1 All ER 878.

\textsuperscript{77} Above n 75.
In 2001 the New Zealand Government decided to review the taxation of Maori authorities (the Maori Tax Review). An important discussion point in the Maori Tax Review was how aspects of the law of charities, such as the ‘public benefit test’ applied to Maori organisations seeking exemption from income tax on the grounds of charitable status. The main concern for Maori organisations (including marae) that wished to use the ‘charitable’ tax exemption was that they usually failed to meet the common law ‘public benefit test’. Despite the fact that Maori organisations provided benefits of a charitable nature to iwi and hapu they often did not qualify as charities because their benefit extended to a group of persons connected by blood ties, rather than the general public.

Part III of the Maori Tax Review dealt with those organisations seeking status as a charitable income tax exempt entity. The Government specifically recognised that there needed to be clarification of the public benefit requirement, particularly for iwi and hapu based structures. The Review also recognised that there were problems for entities that maintained marae as these entities may have purposes that are not charitable as well as failing the public benefit test through benefiting a family or clan.

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79 A meeting place for the Maori community. An area of land set aside for the use of hapu 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 under the MLA as Māori Reservations. See Inland Revenue Department, Marae Taxing Issues, Glossary of Terms, Anne Puttnam, Technical Adviser Whangarei, September 2004, 14.

80 Inland Revenue Department, Policy and Advice Division, Taxation of Maori Organisations, A Government Discussion Document (August 2001) [8.21].
The Maori Tax Review took place at the same time as the Government commenced a general review of the taxation of charities (the Charities Review). The initial discussion that took place as part of the Charities Review noted the uncertainty in New Zealand regarding the application of the public benefit requirement to charities. It pointed out that the judicial comments in both the Society of Accountants and the Educational Fees Society Cases had cast doubt on how strictly the public benefit test should be applied where there are family or contractual connections between beneficiaries of a charity. The Charities Review further accepted that the family limitation for charities was a significant problem for all New Zealand society but of particular impact on iwi and hapu based entities that engaged in otherwise charitable activities.

As a result of the Maori Tax Review the income tax legislation was amended effective for the 2003-04 and subsequent years of income. The amendment introduced a new section into the 1994 income tax legislation that extended the meaning of charitable purpose. The current section states that the public benefit requirement for charitable purpose is still satisfied even though the beneficiaries are related by blood (my emphasis). The same provision is found in the Charities Act.

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82 Ibid [5.22].
83 Ibid [5.22]-[5.23].
85 ITANZ s YA 1.
86 Charities Act s 5.
These new provisions recognise that all organisations with charitable purposes should be granted the fiscal benefits of charitable status despite the fact that their beneficiaries are part of an extended family or clan. The amended provisions regarding charitable purpose apply equally to Maori and non-Maori entities but are particularly relevant to iwi-based or hapu-based entities since some of these engage in charitable activity.\textsuperscript{87} The New Zealand Government specifically stated in the explanation to the income tax amendment that it ‘recognises that the public benefit requirement is inappropriate to New Zealand society because it fails to recognise New Zealand’s unique cultural groupings’.\textsuperscript{88} 

The 2001 Maori Tax Review made it very clear however that to obtain charitable status an entity must still meet the other requirements for being a charity.\textsuperscript{89} In other words its purposes must still fall within the \textit{Pensel} charitable heads and it must be for the public or a sufficient section of the public. The discussion document points out that the relevant factors to be taken into account in determining this public benefit include: the nature of the entity, the number of potential beneficiaries and the degree of relationship between these beneficiaries.\textsuperscript{90} It provides as an example whanau trusts\textsuperscript{91} and states that they may

\begin{footnotesize}
\textsuperscript{87} Inland Revenue Department, Policy Advice Division, \textit{Taxation of Maori Organisations, A Government Discussion Document} (August 2001) [8.15].


\textsuperscript{89} New Zealand Inland Revenue Department, Policy Advice Division, \textit{Taxation of Maori Organisations, A Government Discussion Document} (August 2001) [8.15].

\textsuperscript{90} Ibid [8.16].

\textsuperscript{91} Whanua means family. The term extends beyond the concept of immediate family (parents and siblings). Whanua links people of one family to a common tipuna or ancestor. See Inland Revenue Department, Policy Advice Division, \textit{Taxation of Maori Organisations, A Government Discussion Document} (August 2001) [8.15].
\end{footnotesize}
qualify for a charitable tax exemption if ‘their pool of beneficiaries is large enough and inclusive enough to constitute an appreciably significant section of the public, or if the purposes for which they are established confer a wide public benefit’. The Maori Tax Review also pointed out that if such a trust is only for the benefit of a few family members it would fail the public benefit requirement as it is in effect a family or private trust.

As a result of the Maori Tax Review and amendments to the tax legislation the IRD issued a statement establishing the factors that it considers should be taken into account in determining whether or not the public benefit test has been met. These are the nature of the entity; activities it undertakes; the potential beneficiary class; the relationship (degree of connection) between the beneficiaries; and the number of potential beneficiaries. Both the New Zealand Government and the IRD consider that the numerical issue remains significant. Just what this number might be however is unclear at this stage.

3.5 Decisions of the New Zealand Charities Commission


92 Inland Revenue Department, Policy Advice Division, Taxation of Maori Organisations, A Government Discussion Document (August 2001) [8.17].

93 Inland Revenue Department, Policy Advice Division, Taxation of Maori Organisations, A Government Discussion Document (August 2001) [8.17].


Since the amendments to the ITANZ and enactment of the Charities Act, there have been two cases heard by the New Zealand Charities Commission\textsuperscript{96} relating to charities for Maori and dealing with the public benefit requirement. In 2011 the Commission reviewed the charitable status of the Mokorina Whanau Trust.\textsuperscript{97} The Trust was established for the benefit of the founding parents and their descendents, a total of 22 people (including spouses). The Commission considered that as the benefits of the Trust were for a small number of closely related people there was no public benefit.\textsuperscript{98} The same conclusion was reached in the 2010 decision relating to the Korako Karetai Trust\textsuperscript{99} even though this Trust involved a larger number of beneficiaries. In this case the beneficiaries were defined as the descendents of a single person, Korako Karetai\textsuperscript{100} and numbered 102 adults in addition to children and grandchildren.\textsuperscript{101} The Commission concluded that the Trust’s activities did not provide a benefit to a sufficiently open section of the public but rather a limited number of persons descended from one named individual. For this and other reasons the Commission refused its registration.

\textsuperscript{96} The Charities Commission is a Crown entity established under s 8 of the Charities Act. Its functions include registering, monitoring and receiving annual returns for charities. All charities must be registered with the Commission and once registered are accepted as charities for the purposes of the IRD.

\textsuperscript{97} Deregistration Decision: Mokorina Whanau Trust (CC40304), No D2011-4, 25 May 2011.

\textsuperscript{98} Ibid [41].

\textsuperscript{99} Registration Decision: Korako Karetai Trust, No 2010-18, 23 September 2010.

\textsuperscript{100} A Maori leader and signatory to the Treaty of Waitangi in 1840. He had eight wives and 10 children. See New Zealand Government, \textit{The Encyclopedia of New Zealand}, Biographies.

\textsuperscript{101} Registration Decision: Korako Karetai Trust, No 2010-18, 23 September 2010, [84].
The Charities Commission has also issued an information sheet that explains its interpretation of the public benefit test for charities. The document provides examples of groups of people who are considered a section of the public and who will therefore satisfy this test. One example is an iwi. As stated earlier in this paper iwi is the tribal hierarchy and much larger both in size and genealogy than hapu and whanau.

These decisions are based on their unique facts so it is hard to draw a clear principle from either of them. Furthermore, in both cases the trusts also failed because no charitable purpose was established. However the Commission was very clear in stating that providing benefits to the descendants of one individual was not a sufficiently open section of the public to warrant charitable status. This was even despite the fact that the beneficiaries of the Korako Karetai Trust were over 100 and represented several generations.

The Charities Commission (which has subsequently been deregistered) has also issued an information sheet that explains its interpretation of the public benefit test for charities. The document provides examples of groups of people who are considered a

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103 Ibid 4.
104 The New Zealand Government announced on 11 August 2011 that the Charities Commission would be deregistered. As a result there will not be any further decisions that can be analysed. New Zealand Government, ‘Reduction in State Agencies Confirmed’ http://www.beehive.govt.nz/release/reduction-state-agencies-confirmed 11 August 2011.
section of the public and who will therefore satisfy this test. One example is an iwi.\textsuperscript{106} As explained earlier in this Chapter, iwi is the word for peoples or nations and is much larger both in size and genealogy than hapu and whanau. The Commission has clearly interpreted the legislative provision regarding the blood connection very narrowly and does not seem to have enlarged significantly on the common law.

\textbf{Conclusion}

The discussion of the public benefit requirement for charities and the New Zealand experience indicate that ‘altruism’ as an important and (some may argue) essential aspect of charity is culturally determined, so that it is possible that altruism might take different forms in different cultures. The legislative developments in New Zealand suggest that in the case of tribal communities, altruism cannot be separated from discharging duties associated with blood ties. This might be contrasted with individualistic liberal communities, where altruism is a distinct virtue precisely because it is separated from the discharge of such duties. This latter approach is also in the context of a sophisticated tax system that provides extensive tax concessions to charitable entities and activities. If countries with tribal First Nations do not recognise the different approaches of these peoples in their charity law, they fail to take seriously the normative understandings of those First Nations. This is a form of discrimination. Australia should therefore follow New Zealand’s lead and make it possible for indigenous tribal groupings to form charities that benefit only members of the groupings in question. On the other hand perhaps New Zealand has gone too far by enabling, at least on the face of the legislation, non-Maori

\textsuperscript{106} Ibid 4.
groupings to form charities that benefit only family members, and it may be better in Australia to create an exception only for Native Title Groups and Traditional Owners. This argument is on the basis that they have First Nation status and that their normative understandings are different from those that underpin mainstream charity law.

Although there has been no case law on the New Zealand amendment there are two decisions of the Charities Commission. Both decisions have interpreted the amendments conservatively and stated that a charity for the benefit of a group defined through descent from one common ancestor is still not sufficiently open to the public to enable the granting of charitable status. The Mokorina Whanau Trust was for the benefit of a single closely related family and it was only these family members who received any distribution from the trust. It is therefore easier to reconcile this decision with the broader intent of the legislation as the beneficial group in this case was a family in the Western sense. The Korako Karetai Trust had over one hundred potential beneficiaries and represented several generations. However the purposes of this Trust were all allied to the aims of the family and only for the benefit of its members who were all descended from one common ancestor. So again the Commission did not consider that there was sufficient public benefit. The Commission has however recognised the larger iwi as being a sufficient section of the public to be eligible for charitable status. But until there is a court case on the issue, the dividing line between a single family whanua and the iwi or tribe is still uncertain.
I argue that Australia should also amend its income tax legislation to allow that a blood relationship does not prevent the public benefit test from being complied with. However I argue that this exemption should only apply to Native Title Groups and Traditional Owners. It would require a short legislative instrument to deem the public benefit for all organisations established for the benefit of Native Title Groups and Traditional Owners even though there is a blood connection. It would then be open to the new ACNC\textsuperscript{107} to publish guidelines regarding how this provision will operate. In this way the blood connection limitation might be removed for Australian First Nations but the revenue protected, as all other requirements for a charity would still need to be fulfilled.

Such an amendment would be simple to enact and already has legislative precedent. In 2004 as a result of the Sheppard Report the Federal Government enacted the \textit{Extension of Charitable Purpose Act 2004} (Cth). This legislation deems a public benefit for self-help groups and closed or contemplative religious orders\textsuperscript{108} provided that these groups have a charitable purpose.\textsuperscript{109} Both areas were identified in the Report as being for the public good but not falling within the common law concept of public benefit.

A further argument in favour of this amendment is that if Australia enacts a statutory definition of charity which requires a public benefit for all charitable purposes, including

\textsuperscript{107} The Australian Government has implemented a taskforce for the ACNC with an interim Commissioner. It will commence 1 October 2012 http://acnctaskforce.treasury.gov.au/content/Content.aspx?doc=about.htm.

\textsuperscript{108} \textit{Extension of Charitable Purpose Act 2004} (Cth) s 5.

\textsuperscript{109} \textit{Extension of Charitable Purpose Act 2004} (Cth) s 5 (4).
relief of poverty,\textsuperscript{110} this may mean that many indigenous charities (if they only benefit one or a few families) are then unable to attain charitable status.

\textsuperscript{110} This seems likely given the comments made in Treasury, \textit{A Definition of Charity: Consultation Paper}, 2010 [66].