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The Chief Tax Counsel
Tax Counsel Office
Via Email

Our ref KPMG submission - mutuality.docx

25 June 2025

Dear Sir or Madam

Mutual transactions of association (including clubs and societies)

KPMG is pleased to provide feedback on the draft Operation Statement ("OS"). The draft OS concludes that the mutual association provisions in the Income Tax Act 2007 override the principle of mutuality for amounts that would be income if they were not covered by the principle.

We note the key change in view in the draft OS relates to membership subscriptions, fees and levies paid to associations that are unable to distribute any surplus to members (because of a prohibition in their constitution documents or in statute). The draft OS considers that such amounts may be income under ordinary concepts or business income, rather than amounts covered under the mutuality principle. This represents a change in the Commissioner's view from prior guidance.

The basis for the Commissioner's conclusion is a decision of the Federal Court of Australia, *Coleambally Irrigation Mutual Co-operative Ltd v FCT (2004) ATC 4,126*, which the Commissioner considers should be followed in New Zealand.

We are concerned with the overemphasis on the *Coleambally* decision as this will adversely impact thousands of clubs, societies, associations and other mutual bodies that have applied, and continue to apply, the mutuality principle to member subscriptions, fees and levies (as noted in the *Taxation and the not-for-profit sector* policy consultation). The impact may not necessarily be in the form of income tax to pay (as many will be operating on a break-even, or loss, basis), but from the additional compliance costs.

We note that in Australia, following the *Coleambally* decision, the Federal Government enacted legislative changes to preserve non-taxation of member contributions that were not payments for goods or services, but rather for a common fund for mutual benefit. This suggests that *Coleambally* was clearly not the intended tax policy.

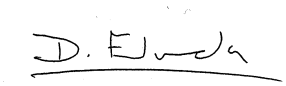
Further, we note that New Zealand decisions such as *Case 27* and *Grieve v CIR* can be used to support the conclusion that member contributions to a common fund for the mutual benefit of members are not taxable income and no business activity is carried on if there is a lack of a profit-making intention. This, in our view, supports maintaining the "status quo" position that membership subscriptions, fees and levies should not be income from a business or under

ordinary concepts.

If the Commissioner continues to be of the view that *Coleambally* should prevail, then we strongly recommend (similar to Australia) that there is legislative clarification that the principles of mutuality apply where member contributions are made to a a common fund for mutual benefit, rather than as payment for goods and services.

The OS should not be finalised in its current form where such legislative reform is pending. It is proposed the OS would only be applied prospectively from the date of publication (which we would otherwise support if no legislative clarification is anticipated).

Yours sincerely



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