

CIS 2016/03

Commissioner's Interpretation Statement: Public Benevolent Institutions

Commissioner's Interpretation Statements provide guidance to ACNC staff, charities and the public on how the ACNC understands the law that applies to charities. These statements reflect our current understanding of the law on charity and are binding on ACNC staff.

While we do not have the power to produce binding rulings, we will ensure that organisations that rely on the Interpretation Statements are treated fairly, consistent with our objects and [regulatory approach](#). If the law or an Interpretation Statement changes, we will apply the new position from the date of the change, not retrospectively in a way that could disadvantage your charity. In most cases, we will also allow a period of time for charities to respond to any change.

The purpose of this Commissioner's Interpretation Statement is to provide guidance on the ACNC's view on the meaning and scope of the charity subtype of 'public benevolent institution' (PBI) for ACNC purposes. The Australian Taxation Office administers the taxation implications of being a registered charity and the PBI subtype of charity for Commonwealth purposes.

This Interpretation Statement should be read together with **Appendix A**, which sets out scenarios illustrating how the ACNC will apply this Commissioner's Interpretation Statement in practice.

1. Background

- 1.1. The phrase public benevolent institution (PBI) does not have a technical legal meaning and must be given its ordinary meaning.¹
- 1.2. Historically, the phrase has been used in various taxation statutes in Australia. Previously the Australian Taxation Office determined whether an organisation was a PBI for Commonwealth taxation purposes.
- 1.3. Entities can now apply to the ACNC to be registered under the charity subtype, PBI.²
- 1.4. If successful, an entity will be a “registered public benevolent institution”. For Commonwealth taxation purposes, the expression “registered public benevolent institution” appears in item 4.1.1 of the table in section 30-45 of the *Income Tax Assessment Act 1997* (Cth) and section 57A of the *Fringe Benefits Tax Assessment Act 1986* (Cth).
- 1.5. An entity that is a “registered PBI” will also be a “registered charity” and therefore may be eligible for the Commonwealth tax concessions which are available to registered charities.
- 1.6. The Australian Taxation Office administers the taxation concessions available to registered charities and registered PBIs, including the ‘in Australia’ condition for deductible gift recipient status.³

2. What is a public benevolent institution?

- 2.1. For ACNC purposes,⁴ a PBI is a charitable institution with a main purpose of providing benevolent relief to people in need.
- 2.2. While the phrase PBI is a compound expression,⁵ it is nevertheless appropriate to define each word in the phrase.⁶
- 2.3. Accordingly a PBI must be:

¹ *Perpetual Trustee Co Ltd v. Federal Commissioner of Taxation* (1931) 45 CLR 224 at 231; *Maughan v. Federal Commissioner of Taxation* (1942) 66 CLR 388 (*Maughan*) at 395.

² Item 14 of the table in section 25-5 of the *Australian Charities and Not-for-profits Commission Act 2012* (Cth).

³ Refer to the ATO’s website for guidance regarding DGR status: [https://www.ato.gov.au/Non-profit/Getting-started/Endorsement/Deductible-gift-recipient-\(DGR\)-endorsement/Can-you-be-endorsed-as-a-DGR/](https://www.ato.gov.au/Non-profit/Getting-started/Endorsement/Deductible-gift-recipient-(DGR)-endorsement/Can-you-be-endorsed-as-a-DGR/)

⁴ This CIS interprets the phrase PBI, as it appears in the *Australian Charities and Not-for-profits Commission Act 2012* (Cth). It is not intended to interpret that phrase where it may appear in other contexts such as in state or territory legislation.

⁵ *Public Trustee (NSW) & Ors v. Federal Commissioner of Taxation* (1934) 51 CLR 75 at 103.

⁶ Dal Pont, G.E. *Law of Charity* (LexisNexis Butterworths, 2010), p.37.

- 2.3.1. 'public' in the required sense;
 - 2.3.2. benevolent; and
 - 2.3.3. an institution.
- 2.4. Additionally, to be eligible for registration as a PBI subtype of charity, an entity must also be eligible for registration as a 'charity' under the *Australian Charities and Not-for-profits Commission Act 2012* (the ACNC Act).⁷

3. Charity

- 3.1. To be registered as a charity, an entity must:
- 3.1.1. meet the definition of a 'charity' in s.5 of the *Charities Act 2013* (Cth) (Charities Act) and therefore must have a 'charitable purpose' as set out in section 12 of the Charities Act; and
 - 3.1.2. meet all of the entitlement criteria in s.25-5 of the ACNC Act, including the conditions set out in subsection (3):
 - 3.1.2.1. "the entity is a not-for-profit entity;
 - 3.1.2.2. the entity is in compliance with the governance standards and external conduct standards (see Part 3-1);
 - 3.1.2.3. the entity has an ABN;
 - 3.1.2.4. the entity is not covered by a decision in writing made by an Australian government agency (including a judicial officer) under an Australian law that provides for entities to be characterised on the basis of them engaging in, or supporting, terrorist or other criminal activities."
- 3.2. It is likely that a PBI will have a charitable purpose of advancing social or public welfare.⁸ Alternatively, or in addition, it may have other charitable purposes.
- 3.3. In defining the term 'charity', the Charities Act states that an entity that is a 'government entity' is not a 'charity'.⁹ Therefore an entity that is a 'government entity' cannot be a registered PBI. For further detail on the

⁷ s.25-5(2)(c) of the *Australian Charities and Not-for-profits Commission Act 2012* (Cth).

⁸ ss.12(1)(c) and 15 of the Charities Act.

⁹ s 5 of the Charities Act.

meaning of 'government entity' refer to the Commissioner's Interpretation Statement on the subject ([CIS 2016/01](#)).

4. Public

- 4.1. Technically, the 'public' component of the phrase PBI:
 - 4.1.1. is not limited to the concept of 'public benefit' which applies to charities;¹⁰ and
 - 4.1.2. is distinct from the taxation concept of a 'public fund'.¹¹
- 4.2. Rather, in determining whether an entity is 'public' for the purposes of being a PBI, a number of criteria are relevant.
- 4.3. The main criterion is the extensiveness of the class¹² of individuals that the entity benefits.¹³
- 4.4. Other criteria are relevant but not decisive in determining whether an entity is 'public':¹⁴
 - 4.4.1. receipt of public funds;
 - 4.4.2. public control and accountability; and
 - 4.4.3. connection with government.
- 4.5. An entity with three or more responsible persons¹⁵ that are unrelated to each other (that are not family members or close friends) and that have a degree of responsibility in the community, is more likely to demonstrate the criterion of "public control and accountability". By contrast, an entity with one or two responsible persons is less likely to do so. The latter entity may still be "public" for PBI purposes if it demonstrates the other criteria – receipt of public funds, connection with government, and especially if it demonstrates the main criterion, that the entity benefits an extensive class of individuals.

¹⁰ See definition of "charity" in s.5(b)(i) of the Charities Act.

¹¹ Refer to the ATO website for more information: <https://www.ato.gov.au/Non-profit/Getting-started/In-detail/Types-of-DGRs/Public-funds/>

¹² The word 'class' is used in the case of *Maughan v. Federal Commissioner of Taxation* (1942) 66 CLR 388. In this context it refers simply to a group of people as opposed to the socio-economic or demographic characteristics of that group.

¹³ *Ibid*, at 397-8 per Williams J.

¹⁴ *Perpetual Trustee Co Ltd v. Federal Commissioner of Taxation* (1931) 45 CLR 224 at 232 per Dixon J.

¹⁵ The ACNC uses the phrase "responsible person" for the term "responsible entity" which has the meaning given in section 205-30 of the *Australian Charities and Not-for-profits Commission Act 2012* (Cth).

- 4.6. As noted in paragraph 3.3, an entity that is a 'government entity' is not eligible to be registered as a PBI.

5. Benevolent

5.1. People in need

- 5.1.1. The seminal case of *Perpetual Trustee Co Ltd v Commissioner of Taxation* (1931) 45 CLR 224, established that a PBI is benevolent if it is organised, promoted or conducted for the relief of poverty or distress (sickness, disability, destitution, suffering, misfortune or helplessness).
- 5.1.2. In simple terms, a PBI must have benevolent relief as its main purpose¹⁶, and that relief must be specifically targeted at people in need and provided to relieve the needs of those people.
- 5.1.3. The entity's benevolence must be targeted (or directed) at people in need and not the broader general community.¹⁷ This principle was elucidated by Priestley JA in *Australian Council of Social Service Inc v. Commissioner of Pay-roll Tax*.¹⁸

'To me, the word "benevolent" in the composite phrase "public benevolent institution" carries with it the idea of benevolence exercised towards persons in need of benevolence, however manifested. Benevolence in this sense seems to me to be quite a different concept from benevolence exercised at large and for the benefit of the community as a whole even if such benevolence results in relief of or reduction in poverty and distress. Thus it seems to me that "public benevolent institution" includes an institution which in a public way conducts itself benevolently towards those who are recognisably in need of benevolence but excludes an institution, which although concerned, in an abstract sense, with the relief

¹⁶ The phrase "main purpose" has the meaning set out in paragraph 5.5. It does not mean that a PBI can have non-benevolent, non-ancillary purposes.

¹⁷ *Australian Council of Social Service Inc v. Commissioner of Pay-roll Tax* (1985) 1 NSWLR 567. The assumption is that many people in the "broader general community" will not be in need of benevolent relief but see also paragraph 5.1.5.

¹⁸ *Australian Council of Social Service Inc v. Commissioner of Pay-roll Tax* (1985) 1 NSWLR 567.

of poverty and distress, manifests that concern by promotion of social welfare in the community generally.’

- 5.1.4. Therefore an organisation that provides general advice, information, research and advocacy services to the whole or part of the community is unlikely to be a PBI.
- 5.1.5. Some health organisations that are not PBIs because their work is not targeted at people in need (for example, an organisation exclusively engaged in health research) may instead be eligible for registration under the subtype health promotion charity.¹⁹
- 5.1.6. An entity may nevertheless be a PBI if its benevolence is targeted at a community, if all or the vast majority of people in the community are “people in need”. This may be the case for PBIs providing benevolent relief in developing countries to disadvantaged communities.

5.2. Financial need

- 5.2.1. A PBI is not restricted to providing relief to people in poverty or financial need only.²⁰ It may provide relief to people in need for one of the other reasons outlined in paragraph 5.1.1.
- 5.2.2. The fact that an organisation charges a fee, or partial fee, does not preclude it from being eligible for registration as a PBI.²¹

5.3. Degree of need

- 5.3.1. Poverty and distress are relative. To qualify as a PBI, the poverty or distress that is relieved must be “of such seriousness as will arouse community compassion and thus engender the provision of relief.”²²
- 5.3.2. An organisation with a purpose of addressing Indigenous disadvantage will ordinarily be considered to be providing

¹⁹ Refer to the [Commissioner’s Interpretation Statement on Health Promotion Charities](#).

²⁰ *Commissioner of Pay-roll Tax v. Cairnmillar Institute* [1992] 2 VR 706.

²¹ *Ibid.*

²² Per McGarvie J in *Pay-roll Tax, Commissioner of (Vic) v. The Cairnmillar Institute* (1990) 90 ATC 4752.

assistance to “people in need”.²³ To qualify as a PBI, the organisation must provide services targeted at those needs.

- 5.3.3. An organisation that provided marriage guidance and counselling was not found to be a PBI. McGarvie J in *Marriage Guidance Council of Victoria v. Commissioner of Pay-roll Tax (Vic.)* 90 ATC 4770 (*Marriage Guidance Council*) stated that, “[t]here could be no doubt that the emotional stress and pain of an unsatisfactory marriage, a separation or a divorce is typically of a severe order.” However this fell “within the ambit of the stress and pain encountered in ordinary human experience associated with such things as failure, deception, loss of status or reputation, and bereavement” and “[m]ost healthy people recover from such hurtful experiences with the passage of time.”
- 5.3.4. The ACNC distinguishes “ordinary human experiences” from those experiences from which people do not recover by themselves with the passage of time – for example, experiences that lead to mental illnesses requiring treatment. Individuals who have experienced family violence may fall into this category. An organisation that assists such people by providing intervention to relieve their condition, is likely to be “benevolent” for PBI purposes because their condition arouses the compassion of the community. The ACNC also recognises that people respond to hurtful experiences in different ways. Therefore the focus ultimately is on the condition of individuals that the entity seeks to assist.
- 5.3.5. The ACNC takes the view that an organisation that provides education and training will not generally be a PBI because people seeking education or training often do not have needs that arouse the community’s compassion. In contrast, if an organisation’s purpose is to provide education and training which is targeted at people in need, for example, people with disabilities or the long-term unemployed, and the programs relieve their need, it may be a PBI.

²³ For further information on Indigenous charities generally, refer to the Commissioner’s Interpretation Statement on the subject ([CIS 2013/02](#)).

5.4. Nature of relief

- 5.4.1. The relief provided need not be practical and material in nature. The relief may encompass the preservation and promotion of indigenous culture, provided that the people assisted by the organisation are “people in need”, and it does not amount to an independent purpose of promoting culture, independent of need.²⁴
- 5.4.2. To qualify as a PBI, an entity’s services must be actually directed towards **relieving** the poverty or distress experienced by the people it assists. It is not enough that the entity’s services are targeted at people in need.

5.5. Main purpose

- 5.5.1. The ACNC takes the view that the terms “main”, “predominant” or “dominant” can be used interchangeably when referring to the purposes or objects of an organisation.²⁵ In this Commissioner’s Interpretation Statement, we have used the phrase “main purpose” for convenience.
- 5.5.2. The main purpose of a PBI must be to provide relief to people in need. If an entity has other purposes that are not benevolent, it will be ineligible to be a PBI unless those purposes are ancillary or incidental to the main benevolent purpose.²⁶ The ACNC notes that some interpretations use the term “minor” in relation to purposes or activities. It is the view of the ACNC Commissioner that the correct enquiry is as to whether any purposes that are not benevolent are incidental or ancillary, rather than enquiry as to whether the purposes are “minor”.
- 5.5.3. An entity’s motives are not directly relevant to determining its main purposes. For example, if an entity’s main purpose is advancing religion it will not be eligible to be registered as

²⁴ *Maclean Shire Council v. Nungera Co-operative Society Ltd* (1995) 86 LGERA 430, 433 (Handley JA, Priestley and Sheller JJA agreeing).

²⁵ The terms were used interchangeably by the majority of the High Court in *Federal Commissioner of Taxation v. Word Investments* (2008) 236 CLR 204, [17]. Other cases and sources have used the terms “principal”, “primary” or “sole”.

²⁶ *Maclean Shire Council v. Nungera Co-operative Society Ltd* (1995) 86 LGERA 430, 432-3 (Handley JA, Priestley and Sheller JJA agreeing); *Bodalla Aboriginal Housing Company Ltd v Eurobodalla Shire Council* [2011] NSWLEC 146, [67] (Preston CJ).

a PBI. However if the entity is motivated by religious faith and its main purpose is benevolent, it may still be eligible.

5.6. Directness

5.6.1. To be a PBI, there is no requirement that the charity must itself directly give or provide the benevolent relief.²⁷ Such a charity can provide relief via, or in coordination with,²⁸ related or associated entities and still be a PBI.

5.6.2. An organisation is not precluded from being registered as a PBI if some of its services are provided by agents or contractors.²⁹

5.6.3. As set out in the [Commissioner's Interpretation Statement on The Hunger Project case \(CIS 2013/01\)](#), the ACNC takes the view that an organisation can be a PBI if it has:

5.6.3.1. **concrete objects of benevolent relief** – the beneficiary group must be recognisably in need of benevolent relief. General, undirected or abstract objects like benefitting the whole community are insufficient. (In the case of a fundraising institution, there must be a recognisable group that would benefit from the charitable work being funded);

5.6.3.2. **clear mechanisms for delivering the benevolent relief** – the way in which the charitable work leads to benevolent relief must be clear. (In the case of a fundraising institution, there must be a clear way to deliver the benevolent relief for which the funds are raised); and

5.6.3.3. **a relationship of collaboration or a common public benevolent purpose** – based on the analogy of the reasoning in *Word Investments*³⁰. There are a number of ways in which an institution may be organised, or conducted for,

²⁷ *Commissioner of Taxation v. Hunger Project Australia* [2014] FCAFC 69.

²⁸ *Australian Council for Overseas Aid v. Federal Commissioner of Taxation* (1980) 49 FLR 27.

²⁹ *Legal Aid Commission of Victoria v Commissioner of Pay-roll Tax (Vic)* 92 ATC 2053.

³⁰ (2008) 236 CLR 204.

or promoting the relief of poverty or distress under a collaborative relationship or common purpose (such as through their organisational structure, shared planning and processes). As in *Word Investments*, the focus is on the substance of the objectives and activities, rather than the form. (In the case of fundraising, an institution that raises funds for associated entities but does not itself provide relief is no bar to it being a public benevolent institution.)

- 5.6.4. The ACNC takes the view that a PBI may provide relief via, or in coordination with, related or associated entities that are not PBIs for the fulfilment of benevolent purposes only.

5.7. Assistance to people

- 5.7.1. A PBI must assist people. An organisation that relieves the suffering of animals is not a PBI.³¹

5.8. Operating overseas

- 5.8.1. An organisation is not precluded from being registered as a PBI subtype of charity if it has a main purpose of providing benevolent relief to people residing overseas.
- 5.8.2. Furthermore, an organisation is not precluded from being registered as a PBI subtype of charity if it provides benevolent relief to people in countries that have not been declared as 'developing' by the Minister for Foreign Affairs.³²
- 5.8.3. As noted in paragraph 1.6, an organisation that is registered by the ACNC as a PBI subtype of charity, must meet additional conditions before it will be eligible for endorsement as a deductible gift recipient (DGR). This assessment is made by the Australian Taxation Office.
- 5.8.4. Some organisations intending to operate overseas, may apply for DGR endorsement under item 9.1.1 of the table in section 30-80 of the *Income Tax Assessment Act 1997* (Cth) – a public fund declared by the Minister to be a

³¹ *Federal Commissioner of Taxation v. Royal Society for the Prevention of Cruelty to Animals, Queensland Inc* 92 ATC 4441.

³² For more information, see <http://dfat.gov.au/aid/who-we-work-with/ngos/Pages/list-of-developing-countries.aspx>.

developing country relief fund under section 30-85. For clarity, the ACNC takes the view that the concept of “relief” for the purposes of s.30-85 is not identical to the concept of “relief” for PBI purposes. The latter concept is explained in this CIS.

5.8.5. In order to be eligible for registration as a charity or PBI subtype of charity, an organisation must comply with the ACNC governance standards.³³ The ACNC takes the view that an organisation operating overseas will generally find it more challenging to demonstrate its compliance with the governance standards, than an organisation operating solely in Australia. This is because charities operating overseas face more risks, for example, risks of:

5.8.5.1. financial loss, which may be in the form of theft, fraud, cyber attack, terrorist financing or money laundering; and

5.8.5.2. abuse to children or other vulnerable people.

5.8.6. These risks may arise due to:

5.8.6.1. cultural and language barriers;

5.8.6.2. lack of experience in development practice; or

5.8.6.3. lack of proximity to Australia, which can mean a lack of accountability and transparency.

5.8.7. Therefore organisations that are currently registered PBIs or that are applying for registration as a PBI subtype of charity, ought to address these risks and can expect the ACNC to enquire into these matters. The ACNC encourages organisations intending to apply for PBI registration to undertake research, review guidance materials on the ACNC website and contact the ACNC for further guidance if required regarding appropriate governance measures.

5.8.8. An entity with a purpose of building, maintaining or enhancing community infrastructure (eg. roads) will ordinarily not be eligible for registration as a PBI because the relief provided to people in need will be too indirect.

³³ s.25-5(3)(b) of the *Australian Charities and Not-for-profits Commission Act 2012* (Cth).

However if such a purpose was incidental or ancillary to a main benevolent purpose, the entity may nevertheless be eligible for registration as a PBI.

5.8.9. Paragraphs 5.1.6 and 5.9.6.2 of this CIS are also relevant to organisations operating overseas.

5.9. **Prevention and relief**

5.9.1. A number of cases have considered whether a purpose of **preventing** poverty or distress from arising can be benevolent. The ACNC considers that it can be in some circumstances, and it will apply the principles set out in the following paragraphs.

5.9.2. A PBI's benevolence must be **targeted** at people in need. Prevention work for the benefit of the community at large will often lack the necessary requirement of targeting people in need (assuming that the community or the vast majority of the community are not people in need as per paragraph 5.1.6).

5.9.3. A PBI's benevolence must actually **relieve** the needs of people in need. Some prevention work will be too remote to be able to meet this requirement.

5.9.4. A PBI's main **purpose** must be the provision of benevolent relief targeted at people in need and for the relief of those needs. A PBI may undertake prevention **activities** provided that these activities are in aid of or further the main benevolent purpose.

5.9.5. A PBI's **main** purpose must be benevolent. It may have a non-benevolent purpose (including a remote preventative purpose) that is incidental or ancillary to the main benevolent purpose.

5.9.6. A PBI's benevolence must be targeted at **people in need**. There are different gradients of "need". To qualify as a PBI, the need must be of such seriousness that the community's compassion is aroused as set out in paragraph 5.3. The ACNC takes the view that those that have "significant needs" will generally be considered "people in need". The ACNC also accepts that the term "at risk" can refer to people who are already in need. This will be the case if the

risk factors they experience or their condition is such that the community's compassion is aroused – for example, if they are suffering from illness or disability, or are in poverty. The following cases illustrate these points:

5.9.6.1. In *Maughan*,³⁴ facilities were provided to boys in necessitous circumstances in slum areas to, amongst other things, “keep them off the streets”. Homeless young people who live on the streets will generally be considered “people in need”. Young people who are at risk of homelessness may also be “people in need” if they experience risk factors that commonly lead to homelessness and their condition is such that the community's compassion is aroused. This is likely to be the case if the young people experience addictions or mental illnesses requiring treatment, are in necessitous circumstances and have a lack of social support.

5.9.6.2. In an international development and relief context, people in receipt of relief or humanitarian assistance work (work which is provided during and in the aftermath of humanitarian crises), will generally be considered “people in need”. Additionally, people who are in receipt of development assistance will also be considered “people in need”, where that assistance is provided to necessitous people in developing countries.³⁵ Development assistance is understood as being activities that improve the long-term well-being of people in developing countries, which build their capacity and provide long-term sustainable solutions to needs stemming from poverty and distress. Development assistance is thus preventative in that it stops such needs recurring. It is equally “relief” in the PBI context because it relieves the needs of the people assisted.

5.9.6.3. In contrast, in *Marriage Guidance Council*, McGarvie J examined an organisation providing

³⁴ *Maughan v. Federal Commissioner of Taxation* (1942) 66 CLR 388

³⁵ *Re SIM Australia as trustee for SIMAID Trust and Federal Commissioner of Taxation* [2007] AATA 1443.

counselling to “**prevent** the stress and pain [of a relationship breakdown arising], to reduce or eliminate it or to enable people to reconcile themselves to living with its memory”. He described the counselling as “preventative work... akin to training, education or improvement”. As set out in paragraph 5.3, the ACNC considers that an organisation with a purpose of undertaking preventative work of this nature is not a PBI because the condition of the people it assists would not arouse the community’s compassion. This is because the condition of these people is an “ordinary human experience” from which most people would recover by themselves with the passage of time.

6. Institution

- 6.1. A PBI must meet the legal requirements of being an ‘institution’. There is no technical legal definition of the term ‘institution’ and it therefore takes its ordinary meaning.
- 6.2. A charitable institution is created and exists to bring into being the charitable purposes and intentions of its founders.³⁶ It was expressed as follows by Lord MacNaghten in *Mayor of Manchester v McAdam* [1896] AC 500:

‘It is the body (so to speak) called into existence to translate the purpose as conceived in the minds of the founders into a living and active principle.’³⁷
- 6.3. A new organisation that is yet to commence operating may be eligible for registration as a PBI. To qualify, it must demonstrate that it has concrete plans to operate in the foreseeable future (within one year of establishment) in order to evidence the bringing of its founders’ purposes and intentions into being.
- 6.4. There are a number of ways in which new organisations may demonstrate that they have concrete plans to operate in the foreseeable future:

³⁶ *Mayor of Manchester v. McAdam* [1896] AC 500 at 511.

³⁷ *Ibid* 511.

- 6.4.1. The provision of an operational, strategic or business plan (two or more pages) outlining what it proposes to do, the resources it requires and how it will obtain them, the personnel it will engage, its financial projections and the third parties it may involve; and/or
- 6.4.2. The provision of agreements with other organisations setting out how the organisations intend to work together to provide benevolent relief.

In addition, evidence of in-principle financial support or seed funding will be advantageous. The more rigorous the above documents are, the more readily the organisation will be able to evidence that it was established to bring the purposes and intentions of its founders into being.

- 6.5. If an entity that was registered as a PBI, fails to commence operating within one year and cannot explain why its plans have not been realised, the ACNC may review its registration as a PBI subtype of charity. Similarly the ACNC may review the registration of an existing PBI that has not been operating for six or more months and cannot explain how it nevertheless evidences the bringing of its founders' purposes and intentions into being.
- 6.6. In bringing purposes and intentions into being, it is acknowledged that the nature of the purposes and intentions and the mode of effecting them may require different levels of activity from time to time.³⁸ In addition, it may be that external circumstances, such as damage to a PBI's premises or equipment or loss of contracts, mean that a PBI's usual operations are suspended while it carries out alternative operations such as obtaining replacement equipment, premises or contracts.³⁹
- 6.7. A mere trust⁴⁰ or a fund is not an institution. Therefore where an entity merely manages trust property which is applied for a charitable purpose, it is not an institution.⁴¹
- 6.8. A PBI can assume any legal structure, whether a corporation, trust or unincorporated association, as long as it has a distinct identity.

³⁸ *Avondale Motors (Parts) P/L v FCT* (1971) 124 CLR 97 per Gibbs J at 103-4 (and the cases there cited). By analogy with carrying on a business.

³⁹ *Avondale Motors (Parts) P/L v FCT* (1971) 124 CLR 97 per Gibbs J at 103-4 (and the cases there cited). By analogy with carrying on a business.

⁴⁰ *Stratton v. Simpson* (1970) 125 CLR 13 per Gibbs J at 158.

⁴¹ See for example *Commissioner of Land Tax v. Joyce* (1974) 132 CLR 22.

Nevertheless incorporation on its own will not be sufficient; so not all corporations will be institutions.

7. How will the ACNC assess whether an entity is a PBI?

7.1. The ACNC will consider a range of indicators in determining whether an entity is eligible to be registered as a PBI, including the entity's:

- 7.1.1. governing documents;
- 7.1.2. responsible persons (composition of board, committee of management or trustees);
- 7.1.3. policies and procedures;
- 7.1.4. operational, strategic or business plan;
- 7.1.5. annual report (if any);
- 7.1.6. financial statements (for an existing entity) or budget (for a new entity);
- 7.1.7. relationship with other organisations and agreements which evidence this;
- 7.1.8. mechanisms to address the risks of operating overseas, if relevant;
- 7.1.9. website and other communications; and
- 7.1.10. activities.

7.2. The ACNC will bear in mind the following principles in determining whether an entity is entitled to be registered as a PBI:

- 7.2.1. The expression PBI is understood according to its ordinary meaning. This meaning is not set in stone for all time. While past judicial statements are useful, it is not appropriate to apply them mechanically.⁴²
- 7.2.2. The focus should be on the substance of an organisation's purposes and activities, rather than its structure.⁴³
- 7.2.3. The focus overall should be on an organisation's purposes, rather than its activities in isolation.⁴⁴ The activities are

⁴² *Commissioner of Taxation v. Hunger Project Australia* [2014] FCAFC 69, [38].

⁴³ *Ibid* [63] – [64] regarding the reasoning of the majority of the High Court of Australia in *Federal Commissioner of Taxation v. Word Investments* (2008) 236 CLR 204.

⁴⁴ *Federal Commissioner of Taxation v. Word Investments* (2008) 236 CLR 204.

relevant insofar as they are a signpost to the organisation's purposes.

8. Duty to notify

If a registered PBI:

- contravenes a provision of the ACNC Act or has not complied with a governance standard or external conduct standard; and
- the contravention or non-compliance is significant; and
- as a result, the entity is no longer entitled to be a registered charity or a registered PBI subtype of charity;

the entity is required to notify the ACNC.⁴⁵

9. Examples

The unique circumstances of each organisation will be considered in determining whether it is a PBI. The following examples may serve to illustrate the application of the principles outlined in this Statement.

Examples of organisations that may be PBIs	Examples of organisations that are unlikely to be PBIs
<ul style="list-style-type: none"> • Organisations providing crisis accommodation to the homeless or women and children experiencing family violence. • Not-for-profit hospitals and hospices. • Not-for-profit aged care facilities. • Not-for-profit community legal services targeted at relieving needs such as poverty, distress or helplessness. • Not-for-profit bodies assisting refugees and asylum seekers. • Disability services organisations. 	<ul style="list-style-type: none"> • Animal welfare societies. • Community associations (unless providing relief that is targeted at a disadvantaged community). • Marriage guidance and marriage counselling organisations.⁴⁸ • Government entities⁴⁹ and other entities that are not charities⁵⁰. • Educational bodies (unless advancing education is incidental to a main benevolent purpose or is targeted only to those in need). • Religious organisations (unless

⁴⁵ Refer to Division 65 of the *Australian Charities and Not-for-profits Commission Act 2012* (Cth) and <https://www.acnc.gov.au/ACNC/Manage/UpdateDetails/ACNC/Edu/UpdateNotify.aspx?hkey=61cea4db-c05f-4384-8880-d3e579d4cdae>

<ul style="list-style-type: none"> • Organisations that raise funds in order to channel the funds to specific benevolent programs operated by another organisation via a collaborative arrangement.⁴⁶ • Providers of low rental or subsidised housing for people in need. • Organisations that are part of a global international aid and development network, which primarily raise funds in Australia for distribution to field offices.⁴⁷ 	<p>advancing religion is incidental to a main benevolent purpose. A religious motive will not preclude registration as a PBI).</p> <ul style="list-style-type: none"> • Youth or social clubs (unless their main purpose is benevolent). • A private trust which manages trust funds for distribution to other charities.
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Appendix A – Practical Scenarios

The scenarios below are hypothetical examples of how the ACNC will apply this Commissioner’s Interpretation Statement in practice.

Example 1

The Newtown Health Board was established by state legislation which provides that the Director of the organisation is subject to legislation applicable to the state’s public sector. The Health Minister has the power to appoint and remove the directors of the organisation.

The Newtown Health Board is not a PBI because it is not a charity. The organisation is not a charity because it is a ‘government entity’. Refer to the [Commissioner’s Interpretation Statement on the meaning of “government entity”](#) for more information.

Example 2

Benevolent Care Ltd is a public company limited by guarantee.

The company pursues the following purposes:–

- conducting research into the causes of youth unemployment;

⁴⁸ See *Marriage Guidance Council of Victoria v. Commissioner of Pay-roll Tax (Vic.)* 90 ATC 4770.

⁴⁹ See definition in s.4 of the *Charities Act 2013* (Cth).

⁵⁰ *Ibid* s.5.

⁴⁶ *Commissioner of Taxation v. Hunger Project Australia* [2014] FCAFC 69.

⁴⁷ *Ibid*.

- engaging in advocacy and lobbying with government and others to influence the policy debate;
- raising awareness in the community about the incidence of youth unemployment and the flow-on effects;
- convening forums with the general public and experts to discuss issues regarding youth unemployment; and
- working with employment agencies to improve youth engagement.

Benevolent Care Ltd is not a PBI because its purposes are not the provision of benevolent relief, its benevolence is not sufficiently targeted at the relief of people in need and it lacks clear mechanisms for delivering relief. Refer to paragraphs 5.1.3 and 5.1.4 above for more detail.

Example 3

Parkhurst Clinic Ltd is a specialist clinic situated in an affluent area of Melbourne and most of its patients are comfortable financially. The clinic's patients suffer from a variety of serious mental illnesses.

Parkhurst Clinic Ltd may be a PBI despite the fact that many of its patients are not in financial need. They are nevertheless "in need" because of their distress due to illness. Refer to paragraph 5.2 above for more detail. See also the case of Commissioner of Pay-roll Tax v. Cairnmillar Institute [1992] 2 VR 706.

Example 4

The Christian Church of Carrara was established to operate a church which meets for public worship weekly and pursues a number of weekly discipleship and evangelism activities. In furtherance of the Christian faith, the Church also undertakes a food bank and soup van ministry amongst the homeless in its neighbourhood on Tuesday nights. The objects clause of the organisation's constitution emphasises the advancement of the Christian religion.

The organisation is unlikely to be a PBI. It appears that its main purpose is not to provide benevolent relief but to advance religion, albeit motivated by the Christian faith. Refer to paragraph 5.5 above for more detail.

However if the benevolent activities were organised in a distinct entity with benevolent purposes, that entity may be a PBI.

Example 5

Kids for Peru is an unincorporated association that was recently founded by an Australian family that had travelled to Peru on holiday. They were dismayed by the lack of educational opportunities for young indigent orphans living in rural Peru. On return to Australia they were motivated to use their networks to raise funds to

provide scholarships for these young people. They run a range of fundraising events each year including fundraising dinners and trivia nights. Each year the organisation selects a Peruvian organisation to receive the funds and to pay the school fees of the young people.

Kids for Peru is unlikely to be a PBI. The fact that it is not directly engaged in relieving the needs of orphans does not preclude it from being a PBI, nor does the fact that it is an unincorporated association. It is engaged in fundraising but it does not appear to have clear mechanisms for delivering the benevolent relief, nor does there appear to be a relationship of collaboration and a common public benevolent purpose. Refer to paragraphs 5.6.1, 6.8 and 5.6.2 above for more detail.

In addition, Kids for Peru may not be able to demonstrate that it displays “public control and accountability” if its responsible persons are all family members and close friends. If this is the case, it will need to consider whether it can demonstrate the other criteria relevant to establishing that it is “public” for PBI purposes. Refer to paragraphs 4.3, 4.4 and 4.5 above for more detail.

Example 6

Disaster Relief Pty Ltd operates a social enterprise. It sells second hand textbooks and 100% of the profits are distributed to organisations working in the developing world. The funds are used to support humanitarian assistance programs following natural disasters. Disaster Relief Pty Ltd has developed a close working relationship with the organisations it supports. It has entered into MOUs with the organisations, is involved in the planning of programs and annually sends volunteers to undertake short term trips to assist with the implementation of the humanitarian programs.

Many proprietary limited companies are not charities because they are typically for-profit legal structures. Nevertheless, Disaster Relief Pty Ltd is a “not-for-profit entity” because its constitution prohibits the distribution of income and assets to its members and contains other clauses which are appropriate for registered charities.

For the most part, Disaster Relief Pty Ltd is not directly engaged in providing benevolent relief. Nevertheless it is likely to be a PBI because it provides relief via, or in coordination with, the organisations it supports. Refer to paragraphs 3.1.2.1, 5.6.1 and 5.6.2 above for more detail.

Example 7

Gifts of Compassion Ltd was founded by a philanthropist. After she retired, she transferred a range of personal investment assets to the entity and appointed a Board of Directors. The Board of the company developed an investment strategy

and each year, the organisation made distributions to various disability services organisations. The personal and social interactions of the Board members helped to inform the Board's decisions about the programs that Gifts of Compassion Ltd supports.

Gifts of Compassion Ltd is unlikely to be a PBI because it is not an institution. It is a mere "fund" that manages trust property which is applied for a charitable purpose. Refer to paragraph 6.5 above for more detail.

Example 8

Montego Aged Care Services Ltd has been operating a 100 bed aged care facility for the last 25 years. The Board of the organisation wishes to embark on a new expansion program to build 50 independent living units (ILUs) on land adjacent to the aged care facility. Occupants of the ILUs have access to lifestyle services in the village hub including a library, general store and social activities, as well as a 24 hour emergency call system for medical emergencies. The ILUs will be designed for independent older people who do not have significant health needs and are able to afford the fees to secure a place. The Board of the organisation sees the development as an opportunity to raise funds which can be used to fund services and renovations to the aged care facility.

The ACNC takes the view that an organisation with a purpose of operating ILUs alone is not generally a PBI because the occupants of ILUs are not generally in poverty or distress that arouses the community's compassion.

At present Montego Aged Care Services Ltd is likely to be a PBI. It will remain so as long as its main purpose remains the provision of relief to the older persons living in the aged care facility. If its main purpose becomes the provision of ILUs and serving the occupants of ILUs, it will no longer be entitled to PBI status. The ACNC will take into account a range of indicators in determining an organisation's main purpose (see paragraph 7.1 above). In the above scenario, it is likely that Montego Aged Care Services Ltd will remain a PBI because it appears that its main purpose is the provision of relief to the occupants of the aged care facility. Refer to paragraphs 5.3.1 and 7.1 above for more detail.

Example 9

Affordable Housing for All Ltd is currently a PBI and its purpose is to provide housing to people in need. It currently manages a community housing program for low income earners.

The Board of the organisation has been approached in relation to a new affordable housing project. Under the plan, the organisation would manage 50 new affordable

housing apartments for the benefit of “essential workers” that are low to moderate income earners.

Proceeding with the proposal could jeopardise, not only the organisation’s PBI status, but also its status as a registered charity for the reason below, and with regard to registration as a charity, as set out in the [Commissioner’s Interpretation Statement on provision of housing by charities](#).

Unless they are in distress, moderate income earners are unlikely to be people in need of benevolent relief. Therefore if the organisation had an independent purpose of the provision of housing to moderate income earners, it would no longer be a PBI. Refer to paragraph 5.3.1 for more detail.

However if it can be demonstrated that the new affordable housing project was for the purpose of funding the community housing program for low income earners, the entity may retain its PBI status.

Version	Date of effect	Brief summary of change
Version 1 – Initial statement	19 December 2016	Initial statement endorsed by the Commissioner on 19 December 2016.