Australian Government

Australian Charities and Not-for-profits Commission

ACNC Registration Technical Induction Training Programme

MODULE 3.0

PUBLIC BENEVOLENT INSTITUTIONS

Version 1.1: 25 May 2017

Contents

Introduction

Welcome to Module 3.0 of the ACNC Registration technical induction training programme.

Purpose of this module and learning outcomes

The table at s.25-5(5) of *the Australian Charities and Not-for-profits Commission Act 2012* (Cth) provides that one of the subtypes which a charity can be registered with is 'public benevolent institution', or PBI.

As PBI isn't one of the charitable purposes recognised at common law, it wasn't covered in Module 2.0: *What is a Charity? An Introduction*.

By the end of this module, you will be able to understand how to determine whether an applicant for charity registration is a PBI.

Material covered in this module includes:

- The definition of PBI
- A brief history of PBIs
- An in-depth look at each of the considerations for determining whether an organisation is a PBI.

Material not covered in this module

This module does not cover the legal definition of 'charity' or 'charitable purpose,' which is covered in Module 2.0: *What is a Charity? An Introduction*.

What are public benevolent institutions?

Public benevolent institutions (PBIs) are a 'subset' of charitable organisations that focus on providing help to people who are experiencing severe suffering. The help a PBI provides to its beneficiaries must relieve their suffering.

For example, a PBI could be:

- a provider of accommodation for homeless people
- an organisation providing supporting to disadvantaged young people so that they can complete their education
- a disability support provider
- a hospice for the terminally ill
- a provider of temporary accommodation for people escaping domestic violence
- an organisation that supports people who have recently arrived in Australia as refugees to settle into life in Australia

To be a PBI, an organisation must be:

- public
- benevolent; and
- an institution

A brief history of public benevolent institutions

The concept of 'public benevolent institution' is unique to Australia, and does not appear in other common law jurisdictions. It arose from the inclusion of the phrase 'public benevolent institution' in Commonwealth, State, and Territory taxation legislation, beginning around 1914. For example, (just to name a few pieces of legislation):

- S.57A(1) of the *Fringe Benefits Tax Assessment Act 1986* (Cth)
- S.175B(3)(c) of the *Local Government Act 1954* (NT)
- S.556(1) of the *Local Government Act 1993* (NSW).

Legislators started using 'public benevolent institution' in taxation legislation as a response to the Privy Council deciding in *Chesterman v Federal Commissioner of Taxation*, that the word 'charitable' in Australian legislation was to be given its technical legal meaning, not its 'popular' meaning.[1] It appears that the PBI category was intended to limit entitlement to certain tax benefits to organisations that more closely fit the 'popular' meaning of 'charity', rather than all organisations that satisfied the technical legal meaning.[2]

Taxation legislation generally affords more favourable tax concessions and exemptions to PBIs than it does to other charitable and not-for-profit organisations. Consequently, courts and tribunals have had to consider whether an organisation is a PBI (and therefore entitled to more favourable tax treatment) on many occasions.

All the courts and tribunals that have considered what 'PBI' means have accepted that it does not have a technical legal meaning, and so takes its 'ordinary meaning' in the context of the time and place it is being considered. However, the resulting case law about the ordinary meaning of PBI can be difficult to understand and to reconcile.

To clarify how the ACNC will interpret the law about the definition of 'PBI', the ACNC has issued 'Commissioner's Interpretation Statement: Public benevolent institutions' (CIS).

This training module is intended to be completed in conjunction with consideration of the CIS, so that analysts understand and are comfortable applying the CIS to determine whether a charity registration applicant is a PBI.

---

[1] *Chesterman v Federal Commissioner of Taxation* (1925) 37 CLR 317.
[2] See discussion in *Perpetual Trustee Co Ltd v Federal Commissioner of Taxation* (1931) 45 CLR 224, at 231 per Starke J.

'Public'

The P in PBI stands for 'public'.

According to the applicable case law, the following criteria are relevant to determining whether or not an organisation is 'public'.

The beneficiaries must be a section of the public

The most important of these criteria is that a PBI must benefit the public. To determine whether an organisation meets this criterion, you will need to consider who the organisation is set up to benefit, and how it chooses the individuals who actually receive the benefit.

An organisation will benefit a section of the public if the people who are entitled to its assistance include anyone suffering from the conditions which the organisation intends to relieve, to the extent that the organisation has the capacity to assist them.

An organisation will not benefit a section of the public if it chooses who it assists based on a purely personal characteristic unrelated to the reason they are in need, or it imposes other arbitrary restrictions on its assistance.[3]

A hypothetical example

An organisation which is set up to relieve poverty by providing basic grocery items to people who cannot afford what they need for a modest standard of living would meet this requirement if it chooses its beneficiaries solely based on need, and assists all the people who are within its capacity to assist. As the beneficiaries are chosen as they are in need alone, and the organisation does not pick and choose which individuals in poverty it will help, while refusing arbitrarily to help others experiencing the same level of poverty, it is operating for the benefit of the public.

In contrast, if the same organisation adopted a policy of only providing groceries to people in poverty whose surnames started with the letter J, and it also reserved the right to refuse to assist people in poverty whose first names started with the letter D, it would not meet this criterion. The organisation

[3] *Re Income Tax Acts (No. 1)* [1930] VLR 211.

would not be operating for the benefit of the public. Rather, it would be operating for the benefit of the specific individuals the organisation chose (for arbitrary reasons) to assist.

If the same organisation were to go back to providing basic grocery items to any people who are in poverty who approached it for assistance, but it decided to only provide groceries to the 10th person who approached it each day, even though it had capacity to provide groceries to all the others who asked for assistance, it would not be operating for the benefit of the public. Again, it would be operating for the specific individuals the organisation chose (for arbitrary reasons) to assist.

Although the second and third examples are highly unlikely to occur in reality, they serve as obvious ways in which an organisation can fail to meet the 'public' part of the definition of PBI.

Receipt of public funds

Another criterion the courts have accepted to indicate that an organisation is public is that it receives public funds.

Although the common law authorities are divided on this point, it appears that the term 'public funds' means 'funds provided by members of the public', rather than 'government funds'.

However, if an organisation receives public funds but does not benefit the public, it will not be a 'public' organisation.

Furthermore, if an organisation does not receive public funds, it may still be 'public' if it benefits a section of the public.

Public control and accountability

Another criterion indicating that an organisation is 'public' is that the organisation is controlled by, and accountable to, the public.

However, if an organisation is under public control and is accountable to the public but does not benefit the public, it will not be a 'public' organisation.

A hypothetical example

An incorporated association which opens its membership to anyone in the community who is interested in achieving its purpose may be a public organisation. The reason for this is that the members of an incorporated association are in control of the association: they can elect members to

be on its committee of management, and must approve (by a certain majority) whether to make changes to its constitution. The association is therefore accountable to members of the public.

In contrast, an unincorporated association which has members which are all related to one another and which has a clause in its constitution stating that no new members can be admitted unless they are related to the existing members is not likely to meet the public control and accountability criterion. The reason for this is that there is no way that the members of the public could control the association. It is therefore not accountable to the public.

Connection with government

Another criterion indicating that an organisation is 'public' is that the organisation has a connection with government.

However, if an organisation is connected with government but does not benefit the public, it will not be a 'public' organisation.

The concept of being 'connected with government' does not mean that the organisation must be a part of government or controlled by government, as government entities are not charitable at law. As PBIs have to be charitable organisations, they therefore cannot be government entities.

Rather, an organisation may be 'connected with government' if it receives funds from government, or has recognition of some other kind from government (including local government). Examples may include:

- The organisation has endorsement for concessions from government on the basis of it being a 'public' organisation
- Government departments refer people to the organisation for assistance
- Government advertising materials (such as a local council website or newsletter) promote the services of the organisation.

'Benevolent'

The B in 'PBI' stands for 'benevolent'.

Beneficiaries must be in need of 'benevolent relief'

An organisation will be 'benevolent' if its purpose is to provide relief to people who are in need of 'benevolent relief' as they are experiencing severe suffering. The suffering could be caused by:

- Poverty
- Sickness
- Disability
- Helplessness
- Disadvantage
- Distress
- Misfortune.[4]

The courts have acknowledged that the conditions listed above can vary in their severity, and that the severity of suffering is relevant to whether an organisation to relieve that suffering is 'benevolent'.

To determine whether an organisation relieves suffering of sufficient severity for that organisation to be accepted as providing 'benevolent relief', courts have considered whether the suffering is severe enough to arouse feelings of compassion in the community, such that someone in the community would feel that assistance should be provided to relieve the suffering.[5]

Activities must actually relieve people who are in need, not the community generally

A PBI's assistance must actually be provided to people who are suffering, and must relieve that suffering.

An organisation which seeks to improve the welfare of the community generally, or which seeks to alleviate suffering through research or the formation of public policy recommendations, will not be benevolent in the required sense.[6]

---

[4] *Perpetual Trustee Co Limited v Federal Commissioner of Taxation* (1931) 45 CLR 224.

[5] See for example, *Marriage Guidance Council of Victoria v Commissioner of Pay-roll Tax (Vic)* (1990) 21 ATR 1272; *Commissioner of Pay-roll Tax (Vic) v Cairnmillar Institute* (1992) 21 ATR 665.

[6] *Australian Council of Social Service v Commissioner of Payroll Tax (NSW)* (1985) 1 NSWLR 567.

Additionally, an organisation which benefits people who are in need of benevolent relief, but which does not relieve their suffering, will not be a benevolent organisation.

Benevolent relief activities not confined to the provision of 'direct' relief

For many years following the decision in *Perpetual Trustee Co Ltd v Federal Commissioner of Taxation* the courts appear to have accepted that a PBI's activities must directly provide benevolent relief to people who are in need, i.e. the PBI itself must provide the relief. For example, in *Australian Council of Social Service Inc v Commissioner of Pay-roll Tax*, Street CJ stated:

> So far as I am aware, in every reported case but one this element of direct dispensation of benefits is to be found within the factual context. This of course, does not necessarily and of itself predicate that direct dispensation of benefits is a prerequisite. It does, however, provide a strongly persuasive basis for holding that, over the passage of years, this element has now become built into the concept of a public benevolent institution. The judges of the past have taken this for granted and it is a long step to hold that a comparatively modern statute [the Pay-roll Tax Act 1971] can properly be construed as being freed from that basic factual element (at [568]).

However, as is clear from the quote above, it wasn't clear that it was compulsory for a PBI to provide benevolent relief directly, simply that the direct provision of relief was a common factor amongst the organisations the courts had previously determined to be PBIs.

Additionally, on two occasions, organisations which weren't involved in the direct provision of benevolent relief were nevertheless accepted to be PBIs. In *Australian Council for Overseas Aid v Federal Commissioner of Taxation*, an organisation which acted as a co-ordinating body for a group of organisations delivering benevolent relief which were almost all PBIs was accepted as a PBI itself, even though its role was not to deliver benevolent relief directly.[7] In *Legal Aid Commission of Victoria v Commissioner of Pay-roll Tax* (Vic), an organisation which engaged agents to provide benevolent relief, rather than providing benevolent relief itself, was accepted as a PBI by the Administrative Appeals Tribunal.[8]

Finally, following the decision of Perram J in *The Hunger Project Australia v Commissioner of Taxation*, it is now clear that a PBI need not dispense relief itself.

---

[7] *Australian Council for Overseas Aid v. Federal Commissioner of Taxation* (1980) 11 ATR 343.

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

The ACNC has released *Commissioner's Interpretation Statement: The Hunger Project case*, which provides a more in-depth commentary of these decisions and how the ACNC will apply them: http://www.acnc.gov.au/ACNC/Publications/Interp_HungerProject.aspx.

Beneficiaries must be people, not animals

A benevolent organisation provides relief to people who need assistance, not animals. However, it is possible for a benevolent organisation to provide relief to people in poverty by paying the bills for necessary veterinary treatment for their pets.

'Institution'

The 'I' in PBI stands for 'Institution'.

An institution is the organisation that is created to provide benevolent relief.

Must be separately identifiable

An institution must have its own identity, separate from that of its founders. It cannot be part of another organisation.

However, an institution does not need to have any particular legal structure. It may be a trust, company, incorporated association or unincorporated association. Separate legal personality can assist in determining a distinct identity, but it is not determinative. An organisation may have separate legal personality and yet not be an institution.

An institution does not need to occupy its own physical premises (although institutions often have headquarters or offices of some sort).

Not a 'mere fund'

An institution carries out activities to achieve its object of relieving benevolent need. An institution is therefore not a 'mere trust' (meaning a mere fund). An organisation that only manages and distributes trust property for charitable purposes is not an institution, even if those charitable purposes would be considered the provision of benevolent relief.

An institution carries out its benevolent relief activities on an ongoing and sustained basis. An organisation will more readily be considered an institution if it has been established to provide benevolent relief indefinitely, and has clear plans about how it will provide that benevolent relief. Therefore, organisational policies, evidence of future objectives and how the organisation will achieve those objectives may assist in demonstrating that it is an institution.

It is acknowledged that the statements above are relatively vague. The reason for this is that the courts have made relatively vague statements when considering the ordinary meaning of 'institution'.

For example, in *Mayor of Manchester v McAdam*,[9] Lord Macnaghton stated:

[9] *Mayor of Manchester v McAdam* [1896] AC 500.

> It is a little difficult to define the meaning of the term 'institution' in the modern acceptation of the word. It means, I suppose, an undertaking formed to promote some defined purpose…It is the body (so to speak) called into existence to translate the purpose as conceived in the mind of the founders into a living and active principle. Sometimes the word is used to denote merely the local habitation or the headquarters of the institution. Sometimes it comprehends everything that goes to make up the institution – everything belonging to the undertaking in connection with the purpose which informs and animates the whole. A public library may, I think, be properly called an institution. (at [511] – [512])

In *Minister for National Revenue v Trusts and Guarantee Co*,[10] the Privy Council stated:

> It is by no means easy to give a definition of the word "institution" that will cover every use of it. Its meaning must ways depend on the context in which it is found. (at [149])

An example: *Sargents Charitable Foundation v Chief Commissioner of State Revenue*

In *Sargents Charitable Foundation v Chief Commissioner of State Revenue*,[11] Gzell J considered whether the corporate trustee of a charitable trust was a 'society or institution' for the purposes of the *Duties Act 1997*. In determining that the organisation in question was not an 'institution' Gzell stated:

> In my view, the fact that Sargents is a corporation is insufficient to constitute it as an institution. (at [23])

Gzell J further stated:

> …the feature that is lacking in the instant circumstances is the establishment, organisation or association created to bring to fruition the purpose conceived by the founders of the Foundation. Here there is but the corporate trustee of a charitable trust. There is no establishment, no organisation and no association. Sargents acts alone exercising the powers conferred upon it by the trust deed.

This shows that separate legal personality is not determinative of an organisation being an institution. It also illustrates the principle that merely managing trust property does not make an organisation an institution.

[10] *Minister for National Revenue v Trusts and Guarantee Co* [1940] AC 138.

[11] *Sargents Charitable Foundation v Chief Commissioner of State Revenue* [2005] NSWSC 659.

PBI in action: examples from the common law

***Perpetual Trustee Co Ltd v Federal Commissioner of Taxation* (1931) 45 CLR 224**

Court: High Court of Australia

Judges: Starke, Dixon, Evatt and McTiernan JJ

Issue to be determined: Is a bequest to the Royal Naval House in Sydney exempt from being assessed for estate duty under the *Estate Duty Assessment Act 1914-1928*, by virtue of the fact that the Royal Naval House is a PBI?

Outcome: The Royal Naval House is not a PBI, as it is not 'benevolent' (per Starke, Dixon and Evatt JJ; McTiernan dissenting)

Facts

The Royal Naval House's (RNH) purpose was to provide accommodation, food and entertainment to petty officers and lower ratings of the Royal Navy while they were ashore. It was open to all petty officers and men of the Royal Australian Navy, and petty officers and men of the warships of other countries when visiting Sydney. RNH's facilities included dormitories, a dining room, a lounge, a reading room, a gymnasium, a cloak room, a locker room, a billiard room, and a social hall.

The construction of the RNH was funded by donations from the public, donations from members of the Navy, and a government grant. It did not pay land tax to the Commonwealth government.

RNH was governed by 12 trustees. The Governor of NSW had to approve the appointment of any new trustees. The trustees did not receive any payment for their services.

The day to day affairs of RNH were governed by a 'house committee' made up of the trustees and a number of others, most of whom were members of the Royal Navy.

Men who stayed at RNH were charged minor amounts for accommodation, meals, baths, billiards and lockers. Men who couldn't pay upfront could stay if they promised to pay what they owed after their next pay-day. Most men who promised to pay for their accommodation later did in fact pay. No guests were refused accommodation.

The amount the men staying at RNH paid did not cover the full cost of running RNH. The shortfall was made up through subscriptions (regular donations) from members of the public and government funding.

'Public'

The court found no difficulty in accepting that RNH was 'public'.

In his judgment, Dixon J stated:

> Because of its association with the various Governments, and because it is concerned with the naval forces of the country, it would be difficult, if it be a benevolent institution, to deny it the description "public. (at [232])

In his judgment, Evatt J stated:

> No doubt, the body both in origin and function has had a sufficiently "public" character impressed upon it. (at [235])

He also mentioned '[t]he public encouragement evidenced at its formation' and 'the public spirit of those who started and those who control the institution.' (at [236])

McTiernan J stated '[t]he Royal Naval House has, in my opinion, characteristics which entitle it to be described as "public"' and cited the English cases of *Shaw v Halifax Corporation* and *Girls' Public Day School Trust v Ereaut.*

The quotes from the judgments above show that the court accepted that the RNH was 'public' due to the following factors:

- The funds for its construction were raised via donations from members of the public and government funding. Therefore, it demonstrated that it was in receipt of public funds, and it had a connection with government in that the government considered it a worthy recipient of government funds.

- It benefited members of the armed forces, which was a further indicator of connection with government.

- The people who operated it were members of the public, indicating public control and accountability.

'Benevolent'

The majority of the court found that RNH was not 'benevolent.' As this decision was the first time in which the meaning of the phrase 'public benevolent institution' had been considered by the High Court of Australia (HCA), the judges spent a considerable amount of time explaining what they understood the term to mean.

Starke J stated:

> Now we have to consider the expression "public benevolent institution". If cannot be said that this expression has any technical legal sense, and therefore it is to be understood in the sense in which it is commonly used in the English language. There is no definition in the Act of the composite expression, nor is it to be found in any dictionary. It is, however, found in the Act under consideration in association with such institutions as public hospitals and with funds established and maintained for the relief of persons in necessitous circumstances in Australia. In the context in which the expression is found, and in ordinary English usage, a "public benevolent institution" means, in my opinion, an institution organized for the relief of poverty, sickness, destitution or helplessness (at [231] – [232])

He then stated:

> The Royal Naval House has none of these characteristics: it is organized for the accommodation and recreation of the naval forces of His Majesty and its hospitality is also extended to the naval forces of other countries. It would surprise English-speaking people, I think, to learn that in the Royal Naval House naval forces are accommodated and entertained at a public benevolent institution (at [232])

These statements show that, for an organisation to be regarded as 'benevolent', it must relieve poverty, sickness, destitution or helplessness. As the men who could stay at the Royal Naval House were not in poverty, sick, destitute or helpless, the Royal Naval House did not provide benevolent relief by accommodating them.

Dixon J stated:

> …it cannot be denied that it is organized and conducted out of feelings of goodwill in order to promote the comfort and happiness of the lower ranks of the Royal Navy…But, in my opinion, it is neither promoted nor conducted for the relief of poverty, distress, suffering or misfortune, and the question is whether for this reason it lacks the qualities necessary to bring it within the meaning of the compound description "public benevolent institution". (at [232] – [233])

He then stated:

> The words "benevolent institution" are commonly used in combination to denote bodies organized for the relief of poverty or of distress. Familiarity with the application of the expression to bodies of this kind inevitably tends to make the use of the phrase appear misplaced in relation to bodies which do not relieve poverty or misfortune and merit the description "benevolent" only because their objects are benignant. (at [233])

And then:

> I am unable to place upon the expression "public benevolent Institution" a meaning wide enough to include organizations which do not promote the relief of poverty, suffering, distress or misfortune. (at [233] – [234])

These statements illustrate the point that 'benevolent' is not to be interpreted as meaning 'benignant'. The fact that an organisation does something for the good or benefit of others in the community will not be sufficient for it to be considered a 'benevolent' organisation.

Evatt J stated:

> There are…very many bodies which readily answer the description of "benevolent institutions". The Benevolent Society of New South Wales provides food and clothing for those in poverty and distress, the Scarba Home takes care of deserted babies, many organizations of Church and State provide for the maintenance, housing and relief of the aged poor, orphans and those suffering from bodily or mental disease.
>
> …
>
> Such bodies vary greatly in scope and character. But they have one thing in common: they give relief freely to those who are in need of it and who are unable to care for themselves. Those who receive aid or comfort in this way are the poor, the sick, the aged, and the young. Their disability or distress arouses pity, and the institutions are designed to give them protection. (at [235] – [236])

Evatt J also stated:

> Neither the public spirit of those who started and those who control the institution nor the convenience or benefit it is to the ratings [beneficiaries] is sufficient to make it a "benevolent institution." (at [236])

Again, these statements show that 'benevolent' isn't to be interpreted as meaning the same thing as 'benignant'. An organisation will only be 'benevolent' if it is established to relieve conditions arising from poverty, sickness, helplessness etc.

McTiernan J, who considered that RNH was a public benevolent institution, did so as he regarded the men who were entitled to make use of it as suffering from special disadvantage by virtue of their occupation, and that the RNH provided relief of that disadvantage. He stated:

> The men who resort to this Royal Naval House are placed in such a position by the circumstances of their calling, that they have a special need of the assistance which this Royal Naval House provides for them. (at [244])

The quotes above illustrate the principle that 'benevolent' does not mean the same thing as 'benignant'. Therefore, the fact that an organisation is doing something intended to be for the good or benefit of a group within the community is not sufficient for that organisation to be 'benevolent.' Rather, an organisation will be 'benevolent' if its activities are directed towards relieving people in the community suffering from needs arising due to poverty, disadvantage, sickness, misfortune, helplessness, advanced age, disability and similar conditions, which they are unable to satisfy without assistance.

'Institution'

The court did not consider the definition of 'institution' in isolation from the other aspects of the phrase 'public benevolent institution'.

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

Court: High Court of Australia

Judges: Rich, McTiernan and Williams JJ

Issue to be determined: Is a donation to the Boys' Brigade Inc an allowable deduction under the *Income Tax Assessment Act 1936-1940*, by virtue of the fact that the Boys' Brigade Inc is a PBI?

Outcome: The Boys' Brigade Inc is a PBI.

Facts

The Boys' Brigade Inc (the Brigade) was located in two areas of Sydney widely regarded as 'urban slums'. The Brigade's purpose was to provide facilities for the boys in these areas to spend their leisure time learning, participating in craft and sport activities, and generally being supervised by the adults operating the facilities. It operated on weeknights between 5:30 and 8:30pm and for most of the day on Sundays.

The Brigade was financed entirely by public donations and subscriptions. It did not receive any financial support from the government. It was controlled by a council consisting of a president, a vice president and up to 12 members. The council was elected by the members of the Brigade, who were people who had paid annual 'subscriptions' to support the operations of the Brigade.

Boys between the ages of eight and 14 were able to make use of the Brigade's facilities. Between 800 and 900 boys (all of whom were described as 'unprivileged and invariably in poor circumstances') were enrolled to make use of the Brigade's facilities. The boys who attended were 'barefooted and poorly clad; many [were] dirty and suffering from malnutrition.' The Brigade encouraged cleanliness and provided washing facilities including soap for the boys to use.

'Public'

The court accepted that the Brigade was 'public'.

In his judgment, McTiernan J stated:

> The institution is not incapable of being properly described as a public benevolent institution because it is not owned or controlled by the Government. It would be contrary to a considerable volume of judicial authority to say that such is the only test whether an institution is public. An individual may render public service although he is not a public official or controlled by the Government. The premises and the facilities of this institution and its services are provided for an extensive class, and by reason of the measure of its public service and the conditions under which it is given, I agree it is not open, on the facts of the case, to say it is not a public benevolent institution. (at [395] – [396])

Williams J, with whom Rich J agreed stated:

> The question whether an institution is subject to some form of public control is a factor to be taken into account in determining whether it is a public institution (*The Little Company of Mary (S.A.) Incorporated v The Commonwealth*). **But public control is not essential (the main criterion is the extensiveness of the class it is the object of the institution to benefit)** and, in order to be of a public nature, the control need not be, in my opinion, that of some

> government body. A constitution which provides for those members of the public who are sufficiently interested in the work of the institution to subscribe to its funds and thereby become annual members and as such eligible to vote at the election of the controlling body creates a control which is public in its nature. It is the sort of control that one could expect to find for an institution which carries on activities calculated to arouse the interest of a considerable number of well-disposed citizens with a liberal and progressive outlook, to cause them to subscribe to its funds and to take an interest in its management and work
>
> …
>
> To sum up, the sources of the Association's finances are public benevolence, it is controlled by an executive elected upon a *quasi*-public basis, and its activities, which accord with and fulfil the main objects in the memorandum of association, are of a public benevolent nature. [Emphasis added]

The quotes from the judgments above show that the court accepted that the Boys' Brigade was 'public', due to the following factors:

- It was funded entirely by donations and subscriptions from members of the public, showing that it was in receipt of public funds
- It was controlled by members of the public, because members of the public could become subscribers, and this meant that they could vote in the regular elections for its governing body
- It had a large number of beneficiaries, most of whom were boys from poor families living in the area. Any boy who wanted to make use of it could do so, without discrimination. It therefore benefited an extensive class of members of the public.

The excerpts from the judgments above also show that public control is not a determinative factor of whether an organisation is 'public'.

'Benevolent'

The court accepted that the Brigade was 'benevolent'.

In his judgment, McTiernan J stated:

> In the present case the argument centres on the question whether the Boys' Brigade Inc is organised for the relief of poverty. Poverty is a relative condition. It is I think hardly open on the facts of the case to draw any other inference than that the charity of those who maintain

> the Boys' Brigade Inc. is excited by social conditions arising from poverty and that the dominant object of the institution is to elevate boys adversely affected by those conditions. It is not probable that many of the boys for whose welfare this institution exists could overcome those conditions without its aid (at [395] – [396])

Williams J, with whom Rich J agreed, stated:

> The headquarters of the Association are located in two buildings situated one in Surry Hills and one in Pyrmont, both of which are slum areas. There it provides free of charge facilities for the boys of these poor districts which their more fortunate brothers obtain in their own homes. This keeps them off the streets, provides intelligent occupation for their leisure hours, and generally contributes to their physical, mental and moral well-being and improvement. As enrolment is voluntary, the fact that on average between 800 and 900 boys a year avail themselves of these facilities proves that the Association cater for a real want. (at [397])

These quotes illustrate that a purpose of relieving poverty can be inferred by undertaking a consideration of all the relevant circumstances under which an organisation operates. In this case, although the Brigade did not explicitly state in its objects that its purpose was to relieve poverty, McTiernan J was able to infer that relieving poverty was its dominant/main/only independent purpose. He relied on the locations in which the Brigade operated and the characteristics of the Brigade's beneficiaries (being poor, young, and unable to otherwise access the types of facilities the Brigade provided) to draw this inference.

The quote from Williams J also illustrates the principle that an organisation can relieve poverty by means other than by providing money or goods and that the provision of education and other activities that otherwise may not be considered to amount to benevolent relief may in fact be for benevolent relief depending on all the circumstances. The fact that the boys were all underage seems to be the main factor relied upon for concluding that the provision of what would otherwise be considered leisure activities was in fact benevolent relief.

Finally, the fact that the judges engaged in such detailed reasoning to come to their conclusion indicates the principle that a PBI's only independent purpose must be the provision of benevolent relief. If some of the activities of the Brigade were considered not to relieve poverty but instead to further some independent purpose that was not considered benevolent relief, the court would not have been able to conclude that the Brigade was a PBI. The judges therefore needed to explain why they accepted that a number of activities that would not ordinarily be accepted as benevolent relief, did in fact provide benevolent relief under the circumstances before them.

'Institution'

In concluding that the Brigade was an institution, Williams J stated:

> [The Brigade] complies with the following definition of an institution contained in the speech of Lord MacNaghton in *Mayor of Manchester v McAdam*: "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. Sometimes the word is used to denote merely the local habitation or the headquarters of the institution. Sometimes it comprehends everything that goes to make up the institution – everything belonging to the undertaking in connection with the purpose which informs and animates the whole" (at [398])

The focus on 'living and active principle' and the concept of something that 'animates the whole' could be argued to support the principle that an institution must be more than a mere passive fund; it must undertake activities to achieve its purpose.

***Lemm v Federal Commissioner of Taxation* (1942) 66 CLR 399**

Court: High Court of Australia

Judges: Rich, McTiernan and Williams JJ

Issue to be determined: Is a bequest of property on trust to be used for accommodating aged women in straitened circumstances exempt from being assessed for estate duty under the *Estate Duty Assessment Act 1914-1940*, by virtue of the fact that the Home is a PBI?

Outcome: The Home for aged women in straitened circumstances is a PBI

Facts

In his Will, George Pitt Wood bequeathed a property in Sydney (the Home) to the Presbyterian Church Property Trust. The property was bequeathed on trust for the purpose of providing a home for aged women in straitened circumstances who could pay £1 per week towards its upkeep. The Home accommodated up to 26 women.

At the time of the hearing, 23 women were living at the Home. Eighteen of the women were over 70 years old, three were over 62 years old and the remaining two were 57 and 54.

Thirteen of the women received an old-age pension under the *Invalid and Old-age Pensions Act 1908-1942* and 11 of those 13 women had no other means of income. The remaining two women who

received a pension had other means of income. Three of the remaining women received a pension for invalids (including the youngest woman living at the home). One woman had a British War Pension as her means of income. The remaining six women did not receive any pension but had incomes varying between £40 and £150 per year, which would equate to between $2,791 and $10,469 if calculated in today's money.

Each of the women paid £1 per week ($69 if calculated in today's money) for the accommodation. None of the women provided any assistance regarding running the Home.

'Public'

In his judgment for the court, Williams J stated:

> The control of the institution is vested in the Church Property Trust. This body, which is incorporated by an Act of Parliament, is a public body in the sense that it represents an important section of the community. The benefits of the institution are available to members of the class of aged women in straitened circumstances irrespective of their religion. (at [410])

Williams J also stated:

> The purpose of the home is to confer benevolence upon an appreciable needy class in the community, so that it complies with the most important test of what is a public institution (at [411])

These quotes show that the court relied on the following criteria for accepted that the Home was 'public':

- connection with government (as it was incorporated by an Act of Parliament); and
- extensiveness of beneficiary class

The court also considered the fact that the trust which governed the Home represented an important section of the community to support the conclusion that the Home was 'public'. It is unclear exactly what this means, but probably relates to the fact that the trust was a body of the Presbyterian Church, which was a large organisation operating in the Australian community.

'Benevolent'

In relation to whether the Home was 'benevolent', Williams J stated:

> A home for such women [meaning aged women in straitened circumstances], even if they are able to pay one pound per week, is an institution organised for the relief of poverty. Poverty is a relative term. There are degrees of poverty less acute than abject poverty or destitution, but poverty nonetheless. It is therefore a benevolent institution… (at [410] – [411])

This quote indicates that relieving poverty will be regarded as 'benevolent' even if the level of poverty does not equate to destitution. It is also authority for the principle that an organisation may charge a fee for the provision of its services and still be a benevolent institution, as long as its purpose is to relieve a benevolent need (in this case, poverty).

'Institution'

In his judgment, Williams J did not consider 'institution' in isolation of the requirement that the 'institution' be 'public.'

***Australian Council for Overseas Aid v Federal Commissioner of Taxation* [1980] 49 FLR 278**

Court: Supreme Court of ACT

Judge: Connor ACJ

Issue to be determined: Is the Australian Council for Overseas Aid (ACOA) exempt from pay-roll tax on the basis that it is a PBI for the purposes of the *Pay-roll Tax (Territories) Assessment Act 1971*?

Outcome: The Australian Council for Overseas Aid is a PBI

Facts

The establishment of ACOA was described in the preamble to its constitution as follows:

> Recognizing the urgent and expanding needs of peoples in many parts of the world, and particularly in emerging nations where far-reaching transformation of economic and social life is taking place, and the contribution which non-government organisations can make in sharing Australian resources for the development of these people and nations, a group of Australian non-government organizations which are concerned with international development and overseas aid, including refugee and migrant service, and related activities, have agreed,

without prejudice to each organization's own independence, to establish an association to be known as the Australian Council for Overseas Aid

The objects set out in ACOA's constitution stated:

(i) To provide for consultation and co-operation between members concerning their work at home and abroad.

(ii) To provide for consultation and co-operation with the Australian and State Governments and the United Nations and its specialised agencies in the field of overseas aid, both at home and abroad.

(iii) To represent the interests of members and to make common representations on their behalf to the Australian and State Governments, other national governments, the United nations and its specialised agencies, and to other domestic and international organizations.

(iv) To enter into arrangements with governments within Australia, other national governments and international or other agencies for the investigation or furtherance of activities within the purposes of the council.

(v) To bring the needs for, and the purposes and results of, overseas aid before member organizations, the Australian community and governments.

(vi) To prepare and disseminate information on aid activities and issues of international development, including refugee and migrant service, and related activities.

(vii) To foster research into aid activities and issues of international development, including refugee and migrant service, and related activities, and in particular the economic and social implications of various kinds of aid.

(viii) To provide information concerning projects within the ambit of the interests of ACOA to member organisations and other bodies.

(ix) To develop relationships with the International Council of Voluntary Agencies and with organisations with similar aims in other countries.

ACOA's activities included co-operation and co-ordination of the member organizations; liaison with government and development education.

The Federal Commissioner of Taxation assessed the Australian Council for Overseas Aid (ACOA) for pay-roll tax. ACOA objected to the assessment on the basis that it was a PBI and therefore exempt from pay-roll tax. The Commissioner refused the objections, so ACOA appealed to a Board of Review. The Board of Review upheld the Commissioner's decision, so ACOA appealed to the Supreme Court. This judgment is the outcome of that appeal.

Public

Connor ACJ did not consider whether ACOA was 'public'.

Benevolent

Connor ACJ stated:

> The question in the case under appeal is…whether an institution may be "organized for" the relief of poverty, in the words of Starke J [in his judgment in *Perpetual Trustee Co Ltd v Commissioner of Taxation*] or whether it may "promote the relief of poverty" etc in the words of Dixon J, even though it does not make funds or services directly available to the objects of the benevolence. (at [281])
>
> It seems that in these days overseas aid may often involve quite intricate dealings with governments at home and abroad as well as with various semi-government and other institutions both here and overseas. Difficult matters in the area of trade and transport may crop up in the course of giving aid. It would thus be surprising if a public benevolent institution could perform its role without having to rely on various agencies. If a public institution used an agency which was itself an independent commercial organization conducting an independent commercial business in which it served for reward a public benevolent institution only as it would serve any of its other customers, then plainly enough such an agency would not itself be a benevolent institution. The position here, however, is that the taxpayer has in effect been set up as a co-ordinating and educating agency by public institutions which are themselves in the main public benevolent institutions in order to perform tasks which they themselves could perform without losing their identity as such. The taxpayer is not a separate institution or organization carrying on an independent business in the course of which it services persons other than its members. It appears to me that the taxpayer and its members should be looked at as a whole enterprise which is predominantly benevolent and of which the taxpayer is an integral part.
>
> …
>
> In this practical arrangement and division of function it seems that nearly everything which the taxpayer does is done in the course of and for the furtherance of relief of poverty even though it is done in conjunction with other institutions (at [281] – [282])

Connor ACJ then stated:

> I do not see anything in the Perpetual Trustee case which runs counter to the proposition that an institution may promote or be organized for the relief of poverty even though it performs only one of a number of several steps in the benevolent process, provided it is clear that the relation of that institution to the other institutions involved in the process is such as to show they have a common benevolent purpose, albeit they contribute to it in different ways. (at [282])

These statements show that an organisation may be regarded as 'benevolent' in the relevant sense if it is one of a group of organisations that work together to provide benevolent relief, even if the organisation under consideration is not the part of the group that directly provides the relief.

'Institution'

Connor ACJ did not consider whether ACOA was an institution.

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

Court: Supreme Court of NSW, Court of Appeal

Judges: Street CJ, Mahoney and Priestley JJA

Issue to be determined: Is Australian Council of Social Service Inc exempt from pay-roll tax on the basis that it is a PBI for the purposes of the *Pay-roll Tax Act 1971*?

Outcome: The Australian Council of Social Service Inc is not a PBI

Facts

The Australian Council of Social Service (ACOSS) was incorporated in ACT in 1978. Its constitution specified the following objects:

A. Carrying out programmes designed to contribute to the elimination of poverty and the promotion of the wellbeing of disadvantaged and vulnerable individuals and groups.
B. Promoting consultation and co-operation amongst non-government organizations and government authorities involved in social welfare activities.

C. Stimulating interest in, and providing information on, social welfare activities in Australia and other countries.
D. Providing a forum to discuss common problems in a spirit of mutual understanding.
E. Encouraging education and training for social welfare personnel.
F. Providing advice on social welfare matters, either on request or its own initiative.
G. Improving the organization of social welfare services, both between and within services.
H. Carrying out services to develop social welfare organizations.
I. Promoting citizen participation in social welfare.
J. Promoting and undertaking research into social welfare problems and services, either at the request of non-government or government authorities, or on its own initiative.
K. Encouraging the development of national social policies in major social welfare areas – paying due regard to the claims and responsibilities of local, city, regional, state, national and international authorities, and to the changing nature of the national society.
L. Undertaking at a national level or at other levels action which appears to be in the best interests of social welfare in Australia.
M. Participating in the development of social welfare in Australia's Trust Territories by co-operation with appropriate organizations within those Territories.
N. Participating in the development of international social welfare particularly through membership of the International Council on Social Welfare.
O. Doing all such other acts of things as may be conducive to the attainment of the objects set out above or any of them.

ACOSS' activities were directed towards providing indirect aid for the relief of poverty or distress by performing advisory, informative, research and advocacy functions. Its activities were directed at changing the circumstances which either create or aggravate poverty or distress. It provided information and advice to its member organisations regarding social matters and provided research assistance to determining factual matters relevant to social welfare work. It also undertook its own research regarding subjects such as poverty, income security, unemployment, welfare provisions and child welfare. ACOSS also conducted policy studies and had an advocacy function aimed at improving or altering the circumstances which lead to poverty and distress.

The Commissioner of Pay-roll Tax assessed ACOSS for pay-roll tax, which ACOSS contended it was not liable to pay, as it was a PBI. ACOSS applied to the Supreme Court for a declaration that it was a PBI, but Rath J refused to make that declaration, instead finding that ACOSS was not a PBI. ACOSS appealed that decision. This judgment is the result of that appeal.

'Public'

The court did not consider the 'public' element of PBI.

'Benevolent'

Counsel for ACOSS acknowledged that past authorities appeared to tacitly accept that PBIs provide relief directly, but submitted that it should not mean that the provision of direct relief was required in modern circumstances (at 575)

In response to this submission, Priestley JA (with whom Street CJ and Mahoney JA agreed) stated:

> 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 benevolent results in relief of or reduction in poverty and distress. Thus is seems to me that "public benevolent institution" includes an institution which in a public way conducts itself benevolently towards those who are recognizably in need of benevolence but excludes an institution, which although concerned, in an abstract sense, with the relief of poverty and distress, manifests that concern by promotion of social welfare in the community generally. (at [575])

This statement makes clear that a benevolent institution's activities must be directed towards people who are in need of benevolent relief, and not to the community at large.

'Institution'

The court did not consider whether or not ACOSS was an institution.

***Federal Commissioner of Taxation v Launceston Legacy* (1987) 75 ALR 122**

Court: Federal Court of Australia

Judge: Northrop J

Issue to be determined: Is the Legacy Club of Launceston (Launceston Legacy) exempt from bank account debits tax under s.11 of the *Bank Account Debits Tax Administration Act 1982* (Cth) on the basis that it is a PBI?

Outcome: Launceston Legacy is a PBI

Facts

Launceston Legacy was established in 1933 with the object of providing assistance to widows and children of servicemen who did not return from war. The objects of Launceston Legacy were subsequently expanded to cover widows and children of servicemen who had returned from war but died thereafter. The aims of Launceston Legacy (and other Legacy clubs in Tasmania) were:

> The care of dependants of comrades who served their country in war and who died on service, or subsequently, affords afield for service. Safeguarding the interests of children is a service worth rendering and their interests include their mental, moral, vocational and physical welfare. Personal effort is the main essential. In as much as these are the activities of Legacy it is your privilege to accept the 'Legacy of fallen comrades'. Therefore men who served overseas with honourable records form you a club to be known as the Launceston Legacy Club and keep fair the name of Legacy.

The objects of Launceston Legacy were:

(a) To honour the memory of departed Ex-Servicemen and to care for their widows and children.
(b) To assist the dependants of deceased Ex Servicemen
(c) To foster the spirit of comradeship, self-sacrifice and national and community service.

There were around 90 members of Launceston Legacy. Each was allotted a number of families for which he was responsible. The aid provided to the families included vocational guidance and job placement, tuition, sporting activities, medical and dental advice and treatment, milk supplies, servicing and replacement of defective home appliances, the provision of furniture and, where necessary, providing interest-free loans. Launceston Legacy also operated a widows' club where war widows could meet for companionship, advice and support.

The members of Launceston Legacy would report to its committee about a particular family's situation, and the committee would consider the situation and make recommendations to the Board about how to assist.

Launceston Legacy was funded primarily through donations of various kinds, including public donations, the Legacy Appeal Week, bequests, and the certificate of adoption programme, through which an individual or organisation could subscribe to assist a particular family by providing a set amount of money.

The people entitled to benefit from Launceston Legacy's activities were widows of deceased Ex Servicemen, and children (including step children and adopted children) who were wholly dependent

on the deceased at the time of his death. However, the child of a deceased Ex Servicewoman would not be entitled to benefit until his or her father was also deceased.

The case arose as Launceston Legacy applied for a certificate exempting five of its bank accounts from bank account debit tax under the *Bank Account Debits Tax Administration Act 1982* (Cth) on the basis that Launceston Legacy was a PBI. The Commissioner of Taxation refused to issue the exemption certificates. Launceston Legacy appealed to the Administrative Appeals Tribunal. Member PM Roach found that Launceston Legacy was a PBI. The Commissioner of Taxation appealed to the Federal Court. This judgment was the outcome of that appeal.

'Public'

Northrup J did not consider whether Launceston Legacy was 'public' in isolation of whether it was a 'benevolent institution'.

'Benevolent'

In deciding that Launceston Legacy was a benevolent organisation, Northrup J made the following comment regarding the beneficiary class:

> The definition [of eligible beneficiary] must be understood in the context of the Code of Legacy, the Charter of Legacy and the Constitution of Launceston Legacy. All are directed to the provision of care "for the dependants" of deceased ex-servicemen. The use of the word "dependants" in these documents connotes a person who depends on another for support…In the present case, the word "dependant" connotes a person who has been deprived of the support, both financial and moral, of a deceased ex-serviceman. (at [130])

After considering the common law authorities regarding PBIs, he stated:

> I am satisfied that Launceston Legacy is an institution organised for the relief of poverty, suffering, distress or misfortune as discussed in the authorities. It is quite natural to describe it as a benevolent institution. I see nothing odd or inappropriate in so describing Launceston Legacy. It is providing a caring service, not limited to the provision of money, to persons who are in need. The caring service that is provided is something which cannot be bought. It is given voluntarily by the legatees [members]. The beneficiaries do no pay for the benefits received. These days the concept of benevolent being limited to the destitute is no longer accepted. (at [137])

Then, he stated:

> I agree with the opinion of the [Administrative Appeals] tribunal that Launceston Legacy "serves a group in need within the community. In doing so it recognises that need is not synonymous with financial poverty and that benevolence is a much broader concept than 'financial assistance'. (at [138])

These quotes demonstrate the point that a PBI can provide relief of needs that aren't material in nature. Although it is not made explicit in the judgment, it appears that Northrup J was influenced by the fact that the widows and children of Ex-Servicemen had been deprived of the moral support that is part of the role of father and husband. He regarded Launceston Legacy's activities as assisting to relieve some of needs that arose from the loss of those relationships, to the extent that was possible for a third party to do (i.e. providing a 'caring service').

'Institution'

Northrup J did not consider 'institution' in isolation of whether Launceston Legacy was a public benevolent institution.

***Trustees of the Allport Bequest v Federal Commissioner of Taxation* (1988) 19 ATR 1335**

Court: Federal Court of Australia

Judge: Northrop J

Issue to be determined: Is the Allport Bequest exempt from bank account debits tax under s.11 of the *Bank Account Debits Tax Administration Act 1982* (Cth) on the basis that it is a PBI?

Outcome: The Allport Bequest is not a PBI.

Facts

A sum of $250,000 from a deceased estate was provided to the Tasmanian Library Board to hold on trust. The income from the money held on trust was to be used 'in providing donations or gifts of money for such public charitable objects for the citizens of Hobart as they [the Trustees] shall in their absolute discretion decide to help'.

The case arose as the trustees of the Allport Bequest applied for a certificate exempting its bank account from bank account debit tax under the *Bank Account Debits Tax Administration Act 1982*

(Cth) on the basis that the Allport Bequest was a PBI. The Commissioner of Taxation refused to issue the exemption certificates. The trustees of the Allport Bequest appealed the decision, which was transferred from the Supreme Court of Tasmania to the Federal Court. This judgment is the outcome of that appeal.

'Public'

In determining that the Allport Bequest was 'public', Northrup J stated:

> There seems little doubt that the Allport Bequest is a charitable trust, or to be more precise, is a trust for charitable purposes. There is the required element of public benefit available to a sufficient section of the public. (at [1338])

He went on to state:

> The Commissioner [of Taxation] contested first, that the applicants do not satisfy the requirement of being public. Counsel submitted that since the Allport Bequest derived solely from a private source, it could not be public. He argued that in order for the Allport Bequest to constitute a "public benevolent institution" there was a need for public contribution of some description, such as donations, government grants or fundraising activities. He relied on *Bray v FCT* (1978) 140 CLR 560; which, he contended, was the only case which has sought to contrast the phrases "public" and "private". In that case the High Court held that in order to be characterised as "public", a fund had to originate in public initiative or attract public financial participation to a substantial degree. That is, the public character of the fund is not obtained from the purpose for which the fund is used, but from the sources from which the fund is comprised.
>
> I reject that contention. Bray's case concerned the definition of the composite phrase "public fund"…It did not concern the phrase "public benevolent institution". In my opinion it is not appropriate to transfer the meaning of "public" in the phrase "public fund" to the meaning of "public" in the different composite phrase "public benevolent institution". The word must be ascribed a meaning in the context of the entire phrase "public benevolent institution". (at [1338])

He then stated:

> It is clear that an institution need not be owned or controlled by the government in order to be properly described as a public institution: see *Maughan v FCT* (1942) 66 CLR 388. However, whether the institution is subject to some form of public control is a relevant factor to be taken

> into account in determining whether the institution is public…*Lemm*'s case is also authority for the proposition that a public benevolent institution can be established by will and that it is immaterial whether the institution existed at the time the will was made or whether the institution was established by the will. None of these cases supports the view that the source of the funds is the major factor in determining whether an institution is "public" in nature, but rather, the use to which the funds are put. (at [1338] – [1339])

He concluded by stating:

> In the present case, the class of persons entitled to benefits from the Allport Bequest constitutes "the citizens of Hobart". The trust is said to be for "public charitable objects". The class of persons which may receive benefits from the Allport Bequest constitutes a sufficient section of the public to make the Allport Bequest "public" within the meaning of the composite phrase "public benevolent institution". (at [1339])

These quotes illustrate the point that the source of funds is not determinative of whether or not an organisation is "public" for the purposes of the definition of PBI. The source of funds may be indicative that an organisation is public. However, it is the extensiveness of the beneficiary class that is the most important indicia of whether an organisation is a public organisation.

'Benevolent'

Northrup J acknowledged that it could be argued that Allport Bequest was not 'benevolent'. However, as the parties did not raise this as an issue for determination, it was not considered in the judgment. [1338]

'Institution'

Counsel argued that the Allport Bequest was an "institution" as it demonstrated the two main indicia of an institution: a recognised identity and a permanent nature. Counsel submitted that the Allport Bequest has a recognised identity because:

- It was established by an Act of Parliament,
- its benefits were distributed in accordance with that Act, and
- The Mercury newspaper regularly published details of its distributions. (at [1339])

Counsel argued that Allport Bequest had a permanent nature as it was capable of continuing indefinitely. (at [1339])

Northrup J noted that counsel had not provided any common law authority in support of his submissions that recognised identity and permanence are the two main indicia of an institution. (at [1339])

Northrup J considered the authorities on the meaning of institution and noted that the existence of a building is not essential to determining whether an organisation is an institution (at [1339]) and that the majority of the *High Court in Stratton v Simpson* (197) 125 CLR 138 stated that an institution would not ordinarily connote a mere trust. He recognised, however, that the court did not find that a trust could not ever be an institution, and that it would depend on the relevant context. (at [1340])

Northrup J then went on to state:

> In my opinion, the fact that the Allport Bequest has the force of an Act of Parliament does not alter its essential character as that of a mere trust. The applicants are no more than simple trustees. Under s 4 of the Act they are empowered to do all acts of things as may be required or necessary in order to give effect to the agreement, but that is all. Their role is simply to apply the income of the trust in providing gifts and donations to such charitable objects as they, in their discretion, determine. In my opinion, they are not an "institution" within the compose phrase "public benevolent institution".

These quotes demonstrate support for the principle that a 'mere trust' (meaning a fund managed by one or more trustees who are empowered to manage trust property and make distributions in accordance with the objects of the fund) will not be an institution.

Furthermore, these quotes demonstrate that establishment via legislation is not, on its own, sufficient for an organisation to be regarded as an institution.

However, it's important to note that this case is not authority for a conclusion that a trust can never be an institution. It depends upon all the circumstances.

***Tangentyere Council v Commissioner of Taxation* (1990) 21 ATR 239**

Court: Supreme Court of the Northern Territory

Judge: Angel J

Issue to be determined: Is Tangentyere Council Inc, an organisation which acted as a peak body for a number of Aboriginal housing organisations, exempt from paying pay-roll tax under the *Pay-roll Tax Act 1984* (NT) by virtue of the fact that it is a PBI?

Outcome: Tangentyere Council Inc is a PBI

Facts

Tangentyere Council Inc (the Council) was an incorporated association. Its members comprised 19 Aboriginal camp organisations, and every person over the age of 18 years old who was normally a resident of an incorporated Aboriginal camp organisation. Members of the camp associations were Aboriginal people normally and permanently resident in the town camp area of the particular camp association. This was between 1000 and 1500 people in total at any one time, when visitors to town camps were included.

The Council was established as a mechanism for providing housing services to the residents of the town camps or people who wanted to become residents of the town camps, as they had specific needs which were not adequately met by existing housing services. Many residents had very little experience with dealing with government agencies, understanding social security entitlements and how to access them, language barriers, regular moves between town and back to country etc. This resulted in the town campers finding it difficult to maintain a tenancy and pay for essential services such as electricity, water etc.

To address these needs the Council provided an incremental housing process, which involved activities such as:

- Assisting town campers to negotiate special purposes leases for their future housing needs
- Initiating improvements to existing camp areas (including improved camp security, services and ablution facilities) while housing funding is being negotiated
- Involving town campers in the design and physical layout of their proposed housing development in consultation with the Council's Design Group
- Constructing houses and using the construction process as an avenue for employment and training for young, unemployed town campers
- Developing, with the active cooperation of tenants, a landscaped environment around new housing, providing a setting which adds psychological and social support, rather than added stress, to the inhabitant; improving general health and living conditions through, for example, dust suppression; fulfilling lease covenants and providing a major channel of employment and training for chronically unemployed young town campers
- Providing management assistance to the 16 legally incorporated housing associations in fulfilling the legal requirements of their incorporations, the repairs and maintenance of their housing stock, together with rental collection and tenancy support services to maintain stable tenancies.

The Council also provided mailing and banking facilities, established parks and playgrounds, installed and maintained a reticulated water system to camps and houses, collected rubbish, provided transport, education and advice. All of these activities were directed to the benefit of Aboriginal persons or persons of Aboriginal descent living in town camps, or visiting town camps.

The Council's main sources of funding were the Federal Government, the NT Government and government agencies and other statutory bodies. Its income in 1985-86 was approximately $1.6 million.

The Council was publicly accountable for the funds it received as the government bodies which provided its funding required accountability through auditing and reports of expenditure.

General approach to interpretation

Angel J made a number of comments about how to go about the task of determining whether an organisation is a PBI, stating:

> Being a compound expression which is not a term of art, it is for the court to look at the whole of the circumstances in order to reach a decision as to whether the taxpayer is or is not, in accordance with the ordinary English usage of the day, a public benevolent institution (at [241])

And:

> Whether the appellant is a public benevolent institution is…to be determined having regard to a number of factors which include the constitution of the appellant, the membership of the managing and governing body thereof, the sources of its moneys, the public accountability of the appellant, the class or classes of recipients of its benevolence, the characteristics of the class or classes of the recipients of its benevolence, the scope and the nature of the work done by the appellant, whether fees are payable by the recipients of the appellant's work or charges made by the appellant and if so the nature of the fees or chargers, and whether the overall work of the appellant is beneficial to the public at large. (at [242])

'Public'

In regard to the 'public' element, Angel J stated:

> As to the public aspect of the institution the question whether it is subject to some form of public control is a factor to be taken into account, but public control is not essential – what has been described as "the main criterion" is the extensiveness of the class benefited by the institution. (at [242])

Angel J noted that the people who benefited from the Council's activities were the 1000 to 1500 people who inhabited the town camps at any one time, and stated:

> In so far as it is relevant, the membership of the appellant [the Council] is sufficiently large to render the appellant "public" for the purposes of being a public benevolent institution. But in the circumstances of this case I don't think it is necessary to so decide. I think it is public by reason of its membership, the people it services, the source of its finances and its public accountability. I do not decide that any one of these is alone determinative of the question. I take all the circumstances into account. (at [242] – [243])

'Benevolent'

Angel J stated:

> While the authorities do not lay down an all embracing formula as to what is a public benevolent institution, the number and characteristics of the persons benefited by the institution in question can be determinative of the question.
>
> The evidence in the present case is overwhelming that the permanent and transient residents of the Alice Springs town camps and the relevant remoter communities constitute an appreciable needy class in the Northern Territory community.
>
> …
>
> In the light of the evidence in the present case, the "town campers" of Alice Springs were at the relevant time in considerable need of special consideration and assistance (at [245])

In response to an argument made by the Commissioner of Taxes that the Council was not benevolent as its beneficiaries 'chose' their lifestyle and the hardships that resulted, Angel J stated:

> The objects of the appellant's activities are fringe dwellers (I do not use that expression in any pejorative sense); they are culturally ambivalent to such a degree that on the one hand they

> are socially ill prepared to live a Western urban existence, and on the other, to live a traditional or tribal existence in the bush. This is but one reason they need special attention and care…As such, they have and had had a cultural and social existence discrete from urban and traditional or tribal Aborigines, and they live and have lived in circumstances over which they have no control other than via the appellant. I have already noted that their adult life expectancy is less than urban Aborigines and traditional or tribal Aborigines in the bush; and the argument overlooks the substantial number of children involved. Their increased susceptibility to disease is not by choice any more than the general social disruption and disorder created by the many uninvited intruders into the town camps, among them alcohol and substance abusers, who, the evidence shows, create bedlam, even in dry camps. By any standards many "town campers" live in squalor. (at [247])

In response to an argument made by the Commissioner of Taxes that the Council was not benevolent as it was an umbrella organisation which did not provide relief directly, Angel J stated:

> I cannot accept this submission. It is true that not all housing associations can themselves be demonstrated to be public benevolent institutions, but I see no need to reach any such conclusion. The evidence discloses that the appellant's efforts do directly benefit the inhabitants of the town camps. The evidence discloses that the housing associations are both conduits for welfare dispersed by the appellant and recipients of capital improvements and matters of maintenance which directly and physically benefit the occupants of the town camps. (at [247])

In response to the Commissioner of Taxes' submission that the Council was not benevolent as it engaged in some activities that were not benevolent relief, Angel J stated:

> To the extent that the appellant may be said to be engaged in other activities, either political or commercial, those activities may be characterised as incidental to the principal activities…The appellant does not lose its character as a public benevolent institution because it is in part self-supporting…or that fees and rents are sometimes charged, albeit as is the case here, often not recovered (at [247])

Angel J provided the following summary of the relief that the Council provided to its beneficiaries:

> The appellant's principal activities have enabled and enable the town campers to have employment, shelter, facilities and amenities required by them but otherwise not available to them. The activities of the appellant generally contribute to town campers' physical and social

> wellbeing and improvement. The recipients of the appellant's benefits are underprivileged and invariably in poor circumstances physically, emotionally and financially (at [247])

In response to the Commissioner of Taxes' submission that the Council's activity of assisting town camp occupants to retain and observe their non-Western customary values, traditions and culture was not the provision of benevolent relief, Angel J stated:

> I reject this submission. Helping those who cannot help themselves to retain and observe their customary values, traditions and culture, Western or not, is benevolent, at least in the sense that it is for their social and spiritual welfare and the welfare of society as a whole…Benevolence in the relevant sense is not confined to practical and material interests and needs. (at [248])

'Institution'

Angel J did not consider whether the Council was an 'institution' independently of whether it was a 'public institution'. As it was not raised as an issue, it was unnecessary to consider it.

***Commissioner of Pay-roll Tax (Vic) v Cairnmillar Institute (Cairnmillar No. 1)* (1990) 21 ATR 665**

Court: Supreme Court of Victoria

Judge: McGarvie J

Issue to be determined: Is the Cairnmillar Institute, an organisation with a purpose of providing psychotherapy to people suffering from mental illness, exempt from paying pay-roll tax by virtue of the fact that it is a PBI?

Outcome: The Cairnmillar Institute is a PBI

Facts

The Cairnmillar Institute was incorporated as a company in around 1988, having previously been operated by the Presbyterian Church as a church relief organisation from 1961 until its incorporation.

At the time of the judgment, the Cairnmillar Institute had the following objects:

- to provide hospital, clinical and counselling facilities for treating psychological, spiritual and social disorders;

- to establish and conduct centres for persons in need of counselling guidance treatment recuperation and/or rehabilitation from psychiatric psychological spiritual and social disorders;
- to provide for facilities for guidance in marriage family therapy.

The people who received treatment from the Cairnmillar Institute were charged a fee. The people who could afford to do so paid a standard treatment fee, which was similar to what would be charged by a private clinical psychologist. Those people who could not afford to pay the standard treatment fee were able to pay a discounted fee.

'Public'

McGarvie J did not undertake an analysis of whether the Cairnmillar Institute was 'public', stating instead: 'It is common ground before me that the Cairnmillar Institute is…a public institution.' (at [668])

'Benevolent'

The Commissioner for Taxation submitted that the Cairnmillar Institute was not 'benevolent', for the following reasons:

- It does not provide its services only to people who are in financial need
- The needs satisfied by the provision of the Cairnmillar Institute's assistance are not such that their satisfaction amounts to benevolence;
- The services are not provided without charge or only for a small charge.

McGarvie J provided a summary of the history of PBI and its consideration in *Perpetual Trustee Co Ltd v Federal Commissioner of Taxation* and stated:

> In my opinion it follows from the *Perpetual Trustee Co* case that the approach in the present case is to ask whether in the ordinary use of the English language in this community today the Cairnmillar Institute is a public benevolent institution. (at [671])

McGarvie J then stated:

> …the ways in which many public benevolent institutions go about achieving their objectives today are different from the ways in which the typical public benevolent institutions operated in 1931 [when the High Court issued its decision in *Perpetual Trustee Co Ltd v Federal Commissioner of Taxation*]
>
> … I do not consider it essential that a public benevolent institution provide relief only for those in poverty or destitution

…

The judgments [in *Perpetual Trustee Co Limited v Federal Commissioner of Taxation*] of the judges in the majority support the view that it is not only an institution which provides relief for those in poverty or destitution which may be a public benevolent institution, but also one which provides relief for those who are sick, suffering, helpless or in distress or subject to misfortune or the disabilities of the aged or the young…They held that it was not enough, as had been argued, that an institution conferred benefits on a section of the community. It was necessary that the institution relieve persons suffering from some unfortunate disability or condition. These are persons whose plight, in terms used by Evatt J, arouses pity or compassion.

Those who are the objects of the benevolence of a benevolent institution are, because of some disability or condition, disadvantaged as compared with the population generally. A benevolent institution operates to provide relief designed to overcome or reduce the disadvantage. (at [671])

After summarising the decisions of various courts regarding the definition of PBI, McGarvie J stated:

My examination of the decision of the courts on the meaning of "public benevolent institution" since the *Perpetual Trustee Co* case in 1931 indicates that it has never been regarded as a necessary criterion that relief be provided only to those in financial need. The poor have been regarded as one category of persons to whom benevolent institutions provide relief: but other categories include those who are sick, suffering, helpless or in distress or subject to misfortune or the disabilities of the aged or the young. (at [674] – [675]).

…

In my opinion the authorities establish that a public institution which provides relief in a direct way to persons suffering from some unfortunate disability or condition is a public benevolent institution. The plight of such persons is sufficiently serious to arouse pity or compassion within the community and they are regarded as in need of benevolent relief. While in that sense they may be described as "needy" it is not necessary that their need be financial need. Their need for benevolent might arise from poverty but it might arise from sickness, suffering, helplessness or other distress or misfortune. Relief given to those suffering distress or misfortune through causes other than poverty falls within the concept of benevolence. Of course it often occurs that people suffering distress or misfortune from a cause other than poverty also suffer from poverty.

> The descriptions of persons as poor, sick, suffering, helpless, in distress, or subject to misfortune or disability are relative descriptions: a person may be moderately or severely so. I consider that the test for whether relief to such persons amounts to benevolence is whether their disability or condition is of such seriousness as will arouse community compassion and thus engender the provision of relief. (at [675])

This analysis shows that McGarvie J rejected the submission that a benevolent organisation must only assist people who are suffering due to financial need. Rather, a benevolent organisation can provide relief to anyone who is suffering due to needs that would arouse pity or compassion in the community, including those who are in need of medical treatment for mental illness.

In considering whether suffering had reached such a level as to arouse community compassion, McGarvie J stated:

> A person who would benefit in some way, or build immunity against some undesirable disability, from some training, education or improvement is not ordinarily one who, for that reason alone would arouse community compassion. (at [675])
>
> …
>
> The test is whether the Institute provides relief from unfortunate disabilities or conditions which arouse compassion within the community today. The answer provided by the test will turn to a substantial degree on the nature and extent of the psychological disability or condition the person is suffering, its present and potential consequences and the need for treatment. In applying the test it is appropriate to have regard to both the objects and the activities of the Institute (at [675] – [676])

McGarvie J then undertook a detailed analysis of the Cairnmillar Institute's activities, having regard to affidavits of the Institute's staff as to the nature and volume of its various activities, before stating:

> One must agree that most people who undergo the upsetting experiences of ordinary life do not become ill, disordered or abnormal and do not need, seek, or receive treatment. On the other hand it is common experience that some psychologically vulnerable people are precipitated into psychological disorder or abnormality by such occurrences. I have no reason to think that the Institute with its responsibilities and with the educative and developmental facilities of the [associated and non-PBI] Company available for people better suited to that, treats people who do not need it. (at [679])

McGarvie J then considered the work that the Cairnmillar Institute undertook in comparison with the work undertaken by the associated Company and stated:

> The evidence satisfies me that in a broad way the line is drawn alongside the persons who carry psychological imperfections to no greater extent than what may be regarded as the ordinary load of a human. Such a person arouses no compassion and needs no treatment. On the other hand the wellbeing of such a person can usually be advanced by improvement. This is the area in which the Company may provide services to improve the person's relations with others.
>
> On the other side of the line [separating out people who are in in need of benevolent relief through the provision of psychotherapy] are persons carrying significantly more than humanity's ordinary load of psychological imperfections who would generally be regarded as having a disorder or abnormality, deserving of pity and needing treatment. These are the persons to whom the Institute provides relief (at [681] – [682]).

McGarvie J then stated:

> The institution with a benevolent purpose has to adapt itself to the realities of obtaining funds and dispensing its benevolence in the conditions of today.
>
> It is of importance that the Institute is a unique organisation. There is no other organisation, public or private, similar to it in Australia. It is geared towards encouraging people who need psychotherapeutic treatment to seek it and providing high quality treatment at the lowest possible charge. Its members receive no profit and would not share in any distribution of assets if the Institution were wound up.
>
> There is no suggestion that its employees or anyone else derive financial benefit other than proper salaries from the Institute's operation. (at [684])

This excerpt illustrates the principle that a benevolent organisation can employ people to provide benevolent relief and pay them a standard salary to do so. It can also charge market rates for its services if necessary to be able to provide those services.

'Institution'

McGarvie J did not undertake an analysis of whether the Cairnmillar Institute was an 'institution', stating instead: 'It is common ground before me that the Cairnmillar Institute is…a public institution.' (at [668])

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

Court: Supreme Court of Victoria

Judge: McGarvie J

Issue to be determined: Is the Marriage Guidance Council of Victoria exempt from pay-roll tax on the basis that it is a PBI for the purposes of the *Pay-roll Tax Act 1971* (Vic)?

Outcome: The Marriage Guidance Council of Victoria is not a PBI

Facts

The Marriage Guidance Council of Victoria (the Council) was incorporated as a company limited by guarantee in 1961, after having existed as an unincorporated association since its establishment in 1948. The main activity of the Council was to provide marriage guidance. This included counselling and/or mediation for couples entering, wishing to maintain or leaving a marital or some other relationship. The services were provided from premises the Council owned at Kew and Croydon and other premises at Sunshine, Coburg, Dandenong, Morwell, Ballarat, Bendigo, Shepparton and Traralgon.

At the time of the judgment, 18 qualified clinical staff and 30 to 40 qualified sessional staff conducted counselling on the Council's behalf.

The Council was approved under the Family Law Act as a marriage counselling organisation. Such an approval was only given if the Attorney-General was satisfied that marriage counselling was the whole or the main part of the activity of the organisation seeking the approval

The Council employed both full time and part time staff. The Council charged fees for its counselling and mediation services. The average fee charged was between $24 and $25. Charges were dependent on the client's level of income. Clients with lower incomes were not expected to pay the same fees of those of more financially comfortable clients.

The Council was controlled by a board of management elected at annual general meetings. Its members were persons who applied for membership and stated approval of the Council's objects, whose applications were accepted by the board or the existing members.

The Commissioner of Taxation assessed the Council for pay-roll tax. The Council objected to the assessment, stating it was not liable to pay pay-roll tax as it was a PBI and therefore exempt. The matter was referred to the Administrative Appeals Tribunal, which affirmed the Commissioner of Taxation's assessment. The Council appealed to the Supreme Court of Victoria (this judgment).

'Public'

McGarvie J did not consider whether the Council was 'public', as his focus was on whether it was 'benevolent'.

'Benevolent'

After considering the Council's activities and the characteristics of the people who received its assistance McGarvie J stated:

> In my opinion the nature of the marriage counselling provided at the condition and circumstances of those who receive it are such that its marriage counselling work does not entitle the Council to be regarded as a public benevolent institution. (at [1274])

McGarvie J also stated:

> I am satisfied that the work done by the Council in marriage counselling is work of great social value and utility to those who receive its services and to the community generally. Its counselling enables many adults and children to derive or recover benefit from a satisfactory marriage. That, however, is not the issue before me. That issue is whether the Council fits the description of a species of institution on which parliament has conferred the benefit of an exemption from taxation: a public benevolent institution.
>
> There 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…
>
> I consider, however, that the community regards such emotional stress and pain as falling within the ambit of stress and pain encountered in ordinary human experience associated with such things as failure, deception, loss of status or reputation, and bereavement
>
> Most healthy people recover from such hurtful experiences with the passage of time. (at [1277])

McGarvie J then stated:

> I am satisfied that the counselling work of the council in many cases, by eliminating strife in marriage or preventing marriage breakdown, avoids the undesirable secondary consequences of the type to which I have referred. While entirely commendable socially, this is preventative work and different from the work of a benevolent institution. It is akin to training, education or improvement (at [1277])

Finally, McGarvie J stated:

> The question to be decided is not one which benefits from prolonged analysis. Essentially the question is whether in the common language of this community the service which the Council provides to those who seek its assistance falls, by and large, within the description of benevolent, used in the relevant sense. In my opinion the bulk of marriage counselling provided by the Council is not to be regarded as benevolent in that sense.
>
> In my opinion the community does not regard those who are, or have been, in marriage, successful or unsuccessful, as a general category of people with an unfortunate disability or condition arousing compassion. The same conclusion is reached if one confines attention to those who seek counselling from an organisation such as the Council. (at [1278])

This decision contrasts with the *Cairnmillar* decision discussed above. It illustrates that emotional distress which is considered a normal part of life is not sufficient to give rise to a need requiring benevolent relief. Organisations which assist to relieve such distress will therefore not be 'benevolent' in the required sense, even though they provide a clear benefit to those who seek their assistance.

However, emotional distress that is so severe that it causes a mental illness would give rise to a need requiring benevolent relief. Organisations which relieve mental illness would likely be 'benevolent' in the required sense, as with the Cairnmillar Institute, discussed above.

This decision also indicates that an organisation that prevents someone from being in a position of needing benevolent relief may not be a benevolent institution, as prevention is different from relief. The ACNC considers whether preventive activities may nevertheless be regarded as benevolent relief on a case-by-case basis. This decision should not, therefore, be considered binding precedent that a PBI can never provide relief through activities that are preventive in nature.

'Institution'

McGarvie J did not consider whether or not the Council was an institution.

***Commissioner of Pay-roll Tax v Cairnmillar Institute* (*Cairnmillar No. 2*) [1992] 2 VR 706**

Court: Supreme Court of Victoria, Appeal Division

Judges: Brooking, Gobbo and Tadgell JJ

Issue to be determined: Was McGarvie J wrong at law in determining that the Cairnmillar Institute was a PBI, even though it provided relief to people who could afford to pay market rates and charged market rates to those people?

Outcome: The Cairnmillar Institute is a PBI

Facts

As above for *Cairnmillar Institute No. 1* 'facts' section.

'Public'

The Court did not undertake an analysis of whether the Cairnmillar Institute was 'public', with Gobbo J stating: 'It was conceded on behalf of the Commissioner of Pay-roll Tax that the institute was a public institution…' (at [708])

'Benevolent'

In upholding McGarvie J's decision that Cairnmillar Institute was a PBI, Gobbo J (with whom Brooking J concurred) noted:

> The findings of the learned primary judge were that the service was predominantly the treatment of mental conditions or disability by psychotherapy and that these conditions were such as to arouse community compassion and so engender the provision of relief. Those findings were sufficient in my opinion to bring the respondent within the concept of public benevolent institution as described in the Perpetual Trustee Case and so demonstrate the element of benevolence. (at [711]).

Gobbo J also stated:

> The hypothetical case was raised in argument of a medical clinic which charged fees for medical treatment…seeking to come within the exemption because they were relieving the suffering of their patients…[there would not] normally be any sense of compassion aroused when the service provided for a fee was of a mundane character such as treatment of a common ailment. It might be otherwise where the service was provided at no fee or reduced fees to those who would but for the special fee arrangement be denied treatment. (at [712])

These quotes highlight the importance of the severity of suffering in determining whether an organisation provides 'benevolent' relief. Emotional or mental suffering which is of such severity that it results in mental illness gives rise to a need requiring benevolent relief.

The comparison to a hypothetical medical clinic that just treats anyone who comes to it for assistance not being benevolent unless it treats patients who cannot afford to pay the standard fee for treatment is also interesting. Although Gobbo J does not explicitly state this, in such cases, the need requiring benevolent relief would not arise from the sickness, but from poverty.

Gobbo J then stated:

> It is no less benevolent to assist an Aids sufferer because that person can afford to pay, for the issue here is not the relief of poverty but the relief of distress. The question of payment for services should not be approached on the basis that the making of a charge is prima facie inconsistent with benevolence. (at [712])

'Institution'

The Court did not undertake an analysis of whether the Cairnmillar Institute was an 'institution', with Gobbo J stating: 'It was conceded on behalf of the Commissioner of Pay-roll Tax that the institute was a public institution…' (at [708])

***Legal Aid Commission of Victoria v Commissioner of Pay-roll Tax (Vic)* (1992) 92 ATC 2053**

Venue: Administrative Appeals Tribunal of Victoria

Decision maker: G Gibson M

Issue to be determined: Is the Legal Aid Commission of Victoria exempt from liability for pay-roll tax under the *Pay-roll Tax Act 1971* on the basis that it is a PBI?

Outcome: The Legal Aid Commission of Victoria is a PBI.

Facts

The Legal Aid Commission of Victoria (the Commission) was established by the *Legal Aid Commission Act 1978* (Vic), which stated that its purpose was to provide legal aid in accordance with the Act, meaning education, advice or information in and about the law, legal services that may be provided by a legal practitioner, the provision of duty lawyer services, legal advice and legal assistance. The Commission also controlled the Legal Aid Fund, which comprises the interest that is generated from funds while they are in solicitors' trust accounts.

The Commission was structured as a body corporate with ten members chosen to represent the legal profession and the general community.

The Commission's activities included providing duty lawyers at most Victorian magistrates' and children's courts, granting legal assistance to clients so that their cases could be handled by a lawyer (either one employed by the Commission or a private practitioner to whom the Commission referred the client); providing free legal information and advice, and providing community legal education and law reform activities. The Commission sought exemption from pay-roll tax for all staff except those employed in delivering its education and law reform functions.

The Commission received 37.2% of its funding from the Commonwealth government, 24% from the State government via the Solicitors' guarantee fund, 9.4% from State government grants, 18.6% from clients, 7.8% from costs recovered, 0.8% from the Appeals Cost Fund and 2.2% from interest on investments.

The Commission was required to choose the individuals who received legal aid based on prioritising those who would be most seriously disadvantaged if aid were not provided. As such, the majority of assistance (60%) was granted in respect of criminal matters, with 25% for family law matters and 17% for civil matters.

'Public'

Gibson M noted:

> On the face of it, the Commission is an institution which is both public and benevolent. (at [2058])

After noting that the Full Federal Court stated in its judgment in *Metropolitan Fire Brigades Board* that the connection of a body with Government may in some circumstances assist toward a conclusion that it is a PBI, Gibson M stated:

> Government involvement in an institution may be the best evidence that the institution is public in the required sense (at [2061])

'Benevolent'

Gibson M noted:

> [A]bout 75% of assisted applicants had household incomes below the poverty line, less than 5% of assisted applicants had net weekly household income over $400, 56% of applicants were on a pension or benefit, 19% had no income, and 25% were employed. Only about 7% are able to pay an initial contribution. It follows, I think, that the Commission is predominantly concerned with helping the poor and that but for the poor, we probably would not have legal aid. It also follows from a review of the kind of legal work that is the subject of legal aid – what might be referred to as the pathology cases – that such work is being done in respect of some misfortune suffered by the recipient of aid, such as a criminal charge, a matrimonial breakdown, or a wrong causing injury. (at [2058] – [2059])

This statement shows the information that Gibson M took into account to conclude that the Commission assisted appreciable needy classes of beneficiary, with needs arising from poverty and misfortune - two of the kinds of conditions identified in *Perpetual Trustee* as giving rise to needs requiring benevolent relief.

Gibson M also stated:

> I do not think that the Tribunal should get bogged down in this notion of "compassion", lest it involve itself in the heresy of treating a gloss on the statute as having the same force as the statute itself. There must inevitably be a subjective element in what one person would regard, and what another person would not regard, as a proper object of compassion. If you are being confronted with a protagonist, and the machinery of the state, and you are facing long imprisonment in respect of an alleged offence, or the prospect that you will not be compensated for the loss of your livelihood, or the loss of access to your children because of some alleged defect of character, or deportation following the loss of refugee status, and you need help from a lawyer, but you cannot afford it, then I think your position is helpless such that most people would feel sorry for you. I am not assisted by an emotive inquiry into the possible reaction of some within the community to the fact that community resources have been devoted to the defence of the Russell Street bombers or Walsh Street murderers; although I have not forgotten that some were acquitted, and that until any was convicted, all were innocent. (at [2059])

This statement is of interest, as it appears that a submission was made on behalf of the Commissioner of Pay-roll Tax that the Commission's beneficiaries were not an appreciable needy class in the community, as their needs wouldn't arouse compassion in the community (presumably because many of them had been arrested and charged with a criminal offence). Gibson M's statement

is a reminder that it's important to try not to be subjective when considering whether a group of people would be an appreciable needy class.

Gibson M went on to state:

> While I doubt whether it is appropriate to try to come to a concluded view on each of these issues in isolation, my present inclination is that the objects and activities of the Commission are such that it ought to be regarded as providing help to the helpless and therefore benevolent within that term as it is currently understood. It is I think clear that just as the categories of misfortune are not closed, neither are the means that may be invoked out of benevolence to help those suffering from misfortune (at [2059])

By this statement, Gibson M is explaining why he considers that benevolent relief can be provided via legal aid, even though prior common law precedents regarding PBI had not included legal aid as a recognised means of providing benevolent relief.

The Commissioner of Pay-roll Tax also made a submission that the Commission was not a PBI as its relief was not provided directly. This submission was supported by the fact that the commission paid barristers and solicitors who were not employees a far greater amount of its total funding than it spent on its wage bill for in-house lawyers. In response to this submission, Gibson M stated:

> In my view the authorities provide no hard and fast rule by which this division of labour in delivering aid may be said of itself to disqualify the commission from characterisation as a public benevolent institution. It is true that the authorities contain references to the direct provision of aid, but in my view those references are directed to the kind of issue that arose in the ACOSS case, above. That was a very different case, of an umbrella organisation providing propaganda, rather than actual assistance.
>
> What seems to me to be critical in this case is that the Commission is involved in delivering aid to those who need it, and I do not think for relevant purposes that aid should be regarded as any less direct simply because the aid is delivered by an outside rather than an inside lawyer, by an agent rather than an employee. The Commissioner can of course ultimately only operate through agents, and what seems to me to be critical is not the degree of control that the Commission has over the agents who actually provide the relief, but whether or not what those agents do may be characterised as providing direct relief. In my view it can and should be so characterised. (at [2060])

So, Gibson M was explaining that, assuming directness was a requirement of a PBI, that delivery of aid via an agent satisfied that requirement.

The Commissioner of Pay-roll Tax also submitted that the Commission was not a PBI as it was a 'government' entity rather than a 'benevolent' entity, and was therefore analogous to the Metropolitan Fire Brigades Board, which the Full Federal Court found not to be a PBI. In response to this submission, Gibson M stated:

> The Commission is plainly in a different category. It is only partly funded by Government. It does not appear to be subject to the same degree of Government control…Indeed many, if not most, of its clients are pitted against the Government. It is publicly accountable, but not solely dependent on Government for funds. It is easier to regard protection from fire as a function of Government than the provision of legal aid. More importantly, even assuming that a guaranteed level of legal aid is now an established function of Government, it appears to me that a legal aid provider operates differently to a fire brigade board. True it is that anyone can be put in a position of misfortune where he or she needs a lawyer, just as anyone can be hit by fire, but it seems to me that the Commission properly directs its activities to an established and reasonably well-defined group within the community whose misfortune is not just that they need a lawyer, but that they cannot afford one. As such, it appears to me that the object of the Commission is to benefit an appreciable and needy section of the public, being those people who cannot afford a lawyer when they are put in a position where they truly need one. (at [2061])

This indicates that Gibson M considered the fact that the Commission didn't assist the community in general, but rather targeted its aid toward the needy, showed that it wasn't analogous to the Metropolitan Fire Brigades Board decision, so that he could proceed to consider the other factors indicating whether or not the Commission was a government entity.

Accordingly, Gibson M went on to state:

> It does not seem to me at all surprising that a Government wanting to do something about providing legal aid should avail itself of funds that may be available through interest on solicitors' trust accounts. That is just a more painless way of raising money. No, given the degree of need for legal aid which the evidence shows, does it seem surprising that a Government would be interested in ensuring that that legal aid was delivered as well as possible, and be administered by a body that the Government regarded as adequate for that

> purpose, and one that is publicly accountable for its decisions It seems to me to be naïve to contemplate the possibility of legal aid in this State being left to be delivered by private benefactors uncontrolled and unfunded by Government. But I do not think that the fact that Government is bound to be involved entails as a consequence that the relevant activity or chosen instrument cannot be regarded as benevolent.
>
> In my view the Commissioner ought not be characterised as "a purely governmental body" so as to come within any general proscription that may have been put forward by the Federal Court, and I do not think that the amount of Government control or funding in the case of the Commission is sufficient of itself to preclude what may otherwise be a characterisation of the Commission as a public benevolent institution. Indeed, if you were to regard the Commission as a purely governmental body, carrying out a purely governmental function, this present context would be even more bizarre (at [2061] – [2062])

It seems that Gibson M was influenced by the fact that, if the Commission were regarded to be part of government, then the case before him would amount to the government suing itself about tax that one government entity paid to another government entity.

'Institution'

Gibson M noted:

> On the face of it, the Commission is an institution which is both public and benevolent. (at [2058]).

No explanation or analysis was provided for this statement.

NOTE: This was a decision of the Administrative Appeals Tribunal of Victoria, which is not a court of record and so which does not create binding precedents. However, the ACNC would apply the law consistently with this decision as long as there were no conflicting precedents from other judgments.

***Federal Commissioner of Taxation v RSPCA, Queensland Inc* (1992) 92 ATC 4441**

Court: Full Supreme Court of Queensland

Judges: Fitzgerald P, Pincus JA and Thomas J

Issue to be determined: Is RSPCA Queensland exempt from paying sales tax under the *Sales Tax (Exemptions and Classifications) Act 1935* on goods its uses on the basis that it is a PBI?

Outcome: RSPCA Queensland is not a PBI.

Facts

RSPCA Queensland was incorporated by Letters Patent pursuant to the Religious Educational and Charitable Institutions Act 1861 (Qld). Its objects were:

> To prevent cruelty to animals by enforcing, where practicable, the existing laws, by procuring the passage of such further legislation as may be though expedient, by executing and sustaining an intelligent public opinion in this regard and by doing all things conducive and incidental to the attainment of the foregoing objects.

RSPCA Queensland's activities including operating animal refuges, providing veterinary treatment for sick or injured animals, prosecution of offences regarding cruelty to animals and maltreatment of animals and providing public education regarding animal welfare issues.

Membership to RSPCA Queensland was open to anyone who wished to become a member. It was controlled by its members and received a significant annual grant from the Queensland governing, along with public donations and bequests, to fund its operations.

RSPCA Queensland applied to the Supreme Court and obtained a declaration that it was a PBI for the purposes of the *Sales Tax (Exemptions and Classifications) Act 1935*. The Commissioner of Taxation appealed that declaration. This judgment is the outcome of that appeal.

'Public'

The Society submitted that it demonstrated this element through its public membership and control, its dependence upon public funding and its performance of public functions, and by the fact that its benefits were provided to animals generally. In response to this submission, Fitzgerald P stated:

> Whether or not an institution is accurately described as a public institution because it performs public functions and is publicly controlled and funded or is correctly described as a benevolent institution because of the nature of the benefits it provides, an institution is not a public benevolent institution unless benefits of the requisite character are provided or available to the general public or a sufficient section of the public. (at [4445])

In the statement quoted above Fitzgerald P is reiterating the principle that 'public benevolent institution' is a compound phrase and, as such, little is to be gained by demonstrating that one element of the phrase is satisfied if the organisation can't satisfy the definition as a whole.

'Benevolent'

Fitzgerald P stated:

> …although it [the RSPCA] may be a public institution in the sense that there is benefit to the community in its activities, and although it may be a benevolent institution in the sense that it provides benefits of the requisite character, it provides those benefits to animals, not to the community or a section of the community. Accordingly, it is not a "public benevolent institution" within the received meaning of that expression (at [4446])

This statement reinforces Fitzgerald P earlier statement (discussed above) that it's not enough for an organisation to show that it satisfies some of the elements of PBI. The organisation must be able to demonstrate that it is, considered holistically, a PBI. As RSPCA Queensland didn't relieve the suffering of people, it was not 'benevolent' in the required sense, so it didn't matter whether it could demonstrate that it was a public institution, or that it provided some benefit to the general public.

Thomas J stated:

> Because the cases have basically confined the exemption to eleemosynary activities, it is not surprising that the reported cases make no mention of animals or of potential beneficiaries other than human beings. The submission on behalf of the Society (which I understand to have been its principal submission in the original proceedings), and which it sought to maintain on appeal, is that "public benevolent institution" includes an institution concerned with the relief of the suffering of animals, and that it is not restricted to human beneficiaries. It is enough to say that the submission is implicitly inconsistent with the well established interpretation of the phrase, which requires promotion of the relief of poverty, suffering, distress or misfortune so that the general public or an identifiable part of it is benefited. It is true that the present argument has never been pronounced upon, but it is implicit that the decisions are directed towards human relief. (at [4449])

Thomas J then stated:

> The question remains whether there is any possibility that a secondary argument…might allow the Society to obtain the desired exemption. It concerns the ultimate benefit that comes to human beings and society from the promotion of the Society's primary object of prevention of cruelty to animals…

> I should have thought it self-evident that the promotion of the Society's objects ultimately benefits mankind, and that such activities are at least indirectly for the benefit of human beings. It is difficult to understand how this could be factually controverted. That however is in the end irrelevant, because the nature of the Society's ultimate benefit to human beings is not for the relief of the needy or underprivileged, or directed towards relief of the human conditions that traditionally call for aid. On the narrow established interpretation of "public benevolent institution" it is not open to rely upon a broad "charitable" human benefit of that kind. (at [4449] – [4450])

These statements illustrate the point that a PBI must relieve the needs of humans, rather than animals. It is not enough that the community receives some benefit from an organisation's activities. That benefit must be in the form of relief of a benevolent need.

Institution

The court did not consider whether RSPCA Queensland was an institution independently of whether it was a 'public institution' or a 'benevolent institution'.

***Maclean Shire Council v Nungera Co-operative Society Ltd* (1995) 86 LGERA 430**

Court: Supreme Court of New South Wales – Court of Appeal

Judges: Priestley, Handley, and Sheller JJA

Issue to be determined: Is Nungera Co-operative Society Ltd exempt from paying land rates under the *Local Government Act 1919 (NSW)* on the basis that it is a PBI?

Outcome: Nungera Co-operative Society Ltd is a PBI.

Facts

Nungera Co-operative Society Ltd (the Society) was incorporated under the *Co-operation Act 1923* (NSW). The following statement of objects was set out in its constitution:

> The objects of the Society shall be to relieve the poverty, sickness, destitution, distress, suffering, misfortune or helplessness of needy members of the Aboriginal community in the Maclean and surrounding areas of New South Wales through:
>
> (a) Improving their housing, living conditions and general standards of living by the provision of educational, training and employment opportunities; and

(b) Improving their vocational skills and employment prospects by the provision of educational, training and employment opportunities; and
(c) Arresting their social disintegration by strengthening and fostering the development of Aboriginal and Islander identity and culture and ensuring that all programs and actions are in accordance with their cultural values, customs and practices.

The Society's main activity was to provide a housing settlement of 16 houses, each of which was occupied by families from the Aboriginal community in that shire. The Society charged rent for its housing, but at a rate less than standard market rates in the area. Only three of the tenants were employed. The remaining tenants were either on social security benefits or employed by the Society at an equivalent wage to social security benefits as part of a project intended to improve the employment skills and confidence of those tenants.

The Maclean Shire Council (the Council) assessed the Society for land rates. The Society appealed the Council's decision to the Land and Environment Court. The appeal was upheld. The Council appealed that decision. This decision is the outcome of that appeal.

'Public'

The Court did not consider whether the Society was 'public', as the Council did not dispute that the Society had a public character.

'Benevolent'

The Council submitted that the Society was not 'benevolent' as it had objects and powers the enabled it to pursue non-benevolent purposes on an independent basis. In support of this submission, the Council referred to object (c) in the Society's constitution, regarding arresting social disintegration by strengthening and fostering the development of Aboriginal and Islander identity and culture. The Council pointed out that a purpose of fostering a particular culture had been found not to be charitable in *Williams' Trustees v Inland Revenue Commissioners* [1947] AC 447, an English case in which the House of Lords denied that an organisation with a purpose of fostering the social and cultural interests of Welsh people in London was charitable. In response to this submission, Handley JA stated for the court:

> One may readily accept that an institution with an independent object of fostering the cultural values of a particular group would not be a public benevolent institution. However [the Society's objects clause] makes it perfectly plain that the object or power in par (c) is ancillary or incidental. The rule provides that the objects of the Society shall be to relieve the poverty

> etc of needy members of the Aboriginal community in the Maclean area "through" the means identified in par (c). The Society's object throughout is the relief of poverty etc and the subrules authorise it to pursue this object through the means referred to. The Society is not authorised to pursue these activities for their own sake as independent objects or purposes but solely as an ancillary or dependent means of carrying out its objects. (at [433])

This statement shows that the court applied standard legal rules regarding the interpretation of documents to interpret the Society's constitution. However, it's important to note that these rules are for guidance only, and that all the relevant circumstances need to be taken into account. For example, if the Society had pursued the object at issue independently, whether or not its rules empowered it to do so, the court may have come to a different conclusion regarding the Council's submission that it was an independent non-benevolent purpose.

The Council also submitted that a power set out at 6(k) within the Society's constitution, and which was 'subject to' rule 65, to apply surplus funds to promote co-operation or to promote, assist or carry out any charitable purpose or undertaking showed that the Society had an independent non-benevolent purpose. In response to this submission Handley JA stated:

> The expression "subject to" indicates which of two or more provisions is the dominant one in the event of any conflict…The Society's constitution, like any other written instrument, should be ready as a whole and if possible, apparent inconsistencies should be reconciled. Since r 6(k) is expressed to be a dependent or incidental power conferred on the Society "to advance the objects" and is otherwise to the same general effect as r 65(b), the latter should be construed, like the former, as being dependent or incidental rather than independent and collateral. (at [434])

This statement demonstrates the principle that the governing document of an organisation must be read as a whole in order to determine its meaning, rather than reading sections in isolation from one another.

The Council also pointed towards the Society's winding up clause, which stated that surplus funds must be transferred to a fund or association established for the benefit of, and controlled by, Aboriginal people in Australia and any land must be held in perpetuity for the use and benefit of Aboriginal people in Australia. As this clause did not express that the surplus needed to be held on trust for the provision of benevolent relief of Aboriginal people in Australia, the Council submitted that it showed the Society had an independent non-benevolent purpose.

In response to this submission, Handley JA stated:

> The requirement that any land be held in perpetuity for the use and benefit of Aborigines makes it clear that such land must be held on a charitable trust. In my opinion the current disadvantaged position in Australia of Aboriginals is such that any valid charitable trust for their benefit must also be for public benevolent purposes.
>
> …
>
> While in theory [the winding up clause] might authorise an application of the Society's surplus funds to some fund or association whose purposes were not strictly benevolent, the context of the rules as a whole and the provision dealing with the disposal of surplus land make it sufficiently clear that the fund or association must be for the benefit of Aboriginals in need. The principle of construction illustrated by the charity cases referred to above which prima facie limits gifts for the benefit of the aged, infirm or sick to persons within these categories which are in need is sufficient to support this construction. (at [434])

Again, this statement shows that the court read the winding up clause in light of the constitution as a whole and, in so doing, read into the clause a requirement that surplus assets must be applied for benevolent relief.

Finally, the Council submitted that the trial judge had erred at law in finding that the Society's activities amounted to benevolent relief as he didn't explain this finding despite the fact that three of the Society's tenants were employed and were therefore not necessarily needy. Handley JA disposed of this submission on behalf of the court, stating that there was no evidence that the trial judge had failed to take relevant evidence into account. He then stated:

> Whether particular persons are in need is a question of fact. There is no suggestion that the three Aboriginals in outside employment were well off by ordinary Australia standards…I can see no error of law or fact in the finding that they were in need. (at [435])

No further submissions were made to dispute the acceptance that the Society's tenants were 'needy' [had needs requiring benevolent relief which the Society relieved via the provision of housing].

'Institution'

The Court did not consider whether the Society was an 'institution', as the Council did not dispute that the Society was an institution.

***Northern Land Council v Commissioner of Taxes* (NT) (2002) 141 NTR 1**

Court: Supreme Court of the Northern Territory – Court of Appeal

Judges: Martin CJ, Mildren and Thomas JJ

Issue to be determined: Is Northern Land Council exempt from paying pay-roll tax under the *Pay-roll Tax Act 1978 (NT)* on the basis that it is a PBI?

Outcome: Northern Land Council is a PBI.

Facts

The Northern Land Council was established under the *Aboriginal Land Rights (NT) Act 1976* (Cth). Its purpose was to manage Aboriginal land. As part of that function, it consulted with traditional owners and other interested Aboriginal persons claiming to have a traditional land claim or who wished to carry out commercial activities on Aboriginal land. Its purpose also included protecting sacred sites, access to Aboriginal Land and schemes for managing wildlife on Aboriginal Land.

The Commissioner of Taxes issued a pay-roll tax assessment to Northern Land Council. Northern Land Council objected to the assessment, claiming that it was exempt from pay-roll tax liability as it was a PBI. The objection was disallowed, so the Northern Land Council appealed to the Northern Territory Supreme Court. The judge determined that the Northern Land Council was not a PBI, so the Northern Land Council appealed. This judgment is the decision of that appeal.

'Public'

In response to a submission that Northern Land Council did not demonstrate many of the indicia previous courts had relied on to determine that other organisations were 'public' in the relevant sense Mildren J stated:

> Although an institution is not subject to public ownership and control, this does not necessarily compel the conclusion that it is not a public benevolent institution. It is a question of fact and degree in each case which depends not such much on how it was established or financed, but upon the character of the institution and the nature of the services rendered…

> An institution which aims at benefiting an appreciable, but not necessarily appreciable needy, section of the community is a public institution. (at [6])

These statements demonstrate the principle that the most important factor in determining whether an institution is 'public' is the extensiveness of the class that the institution benefits. If the institution benefits an appreciable needy class in the community, the absence of other indicia is unlikely to lead to a conclusion that it is not 'public'.

In response to a submission that Northern Land Council was not a public body as its members were chosen by its beneficiaries Mildren J stated:

> In my opinion, the fact that a land council's members are chosen by the persons whose interests the land council is meant to serve merely reinforces the fact that the appellant is a "public body"; it does not detract from the status of the appellant as a PBI. (at [12])

'Benevolent'

In regard to whether or not a PBI can have objects that were inconsistent with providing benevolent relief Mildren J stated:

> A institution may have independent or collateral objects and powers which enable its funds to be devoted to purposes which are not benevolent which can have the result of the institution losing the status it would otherwise possess as being a benevolent institution. The distinction to be drawn is between objects and powers which are independent and collateral, even if subsidiary, which have a disqualifying effect and those which are "merely ancillary, incidental, dependent or concomitant" which do not. (at [7])

This statement illustrates the point that an organisation can't be a 'part PBI'. An organisation's purpose is either to provide benevolent relief, or it is not. Non-benevolent objects can only be pursued to the extent that they are in aid of benevolent relief.

In regard to findings by the trial judge that Northern Land Council wasn't 'benevolent' as it wasn't charitable in the popular or 'eleemosynary' sense of providing material aid to relieve poverty, Mildren J stated:

> The learned trial judge placed emphasis on the need for the appellant to establish that it was formed to act charitably in the popular sense, or benevolently in the eleemosynary sense. I do not accept that, in order to succeed, it is necessary for the appellant to establish either of these propositions. In my view, while proof of those matters may well assist in reaching a conclusion favourable to the appellant, the absence of either or both of those factors is not determinative...

> As to whether benevolence is limited to benevolence in the eleemosynary sense, which I take to mean "by the giving of welfare assistance", it is plain from a number of decisions that this is not essential if by welfare assistance one is speaking of the provision of money, housing, food, and other basic essentials…
>
> The fact that not all those who are assisted are needy, or in states of distress, or objects of compassion, is also not necessarily conclusive, so long as the section of the public to whom assistance is directed may be so described as a class and so long as that class may be described as disadvantaged and appreciable. (at [8])

Mildren J went on to state:

> It is clear that [the Northern Land Council Act] was not merely about addressing the wrongs of the past, but that it was designed to enable a class of people with strong spiritual affiliations and responsibilities to a site to live a traditional lifestyle, according to their cultural and spiritual beliefs if that is what they choose to do. This has been recognised by some authorities as "beneficial" in the relevant sense. (at [10])

Mildren J also stated:

> I consider that traditional owners are a class for the purpose of this legislation and that it is plain that they have special needs and responsibilities which makes it appropriate to differentiate them from other Aborigines which, without the assistance of the appellant, they would be unable to procure or maintain. (at [10] – [11])

This statement is Mildren J's explanation regarding why he considered the beneficiaries of Northern Land Council to be an appreciable needy class in the community. He has pointed out the specific needs of the class, which justify excluding others from the beneficiary class, without jeopardising its 'public' nature.

After considering an argument for the Commissioner of Taxes that the Northern Land Council was of benefit to Aboriginal people, but not designed to relieve poverty, sickness, destitution, helplessness or distress because its functions were largely administrative in nature Mildren J stated:

> …a land council was necessary to provide the support and assistance traditional Aboriginal owners and other Aboriginal persons living on Aboriginal land in accordance with s 71 of the Act clearly needed if their culture, spirituality, traditions and freedom of choice were to be respected and protected. Those needs are recognisably beneficial in relieving distress and helplessness and in my opinion, that is the essential nature to which the core functions of the appellant are directed (at [11])

In response to an argument for the Commissioner of Taxes that the Northern Land Council was not benevolent as it performed its functions as a statutory body, rather than due to feelings of benevolence on the part of its members, Thomas J stated:

> There is no authority to the effect that a body that performs statutory functions, independent of government is not a public benevolent institution. The question that is determinative of it being a public benevolent institution is whether the Northern Land Council performs functions designed to provide relief to a disadvantaged and appreciable section of the community. (at [21])

'Institution'

The court did not consider whether Northern Land Council was an institution.

***Bodalla Aboriginal Housing Co Ltd v Eurobodalla Shire Council* [2011] NSWLEC 146**

Court: Land and Environment Court of New South Wales

Judge: Preston CJ

Issue to be determined: Is Bodalla Aboriginal Housing Co Ltd exempt from paying land rates under the *Local Government Act 1993 (NSW)* on the basis that it is a PBI?

Outcome: Bodalla Aboriginal Housing Co Ltd is not a PBI.

Facts

Bodalla Aboriginal Housing Co Ltd (BAHC Ltd) owned 28 properties in the Eurobodalla local government area. BAHC Ltd rented out 27 of those properties to Aboriginal people and used the 28th property as its office. Three of the tenants occupying BAHC Ltd's properties had a low income. The remaining 24 tenants relied on government pensions as their only source of income.

BAHC Ltd's constitution included both charitable objects and non-charitable objects. BAHC Ltd amended its constitution to remove the non-charitable objects in 2011.

In 2006 (five years before amending its constitution) BAHC Ltd applied to Eurobodalla Shire Council (the Council) for an exemption from having to pay rates on the basis that it was either a public charity or a public benevolent institution. The Council refused the exemption and continued to levy rates on BAHC Ltd's properties.

BAHC Ltd did not pay the rates levied against its properties from 1 January 2005 onwards, so in 2008 the Council commenced proceedings in the District Court of NSW to recover the outstanding rates. BAHC Ltd did not defend the proceedings, so default judgment was given in favour of the Council. BAHC Ltd then applied for the default judgment to be set aside. The District Court granted BAHC Ltd's application on the condition that BAHC Ltd commenced proceedings in the Supreme Court seeking declaratory relief that its properties were exempt from rates. BAHC Ltd commenced those proceedings, which were transferred to the Land and Environment Court. This judgment is the outcome of those proceedings.

'Public'

Preston CJ did not consider whether BAHC Ltd was 'public' independently of whether it was a public benevolent institution.

'Benevolent'

Preston CJ stated:

> The concept of "public benevolent institution" is a narrower concept than that of a "public charity." (at [330])

And pointed out:

> As with public charity, the existence of independent and collateral objects that are not of a public benevolent nature will operate to deny an institution status as a public benevolent institution. (at [330])

In relation to BAHC Ltd's objects, Preston CJ stated:

> The objects in cl 2(l), 2(m), 2(s), and (t) cannot be characterised as being for a public benevolent purpose. They also cannot be characterised as being ancillary or incidental to the object in cl 2(a) of providing housing for persons of Aboriginal descent…
>
> It is noticeable that the statement of the objects in the plaintiff's Memorandum of Association does not have a chapeau specifying an overarching object of relief of poverty, sickness, destitution or helplessness of needy members of the Aboriginal community and specifying

> that such object is to be achieved through the means of undertaking the activities in the paragraph listed. (at [331])

Preston CJ's statements identify a 'benevolent' purpose, being the provision of housing for persons of Aboriginal descent. However, as BAHC Ltd's objects were not worded in such a way as to make the object of providing housing for Aboriginal people take precedence over the remaining objects, Preston CJ found that the non-benevolent objects were evidence that BAHC Ltd had independent non-benevolent purposes.

This conclusion doesn't sit comfortably with other precedents which place importance on the concept of reading a constitution as a whole when interpreting what it means, rather than focusing on small parts of the constitution and interpreting them in isolation of the whole.

It is notable that, prior to making the determination that BAHC Ltd wasn't a PBI, Preston CJ made a determination that BAHC Ltd wasn't a public charity. In doing so, he made a number of comments about the appropriate approach for interpreting BAHC Ltd's constitution. These included that he needed to focus solely on the wording in BAHC Ltd's objects to determine its purposes, and not on its activities, as that was the approach had been taken by other courts which had interpreted whether an organisation was entitled to exemption from rates. (at 321) It appears that he used the same approach to interpreting BAHC Ltd's constitution in determining that BAHC Ltd wasn't a PBI.

Preston CJ's approach is inconsistent with that followed by a number of other courts determining whether an organisation was a PBI or not under various other pieces of legislation. It is not clear why the approach when considering a land rates exemption should be different from the approach used in the context of other legislation. There doesn't seem to be any principle basis ground in legal principle for the difference.

NOTE: the ACNC does not determine whether an organisation is a PBI for the purpose of land rates exemption. Therefore, the ACNC will not follow the approach taken by Preston CJ in this judgment. The ACNC's approach is to consider the objects of an applicant in light of its activities and any other relevant matter to determine whether it has a benevolent purpose.

'Institution'

Preston CJ did not consider whether BAHC Ltd was an 'institution' independently of whether it was a public benevolent institution.

***The Hunger Project Australia v Commissioner of Taxation* [2013] FCA 693**

Court: Federal Court of Australia

Judge: Perram J

Issue to be determined: Is The Hunger Project Australia Ltd exempt from paying fringe benefits tax under the *Fringe Benefits Tax Assessment Act 1986* (Cth) on the basis that it is a PBI?

Outcome: The Hunger Project Australia Ltd is a PBI.

Facts

The Hunger Project Australia (HPA) was a company limited by guarantee, with a board of directors comprised of prominent Australian business people, philanthropists and consultants. Its objects were:

> The relief of poverty, sickness, suffering, distress, destitution and helplessness with a particular emphasis on directly aiding and developing those suffering from chronic and persistent hunger in certified developing countries as approved by the Australian Minister for Foreign Affairs from time to time.
>
> The Hunger Project Australia will work towards the sustainable end of hunger by identifying what is missing in achieving he [sic] goal of ending hunger and creating strategic initiatives to provide it.

HPA was one of a group of organisations which had a common goal of relieving hunger. 'Branches' of the group were located in various countries, including developed and developing countries. HPA's role was to undertake active fundraising activities and to provide the funds it raised to member organisations of the Hunger Project group that were located in developing countries. The in-country organisations used the funds to relieve hunger.

HPA was operated by a CEO and three to four staff, who undertook the fundraising activities. HPA distributed around $1.5 million per year to its partner organisations in developing countries.

The Commissioner of Taxation (the Commissioner) refused to grant HPA tax concessions available to PBIs, stating that HPA was not a PBI as it did not **directly** relieve hunger. Rather, as a fundraising body, its input into relieving hunger was indirect. The AAT dismissed HPA's appeal, so HPA appealed to the Federal Court of Australia. This judgment is the result of that appeal.

'Public'

Perram J did not consider whether or not HPA was 'public'.

'Benevolent'

The Commissioner submitted that the accepted common law definition of PBI required that a PBI must provide relief directly. The Commissioner also submitted that HPA was not 'benevolent' as its fundraising activity did not relieve hunger directly, but rather relied on the efforts of the in-country partner organisations.

After considering previous court judgments regarding the meaning of PBI, in the context of whether there was a 'directness' requirement, Perram J stated:

> In my view, his Honour [Priestley J, in his judgment in *Australian Council of Social Service Inc v Commissioner of Pay-roll Tax* (*ACOSS*)] did not decide whether the requirement of directness was sound or not although he indicated a preference for the view that it was not. Instead, what his Honour did was to formulate a requirement that the objects of the entity's benevolence [meaning the beneficiaries of the organisation] had to be concrete, that is, they had to be 'those who are recognisably in need of benevolence' and he eschewed the notion that general, but undirected or abstract, benevolence would suffice…
>
> Pausing there, it is apparent that the applicant passes this test because its involvement in the relief of hunger is concrete, it being a member of a structure of organisations that in fact relieve hunger. (at [70] – [71])
>
> …
>
> [T]he reasons of Priestley JA in ACOSS have as their *ratio decidendi* the necessity for the benevolent objects of an organisation to be more than merely abstract. (at [126])

Perram J also considered Street CJ's judgment in *ACOSS*. In response to Street CJ's conclusion that a PBI must be able to ascertain the identity of its beneficiaries, which would imply that there will be direct beneficiaries of the benevolence Perram J stated:

> This seems to me, with respect, to involve a non-sequitur. The fact that a person is identified as the subject of benevolence does not imply that the benevolence should be provided directly. I may direct the trustees under my will to benefit the homeless and the destitute but I should be surprised if this meant that the trustees had to do so themselves. (at [74])

After concluding his consideration of previous judgments, Perram J pointed out that there was no common law requirement that a PBI must distribute its benevolence directly, stating:

> The position in terms of direct judicial opinion is, therefore, inconclusive. Only Street CJ and Rath J in *ACOSS* have directly decided the issue, but Street CJ was not in the majority on this approach and Rath J's approach was not applied by the majority; the majority in *ACOSS* avoided the issue but doubted the existence of a directness requirement; some judges have avoided the issue factually by concluding that in the case before them the directness requirement was satisfied…
>
> I do not consider myself bound in any particular direction by the current state of the authorities on the question at hand. (at [89] – [90])

Perram J went on to consider whether there was any reason based on legal principle, that there should be a directness requirement. A close reading of the legislation in which the meaning of PBI was at issue did not assist. Although the Commissioner pointed out that the Explanatory Memorandum to the legislation indicated that a PBI gives aid directly, Perram J dismissed that argument as reflecting an erroneous assumption, and irrelevant to the legislative task with which the Bill was concerned.

Perram J then stated:

> I do not find compelling, therefore, any of the reasons put forward by the Commissioner for why the suggested limitation to direct activities should be discerned in the expression public benevolent institution. On the other hand there is at least one good reason not to do so and that is the High Court's decision in *Word Investments*. That case was concerned with 'charitable institutions' rather than public benevolent institutions. Word Investments was founded by persons closely associated with a charitable organisation which conducted missionary and bible translation activities overseas. There was no dispute that those activities were, relevantly, charitable. Word Investments accepted deposits from the public paying little or no interest upon them and used those inexpensive funds to earn profits which were then given to the charitable organisation.
>
> The Commissioner's contention was that whilst it was an object of Word Investments to proclaim the Christian religion it did not, in fact, do so. All it did…was to 'raise money from commercial activities and hand it over to other bodies so that they could proclaim the Christian religion'.
>
> The Court did not accept that this prevented Word Investments from being classified as a charitable institution. Insofar as the law of charities was concerned, it found nothing which

> would prevent such a fund raising entity from being characterised as being for charitable purposes. More importantly, the Court observed a consequence of the Commissioner's argument. This was that if a charitable institution had arranged its affairs in such a way that it had two divisions, one engaged in charitable activities and the other fund raising, then the organisation would be exempt but if it were to split into two organisation then the fund raising entity would lose its exempt states. (at [119] – [121])

In response to the Commissioner's submission that Word Investments should not provide guidance about PBIs and directness, as the decision in that case was about the definition of 'charitable institution', not 'public benevolent institution', Perram J stated:

> …the High Court's reasoning…was instead simply the observation that it was difficult to discern the redeeming features of an approach which focussed entirely on the form an organisation took rather than its substance. If the law is affronted by the proposition that a charitable institution might lost its exempt status for its fund raising activities if they be devolved into a separate entity (and *Word Investments* holds that it is) I cannot see why it would be any less affronted if a public benefit institution lost exempt status for its fund raising activities by doing the same thing. There is no relevant difference. (at [124])

On that basis, Perram J found that HPA was a benevolent organisation.

'Institution'

In considering the meaning of 'institution', Perram J stated:

> The expression 'institution' has a range of meanings but as was pointed out by the Privy Council in *Minister of National Revenue v Trusts and Guarantee Co* [1940] AC 138 at 149-150 it does not, without more, connote a mere trust for charitable purposes. I think the same may be said of funds, that is to say, I do not think that a fund, without more, can be an 'institution' (at [112])

NOTE: The ACNC has issued *ACNC Commissioner's Interpretation Statement: the Hunger Project case*. This judgment should be applied in accordance with that Interpretation Statement.

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

Court: Federal Court of Australia (Full Court)

Judge: Edmonds, Pagone and Wigney JJ

Issue to be determined: Is The Hunger Project Australia Ltd exempt from paying fringe benefits tax under the *Fringe Benefits Tax Assessment Act 1986* (Cth) on the basis that it is a PBI?

Outcome: The Hunger Project Australia Ltd is a PBI.

Facts

As above for *The Hunger Project Australia v Commissioner of Taxation* [2013] FCA 693.

The Commissioner of Taxation appealed Perram J's decision that The Hunger Project Australia was a PBI. This judgment is the outcome of that appeal.

'Public'

'Benevolent'

In regard to the decision of the primary judge, the Court stated that:

> …the primary judge found that the authorities support the proposition that the expression "public benevolent institution" must be given its ordinary meaning, but are inconclusive as to whether the ordinary meaning includes a requirement that the institution provide relief directly to those in need. (at [17])

In regard to Rath J's analysis of the decision in *Perpetual Trustee* in his judgment in the *ACOSS* decision the Court stated:

> …we doubt that any of the judges in *Perpetual Trustee* intended to provide an irrefutable test or definition that required the direct provision of aid. We therefore doubt that Rath J [in the *ACOSS* decision] was correct in finding that the reasoning of the Court in Perpetual Trustee was based on the proposition that a public benevolent institution must itself dispense relief to the needy (at [50])

The Court also stated:

> In our opinion Rath J's observations concerning the requirement that a public benevolent institution must itself dispense relief to the needy must be read in light of the particular facts his Honour was considering, namely and institution that provided general advice, information, research and advocacy services. Such services did not amount to dispensing relief to the needy. His Honour was not considering whether an organisation which raised funds for use

> by particular public benevolent institutions could not itself by said to be organised "in a direct and immediate sense" for the relief of poverty, sickness, destitution or helplessness. (at [52])

In the statement above, the Court is pointing out that principles drawn from prior judgments need to be considered in the relevant context, rather than individual aspects isolated and applied in a completely different context. In the case of *ACOSS,* the court was not actually required to determine whether direct provision of relief was a necessary characteristic of a PBI, so its comments about directness are not binding on subsequent courts and are of only limited assistance.

The Court concluded that:

> In our opinion, whilst there is no single or irrefutable test or definition, the ordinary meaning or common understanding of a public benevolent institution includes (to adapt the words of Starke and Dixon JJ in Perpetual Trustee) an institution which is organised, or conducted for, or promotes the relief of poverty or distress. To adapt the words of Priestley JA in ACOSS, such an institution conducts itself in a public way towards those in need of benevolent, however that exercise of benevolence may be manifested.
>
> The ordinary contemporary meaning or understanding of a public benevolent institution is broad enough to encompass an institution, like HPC, which raises funds for provision to associated entities for use in programs for the relief of hunger in the developing world. The fact that such an institution does not itself directly give or provide that relief, but does so via related or associated entities, is no bar to it being a public benevolent institution. Such an institution is capable of being considered to be an institution organised or conducted for the relief of poverty, sickness, destitution and helplessness. (at [66] - [67])

The Court therefore dismissed the Commissioner's appeal.

'Institution'

The Court did not consider whether or not HPA was an institution.

NOTE: The ACNC has issued *ACNC Commissioner's Interpretation Statement: the Hunger Project case*. This judgment should be applied in accordance with that Interpretation Statement.

Version control

Version no.	Date	Amendments
1.0	10/05/2017	Original version
1.1	25/05/2017	Typos identified by Danielle corrected