TR 2003/5 - Income tax and fringe benefits tax: public benevolent institutions

Taxation Ruling

Income tax and fringe benefits tax: public benevolent institutions

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Preamble

The number, subject heading, ***What this Ruling is about*** *(including* ***Class of person/arrangement*** *section,* ***Date of effect****, and* ***Ruling*** *parts of this document are a 'public ruling' for the purposes of* ***Part IVAAA of the Taxation Administration Act 1953*** *and are legally binding on the Commissioner. The remainder of the document is administratively binding on the Commissioner of Taxation. Taxation Rulings TR 92/1 and TR 97/16 together explain when a Ruling is a 'public ruling' and how it is binding on the Commissioner.*

What this Ruling is about

1. This Ruling sets out the views of the Australian Taxation Office (ATO) on what is a public benevolent institution. It also gives our views about when a public benevolent institution is a charitable institution and when it is considered to be 'in Australia' for gift deduction purposes.

Class of person/arrangement

2. This Ruling applies to:

- organisations seeking endorsement, or which are endorsed, as deductible gift recipients as public benevolent institutions under item 4.1.1 of section 30-45 of the *Income Tax Assessment Act 1997* (ITAA 1997);
- persons claiming income tax deductions for gifts to public benevolent institutions under item 4.1.1 of section 30-45 of the ITAA 1997;
- organisations seeking to be endorsed as income tax exempt charities under Subdivision 50-B of the ITAA 1997; and
- organisations seeking fringe benefits tax concessions as public benevolent institutions under section 57A of the *Fringe Benefits Tax Assessment Act 1986* (FBTAA).

Summary of this Ruling

3. The Ruling is arranged around four questions:

- what is the meaning of the expression 'public benevolent institution'? (see Ruling at paragraphs 7-21 and Explanations at 27-94)
- how is this meaning applied to a particular organisation? (see Ruling at paragraphs 22-23, Explanations at 95-125)
- are public benevolent institutions charitable institutions for the purposes of the ITAA 1997? (see Ruling at paragraph 24, Explanations at 126-127) and
- for the purposes of income tax gift deductibility, when is a public benevolent institution taken to be in Australia? (see Ruling at paragraph 25, Explanations at 128-131).

Examples are provided at paragraph 132.

4. Some matters that can affect public benevolent institutions are not addressed in this Ruling. These include the Australian Business Number (ABN), tax file numbers and employer status for fringe benefits tax purposes. The requirements for endorsement as a deductible gift recipient and maintaining a gift refund are not discussed. These requirements are dealt with in Taxation Ruling TR 2000/12. Also this Ruling does not address funds that may be set up for various charitable and philanthropic purposes. They are discussed in Taxation Ruling TR 95/27 on public funds.

5. Organisations that are not public benevolent institutions might nonetheless be able to receive tax deductible donations. This Ruling does not address the criteria for deductibility under different provisions of the law.

Previous Rulings

6. This Ruling replaces Taxation Rulings IT 2345, IT 2386 and IT 2438, and Taxation Determinations TD 92/197, TD 93/11 and TD 94/73 which are all withdrawn from the date of issue of this Ruling.

Ruling

What is a 'public benevolent institution'?

7. A public benevolent institution is a non-profit institution organised for the direct relief of such poverty, sickness, suffering, distress, misfortune, disability, destitution, or helplessness as arouses compassion in the community.

8. It is not sufficient that an organisation is 'benevolent' in merely dictionary terms, that its actions are socially worthwhile, that it is charitable in legal terms or that it is fully funded by government.

9. The ATO does not have a discretion to accept an organisation as a public benevolent institution when in reality it is not.

Needs requiring benevolent relief

10. The condition or misfortune that is relieved by a public benevolent institution will be such as to arouse pity or compassion in the community. Needs might be caused by poverty or lack of financial resources. Disability or sickness can also give rise to misfortune or helplessness. On the other hand, needs that are to be met by education, training or the promotion of cultural or social objectives will not normally arouse community compassion and call forth the giving of benevolent relief. However, they might do so where the needs arise from poverty or helplessness.

11. The needs requiring benevolent relief are limited to human needs. Accordingly, an organisation for the relief of suffering animals will not be a public benevolent institution.

12. Fees charged for the provision of services will be one of the factors to be considered in determining whether an organisation is a public benevolent institution. The type and level of charges and any waiver policy may, in light of the types of services provided, indicate that an organisation is not primarily for the relief of distress and suffering.

Benevolence for people in need, not for the community generally

13. A public benevolent institution directs its activities towards persons in need of relief. If an organisation exists to promote social welfare in the community generally it will lack the required direct benevolence.

14. A purpose of preventing distress or misfortune from arising will not on its own be benevolent in the required sense. In the same

way it is not sufficient that the consequences of an organisation's activities tend to relieve distress and suffering.

15. Purely governmental bodies - which are constituted, funded and controlled by government and perform the accepted functions of government - operate to promote the welfare of the community generally and are unlikely to be public benevolent institutions.

16. It is not sufficient that an organisation's operations be directed towards categories of people who could be in need of relief. It must be for the relief of suffering and distress experienced by those people.

Direct provision of services

17. A public benevolent institution provides its aid and services directly to people in need of benevolent relief. The provision of direct relief may be achieved through the work of the employees or volunteers of the organisation itself or through its agents. Also, having regard to *Australian Council for Overseas Aid v. FC of T* 80 ATC 4575; 11 ATR 343, an organisation that provides services and coordination for public benevolent institutions is itself a public benevolent institution where the circumstances are the same as in that case.

Public

18. A public benevolent institution is organised to confer benevolence upon an appreciable needy class in the community. Organisations are not public in the required sense where:

- they are carried on for the profit or gain of particular persons including the organisation's individual members;
- benefits are not provided to the public or a section of it, but rather on such grounds as personal relations, membership of a voluntary association, or an employment relationship; or
- benefits are provided on a discriminatory basis, not primarily because of need.

19. Public control and management of the organisation is not essential, and the public or government source of its funds is not necessarily determinative. Nonetheless, these characteristics can help show that it is public in the required sense.

Institution

20. No particular structure is prescribed for a public benevolent institution but it must be capable of being separately identified.

21. An organisation that merely manages property and makes distributions to other organisations is not an institution within the compound phrase 'public benevolent institution'.

Is your organisation a public benevolent institution?

Predominantly for benevolent relief

22. The organisation must be at least predominantly for the direct relief of poverty, sickness, destitution or helplessness. Any other purposes and operations must be incidental to the public benevolence or of minor extent and importance.

Question of fact and degree

23. Whether a particular organisation is a public benevolent institution is a matter of fact and degree. It is an objective question in which all relevant factors must be considered. In particular, both the organisation's constitution and its activities will be relevant. Features to consider include:

- the objects, powers and membership criteria set out in the organisation's constituent documents;
- legislation affecting its rules, powers, etc;
- the policies and procedures which guide its operations;
- the activities and operations that it actually performs, including:
  - the uses and sources of funds and property;
  - the activities of the executive body;
  - the duties and tasks of employees and volunteers.

Are public benevolent institutions also charitable institutions?

24. For the purposes of Division 50 of the ITAA 1997, a public benevolent institution which is an entity is a charitable institution.

Gift deductibility - 'in Australia'

25. For endorsement as a deductible gift recipient so that it can receive tax deductible gifts, the public benevolent institution must be 'in Australia'. This involves a range of factors including establishment, control, maintenance and operation in Australia and the providing of public benevolence in Australia.

Date of effect

26. This Ruling applies to years commencing both before and after its date of issue. However, it does not apply to taxpayers to the extent that it conflicts with the terms of settlement of a dispute agreed to before the date of issue of the Ruling (see paragraphs 21 and 22 of Taxation Ruling TR 92/20).

Explanations

What is a 'public benevolent institution'?

27. There is no legislative or dictionary definition of the compound expression 'public benevolent institution'. In interpreting it, we adopt the meaning given by the High Court in *Perpetual Trustee Co Ltd v. FC of T* (1931) 45 CLR 224.

28. In the *Perpetual Trustee* case the High Court considered whether the Royal Naval House - which provided low cost accommodation and recreation for petty officers and lower ratings when ashore in Sydney - was a public benevolent institution. In holding that it was not, the judgments explained the scope of the expression:

> '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.' [per Starke J at 45 CLR 232]
>
> '... I am unable to place upon the expression "public benevolent institution" in the exemption a meaning wide enough to include organizations which do not promote the relief of poverty, suffering, distress or misfortune.' [per Dixon J at 45 CLR 233-234]
>
> '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.' [per Evatt J at 45 CLR 235-236]

29. The principles of the judgments in that case have been applied and elaborated in subsequent cases and the meaning is now well established. Any change in approach could only safely be taken by the High Court: *FC of T v. Royal Society for the Prevention of Cruelty to Animals Qld Inc.* 92 ATC 4441; (1992) 23 ATR 582 per Fitzgerald P at ATC 4445; ATR 586 and per Thomas J at ATC 4449; ATR 591. This meaning is not, however, a judicial definition, nor is it a finite list of types of institution.

30. While the essence of what is a public benevolent institution has not changed since the *Perpetual Trustee* case was decided in 1931, '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' (per McGarvie J in *Commr of Pay-roll Tax (Vic) v. Cairnmillar Institute* 90 ATC 4752 at 4757; (1990) 21 ATR 665 at 671).

31. The meaning adopted in the *Perpetual Trustee* case applies for income tax and fringe benefits tax legislation. Although that case concerned an estate duty statute, the contexts in the income tax and fringe benefits tax legislation do not indicate a different meaning. The same meaning has been applied by the courts for statutes on local government rates, pay-roll tax, income tax, fringe benefits tax and debits tax. For example, in *Maughan v. FC of T* (1942) 66 CLR 388 McTiernan J said at 395: 'Its meaning may be governed by the context in which it is found. There is nothing to indicate that the expression in sec 78(1)(a)(ii) [of the *Income Tax Assessment Act 1936*, concerning income tax deductibility of gifts] has any other meaning than its ordinary meaning.'

Needs requiring benevolent relief

32. To be a public benevolent institution, the condition or misfortune that is relieved must be such as to arouse pity or compassion in the community. Not all degrees of what might be described as distress, suffering or poverty would necessarily have such an effect. In *Perpetual Trustee* (at 45 CLR 236) Evatt J referred to disability or distress which 'arouses pity'. In *Cairnmillar Institute* McGarvie J said (at 90 ATC 4761; 21 ATR 675):

> '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.'

33. In *Marriage Guidance Council of Victoria v. Commr of Pay-roll Tax (Vic.)* 90 ATC 4770 at 4775; (1990) 21 ATR 1272 at

1277-1278 McGarvie J contrasted such needs with 'the stress and pain encountered in ordinary human experience associated with such things as failure, deception, loss of status and reputation, and bereavement'. Marriage guidance and counselling was not public benevolence because '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.' Parents Without Partners has also been held not to be a public benevolent institution (see Case S70 85 ATC 501; Case 76 (1985) 28 CTBR (NS) 557).

34. Needs that are to be met by education or training will not normally be such as to arouse compassion. This includes vocational training and apprenticeship schemes. However, there will be circumstances where education or training may be among the services provided to alleviate the effects of poverty or misfortune. For example some organisations will be public benevolent institutions where they exist to assist long-term unemployed young people cope with the problems caused by not being able to obtain employment. Such organisations encourage them to take on community service and casual employment and also offer a range of activities and training aimed at developing employment and related skills. In contrast, a training or skills organisation that does not specifically target its assistance for those suffering poverty or misfortune (eg through its selection processes, the types of courses it offers, the types of special assistance it provides, the targets of its advertising and promotion, and so on) would be unlikely to be a public benevolent institution.

Non-material relief

35. The type of misfortune or distress need not be susceptible to relief by way of material things. Examples include the treatments for many illnesses and disabilities. Also, the effects of poverty might be addressed in terms of social and cultural conditions.

36. In *Maughan*, the Boys' Brigade was held to be a public benevolent institution. It operated in slum areas to provide 'intelligent occupation' during the boys' leisure hours and contributed 'to their physical, mental and moral well-being and improvement' through facilities such as 'their more fortunate brothers obtain in their own homes' (at 66 CLR 397 per Williams J). McTiernan J described the charity of the Brigade as 'excited by social conditions arising from poverty' (at 66 CLR 395).

37. We consider that promoting social and cultural objectives will only be benevolent in the required sense where the needs flow from poverty or helplessness. In *Tangentyere Council Inc. v. Commr of Taxes (NT)* 90 ATC 4352; (1990) 21 ATR 239 an Aboriginal housing association in Alice Springs was held to be a public benevolent

institution.[1] It provided services for 'town campers' who were in considerable need of special consideration and assistance concerning poverty, health, hygiene, etc. In relation to the incidental cultural assistance it provided, Angel J said at ATC 4359; ATR 248:

> '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.' [emphasis added]

The cultural promotion must not be more than incidental. As Handley JA, with whom Priestley and Sheller JJA agreed, said in *Maclean Shire Council v. Nungera Co-operative Society Ltd* (1994) 84 LGERA 139 at 143:

> '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.'

See also *Toomelah Co-operative Ltd v. Moree Plains Shire Council* (1996) 90 LGERA 48 at 56-59 and *Northern Land Council v. Commissioner of Taxes (NT)* 2002 ATC 5117 at 373-374; (2002) 51 ATR 365 at 373-374.

Human suffering

38. Public benevolence in the relevant sense applies to human beneficiaries and an organisation for the relief of suffering animals is not a public benevolent institution: *Royal Society for the Prevention of Cruelty to Animals Qld Inc*. See also paragraph 135.

Financial need

39. The needs relieved by public benevolent institutions might arise from sickness, disability or helplessness. They are not necessarily financial or caused by poverty: *Commr of Pay-roll Tax (Vic.) v. Cairnmillar Institute* 92 ATC 4307 at 4311; (1992) 23 ATR 314 at 319. For example in *FC of T v. Launceston Legacy* 87 ATC 4635; (1987) 19 ATR 41 an organisation cared for widows and children who had been deprived of the support, both financial and moral, of fallen Australian servicemen. The beneficiaries were not necessarily in necessitous financial circumstances and, following examination of the circumstances, could receive services such as vocational guidance and job placement, tuition, medical and dental

[1] While this decision was overturned on different grounds on appeal (92 ATC 4313; (1992) 23 ATR 370), it has been cited in several public benevolent institution cases such as *Toomelah Co-operative Ltd v. Moree Plains Shire Council* (1996) 90 LGERA 48 and *Northern Land Council v. Commissioner of Taxes (NT)* 2002 ATC 5117; (2002) 51 ATR 365.

advice and treatment, and the provision of furniture as appropriate. The organisation was held to be a public benevolent institution as its essential object was to provide a caring service to people in need.

40. Needs that, considered separately, might not arouse compassion, may do so where they are caused by poverty. *Maughan's* case is an example. Likewise for needs flowing from lives being lost or risked in defence of the country in war, as in *Launceston Legacy*.

Fees

41. Fees charged for the provision of services are one of the factors considered in determining whether an organisation is a public benevolent institution. The type and level of charges, in light of the types of services provided, may indicate that an organisation is not primarily for the relief of distress and suffering. For example the fees might indicate that the organisation was to 'enrich those who directly or indirectly controlled it', or that there was no 'sense of compassion aroused when the service provided for a fee was of a mundane character such as treatment of a common ailment' (*Cairnmillar Institute* at 92 ATC 4311; 23 ATR 320 per Gobbo J, with whom Brooking and Tadgell JJ agreed).

42. However, an organisation will not fail to be a public benevolent institution solely because it charges fees. In *Lemm v. FC of T* (1942) 66 CLR 399 the High Court found a home for aged women in straitened financial circumstances to be a public benevolent institution where the residents were required to pay one pound per week towards the upkeep of the home. The fact that 'the then substantial amount of one pound per week' had to be paid (per Mr Gibson of the Victorian AAT in *Legal Aid Commission of Victoria v. Commr of Pay-roll Tax (Vic)* 92 ATC 2053 at 2060; (1992) 23 ATR 1148 at 1157) did not detract from the institution being for the relief of poverty.

43. The waiving of charges for those in financial need can assist to characterise activities as benevolent. The importance of waiver of fees will depend on other factors especially the characteristics of the recipients of the benevolence, the types of distress being relieved, and the nature of the charges and the waiver policy. In *Cairnmillar Institute* the Institute's predominant purpose and activity was providing psychotherapeutic treatment for psychological disorders and abnormalities. It did not directly provide relief from poverty or destitution. The fees charged for treatment were in the general region of charges made by private practitioners. However treatment was never refused to those unable to pay and, although it did not widely advertise its readiness to waive or reduce fees, about 10% to 12% of patients had fees reduced on the basis of inability to pay. The Institute could not cover all expenses with the fees and was subsidised by

associated bodies. It was found to be a public benevolent institution. In considering the importance of the charges McGarvie J emphasised that the relief of poverty is not necessary to public benevolence, that organisations must adapt themselves 'to the realities of obtaining funds and dispensing ... benevolence in the conditions of today' (at 90 ATC 4769; 21 ATR 684). As was said on appeal (at 92 ATC 4312; 23 ATR 320): '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.'

Benevolence for people in need, not for the community generally

44. The activities of a public benevolent institution are directed towards persons in need of relief. If an organisation exists to promote social welfare in the community generally it will lack the required direct benevolence. Examples of activities that might be directed to improving general social welfare include lobbying, advocacy, conducting research and policy studies, providing research assistance, and publishing and disseminating information and advice on social matters.

45. In *Australian Council of Social Service Inc. v. Commr of Pay-roll Tax (NSW)* 85 ATC 4235; (1985) 16 ATR 394 the Council was not accepted as a public benevolent institution. Its activities were to provide indirect aid for the relief of poverty or distress by performing advisory, informative, research and advocacy functions. They were directed at changing the circumstances that created or aggravated poverty or distress and the Council was not directly involved in providing benevolent relief to people in need. In the principal judgment Priestley JA said at ATC 4242; ATR 402:

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

46. Accordingly, organisations that merely play a general role in the field of benevolent relief – eg conducting research in the field or instructing the public about the particular problem – will not be public benevolent institutions. Similarly, an organisation that merely provides information on welfare and/or similar services to the

community at large, will not be regarded as a public benevolent institution.

47. This can be contrasted with the situation where information is directed to particular persons for whom it will constitute benevolent relief. For example public benevolence includes the provision of information and advice to disabled persons and their carers where a significant part of the target group is unable to obtain, or has difficulty in obtaining, the information and advice through usual everyday means. The information and advice to disabled persons might be provided on issues as diverse as employment, education, accommodation, transport, government concessions and pensions, wheelchair repairs and registering a seeing eye dog for the blind. Such advice directly assists disabled persons overcome an effect of disability which limits their access to information, etc.

Prevention of distress

48. A purpose of preventing distress or misfortune from arising is not on its own benevolent in the required sense[2]. In *Marriage Guidance Council* McGarvie J confirmed this approach (at 90 ATC 4775; 21 ATR 1277-1278). His Honour rejected the contrary view that had been adopted by Brereton J in *Greater Wollongong City Council v. Federation of NSW Police Citizens Boys' Clubs* (1957) 2 LGRA 54 at 59. McGarvie J said of marriage guidance and counselling that 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.'

Beneficial consequences

49. In the same way, where relief is not directed to persons in need, it is not sufficient that the consequences of the organisation's activities tend to relieve distress and suffering. Priestley JA said in *Australian Council of Social Service* at 85 ATC 4242; 16 ATR 402:

> 'Benevolence in this sense seems to me to be quite a different concept from benevolence exercised at large and for the benefit of the community as a whole *even if such benevolence results in relief of or reduction in poverty and distress*.' [emphasis added]

(See examples at paragraphs 138 and 155.)

[2] The taxation law has subsequently been amended to confer various tax concessions on charitable institutions whose principal activity is to promote the prevention or the control of diseases in human beings.

Functions of government

50. Purely governmental bodies performing the accepted functions of government operate to promote the welfare of the community generally and are unlikely to be public benevolent institutions. Even where they provide direct relief to those in need, it will be merely incidental to the performance of governmental functions and not public benevolence.

51. In *Metropolitan Fire Brigades Board v. FC of T* 91 ATC 4052; (1990) 21 ATR 1137 a fire brigade was constituted under legislation with the responsible Minister having important powers of control. Its operations were chiefly funded by taxes on property owners. The Full Federal Court held that the fire brigade was not a public benevolent institution because it was 'a body constituted, funded and controlled by government and performing functions on behalf of government'. The Court, at ATC 4056; ATR 1141, compared the relief provided by the fire brigade to government providing pensions: 'It is simply, like the appellant, using government funds to exercise a function of government.' This case was applied in *Mines Rescue Board of New South Wales v. FC of T* 2000 ATC 4191; (2000) 44 ATR 107 and on appeal at 2000 ATC 4580; (2000) 45 ATR 85. The degree to which the Board was governmental precluded it from being a public benevolent institution. Indicators of the Board being governmental included its establishment as a statutory body representing the Crown, governmental authority for funding, and the Minister's powers on directors, functions, planning and investment. It was not determinative that the Minister had not sought to exercise powers of control, that the funding came from coal mine owners, and that providing emergency rescue services at underground coal mines has not always been regarded as a governmental responsibility.[3]

52. Another example would be a drug and alcohol abuse unit of a State Health Department providing assistance as part of a wider organisational function directed to the general good of the community. The unit would not be a public benevolent institution as the relief was provided as a function of government.

53. However, there will be organisations that are funded by and accountable to government which are nonetheless public benevolent institutions.

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[3] These cases were applied in *Ambulance Service of NSW v. DFC of T* 2002 ATC 4681; (2002) 50 ATR 496. There 'the relief of distress and suffering which the applicant's activities bring about is not through benevolence, but through the successful discharge or execution of government policy'. When 'properly understood, by reference to its constitution, funding, control and activities', the Service was not a public benevolent institution. Rather, it was 'the provider of services which the government, as part of its responsibilities, has chosen, or recognised, to be a matter for it to fund, control and provide.' At the time of publication of this Ruling the case was subject to appeal.

54. An example is a legal aid provider that was established under statute and received over 70% of its funding from government. It was accepted as a public benevolent institution by the Victorian Administrative Appeals Tribunal. In distinguishing the *Metropolitan Fire Brigades Board case* Mr Gibson pointed to the fact that the legal aid service was only partly funded by government, was not subject to the same degree of government control and that its activities were not directed to the general community but to the more limited class who could not afford necessary legal assistance (see *Legal Aid Commission of Victoria v. Commr of Pay-roll Tax* 92 ATC 2053 at 2060-2062; 23 ATR 1148 at 1158-1159).

55. Search and rescue teams which consist of volunteers, and voluntary organisations such as bush fire brigades which have as their central purpose the provision of direct relief to persons in distress, may qualify as public benevolent institutions even where they are government sponsored. This will be so where they are not arms of government and subject to government control.

For relief of need

56. It is not sufficient that an organisation's operations be directed towards categories of people who could be in need of relief. It must also be for the relief of poverty, sickness, suffering, distress, misfortune, disability, destitution, or helplessness experienced by those people. The services of some organisations are too broad and not sufficiently focused on meeting such needs to be public benevolent institutions.

57. For example, aged people may have many needs that would stir pity and compassion. However not all non-profit organisations for persons of pensionable age would necessarily be public benevolent institutions. Sporting and social clubs for the elderly are examples. Organisations that primarily give information and advice in a general sense concerning a disease or ailment are not providing relief and accordingly will not be public benevolent institutions. (This should be contrasted with organisations that provide advice that directly assists the helpless such as the disabled, as explained in paragraph 47.) Organisations that are only to facilitate mutual self-help are not providing relief in the relevant sense (see for example paragraph 141).

58. While Aboriginal Australians have been accepted by the courts as being in need of special consideration and assistance, not all organisations concerned with indigenous Australians will necessarily be public benevolent institutions. We consider that the tests set out in the *Perpetual Trustee* case and subsequent decisions must be applied. In reported cases that have accepted organisations for the relief of Aborigines as public benevolent institutions, the courts have considered closely the needs of the relevant indigenous Australians for

benevolent relief and the benevolent services being provided: see *Maclean Shire Council v. Nungera Co-operative Society Ltd* (1994) 84 LGERA 139, *Toomelah Co-operative Ltd v. Moree Plains Shire Council* (1996) 90 LGERA 48, *Gumbangerrii Aboriginal Corporation v. Nambucca Council* (1996) 131 FLR 115, *Mpwetyerre Aboriginal Corporation v. Alice Springs Town Council* (1996) 132 FLR 1 (decided on different grounds on appeal: (1997) 115 NTR 25), and *Northern Land Council v Commissioner of Taxes (NT)* 2002 ATC 5117; 51 ATR 365.[4]

59. In *Maclean Shire Council v. Nungera Co-operative Society Ltd* at 84 LGERA 144 Handley JA, with whom Priestley and Sheller JJA agreed, said that 'the current disadvantaged position in Australia of Aboriginals is such that any valid trust for their benefit must also be for public benevolent purposes ...' This comment must, however, be understood in the context of the judgment as a whole. The relevant test is whether the particular organisation is for the relief of poverty, sickness, suffering, distress, misfortune, disability, destitution, or helplessness.

60. The current disadvantaged position of many Aborigines does not lead 'to the result that aborigines are to be classified perpetually as in need of protection and assistance': *Re Bryning* [1976] VR 100 at 101 per Lush J.

Direct provision of services

61. Because the benevolence of public benevolent institutions is directed to persons in need of relief, they provide their aid and services directly to those people. In some circumstances such provision may be made by arrangement with other organisations.[5] Services and aid do not need to be provided only by employees or volunteers of the institution, but may also be provided by agents (for example as in *Legal Aid Commission of Victoria v. Commr of Pay-roll Tax (Vic.)* 92 ATC 2053 at 2060; 23 ATR 1148 at 1157).

62. The view that a public benevolent institution must itself dispense aid to those in need was taken by Rath J in *Australian Council of Social Service* at first instance (at 82 ATC 4393; 13 ATR 299) and by Street CJ on appeal (at 85 ATC 4237; 16 ATR 396). Priestley JA, with whom Mahoney JA agreed, found it unnecessary to decide the matter (at 85 ATC 4242; 16 ATR 402). In *Trustees of the Allport Bequest v. FC of T* 88 ATC 4436 at 4441; (1988) 19 ATR

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[4] The obiter dicta of Gyles J in *Trustees of the Indigenous Barristers' Trust v. FC of T* 2002 ATC 5055; (2002) 51 ATR 495, on setting up indigenous persons as barristers, are not easily reconciled with the approach of these cases.

[5] For an example of such arrangements with other organisations see *Tangentyere* at 90 ATC 4358-4359; 21 ATR 247.

1335 at 1341 Northrop J found support for his conclusion against public benevolent institution status in the fact that 'the applicants are not benefiting directly members of the public but are making donations or gifts to institutions which are public benevolent institutions'. With one exception, which is discussed below, all the organisations accepted in the reported cases as public benevolent institutions have dispensed benefits immediately to people in need.

Coordination of services and support

63. In *Australian Council for Overseas Aid v. FC of T* 80 ATC 4575; (1980) 11 ATR 343 the Council did not itself dispense aid but coordinated and performed education, government liaison and other services for organisations which provided benevolent relief to poor people overseas. Connor ACJ accepted that it was a public benevolent institution. His Honour said at ATC 4577-4578; ATR 346:

> 'The taxpayer is not a separate institution or organisation carrying on an independent business in the course of which it serves 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 the relief of poverty even though it is done in conjunction with other institutions.'

64. The decision has not been applied in any later reported case and doubt has been cast on its correctness (per Street CJ in *Australian Council of Social Service* at 85 ATC 4237; 16 ATR 396).

65. However we accept that a non-profit organisation may be a public benevolent institution in the circumstances of the *Australian Council for Overseas Aid* case where:

- its members are predominantly public benevolent institutions;
- it has a common benevolent purpose with its members;
- it provides services only to its members (apart from any provided directly to persons in need of benevolent relief);
- for those members which are not public benevolent institutions, it serves them only in relation to their public benevolent activities;
- it does not carry on activities separately from its members;

- its activities can be properly considered as a step in the benevolent process of the group of organisations;
- it and its members can be appropriately regarded as one whole enterprise of which the organisation is an integral part; and
- its activities are such that if they had been performed by the members themselves they would have been regarded as being carried on in the course of performing their benevolent activities.

66. We do not consider that an organisation set up to carry on commercial operations to fund the member public benevolent institutions will meet these criteria.

Contrasts with the principles of the Perpetual Trustee *case*

67. In claiming public benevolent institution status, organisations sometimes emphasise that they are 'benevolent' in dictionary terms, that their actions are socially worthwhile, that they are charitable in legal terms, or that they are fully funded by government. These claims are not sufficient.

68. Organisations which could be described as 'benevolent' in terms of a dictionary definition will not necessarily be public benevolent institutions. Dixon J said in the *Perpetual Trustee* case at 45 CLR 233 that 'the word "benevolent" does not [in the statutory context under consideration] possess its general descriptive meaning'. Also, the phrase 'is to be treated as a compound expression' (per Dixon J in *Public Trustee (NSW) v. FC of T* (1934) 51 CLR 75 at 103) and 'should not be construed by piecing together the respective meanings of the three words of which it is composed' (per McTiernan J in *Perpetual Trustee* at 45 CLR 240).

69. Not all organisations which perform socially worthwhile activities are public benevolent institutions. For example in *Marriage Guidance Council* at 90 ATC 4775; 21 ATR 1277 McGarvie J said:

> '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 ... 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.'

70. We do not have a discretion to treat socially worthwhile organisations as if they were public benevolent institutions. 'The law as it is contained in the legislation and the principles set forth in the cases ... are each to govern and direct the decision maker. There is not

a discretion given to the Commissioner of Taxation or the [Administrative Appeals] Tribunal': per Purvis J in Case X13 90 ATC 165 at 168; AAT Case 5560 (1989) 21 ATR 3132 at 3135-3136.

71. Organisations which are 'charitable' for legal purposes will not necessarily be public benevolent institutions. Legal charities are for the relief of poverty, age or impotence, the advancement of education or religion, or for other purposes beneficial to the community. On the other hand public benevolent institutions are for the relief of poverty, sickness, destitution, or helplessness. As Dixon J said in the *Public Trustee* case at 51 CLR 104: 'Institutions ... coming within the legal conception of "charitable" may be imagined to which no one would apply the term "public benevolent institution"'.

72. Organisations whose funding is substantially provided by government are not necessarily public benevolent institutions. While we accept that the 'connection of a body with government may, in some circumstances, assist towards a conclusion that it is a public benevolent institution' (*Metropolitan Fire Brigades Board* at 91 ATC 4055; 21 ATR 1140), none of the cases has looked to government funding as the sole or main criterion.

Main criterion of 'public': extensiveness of benefit

73. The main criterion, but not the only criterion, of 'public' within the compound phrase public benevolent institution is 'the extensiveness of the class it is the object of the institution to benefit': *Maughan* at 66 CLR 397 per Williams J. Thus if the purpose of an institution 'is to confer benevolence upon an appreciable needy class in the community' it will have complied with the most important test of what is a public institution: *Lemm* at 66 CLR 411 per Williams J.

74. An illustration is provided by *O'Farrell v. Council of the Municipality of Bathurst* (1923) 40 WN (NSW) 78. An orphanage owned and operated by a Roman Catholic religious order was accepted as a public benevolent institution. Its public character was more dependent upon the character and objects of its benevolence - the care of orphaned children - than upon the circumstances of its constitution and domestic government as a religious order.

75. Organisations will not be 'public' in the required sense, because they are not for the public or a section of it, where:

- they are carried on for the profit or gain of particular persons including the organisation's individual members;
- benefits are not provided for the public or a section of it, but rather on the grounds of, for example, personal

relations, membership of a voluntary association, or employment; or

- benefits are provided on a discriminatory basis and not primarily because of need.

76. Such organisations are not public benevolent institutions even where they purport to provide benevolent relief or where beneficial consequences can flow from their activities.

Non-profit

77. A public benevolent institution is not carried on for the purposes of profit or gain to particular persons including the individual members (see for example *Cairnmillar Institute* at 92 ATC 4311; 23 ATR 319-320 and *Repromed Pty Ltd v. Lucas and Commr for State Taxation (SA)* 2000 ATC 4542; (2000) 44 ATR 452). This is known as the non-profit requirement. If an organisation was carried on for the profit of its members or owners, it would be for their benefit and not for the benefit of the public. This would still be the case even if, as a consequence of its operations, some needy people were better off.

78. We will accept an organisation as being non-profit where, by its constituent document or by operation of law (for example, a statute governing the organisation), it is prevented from distributing its profits or assets among members while it is operating and on its winding-up. The organisation's actions must, of course, be consistent with the prohibition. Subject to the legal and other requirements for particular organisations, examples of suitable clauses in constituent documents are:

Non-profit clause

The assets and income of the organisation shall be applied solely in furtherance of its above mentioned objects and no portion shall be distributed directly or indirectly to the members of the organisation except as bona fide compensation for services rendered or expenses incurred on behalf of the organisation.

Dissolution clause

In the event of the organisation being wound up, any surplus assets remaining after the payment of the organisation's liabilities shall be transferred to another organisation in Australia which is a public benevolent institution for the purposes of any Commonwealth taxation Act.

Alternative words may be used provided the result is achieved that funds and assets of the organisation cannot find their way to members (or their associates or nominees).

79. For organisations that want to be endorsed as deductible gift recipients, there are special requirements for the winding up of the organisation's gift fund: subsection 30-125(6) and subsection 30-125 (7) of the ITAA 1997. These conditions are discussed in Taxation Ruling TR 2000/12 on the gift fund requirement.

Section of the public

80. Where the intended recipients of the services or aid of an organisation are a private group, rather than the whole public or a section of the public, it will not be a public benevolent institution. In *In re Income Tax Acts (No 1)* [1930] VLR 211 the issue was whether a benevolent asylum was a 'public benevolent asylum'. It was founded and controlled by Freemasons for the benefit of Freemasons and their wives and widows. It was not accepted as 'public'. It was not carried on for the benefit of the public or of a section of the public because benefits were 'limited to members of a voluntary association and their wives and widows of deceased members' (at VLR 215 per Irvine CJ).

81. Whether a class of beneficiaries comprises a section of the public is largely a question of fact and degree and can depend upon a number of factors. The number of people in the group may be relevant but is not determinative. A smaller number is more likely to indicate a private character. Strong indicators of a private character are where the intended recipients are limited by personal or family relationships, employment with a particular employer, or membership of a voluntary association (such as a trade union, cultural association or organisation like that in the case in paragraph 80). For example an organisation formed to help relieve sickness suffered by members of a social club and their dependants would not be a public benevolent institution.

82. In contrast, groups which are sections of the public include those who reside in a particular area, the adherents of a religion, and those with a common calling or condition. For example an organisation to relieve financial distress suffered by Protestant Christians in South Australia could be a public benevolent institution. The cases show that distinctions may sometimes appear fine.

83. In some circumstances a public benevolent institution will be able to identify all those people to benefit from its services. For example an organisation set up to help those people in Tasmania suffering from a particular rare disease might ascertain all of its current beneficiaries. It may still be a public benevolent institution as long as the real grounds for providing services are public - such as the

medical condition and residence within an area - and not personal or family relations, etc.

84. A power to determine potential beneficiaries through membership procedures - which is a feature of voluntary associations - will usually indicate a private character. However, in some circumstances it can be consistent with benefit for a section of the public. In *Greater Wollongong City Council v. Federation of New South Wales Police Citizens Boys' Clubs* the rules of the Club were argued to allow the committee of management to select the boys who could be members. The Club was, however, found to be for all boys within the stipulated age limits and accordingly public. The membership rule had not been applied arbitrarily, as indicated in part by the number of members which was 1800 boys between fourteen and eighteen years of age in Wollongong.

Non-discriminatory

85. Where an organisation purports to be for the benefit of the whole or a section of the community, it must not in fact limit its aid and services in a discriminatory way. The word 'public' necessarily connotes that '... the benefit of the institution is available without discrimination to every member of the public or of that section of it' (per Lowe J in *In re Income Tax Acts (No 1)* at [1930] VLR 222). For example, benefits should not be arbitrarily withheld, or be provided only to those with some family or other personal connection. The type and level of fees can indicate that an organisation is not primarily for public benevolence.

86. The requirement against discrimination does not prevent policies and practices designed to deliver aid and services to the most needy in a sustainable way given the organisation's resources.

Other indicators of 'public': management, control, funding

87. While the main criterion of 'public' is gauged by the extensiveness of an organisation's potential beneficiaries, in some circumstances the public character of its control and management and the source of its funds may also be relevant. The several criteria of 'public' were applied together in *Maughan* at 66 CLR 398 per Williams J:

> '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.'

88. The High Court has held that government control or even public control is not essential: *Maughan* at 66 CLR 397 per Williams J.

89. Funding by and accountability to government or the public can help indicate a public character. However, unlike for a 'public fund', the source of funds is not determinative: *Trustees of the Allport Bequest* at 88 ATC 4439; 19 ATR 1338.

90. The relevance of internal control and funding is illustrated by Case L50 79 ATC 354; Case 58 (1979) 23 CTBR (NS) 493. A society comprising a small group of close friends and business associates was not accepted as a public benevolent institution. Its purposes and the application of its assets were not solely benevolent. Also, it did not seek or receive money from the public, excluded the public from its activities as far as possible and was no more than a private fund.

Institution

91. No particular structure is prescribed for public benevolent institutions. An institution has been described as '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' (*Mayor of Manchester v. McAdam* (1896) 3 TC 491 at 497; [1896] AC 500 at 511 per Lord Macnaghten). Some institutions take the form of corporations limited by guarantee, unincorporated associations or charitable trusts. Incorporation is not sufficient on its own: *Trustees of the Allport Bequest*. An institution may be created by will: *Lemm* at 66 CLR 409-410 per Williams J. Whether a particular entity is an institution is indicated by a range of factors including activities, size, permanence and recognition. All relevant factors need to be considered and whether an institution exists will depend on its particular facts. Institutions accepted by the High Court in this and related contexts have included a Boys' Brigade,[6] a home for aged women,[7] a university and a university college,[8] a publisher of law reports,[9] a YMCA,[10] and an association of surgeons.[11] The word institution has a meaning 'greater than a structure controlled and operated by family members and friends': *Pamas Foundation (Inc) v. DFC of T* 92 ATC 4161 at 4168; (1992) 23 ATR 189 at 197.

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[6] *Maughan v. FC of T* (1942) 66 CLR 388 (public benevolent institution).
[7] *Lemm and others v. FC of T* (1942) 66 CLR 399 (public benevolent institution).
[8] *University of Birmingham and Epson Colleger v. FC of T* (1938) 60 CLR 572 (public educational institution).
[9] *Incorporated Council of Law Reporting (Qld) v. FC of T* (1971) 125 CLR 659 (charitable institution).
[10] *The Young Men's Christian Association v. FC of T* (1926) 37 CLR 351 (religious institution).
[11] *Royal Australasian College of Surgeons v. FC of T* (1943) 68 CLR 436 (scientific institution).

92. A public benevolent institution will not necessarily be a juristic person (*Joyce v. Ashfield Municipal Council* (1959) 4 LGRA 195 at 200 per Owen J), but will be capable of being separately identified. Constituent documents, separate accounts and records, separate premises, staff and management help to indicate a separate identity. The need for a separate identity is illustrated by the decision in Case X33 90 ATC 308; AAT Case 5773 (1990) 21 ATR 3305. A gift of land was made to a church to facilitate the construction of an old people's home. Although there was some evidence that separate funds were held for a home, no institution existed separately from the church. The church itself was not a public benevolent institution and therefore no income tax deduction was allowable. However, where a separate legal entity is set up by a church or other body, that fact does not preclude it from having an institutional character.

93. An organisation which merely manages property and makes distributions to other organisations will not be an institution within the compound phrase 'public benevolent institution'[12]. In *Trustees of the Allport Bequest v. FC of T* an organisation which was established by Act of Parliament was held to not be an institution and therefore not a public benevolent institution. Its sole activities were to manage trust property and apply the income in donations to such other charitable organisations and objects as it determined. Northrop J characterised the activities as those of simple or mere trustees; they were insufficient to constitute the organisation as an institution.[13] The fact that it had a recognised identity and permanent nature was not sufficient. (The lack of direct benefit by such organisations also points to them not being public benevolent institutions: cf *Trustees of the Allport Bequest v. FC of T* at 88 ATC 4441-4442; 19 ATR 1341.) See also Case X13 90 ATC 165; AAT Case 5560 (1989) 21 ATR 3132 and Case 101 (1945) 12 CTBR 823 at 834-836.

94. For endorsement as a deductible gift recipient, an entity must be a public benevolent institution in its own right, or the entity must include the public benevolent institution as part of itself: paragraphs 30-17(2)(a) and (c) of the ITAA 1997.

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[12] See for example *Stratton v Simpson* (1970) 125 CLR 138 where Gibbs J at p158 said that a mere trust would not ordinarily be an institution. See also *Trustees of the Indigenous Barristers' Trust v. FC of T* where Gyles J found that 'a trust fund administered by trustees who provide money in order that services provided by others can be availed of is not an institution in this sense'.

[13] Gifts to some types of public funds, as distinct from public benevolent institutions, may be income tax deductible under Division 30 of the ITAA 1997.

Is your organisation a public benevolent institution?

Predominantly for benevolent relief

95. To be a public benevolent institution an organisation must be at least predominantly for the direct relief of poverty, sickness, destitution or helplessness. Other purposes or activities must be incidental to the main purpose or minor in extent and importance.

96. In contrast, the benevolent services provided by some organisations are only part of broader purposes or operations which cannot be described as public benevolence. Such broader purposes include propagating religion, providing social services or promoting ethnic community. These organisations are not public benevolent institutions.

97. For example in Case P104 82 ATC 551; Case 36 (1982) 26 CTBR (NS) 316 an organisation was not accepted as a public benevolent institution even though its objects and activities included providing residential care for the aged, a sheltered workshop, resettlement of Jewish persons from the Soviet Union, and assisting the housebound. Its primary purpose was found to be promotion of the economic, social and cultural interests of the local Jewish community. It did not exist primarily to meet needs for benevolent relief.

98. In Case H24 76 ATC 174; Case 79 (1976) 20 CTBR (NS) 818, a swimming and life saving club was not accepted as a public benevolent institution. The club's major activities included instruction in swimming and lifesaving, and participation in club and inter-club water sports. It was not enough that members were rostered to provide lifesaving supervision, outside business hours, at the municipal baths where the club was based.

99. In Case T13 86 ATC 188; Case 17 (1986) 29 CTBR (NS) 138 the St Columban's Mission Society provided various benevolent services in developing countries. However, its dominant function was evangelisation. Its benevolent works were purely subsidiary to its spiritual role, rather than the reverse, and so it was not a public benevolent institution.

Question of fact and degree

100. Deciding whether an organisation is predominantly for the provision of benevolent relief is a matter of fact and degree. It is an objective question which will involve the weighing of all relevant factors. Both the organisation's constitution and activities are relevant. As it is the character and purpose of the organisation that must be ascertained, a solely quantitative measurement would be

inadequate (cf *Cairnmillar Institute* at 92 ATC 4312-4313; 23 ATR 321 per Tadgell J).

101. If there are changes in an organisation's constitution and operations, its status may change. This means an organisation's character upon foundation will not be determinative. However, the foundation, history and proposed future directions may all be relevant. Helpful materials and questions include:

- the constituent documents, eg memorandum and articles of association, rules, constitution, trust deed;
- occupations and relevant qualifications of the office bearers or controlling committee;
- who is the organisation set up to help?
- why do these people need help?
- what aid or services does the organisation provide to these people?
- how are recipients of services and aid selected?
- details of charges (if any) made for services, and the circumstances in which they will be waived;
- details of the day-to-day activities and operations of the organisation;
- financial statements, or for newly established organisations, estimates of future income and expenditure;
- details of fund-raising activities including applications for funding;
- pamphlets, brochures, advertisements, newsletters, annual reports, etc showing the organisation's activities.

102. The following paragraphs explain how the relevant features and material can affect public benevolent institution status.

Constitution and objects

103. The objects in an organisation's constituent documents can strongly indicate whether it is a public benevolent institution. For example the objects might clearly limit the organisation to the provision of direct benevolent relief, or they might be the relief of distress, sickness or suffering, or similar purposes drawn from the judgments in the *Perpetual Trustee* case. Where the objects are solely for public benevolent relief and the institution's operations give effect to them, it will be a public benevolent institution.

104. Even where an organisation's objects are not clearly limited to the provision of benevolent services, it might in some circumstances be a public benevolent institution. However, we encourage organisations to draft their objects to reflect their activities and real purposes.

Broad objects but operations limited to benevolent relief

105. Where the objects are broader than the provision of direct benevolent relief, its purposes, policies and activities must be predominantly to provide such relief.

106. In *Maughan*, the High Court found the Boys' Brigade to be a public benevolent institution. Its objects were broad, providing for 'the development as good citizens of the boys ...; to cultivate Christian manliness; to promote habits of reverence, loyalty, industry, discipline and self-respect ...' and for 'the delivery and holding of lectures, entertainments, games, sports, tournaments, meetings, classes, debates and conferences ...' (at 66 CLR 390). However, both of the Brigade's branches were located in the worst slum areas of Sydney and the boys who enrolled were underprivileged and invariably in poor circumstances. McTiernan J described the charity of the Brigade as 'excited by social conditions arising from poverty' (at 66 CLR 395). The organisation's activities were clearly targeted at the relief of the needy.

107. In contrast, a Brownie Pack was not accepted as a public benevolent institution in Case X32 90 ATC 299; AAT Case 5772 (1990) 21 ATR 3295. While the objects in its constituent documents may have been similar to those of the Boys' Brigade in *Maughan*, the circumstances and real purposes were different. Circumstances like being underprivileged and in poor circumstances in slums were not present.

Ancillary or 'non-benevolent' objects

108. Considered in isolation, some of an organisation's objects might not be characterised as promoting benevolent relief. However, where they are merely incidental to the benevolent purposes, or the activities giving effect to them are minor, the organisation might nonetheless be a public benevolent institution.

109. In *Maclean Shire Council v. Nungera Co-operative Society Ltd* the object of the Society was to relieve the poverty and helplessness of needy members of the Aboriginal community. This was to be done through three means: improving housing, improving vocational skills and employment prospects, and arresting 'social disintegration by strengthening and fostering ... identity and culture ...' It was argued

that the third means disqualified the Society from being a public benevolent institution. The Court rejected this view. The object was the relief of poverty and helplessness, and the fostering of culture only a means. 'The Society is not authorised to pursue these activities for their own sake as independent objects or purposes but solely as ancillary or dependent means of carrying out its objects' (at 84 LGERA 143).

110. Of course, if the organisation was in fact chiefly and independently engaged in cultural pursuits, it would be necessary to consider whether the organisation was truly for the provision of benevolent relief. Having an expression from the *Perpetual Trustee* case - such as the relief of poverty, sickness, destitution or helplessness - as the primary object will not on its own make an organisation a public benevolent institution. The secondary objects and the actual operations must also be considered.

Mere change in constituent documents

111. When we notify organisations that they are not public benevolent institutions they sometimes change their constituent documents and re-apply. If their plans and operations are still not predominantly for public benevolence, their status will not change.

Broad objects and no current activities

112. If an organisation has not commenced substantial operations and its objects permit activities which are not for public benevolence, we generally cannot accept it as a public benevolent institution. Changes to the objects may be necessary. These changes will need to be supported by evidence of future directions and activities - including detailed plans and funding applications - which show that public benevolence is the dominant purpose.

Motives

113. The constituent documents will sometimes explain the organisation's motives. They might be religious or flow from an ethical or philosophical stance. However, where the purpose is the provision of benevolent services, the motives will not detract from public benevolent institution status.

Powers and membership

114. The constituent documents confer powers upon the organisation to carry out its objects and may set membership criteria. In some circumstances, these can assist in characterising the purposes

of the organisation. For example in Case T13 86 ATC 188; Case 17 (1986) 29 CTBR (NS) 138, the St Columban's Mission Society was not accepted as a public benevolent institution. The fact that its members were religious priests and brothers supported the conclusion that its dominant function was evangelisation (at 86 ATC 193; 29 CTBR (NS) 144).

Legislation

115. The rules and powers of organisations are sometimes affected by legislation. This legislation may assist in characterising the organisation.

Operations and activities

116. An organisation's objects and constitution are not treated in isolation. They need to be considered in light of what the organisation actually does. It is the reality of its purposes that must be determined. Features which help indicate whether its operations are predominantly the provision of benevolent relief include:

- the policies and procedures which guide its operations;
- the activities and operations that it actually performs, including:
  - the activities of the executive body;
  - the uses and sources of funds and property;
  - the duties and tasks of employees and volunteers.

Activities incidental to benevolent relief

117. Some of a public benevolent institution's activities might not, if viewed in isolation, be characterised as benevolent operations. Examples include negotiating contracts and employment, fund-raising, promotions, lobbying, record-keeping and storage. Where these activities are incidental or ancillary to the provision of direct benevolent services they will not detract from public benevolent institution status.

118. However, where they are or become dominant, the organisation will not be a public benevolent institution. For example in *Australian Council of Social Service* the Council did not provide services directly to those in need of benevolent relief. Its advisory, informative, research and advocacy functions were not incidental or

ancillary to any benevolent activities. It was not a public benevolent institution.

Minor non-benevolent activities

119. Some organisations predominantly provide benevolent services but also perform non-benevolent activities. They will still be public benevolent institutions if the other activities are minor in extent and importance.

120. For example in *Cairnmillar Institute*, the Institute predominantly provided psychotherapeutic treatment that constituted public benevolence. However, it also provided marriage counselling at two community centres on one day a week. The counselling was not itself public benevolence. In finding that the Institute was a public benevolent institution McGarvie J said at 90 ATC 4767; 21 ATR 683 that 'on the whole scale of the institute's activities, the operation of the two centres is a relatively minor activity'.

Targeting

121. A public benevolent institution operates to get its aid and services to those in need. The policies and procedures that the organisation adopts to target its services for them will help indicate whether it is predominantly for public benevolence. Practices and procedures which are not designed primarily to relieve those in need will indicate some other purpose.

Funding and grants

122. Organisations sometimes receive government grants. The reasons for making the grants, the conditions attaching to them, the applications requesting the grants, and plans to use the funds all assist in characterising the purposes of an organisation.

Distributions to other organisations

123. The distributions of funds that public benevolent institutions sometimes make to other bodies should promote benevolent purposes. If funding is not relevant or incidental to those purposes, their status may be jeopardised. For a public benevolent institution that is endorsed as a deductible gift recipient, its gift fund can only be used for its principal purpose: subsection 30-125(5) of the ITAA 1997.

Benevolent activities by members

124. It is not sufficient that persons who are members of an organisation perform benevolent acts. The organisation itself must be for providing benevolent relief. For example in Case H24 at 76 ATC 176; Case 79 20 CTBR (NS) 821 - where a swimming and lifesaving club was not accepted as a public benevolent institution - the Taxation Board of Review Chairman disregarded various benevolent acts. '[H]aving regard to the constitution of the club and to the fact that club funds were not used ... such benevolence ... cannot be regarded as a club activity or function even though organized through and effected by people who were members of the club'.

Organisations operated by public benevolent institutions

125. An organisation which a public benevolent institution owns or has an interest in will not necessarily be a public benevolent institution. Its own constitution and activities must be considered in light of what the expression 'public benevolent institution' means. In this the degree to which its operations are integrated with those of the public benevolent institution in providing immediate relief may, however, be relevant.

Are public benevolent institutions also charitable institutions?

126. For a charitable institution to be exempt from income tax from 1 July 2000, it must be endorsed as exempt: section 50-52 of the ITAA 1997[14]. This endorsement is different from the endorsement as a deductible gift recipient.

127. We accept that entities which are public benevolent institutions are also charitable institutions.

Gift deductibility - 'in Australia'

128. To be accepted as a public benevolent institution, an organisation need not be in Australia. However, for the public benevolent institution to be endorsed as a deductible gift recipient and so eligible to receive income tax deductible gifts, it must be 'in Australia': special condition (a) of item 1 in the table in section 30-15 of the ITAA 1997. If a public benevolent institution is not in Australia it will still be eligible for fringe benefits tax concessions, but it will not be entitled to endorsement as a deductible gift recipient and donors will not be entitled to income tax deductions under section 30-15.

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[14] A charitable institution does not need exemption endorsement if it is a prescribed institution that meets the conditions of paragraph 50-50(c) or (d).

129. To be in Australia a public benevolent institution must be established, controlled, maintained and operated in Australia and its benevolent purposes must be in Australia. Because the purpose of public benevolent institutions is to provide direct relief to persons in need, this will mean that relief will be provided to people located in Australia.

130. However, we accept that where a public benevolent institution conducts an activity outside Australia that is merely incidental to providing relief in Australia, or is insignificant, it will not disqualify the institution from endorsement. For example, if a public benevolent institution provides medical assistance to children in Australia with a particular disability but, to a minor extent, it also brings children from other countries to receive treatment in Australia, it still meets this condition for endorsement.

131. Where a public benevolent institution provides public benevolence outside Australia it might establish a public fund to provide for those services. Income tax gift deductibility may be available for the public fund under the Overseas Aid Gift Deduction Scheme provided for by item 9.1.1 of section 30-80 of the ITAA 1997.

Examples

132. As explained above, the particular circumstances of each organisation must be considered to determine whether it is a public benevolent institution. The considerations relevant for deciding whether an organisation is predominantly for benevolent relief are explained in paragraphs 95-125. The following examples illustrate how the principles in this Ruling are likely to apply to some common types of organisations.

133. **Aged persons clubs** are not automatically public benevolent institutions. However, they may be where their predominant aim is to alleviate the misfortunes flowing from the loneliness suffered by those aged people unable to readily mix in society. Activities consistent with such an aim would include organised outreach to the housebound, providing transport and arranging interaction with members of community groups. In contrast, if the clubs are essentially for the social, cultural or other pursuits of persons who are over the usual retirement age, they will not qualify. The fact that some members of such clubs will be less lonely as a result is not sufficient.

134. **Aged persons hostels** may be public benevolent institutions: *Lemm v. FC of T* (see paragraph 42). They must be predominantly for persons in necessitous circumstances or for the relief of needs arising

from old age, such as sickness or incapacity, isolation, loneliness or insecurity, or the greater risks of being without prompt medical or other help. Accepting residents who could not otherwise afford reasonable accommodation will help indicate that a hostel is a public benevolent institution.

135. **Animal welfare societies** are not public benevolent institutions (see paragraph 38). However, gifts may be deductible when made to the societies for the prevention of cruelty to animals listed in subsection 30-45(2) of the ITAA 1997.

136. **Business enterprise organisations** are not public benevolent institutions. While clients of the centres may include the unemployed, they do not operate primarily to meet needs for benevolent relief.

137. **Charitable organisations** are not necessarily public benevolent institutions (see paragraph 71). Charities are for the relief of poverty, age or impotence, the advancement of education or religion, or for other purposes beneficial to the community. Only those charities that are for the relief of poverty, sickness, destitution, or helplessness could be public benevolent institutions.

138. **Community bodies** which generally would not be public benevolent institutions include:

- baby health centres (Case 33 (1938) 8 CTBR 99, Case Q18 (1964) 15 TBRD 100);
- conservation groups;
- contraception or family planning services (Case R6 84 ATC 140);
- credit unions, building societies, friendly societies;
- hostels providing low cost accommodation for travellers (VTBR Case 2 (1982) 26 CTBR (NS) 46);
- political parties and lobby groups;
- professional and trade associations, chambers of commerce, trade unions;
- progress associations, community associations, community activities centres, advice bureaus, development associations, neighbourhood watch, agricultural societies;
- Scouts, Brownies, Guides and similar organisations (Case X32 90 ATC 299; AAT Case 5772 (1990) 21 ATR 3295);
- school parents and citizens associations (Case U130 87 ATC 762);

- social, cultural and sporting bodies, community radio stations;
- student unions (*Australian National University Union v. Commissioner for ACT Revenue* [1997] ACT AAT 47); and
- traditional service clubs (however, such clubs could set up separate institutions that meet the requirements of being a public benevolent institution).

139. **Co-ordinating bodies** - such as a national association to co-ordinate the activities of its State affiliates - will only be public benevolent institutions where they meet the conditions explained in paragraph 65.

140. **Counselling organisations** are not automatically public benevolent institutions. However, they may be where their services are predominantly to meet needs for benevolent relief, as explained in this Ruling. For example, we have accepted organisations that alleviate helplessness by providing counselling for alcoholics and newly discharged prisoners. They do not include organisations primarily for marriage, financial, family and similar counselling.

141. **Family self-help organisations** are unlikely to be public benevolent institutions. For example in Case S70 85 ATC 501; Case 76 (1985) 28 CTBR (NS) 557, Parents Without Partners was found to be essentially a self-help organisation which was predominantly concerned with social, recreational, educational and quasi political activities. The fact that most sole parents and children suffer varying degrees of trauma for varying periods was not sufficient.

142. **Government departments and agencies** are unlikely to be public benevolent institutions. They are to promote community welfare generally rather than to provide benevolent relief (see paragraphs 50-55).

143. **Government-funded organisations** can be public benevolent institutions if they operate predominantly to directly meet needs for benevolent relief (see also paragraph 72).

144. **Housing schemes** may be accepted as the provision of public benevolence where they are operated by non-profit organisations to provide low rental or subsidised accommodation to underprivileged persons affected by poverty, sickness, suffering, distress, misfortune, disability, destitution, or helplessness.

145. **Indigenous organisations** can be public benevolent institutions where their primary purpose and predominant activity is the direct relieving of poverty, sickness, suffering, distress, misfortune and helplessness. For discussion of cases involving indigenous organisations see paragraphs 37, 58-60 and 109-110.

146. **Information services** will not usually be public benevolent institutions because their services are directed to the community in general rather than to particular persons in need of benevolent relief (see paragraphs 44-46). However the provision of information can in some circumstances be a means of alleviating distress and helplessness (see paragraph 47).

147. **Kindergartens**, child care centres and creches are not public benevolent institutions. They are primarily educational or for child care, and not for providing benevolent relief. (A kindergarten was accepted as a public benevolent institution in Case 35 (1940) 9 CTBR 120. However, it was essentially to relieve poverty. Education was not its end but its means.)

148. **Legacy organisations**, which provide benevolent services to the dependants of deceased ex-members of the armed forces, are public benevolent institutions: *FC of T v. Launceston Legacy* (see paragraph 39).

149. **Legal aid services** may be public benevolent institutions where they are predominantly to handle the legal affairs of the needy and underprivileged. They might be operated by law societies, as community legal centres, or by government (as in *Legal Aid Commission of Victoria v. Commr of Pay-roll Tax (Vic.)*).

150. **Marriage guidance** organisations are not public benevolent institutions: *Marriage Guidance Council of Victoria v. Commr of Pay-roll Tax (Vic.)* (see paragraph 33). Nonetheless gifts can be allowable as income tax deductions where they are made to the public funds of marriage guidance organisations approved by the Attorney-General: item 8.1.1 of s 30-70 of the ITAA 1997.

151. **Migrants** cannot be said to be suffering poverty, sickness, suffering, distress, misfortune, disability, destitution, or helplessness simply because they are migrants. Migrant resource centres are not public benevolent institutions. In contrast, non-profit organisations that are predominantly to relieve directly the helplessness and distress of refugees may be public benevolent institutions.

152. **Organisations for minority cultural and social groups** are not automatically public benevolent institutions. Being a member of such a group is not sufficient to show a need for benevolent relief.

153. **Pensioner organisations** are not automatically public benevolent institutions. However, they will be where they are predominantly to alleviate distress and helplessness requiring benevolent relief, as explained in this Ruling. In contrast, pensioner organisations which are primarily for political or lobbying purposes, managing funeral funds for financial members, or running homes or flats for members will not be public benevolent institutions.

154. **Religious organisations** can be public benevolent institutions only where their primary purpose and predominant activity is the direct relieving of poverty, sickness, suffering, distress, misfortune and helplessness. An example was the Hobart City Mission: see Case 101 (1945) 12 CTBR 823. If the benevolent activities are subsidiary to, or coordinate with, the religious purposes they will not qualify (see paragraph 99).

155. **Research bodies** are not public benevolent institutions. They may be motivated by a concern with poverty or distress and the results of their work may ultimately benefit the needy. However they are not engaged in the direct provision of benevolent services.

156. **Surf life saving associations** will be public benevolent institutions if their purposes and activities are predominantly for providing life saving services.

157. **Unemployed persons** may have needs that arouse compassion and elicit benevolent relief. However not all organisations providing services to the unemployed will be public benevolent institutions. For example vocational training, apprenticeship, counselling, referral, fellowship and advisory services will not qualify. On the other hand we have accepted particular organisations as public benevolent institutions where they assisted unemployed people in situations of helplessness to become more self-reliant during periods of unemployment and develop their capacities for obtaining employment.

158. **Women's health centres** are not automatically public benevolent institutions. However, they will be where their predominant purpose and operation is the providing of benevolent relief, as explained in this Ruling. If this is only one among many activities - such as education, public awareness, lobbying, counselling and referral - the centre will not be a public benevolent institution.

159. **Youth clubs** will be accepted as public benevolent institutions where the circumstances are similar to *Maughan v. FC of T* (see paragraph 36). That is, they must be predominantly for youths from poor and disadvantaged backgrounds and provide services primarily directed to relieving their condition. Youth clubs which are principally for religious purposes are not public benevolent institutions.

Detailed contents list

160. Below is a detailed contents list for this Taxation Ruling:

Paragraph

Commissioner of Taxation
4 June 2003

Previous draft:
TR 2000/D14

Previous ruling:
TD 92/197; TD 93/11; TD 94/73; IT 2345; IT 2386; IT 2438

Related Rulings/Determinations:
TR 92/1; TR 95/27; TR 92/20; TR 97/16; TR 2000/12

Subject references:
- charities
- community service organisations
-fringe benefits tax
- gifts & donations
- government agencies
- non profit bodies
-non profit entities
- overseas aid agencies
- public benevolent institutions

Legislative references:
- ITAA 1936 78(1)(a)(ii)
- ITAA 1953 IVAAA
- ITAA 1997 30
- ITAA 1997 30-15
- ITAA 1997 30-17(2)(a)
- ITAA 1997 30-17(2)(c)
- ITAA 1997 30-45 4.1.1
- ITAA 1997 30-45(2)
- ITAA 1997 30-70 8.1.1
- ITAA 1997 30-80 9.1.1
- ITAA 1997 30-125(5)
- ITAA 1997 30-125(6)
- ITAA 1997 30-125(7)
- ITAA 1997 50
- ITAA 1997 50-50(c)
- ITAA 1997 50-50(d)
- ITAA 1997 50-52
- ITAA 1997 125(6)
- ITAA 1997 125(7)
- ITAA 1997 50-52
- ITAA 1997 Subdiv 50-B
- FBTAA 1986 57A

Case references:
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- Case 35 (1940) 9 CTBR 120
- Case 79 20 CTBR (NS) 818
- Case 101 (1945) 12 CTBR 823
- Case 5560 (1989) 21 ATR 3132
- Case Q18 (1964) 15 TBRD 100
- Case H24 76 ATC 174; (1976) 20 CTBR (NS) 818
- Case H24 76 ATC 174
- Case L50 79 ATC 354; (1979) 23 CTBR (NS) 493
- Case P104 82 ATC 551; (1982) 26 CTBR (NS) 316
- VTBR Case 2 (1982) 26 CTBR (NS) 46
- Case R6 84 ATC 140
- Case S70 85 ATC 501; (1985) 28 CTBR (NS) 557
- Case T13 86 ATC 188; (1986) 29 CTBR (NS) 138
- Case U130 87 ATC 762
- Case X13 90 ATC 165; (1989) 21 ATR 3132
- Case X32 90 ATC 299; (1990) 21 ATR 3295
- Case X33 90 ATC 308; (1990) 21 ATR 3305
- Ambulance Service of NSW v. DFC of T 2002 ATC 4681; (2002) 50 ATR 496
- Australian National University Union v. Commissioner for ACT Revenue [1997] ACT AAT 47
- Australian Council for Overseas Aid v. FC of T 80 ATC 4575; (1980) 11 ATR 343
- Australian Council of Social Service v. Commr of Pay-roll Tax (NSW) 85 ATC 4235; (1985) 16 ATR 394
- Re Bryning [1976] VR 100
- Commr of Pay-roll Tax (Vic.) v. Cairnmillar Institute 90 ATC 4752; (1990) 21 ATR 665
- Commr of Pay-roll Tax (Vic.) v. Cairnmillar Institute 92 ATC 4307; (1992) 23 ATR 314
- FC of T v. Launceston Legacy 87 ATC 4635; (1987) 19 ATR 41
- FC of T v. Royal Society for the Prevention of Cruelty to Animals Qld Inc. 92 ATC 4441; (1992) 23 ATR 582
- Greater Wollongong City Council v. Federation of NSW Police Citizens Boys' Clubs (1957) 2 LGRA 54
- Gumbangerri Aboriginal Corporation v. Nambucca Council (1996) 131 FLR 115
- In re Income Tax Acts (No 1) [1930] VLR 211
- Incorporated Council of Law Reporting (Qld) v. FC of T (1971) 125 CLR 659

- Joyce v. Ashfield Municipal Council (1959) 4 LGRA 195
- Legal Aid Commission of Victoria v. Commr of Pay-roll Tax (Vic.) 92 ATC 2053; (1992) 23 ATR 1148
- Legal Aid Commission of Victoria v. Commr of Pay-roll Tax at 92 ATC 2060 – 2062; 23 ATR 1158-1159
- Lemm v. FC of T (1942) 66 CLR 399
- Maclean Shire Council v. Nungera Co-operative Society Ltd (1994) 84 LGERA 139
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- Mines Rescue Board of New South Wales v. FC of T 2000 ATC 4191; (2000) 44 ATR 107
- Mines Rescue Board of New South Wales v. FC of T 2000 ATC 4580; (2000) 45 ATR 85
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- Public Trustee (NSW) v. FC of T (1934) 51 CLR 75
- Repromed Pty Ltd v. Lucas Commr for State Taxation (SA) 2000 ATC 4542; (2000) 44 ATR 452
- Royal Australasian College of Surgeons v. FC of T (1943) 68 CLR 436
- Stratton v Simpson (1970) 125 CLR 138
- Tangentyere Council Inc. v. Commr of Taxes (NT) 90 ATC 4352; (1990) 21 ATR 239
- The Young Men's Christian Association v. FC of T (1926) 37 CLR 351
- Toomelah Co-operative Ltd v. Moree Plains Shire Council (1996) 90 LGERA 48
- Trustees of the Allport Bequest v. FC of T 88 ATC 4436; (1988) 19 ATR 1335
- Trustees of the Indigenous Barristers' Trust v. FC of T 2002 ATC 5055; (2002) 51 ATR 495
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ATO references:
NO: 2003/5331
ISSN: 1039-0731