

Tax Law update
PBIs, Health Promotion
Charities
special emphasis on
Case Law Principles

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The Meaning of Public Benevolent Institution

Perpetual Trustee Co Ltd v. FC of T (1931)

- The focus was the Royal Naval House –
- which provided low cost accommodation and recreation for petty officers and lower ratings when ashore in Sydney
- High Court agreed that it was not a PBI.

Perpetual Trustee Co Ltd v. FC of T (1931)

- Justice Starke:
- a "public benevolent institution" means, in my opinion, an institution organized for the relief of poverty, sickness, destitution, or helplessness.'
- '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.

The significance of needs
arousing compassion

Perpetual Trustee Co Ltd v. FC of T (1931)

- Justice Evatt:
- 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..“
- They are very numerous—“the nobler a soul is the more objects of **compassion** it hath”—and they have come to be known as “benevolent institutions

*Commissioner of Pay-roll Tax (Vic) v.
Cairnmillar Institute (1990)*

- Justice Evatt 1931 “Pity”
- Justice McGarvie 1990 “Compassion”
- '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.**'

Needs requiring benevolent relief

- 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.

Maughan v. FC of T (1942)

- Justice McTiernan : Boys Brigade
- The meaning of “Public Benevolent Institution”
- '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**.'

Maughan v. FC of T (1942)

- Justice McTiernan
- Non Material Relief : Boys Brigade a PBI
- 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'
- described the charity of the Brigade as 'excited by social conditions arising from poverty'

Maughan v. FC of T (1942)

- **Youth clubs** will be accepted as public benevolent institutions where the circumstances are similar to *Maughan v. FC of T*.
- 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.

The issue of control

Maughan v. FC of T (1942)

- Justice Williams
- The High Court has held that government control or even public control is not essential:
- As opposed to a “Public Fund” which must demonstrate control by the public through “Responsible Persons”

The issue of fees from clients

*Lemm v. FC of T (1942) ,
Legal Aid Commission of Victoria v.
Commissioner of Pay-roll Tax (Vic) 1992*

- An institution may be created by will
- 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
- “then a substantial amount”
- Substantial Fees did not detract from the institution being for the relief of poverty.

The predominance of
clients in necessitous
circumstances

*Lemm v. FC of T (1942) ,
Legal Aid Commission of Victoria v.
Commissioner of Pay-roll Tax (Vic) 1992*

- 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.

FC of T v. Launceston Legacy 1987

- 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 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.

The problem of
non-benevolent
or
non-charitable
purposes or objects

Oxford Group v. Inland Revenue Commissioners (1949)

- Two Main Objects
- The second was held not to be charitable,
- for in the pursuit of it the company could engage in secular activities and expend its funds on matters which were not charitable.
- Therefore it was not a charity

Thistlethwayte's Case (1952)

- "An institution is a charitable institution if its main purpose is charitable although it may have other purposes which are
- merely concomitant and incidental to that purpose."

Stratton v Simpson 1970

- Justice Windeyer
- In each of these the question was whether the
- non-charitable objects or purposes of a corporate body were independent of or ancillary to its charitable object or objects.
- That question was resolved upon the construction of its memorandum of association or other incorporating instrument.
- In none of these did the words "main object" appear.

Case 36 (1982)

- 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.

Case H24 1976

- 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.

Commissioner of Pay-roll Tax (Vic) v. Cairnmillar Institute (1990)

- *Justice McGarvie*
- 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
- 1992 appeal
- '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.'

Commissioner of Pay-roll Tax (Vic) v. Cairnmillar Institute (1990)

- the Institute predominantly provided psychotherapeutic treatment that constituted public benevolence.
- However, it also provided marriage counseling at two community centres on one day a week. The counseling was not itself public benevolence.
- In finding that the Institute was a public benevolent institution Justice McGarvie said that 'on the whole scale of the institute's activities, the operation of the two centres is a relatively minor activity'.

Marriage Guidance Council of Victoria v. Commissioner of Pay-roll Tax (Vic.) 1990

- Justice McGarvie:
- Marriage Guidance/ Counseling
- Needs arousing compassion are not
- 'the stress and pain encountered in ordinary human experience associated with such things as failure, deception, loss of status and reputation, and bereavement'
- '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.'

Marriage Guidance Council of Victoria v. Commissioner of Pay-roll Tax (Vic.) 1990

- McGarvie J said of marriage guidance and counseling 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.'
- A purpose of preventing distress or misfortune from arising is not on its own benevolent in the required sense

*Tangentyere Council Inc. v.
Commissioner of Taxes (NT) 1990*

- Justice Angel:
- In relation to incidental cultural assistance
- '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]

*Tangentyere Council Inc. v.
Commissioner of Taxes (NT) 1990*

- 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

*Macleay Shire Council v.
Nungera Co-operative Society Ltd (1994)*

- Justice Handley
- The cultural promotion must not be more than incidental.
- '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.'

*Macleay Shire Council v.
Nungera Co-operative Society Ltd (1994)*

- 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 ...'

*Macleay Shire Council v.
Nungera Co-operative Society Ltd (1994)*

- Handley JA
- “It is well established. that the existence of ... independent and collateral objects and powers can result in an institution or association losing some status it would otherwise possess such as being charitable, religious, benevolent or scientific ...”

*Macleay Shire Council v.
Nungera Co-operative Society Ltd (1994)*

- 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'

Gumbangerrii Aboriginal Corporation v. Nambucca Council 1996

- Justice Stein
- It is well established that non-benevolent objects and purposes that are not incidental or ancillary to the main benevolent purpose can result in the organisation losing its benevolent status, whereas objects and purposes which are incidental or ancillary to the main benevolent purpose do not have a disqualifying effect

*Northern Land Council v.
Commissioner of Taxes (NT) 2002*

- Justice Angel
- It is well established that if each function of an institution is either benevolent in itself or necessarily incidental to other functions which themselves are benevolent then the institution is a benevolent institution
- whereas **if a function is non-benevolent** and not merely incidental or ancillary to a main benevolent purpose or function the institution will not be benevolent,
- *Stratton v Simpson* (1970);
- *Royal Australasian College of Surgeons v Commissioner of Taxation* (1943)
- *Gumbangerii v Nambucca Council* (1996)

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- “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.**”
- “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”

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- “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.”

Indirect Aid
The problem of Peak
Bodies

Australian Council of Social Service Inc. v. Commissioner of Pay-roll Tax (NSW) 1985

- 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.
- Justice Priestley
- PBI “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”

The Enterprise Test

Australian Council for Overseas Aid v. FC of T 1980

- '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.'

*Australian Council for Overseas Aid v.
FC of T 1980*

- Acting Chief Justice Connor – “The Enterprise Test for Co-ordinating Organisations”
- 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. accepted that it was a public benevolent institution

The issue of sub-
contracting or use of agents

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

- Services and aid do not need to be provided only by employees or volunteers of the institution, but may also be provided by agents

The problem for
Religious Institutions
providing benevolent relief

*O'Farrell v. Council of the Municipality of
Bathurst (1923)*

- 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.

Hobart City Mission: Case 101 (1945)

- **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.
- If the benevolent activities are subsidiary to, or coordinate with, the religious purposes they will not qualify

Case 17 (1986)

- 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
- The fact that its members were religious priests and brothers supported the conclusion that its dominant function was evangelisation

The problem of Pty Ltd Companies

*Repromed Pty Ltd v. Lucas and
Commissioner for State Taxation (SA) 2000*

- 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.
- **Non-profit clause**
- **Dissolution clause**
- Nearly all Pty Ltd Companies cannot be PBI nor Charitable

The problem of restricted services

In re Income Tax Acts (No 1) 1930

- Chief Justice Irvine : **Meaning of “Public”**
- a 'public benevolent asylum' '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'
- A power to determine potential beneficiaries through membership procedures - which is a feature of voluntary associations - will usually indicate a private character

The problem of control
by family & friends

Pamas Foundation (Inc) v. DFC of T 1992

- An institution has a meaning 'greater than a structure controlled and operated by family members and friends'

The issue of identifying
a PBI
within another structure

Joyce v. Ashfield Municipal Council (1959)

- A public benevolent institution will not necessarily be a juristic person 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.

Case X33 1990

- 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.

The problem of Trusts

Trustees of the Allport Bequest v. FC of T
1988

- Justice Northrop
- 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'

Trustees of the Allport Bequest v. FC of T
1988

- Its sole activities were to manage trust property and apply the income in donations to such other charitable organisations and objects as it determined.
- Justice Northrop characterised the activities as those of simple or mere trustees; they were insufficient to constitute the organisation as an institution

Commissioner of Taxation -v- Word Investments Ltd (2007)

- The Word Investments decision means that an entity, which is a fund-raising arm of a charity, can, in certain circumstances, be eligible for TCC status, notwithstanding the fact that it is operating predominantly a commercial activity.
- The focus is on the intention of the commercial activity as fund raising for charitable purpose

Commissioner of Taxation -v- Word Investments Ltd (2007)

- The full bench of the Federal Court supported the conclusions of the original trial judge in saying the mere fact that an entity made a profit did not of itself deny TCC status. Nor did the fact that it was operating an activity, which for-profit businesses would also operate necessarily, deny TCC status. It hinged more upon other matters with strong emphasis on the Objects.

Other Community Bodies

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

- baby health centres Case 33 (1938), Case Q18 (1964)
- contraception or family planning services Case R6 1984
- hostels providing low cost accommodation for travelers VTBR Case 2 (1982)
- Girl Guides and similar organisations Case X32 1990; AAT Case 5772 (1990)
- school parents & citizens associations Case U130 1987
- student unions *Australian National University Union v. Commissioner for ACT Revenue* (1997)

Health Promotion Charities

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- Opportunity to re-classify a doubtful PBI
- Full FBT exemption up to Cap
- principal activity must promote the prevention **or** the control of diseases in human beings.
- Disease is a morbid mental or physical condition of the body, or of some organ or part; illness; sickness; ailment.
- In practice requires a Medical Diagnosis

Examples

Health Promotion Activities

- treating and caring for persons suffering the diseases;
- developing and implementing co-operative and cross disciplinary approaches to treatment and prevention of diseases in human beings; and
- coordinating health promotion activities of charitable institutions that principally promote the prevention or the control of the diseases.

Examples

Health Promotion Activities

- providing information about prevention or control to sufferers, health professionals, carers and to the public;
- researching how to detect, prevent or treat the diseases;
- developing or providing relevant aids and equipment;
- evaluating health programs to prevent or control disease;
- training carers & health professionals to control disease

Questions