



Law Council
OF AUSTRALIA

Legal Practice Section

Commissioner's Interpretation Statement: Public Benevolent Institutions

Australian Charities and Not-for-Profits Commission

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About the Law Council of Australia

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The Law Council advises governments, courts and federal agencies on ways in which the law and the justice system can be improved for the benefit of the community. The Law Council also represents the Australian legal profession overseas, and maintains close relationships with legal professional bodies throughout the world.

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- Australian Capital Territory Law Society
- Bar Association of Queensland Inc
- Law Institute of Victoria
- Law Society of New South Wales
- Law Society of South Australia
- Law Society of Tasmania
- Law Society Northern Territory
- Law Society of Western Australia
- New South Wales Bar Association
- Northern Territory Bar Association
- Queensland Law Society
- South Australian Bar Association
- Tasmanian Bar
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The Law Council is governed by a board of 23 Directors – one from each of the constituent bodies and six elected Executive members. The Directors meet quarterly to set objectives, policy and priorities for the Law Council. Between the meetings of Directors, policies and governance responsibility for the Law Council is exercised by the elected Executive members, led by the President who normally serves a 12 month term. The Council's six Executive members are nominated and elected by the board of Directors.

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The Chief Executive Officer of the Law Council is Dr James Pople. The Secretariat serves the Law Council nationally and is based in Canberra.

About the Section

The Legal Practice Section of the Law Council of Australia was established in March 1980, initially as the 'Legal Practice Management Section', with a focus principally on legal practice management issues. In September 1986 the Section's name was changed to the 'General Practice Section', and its focus broadened to include areas of specialist practices including Superannuation, Property Law, and Consumer Law.

On 7 December 2002 the Section's name was again changed, to 'Legal Practice Section', to reflect the Section's focus on a broad range of areas of specialist legal practices, as well as practice management.

The Section's objectives are to:

- Contribute to the development of the legal profession;
- Maintain high standards in the legal profession;
- Offer assistance in the development of legal and management expertise in its members through training, conferences, publications, meetings, and other activities.
- Provide policy advice to the Law Council, and prepare submissions on behalf of the Law Council, in the areas relating to its specialist committees.

Members of the Section Executive are:

- Ms Maureen Peatman, Chair
- Mr Geoff Provis, Deputy Chair
- Dr Leonie Kelleher OAM, Treasurer
- Ms Tanya Berlis
- Mr Mark Cerche
- Ms Peggy Cheong
- Mr Philip Jackson SC
- Ms Christine Smyth

The Section's administration team serves the Section nationally and is based in the Law Council's offices in Canberra.

Acknowledgement

The Law Council acknowledges the assistance of the Charities and Not-for-profits Committee of the Legal Practice Section in the preparation of this submission.

Executive Summary

1. The Australian Charities and Not-for-profits Commission (**ACNC**) released a Redraft of the Commissioner's Interpretation Statement: Public Benevolent Institutions (**PBI CIS Redraft**) for consultation in late June 2022 together with a document setting out four questions on which the ACNC has particularly sought comments.
2. This submission has been prepared by the Charities and Not-for-profits Committee of the Law Council's Legal Practice Section (**Committee**).
3. In response to the first of the ACNC's consultation questions, the Committee recommends that significant decisions that may impact on the way that the ACNC interprets and applies the law might better be classified as Decision Impact Statements (**DIS**), rather than Commissioner's Interpretation Statements (**CIS**), and that the scope of the DISs should be expanded beyond cases to which the ACNC is a party.
4. In response to the third consultation question, the Committee recommends that the question regarding public control should be removed from the charity registration application form.
5. Additionally, the Committee has identified many significant issues with the PBI CIS Redraft and recommends that the ACNC not proceed with the PBI CIS Redraft in its current form.
6. The view of the Committee is that the current Commissioner's Interpretation Statement Public Benevolent Institutions (**Current PBI CIS**) should be updated and improved by the ACNC in accordance with the following recommendations:
 - (a) Part 7 of the Current PBI CIS should be amended to include a statement that taxation considerations do not form part of the process by which the ACNC assesses where an entity is a Public Benevolent Institution (**PBI**).
 - (b) The Current PBI CIS should be amended in the manner as set out in paragraphs [60], [68], [70] and [72] of this submission to address the recommendations in the Committee's 2020 submission to the ACNC (**Attachment A**) in relation to when an institution has a purpose of relieving PBI needs.¹
 - (c) The Current PBI CIS should be amended in the manner as set out in paragraphs [78], [82], [84], [86] and [94] of this submission to address the recommendations in the Committee's 2020 submission in relation to when an institution targets its activities towards those in need.
 - (d) In relation to the extent to which a PBI may have 'other' purposes:
 - (i) The PBI CIS should recognise that the *Australian Charities and Not-for-profits Commission Act 2012* (Cth) (**ACNC Act**) specifically allows a PBI to have more than one subtype.

¹ Law Council of Australia, Submission to Australian Charities and Not for Profits Commission, *Commissioner's Interpretation Statement: The Hunger Project Case* (8 September 2020). This submission is provided at Attachment A to this submission.

- (ii) Statements on the basis of case law cited by the ACNC in the updated PBI CIS which do not support the proposition that other purposes are to be merely incidental or ancillary should be omitted.
- (iii) The PBI CIS should reflect existing case law which clearly recognises and envisages that a PBI may have other purposes.

7. Further recommendations of the Committee include:

- (a) Given the significance of the implications of the PBI CIS Redraft, finalisation of it should be delayed until such time as the permanent Commissioner of the ACNC is appointed.
- (b) Given the significant concerns with the current version of the PBI CIS Redraft, a further redrafted PBI CIS should be issued with an appropriate period of consultation.
- (c) All submissions made in relation to the current version of the PBI CIS Redraft should be made public on the ACNC website prior to the issuing of the second version.
- (d) The ACNC should cease its current audit of PBIs for the time being.

Introduction

8. The Committee includes among its members some of the most experienced legal practitioners as well as academics in the area of charity law in Australia. Many of them have extensive experience in advising clients on the establishment of PBIs (including in applications to register them as charities with the ACNC) and in the ongoing compliance requirements that apply after registration. Several members of the Committee have direct experience with the cases that currently form the law relating to PBIs. In preparing this submission, members of the Committee have drawn on this collective experience and have revisited relevant judgements in relation to PBIs and authoritative texts in connection with what constitutes a PBI,² as well as the Current PBI CIS and the Australian Taxation Office's Taxation Ruling 2003/5 – *Income tax and fringe benefits tax: public benevolent institutions*.³
9. It is acknowledged that the definition of PBI is fraught. Set out in **Attachment B** is commentary from the Committee about why this is so and the possible policy solutions. To address this, the Committee supports further discussion of the following:
 - (a) the extension of gift deductibility to all charitable institutions and charitable funds registered with the ACNC, as recommended by a number of reports and reviews (with some limitations); and
 - (b) the funding of test cases, including to the High Court.
10. While some of these solutions set out in Attachment B may be well beyond the ACNC's current review, the Committee supports further collaboration between the ACNC, charities and other stakeholders to overcome the differences of opinion that are apparent in crafting an acceptable view of the term 'public benevolent institution'.
11. In the meantime, the Committee urges the ACNC to adopt a construction approach based on the underlying principles in the decided cases, which include, first and foremost, the concept that PBI is to be interpreted in a contemporary setting. The ACNC must ensure its interpretation remains relevant to the current day.

The four questions raised by the ACNC

Question 1

Do you think there are any issues with withdrawing Commissioner's Interpretation Statement: The Hunger Project Case'?

12. The PBI CIS Redraft draws on *The Hunger Project Australia v Federal Commissioner of Taxation*⁴ (**Hunger Project**) as an example of a case where a charity can still have a purpose of benevolent relief by providing relief indirectly [18]-[19]. The PBI CIS Redraft notes that:

² Gino Dal Pont, *Law of Charity* (LexisNexis, 3rd ed, 2021); Ann O'Connell, *Taxation of Charities and Not-for-profits* (LexisNexis, 2021); Ian Murray, 'Looking for Direct Assistance in the Phrase "Public Benevolent Institution": Time to Abandon the Search' (2012) 35(1) *University of New South Wales Law Journal* 103.

³ Note: TR2003/5 has been withdrawn with effect from 17 May 2017.

⁴ (2013) 94 ATR 855.

The Court accepted that the charity had a purpose of relieving poverty of people in developing countries because it was clear that the funds it raised for the purpose of relieving poverty would be used for that purpose, albeit by the partner entity.

Although this is a general statement not pinpointed in the Hunger Project decisions, with respect, it is a fair application of the case.

13. The Commissioner's Interpretation Statement: The Hunger Project Case (**CIS 2013/1**), takes into account the decision of the Federal Court of Australia and the full court of the Federal Court of Australia and provides guidance on the way in which the ACNC will apply the cases.
14. It is appreciated that subsequent cases have thrown further light on the meaning of 'public benevolent institution'. However, they have not thrown doubt on the principles set out in the Hunger Project cases.
15. CIS 2013/1 provides more extensive and detailed guidance on the implications of the cases including matters of directness, objects of benevolence, collaboration and the role of a fundraising institution. Accordingly, in the Committee's view, CIS 2013/1 should not be withdrawn, but amendments should be made as highlighted in paragraph [72] below.
16. The ACNC publishes CISs designed to advise the sector of the ACNC's view of the implications of court or tribunal decisions where the ACNC is a party. The Committee recommends that significant decisions that may impact on the way that the ACNC interprets and applies the law might better be classified as DISs rather than CISs and the scope of DISs should be expanded beyond cases to which the ACNC is a party.

Recommendation

- **Significant decisions that may impact on the way that the Australian Charities and Not-for-profits Commission interprets and applies the law might better be classified as Decision Impact Statements rather than Commissioner's Interpretation Statements, and the scope of Decision Impact Statements should be expanded beyond cases to which the Australian Charities and Not-for-profits Commission is a party.**

Question 2

Which introductory statement do you consider more appropriately reflects the position of Commissioner's Interpretation Statements as guidance documents?

17. The proposed changes in wording for the introductory statement have the following implications:
 - (a) The revised version removes the protection that a charity can expect when relying on a CIS. That is, to be treated fairly, consistent with the objects set out in the ACNC Act and the published regulatory approach of the ACNC.

- (b) The revised version removes the assurance that where the law or the ACNC interpretation changes, the changes will not be applied retrospectively to disadvantage a charity.
18. These changes are a material shift in the regulatory approach of the ACNC and constitute a withdrawal of reasonable protections for charities relying on the CIS.
19. While the Committee has no objection to the rewording of the introduction to improve clarity, and welcomes the removal of the statement that CISs are binding on ACNC staff, it does not support the removal of protections for charities that follow CIS guidance.

Question 3

To help explain and clarify the meaning of ‘institution’, should the principles expressed in *Pamas* be included in the two revised Commissioner’s Interpretation Statements?

20. In most instances, the distinction between ‘fund’ and ‘institution’ has been removed from the *Income Tax Assessment Act 1997* (Cth). The line between the two terms is difficult – especially in the modern context where the activities may all be online and fundraising activities are considered sufficient to be an institution. The ACNC should only consider trusts which are ‘mere funds’ (that is, do not actively fund raise and passively make grants) to not be institutions.
21. In the Committee’s view, the paragraphs in the Current PBI CIS are adequate. The issue of public control is not as relevant now with public accountability being available through the ACNC register. The Committee also considers that this question should be removed from the charity registration application.
22. It is not clear to the Committee what ‘principles’ the ACNC considers are expressed in *Pamas Foundation v Commissioner of Taxation (Pamas)*.⁵ It should be noted that:
- (a) *Pamas* is often misinterpreted as standing for the proposition that ‘a structure controlled and operated by family members and friends’ cannot be an institution; and
- (b) *Pamas* considered the meaning of the term ‘religious institution’. ‘Public benevolent institution’ is a compound term that should be interpreted in the light of ‘Public Benevolent Institution’ cases (see comments in paragraphs [36]-[37] of this submission).
23. In the Committee’s view, the following examples demonstrate *Pamas* being misinterpreted as standing for the proposition that ‘a structure controlled and operated by family members and friends’ cannot be an institution:
- Taxation Ruling 2003/5, which stated that ‘the word institution has a meaning “greater than a structure controlled and operated by family members and friends”’;⁶

⁵ (1992) 35 FCR 117 (*Pamas*).

⁶ See Australian Taxation Office, *Income tax and fringe benefits tax: public benevolent institutions* (TR 2003/5) [91] (withdrawn 17 May 2017).

- Taxation Ruling 2004/8, which stated that a health promotion charity ‘must be an institution, and not an entity established, controlled and operated by family members and friends’;⁷
- Taxation Ruling 2011/4, which states that a ‘structure with a small and exclusive membership that is controlled and operated by family members and friends and undertakes limited activities is not an institution’;⁸ and
- Taxation Ruling 2019/3, which states that a ‘structure which conducts activities of limited scale, controlled and operated by family members or friends is not an “institution” in this context’.⁹

24. In the Committee’s view, each of these Taxation Rulings relies on, and inappropriately applies, *Pamas*. *Pamas* was decided on the basis of a particular fact situation, which included that the Foundation was closely integrated with the business affairs of a Dr Staer; was substantially engaged in commercial activity; and had small scale activities. The governing document of the Foundation also entrenched family control, providing that the Chairman and Secretary (Dr Staer and his wife) could only be removed by a 75 per cent majority vote, death or retirement. Although these factors are summarised in *Pamas* at paragraph [126] with specific reference only to the scale of activities and whether the entity was closely held, all of the factors were arguably taken into account by the Court.
25. This holistic approach, which requires consideration of factors other than simply whether the entity is controlled by family members and friends, is evident from the judgment itself, in which Beaumont and Lee JJ stated (emphasis added):

*The Foundation has a small and exclusive membership which is limited to Dr Staer, his family and some close friends. The scale of its activities is relatively small. **Looking at the whole of the circumstances**, in our opinion, the Foundation is not a religious institution.*¹⁰

26. This approach was affirmed in *KinCare Community Services Ltd v Chief Commissioner of State Revenue (NSW) (KinCare)*, in which the Court held that, notwithstanding control by the Howie family, KinCare Community Services Inc was not a ‘structure controlled and operated by family members and friends’.¹¹ In making these findings Payne J distinguished *Pamas* with reference to a range of factors. Those factors go well beyond control by family and friends (including the scale of activities, integration with Dr Staer’s business, nature of activities and source of funding) (emphasis added):

The facts found by French J, sitting as the Tribunal in that case, were far removed from the present case. The Pamas Foundation was a small and exclusive organisation. The scale of its activities was ‘relatively small’. The Foundation was closely integrated with the business affairs of a Dr Staer. The Foundation was ‘substantially engaged in commercial activity’. It was a vehicle for Dr Staer and his family to pursue ‘their Christian purposes’. I find that KinCare was a body which was the recipient of millions of dollars from the Commonwealth and State

⁷ See Australian Taxation Office, *Income tax and fringe benefits tax: health promotion charities* (TR 2004/8) [16] (withdrawn 25 November 2015).

⁸ See Australian Taxation Office, *Income tax and fringe benefits tax: charities* (TR 2011/4) [24].

⁹ See Australian Taxation Office, *Fringe benefits tax: benefits provided to religious practitioners* (TR 2019/3) [9].

¹⁰ *Pamas* (1992) 35 FCR 117, [126].

¹¹ *KinCare Community Services Ltd v Chief Commissioner of State Revenue (NSW)* [2019] NSWSC 182, [212] (Payne J) (*KinCare*).

*Governments to pursue the important work of providing home care to the aged and disabled in our society and not a 'structure controlled and operated by family members and friends' of the kind addressed in Pamas.*¹²

27. KinCare makes it clear that the fact that a structure is controlled and operated by family members and friends is only one factor to be taken into account when considering whether or not it is an institution.
28. Rather than explaining and clarifying the meaning of 'institution', including reference to *Pamas* in the PBI CIS may lead to the inappropriate exclusion of entities solely on the basis of close control rather than the holistic approach required by the case law.
29. Additionally, *Pamas* considered the meaning of the term 'institution' in the context of 'religious institution'. Caution is required when using a 'religious institution' case to interpret the phrase 'public benevolent institution', a compound term that should properly be understood by reference to ordinary contemporary usage rather than a technical analysis of the individual words. In the High Court decision of *Perpetual Trustee Co Ltd v Federal Commissioner of Taxation (Perpetual)* it was held that 'public benevolent institution' is not a term of art, is to be understood in its ordinary English usage, and does not have a fixed meaning.¹³ None of the judgments in *Perpetual* separate the term 'public benevolent institution' into its constituent parts, with Dixon J confirming that it is a 'compound description'.¹⁴ McTiernan J (albeit in a dissenting judgment) expressly rejected the approach of 'piecing together the respective meanings of the three words of which [public benevolent institution] is composed'.¹⁵ While some cases do consider the terms separately, in the Committee's view, the approach in *Perpetual* should be preferred.
30. In light of the potential for *Pamas* to be misapplied and the fact that it is a 'religious institution' case, in the Committee's view, including reference to *Pamas* in the revised CIS would not assist with the proper interpretation of term 'public benevolent institution'.

Recommendation

- **The question about public control should be removed from the charity registration application form.**

Question 4

What weight does the law give to factors other than extensiveness of the beneficiary class when determining whether an entity is 'public' in the sense of a Public Benevolent Institution? Should this be covered in the Commissioner's Interpretation Statement: Public Benevolent Institutions?

31. As stated at paragraph [21] above, the issue of public control is less relevant today due to public accountability being available through the ACNC register. The wording in the current PBI CIS is adequate. The key in *Maughan v Federal Commissioner of Taxation (Maughan)* and other cases is that 'public control is not essential (the main

¹² Ibid.

¹³ (1931) 45 CLR 224, 231 ('*Perpetual*').

¹⁴ Ibid 233. See also *Public Trustee (NSW) v Federal Commissioner of Taxation* (1934) 51 CLR 75.

¹⁵ Ibid 240.

criterion is the extensiveness of the class it is the object of the institution to benefit'.¹⁶

32. It is likely that the criteria other than the public nature of those for whom the purpose is to benefit will only be relevant if the entity is concerned only with the relief of poverty to a small number of people. If the ACNC considers such an entity could be a PBI then, the ACNC may consider the discussion of other characteristics of 'public' in the limited context of where the extensiveness of the class of beneficiaries is not demonstrated.

Additional issues regarding the PBI CIS Redraft

33. Several additional issues with the PBI CIS Redraft have been identified by the Committee. These issues are discussed below.

Clarity lost

34. The PBI CIS Redraft contains significant less explanation and, as such, much of the clarity already found in the Current PBI CIS would be lost. The ACNC states that its:

Commissioner's Interpretation Statements are developed to help to guide charities and the public on how we understand the law that applies to charities, including to explain the law made by judges ('common law'), parliament (legislation) and any other legal issues ... These statements reflect our current understanding of the law on charity and are binding on our staff."

35. A key reason for the PBI CIS Redraft is the desire to improve clarity about what constitutes a PBI for charities, the public and the ACNC's staff. However, in the Committee's view, the PBI CIS Redraft would result in the opposite outcome for the reasons set out below.

Inaccurate or incorrect use of case authorities

36. In the Committee's view, in several instances, the PBI CIS Redraft is inaccurate or incorrect in its use of case authorities regarding PBIs. For example:

- (a) The PBI CIS redraft in paragraph 7 states that:

The paragraphs that follow explain each element of the description of a PBI with references to the findings of courts and tribunals that have considered the meanings of these terms in this context.

- (b) However, the paragraphs following this statement contain many authorities that considered the words 'public', 'benevolent' and 'institution' in non-PBI contexts.
- (c) There are a number of cases that are drawn from contexts where the legislation uses terms other than PBI, such as:
 - (i) Dareton Local Aboriginal Land Council v Wentworth Council – 'public charity';¹⁷

¹⁶ (1942) 66 CLR 388, 397 (Williams J).

¹⁷ (1995) 89 LGERA 120, 125 (Bignold J).

- (ii) *City of Hawthorn v Victorian Welfare Association* – ‘exclusively for charitable purposes’;¹⁸
- (iii) *Estate of Hadji* – a testamentary charity case;¹⁹
- (iv) *Navy Health Ltd v Federal Commissioner of Taxation* – ‘charitable institution’ and ‘non-profit association, ... established for community service purposes’;²⁰
- (v) *Mayor of Manchester v McAdam* – ‘the property of any literary or scientific institution’;²¹
- (vi) *Re Income Tax Acts (No 1)* – ‘public benevolent asylum’;²²
- (vii) *O’Connell v City of Greater Newcastle* – ‘public hospital’;²³
- (viii) *Sargents Charitable Foundation Ltd v Commissioner of State Revenue* – ‘a charitable or benevolent nature’;²⁴ and
- (ix) *Commissioner of Land Tax v Joyce* – ‘charitable institution, religious society’.²⁵

Preference should be given to PBI cases as authorities, and other authorities should not be used, or used cautiously, with a note to readers that they were not PBI cases. Most have limited precedential value in expounding the definition of PBI.

- (d) Other references used in the PBI CIS redraft are to authorities that have a technical charity law context, rather than a PBI context. It is critical not to confuse or muddle the logic and definitional infrastructure of technical charity with the uniquely Australian process of establishing the definitional boundaries of a PBI. This confusion of thought can easily occur as:
 - (i) the recent statutory amendment requires a PBI to also qualify as an ‘ACNC defined charity’ (by a separate process); and
 - (ii) the end result is that a PBI will also be a technical charity (but not all charities will be PBIs), but by a different route of legal reasoning.
- (e) The historical context is that the term ‘PBI’ is intended to exclude from the benefit of tax concessions organisations that were clearly charities in the technical legal sense, but not charitable in the popular sense of the contemporary community. A different process of determination of PBI status is used to that of an inquiry about technical charities, and the two processes should not be mixed or ‘hybridised’. It is noticeable that in PBI cases the High Court does not draw from technical charity cases, and such authorities are not mentioned other than to explain the history and context of PBI’s meaning.

¹⁸ [1970] VR 205, 208-9 (Smith J).

¹⁹ [1948] 1 MLJ 62.

²⁰ (2007) 163 FCR 1, 29 [65] (Jessup J).

²¹ [1896] AC 500, 511 (McNaghten LJ).

²² [1930] VLR 211.

²³ (1941) 41 SR (NSW) 190 (Jordan CJ).

²⁴ [2005] NSWSC 659, [25] (Gzell J).

²⁵ (1974) 132 CLR 22.

- (f) It is acknowledged that recent cases such as *Hunger Project and Global Citizen Limited v Commissioner of the Australian Charities and Not-for-profits Commission*²⁶ (**Global Citizen**) have referred to *Commissioner of Taxation v Word Investments* (**Word Investments**).²⁷ However, this is to distinguish the notion of technical charity, or to note that a similar interpretation was taken rather than to adopt or apply a concept of technical charity.
- (g) The use of the following technical charity cases as authority for propositions relating to the process of arriving at a decision about PBI status is, in the Committee's view, misplaced:
- (i) Footnote 7 – *Estate of Hadji* [1948] 1 MLJ 62 and *City of Hawthorn v Victorian Welfare Association* [1970] VR 205;²⁸
 - (ii) Footnote 45 – Gino Dal Pont, *Law of Charity* (LexisNexis, 2010) 37 [2.8]. The latest edition is Gino Dal Pont, *Law of Charity* (LexisNexis, 3rd ed, 2021). Motive is not mentioned in paras 2.32 – 2.42 in the latest, or earlier, edition. However, it is extensively used with the concept of charity in the text; and
 - (iii) Footnotes 63 and 68 – *Study and Prevention of Psychological Diseases Foundation v Federal Commissioner of Taxation* [2013] AATA 119.
- (h) More appropriate authorities or passages (and accuracy in the application) could be used in many instances, such as:
- (i) Footnote 64 – *Study and Prevention of Psychological Diseases Foundation v Federal Commissioner of Taxation* [2013] AATA 119, [77] (Molloy DP), quoting *Stratton v Simpson* (1970) 125 CLR 138, 158 (Gibbs J). The paragraph number is [48], not [77] and the original text indicates that it was taken from The Shorter Oxford English Dictionary.
 - (ii) Footnote 65 – Consider that a PBI will not necessarily be a juristic person: *Case X33 90 ATC 308*; *AAT Case 5773* (1990) 21 ATR 3305.
- (i) One of the most significant instances where the PBI CIS Redraft is inaccurate or incorrect in its use of case authorities relates to the PBIs with another charity subtype. In the Committee's 2020 submission (**Attachment A**), explanation has been provided about this. In this submission, further detail on this is provided in paragraphs [95]-[138].
- (j) In connection with use of case authorities in relation to PBIs, it is also submitted that the ACNC has been inconsistent with its use of Administrative Appeals Tribunal (**AAT**) decisions (see comments in paragraph [130] of this submission) and that, on a broader level, AAT decisions should effectively be considered precedents. This is particularly so with a decision such as *Global Citizen* which was written by a Deputy President, and Professor of the University of Melbourne who is highly regarded for expertise in matters of taxation concessions for charities and provides a thorough canvass of the

²⁶ [2021] AATA 3313 ('*Global Citizen*').

²⁷ [2007] FCAFC 171, [14]-[15] (Allsop J) ('*Word Investments*').

²⁸ Even this is not an appropriate statement of the law of technical charity – refer to *YWCA Australia v Chief Commissioner of State Revenue* [2020] NSWSC 1798, which confirms that the concept of poverty in this context is persons whose lot needs improvement or who are 'subject to some degree of financial necessity' and not 'poverty line' assessments such as that published by the Organisation for Economic Cooperation and Development. Payne JA at [45], and his review of the cases at [39]-[45], is instructive.

relevant decisions about what constitutes a PBI. The ACNC is referred to the speech 'Structure, Power and Duties of the Administrative Appeals Tribunal of Australia' by Justice Garry Downes, former President of the AAT, in 2006 (emphasis added):

*The giving of detailed reasons for decision and the publication of those reasons are the matters which underpin the doctrine of precedent. Their presence naturally leads at least to an informal doctrine of precedent. Uniformity of decision-making is desirable. The publication of reasons makes it possible. Accordingly, although no res judicata or other estoppel and no formal doctrine of precedent exists in administrative law, members of the Administrative Appeals Tribunal will follow earlier decisions of the Tribunal unless they are satisfied that the earlier decision is manifestly wrong. This is particularly so when the same issue arises in proceedings between the same parties. Effectively there is a res judicata in the Administrative Appeals Tribunal as well as issue estoppel. **Effectively there is a doctrine of precedent.***

Government departments and agencies treat themselves as bound by the decisions and the reasoning of the Administrative Appeals Tribunal. This is, in part, because they know that on review the Tribunal will make the same decisions it has previously made on the same issues. The sensible course for government departments and agencies is to make the decision they know the Tribunal will make.²⁹

Propositions not supported by case authority

37. There are also a number of propositions in the PBI CIS Redraft which the Committee submits should be supported by case authority, including:

- Paragraph [10] – 'A charity is 'benevolent', in the required sense, if it has a main purpose of providing relief from poverty';
- Paragraph [14] – 'it provides goods or services to people who already have what they need for a modest standard of living';
- Paragraph [15] – 'These conditions include, but are not restricted to, sickness, disability, misfortune and helplessness';
- Paragraph [20] – 'If a charity provides benevolent relief by sending funds or resources to another organisation that is not a PBI, the charity must demonstrate how it ensures the other organisation will use the funds and resources only for benevolent relief. It could do this by establishing partnership agreements or memorandums of understanding with partner organisations';
- Paragraph [26] – 'The charity's benevolent relief must be targeted or directed to people in need and not the broader general community, even though the general community includes people in need';
- Paragraph [28] – 'A charity that provides goods or services to an entire community may have a purpose of benevolent relief if the whole community (or the vast majority of the community) are people in need. For example, in developing countries, entire communities may be living in poverty.

²⁹ Justice Garry Downes, 'Structure, Power and Duties of the Administrative Appeals Tribunal of Australia' (Speech on visit to the Supreme Administrative Court of Thailand and Central Administrative Court of Thailand, 21 February 2006) [48]-[49] <<https://www.aat.gov.au/about-the-aat/engagement/speeches-and-papers/the-honourable-justice-garry-downes-am-former-pres/structure-power-and-duties-of-the-administrative-a>>.

Development assistance provided to such communities is likely to be a purpose of benevolent relief’;

- Paragraph [29] – ‘A charity that charges for its services may have a purpose of benevolent relief. But it depends on the nature of the service, the need it intends to relieve, and the fees charged’; and
- Paragraph [37] – ‘If a charity has an independent purpose that is not benevolent relief, it is not entitled to registration as a PBI. For example, if a charity has an independent purpose of advancing religion or advancing the natural environment, it is not entitled to registration as a PBI’.

Alterations from the Current PBI CIS

38. In the Committee’s view, there are a number of significant alterations from the Current PBI CIS which require further consideration.
39. In paragraph [57] of the PBI CIS Redraft under the heading ‘How we assess whether a charity is a PBI’ the following alterations are made:
 - (a) adding the words ‘including the number of Responsible People and their relationship with one another’ to dot point three; and
 - (b) in the last dot point, adding ‘and other publicly available information about the charity, including social media posts’.
40. In relation to the first alteration, the Committee refers the ACNC to the comments regarding the meaning of ‘institution’ in paragraph [6] of this submission.
41. The second alteration gives regard to the increasing regulatory practice of using websites and social media as a significant source of information about the purposes and activities of an organisation – in many instances putting more weight on these, than the information and explanations provided directly from the organisation.
42. In *Greenpeace of New Zealand Inc v Charities Registration Board*,³⁰ the High Court of New Zealand noted substantial and detailed assessments (760 pages) by Charities Services about the views advocated by Greenpeace, including extensive footnotes to the material on Greenpeace websites. There was also a 13-page summary of examples of Greenpeace’s ‘activist’ activities under the heading ‘illegal purpose’, with photographs and website references, and other internal work carried out by NZ Charities Services.
43. Greenpeace NZ disputed that the information the Commission had obtained was representative of its activities, arguing that some material was taken from a handful of pages about its historical campaigns, campaigns in other countries by affiliates, opinion pieces, and material republished from other sources.
44. It is notable that now the New Zealand Charity Board, when it relies on websites and social media, gives the applicant early notice of the use of this information and the ability to respond to it in any decision making.³¹ In that case, it was found that the website had material that was difficult to separate from other affiliated organisations,

³⁰ [2020] NZHC 1999 <<http://www.nzlii.org/nz/cases/NZHC/2020/1999.pdf>>.

³¹ *In Registration Decision: Nelson Grey Power Association Incorporated*, New Zealand Charities Registration Board, Decision No 2020-1 (21 May 2020) <<https://www.charities.govt.nz/assets/Uploads/Nelson-Grey-Power-decision-paper.pdf>>.

recorded proposed policy remits that were, in the end, not supported, and interweaved historical information of broader movements.

45. Another example of inappropriate reliance on web-based materials is *Redeemer University College v Canada (Employment, Workforce Development and Labour)*.³² This case involved an application by a non-profit university for work experience funding was inappropriately deemed high risk on the basis of information found on the University's website, which was several years old, and a recent article about faith-based institutions. The Court remarked that:

*What appears to have happened is that the ESDC program officer reviewing the application did a cursory search of the Internet for information about Redeemer's policies and practices, turned up a few pages about its faith based approach to education and submitted them to the Escalation Committee as evidence of Redeemer's ineligibility.*³³

46. Scanning web-based materials is not a substitute for firstly examining the constitution of the organisation. A website is not a statement of purpose. Activities are one of the things from which purpose can be inferred, along with website content and other sources of information. This approach is consistent with the Australian approach expressed succinctly by Allsop J in *Word Investments*:

*It is an integrated, holistic enquiry directed to whether a body of facts and circumstances satisfies a legal category or conception...Such an inquiry inevitably focuses on an analysis of activity.*³⁴

47. This methodology has been enshrined in note 1 to section 5 in the *Charities Act 2013* (Cth):

In determining the purposes of the entity, have regard to the entity's governing rules, its activities and any other relevant matter.

48. As such, what is required in the PBI CIS Redraft is a paragraph which:
- (a) articulates the approved judicial methods of establishing an organisation's purpose; and
 - (b) concerning web and social media, specifies the giving of notice of its use and seeking the applicant's informed response.

49. Paragraph [58] of the PBI CIS Redraft remains largely unaltered in sense from the current PBI CIS. However, there is an alteration in paragraph [59], as the last qualifying sentence is omitted:

- Paragraph 7.2.3 of the Current PBI CIS states (footnote omitted):

The focus overall should be on an organisation's purposes, rather than its activities in isolation. The activities are relevant insofar as they are a signpost to the organisation's purposes.

- However, the PBI CIS Redraft states (footnote omitted):

³² [2021] FC 686 <<https://www.canlii.org/en/ca/fct/doc/2021/2021fc686/2021fc686.html>>

³³ *Ibid* [40].

³⁴ *Word Investments* [2007] FCAFC 171, [14]-[15] (Allsop J).

The focus overall is on the charity's purposes, rather than its activities in isolation.

50. Given the common and persistent muddling of purposes and activities in the assessment of charity status, the Committee believes that the omitted sentence provides a valuable reminder and guide to the statement of principles. In the Committee's view, the sentence should be restored.
51. Further, the section on principles is so important that it ought to be given more prominence in the CIS. The paragraph should be elevated to prior to paragraph 5 under the subheading 'How we assess whether a charity is a PBI'.
52. In combination with a more prominent position for the statement of principles, a more expansive explanation of the principles on such issues as the following would also be helpful:
 - The relative precedential value of not only judicial statements, but those from administrative tribunals, taxation boards of review, state/territory and international judicial, administrative decisions, and decisions of charity regulators.
 - The relative precedential value of such statements deriving from statutes using the term PBI and those that concern charity.
 - The precedential value of such statements in relation to their contemporary attributes. The term PBI is to be understood in its ordinary English usage, and does not have a fixed meaning, so older PBI cases should be treated with caution as the common usage may have altered. Apart from contemporary judicial decisions, how does the ACNC inform itself of the contemporary ordinary English usage of the words 'public benevolent institution'?
 - The process to be used to identify those persons whose plight 'is sufficiently serious to arouse pity or compassion within the community and they are regarded as in need of benevolent relief.' Apart from reference to legal decisions dating back several decades, how does the ACNC identify such persons in contemporary Australia?

Overall position

53. Because of the significant issues as listed above, the view of the Committee is that the ACNC should not proceed with the PBI CIS Redraft.

Recommendation

- **The Australian Charities and Not-for-profits Commission should not proceed with the Redraft of the Commissioner's Interpretation Statement: Public Benevolent Institutions in its current form.**

The Current PBI CIS – Improvements and updates taking into account the recommendations in the 2020 submission

54. In the Committee's view, the Current PBI CIS should be retained but improved and updated in line with the following:
- (a) The ACNC should not have regard to revenue implications when considering whether an entity is a PBI (see paragraph [56]). The Committee's relevant recommendation is set out in paragraph [56(d)] of this submission.
 - (b) The recommendations made in the Committee's 2020 submission (see paragraphs [7]-[33] of the 2020 submission) in relation to when an institution has a purpose of relieving PBI needs should be adopted and implemented. In paragraphs [57]-[73] of this submission, the Committee provides further detail and explanation of how the Current PBI CIS can be amended to accommodate the recommendation. The Committee's relevant recommendations are set out following paragraph [73] of this submission.
 - (c) The recommendations made in the 2020 submission (see paragraphs [34]-[48] of the 2020 submission) in relation to when an institution targets its activities towards those in need should be adopted and implemented. In paragraphs [74]-[94] of this submission, the Committee provides further detail and explanation of how the Current PBI CIS can be amended to accommodate the recommendation. The Committee's relevant recommendations are set out following paragraph [94] of this submission.
 - (d) The extent to which a PBI may have 'other' purposes (that is, purposes in addition to benevolent purposes) discussed in paragraphs [49]-[56] of the 2020 submission and expanded in paragraphs [95]-[138] of this submission. The Committee's relevant recommendations are set out in paragraph [138] of this submission.
55. It should be noted that the 2020 submission invited the ACNC to consider a number of questions. These matters were further discussed between members of the Committee and senior personnel of the ACNC at a meeting in December 2021. There is no indication in the PBI CIS Redraft that the ACNC has taken into account any of the matters or considered the questions which have been raised and no explanation has been given as to why this is the case.

Consideration of revenue implications

56. The ACNC should not have regard to revenue implications when considering if an entity is a PBI:
- (a) The ACNC Act established PBI as a category of charitable purpose(s). The tests upon which the ACNC ought to be focused are:
 - (i) whether an entity meets the requirements of being public, benevolent and an institution (taken as a term); and
 - (ii) whether an entity otherwise meets the eligibility requirements to be registered as a charity under the ACNC Act.
 - (b) Although there are revenue implications that follow from ACNC decisions, the ACNC is not directed by its Act to have regard to revenue considerations (see

section 15-10 of the ACNC Act). Further, one of the drivers behind the establishment of the ACNC was to avoid the perceived conflict of interest that existed when the ATO was determining charitable status – namely, protection of the revenue.

- (c) Additionally, while it is not a PBI case, in *Aid/Watch Incorporated v Commissioner of Taxation*,³⁵ the majority eschewed an approach that considered the revenue implications in determining whether an institution was charitable.
- (d) The recommendation set out below is to put the matter beyond doubt.

Recommendation

- **Part 7 of the current Commissioner’s Interpretation Statement: Public Benevolent Institutions should be amended to include a statement that taxation considerations do not form part of the process by which the Australian Charities and Not-for-profits Commission assesses where an entity is a public benevolent institution.**

A purpose of relieving PBI needs?

How does the concept of ‘in need’ apply in the modern context?³⁶

57. The Committee’s 2020 submission sets out the following recommendation and questions in relation to the above heading:

The PBI CIS needs to expand on the concept of people ‘in need’ in the modern context and clarify the cohorts to whom the concept applies. Questions to consider include:

- *Is it appropriate to define ‘need’ by reference to who arouses community compassion? What if an AFL player experiencing illness arouses community compassion and an asylum seeker fleeing a war-torn country does not?*
- *Is this legal test being used in practice? Or is the test more objective? Are there other considerations that are more pertinent to defining the concept of ‘need’?*
- *If there is a gradient of ‘need’, what is its purpose? Is it used to determine who is ‘in need’ by comparing against groups that are ‘more in need’? If so, can examples be provided of types of cohorts who are ‘in need’ and where they sit on the gradient? When will they no longer be ‘in need’?*

... The PBI CIS should provide further guidance on the concept of community development, with particular reference to:

- *How this concept applies to the provision of education and the operation of schools. It is clear that an entity providing education in*

³⁵ (2010) 241 CLR 539.

³⁶ For further discussion of this issue, see paragraphs [7]-[10] and paragraphs [34]-[43] of the Committee’s 2020 submission provided at Attachment A.

a developing country is targeting a community in need – in what other circumstances will this be the case?

- *Making clear that operating a school in a remote Indigenous Australian community is also targeting a community ‘in need’ as is a school in an inner-city suburb where the demographic is disengaged students who often do not complete high school.*
- *Making clear that providing vocational training in a low sociodemographic area with high rates of unemployment and underemployment is sufficiently targeted.*
- *The number of people that have to be ‘in need’ for it to be ‘the vast majority’.*

The PBI CIS should provide more guidance on when Indigenous community development activities (in the form of economic development) address Indigenous disadvantage and on when they are sufficiently targeted towards those in need.

58. Identifying the cohort the organisation is seeking to benefit is important to determining if the organisation meets the PBI requirements. For the organisation to be considered benevolent the cohort must be in need of benevolence. This is sometimes difficult to decide and the more examples and information that can be provided, the greater the clarity the ACNC will provide as is the aim of the CIS. The PBI CIS Redraft provides very little to assist on the borderline areas and provides less helpful discussion and information than the Current PBI CIS.
59. Reference to ‘arousing compassion in the community’ is not helpful as the community has vastly differing responses and levels of compassion today. No test of the level of compassion of the community is used and such a test was not used by McGarvie J (it was just an expression to try and demonstrate a level of seriousness to the needs requiring relief). Even if ‘most healthy people recover from such hurtful experiences with the passage of time’, as stated by McGarvie J in *Marriage Guidance Council of Victoria v Commissioner of Pay-Roll Tax (Vic)*,³⁷ this does not mean that an organisation providing counselling and support as relief of the suffering while it is being experienced as a result of divorce, bereavement, failure, deception, loss of status or reputation could not be a PBI. A more nuanced representation of this case is applied currently by the ACNC and the PBI CIS should reflect this.
60. To address these issues the current PBI CIS can be amended in the following manner to not just refer to examples arising from decided cases, but provide examples from how the ACNC interprets current applications:
- (a) Insert areas where the ACNC has considered the cohort to be ‘in need’ (for example: refugees; people with disabilities; people who are sick or injured, and their families/carers; those with housing insecurity; victims of disaster; people experiencing addiction; and people suffering abuse or discrimination, among many others.
 - (b) Insert descriptions of where a benevolence may be directed to a group such as a whole community, or a class at school – the CIS refers to developing countries and remote indigenous communities, but what is the view of other

³⁷ (1990) 21 ATR 1272, 1277 (McGarvie J).

low socio-economic areas in Australia with high rates of unemployment and school disengagement? Where the whole community is considered in need, are there any restrictions on how relief can be provided (for example, clarify that the helpless and hopelessness can be relieved through education and economic development, as currently occurs in many PBIs)?

(c) Insert areas where the ACNC has not considered the cohort to be 'in need'.

Prevention and relief³⁸

61. The Committee's 2020 submission sets out the following recommendation and questions in relation to the above heading:

The PBI CIS should be updated to articulate when prevention activities are benevolent, with specific reference to the following questions:

- *We understand that entities that work with people who are likely to become unemployed because of their circumstances are usually accepted as PBIs. Is this because the need being relieved is 'hopelessness' or 'helplessness'? Can the PBI CIS assist in framing this?*
- *Where do organisations that work with children to break the poverty cycle fit within the concept of prevention as benevolence?*
- *The PBI CIS explains that 'development assistance' is preventative because it stops certain needs recurring and is also relief because it relieves the needs of the people assisted. How does this apply to organisations carrying out their activities in Australia? Can the PBI CIS make clear that they can also do preventative activities because such activities will stop certain needs recurring and relieve those needs?*

62. The PBI CIS redraft no longer expressly addresses the extent to which prevention can constitute 'relief'. However, this is likely to be a recurring question for many organisations. Indeed, it is the elephant in the room for Examples 1 and 7 of the PBI CIS Redraft. The need for guidance provides another reason for returning to the Current PBI CIS as the starting base for amendments.

63. Precedent and policy provide support for treating at least some prevention as 'relief'. As to precedent, see for example, *Maclean Shire Council v Nungera Co-operative Society Ltd*, in which Handley JA held (Priestly and Sheller JJA agreeing) that an object of 'arresting ... social disintegration by strengthening and fostering the development of Aboriginal and Islander identity and culture' was a means of achieving a PBI object.³⁹ The Society's purpose was to 'relieve the poverty, sickness, destitution, distress, suffering, misfortune or helplessness of needy members of the Aboriginal community in the Maclean and surrounding areas of New South Wales' through the means identified in the object.⁴⁰

³⁸ For further discussion of this issue, see paragraphs [11]-[12] of the Committee's 2020 submission provided at Attachment A.

³⁹ (1994) 84 LGERA 139, 143 ('*Maclean Shire Council*').

⁴⁰ *Ibid* (emphasis of 'Maclean' removed from original).

64. Additionally, see for example, *Maughan*⁴¹ and, similarly, *Greater Wollongong City Council v Federation of New South Wales Police Citizens Boys' Clubs*.⁴² See also, *SIM Australia (as Trustee for SIMAID Trust) v Federal Commissioner of Taxation*,⁴³ which accepts that development activities under the Overseas Aid Gift Deduction Scheme (administered by the Department of Foreign Affairs and Trade) can constitute relief.
65. It is also accepted in *Global Citizen* that 'relief' can include prevention (see the description of polio eradication and vaccination programs intended to prevent diseases that can result in poverty,⁴⁴ and the reference to actions aimed at addressing the structural causes of poverty).⁴⁵
66. From the perspective of principle,⁴⁶ there are a range of possible responses to social welfare issues, particularly given intersecting causes for many issues.⁴⁷ Preventative activities would typically be sourced within this broader ambit of indirect activities and might involve general community education (for instance on drink-driving) or more targeted 'secondary' or 'tertiary' preventative activities aimed at high-risk groups or at people in need to prevent that need from recurring in the future.⁴⁸
67. It is suggested that distinguishing between primary, secondary and tertiary prevention may be a useful means of determining whether prevention is sufficiently directed to people in need to constitute 'relief'.⁴⁹ Primary prevention activities are typically directed at the wider community with the aim of reducing certain risks of a need arising in the first place. Secondary prevention activities are usually directed to persons at high risk of developing a need. Tertiary prevention activities are intended to stop a cause from recurring for persons who currently suffer from a particular need.
68. To address the recommendations of the Committee in its 2020 submission, the current PBI CIS could be amended by changing paragraph 5.9 to include a statement that: Preventative activities arise within a broader ambit of indirect activities and range from general community education (for instance on drink-driving) or more targeted 'secondary' or 'tertiary' preventative activities aimed at high-risk groups or at people in need to prevent that need from recurring in the future.⁵⁰ Primary prevention is typically directed at the wider community with the aim of reducing certain risks of a need arising in the first place. It would not generally amount to the benevolent relief of need. However, tertiary and secondary prevention should often be sufficiently directly linked to persons at risk so as to

⁴¹ (1942) 66 CLR 388, 397 (Williams J, Rich J agreeing).

⁴² (1957) 2 LGRA 54, 59.

⁴³ 2007 ATC 2243 [61] (Deputy President Walker).

⁴⁴ *Global Citizen* [2021] AATA 3313, [46]-[51].

⁴⁵ *Ibid* [119], [122].

⁴⁶ For further discussion of the issues of principle, see, eg, Ian Murray, 'Looking for "Direct Assistance" in the phrase "Public Benevolent Institution"' (2012) 35(1) *University of New South Wales Law Journal* 103.

⁴⁷ Judith Healy, *Welfare Options: Delivering Social Services* (Allen & Unwin, 1998) 15.

⁴⁸ Industry Commission, *Charitable Organisations in Australia*, Report No 45 (1995) 62-64, citing the Uniting Church of Queensland.

⁴⁹ These classifications of prevention are typically used in the context of public health and criminal justice. See, eg, Australian Institute of Criminology (Cth), *Approaches to Understanding Crime Prevention* (2009) <<http://www.aic.gov.au/publications/current%20series/crm/1-20/crm001.html>>; National Public Health Partnership, *The Language of Prevention* (2006); Australian Drug Foundation, *What is Alcohol and Drug Prevention?* (2016) <<http://www.druginfo.adf.org.au/fact-sheets/our-publications/fact-sheets/what-is-alcohol-and-drug-prevention>>. They have also been employed more broadly in relation to social welfare and charities. See, eg, Industry Commission, *Charitable Organisations in Australia*, Report No 45 (1995) 62-64, citing the Uniting Church of Queensland.

⁵⁰ *Ibid*.

comprise benevolent relief. Examples could then be given to clarify these categories.

Purposes and activities⁵¹

69. The Committee's 2020 submission sets out the following recommendation and questions in relation to the above heading:

The PBI CIS should be revised to clearly articulate the principles for establishing the dominant purpose of an entity and distinguishing activities that contribute to the dominant purpose or that are purposes in their own right.

70. To address this issue, the Current PBI CIS could be amended at paragraph [7] to incorporate the hierarchical path of inquiry set out in paragraph [25] of the 2020 submission, with that inquiry focussing first on the stated objects of the entity.

Advocacy as an activity and not a purpose⁵²

71. The Committee's 2020 submission sets out the following recommendation and questions in relation to the above:

Example 2 in the PBI CIS should be amended to clarify that such advocacy activities are encompassed within the modern notion of a PBI.

72. To address this, the Current PBI CIS could be amended at Example 2 to provide that Benevolent Care has a purpose of 'relieving youth unemployment' and that the dot-pointed purposes are merely activities carried out in pursuit of that purpose, such that Benevolent Care is a PBI.

73. Further the PBI CIS Redraft implies, at paragraph [18] that a charity that advocates for policy change cannot be a PBI based on the decision in *Global Citizen*. In the Committee's view, this is a selective, and potentially misleading application of the decision. The AAT explicitly did not opine on whether advocating for changes in government policy would be concrete enough to amount to relieving policy because it did not need to decide that question.⁵³

Recommendation

- **The Current Commissioner's Interpretation Statement: Public Benevolent Institutions should be amended in the manner set out in paragraphs [60], [68], [70] and [72] of this submission, to address the recommendations in the Committee's 2020 submission (Attachment A) in relation to when an institution has a purpose of relieving public benevolent institution needs.**

⁵¹ For further discussion of this issue, see paragraphs [13]-[30] of the Committee's 2020 submission provided at Attachment A.

⁵² For further discussion of this issue, see paragraphs [31]-[33] of the Committee's 2020 submission provided at Attachment A.

⁵³ *Global Citizen* [2021] AATA 3313, [125].

Conducting the Organisation Towards Those in Need – The Targeting Requirement

Hunger Project case and targeting⁵⁴

74. The Committee's 2020 submission sets out the following recommendation and questions in relation to the above:

Paragraph 5.6.3 of the PBI CIS and paragraph 6.5 of the Hunger Project CIS should reflect the fact that the Hunger Project case expressly sought to provide an inclusive and not an exclusive definition of PBI.

Paragraph 5.6.3.2 should be deleted from the PBI CIS and paragraph 6.5.2 should be deleted from the Hunger Project CIS.

75. The 2020 submission and the above recommendations are consistent with the decision of the AAT in *Global Citizen*. Indeed, the AAT was at pains to stress the open-textured nature of the connection between indirect activities and ultimate relief, stating: 'the cases do not suggest it is necessary to require proof of the link between the activities of the entity and the provision of relief. Nor are the cases prescriptive about the relationship between the relevant entities'.⁵⁵ Though, at some point, indirect activities may become so remote that 'it is not possible to say the entity is "organised" for, or "concerned in" or "promoting" the relief of poverty etc'.⁵⁶
76. This idea of the need for some connection (a fairly wide notion) is also reflected to an extent in paragraphs [18] to [22] of the PBI CIS Redraft. However, to the extent that the PBI CIS Redraft attempts to replace the 'clear mechanisms test' found in the Current PBI CIS with a 'clear connection' test as indicated in paragraph [17] of the PBI CIS Redraft, such a test has no basis in law.
77. At paragraph [17] of the PBI CIS Redraft the ACNC refers to paragraph [113] of the decision in *Global Citizen* as authority for the proposition that a clear connection is required between a PBI's activities to achieve its purpose and the relief. As outlined above, neither that paragraph [113], nor *Global Citizen* itself, can be read as authority for any such proposition.
78. To address this issue, paragraph [5.6] of the Current PBI CIS should be amended by deleting all of [5.6.2] and [5.6.3].
79. The reference to purpose in the above text is because it is not necessary that activities be guaranteed to achieve relief (see the Committee's 2020 submission) – the connection is with the goal of achieving relief.

Provision of general information and targeting⁵⁷

80. As set out in the Committee's 2020 submission, Example 2 of the PBI CIS relies on the statement at paragraph [5.1.3] that benevolence 'must be targeted (or directed) at people in need and not the broader general community'. The PBI CIS cites

⁵⁴ For further discussion of this issue, see paragraphs [44]-[45] of the Committee's 2020 submission provided at Attachment A.

⁵⁵ *Global Citizen* [2021] AATA 3313, [113].

⁵⁶ *Ibid* [115].

⁵⁷ For further discussion of this issue, see paragraphs [47]-[48] of the Committee's 2020 submission provided at Attachment A.

Australian Council of Social Service Inc v Commissioner of Pay-roll Tax (ACOSS) as authority for this statement.⁵⁸

81. The PBI CIS then cites a passage from *ACOSS* to conclude in paragraph [5.1.4] that: 'an organisation that provides general advice, information, research and advocacy services to the whole or part of the community is unlikely to be a PBI'. This has been reproduced in the PBI CIS Redraft at paragraph [26].
82. The ACNC should provide more detail about what this means in practice, particularly in modern times where websites, podcasts, electronic newsletters and other digital media are common and efficient means of providing information and advice. The ACNC should also clarify the principles in *ACOSS* that are being relied upon. In particular, paragraph [5.1.4] could be interpreted as meaning that a PBI which provides information or advice that is accessible by the general public is not eligible to be a PBI. However, this proposition is not supported by *ACOSS* (see below) and the question of whether information or advice is 'targeted or directed' towards disadvantaged groups is significantly more nuanced than simply considering who can access the information or advice.
83. In *ACOSS*, the purposes of the Australian Council of Social Services (**ACOSS**) were too broad for a PBI because they included the promotion of social welfare for all Australians. Relevantly, the issue was **not** that *ACOSS* provided information, which was accessible by the general community, but that the content of that information revealed that *ACOSS* sought to promote the welfare of the general community.
84. The PBI CIS should therefore clarify that a PBI which provides information and advice, which can be accessed by the general public (for example, because it is available on its website or through a podcast), is still a PBI if the reason that it provides that information and advice is to assist people in need of benevolent relief.
85. As noted above, in modern times, communication through websites, podcasts, newsletters and the like can be an efficient way of providing benevolent relief. For example, in the past, a PBI might have provided information about requesting a fee reduction from a utility company on the basis of financial distress at an in-person clinic. Now, that same information can be provided on a website where it has the potential to reach a much larger number of financially disadvantaged beneficiaries, including those who do not have the means to attend an in-person clinic. In both cases, the purpose of the PBI in providing the information is the same – to provide benevolent relief to people experiencing financial disadvantage. It would seem to be an inefficient and legally questionable result if only the first organisation could qualify as a PBI in purported reliance on *ACOSS*. In addition, in considering the modern meaning of PBI, modern forms of communication must be taken into account.
86. In terms of assessing the purpose of providing the information or advice, the CIS should provide two examples:
 - (a) where the information or advice is specifically relevant to a disadvantaged group (for example, information for people with disabilities on how to access a support worker); and
 - (b) where the information or advice is relevant to a disadvantaged group, but may also be relevant to the community generally (for example, information about preparing a CV).

⁵⁸ (1985) 1 NSWLR 567 ('*ACOSS*').

87. Where the information or advice is specifically relevant to a disadvantaged group, that information is necessarily targeted. ACOSS makes clear that the content of the information or advice is relevant in assessing the purpose of providing the information or advice. As such, if the content deals ‘exclusively with matters concerning poverty, destitution, sickness, helplessness or distress’ and the information or advice is directed at relieving these circumstances, it is clear that the information is being directed at people in need and not the general community.
88. Where the information provided by an organisation could be relevant or useful to the community at large and not only relevant to a disadvantaged group, the stated purpose of the organisation and its other activities should be viewed holistically to determine the organisation’s purpose. The mere fact that this information is provided to the community at large is not determinative. Rather, the ACNC should seek to ascertain the purpose of providing that information – whether it might be to assist the community generally, or to support the target disadvantaged group and providing the information on a website, for example, is the most efficient way for the disadvantaged group to access the information.
89. Where the other activities of the organisation are clearly targeted at a disadvantaged group, it is likely that the purpose of providing this information is to support that group as well. For example, an organisation that works with the long term unemployed to find employment, is not likely seeking to assist the general community by providing information on its website about writing a CV. Again, it is important to recognise that in modern times, providing information on a website, newsletter, podcast etc, are efficient mechanisms of targeting disadvantaged people.
90. An accurate summation of ACOSS can be found in the Full Federal Court decision of *Commissioner of Taxation v Hunger Project Australia*, which explained ACOSS in the following terms:

In ACOSS, the relevant institution, the Australian Council of Social Service, was an umbrella organisation the primary object of which was to promote the social welfare of all Australians, with particular reference to poor and disadvantaged persons...

ACOSS sought to promote relief from poverty by promoting social welfare in the country generally. Because its central activity involved seeking wellbeing not only for the poor, but for the public generally, his Honour doubted that its objects were those of a public benevolent institution.⁵⁹

91. In ACOSS, Priestly JA examined the publications produced by ACOSS and said:

I think it is nevertheless fair to say that the titles of the publications can be roughly divided into three categories: publications dealing exclusively with matters concerning poverty, destitution, sickness, helplessness or distress, publications dealing with one or more of those matters and more general issues and publications dealing with issues of general community concern which may or may not touch on any of the foregoing topics.⁶⁰

⁵⁹ [2014] 221 FCR 302, 47-48.

⁶⁰ ACOSS (1985) 1 NSWLR 567, 571.

92. His Honour then listed the numerous publications that fell within this third category, of 'general community concern', including publications on freedom of information, manpower issues, population issues, analysis of consumer groups, etc. The content of the publications was concerned with not just the welfare of people in need, but also with the general welfare of the community.⁶¹ Therefore, when the purposes and activities of ACOSS were viewed holistically (and given the general nature of the objects as expressed in the CSS's constitution), ACOSS's purposes were found to be too wide:

*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.*⁶²

93. In other words, the issue in ACOSS was not that the information was being broadly provided to the community, but that the information related to issues of general community concern and not the provision of benevolent relief. When viewed holistically, ACOSS was concerned with and sought the well-being of all Australians.
94. The Committee considers that paragraph [5.1.4] of the Current PBI CIS should be amended to:
- (a) clarify that in ACOSS, ACOSS was found not to be a PBI because it sought to promote the social welfare of all Australians;
 - (b) confirm that if an organisation provides information or advice widely, the ACNC will need to ascertain whether the purpose of providing that information or advice is for benevolent relief;
 - (c) provide examples to explain how that assessment will be made, with particular reference to the stated purposes of the organisation, circumstances where a charity provides information which is specifically relevant to the cohort in need and where a charity provides information which has broader relevance; and
 - (d) at Example 2, state that Benevolent Care is a PBI and that the five dot points are not purposes but activities which are a manifestation of the exercise of Benevolent Care's benevolence.

Recommendation

- **The Current Commissioner's Interpretation Statement: Public Benevolent Institutions should be amended in the manner set out in paragraphs [78], [82], [84], [86] and [94] of this submission to address the recommendations in the Committee's 2020 submission (Attachment A) in relation to when an institution targets its activities towards those in need.**

⁶¹ Ibid 574.

⁶² Ibid 575.

Registration of PBIs with another Charity Subtype

95. The Committee's 2020 submission sets out the following recommendation and questions in relation to the above heading:

The PBI CIS should clarify that an entity can be registered with the PBI subtype and with another subtype, so long as the purposes that form the basis for that other subtype are incidental or ancillary to the PBI purposes.

96. For this submission, the Committee has further considered this recommendation. The Committee has conducted a detailed analysis of the case law provided by the ACNC in the draft PBI CIS, and it has considered the case law since the 2020 submission. The analysis is set out below.
97. The following propositions emerge in paragraphs [34]-[38] of the PBI CIS redraft:
- (a) any purpose (other than a purpose of providing benevolent relief) must be ancillary or incidental to a charity's purpose of providing benevolent relief;
 - (b) if a charity has a purpose other than providing benevolent relief, and that purpose is of substance in its own right, it is regarded as an independent purpose, not an ancillary or incidental purpose; and
 - (c) if a charity has an independent purpose that is not providing benevolent relief, it is not entitled to registration as a PBI. For example, if a charity has an independent purpose of advancing religion or advancing the natural environment, it is not entitled to registration as a PBI.
98. In summary, the Committee considers that:
- (a) These propositions appear contradictory to the express provisions of section 25-5 of the ACNC Act.
 - (b) These propositions are not supported by law.
 - (c) These propositions are not workable in practice.
 - (d) These propositions are contentious and are not the articulation of existing, established legal principle.
99. A detailed explanation of the above points is set out below.
100. In the interests of brevity, the following terms are used as short-hand in the following paragraphs:
- (a) 'benevolent purpose' to mean being organised for the relief of such poverty, sickness, disability, misfortune and helplessness as arouses compassion in the community; and
 - (b) 'other purpose' to mean any purpose that is charitable at law but is not a benevolent purpose as described above.

Contrary to express provisions in section 25-5 of the ACNC Act

101. Subsection 25-5(4) of the ACNC Act specifically recognises that 'an entity may be entitled to registration as more than one subtype of entity'. It does not exclude PBIs

from this category. In fact, it specifically recognises that a PBI may have another subtype. The note to section 25-5 also states '[a]n entity could be registered as an entity with a purpose of advancing social or public welfare, and also be registered as a public benevolent institution.'

Not supported by law

102. Of most concern to the Committee in relation to paragraphs [36]-[37] of the PBI CIS Redraft is the absence of authority supporting the propositions stated by the ACNC:

- (a) There is no authority cited for the statement at paragraph [36] that 'if a charity has a purpose other than providing benevolent relief, and that purpose is of substance in its own right, it is regarded as an independent purpose, not an ancillary or incidental purpose.'
- (b) There is no authority cited to support the statement at paragraph [37] that 'if a charity has an independent purpose that is not benevolent relief, it is not entitled to registration as a PBI.'

103. If it is intended that the authority cited in the next sentence of paragraph 36 applies to it, that authority is not a PBI case – it does not address the issues. Paragraphs [36] and [37] of the PBI CIS Redraft are unsubstantiated opinion and not law.

104. Paragraph 35 of the PBI CIS redraft states:

For a charity's main purpose to be providing benevolent relief, any other purpose must be ancillary or incidental to its purpose of benevolent relief
(Paragraph 35 Proposition).

105. The crux of the issue is as follows:

- (a) The starting proposition is the stipulation that a PBI must have benevolent purposes as its predominant purposes.⁶³
- (b) A separate proposition, but well established at law, is that a charity must have exclusively charitable purposes, and that any other purposes must be incidental or ancillary.⁶⁴
- (c) The ACNC appears to have merged both of these principles into one, in the case of PBIs.
- (d) This is an error of law and a misapplication of the relevant principles.

106. The point of contention may be summarised as follows:

⁶³ The view is expressed by the ACNC in the PBI CIS Redraft paragraph [34], and subparagraphs [5.1.1] – [5.1.2] of the Current PBI CIS. The Current PBI CIS makes clear that this is an ACNC summary of the position expressed in *Perpetual*. However, in the interests of technical accuracy, it should be noted that the term 'purpose' was not utilised in that case – see paragraph [137] on this point. Accordingly, the terminology of 'main purpose' should, in this context, be understood to be an ACNC summary of the relevant principles, but in other contexts, it may be necessary to have regard to the specific wording evident in the relevant case law, and in that regard, subparagraphs [5.1.1] and [5.1.2] of the current PBI CIS contain preferable wording to that which appears in paragraph [34] of the PBI CIS Redraft.

⁶⁴ *Congregational Union of New South Wales v Thistlethwayte* (1952) 87 CLR 375, 442, 450; *Stratton v Simpson* [1970] HCA 45.

- (a) Whether the case law establishes (as contended for by the ACNC in the Paragraph 35 Proposition) that:
- (i) ‘Predominant’ means ‘exclusive’ such that any other purpose ‘**must**’ be incidental or ancillary to the benevolent purpose; and
 - (ii) the existence of any other purpose that is not incidental or ancillary to benevolent relief means that the predominant purpose **cannot** be benevolent relief;
- (b) or
- (c) Whether the case law simply establishes that the predominant purposes must be benevolent (to be a PBI).⁶⁵

107. There are 4 authorities cited by the ACNC to support the Paragraph 35 Proposition:

- *Maclean Shire Council v Nungera Co-operative Society Ltd (Maclean)*,⁶⁶
- *Federal Commissioner of Taxation v Launceston Legacy (Launceston Legacy)*,⁶⁷
- *Northern Land Council v Commissioner of Taxation*,⁶⁸ and
- *Women’s Life Centre Inc v Commissioner of the Australian Charities and Not-for-profits Commission (Women’s Life Centre)*.⁶⁹

108. None of these provide authority for the Paragraph 35 Proposition and each will be addressed in turn below. However, at the outset, the following excerpt from Ann O’Connell, *Taxation of Charities and Not-for-profits* should be noted (footnotes omitted):

*In its Interpretation Statement on PBIs, the ACNC states that benevolent relief must be the ‘main’ purpose of a PBI, and if it has other non-benevolent purposes, it will be ineligible to be a PBI unless those purposes are ancillary or incidental to the main benevolent purpose. It also states that if an entity’s main purpose is advancing religion it will not be eligible to be registered as a PBI. This indicates that the ACNC takes the view that a PBI cannot have more than one main purpose, although it does not provide any authoritative case law to support this proposition.*⁷⁰

Maclean Shire Council v Nungera Co-operative Society

109. This case does not provide sufficient authority to support the Paragraph 35 Proposition.

110. Presumably, the statements that the ACNC is relying on to support the Paragraph 35 Proposition are as follows (emphasis added):

⁶⁵ Please see the footnote directly above regarding the use of this phraseology by the ACNC as a summary.

⁶⁶ (1995) LGERA 430, 432-433 (Handley JA)

⁶⁷ (1987) 75 ALR 122, 138 (Northrop J).

⁶⁸ [2002] NTCA 1, 7 [22] (Mildren J).

⁶⁹ (2021) 112 ATR 967, [32] (the Tribunal).

⁷⁰ Ann O’Connell, *Taxation of Charities and Not-for-profits* (LexisNexis, 2020), 125.

The Council submitted that the Society was not a public benevolent institution because it had independent or collateral objects and powers which enabled its funds to be devoted to purposes which were not benevolent...

*It is **well established** that the existence of such 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.***⁷¹

111. However, the Committee notes that:

- the Nungera Co-operative Society was found to be a PBI;
- the principles were cited as ‘well established’ were cited in the context of decisions about whether an entity is charitable – they were not PBI cases;
- the relevant point of law was not argued in this case. What was argued in this case was the application of law to certain facts – namely, the specific provisions of the constitution of this association; the relevant issues of law were not contested at the time. See above to reference to them being ‘well established’; and
- in circumstances when the relevant principles of law are plainly in contest, it does not resolve the issue to assert they were determined in this case. It is not *ratio decidendi* which follows from the case.

112. Additionally, the passage cited above states that the ‘well established’ principles apply to religious and scientific institutions as well. If this were a true *ratio decidendi* in the manner contended for by the ACNC in the Paragraph 35 Proposition, then it would follow that religious institutions and scientific institutions were bound by the same rule. Such an approach stands at odds with facts and the decision of the High Court in *The Young Men’s Christian Association of Melbourne v Federal Commissioner of Taxation*.⁷² When considered this way, the reliance by the ACNC on *Maclean* misapplies the decision.

Federal Commissioner of Taxation v Launceston Legacy

113. It is the Committee’s submission that *Launceston Legacy* does not provide authority for the Paragraph 35 Proposition. The issue at law in this case was whether the relevant institution had a predominantly benevolent purpose:

*the question of law is whether a public benevolent institution can include a public institution extending assistance to a restricted class of recipients chosen or capable of being chosen without regard to whether the recipients are in necessitous circumstances.*⁷³

114. This issue (and the facts described in the decision) appear directed to the matter addressed in paragraph [26] of the PBI CIS Redraft: whether relief is sufficiently targeted to those in need – and therefore whether its predominant purpose was benevolent. The resolution of that issue does not determine whether any other purpose **must** be ancillary or incidental to its purpose of benevolent relief.

115. The Committee queries whether the case establishes the proposition as contended for by the ACNC that the existence of any other purpose that is not incidental or

⁷¹ *Maclean Shire Council v Nungera Co-operative Society* (1995) LGERA 430, 432 (Handley JA).

⁷² [1926] 37 CLR 351.

⁷³ *Federal Commissioner of Taxation v Launceston Legacy* (1987) 87 ATC 4635 (Northrop J).

ancillary to benevolent relief means that the predominant purpose cannot be benevolent relief. The following passage is presumably the one upon which the ACNC relies (emphasis added):

*In my opinion, **the essential object of Launceston Legacy is benevolent. The objects and powers listed in the Objects section of its Constitution are incidental and ancillary to that essential object.** If it be a fact that some of those powers and objects, considered alone, might not be regarded as benevolent, that fact would not prevent Launceston Legacy being benevolent. By analogy, I apply what was said by Dixon C.J., McTiernan, Williams and Fullagar JJ. In *Congregational Union of New South Wales v Thistlethwayte* (1952) 87 C.L.R. 375 at p. 442. 1. I agree with the opinion of the Tribunal that Launceston Legacy "serves a group in need within the community. In doing so, it recognises that need is not synonymous with financial poverty and that benevolence is a much broader concept than 'financial assistance'. Accordingly, I hold that Launceston Legacy is a public benevolent institution within the Administration Act."⁷⁴*

116. Northrop J conducted a detailed analysis of the objects of Launceston Legacy. The constitution provided that legacy benefits were available to 'dependents' of deceased servicemen and servicewomen. Northrop J acknowledged that the relevant 'definitions are rather inelegantly worded and not as clear as would be desired', and so looked to the Code of Legacy and Charter of Legacy and Constitution of Legacy for context. Northrop J found that '[t]he use of the word "dependants" in these documents connotes a person who depends on another for support'.⁷⁵

117. Northrop J found that (emphasis added):

*On the facts of the present appeals, I am satisfied that Launceston Legacy is an institution organized for the relief of poverty, suffering, distress or misfortune as discussed in the authorities. It is quite natural to describe it as a benevolent institution. I see nothing odd or inappropriate in so describing Launceston Legacy. **It is providing a caring service, not limited to the provision of money, to persons who are in need.** The caring service that is provided is something which cannot be bought. It is given voluntarily by the Legatees."⁷⁶*

118. When read in context, the case should be read as determining whether relief is sufficiently targeted to those in need, and the nature of the needs that may be met by a PBI.

119. The specific findings made by Northrop J do not determine the issues presently in contention:

- Northrop J found that the essential object was benevolent.
- Northrop J also found that the objects and powers of Launceston Legacy were incidental and ancillary to that essential object.

⁷⁴ Ibid 4646.

⁷⁵ Ibid 4640.

⁷⁶ Ibid 4646.

- Northrop J also found that if some of the objects and powers were not benevolent, it would not prevent Launceston Legacy being benevolent.
- Northrop J relied ‘by analogy’ on the incidental/ancillary concept in *Congregational Union of New South Wales v Thistlethwayte*⁷⁷ to support this finding.
- However, it does not follow from that that other objects or powers can **only** be incidental or ancillary.
- Nor does it follow that the presence of other objects or powers **will prevent** a finding that the main or essential or predominant object is benevolent.

120. Accordingly, this case does not provide authority for the Paragraph 35 Proposition.

121. Further, the Committee notes the following statement of Northrop J which is in contradiction to the Paragraph 35 Proposition (emphasis added):

*Launceston Legacy seeks to achieve its essential object. The other **main object of honouring departed ex-servicemen and maintaining and handing on the ideals for which they gave or risked their lives is achieved by seeking to carry out the essential object.***

122. Consider the implications of this statement if the words underlined were replaced with any of religion, education, health, protection of the environment, promoting and protecting human rights or another charitable purpose. When considered in this light, the decision of Northrop J in *Launceston Legacy* is contrary to the Paragraph 35 Proposition – it states that a second (‘other’) ‘main’ object is possible.

Northern Land Council v Commissioner of Taxes

123. Paragraph [39] of this decision mentions incidental and ancillary objects. However, it is premised with the statement from Mildren J that these issues were not argued in the case, and as a result, Mildren J does not rely on them in reaching a conclusion. Accordingly, it is not appropriate for the ACNC to rely on them as authority to support the statements in the CIS. In any event, the matter is one in which the Northern Land Council was found to be a PBI.

Women’s Life Centre Inc v Commissioner of the Australian Charities and Not-for-profits Commission

124. The relevant passage relied upon by the ACNC to support the Paragraph 35 Proposition is as follows (emphasis added):

*The characterisation process requires that we consider the main purpose because an organisation might have a number of purposes that are ancillary to its main purpose or objective. For example, it might have to engage in fund-raising activities or make investments that will facilitate the achievement of the main purpose of providing benevolent relief. Provided we are satisfied those other purposes are genuinely ancillary to the main purpose of benevolence, that will not be an issue. But **if we are not satisfied benevolence relating to an identified need is the main purpose** – because one of the supposedly ancillary purposes has effectively become an end in itself, or because there is evidence which suggests another sufficiently important purpose is present – then the*

⁷⁷ (1952) 87 CLR.

*applicant may not qualify as a public benevolent institution. As Handley JA explained in Maclean Shire Council v Nungera Co-operative Society Ltd (1994) 84 LGERA 139:...*⁷⁸

125. The issue in this decision was whether benevolent purposes were the main purpose. On the relevant facts, it was found that it was not.
126. The judgement in this matter was given by Deputy President McCabe and Professor Ann O'Connell of the Administrative Appeals Tribunal. These same Tribunal Members specifically considered the issues that are now in contention (namely the Paragraph 35 Proposition) in *Global Citizen*. It is an error to endeavour to read *Women's Life Centre* as establishing a proposition that the Tribunal Members themselves do not consider it established, as is evident from the specific text in the *Global Citizen* decision.
127. Paragraphs 83-87 of the decision in *Global Citizen* address the specific issues raised in the Paragraph 35 Proposition (emphasis added, footnotes omitted):

*An alternative view, favoured by the Commissioner, is that the 'main purpose' requirement means that any other purpose must be incidental or ancillary to the benevolent purpose. On that view, an independent non-incidental purpose would be disqualifying. The conception of 'main purpose' under this alternative view appears to come from charity law and in particular from cases dealing with charitable bequests, where a gift to both charitable and non-charitable purposes would be invalid. This gave rise to the notion of 'exclusively charitable purposes', although different terminology has been used in the cases. In *Stratton v Simpson*, for example, Windeyer J (at [10]) refers to the 'main object'; in *Navy Health Ltd v Federal Commissioner of Taxation*, Jessup J noted (at [59]) that the purposes of a charitable institution must be 'wholly charitable' while the High Court in *Word Investments* used the phrase 'main, dominant or predominant': at [17] per Gummow, Hayne, Hayden and Crennan JJ.*

*Windeyer J in *Stratton v Simpson* discussed the different meanings that could be used:*

In itself the phrase 'main object', as used in legal writings, is ambiguous: but in any particular case the context or the topic ordinarily shews in which of two senses it is used. Sometimes it means the principal object of an institution having also secondary objects or activities which, although of less importance, are capable of being lawfully pursued independently of and without their having any essential bearing upon the pursuit of the main object. On the other hand the words can postulate a dominant object, other objects being all incidental, subservient and ancillary, only lawfully to be pursued as conducive to promoting the main object.

Windeyer J preferred the latter meaning in the context of that case. This principle is now expressed in the Charities Act that defines a charity to mean an entity 'all of the purposes of which are charitable purposes; or purposes that are incidental or ancillary to, or in furtherance of the

⁷⁸ *Women's Life Centre Inc v Commissioner of the Australian Charities and Not-for-profits Commission* (2021) 112 ATR 967, [32].

[charitable] purposes'. While a PBI is a type of charity, it is important to distinguish between cases and principles that apply to determining charitable status on the one hand and those that apply to determining PBI status on the other. Although it may be appropriate to consider charity cases in interpreting the term PBI – as we have done - it must be done with caution and mindful of the differences in the concepts. The fact that charitable purpose or purposes must be exclusively charitable does not mean a PBI must have exclusively benevolent purposes.

*The issue about independent purposes in the PBI context appears to have first arisen in **Maclean Shire Council v Nungera Co-operative Society Ltd**. That case dealt with the entitlement to an exemption from local rates that was available to PBIs. The Society provided housing for families from the aboriginal community that were mostly unemployed. The Council conceded the Society did have benevolent objects but it argued the Society was nevertheless not a PBI because it was permitted under its constitution to distribute any surplus on winding up to any 'charitable purpose or undertaking'. Handley JA (with whom the other judges agreed) observed:*

It is well established that the existence of such independent and collateral objects and powers can result in an institution losing some status it would otherwise possess.

Interestingly, none of the cases his Honour referred to are PBI cases. Handley JA then noted 'the current position in Australia of Aboriginals is such that any valid charitable trust for their benefit must also be for public benevolent purposes'. In relation to the relevant power, Handley JA concluded the correct interpretation of the constitution as a whole was that the power was 'dependent or incidental'.

*The Commissioner also relied on some other cases concerned with exemptions from council rates in different states and territories. In only one case was it held there were independent non-benevolent objects – and this appeared to turn on the drafting of the constitution of the entity. **Bodalla Aboriginal Housing Co Ltd v Eurobodalla Shire Council** dealt with an exemption under the Local Government Act 1983 (NSW). The exemption in question referred to a 'public charity or public benevolent institution' and much of the judgment is concerned with the term 'public charity'. There were numerous objects referred to in the memorandum of association. Preston CJ at first instance pointed out there was no 'chapeau specifying an overarching object of relief of poverty etc' (as there had been in **Maclean**) and on that basis several objects, when read in isolation, were non-benevolent. This meant the company was not a PBI. Preston CJ did note the objects were amended in 2011 and that for years afterwards the Council had accepted the company was a public charity. In the decision of the Land and Environment Court of New South Wales in **Gumbangerrii Aboriginal Corporation v Nambucca Council**, Stein J declined to read the objects disjunctively despite the absence of an overarching clause and concluded all of the objects were benevolent. In **Northern Lands Council v Commissioner of Taxes**, the Northern Territory Court of Appeal also concluded that, looked at holistically, all the objects in the constitution were incidental to the benevolent purpose. **Our analysis of the authorities suggests we***

should not apply an ‘exclusivity of purpose’ test in relation to PBIs.
*It is interesting to note that when the Commissioner of Taxation was responsible for determining PBI status before arrangements changed in 2012 he took the view that ‘any other purposes and operations must be incidental to the public benevolence or of minor extent and importance’.*⁷⁹

Summary of the Committee’s position

128. In summary, the following emerges from *Global Citizen*:

- (a) *Maclean* cannot be relied upon for the proposition asserted by the ACNC in paragraph 35 of the PBI CIS Redraft;
- (b) the fact that charitable purpose or purposes must be exclusively charitable does not mean a PBI must have exclusively benevolent purposes;
- (c) as such, the ACNC has made an error in confusing the incidental/ancillary test as it exists as a charitable law requirement with the PBI predominant purpose test;
- (d) the AAT explicitly rejected the view taken by the Commissioner, and it is therefore incorrect of the Commissioner to effectively assert those views in paragraph 35 of the PBI CIS Redraft.

129. *Global Citizen* is the most recent decision in relation to PBI; it specifically considers the issues raised in paragraphs 35-38 of the PBI CIS redraft, and the PBI CIS redraft makes no reference to it in this context.

130. As to whether a decision of the AAT can only suggest a way forward, rather than set precedent, see comments in paragraph [36(j)] above. It is also concerning to the Committee to see inconsistency in the ACNC’s approach without justification:

- (a) *Women’s Life Centre*, a decision of the AAT, has sought to be relied upon by the ACNC in the PBI CIS Redraft as precedent in relation to the Paragraph 35 Proposition at footnote 42.
- (b) The Draft CIS on Health Promotion Charities cites numerous decisions from the AAT.

131. The Committee is strongly of the view that *Global Citizen* ought to be applied. This is even more so in circumstances when there are no authorities cited for paragraphs [36] and [37] of the PBI CIS Redraft and insufficient authority cited for the Paragraph 35 Proposition.

Not workable in practice

132. In addition to being unsupported by law, it is also concerning that in practice, the dividing line between an independent or an ancillary purpose can be illusory:

- (a) The PBI CIS Redraft states that an ‘independent’ purpose is one that has substance in its own right (paragraph [36]) and that an **ancillary** or incidental purpose is one that ‘tends to assist or goes naturally with’ the achievement of benevolent purposes (paragraph [35]). It seems that there are many cases where a purpose may be one that is ‘of substance’, but that also ‘tends to

⁷⁹ *Global Citizen* [2021] AATA 3313, [83]-[87].

assist or naturally goes with' a benevolent purpose. An example of this would be a PBI hospital that has advancement of health as one of its purposes. In any event, the distinction between 'independent' and 'ancillary' is not a distinction that needs to be made in relation to eligibility for PBI.

- (b) The PBI CIS Redraft has also not addressed whether subtype registration is possible for an incidental or ancillary purpose.

A new proposition

133. There are numerous hospitals, aged care facilities and other charitable institutions in Australia that are founded with both benevolent *and* other purposes, and that have PBI status.
134. Whether these PBIs are newly registered or were PBIs before the ACNC came into existence, the notion that these organisations are now not entitled to PBI is a new proposition. The ACNC's position in the PBI CIS Redraft represents a significant departure from what has been the case since the concept of PBI was created.
135. Consider, for example, the *Hobart City Mission* case.⁸⁰ Paragraphs [34] and [35] of *the Hobart City Mission* case deal precisely with the point in respect of the advancement of religion (emphasis added):

But for the religious interests of the Mission there could not be any reasonable doubt that it would properly be described as a 'public benevolent institution'. On the facts as they appear in evidence, we are satisfied that the relief work is not merely ancillary and subordinate to the religious aspect, but is at least of equal importance for the purposes of this case. We regard the City Missioner as a witness of truth, and we accept his statement (which is supplemented by the particulars in the annual reports) that the giving of relief to those in poverty and distress is not a secondary task of the Mission, but is one to which the energies of the City Missioner and the Mission Sister are mainly directed. Even if we were of opinion that both phases of the Mission's work-the religious and the material-were of equal importance and called for an equal division of the time of the two officials, we think it would be open to us to find in favour of the taxpayer's claim. In view, however, of the volume of relief work, the time devoted to it and other circumstances, including the substantial amount of public recognition and practical aid, we have little difficulty in arriving at the conclusion that the Hobart City Mission is a public institution which promotes the relief of poverty, suffering, distress or misfortune, and is therefore a 'public benevolent institution'.

It may be added-although it is not a vital factor in our decision that the religious aspect cannot reasonably be divorced from the material. Poverty or helplessness is not always the result of adverse exterior forces: it is often clue to moral anaemia, the cure for which is to be found in a wholesome outlook on life. Consequently, even where a man's physical needs are urgent and paramount, it may be found necessary to awaken spiritual forces within him if he is not to become a permanent subject of material assistance. Seen in this light, the religious work of the Mission is a valuable, if not indispensable, accompaniment to its efforts in alleviating misfortune of various kinds.

⁸⁰ Commonwealth Taxation Board of Review, 12 CTBR Case 101, Reference No 139/1945.

136. The view expressed by the ACNC is that a PBI must have a ‘main purpose’ of benevolence. This is set out in paragraph [5.1] of the Current PBI CIS (footnotes omitted and emphasis added):

5.1. People in need

*5.1.1. The seminal case of *Perpetual Trustee Co Ltd v Commissioner of Taxation* (1931) 45 CLR 224, established that a PBI is benevolent if it is organised, promoted or conducted for the relief of poverty or distress (sickness, disability, destitution, suffering, misfortune or helplessness).*

5.1.2. In simple terms, a PBI must have benevolent relief as its main purpose, and that relief must be specifically targeted at people in need and provided to relieve the needs of those people.

137. However, it should be noted that the relevant case law does not use the term ‘main purpose’ in this way. Reflected in subparagraph [5.1.1] of the current PBI CIS, the actual wording that appears in *Perpetual* decision is different:

- (a) Dixon J utilised the terminology of ‘organised and conducted’, ‘promoted and conducted’ and ‘promote’;
- (b) Evatt J did not specifically use any term;
- (c) McTiernan J (minority) stated that ‘its object was to minister to’.⁸¹

The wording as it appears in paragraph [5.1.1] of the current PBI CIS should be retained as it is the accurate wording as it appears in the case law.

138. It follows from this analysis that:

- (a) The ACNC Act specifically allows a PBI to have more than one subtype. The CIS should recognise this.
- (b) The case law cited by the ACNC in the updated PBI CIS does not support the proposition that other purposes to be merely incidental or ancillary. Such statements should be deleted from the CIS.
- (c) The existing case law clearly recognises and envisages that a PBI may have other purposes. The CIS should reflect this.

⁸¹ *Perpetual* (1931) 45 CLR 224.

Recommendations:

- **The Commissioner’s Interpretation Statement: Public Benevolent Institutions should recognise that the *Australian Charities and Not-for-profits Commission Act 2012* (Cth) specifically allows a PBI to have more than one subtype.**
- **Statements on the basis of case law cited by the Australian Charities and Not-for-profits Commission in the Redraft of the Commissioner’s Interpretation Statement: Public Benevolent Institutions which do not support the proposition that other purposes to be merely incidental or ancillary should omitted.**
- **The Commissioner’s Interpretation Statement: Public Benevolent Institutions should reflect existing case law which clearly recognises and envisages that a public benevolent institution may have other purposes.**

Further recommendations

139. The Committee also makes the following recommendations

Recommendations:

- **Given the significance of the implications of the Redraft of the Commissioner’s Interpretation Statement: Public Benevolent Institutions, finalisation of this document should be delayed until such time as the permanent Commissioner of the Australian Charities and Not-for-profits Commission is appointed.**
- **Given the significant concerns with the current version of the Redraft of the Commissioner’s Interpretation Statement: Public Benevolent Institutions, a second version be issued with an appropriate period of consultation.**
- **All submissions made in relation to the current version of Redraft of the Commissioner’s Interpretation Statement: Public Benevolent Institutions should be made public on the Australian Charities and Not-for-profits Commission website prior to the issuing of the second version.**
- **The Australian Charities and Not-for-profits Commission should cease its current audit of public benevolent institutions for the time being.**

140. In relation to the recommendation about publication of submissions, the Committee consents to this submission being published by the ACNC.