

## LOOKING FOR 'DIRECT ASSISTANCE' IN THE PHRASE 'PUBLIC BENEVOLENT INSTITUTION': TIME TO ABANDON THE SEARCH

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### I INTRODUCTION

Lord Milner asserted '[i]f we believe a thing to be bad, and if we have a right to prevent it, it is our duty to try to prevent it and to damn the consequences'.<sup>1</sup> As the law is currently administered, not-for-profit entities which adopt this maxim and use preventative means to achieve their objects do suffer consequences. The tax concessions that come with public benevolent institution ('PBI') status are denied to them on the basis that the term PBI requires relief to be provided 'directly' in respect of needs arousing compassion in the community. However, this paper's thesis is that the PBI concept does permit preventative activities as a matter of law and should as a matter of policy, provided they are sufficiently targeted to relieving needs arousing compassion in the community. It is argued that such an 'expanded' PBI concept is consistent with the policy behind PBI status of promoting selected social welfare objectives while still maintaining an appropriate balance between revenue sustainability and the achievement of those objectives.

A reconsideration of the issue is timely, as the Federal Government has recently embarked on a number of not-for-profit reforms,<sup>2</sup> including the establishment of a working group ('Tax Concession Working Group') to review tax concessions for not-for-profits,<sup>3</sup> a term which would include all charities and

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1 Lord Milner (Speech delivered at Saint Andrew's Hall, Glasgow, 26 November 1909), quoted in A M Gollin, *Proconsul in Politics: A Study of Lord Milner in Opposition and in Power* (Anthony Blond, 1964) 157 (the comment related to tax reform in the United Kingdom).

2 For a useful summary of the full range of reforms, see, eg, Department of the Treasury, *Not-for-Profit Reform* (9 March 2012) < [www.treasury.gov.au/Policy-Topics/PeopleAndSociety/NFP-reform](http://www.treasury.gov.au/Policy-Topics/PeopleAndSociety/NFP-reform) >.

3 Mark Arbib and Mark Butler, 'Not-for-Profit Sector Tax Concession Working Group' (Press Release, No 7, 12 February 2012).

PBIs, along with other organisations.<sup>4</sup> The reforms also involve the introduction of a national regulator, in the form of the Australian Charities and Not-for-profits Commission ('ACNC'),<sup>5</sup> which will apparently take over the Commissioner of Taxation's ('Commissioner') role of determining PBI status, as well as charitable status.<sup>6</sup> Although not directly relevant, the adoption of a statutory definition of 'charity' is also planned, with the consultation paper suggesting that the current law on the meaning of charity would permit preventative means to advance charitable social welfare purposes and expressly asking whether the wording of the statutory definition should clarify this issue for the meaning of charity.<sup>7</sup>

Part II explains how the term PBI operates as a means of targeting additional tax concessions to a limited pool of charities which are more generous than those ordinarily applying to charities.<sup>8</sup> This paper focuses on the deductible gift recipient ('DGR') category of PBI used in the *Income Tax Assessment Act 1997* (Cth) ('ITAA97'), which enables donors to obtain tax deductions. Parts II(B) and II(C) examine the leading case on the construction of the term, along with subsequent decisions, to demonstrate that there is no binding requirement that relief be provided directly.

In Part III(A), the paper distinguishes direct activities, such as the provision of food or clothing by a PBI itself (including through agents or as a delivery participant with other organisations) to persons currently in need, from indirect activities, which comprise a range of matters, such as research, intermediary activities by peak organisations, and preventative measures. It is demonstrated that they each form part of a spectrum of responses to achieving particular ends. Part III(B) then explores reasons why preventative activities, in particular, might be preferred in some circumstances.

On the bases that there is no express requirement for direct relief and that there may be circumstances in which preventative activities are preferable, Part IV(A) emphasises that the PBI concept is ambulatory, within the bounds of *Perpetual Trustee Co Ltd v The Federal Commissioner of Taxation* ('*Perpetual Trustee*'),<sup>9</sup> permitting expansion to encompass preventative activities. Part IV(B) shows that precedent on some aspects of charity law bolsters the use of preventative means to achieve targeted PBI ends. The argument is not that charities are analogous to PBIs and hence that developments in charity law

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4 See, eg. Productivity Commission, 'Contribution of the Not-for-Profit Sector' (Research Report, 11 February 2010) 3–8.

5 Commonwealth of Australia, 'Budget Paper No. 2: Budget Measures 2011–12' (10 May 2011) 322–3; Bill Shorten, Assistant Treasurer, 'Susan Pascoe Appointed NFP Reform Implementation Taskforce Chair' (Press Release, No 100, 4 July 2011) <<http://ministers.treasury.gov.au/DisplayDocs.aspx?doc=pressreleases/2011/100.htm&pageID=003&min=brs&Year=&DocType=>>; Department of the Treasury (Cth), 'Final Report: Scoping Study for a National Not-for-profit Regulator' (Final Report, April 2011) 3, 29–30.

6 Exposure Draft, Australian Charities and Not-for-profits Commission Bill 2011 (Cth) cl 5-10(3) item 1.

7 Department of the Treasury (Cth), 'Consultation Paper: A Definition of Charity' (Consultation Paper, 28 October 2011), [125] <<http://archive.treasury.gov.au/contentitem.asp?NavId=037&ContentID=2161>>.

8 See, eg. Ian Sheppard, Robert Fitzgerald and David Gonski, Department of the Treasury (Cth), 'Report of the Inquiry into the Definition of Charities and Related Organisations' (Final Report, 28 June 2001) 243.

9 (1931) 45 CLR 224.

should affect the meaning of 'PBI'. Instead, the discussion recognises that some components of the PBI test are the same as, or similar to, those for charities and therefore cases on these components are relevant.

Finally, Part V investigates the implications of accepting that PBIs may predominantly carry out preventative activities, including whether any limits should be imposed. This investigation is carried out by reference to the policy underlying the PBI category (Part V(A)), being to support selected social welfare objectives, while also ensuring an appropriate balance between fiscal requirements and welfare objectives. In particular, Part V(B) looks at whether the degree of advancement of social welfare objectives by preventative activities can be evaluated and also whether such advancement can be obtained more efficiently. Part V(C) discusses the potential impact on revenue sustainability. It is proposed that restrictions are needed so that too broad a range of indirect activities, with their revenue impact and risk of insubstantial benefits, are not permitted. However, it is submitted that these limits are largely in place through the PBI targeting requirement, the need to establish that a welfare objective will be advanced and the general limits on charities.

## II CURRENT LAW ON THE MEANING OF PBI

### A Tax Concessions For PBIs

The term 'PBI' is used in various pieces of tax legislation to direct concessions to a particular class of entities.<sup>10</sup> The better view is that PBIs form a sub-class of charities,<sup>11</sup> which means that PBIs are able to access concessions such as the income tax exemption and Goods and Services Tax ('GST')

10 See, eg, Mark Lyons, *Third Sector: The Contribution of Nonprofit and Cooperative Enterprise in Australia* (Allen and Unwin, 2001) 20; Australia's Future Tax System Review Panel, 'Australia's Future Tax System: Report to the Treasurer' (Final Report, 2 May 2009) pt 2 vol 1 207 <<http://www.taxreview.treasury.gov.au>>.

11 The narrower range of entities covered by the term PBI was intended to broadly correspond to the popular meaning of charity: *Perpetual Trustee* (1931) 45 CLR 224, 231 (Starke J), 233 (Dixon J); *Ashfield Municipal Council v Joyce* [1978] AC 122, 137 ('Joyce'). Several judgments do suggest that the popular meaning constitutes a subset of the broader technical meaning: *Young Men's Christian Association of Melbourne v Federal Commissioner of Taxation* (1926) 37 CLR 351, 358–9 (Isaacs J); *Chesterman v Federal Commissioner of Taxation* (1923) 32 CLR 362, 375 (Knox CJ), 384–5 (Isaacs J), 392 (Higgins J), 398 (Rich J), 399–400 (Starke J); *Swinburne v Federal Commissioner of Taxation* (1920) 27 CLR 377, 383 (Isaacs, Gavan Duffy, Rich and Starke JJ). Cf Terry Carney and Peter Hanks, 'Taxation Treatment of Charities: Distributional Consequences for the Welfare State' in Richard Krever and Gretchen Kewley (eds), *Charities and Philanthropic Institutions: Reforming the Tax Subsidy and Regulatory Regimes* (Australian Tax Research Foundation, 1991) 49, 66–7. See also *Northern Land Council v Commissioner of Taxes (NT)* (2002) 171 FLR 255, [15] (Mildren J, Martin CJ agreeing) ('*Northern Land Council*'); Kerry O'Halloran, Myles McGregor-Lowndes and Karla W Simon, *Charity Law & Social Policy: National and International Perspectives on the Functions of the Law Relating to Charities* (Springer, 2008) 245; G E Dal Pont, *Law of Charity* (LexisNexis Butterworths, 2010) 36; Michael Chesterman, 'Foundations of Charity Law in the New Welfare State' (1999) 62 *Modern Law Review* 333, 340; Australian Tax Office, *Income Tax and Fringe Benefits Tax: Public Benevolent Institutions*, TR 2003/5, 4 June 2003, [24], [126]–[127].

concessions which are available for all charities.<sup>12</sup> However, PBIs obtain additional advantages that are not available to all charities.<sup>13</sup> For instance, PBI status is one of the categories for deductible gift recipient status under the *ITAA97*,<sup>14</sup> which means that donors can potentially claim an income tax deduction for gifts or contributions to a PBI, provided the other deductibility criteria are satisfied.<sup>15</sup> By way of context, there are numerous DGR categories, grouped in overarching classifications, some of which are ‘health’, ‘education’, ‘research’, and ‘welfare and rights’, and comprised of both generally applicable tests as well as entities which are specifically named in the legislation, and which do not therefore need to satisfy the general tests.<sup>16</sup> The PBI category is a generally applicable test which falls within the welfare and rights classification.<sup>17</sup> In addition, the term PBI is used to treat fringe benefits provided in respect of the employment of a PBI employee as exempt benefits,<sup>18</sup> up to a cap.<sup>19</sup> Charitable institutions that are not PBIs would generally only be entitled to a fringe benefits tax rebate.<sup>20</sup>

At the state, territory and local government level, PBI characterisation (and sometimes charity status)<sup>21</sup> is used as a gateway to concessions in relation to land tax,<sup>22</sup> pay-roll tax,<sup>23</sup> stamp duty,<sup>24</sup> and council rates,<sup>25</sup> not all of which apply to all charities.<sup>26</sup>

Accordingly, the Federal Government’s proposal to move from a definition of charity based largely on the common law to one enunciated in legislation should not directly affect the meaning of ‘PBI’. However, there may be an indirect effect if the statutory definition of charity proves to be broader than that under the current law (contrary to the Federal Government’s efforts to enact a largely codifying rather than expansionary definition),<sup>27</sup> due to a broader range of

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12 See, eg, *ITAA97* s 50-1 item 1.1; *A New Tax System (Goods and Services Tax) Act 1999* (Cth) ss 38-250, 38-255, 38-260, 38-270, 40-160.

13 Certain other subsets of charities are also able to access gift deductibility and the fringe benefits tax exemption. For instance, health promotion charities: *Fringe Benefits Tax Assessment Act 1986* (Cth) s 57A(1); *ITAA97* s 30-20 item 1.1.6.

14 *ITAA97* s 30-45(1) item 4.1.1.

15 See *ITAA97* s 30-15(1) items 1, 7, 8.

16 *ITAA97* sub-div 30-B.

17 *ITAA97* s 30-45(1).

18 *Fringe Benefits Tax Assessment Act 1986* (Cth) s 57A(1).

19 Broadly, the cap is \$30,000 per employee, based on what would otherwise have been the grossed up value of the benefits provided: *Fringe Benefits Tax Assessment Act 1986* (Cth) s 5B(1A).

20 *Fringe Benefits Tax Assessment Act 1986* (Cth) s 65J(1)(baa).

21 See, eg, land used exclusively for charitable purposes: *Local Government Act 1995* (WA) s 6.26(g); exemption for dutiable transactions that have been entered into or occurred for charitable or similar public purposes: *Duties Act 2008* (WA) s 95.

22 See, eg, ‘public charitable or benevolent institution’: *Land Tax Assessment Act 2002* (WA) s 37.

23 See, eg, *Pay-roll Tax Assessment Act 2002* (WA) s 40(2)(c).

24 See, eg, motor vehicle duty exemption in relation to a ‘charitable organisation’, which is defined to include a ‘public benevolent institution’: *Duties Act 2008* (WA) s 247(1)(a).

25 See, eg, *Local Government Act 1993* (NSW) s 556(1)(h).

26 See, eg, Dal Pont, above n 11, 148–53.

27 See, eg, Department of the Treasury (Cth), above n 7, [130].

charities attempting to fall within the PBI definition to access the additional tax concessions.

This paper focuses on the use of the term PBI for gift deductibility purposes, given the significant quantum of the DGR tax expenditure, projected to be approximately \$760 million in 2010–11.<sup>28</sup> In addition, DGR status is very important to individual organisations in seeking donations, particularly from intermediaries such as private or public ancillary funds, which are restricted to distributing to DGRs.<sup>29</sup> However, authorities relating to the meaning of 'PBI' under other tax concessions remain relevant and the ramifications of a conclusion that relief need not be provided directly, must be understood in light of the suite of concessions.

## B General

The key construction of the term PBI was enunciated in 1931 in *Perpetual Trustee*,<sup>30</sup> and has consistently been applied in subsequent cases,<sup>31</sup> including decisions relating to income tax deductibility.<sup>32</sup> The case concerned the *Estate Duty Assessment Act 1914* (Cth), which exempted bequests for 'religious, scientific, or public educational purposes in Australia or to a public hospital or public benevolent institution in Australia ...'.<sup>33</sup> The High Court found that the Royal Naval House, which provided reduced rate accommodation and recreation facilities for lower ranking members of the Australian and foreign navies, was not a PBI within this exemption. The majority described the term PBI in the following ways:

28 Department of the Treasury (Cth), *Tax Expenditures Statement 2010* (28 June 2011) 7, 61, 137.

29 Productivity Commission, above n 4, 177.

30 (1931) 45 CLR 224.

31 See, eg, *Public Trustee of NSW v Federal Commissioner of Taxation* (1934) 51 CLR 75, 100 (Starke J), 103–4 (Dixon J, Rich J agreeing), 106 (McTiernan J) ('Public Trustee'); *Commissioner of Pay-roll Tax (Vic) v Cairnmillar Institute* (1990) 90 ATC 4752, 4756–8, 4761 (McGarvie J) ('Cairnmillar'); *Commissioner of Pay-roll Tax (Vic) v Cairnmillar Institute* [1992] 2 VR 706, 708–9, 711 (Gobbo J, Brooking and Tadgell JJ agreeing); *Tangentyere Council Inc v Commissioner of Taxes (NT)* (1990) 90 ATC 4352, 4353–4 (Angel J) ('Tangentyere'); *Metropolitan Fire Brigades Board v Federal Commissioner of Taxation* (1990) 27 FCR 279, 281–2; *Maclean Shire Council v Nungera Co-operative Society Ltd* (1994) 84 LGERA 139, 141 (Handley JA, Priestly and Sheller JJA agreeing) ('Maclean'); *Northern Land Council* (2002) 171 FLR 255, [15]–[16] (Mildred J, Martin CJ agreeing), [52] (Thomas J). See also Australian Tax Office, *Income Tax and Fringe Benefits Tax: Public Benevolent Institutions*, TR 2003/5, 4 June 2003, [27]–[28]; Ann O'Connell, 'The Tax Position of Charities in Australia: Why Does It Have To Be So Complicated?' (2008) 37 *Australian Tax Review* 17, 27.

32 '[A] body organized for the relief of poverty or distress': *Maughan v Federal Commissioner of Taxation* (1942) 66 CLR 388, 395 (McTiernan J) ('Maughan'); 'the relief of poverty, suffering, distress or misfortune': *Maughan* (1942) 66 CLR 388, 397 (Williams J, Rich J agreeing). See also *Ambulance Service of New South Wales v Federal Commissioner of Taxation* (2003) 130 FCR 477, [15] (Hill, Goldberg and Conti JJ) ('Ambulance Service'); *Trustees of the Indigenous Barristers' Trust v Federal Commissioner of Taxation* (2002) 127 FCR 63, [14] (Gyles J) ('Indigenous Barristers' Trust'); *Re Vibrational Individuation Programme Inc and Federal Commissioner of Taxation* (2003) 52 ATR 1015, [23] (Member Trowse) ('Re Vibrational').

33 *Estate Duty Assessment Act 1914* (Cth) s 8(5).

a ‘public benevolent institution’ means, in my opinion, an institution organized for the relief of poverty, sickness, destitution, or helplessness.<sup>34</sup>

The words ‘benevolent institution’ are commonly used in combination to denote bodies organized for the relief of poverty or of distress. Familiarity with the application of the expression to bodies of this kind inevitably tends to make the use of the phrase appear misplaced in relation to bodies which do not relieve poverty or misfortune and merit the description ‘benevolent’ only because their objects are benignant ... I am unable to place upon the expression ‘public benevolent institution’ in the exemption a meaning wide enough to include organizations which do not promote the relief of poverty, suffering, distress or misfortune.<sup>35</sup>

Such bodies vary greatly in scope and character. But they have one thing in common: *they give relief freely to those who are in need of it and who are unable to care for themselves*. Those who receive aid or comfort in this way are the poor, the sick, the aged and the young. Their disability or distress arouses pity, and the institutions are designed to give them protection.<sup>36</sup>

The guidance provided by the majority focuses on the meaning of a phrase, ‘benevolent institution’ or ‘public benevolent institution’ rather than a checklist of elements.<sup>37</sup> In part, that is because the expression PBI does not have a set technical meaning, but rather ‘is to be understood in the sense in which it is commonly used in the English language’.<sup>38</sup> Nevertheless, this paper will consider the elements identified in *Perpetual Trustee* to help elucidate the meaning of the whole phrase.<sup>39</sup> The High Court appeared to accept that the Royal Naval House was ‘public’.<sup>40</sup> Accordingly, the additional features of a PBI identified by the majority were:

- the entity must be an institution;
- the entity must have the object (‘PBI Object’) of providing relief to people with the requisite needs (that is, a targeting requirement); and
- the requisite needs to which relief must be targeted are poverty, sickness, destitution, helplessness, distress, misfortune, or other needs which arouse pity – subsequent cases, recognising that need may be relative, have indicated that the needs must be ‘sufficiently serious to arouse pity or compassion within the community’.<sup>41</sup>

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34 *Perpetual Trustee* (1931) 45 CLR 224, 232 (Starke J).

35 *Ibid* 233–4 (Dixon J).

36 *Ibid* 235–6 (Evatt J) (emphasis added).

37 See also *Public Trustee* (1934) 51 CLR 75, 103 (Dixon J); *Tangentyere* (1990) 90 ATC 4352, 4353 (Angel J). On appeal, Justice Angel’s decision was set aside on procedural grounds, but his reasoning as to PBI status was not questioned: see *Commissioner of Taxes (NT) v Tangentyere Council Inc* (1992) 107 FLR 470; Dal Pont, above n 11, 36.

38 *Perpetual Trustee* (1931) 45 CLR 224, 232 (Starke J), 233 (cf Dixon J), 236–7 (cf McTiernan J).

39 See, eg, Dal Pont, above n 11, 37; *Indigenous Barristers’ Trust* (2002) 127 FCR 63, [10] (Gyles J).

40 *Perpetual Trustee* (1931) 45 CLR 224, 233 (Dixon J), 235 (Evatt J), 237 (McTiernan J). Starke J did not expressly comment on this element.

41 *Cairnmillar* (1990) 90 ATC 4752, 4761 (McGarvie J) (Justice McGarvie’s conclusion and reasons were affirmed on appeal). See also *Commissioner of Pay-roll Tax (Vic) v Cairnmillar Institute* [1992] 2 VR 706, 711 (Gobbo J, Brooking and Tadgell JJ agreeing); *Lemm v Federal Commissioner of Taxation* (1942) 66 CLR 399, 410 (Williams J, Rich and McTiernan JJ agreeing).

Looking at the descriptions used by the majority to describe the phrase 'PBI',<sup>42</sup> those descriptions do not expressly require that relief be provided in the form of direct assistance to people with the requisite needs.<sup>43</sup> However, it is not sufficient that an entity merely 'confe[r] benefits on a section of the community'; relief must be targeted to particular persons.<sup>44</sup> While Evatt J did provide examples of PBI bodies which concerned organisations providing direct relief,<sup>45</sup> his Honour noted that '[PBIs] vary greatly in scope and character' and that the key nexus requirement is the giving of 'relief' to those with the requisite needs, rather than direct relief.<sup>46</sup>

The dissenting judge, McTiernan J, who would have accepted the Royal Naval House as a PBI, did refer to direct relief.<sup>47</sup> However, Justice McTiernan's comments are not binding and their relevance is diminished by the fact that his Honour was in dissent; it was not necessary to consider indirect activities in *Perpetual Trustee*; and a further description of the test by McTiernan J focused solely on the 'relief' of particular needs without any reference to direct relief.<sup>48</sup>

In reaching their conclusions, the members of the majority also considered the mischief which the compound term PBI had been introduced to address.<sup>49</sup> The phrase PBI, which appears to be a uniquely Australian development,<sup>50</sup> was introduced as a new category of philanthropic entity under the Estate Duty Assessment Bill 1928 (Cth) to replace the term 'charitable purpose'. A PBI was intended to be a subcategory of the existing notion of 'charity'<sup>51</sup> and was introduced to, in the words of Treasurer Earl Page, staunch 'a considerable loss of revenue' resulting from the decision in *Chesterman v Federal Commissioner of Taxation*<sup>52</sup> ('*Chesterman*').<sup>53</sup> That is because *Chesterman* decided that estate

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42 Justice Evatt's comments focussed on the meaning of a 'benevolent institution' as his Honour accepted that the Royal Naval House was 'public': *Perpetual Trustee* (1931) 45 CLR 224, 235.

43 This is in contrast to the test adopted in Australian Tax Office, *Income Tax and Fringe Benefits Tax: Public Benevolent Institutions*, TR 2003/5, 4 June 2003, [17]. The other features are consistent with Australian Tax Office, *Income Tax and Fringe Benefits Tax: Public Benevolent Institutions*, TR 2003/5, 4 June 2003.

44 *Cairnmillar* (1990) 90 ATC 4752, 4758 (McGarvie J). See also *Indigenous Barristers' Trust* (2002) 127 FCR 63, [19] (Gyles J).

45 The 'Benevolent Society of New South Wales provides food and clothing for those in poverty and distress, the Scarba Home takes care of deserted babies, many organizations of Church and State provide for the maintenance, housing and relief of the aged poor, orphans and those suffering from bodily or mental disease': *Perpetual Trustee* (1931) 45 CLR 224, 235 (Evatt J).

46 *Ibid.*

47 *Ibid* 242 (McTiernan J).

48 *Ibid* 241 (McTiernan J).

49 *Ibid* 231 (Starke J), 233–4 (Dixon J). See also *Public Trustee* (1934) 51 CLR 75, 100 (Starke J); *Cairnmillar* (1990) 90 ATC 4752, 4757 (McGarvie J); *Northern Land Council* (2002) 171 FLR 255, [15] (Mildred J, Martin CJ agreeing).

50 O'Halloran, McGregor-Lowndes and Simon, above n 11, 245.

51 *Ibid* 245; Dal Pont, above n 11, 36; *Chesterman*, above n 11, 340.

52 (1925) 37 CLR 317.

53 Commonwealth, *Parliamentary Debates*, House of Representatives, 11 September 1928, 6565 (Earle Page, Treasurer) cited in Myles McGregor-Lowndes, 'A Taxing Definition – A Comment on the Industry Commission's Draft Proposals for Defining Community Social Welfare Organisations' (1995) 2 *Canberra Law Review* 121, 131.

duty relief applied to the broader class of charitable purposes in the technical legal sense, rather than to the popular notion of charity:

This re-statement of the law in regard to charitable bequests has been necessitated by a decision of the Privy Council over-ruling the judgment of the High Court ... The High Court held that this bequest is not a charitable bequest within the meaning of the act, because its character is not eleemosynary, and because the word 'charitable' was, in the opinion of the court, used in the act in its popular meaning which involves the idea of assisting poverty or destitution. The Privy Council held that the four words 'religious,' 'scientific,' 'charitable' and 'public educational' as used in the section, are not mutually exclusive, and that the word 'charitable' as used in the act must be given its technical legal meaning as used in the Elizabethan sense ... When the Estate Duty Act was passed it was intended that the four terms referred to should be mutually exclusive. It is proposed to bring this about by means of the proposed amendment. The bill will also make clear the charitable purposes intended to be provided for. For this purpose it uses the language which was inserted by Parliament for the same purpose in the *Income Tax Assessment Act 1927*, in connexion with deductions for donations to public charitable institutions.<sup>54</sup>

It appears from the Parliamentary debates on the Estate Duty Assessment Bill 1928 (Cth), as well as the Income Tax Assessment Bill 1927 (Cth),<sup>55</sup> that the term 'public benevolent institution' was inserted in precursor gift deductibility provisions of the income tax legislation to limit the meaning of 'public charitable institution' for the same reason.<sup>56</sup> The Senate debates, in particular, indicate that the income tax amendments were prompted by *Young Men's Christian Association of Melbourne v Federal Commissioner of Taxation*<sup>57</sup> ('YMCA case'),<sup>58</sup> in which Isaacs J had noted that, for income tax purposes, Parliament should:

by a few words [declare] whether by 'charitable' it means to use that word in its ordinary modern sense, or in the technical Elizabethan sense that some quaint Chancery decisions in connection with trusts have affixed to it as its primary legal meaning ...<sup>59</sup>

54 Commonwealth, *Parliamentary Debates*, House of Representatives, 11 September 1928, 6568 (Earle Page, Treasurer). Nearly identical comments were made in the Senate: Commonwealth, *Parliamentary Debates*, Senate, 19 September 1928, 6848–9 (Sir George Pearce).

55 The Treasurer stated that '[a]s regards gifts to public charitable institutions, the term "charitable institution" is being defined in order to remove any possible difficulty which might arise in litigation through what is apparently regarded by the court as a somewhat obscure provision': Commonwealth, *Parliamentary Debates*, House of Representatives, 15 November 1927, 1395 (Earle Page, Treasurer).

56 Commonwealth, *Parliamentary Debates*, House of Representatives, 15 November 1927, 1395 (Earle Page, Treasurer); Commonwealth, *Parliamentary Debates*, House of Representatives, 11 September 1928, 6568 (Earle Page, Treasurer). O'Connell notes that the defined term 'public charitable institution' was removed when the *Income Tax Assessment Act 1936* (Cth) was enacted, with the different types of DGR, such as PBIs, listed in that legislation. This approach of listing the classes of DGR entities is adopted in the current provisions of *ITAA97* div 30: see O'Connell, above n 31, 26–7.

57 (1926) 37 CLR 351.

58 Commonwealth, *Parliamentary Debates*, Senate, 7 December 1927, 2714 (Sir George Pearce). See also Joyce Chia and Ann O'Connell, 'Charitable Treatment? – A Short History of the Taxation of Charities in Australia' (Paper presented at the Tax History Conference, Lucy Cavendish College, Cambridge, 5 July 2010) 22 <[http://tax.law.unimelb.edu.au/files/Charitable\\_Treatment\\_Paper.pdf](http://tax.law.unimelb.edu.au/files/Charitable_Treatment_Paper.pdf)>.

59 *YMCA case* (1926) 37 CLR 351, 359 (Isaacs J).

Accordingly, it appears that revenue considerations played a role in forming the definition of PBI in *Perpetual Trustee*, with the court adopting a more restricted range of purposes for PBIs than for charitable institutions generally, to take account of the 'history of the legislation'.<sup>60</sup>

### C Current Law on the Direct Benefit Requirement

Although *Perpetual Trustee* does not expressly require relief to be provided 'directly',<sup>61</sup> most, although not all, entities which have been found to be PBIs do in fact directly provide relief.<sup>62</sup> This led Street CJ to find in *Australian Council of Social Service Inc v Commissioner of Pay-roll Tax (NSW)*<sup>63</sup> ('ACOSS') that this had become a required component of the definition of PBI.<sup>64</sup> That is also the approach of the Commissioner in Taxation Ruling TR 2003/5.<sup>65</sup> This Part tests the rationale for direct relief and suggests that it has not become a binding requirement.

#### 1 Rationale for the Direct Relief Requirement

Street CJ provided three reasons in *ACOSS*:

- the requirement that the class of persons who benefit must be evaluated and ascertained, to ensure that they are in need of relief, 'tends naturally to imply that there will be direct beneficiaries of such benevolence';<sup>66</sup>
- in all reported cases of which his Honour was aware, except *Australian Council for Overseas Aid v Federal Commissioner of Taxation* ('*ACFOA*'),<sup>67</sup> an institution held to be a PBI directly provided benefits;<sup>68</sup> and
- 'social conditions and expectations' had not changed to an extent which required an alteration of the test.<sup>69</sup>

The first reason supports the targeting requirement for relief. However, provided the class of persons who will benefit, directly or indirectly, is clearly

60 *Perpetual Trustee* (1931) 45 CLR 224, 233–4 (Dixon J). See also 231 (Starke J).

61 Although cf *Perpetual Trustee* (1931) 45 CLR 224, 242 (McTiernan J).

62 *Australian Council of Social Service Inc v Commissioner of Pay-roll Tax (NSW)* (1985) 1 NSWLR 567, 568 (Street CJ); Dal Pont, above n 11, 41.

63 (1985) 1 NSWLR 567. The issue was whether the Australian Council of Social Service Inc was a 'public benevolent institution' under the *Pay-roll Tax Act 1971* (NSW).

64 Ibid 568 (Street CJ).

65 Australian Tax Office, *Income Tax and Fringe Benefits Tax: Public Benevolent Institutions*, TR 2003/5, 4 June 2003, [17] (subject to an 'exception' for organisations in the same factual circumstances as existed in *Australian Council for Overseas Aid v Federal Commissioner of Taxation* (1980) 49 FLR 278).

66 *ACOSS* (1985) 1 NSWLR 567, 568 (Street CJ).

67 (1980) 49 FLR 278.

68 *ACOSS* (1985) 1 NSWLR 567, 568 (Street CJ).

69 Ibid 569 (Street CJ).

defined, there should be no inherent need to limit relief to direct activities.<sup>70</sup> Chief Justice Street's second reason is difficult to justify on the grounds of policy or precedent as his Honour did not cite cases in which institutions providing indirect benefits had been denied PBI status, while citing one case in which such an institution had been found to be a PBI.<sup>71</sup> The discussion in Part III(B) of this paper emphasises that there is presently a need for indirect activities, such as preventative activities, so that the third reason may no longer apply.

To the extent that the impact on tax revenue was an unarticulated additional ground,<sup>72</sup> this issue is addressed in Part V(C).

## 2 Binding Requirement?

The 'direct' requirement has been endorsed by the Commissioner in Taxation Ruling TR 2003/5,<sup>73</sup> as well as by individual judges and members in some subsequent decisions, although not in the High Court.<sup>74</sup>

However, the provision of direct relief did not form part of the ratio decidendi of *ACOSS*. Priestly JA (with Mahoney JA concurring) admitted there was 'some force' in the argument that a 'proper application' of *Perpetual Trustee*, given changed social conditions, would permit indirect as well as direct activities.<sup>75</sup> Ultimately, Priestly JA found that it was unnecessary to decide the issue.<sup>76</sup> Instead, Priestly JA found that *ACOSS* was not a PBI on a different ground, being that *ACOSS*' activities were aimed at the community as a whole, and so were not targeted toward those in need of relief:

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70 In the context of mere powers to distribute trust property among beneficiaries, the courts accept that certainty of trust objects will be satisfied where the class of potential beneficiaries satisfies the 'criterion certainty' requirement: Thomson Reuters, *Principles of the Law of Trusts* (1 December 2009) [5.8210], [5.8270]; *Re Gulbenkian's Settlements*; *Whishaw v Stephens* [1970] AC 508, 518–9 (Lord Reid), 524–5 (Lord Upjohn, Lords Hodson and Guest agreeing); *Re Blyth* [1997] 2 Qd R 567, 574 (Thomas J). That is, the criteria defining the class must be sufficiently certain that it is possible to say if someone is within or without the class. An additional requirement of 'administrative workability' applies to trust powers: *Re Blyth* [1997] 2 Qd R 567, 574 (Thomas J).

71 Chief Justice Street did, however, expressly 'doubt the correctness' of *ACFOA: ACOSS* (1985) 1 NSWLR 567, 569.

72 Professor McGregor-Lowndes suggests that such considerations have played a role in courts' approach to the term PBI: McGregor-Lowndes, above n 53, 131.

73 Australian Tax Office, above n 65.

74 *Re Royal Society for the Prevention of Cruelty to Animals, Queensland Inc* [1993] 1 Qd R 571, 577 (Fitzgerald P) ('*RSPCA*'); *Cairnmillar* (1990) 90 ATC 4752, 4761 (McGarvie J); *Re Vibrational* (2003) 52 ATR 1015, [25] (Member Trowse); *Trustees of the Allport Bequest v Federal Commissioner of Taxation* (1988) 19 ATR 1335, 1341 (Northrop J); Australian Tax Office, *Income Tax and Fringe Benefits Tax: Public Benevolent Institutions*, TR 2003/5, 4 June 2003, [61]–[62] (the Commissioner has accepted that relief need not be provided directly in circumstances strictly analogous with *ACFOA*). See also Lyons, above n 10, 20.

75 *ACOSS* (1985) 1 NSWLR 567, 569 (Mahoney JA), 575 (Priestly JA).

76 *Ibid* 569 (Mahoney JA), 575 (Priestly JA).

the word 'benevolent' in the composite phrase 'public benevolent institution' carries with it the idea of benevolence exercised towards persons in need of benevolence, however manifested. Benevolence in this sense seems to me to be quite a different concept from benevolence exercised at large and for the benefit of the community as a whole even if such benevolence results in relief of or reduction in poverty and distress.<sup>77</sup>

Accordingly, a PBI did not include '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'.<sup>78</sup>

Further, there are a number of decisions which explicitly accept or suggest that indirect activities, including preventative activities, may be carried out by PBIs. In particular, the earlier decision of *ACFOA*,<sup>79</sup> which was distinguished by Priestly JA and doubted by Street CJ in *ACOSS*.<sup>80</sup> In *ACFOA*, the Council provided services solely to its member organisations, including cooperation and coordination of members, liaising with government on behalf of members and 'development education', which the court found to be 'closely associated with stimulating fund raising by its members'.<sup>81</sup> The majority of members were PBIs and services to non-PBI members were limited to the PBI activities of those members.<sup>82</sup> Acting Chief Justice Connor did not go so far as to say that a PBI could in all instances provide indirect relief. However, his Honour found that an entity might relieve the requisite needs if it performed one or more steps in the 'benevolent process' and that this was what the Council did in relation to its members.<sup>83</sup>

Likewise, in *Tangentyere Council Inc v Commissioner of Taxes (NT)*,<sup>84</sup> the Tangentyere Council's members comprised incorporated and unincorporated Aboriginal town camp associations in the vicinity of Alice Springs, along with the members of those associations. The Tangentyere Council provided significant services to both, including a range of management and maintenance services for the associations which incorporated matters such as administrative assistance, rubbish collection and the provision of education and advice.<sup>85</sup> Nevertheless, Angel J found the Council to be a PBI and that the provision of services to the associations involved the Council using those associations as 'conduits' to deliver welfare which 'directly and physically benefit[ed] the occupants of the town camps'.<sup>86</sup> This would appear to be a significant expansion of permitted activities from the type of 'direct' relief contemplated in *ACOSS*.

Further, the discussion of the Council's activities in relation to assisting town camp inhabitants 'to retain and observe their non-western customary values,

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77 Ibid 575 (Priestly JA).

78 Ibid.

79 (1980) 49 FLR 278.

80 (1985) 1 NSWLR 567, 569 (Street CJ), 575-6 (Priestly JA).

81 *ACFOA* (1980) 49 FLR 278, 280.

82 Ibid.

83 Ibid 282.

84 (1990) 90 ATC 4352.

85 Ibid 4359 (Angel J).

86 Ibid.

traditions and culture’ provides some support for the acceptance of preventative activities.<sup>87</sup> Justice Angel found that these activities were benevolent, in part on the basis that they ‘enabl[ed] self-help’.<sup>88</sup> Similarly, in *Maclean Shire Council v Nungera Co-operative Society Ltd*, Handley JA held 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.<sup>89</sup> The Society’s purpose was to ‘relieve the poverty etc of needy members of the Aboriginal community in the Maclean area “through” the means identified in [the object]’.<sup>90</sup>

A purpose of identifying and treating ‘psychological disorders and abnormalities’ (by means of counselling services) was found to be consistent with PBI status in *Commissioner of Pay-roll Tax (Vic) v Cairnmillar Institute*,<sup>91</sup> even though an element of the counselling could be viewed as preventative, in the sense of stopping harmful patterns of thinking or behaviour from arising again in the future.<sup>92</sup>

Some decisions on local government rating legislation<sup>93</sup> also accept that the use of land for administrative or support purposes for the members of the institution (for instance a home for nurses) who directly provide relief is a use for PBI purposes.<sup>94</sup>

Support can also be found in the High Court case of *Maughan v Federal Commissioner of Taxation*, in which Williams J characterised the relief provided by the relevant association in a way which emphasised a substantial preventative component of inoculating poor boys from moral decay by occupying them with honest pursuits:

There it provides free of charge facilities for the boys of these poor districts which their more fortunate brothers obtain in their own homes. This keeps them off the streets, provides intelligent occupation for their leisure hours, and generally contributes to their physical, mental and moral well-being and improvement.<sup>95</sup>

This was not surprising as the key object of the association was to develop the boys as ‘good citizens’, to ‘cultivate Christian manliness; to promote habits of reverence, loyalty, industry, discipline and self-respect’.<sup>96</sup> Its chief activities were ‘designed to provide the boys with a wholesome environment, and intelligent occupation for their leisure hours, in substitution for the demoralizing

87 Ibid.

88 Ibid 4360 (Angel J).

89 *Maclean* (1994) 84 LGERA 139, 143 (Handley JA, Priestly and Sheller JJA agreeing). See also Australian Tax Office, *Income Tax and Fringe Benefits Tax: Public Benevolent Institutions*, TR 2003/5, 4 June 2003, [109]

90 *Maclean* (1994) 84 LGERA 139, 143 (Handley JA, Priestly and Sheller JJA agreeing).

91 (1990) 90 ATC 4752, 4767, 4770 (McGarvie J). Justice McGarvie’s conclusion and reasons were affirmed on appeal.

92 Ibid 4762–3 (McGarvie J).

93 Ratings legislation frequently looks not only to ownership of land by a PBI, but also to use or occupation for PBI purposes: see, eg, *Local Government Act 1993* (NSW) s 556(1)(h).

94 *McLaughlin v Council of the Municipality of Randwick* (1926) 43 WN (NSW) 165, 166 (Campbell J).

95 *Maughan* (1942) 66 CLR 388, 397 (Williams J, Rich J agreeing).

96 Ibid 390.

influences of the streets' and did not involve the provision of 'sleeping accommodation', 'food ... except at the Christmas treat and by means of occasional distributions of fruit', or the treatment of '[p]hysical defects'.<sup>97</sup>

Similarly, in *Greater Wollongong City Council v Federation of New South Wales Police Citizens Boys' Clubs* ('*Greater Wollongong*'), Brereton J commented that 'it is difficult to see why prophylaxis should not be regarded as an activity just as benevolent as therapy. Certainly from the point of view of the public benefit, prevention is a great deal better than cure'.<sup>98</sup> Accordingly, Brereton J held the Federation of New South Wales Police Citizens Boys' Clubs to be a PBI on the basis that it provided for the 'relief of conditions which are known to nurture delinquency' by providing recreation and education for boys in the relevant area.<sup>99</sup>

There are also several cases which could be interpreted as supporting a direct relief requirement. However, these cases can be satisfactorily explained on the basis of the targeting requirement alone. In *Re Royal Society for the Prevention of Cruelty to Animals, Queensland Inc*,<sup>100</sup> the majority held that the society was not a PBI as it provided benefits to animals rather than those with the requisite need in the community.<sup>101</sup> However, the majority also indicated that even if the Society's activities were to indirectly '[improve] public morality and conduct' of people, it would not be a PBI.<sup>102</sup> Justice Thomas best articulated the reason, being that 'the nature of the Society's ultimate benefit to human beings is not for the relief of the needy or underprivileged, or directed towards relief of the human conditions that traditionally call for aid'.<sup>103</sup> That is, the targeting requirement was not met.

Further, in *Marriage Guidance Council of Victoria v Commissioner of Pay-roll Tax (Vic)*, McGarvie J held the Council not to be a PBI.<sup>104</sup> His Honour's reasons included that the Council's object of using counselling to prevent stress and pain from an unsatisfactory marriage, separation, or divorce, was not targeted toward needs which arouse compassion in the community since such stress and pain fall 'within the ambit of the stress and pain encountered in ordinary human experience'.<sup>105</sup> In addition, McGarvie J considered the Council's activities to be 'preventative' and so 'different from the work of a benevolent institution. It is akin to training, education or improvement'.<sup>106</sup> His Honour expressly questioned Justice Brereton's comments in *Greater Wollongong*, although it is arguable that the

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97 Ibid 392.

98 (1957) 2 LGRA 54, 59.

99 Ibid.

100 [1993] 1 Qd R 571. The case concerned the meaning of 'public benevolent institution' under item 81(1)(c) in the First Schedule to the *Sales Tax (Exemptions and Classifications) Act 1935* (Cth).

101 Ibid 579 (Fitzgerald P), 582-3 (Thomas J).

102 Ibid 573 (Fitzgerald P). See also 583 (Thomas J), 581 (Pincus JA).

103 Ibid 583 (Thomas J).

104 (1990) 90 ATC 4770, 4775.

105 Ibid.

106 Ibid.

reason for doing so appears based on the targeting requirement.<sup>107</sup> Further, Justice McGarvie's reasoning ties the direct and targeting requirements together and the case could have been decided on the basis of the targeting requirement alone.<sup>108</sup>

### III METHODS OF RELIEF

#### A 'Direct' versus 'Indirect' Relief

Direct relief involves a focus on the type of *activities* by which the *purpose* of providing relief to persons with the requisite needs is achieved. Chief Justice Street required in *ACOSS* that there be 'direct beneficiaries' of assistance (who have the requisite needs) and that the organisation 'directly dispense' benefits.<sup>109</sup> Accordingly, direct relief activities involve a PBI itself (including through agents or as a delivery participant with other organisations) providing assistance to persons currently in need, to address that particular need.<sup>110</sup> For instance, the provision of food, clothing or housing.<sup>111</sup>

However, there are a range of possible responses to social welfare issues, particularly given intersecting causes for many issues.<sup>112</sup> Indirect activities, such as research, advocacy and law reform initiatives concerning systemic issues, as well as intermediary services by peak bodies (such as ACFOA and ACOSS),<sup>113</sup> represent alternative responses.<sup>114</sup> Preventative activities would typically be sourced within this broader ambit of indirect activities,<sup>115</sup> and might involve general community education (for instance on drink-driving) or more targeted

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107 Ibid, citing *Case L21* (1960) 11 TBRD 117, 124–5 (Member Webb) (the decision can also be found as *Case 66* (1960) 9 CTBR (NS) 417). However, the detailed reasons provided by Member Webb, in that decision, indicate that a marriage guidance council (there the Marriage Guidance Council of Western Australia) would not be a PBI because it 'relieves or prevents conditions analogous to those engendered by poverty, sickness, destitution or helplessness ... It may well be true that marital disharmony tends to nurture juvenile delinquency in the same way as does poverty ... But it does not follow that the prevention or relief of marital disharmony is "benevolent" in the relevant sense. Conditions which produce the same consequences [that is, juvenile delinquency] need have nothing else in common': at 125.

108 Contrast the following authors, who treat the case as confirming that preventative activities are inconsistent with PBI status: McGregor-Lowndes, above n 53, 127; Carney and Hanks, above n 11, 76.

109 *ACOSS* (1985) 1 NSWLR 567, 568 (Street CJ).

110 See eg, Supplementary Explanatory Memorandum, Tax Laws Amendment (2006 Measures No 3) Bill 2006 (Cth) [11.37]–[11.38] (explanation of PBI characteristics in the context of a new deductible gift recipient category). See also Australian Tax Office, *Income Tax and Fringe Benefits Tax: Public Benevolent Institutions*, TR 2003/5, 4 June 2003, [44]–[45], [48], [61]–[62] (although the Commissioner discusses preventative activities primarily in the context of the provision of relief for those in need).

111 See, eg, *Perpetual Trustee* (1931) 45 CLR 224, 235–6 (Evatt J).

112 See, eg, Judith Healy, *Welfare Options: Delivering Social Services* (Allen and Unwin, 1998) 15.

113 Productivity Commission, above n 4, 7.

114 See, eg, Healy, above n 112, 15.

115 See, eg, Sheppard, Fitzgerald and Gonski, above n 8, 254.

'secondary' or 'tertiary' preventative activities aimed at high-risk groups or at people in need so as to prevent that need from recurring in the future.<sup>116</sup>

As noted by the Productivity Commission, not-for-profits carry out activities across this spectrum.<sup>117</sup> In particular, peak bodies, which 'represent the interests of their member organisations and have a liaison and advocacy role with governments and the broader community', typically carry out extensive indirect activities.<sup>118</sup> However, the broad role of government in service provision has meant that many not-for-profits work alongside the state in achieving their objects and so expand their indirect activities in relation to systemic issues.<sup>119</sup> Another example is provided by 'health promotion charities' (a charitable institution, the principal activity of which 'is to promote the prevention or the control of diseases in human beings')<sup>120</sup> and 'harm prevention charities' (a charitable institution whose principal activity is 'the promotion of the prevention or the control of behaviour that is harmful or abusive to human beings').<sup>121</sup> These categories appear to have been added to the DGR provisions in order to assist organisations that could be PBIs except for the fact that their preventative activities stop them providing direct relief.<sup>122</sup>

Further, as indicated by the Salvation Army in its submission to the Inquiry into the Definition of Charities and Related Organisations, many PBIs do or should engage in 'administration, research and advocacy' as an 'integral' part of the 'delivery of public benevolence'.<sup>123</sup> In particular, the Salvation Army notes the inevitability of indirect administrative activity by PBIs in order to support service provision.<sup>124</sup>

Several points flow from these observations. First, different mixes of responses may be required for different purposes, with ACOSS suggesting that the efficiency of service provision should be measured with regard to the 'appropriate balance between preventative, developmental, rehabilitative and remedial' services.<sup>125</sup>

116 W I Scales, R G Mauldon and M M McGovern, 'Charitable Organisations in Australia' (Report No 45, Industry Commission, 16 June 1995) 62–4, citing the Uniting Church in Australia, Qld Synod, Division of Child and Family Care, Submission No 31 to Industry Commission, *Charitable Organisations in Australia*.

117 Productivity Commission, above n 4, 7.

118 Sheppard, Fitzgerald and Gonski, above n 8, 45. See also Lord Wolfenden, *The Future of Voluntary Organisations: Report of the Wolfenden Committee* (Joseph Rowntree Memorial Trust and Carnegie United Kingdom Trust, 1978) 110–1.

119 Michael Chesterman, *Charities, Trusts and Social Welfare* (Weidenfeld and Nicolson, 1979) 84, citing Lord Wolfenden, above n 118, 43.

120 *ITAA97* s 30-20 item 1.1.6. See also *Fringe Benefits Tax Assessment Act 1986* (Cth) s 57A(5).

121 *ITAA97* s 30-45 item 4.1.4. See also item 4.1.7 and s 30-289(1) (deductible gift recipient status can be obtained for a public fund maintained by a harm prevention charity).

122 See, eg, Explanatory Memorandum, Taxation Laws Amendment Bill (No 2) 2001 (Cth) [5.20]; Explanatory Memorandum, Taxation Laws Amendment Bill (No 6) 2003 (Cth) [7.4], citing Peter Costello, Treasurer, 'Government Response to Charities Definition Inquiry' (Press Release, No 49, 29 August 2002), citing Sheppard, Fitzgerald and Gonski, above n 8; Sheppard, Fitzgerald and Gonski, above n 8, 253–4.

123 Salvation Army, *Submission to Inquiry into the Definition of Charities and Related Organisations*, 2001, 5.

124 *Ibid* 12.

125 ACOSS, *Beyond Charity: The Community Services Sector in Australia: Historical Overview* (1994) 24.

Second, it is possible, and indeed likely (as all administrative activities must be indirect), that organisations will carry out a mix of both direct and indirect activities, with differing degrees of emphasis. This potentially means that ‘multi-service’ not-for-profits, which pursue a number of purposes by way of a range of activities, including the provision of direct and indirect relief,<sup>126</sup> have an advantage over more targeted organisations since, at least administratively, it is accepted that PBIs need only be ‘predominantly’, not ‘solely’, for the direct relief of the requisite needs.<sup>127</sup>

## B Benefits from Permitting Prevention

As discussed in Part III(A) above, there are a range of ways in which needs can be addressed, including dealing with causes, as well as attending to the consequences.<sup>128</sup> However, as emphasised by the Productivity Commission, preventative activities may have significant efficiency benefits:

Prevention is a good example of the allocation challenge. There is almost universal agreement that prevention is better than cure, and generally costs far less. Nevertheless, as it is difficult to demonstrate the value of avoiding a cost that would otherwise be imposed by a problem, prevention tends to attract less donor support.<sup>129</sup>

Indeed, a number of foreign jurisdictions, including those which, like Australia, use a separate test for donation concessions, provide donation concessions for welfare organisations which carry out preventative activities.<sup>130</sup>

Further, the *Report of the Inquiry into the Definition of Charities and Related Organisations* (‘CDI Report’) comments on the fact that significant government

126 Scales, Mauldon and McGovern, above n 116, 282.

127 Australian Tax Office, *Income Tax and Fringe Benefits Tax: Public Benevolent Institutions*, TR 2003/5, 4 June 2003, [95]. See also Sheppard, Fitzgerald and Gonski, above n 8, 61.

128 Charity Commission for England and Wales, ‘The Prevention or Relief of Poverty for the Public Benefit’ (Report, Charity Commission for England and Wales, December 2011) 9 <[http://www.charity-commission.gov.uk/charity\\_requirements\\_guidance/charity\\_essentials/public\\_benefit/pbpoverty.aspx](http://www.charity-commission.gov.uk/charity_requirements_guidance/charity_essentials/public_benefit/pbpoverty.aspx)>.

129 Productivity Commission, above n 4, 19. See also Leon Ginsberg, *Understanding Social Problems, Policies, and Programs* (University of South Carolina Press, 2<sup>nd</sup> ed, 1996) 54; Sheppard, Fitzgerald and Gonski, above n 8, 56; Scales, Mauldon and McGovern, above n 116, 54, 62; Lord Goodman et al, *Charity Law and Voluntary Organisations: Report of an Independent Committee of Inquiry Set up by the National Council of Social Service, under the Chairmanship of Lord Goodman, to Examine the Effect of Charity Law and Practice on Voluntary Organisations* (Bedford Square Press, 1976) 25.

130 In South Africa, tax deductible status is conferred on ‘public benefit organisations’ and other tax exempt organisations to the extent that they carry out a sub-class of ‘public benefit activities’, with such activities including some that explicitly involve preventative activities in the sphere of human welfare: *Income Tax Act 1962* (South Africa) ss 18A(1), 30(1), sch 9 pt I items 1(h), 1(p), sch 9 pt II items 1(h), 1(p); South African Revenue Service, *Tax Exemption Guide for Public Benefit Organisations in South Africa* (10 October 2007) 24 <[www.sars.gov.za/home.asp?pid=1833](http://www.sars.gov.za/home.asp?pid=1833)>. Singapore provides tax deductible status to ‘institutions of a public character’, a category which is potentially broader than the technical notion of charity and expressly includes prevention: *Income Tax Act* (Singapore, cap 134, 2008, rev ed) s 37(3)(c)(ii); *Charities Act* (Singapore, cap 37, 2007 rev ed) s 40A; Internal Revenue Authority of Singapore, *Overview of Charities and IPCs* (30 April 2009) Internal Revenue Authority of Singapore <<http://www.iras.gov.sg/irasHome>>. In England and Wales the statutory definition of charity expressly contemplates ‘prevention’ as well as the ‘relief’ of poverty: *Charities Act 2006* (UK) s 2(2)(a). Similar statutory provisions apply in Northern Ireland (*Charities Act 2008* (Northern Ireland) s 2(2)(a)) and Scotland (*Charities and Trustee Investment Act 2005* (Scotland) s 7(2)(a)).

funding exists for 'prevention and early intervention initiatives at the community level, for example in family relationship support, youth homelessness prevention, and intervention strategies for children at risk',<sup>131</sup> and that such approaches involve greater 'research and evaluation'.<sup>132</sup> As noted by Brown, the trend has been particularly marked in relation to health issues, but applies more broadly.<sup>133</sup>

In the context of the social problem of child abuse, Ginsberg suggests that such preventative action could encompass 'public education, financial assistance to low-income families, and mental health counselling'.<sup>134</sup> Healy cites homelessness as an area where the issue would be better served by addressing underlying causes such as 'shortage of affordable housing, violence, unemployment, deinstitutionalisation and cuts in social security' rather than merely focussing on the provision of temporary accommodation.<sup>135</sup>

However, indirect activities must be seen as part of a mix of responses to social issues. As noted by the Goodman Committee, providing tax concessions for indirect relief can '[raise] considerable problems' and that '[t]he start of a new industry in order to enrich a community would not normally be regarded as a charitable object at any rate unless actual poverty already existed in that community'.<sup>136</sup>

Nevertheless, the Goodman Committee acknowledged that if there can be 'a near certainty that poverty would develop in an area unless something were done, e.g. on account of the running down of an obsolescent craft industry' in this context change should occur.<sup>137</sup> As discussed in Part V, this example neatly emphasises that the issue can be addressed through explicit targeting requirements for relief, rather than a wholesale rejection of preventative activities.

#### IV FLEXIBILITY FOR INDIRECT RELIEF

As argued in Part II, *Perpetual Trustee* contains no express requirement that relief be provided directly. Further, Part III demonstrates that there is a need for preventative activities to achieve PBI Objects. This Part explains that:

- the PBI concept is ambulatory, within the bounds of *Perpetual Trustee*, therefore permitting expansion to encompass preventative activities (Part IV(A)); and

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131 Sheppard, Fitzgerald and Gonski, above n 8, 56.

132 Ibid.

133 David Brown, 'The Charities Act 2005 and the Definition of Charitable Purposes' (2005) 21 *New Zealand Universities Law Review* 598, 620–1.

134 Ginsberg, above n 129, 55.

135 Healy, above n 112, 121.

136 Lord Goodman et al, above n 129, 25.

137 Ibid. See also Not-for-Profit Project Tax Group, *Defining Charity: A Literature Review* (20 February 2011) University of Melbourne <<http://tax.law.unimelb.edu.au/index.cfm?objectid=053E24C1-B048-8204-A721A46DFB996924>> 53.

- some components of the PBI test are the same as, or similar to, those for charities and therefore precedent in the context of charity law bolsters the use of preventative means to achieve relief (Part IV(B)). This discussion does not simply rely on a general analogy between charities and PBIs.

### A Flexibility of Meaning

As discussed above, ‘PBI’ does not have a set technical meaning, but ‘must be understood according to its ordinary English usage’.<sup>138</sup> This means the ordinary usage at the time of the relevant case, so that the content of ‘PBI’ is ambulatory to some degree.<sup>139</sup> As emphasised by McGarvie J in *Cairnmillar*:

It is, I think, important not to approach a consideration of the ways open to a benevolent institution to go about achieving its objectives, with preconceptions arising from the fact that the leading case was decided in the context of the very different society which existed some 60 years ago.<sup>140</sup>

However, as noted by Street CJ, the benefits of ‘extension or modification’ must be weighed against ‘the pursuit of certainty’.<sup>141</sup> This means that there can be some development in PBI boundaries, provided it is within the ‘essential limitations of the *Perpetual Trustee* decision’.<sup>142</sup>

On the basis that *Perpetual Trustee* leaves open the possibility of undertaking preventative activities, as argued above, this paper suggests that preventative activities should be permitted, subject to the limits discussed in Part V. Moreover, it appears that the ACNC’s role, once it is set up, will include determining whether an entity is a PBI, with the Commissioner being required to accept that determination for DGR and other tax purposes.<sup>143</sup> This provides a useful opportunity to revisit the current understanding of the meaning of PBI, to enable any material released by the ACNC<sup>144</sup> to incorporate a more contemporary explanation of the term which permits preventative activities.

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138 Dal Pont, above n 11, 36. See also *Perpetual Trustee* (1931) 45 CLR 224, 232 (Starke J); *Public Trustee* (1934) 51 CLR 75, 100 (Starke J); *ACOSS* (1985) 1 NSWLR 567, 575 (Priestly JA), 568 (cf Street CJ); *Cairnmillar* (1990) 90 ATC 4752, 4757 (McGarvie J).

139 *Ambulance Service* (2003) 130 FCR 477, [44] (Hill, Goldberg and Conti JJ); *Re Royal Society for the Prevention of Cruelty to Animals, Queensland Inc* (Unreported, Supreme Court of Queensland, McGarvie J, 4 March 1992) 6, 13; *Cairnmillar* (1990) 90 ATC 4752, 4757, 4761 (McGarvie J); *Tangentyere* (1990) 90 ATC 4352, 4353 (Angel J); *Northern Land Council* (2002) 171 FLR 255, [15] (Mildred J, Martin CJ agreeing). See also Ann O’Connell, ‘Tax Issues for Charities in the New Millennium’ (2002) 7 *Deakin Law Review* 131, 136.

140 (1990) 90 ATC 4752, 4769 (McGarvie J).

141 *ACOSS* (1985) 1 NSWLR 567, 568 (Street CJ). See also *RSPCA* [1993] 1 Qd R 571, 577 (Fitzgerald P), 582 (Thomas J).

142 *RSPCA* [1993] 1 Qd R 571, 582 (Thomas J).

143 Treasury (Cth), ‘Scoping Study for a National Not-for-profit Regulator’, above n 5, 29–30; Explanatory Materials, Exposure Draft Australian Charities and Not-for-profits Commission Bill 2011 (Cth) [14]–[16]; Exposure Draft Australian Charities and Not-for-profits Commission Bill 2011 (Cth) cl 5-10(3) item 1.

144 It appears that the ACNC’s role will include the provision of information to not-for-profits: Explanatory Materials, Exposure Draft Australian Charities and Not-for-profits Commission Bill 2011 (Cth) 48.

## B Charity Law Cross-Pollination

Guidance can be obtained from charity law developments concerning components of the meaning of charity which are the same as, or similar to those, for PBIs. In particular:

- the meaning of 'relief' (Part IV(B)(1)); and
- the broadening of the means by which charitable ends can be achieved (Part IV(B)(2)).

As a preliminary matter, the technical legal meaning of charity,<sup>145</sup> subject to adjustments for certain purposes,<sup>146</sup> involves two positive limbs:

The entity's purposes must be charitable in the technical sense.<sup>147</sup> Accordingly, the purpose must be the 'relief of poverty', the 'advancement of education', the 'advancement of religion', or 'other purposes beneficial to the community'.<sup>148</sup>

The entity (unless it is for the relief of poverty) must be for the public benefit. This means that the entity must bestow an actual benefit,<sup>149</sup> and must do so in relation to the public or a section of the public rather than a private class of individuals.<sup>150</sup>

The charitable purposes referred to in the first limb are typically characterised in the context of the four 'heads' of charity identified,<sup>151</sup> with the first head relating to 'the relief of poverty',<sup>152</sup> and the fourth including, amongst others, the relief of needs arising from old age or sickness.<sup>153</sup>

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145 See, eg, *Central Bayside General Practice Association Ltd v Commissioner of State Revenue* (2006) 228 CLR 168, 178 n 28 (Gleeson CJ, Heydon and Crennan JJ). Although the case concerned a provision in the *Pay-roll Tax Act 1971* (Vic), their Honours' comments related to the use of 'charitable' generally in legislation. See also 222–4 (Callinan J), 195–208 (Kirby J). For a comprehensive literature review of the meaning of charity and of proposals for reform, see Not-for-Profit Project Tax Group, above n 137.

146 For instance, there have been certain modifications to the notions of charitable purpose and public benefit to extend their reach under the *ITAA97: Extension of Charitable Purpose Act 2004* (Cth).

147 That is, in the manner discussed in *Commissioners for Special Purposes of the Income Tax v Pemsel* [1891] AC 530, 573 (Lord Herschell, Lord Watson agreeing), 583 (Lord Macnaghten, Lords Morris and Watson concurring) ('*Pemsel*') in light of the preamble to the *Charitable Uses Act 1601*, 43 Eliz 1 c 4. See also *Aid/Watch Incorporated v Federal Commissioner of Taxation* (2010) 241 CLR 539, 548 (French CJ, Gummow, Hayne, Crennan, Bell JJ) ('*Aid/Watch*').

148 The last is a general category determined by analogy with the authorities or the *Charitable Uses Act 1601*, 43 Eliz 1 c 4.

149 *Re Pinion* (dec'd); *Westminster Bank Ltd v Pinion* [1965] Ch 85, 107 (Harman LJ), 107–8 (Davies LJ), 109–11 (Russell LJ) ('*Re Pinion*'); *Gilmour v Coats* [1949] AC 426, 446 (Lord Simonds).

150 *Verge v Somerville* [1924] AC 469, 499 (Lord Wrenbury); *Thompson v Federal Commissioner of Taxation* (1959) 102 CLR 315, 321–3 (Dixon CJ, Fullagar and Kitto JJ in agreement); *Strathalbyn Show Jumping Club Inc v Mayes* (2001) 79 SASR 54, 74 (Bleby J).

151 See, eg, O'Connell, above n 31, 18.

152 *Pemsel* [1891] AC 530, 583 (Lord Macnaghten, Lords Morris and Watson concurring).

153 On the basis that they are expressly listed in the preamble: *West Australian Baptist Hospital & Homes Trust Inc v City of South Perth* [1978] WAR 65, 68, 72. See also, F Maxwell Bradshaw, *The Law of Charitable Trusts in Australia* (Butterworths, 1983) 58–9; Chesterman, *Charities, Trusts and Social Welfare*, above n 119, 138; *Hilder v Church of England Deaconess' Institution Sydney Ltd* [1973] 1 NSWLR 506, 512 (Street CJ) ('*Hilder*'); *Perpetual Trustee Co Ltd v St Luke's Hospital* (1939) 39 SR (NSW) 408, 419–20 (Nicholas J); *Inland Revenue Commissioners v Baddeley* [1955] AC 572, 607–8 (Lord Reid).

In terms of specific linkages between developments in charity law and the meaning of PBI, the first link is that both categories involve the notion of ‘relief’ as either a required or potential element. The majority in *Perpetual Trustee*, in defining PBI, refer to the ‘relief of’ needs arousing compassion in the community.<sup>154</sup> For charity law, both the first head and some purposes under the fourth head concern ‘relief’.

The second common link arises because a key requirement for an institution to be a PBI is that it have the purpose of providing relief to people with certain needs (see Part II(B)). An analogy can be drawn with the requirement for charities that an entity’s purposes be charitable in the technical sense. Charity authorities which explain the distinction between powers or activities (as means) and a particular purpose (as the end) are therefore relevant to the PBI definition by demonstrating that a particular means need not prevent an end from existing.

Accordingly, charity law cases, while not determinative,<sup>155</sup> should at least inform PBI developments.

### 1 *Indirect ‘Relief’*

The concept of ‘relief’ is relevant to both PBIs and the technical meaning of charity, in particular to the first head of the relief of poverty and the fourth head which includes the relief of needs arising from old age or sickness.<sup>156</sup> This Part examines the meaning of ‘relief’ in charities cases, which unless otherwise stated, *expressly* use or consider the term ‘relief’. That is because charitable purposes are not limited to ‘relief’ of certain needs and some indirect assistance cases more appropriately constitute the advancement of purposes beneficial to the community rather than truly comprising ‘relief’. However, as the cases show, there are accepted instances where ‘relief’ can be effected by indirect, including preventative, means.

As demonstrated by the Macquarie Dictionary definition, the concept of ‘relief’ is linked to need and, generally, to the removal of that need:

1. (sometimes followed by *from*) deliverance, alleviation, or ease through the removal of pain, distress, oppression, etc.
2. a means of relieving, or a thing that relieves pain, distress, anxiety, etc.
3. help or assistance given, as to those in poverty or need ...<sup>157</sup>

The authorities accept that activities which indirectly achieve a purpose can amount to ‘relief’.<sup>158</sup> Indeed, the Preamble to the *Statute of Elizabeth* refers to a

154 (1931) 45 CLR 224, 232 (Starke J), 233–4 (Dixon J), 235–6 (Evatt J).

155 Nor is the popular meaning of charity determinative of the meaning of PBI: *Aid/Watch* (2010) 241 CLR 539, 548 (French CJ, Gummow, Hayne, Crennan, Bell JJ); *RSPCA* [1993] 1 Qd R 571, 582 (Thomas J); *Cairnmillar* (1990) 90 ATC 4752, 4757 (McGarvie J).

156 See above nn 152–53.

157 Macmillan Publishers Australia, *Macquarie Dictionary Online* (2011) Macquarie Dictionary <<http://www.macquariedictionary.com.au>>. See also *Joseph Rowntree Memorial Trust Housing Association Ltd v A-G* [1983] 1 Ch 159, 171 (Peter Gibson J).

158 Bradshaw, above n 153, 11. See also Hubert Picarda, *The Law and Practice Relating to Charities* (Butterworths, 3<sup>rd</sup> ed, 1999) 38; Jean Warburton and Debra Morris, *Tudor on Charities* (Sweet and Maxwell, 8<sup>th</sup> ed, 1995) 32; Dal Pont, above n 11, 539.

number of objects, particularly the repair of infrastructure,<sup>159</sup> which several commentators, including one of the statute's drafters, indicate were originally included to indirectly provide poverty relief by lessening the need for parish funds (used for poor relief) to be applied to such repairs.<sup>160</sup>

In terms of the types of indirect relief that have been accepted, gifts for the support of persons or infrastructure that in turn directly provide, or are used to provide, relief have been held to be for:

- the 'relief of' poverty;<sup>161</sup> and
- the 'relief of' the aged.<sup>162</sup>

There are numerous cases relating to the relief of sickness or the advancement of health in which the court did not focus on whether the particular objects amounted to 'relief', but simply whether they were for charitable purposes.<sup>163</sup>

There are other instances of health cases where indirect objects have expressly been held to amount to 'relief'. For instance, research and training in relation to the treatment of the sick, as being for 'the relief of human

159 '[R]epair of bridges, ports, havens, causeways, churches, sea-banks and highways': *Charitable Uses Act 1601*, 43 Eliz 1 c 4, preamble.

160 George Duke, *The Law of Charitable Uses* (Henry Twyford, 1676) 135, quoting Sir Francis Moore, *The Learned Readings*, noting that a gift for the repair of sea banks would be charitable 'notwithstanding others stand bound, by covenant and prescription, to repair them'; Gareth Jones, *History of the Law of Charity 1532–1827* (Cambridge University Press, 1969) 29, 31, citing Sir Francis Moore, *The Learned Readings*; Chesterman, above n 119, 26; Myles McGregor-Lowndes and Ted Flack, 'The Border Between Government and Charity: A Case Study of Queensland Hospital Foundations' (2002) 8(1) *Third Sector Review* 99, 99–100.

161 'I think that I may hold this institution to be an almshouse and a house provided for the reception or relief of poor persons': *Trustees of the Mary Clark Home v Anderson* [1904] 2 KB 645, 651, 656 (Channell J). See also *Re Gardom*; *Le Page v A-G* [1914] 1 Ch 662, 667–8 (Eve J) (the term 'relief' of poverty was not expressly used).

162 *Re Clark; Perry v Salvation Army (Victoria) Property Trust* [1957] VR 171, 173, 177 (O'Bryan J). See also Bradshaw, above n 153, 16.

163 *Re Coxen; McCallum v Coxen* [1948] Ch 747, 755–6 (Jenkins J) (annual allowance for a dinner for the trustees of a trust for the benefit of orthopaedic hospitals); *Re White's Will Trusts*; *Tindall v Board of Governors of The United Sheffield Hospitals* [1951] 1 All ER 528, 530 (Harman J) (money left on trust to maintain 'a home of rest for the nurses of [a hospital]'); *Cocks v Manners* (1871) LR 12 Eq 574, 585 (Sir Wickens VC) (gift for the support of the Sisters of the Charity of St Paul at Selly Oak, who provided education and nursed sick people); *Re Delany*; *Conoley v Quick* [1902] 2 Ch 642, 647 (Farwell J); *Re Travis*; *Young v Otago University* [1947] NZLR 382, 387–8 (Smith J) (trust for the support of scientific research into cancer or consumption); *Re Simpson* [1961] QWN 50, 66 (Gibbs J) (cancer research). See also Bradshaw, above n 153, 16–7; Chesterman, above n 119, 165. Note that gifts to hospitals and similar institutions have been held to be charitable on the basis of being for the 'relief of' impotence: *City of Hawthorn v Victorian Welfare Association* [1970] VR 205, 209 (Smith J) ('VWA').

suffering’;<sup>164</sup> or the provision of training to assist blind, deaf, and dumb people find employment being ‘the relief of the impotent’, within the term used in the will under consideration.<sup>165</sup>

Finally, preventative activities have been so treated in some circumstances, as apparently acknowledged by the Commissioner.<sup>166</sup> In *DV Bryant Trust Board v Hamilton City Council* (*‘DV Bryant’*), a trust operating a retirement village which created an environment intended to prevent isolation of the aged was held charitable on the basis that it relieved the needs of old age:

the needs of the aged for fraternity, belonging, respect, mutual activities, interaction, and security are surely a matter of the greatest moment both for the aged, and for society. Could there be anything more dispiriting and debilitating for an aged person than to be left isolated in old age? To argue ... that the aged are not ‘relieved’ to a sufficient extent by the activities of the Bryant Village is in my view not just wrong in law; but downright churlish.<sup>167</sup>

Justice Hammond accepted there should be an express focus on the term ‘relief’ and that the Bryant Village did indeed provide relief for the ‘incidents of old age’, and the fact ‘that there are no nursing facilities, or care of that kind is not fatal’.<sup>168</sup> The Charity Commission for England and Wales also expressly accepts that activities ‘preventing’ causes of poverty may be for the ‘relief of poverty’.<sup>169</sup>

## 2 Indirect Means to PBI Ends

As discussed in Part IV(B), both PBIs and charities have a purpose requirement. Other than the precedential ground that most accepted PBIs do in fact directly provide relief, it appears to be the targeting requirement for a PBI’s purpose, discussed in Part II(B), which is used to justify the need for direct relief. Therefore, charities cases which accept that an entity may use indirect, including preventative, means, to achieve a charitable end are relevant to whether the PBI purpose test necessitates direct relief to achieve a targeted purpose. The discussion below examines:

- the link between means and ends; and
- examples, from charity law, of indirect means being used to effect a charitable purpose.

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164 *Royal College of Surgeons of England v National Provincial Bank Ltd* [1952] AC 631, 654 (Lord Morton, Lord Normand agreeing) (the ‘due promotion and encouragement of the study and practice of the art and science of surgery’ found to be ‘directed to the relief of human suffering or to the advancement of education or science or to all of these ends’), 672 (cf Lord Cohen). Also, the objects of promoting ‘the science and art of nursing and the better education and training of nurses and their efficiency in the profession of nursing’ and ‘the advance of nursing as a profession in all or any of its branches’ were charitable because they promoted ‘the relief of human suffering’: *Royal College of Nursing v St Marylebone Borough Council* [1959] 1 WLR 1077, 1083–4 (*‘College of Nursing’*).

165 *Re Vosz; Public Trustee v Steele* [1926] SASR 218, 237 (Murray CJ).

166 Australian Tax Office, *Income Tax and Fringe Benefits Tax: Charities*, TR 2011/4, 12 October 2011 [318].

167 [1997] 3 NZLR 342, 349–50 (Hammond J).

168 *Ibid* 350 (Hammond J).

169 Charity Commission for England and Wales, above n 128, 9.

The manner in which the end, or purpose, is characterised is significant to the link between means and ends. In the context of a charitable institution, the purpose must be solely charitable and a determination of purpose typically involves examination of the entity's activities and the 'circumstances of [its] formation' as well as the objects stated in its constitution.<sup>170</sup> A similar examination takes place to identify PBI purposes,<sup>171</sup> although an acceptance that minor, non-ancillary, purposes do not prevent characterisation as a PBI may mean the test is in fact broader for PBIs.<sup>172</sup>

Accordingly, the means (whether in the form of an activity or expressed as a subsidiary object) by which a purpose is achieved may be relevant to the identification of that purpose.<sup>173</sup> However, the means is not determinative, particularly as it is difficult to characterise the 'means' without understanding the purpose for which it is employed.<sup>174</sup>

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- 170 *Federal Commissioner of Taxation v Word Investments Ltd* (2008) 236 CLR 204, 216–7, 220–1 (Gummow, Hayne, Heydon and Crennan JJ) ('*Word Investments*'). See also *Royal Australasian College of Surgeons v Federal Commissioner of Taxation* (1943) 68 CLR 436, 444 (Latham CJ), 446 (Rich J), 448 (Starke J), 450–1 (McTiernan J), 452 (Williams J) ('*College of Surgeons*') (the case focused on whether the College was a scientific institution rather than a charitable institution); *Inland Revenue Commissioner v City of Glasgow Police Athletic Association* [1953] AC 380, 396 (Lord Normand), 399 (Lord Morton), 398 (cf Lord Oaksey) ('*Glasgow Police*'); *Tasmanian Electronic Commerce Centre Pty Ltd v Federal Commissioner of Taxation* (2005) 142 FCR 371, 385 (Heerey J).
- 171 *Maughan* (1942) 66 CLR 388, 398 (Williams J, Rich J agreeing); *Tangentyere* (1990) 90 ATC 4352, 4354 (Angel J); Australian Tax Office, *Income Tax and Fringe Benefits Tax: Public Benevolent Institutions*, TR 2003/5, 4 June 2003, [95], [100]; cf *Cairnmillar* (1990) 90 ATC 4752, 4767 (McGarvie J), citing *R v The Judges of the Federal Court of Australia*; *Ex parte The Western Australian National Football League Inc* (1979) 143 CLR 190 (the more stringent of the tests described: see 207–208 (Barwick CJ), 213 (cf Gibbs J), 233, 235–6 (Mason J, Jacobs J agreeing), 239 (Murphy J) ('*Adamson's Case*').
- 172 *Cairnmillar* (1990) 90 ATC 4752, 4767 (McGarvie J), citing *Adamson's Case* (1979) 143 CLR 190 (see 207–8 (Barwick CJ), 213 (Gibbs J), 233, 235–6 (cf Mason J, Jacobs J agreeing), 239 (cf Murphy J)); Australian Tax Office, *Income Tax and Fringe Benefits Tax: Public Benevolent Institutions*, TR 2003/5, 4 June 2003, [108], [119]–[120].
- 173 *Word Investments* (2008) 236 CLR 204, 224 (Gummow, Hayne, Heydon and Crennan JJ); *College of Surgeons* (1943) 68 CLR 436, 448 (Starke J), 450 (McTiernan J); *A-G v Ross* [1986] 1 WLR 252, 260, 263–4 (Scott J); *Glasgow Police* [1953] AC 380, 396–7 (Lord Normand), 399–400 (Lord Morton); *Cronulla Sutherland Leagues Club Ltd v Federal Commissioner of Taxation* (1990) 23 FCR 82, 97 (Lockhart J), 120 (Foster J); *Commissioner for Australian Capital Territory Revenue Collections v Council of Dominican Sisters of Australia* (1991) 101 ALR 417, 423–4 (Morling, Neaves and Foster JJ). See also Dal Pont, above n 11, 322–323.
- 174 Maurice C Cullity, 'The Myth of Charitable Activities' (1990) 10 *Estates & Trusts Journal* 7, 7; Dal Pont, above n 11, 322. See also *Vancouver Society of Immigrant & Visible Minority Women v Minister of National Revenue* [1999] 1 SCR 10, [152] (Iacobucci J, Cory, Major and Bastarache JJ agreeing), [54] (Gonthier J, L'Heureux-Dubé and McLachlin JJ in dissent in the result but in agreement on the issue of activities versus purposes) ('*Vancouver Society*'). The Canadian Income Tax Act (*Income Tax Act*, RSC 1985 (5th supp), c 1, s 149.1(1)) defines a 'charitable organisation' as an organisation that, amongst other requirements, devotes all of its resources to 'charitable activities'. The comments of the Canadian Supreme Court in the *Vancouver Society* case confirmed that, although the legislation referred only to activities and not purposes, it was necessary to consider the purposes to determine how the activities should be characterised.

This relationship was emphasised in *Federal Commissioner of Taxation v Word Investments Ltd* ('*Word Investments*').<sup>175</sup> There, activities of accepting deposits from the public to be invested at market rates with nil or nominal interest paid in return; operating a funeral business; and distributing surpluses to other entities to support evangelical religious activities, were held to indirectly achieve a purpose of the advancement of religion.<sup>176</sup> Further, the High Court construed Word's subsidiary objects (being its business objects) as powers rather than true objects and as a means to achieving Word's religious charitable purpose, rather than separate ends:

Word endeavoured to make a profit, but only in aid of its charitable purposes. To point to the goal of profit and isolate it as the relevant purpose is to create a false dichotomy between characterisation of an institution as commercial and characterisation of it as charitable.<sup>177</sup>

Similarly, in relation to activities, the majority noted that the real issue was whether the activities 'are carried on in furtherance of a charitable purpose', rather than being 'intrinsically charitable',<sup>178</sup> and found that Word's activities were carried on 'only in order to effectuate' its charitable purposes.<sup>179</sup> While the Federal Government has announced that it will limit the extent to which tax concessions apply to 'commercial' activities undertaken by not-for-profit entities, the proposed reforms do not currently affect the above means/ends analysis.<sup>180</sup> Indeed, the federal government has confirmed that the reforms are not intended to prevent not-for-profits from undertaking commercial activities.<sup>181</sup>

The distinction between means and ends predates *Word Investments* and has been accepted in charities cases relating to incidental or ancillary purposes.<sup>182</sup> In circumstances where an entity has various objects or activities,<sup>183</sup> a distinction is made between objects or activities which are 'incidental or ancillary' to the entity's main purpose and those which are independent and hence contribute to

175 (2008) 236 CLR 204.

176 Ibid 217–8, 219 (Gummow, Hayne, Heydon and Crennan JJ).

177 Ibid 219. See also 217–8 (Gummow, Hayne, Heydon and Crennan JJ).

178 Ibid 221 (Gummow, Hayne, Heydon and Crennan JJ).

179 Ibid.

180 Bill Shorten, Assistant Treasurer and Tanya Plibersek, Minister for Human Services and Social Inclusion, 'Making It Easier for Charities to Help Those Who Need It' (Press Release, No 77, 10 May 2011).

181 Department of the Treasury (Cth), 'Consultation Paper: Better Targeting of Not-for-profit Tax Concessions' (Consultation Paper, Treasury, 27 May 2011) 1. However, the normal tax rules may apply to profits from 'unrelated commercial activities', which are not 'directed back to [an entity's] altruistic purpose': at 1.

182 The distinction is also referred to in the *cy-près* context when determining whether property has been given for a specific purpose or with a general charitable intention: *A-G (NSW) v Perpetual Trustee Co (Ltd)* (1940) 63 CLR 209, 223 (Dixon and Evatt JJ).

183 The leading cases discuss incidental objects. However, the same analysis can be applied to activities or powers: *Navy Health Ltd v Federal Commissioner of Taxation* (2007) 163 FCR 1, 29–30 (Jessup J) ('*Navy Health*'); *Trustees of the Dean Leigh Temperance Canteen v Commissioners of Inland Revenue* (1958) 38 TC 315, 324 (Harman J) ('*Dean Leigh*'); *Commissioner of Inland Revenue v Carey's (Petone and Miramar) Ltd* [1963] NZLR 450, 455–6 (Gresson P) ('*Carey*'); *Vancouver Society* [1999] 1 SCR 10, [157]–[158] (Iacobucci J, Cory, Major and Bastarache JJ agreeing).

separate purposes, precluding charitable status.<sup>184</sup> An incidental or ancillary purpose or activity is one which contributes toward achieving or is 'conducive to promoting'<sup>185</sup> the main purpose.<sup>186</sup>

As previously noted, it may be difficult to 'determin[e] when powers or activities are to be characterised as being "carried on in furtherance of a charitable purpose", rather than evidencing a separate, non-charitable purpose'.<sup>187</sup> The cases considering incidental or ancillary objects have tended to involve an overall weighing of facts rather than the application of a particular test.<sup>188</sup> However, the following statements provide some assistance in determining whether an object or activity is separate in its own right: whether the object is 'conducive to promoting',<sup>189</sup> 'conducive to the achievement of',<sup>190</sup> or 'tends to assist, or which naturally goes with, the achievement of'<sup>191</sup> the main purpose.<sup>192</sup>

Nevertheless, when considering whether indirect activities can be consistent with PBI Objects, it is not necessary to identify the precise limits of the nexus test. It suffices that charity cases accept that purposes or activities may be characterised as ancillary or incidental to a charitable purpose where they indirectly effect that purpose. For instance, in *Commissioners of Inland Revenue*

184 *Glasgow Police* [1953] AC 380, 397 (Lord Normand), 397–8 (Lord Oaksey), 400 (Lord Morton), 402 (Lord Reid), 405 (Lord Cohen); *Congregational Union of New South Wales v Thistlethwayte* (1952) 87 CLR 375, 442 (Dixon CJ, McTiernan, Williams and Fullagar JJ), 450 (Kitto J) ('*Thistlethwayte*'); *Stratton v Simpson* (1970) 125 CLR 138, 148–9 (Windeyer J), 159–60 (Gibbs J, Barwick CJ and Menzies J in agreement).

185 *Stratton v Simpson* (1970) 125 CLR 138, 148–9 (Windeyer J). See also 159–60 (Gibbs J, Barwick CJ and Menzies J in agreement).

186 *Thistlethwayte* (1952) 87 CLR 375, 442 (Dixon CJ, McTiernan, Williams and Fullagar JJ); *Dean Leigh* (1958) 38 TC 315, 324 (Harman J); *Carey* [1963] NZLR 450, 455–6 (Gresson P); *Re Hood; Public Trustee v Hood* [1931] 1 Ch 240, 247–9 (Lord Hanworth MR), 252 (Lawrence LJ), 253 (Romer LJ) ('*Re Hood*'). See also Australian Tax Office, *Income Tax and Fringe Benefits Tax: Charities*, TR 2011/4, 12 October 2011, [184]. The other sense in which activities or objects have been described as 'incidental' is where they are a result, as opposed to a method, of carrying out a charitable purpose, for instance an 'inevitable concomitant': *Royal Choral Society v Commissioner of Inland Revenue* [1943] 2 All ER 101, 106 (Lord Greene MR, Mackinnon LJ in agreement), 109 (Du Parcq LJ), or 'mere incident': *Salvation Army (Victoria) Property Trust v Fern Tree Gully Corporation* (1952) 85 CLR 159, 172 (Dixon, Williams and Webb JJ).

187 Ian Murray, 'Charity Means Business: *Commissioner of Taxation v Word Investments Ltd*' (2009) 31 *Sydney Law Review* 309, 316. Cf Dal Pont, above n 11, 62–3.

188 See, eg, *Thistlethwayte* (1952) 87 CLR 375, 441–2 (Dixon CJ, McTiernan, Williams and Fullagar JJ); *College of Surgeons* (1943) 68 CLR 436, 447 (Rich J), 448 (Starke J), 450–1 (McTiernan J), 453–454 (Williams J) although that case considered whether the college was a scientific institution, rather than a charitable institution; *Navy Health* (2007) 163 FCR 1, 29–31 (Jessup J); *Glasgow Police* [1953] AC 380, 397 (Lord Normand), 397–8 (Lord Oaksey), 400 (Lord Morton), 402–3 (Lord Reid), 405–7 (Lord Cohen).

189 *Stratton v Simpson* (1970) 125 CLR 138, 148 (Windeyer J). See also 159–60 (Gibbs J, Barwick CJ and Menzies J in agreement).

190 *Thistlethwayte* (1952) 87 CLR 375, 442 (Dixon CJ, McTiernan, Williams and Fullagar JJ).

191 *Navy Health* (2007) 163 FCR 1, 29 (Jessup J).

192 The majority in *Word Investments* did not expressly consider a nexus test, although their Honours potentially gave some guidance on the outer bounds by reference to the 'natural and probable consequences' of purposes and activities: (2008) 236 CLR 204, 226 (Gummow, Hayne, Heydon and Crennan JJ). See also Murray, above n 187, 318.

*v Falkirk Temperance Café Trust*, Lord Blackburn accepted that the founding and operation of a restaurant selling food and non-alcoholic drinks could achieve the same ‘temperance’ purpose as the direct reclamation of drunkards.<sup>193</sup>

Likewise, the Court of Appeal in *Royal College of Nursing v St Marlyebone Borough Council* noted that advancing the nursing profession for the benefit of its members as one of the methods of achieving its charitable object of advancing nursing for the relief of sickness was an acceptable way to achieve its object.<sup>194</sup>

Preventative means have also expressly been found to promote charitable ends. The prevention of cruelty to animals cases and prevention of extinction of animals cases clearly demonstrate that preventative activities which indirectly ‘enhance the life of humans’ are charitable.<sup>195</sup> Further, in *Re Blyth*, Thomas J held that a purpose of ‘the elimination of war’ would be charitable on the basis that it would benefit the community.<sup>196</sup>

Several cases relate to charitable trusts which support the mental wellbeing of patients with physical illnesses by providing amenities or enabling easier visits by relatives.<sup>197</sup> In one sense such activities indirectly provide relief by adding to mental fortitude, in another sense, they are preventative as they are aimed at stopping a decline in a patient’s psychological state. For instance, in *Re Dean’s Will Trusts; Cowan v Board of Governors of St Mary’s Hospital, Paddington*, Harman J held a gift for the purpose of providing lodging for relatives who travelled to visit sick relatives in hospital to be charitable on the basis that ‘the provision of such accommodation may be a very important purpose of a hospital of this kind for the spiritual and psychological comfort of its patients, and, indeed, to aid their recovery’.<sup>198</sup>

## V POLICY IMPLICATIONS OF ACCEPTING INDIRECT ASSISTANCE

This part examines the potential implications of accepting that PBIs may carry out indirect activities, particularly preventative activities, including whether any limits should be imposed. It does so by reference to the policy rationale for the PBI category (Part V(A)), being to support the PBI Objects identified in Part

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193 (1926) 11 TC 353, 368–9 (Lord Blackburn). For further temperance cases, see also *Dean Leigh* (1958) 38 TC 315, 324–5 (Harman J); *Re Hood* [1931] 1 Ch 240, 251 (Lord Hanworth MR), 252 (Lawrence LJ), 252–3 (Romer LJ).

194 *College of Nursing* [1959] 1 WLR 1077, 1084–5.

195 *Perpetual Trustees Tasmania Ltd v State of Tasmania* [2000] TASSC 68 (16 June 2000), [15] (Slicer J). See also *Re Inman (dec’d)* [1965] VR 238, 242 (Gowans J); *Murdoch v A-G* (1992) 1 Tas R 117, 131 (Zeeman J); *Swifte v A-G* [1912] 1 IR 133, 138, 140 (Barton J); *Re Douglas; Obert v Barrow* [1886-90] All ER Rep 228, 231–2 (Cotton LJ), 233 (Lindley LJ), 234 (Bowen LJ). See also *A-G (South Australia) v Bray* (1964) 111 CLR 402, 418 (Kitto J, Menzies J agreeing), 424 (Windeyer J).

196 [1997] 2 Qd R 567, 581 (Thomas J).

197 *Re Adams (dec’d); Gee v Barnet Group Hospital Management Committee* [1968] 1 Ch 80, 93 (Danckwerts LJ).

198 [1950] 1 All ER 882, 883.

II(B), while also ensuring an appropriate balance between fiscal requirements and welfare objectives.

Based on this function for the PBI concept, indirect activities raise two key concerns:

- whether the particular indirect activities, such as preventative assistance, do in fact advance the PBI Objects and whether permitting such activities would improve efficiency in meeting those PBI Objects (discussed in Part V(B)); and
- that support for indirect activities might upset the balance between revenue sustainability and the promotion of PBI Objects (see Part V(C)).

A more minor issue with permitting activities which are less clearly linked to achievement of the ultimate PBI Objects, is that it could increase the cost to government of administering the PBI concession (and potentially the compliance costs for PBIs).<sup>199</sup> This is particularly so if greater evidence is required to show the link between activities and the achievement of PBI Objects. However, as discussed in Part V(C), a strict targeting requirement should at least limit any increase in administrative costs.

### **A Policy Rationale for the PBI Category**

Although not clearly articulated in the legislation or explanatory materials, the purpose of PBI status appears to be to provide a degree of support (via tax concessions) for selected social welfare objectives, while also ensuring an appropriate balance between fiscal requirements and the achievement of those objectives by targeting, and so restricting, that support to the selected objectives.<sup>200</sup>

Looking at the selected welfare objectives, as identified in Part II(B), the phrase PBI was introduced to narrow the range of institutions able to access gift deductibility from the full range of charitable institutions in the technical sense, to a category broadly corresponding to the popular meaning of charity.<sup>201</sup> As emphasised in the Parliamentary debates on the Estate Duty Assessment Bill 1928 (Cth), this was because Parliament had intended that the word 'charitable' meant something exclusive from 'religious', 'scientific' and 'public educational'

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199 See, eg, M M Katz et al, 'Ninth Interim Report of the Commission of Inquiry into Certain Aspects of the Tax Structure in South Africa: Fiscal Issues Affecting Non-Profit Organisations' (Interim Report, Commission of Inquiry into Certain Aspects of the Tax Structure of South Africa, 12 February 1999) 7. This issue correlates with the tax policy criterion of 'simplicity', which concerns the facility of administration and compliance: Chris Evans and Binh Tran-Nam, 'Managing Tax System Complexity: Building Bridges Through Pre-filled Tax Returns' (2010) 25 *Australian Tax Forum* 245, 249; Nicole Wilson-Rogers and Dale Pinto, 'Tax Reform: A Matter of Principle? An Integrated Framework for the Review of Australian Taxes' (2009) 7 *eJournal of Tax Research* 72, 81.

200 Carney and Hanks, above n 11, 51, 77. See also Myles McGregor-Lowndes, Cameron Newton and Stephen Marsden, 'Did Tax Incentives Play Any Part in Increased Giving?' (2006) 41 *Australian Journal of Social Issues* 493, 495; O'Connell, above n 31, 30. See also Sheppard, Fitzgerald and Gonski, above n 8, 244.

201 See also *Perpetual Trustee* (1931) 45 CLR 224, 231 (Starke J), 233 (Dixon J); *Joyce* [1978] AC 122, 137.

and more akin to ‘assisting poverty or destitution’.<sup>202</sup> When proceedings were before the High Court in *Chesterman* (the case which prompted the amendment), the popular meaning of charity was referred to as ‘the relief of any form of necessity, destitution, or helplessness which excites the compassion or sympathy of men, and so appeals to their benevolence for relief’,<sup>203</sup> and as ‘compris[ing] benevolent assistance in aid of physical, mental and even spiritual progress for the benefit of those whose means are otherwise insufficient for the purpose’.<sup>204</sup> Further, in the *YMCA case* (which served as the impetus for the deductible gift recipient amendment), Isaacs J described the ordinary meaning of charity as the ‘usual modern sense of relief to persons ... [meaning] assistance, physical, mental or spiritual, for the benefit of those whose means or opportunities are otherwise insufficient for the purpose ...’.<sup>205</sup>

Therefore, while there may be ambiguity in the precise ambit of the ordinary meaning of charity,<sup>206</sup> the PBI concept appears to have been introduced to limit the range of social welfare purposes, not their means of attainment. The parliamentary debates on the Estate Duty Assessment Bill 1928 (Cth) support this, by emphasising that the amendment was intended to ‘make clear the charitable purposes intended to be provided for’.<sup>207</sup> The social welfare objectives intended to be met by the PBI category are therefore the relief of the needs identified in Part II(B), that is, the PBI Objects.

In terms of the appropriate trade-off between lost revenue and the achievement of these PBI Objects, clearly resource constraints will impose some limit on the extent to which social problems can be addressed.<sup>208</sup> As noted by McGregor-Lowndes, Newton and Marsden, the basis for providing gift deductible status to organisations is ‘to increase giving to such organisations thus producing more public goods such as research, health and education services’.<sup>209</sup> Providing tax concessions for indirect relief may result in the production of a wider range of public goods with tax revenue consequences as well as implications for how well-targeted such concessions would continue to be in meeting government priorities. In contrast, limiting tax deductibility to a more restricted range of charities allows a focus on “‘hands-on” poverty symptom relief’.<sup>210</sup> This can be a way to ensure that additional tax concessions are received

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202 See above Part II(B).

203 *Chesterman* (1923) 32 CLR 362, 384 (Isaacs J), 398 (Rich J, agreeing), quoting *Pemsel* [1891] AC 531, 572 (Lord Herschell). See also at 399–400 (Starke J).

204 *Ibid* 384–5 (Isaacs J), 398 (Rich J agreeing). See also at 399–400 (Starke J).

205 *YMCA case* (1926) 37 CLR 351, 358 (Isaacs J).

206 See, eg, *Pemsel* [1891] AC 530, 558 (Lord Watson), 573 (Lord Herschell), 583–4 (Lord Macnaghten, Lord Morris agreeing).

207 Commonwealth, *Parliamentary Debates*, House of Representatives, 11 September 1928, 6568 (Earle Page, Treasurer).

208 Ginsberg, above n 129, 44–5. See also Lord Wolfenden, above n 118, 21.

209 McGregor-Lowndes, Newton and Marsden, above n 200, 495.

210 O’Halloran, McGregor-Lowndes and Simon, above n 11, 246.

only by those entities that provide a sufficient public benefit that corresponds to the government's priorities.<sup>211</sup>

However, a number of commentators have specifically criticised the perceived PBI requirement of direct relief as being 'unnecessarily restrictive', given the potential benefits of permitting indirect activities, as identified in Part III(B).<sup>212</sup> Indeed, the federal government has itself recognised such a limit as being unnecessary, in some circumstances, for entities that would otherwise be PBIs, through the provision of additional concessions to health promotion charities;<sup>213</sup> harm prevention charities;<sup>214</sup> and charitable institutions that would be PBIs except that they also promote (but not as a principal activity) health promotion or harm prevention activities.<sup>215</sup>

Not surprisingly, Carney and Hanks describe the PBI concept as an 'advance' on the notion of 'charity', but 'as an instrument of welfare policy' still a 'comparatively crude and unsophisticated discriminant'.<sup>216</sup> Nevertheless the key issues raised by accepting that PBIs may carry out indirect activities are examined in Parts V(B) and V(C).

## **B Advancement of Selected Welfare Objectives with Greater Efficiency**

As noted by Dal Pont, the effects from preventing poverty or other needs from arising may not be as easily measured as the effects of relieving a condition.<sup>217</sup> This difficulty does not, however, deny the fact that assistance can be provided directly or indirectly to a class of people.<sup>218</sup> Moreover, Part III demonstrates that it may be more effective to indirectly provide assistance. The real issues are therefore:

- whether the courts are capable of determining if a particular preventative activity will advance a targeted PBI Object; and
- if the courts are capable of such a determination, whether there may be an efficiency gain from permitting indirect activities.

### **1 Ability to Measure Advancement of PBI Object**

As discussed in Part II(C)(1), one of the main reasons Street CJ considered that PBIs must directly provide relief, was that the class of persons who would benefit are more easily identified.<sup>219</sup> However, the recent decision of *Aid/Watch*

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211 Ibid 476.

212 Michael Chesterman, 'Foundations of Charity Law in the New Welfare State' in Charles Mitchell and Susan R Moody (eds), *Foundations of Charity* (Hart Publishing, 2000) 249, 260; McGregor-Lowndes, above n 53, 123; Chesterman, above n 11, 342; Carney and Hanks, above n 11, 75.

213 See above Part III(A).

214 Ibid.

215 *ITAA97* s 30-45 item 4.1.7.

216 Carney and Hanks, above n 11, 77.

217 Dal Pont, above n 11, 540. See also Scales, Mauldon and McGovern, above n 116, 64.

218 Chesterman, above n 119, 136.

219 *ACOSS* (1985) 1 NSWLR 567, 568 (Street CJ).

*Inc v Federal Commissioner of Taxation* ('*Aid/Watch*')<sup>220</sup> and the general charity law approach to the 'public benefit' requirement, indicate that the courts are capable of making such evaluations.

At issue in *Aid/Watch* was whether *Aid/Watch Inc* was prevented from being charitable by the 'political objects' doctrine which arose from the cases employing *Bowman v Secular Society Ltd.*<sup>221</sup> The doctrine potentially prohibited, amongst others, purposes of procuring a reversal of government policy or a change in particular decisions of government authorities.<sup>222</sup> In finding that no such general rule applies in Australia, the majority in *Aid/Watch* found that a court need not decide whether effecting a particular law reform would be for the public benefit.<sup>223</sup> However, their Honours did accept that a court has the capacity to determine whether the manner in which a law reform purpose is carried out is for the public benefit. The majority noted that 'the generation by lawful means of public debate', at least in relation to government activities concerning one of the four heads of charity, could be for the public benefit and that a court could determine this by reference to the 'particular ends and means involved'.<sup>224</sup>

In a broader sense, there are many instances in which the courts have demonstrated their ability to evaluate the public benefit of indirect activities (including that carrying out a particular law reform activity would not be for the public benefit),<sup>225</sup> which reflects the fact that courts are regularly called on to determine policy issues.<sup>226</sup> As noted in Part IV(B), the public benefit test requires that a charitable purpose bestow an actual benefit (something of 'practical utility')<sup>227</sup> and that it do so for the public or a section of the public rather than a private class of individuals. It is the first requirement that is pertinent. While the

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220 (2010) 241 CLR 539.

221 [1917] AC 406. See, eg, G F K Santow, 'Charity in its Political Voice – a Tinkling Cymbal or a Sounding Brass?' (1999) 18 *Australian Bar Review* 225, 226–7; David Brown, 'Charity, Politics and Agitation' (2011) 2 *New Zealand Law Journal* 54, 54; Not-for-Profit Project Tax Group, above n 137, 30–1. The doctrine had not been comprehensively accepted in Australia: *Aid/Watch* (2010) 241 CLR 539, 554–6 (French CJ, Gummow, Hayne, Crennan and Bell JJ). See also *Victorian Women Lawyers' Association Inc v Federal Commissioner of Taxation* (2008) 170 FCR 318, 348 (French J); *A-G (New South Wales) v New South Wales Henry George Foundation Ltd* [2002] NSWSC 1128, [53]–[54], [63] (Young CJ) ('*Henry George*'). A number of commentators had also questioned the rationale for this rule before *Aid/Watch*: Santow at 229; Picarda, above n 158, 182.

222 *McGovern v A-G* [1982] Ch 321, 339 (Slade LJ). See also *National Anti-Vivisection Society v Inland Revenue Commissioners* [1948] AC 31, 77 (Lord Normand) ('*Anti-Vivisection*'); Santow, above n 221, 228–9.

223 *Aid/Watch* (2010) 241 CLR 539, 556–7 (French CJ, Gummow, Hayne, Crennan and Bell JJ).

224 *Ibid* 557 (French CJ, Gummow, Hayne, Crennan and Bell JJ).

225 *Anti-Vivisection* [1948] AC 31, 46, 49 (Lord Wright), 70, 73 (Lord Simonds, Viscount Simon agreeing), 78–9 (Lord Normand) (amendment to the law to prevent vivisection).

226 Santow, above n 221, 229; *Henry George* [2002] NSWSC 1128, [63]–[64] (Young CJ).

227 Ontario Law Reform Commission, 'Report on the Law of Charities' (Report, Ontario Law Reform Commission, December 1996) 182; *Re Pinion* [1965] Ch 85, 107 (Harman LJ), 107–8 (Davies LJ), 109–11 (Russell LJ); *Gilmour v Coats* [1949] AC 426, 446 (Lord Simonds), 452–3 (Lord du Parc), 454 (Lord Normand), 454 (Lord Morton), 461 (Lord Reid).

courts assume that a purpose of relieving poverty does provide such a benefit,<sup>228</sup> there is merely a rebuttable presumption in respect of the relief of needs arising from age or sickness,<sup>229</sup> which means that charities cases in these areas, or more broadly relating to the fourth head of charity, are relevant to applying the public benefit test.

The benefit must be 'real or substantial' and not, as Martin emphasises, one which is 'too vague and incapable of proof'.<sup>230</sup> The need for 'proof' is demonstrated by *Southwood v Attorney-General*, in which a purpose of advancing education concerning the achievement of peace through disarmament was held not charitable because the court was not in a position to determine if the particular means of achieving peace was for the public benefit.<sup>231</sup>

However, the benefit need not be 'purely material'.<sup>232</sup> The courts have proved willing to evaluate more indirect and intangible benefits, outside the political objects context. For instance, in *Re Blyth*, Thomas J held that a purpose of 'the elimination of war' (without prescribing a particular means of achieving the elimination) would 'promot[e] a benefit that accrues for the whole community'.<sup>233</sup> In *Royal College of Surgeons of England v National Provincial Bank Ltd*, Lord Morton found the public benefit test satisfied in relation to the 'promotion and encouragement of the study and practice of the art and science of surgery' to indirectly (through more highly skilled surgeons and advanced surgical practices) achieve the relief of human suffering.<sup>234</sup>

Nevertheless, as Harding notes, there are dangers in seeking to 'evaluate' intangible benefits, particularly generalised benefits such as 'moral improvement' or 'spiritual benefit', for which it is difficult to adduce evidence and which are more common in the context of religious charities.<sup>235</sup> Faced with this difficulty, Harding has noted that there are at least two potential 'approaches'

228 Picarda, above n 158, 40; LA Sheridan, *Keeton & Sheridan's The Modern Law of Charities* (Barry Rose Law Publishers, 4<sup>th</sup> ed, 1992) 150; Chesterman, above n 119, 137, 144; Fiona Martin, 'The Legal Concept of Charity in the Context of Australian Taxation Law: The Public Benefit and Commercial Activity, Important Issues for Indigenous Charities' (2010) 25 *Australian Tax Forum* 275, 284.

229 *VWA* [1970] VR 205, 209 (Smith J); *Hilder* [1973] 1 NSWLR 506, 512 (Street CJ); *Re Resch's Will Trusts* [1969] 1 AC 514, 540; Thomson Reuters, *Principles of the Law of Trusts* (10 January 2011) [19.1050], [19.1070], [19.2010]; cf Matthew Harding, 'Trusts for Religious Purposes and the Question of Public Benefit' (2008) 71 *Modern Law Review* 159, 159; *West Australian Baptist Hospital & Homes Trust Inc v City of South Perth* [1978] WAR 65, 68, 72.

230 Fiona Martin, 'What's Public Benefit Got to Do With It? How the Law in Australia Relating to the Public Benefit Requirement of "Charitable" Applies to Charities for the Benefit of Australian Indigenous People' (2006) 21 *Australian Tax Forum* 331, 337; Australian Tax Office, *Income Tax and Fringe Benefits Tax: Charities*, TR 2011/4, 12 October 2011, [132]. See also Martin, 'Legal Concept of Charity', above n 228, 284–5; Paul Harpur, 'Charity Law's Public Benefit Test: Is Legislative Reform in the Public Interest?' (2003) 3 *Queensland University of Technology Law Journal* 422, 423–4.

231 *Southwood v A-G* [2000] WTLR 1199, [29] (Chadwick LJ, May and Kennedy LJJ agreeing). Chadwick LJ referred also to the court usurping the role of government: at [29]. See also, Australian Tax Office, *Income Tax and Fringe Benefits Tax: Charities*, TR 2011/4, 12 October 2011, [293].

232 Martin, 'Legal Concept of Charity', above n 228, 284.

233 *Re Blyth* [1997] 2 Qd R 567, 581 (Thomas J).

234 [1952] AC 631, 654 (Lord Morton, Lord Normand agreeing).

235 Harding, above n 229, 168, 171. See also Ontario Law Reform Commission, above n 227, 183.

to determining benefit: ‘evaluation’, based on the evidence presented to the relevant court; and ‘deference’, based on the settlor’s belief about the benefit of a trust.<sup>236</sup>

However, as acknowledged by Harding, the ‘deference’ approach is not a particularly discerning discriminant of public benefit.<sup>237</sup> Moreover, the writer submits that social welfare institutions with targeted PBI Objects would be less likely to produce benefits which are so general or based on subjective beliefs. This appears consistent with the approach adopted by the Charities Commission of England and Wales. The Charities Commission has detailed guidance to help charities which carry out preventative activities determine whether they satisfy the statutory public benefit test which applies in England and Wales.<sup>238</sup> The guidance relies on an evidence-based approach, requiring the identification and description of a benefit, though not necessarily its ‘measurement’.<sup>239</sup>

As discussed in Part III(A), preventative activities are not necessarily aimed at achieving different social welfare benefits. Rather, they are simply another means to achieving the same benefits. Accordingly, it should be no more difficult to establish the public benefit element. Indeed, the cases demonstrate that preventative activities have been accepted, where sufficient evidence has been adduced, as resulting in a public benefit. One example is *Attorney-General (New South Wales) v Sawtell*, which involved a gift for the preservation of native wildlife.<sup>240</sup> After examining expert evidence, Holland J concluded that the gift did result in a public benefit, in that preserving Australia’s unique plants and animals from extinction would:

- be in the national interest (as particular plants and animals were identified with state and federal coats of arms and stamps);
- benefit tourism;
- enable the ‘provision of reservoirs of genetic information for scientific study’;
- enable the ‘promotion of the development of new native species which may be of use to man’ and ‘the provision of education in the field’; and
- contribute to ‘public recreation and health’.<sup>241</sup>

In *DV Bryant*, Hammond J expressly considered whether ‘the relief that is afforded [is] “real”, as opposed to fanciful, or trifling, or insubstantial’, finding that the provision of an environment for the aged, which prevented particular

236 Harding, above n 229, 166, 173–4.

237 Ibid 176–7.

238 Charity Commission of England and Wales, ‘The Prevention or Relief of Poverty for the Public Benefit’ (Report, Charities Commission of England and Wales, December 2011) 13–4 <[http://www.charity-commission.gov.uk/charity\\_requirements\\_guidance/charity\\_essentials/public\\_benefit/pbpoverity.aspx](http://www.charity-commission.gov.uk/charity_requirements_guidance/charity_essentials/public_benefit/pbpoverity.aspx)>.

239 Charity Commission of England and Wales, ‘Charities and Public Benefit: The Charity Commission’s General Guidance on Public Benefit’ (Report, Charities Commission of England and Wales, 2008) 13–4.

240 [1978] 2 NSWLR 200.

241 Ibid 209–11 (Holland J). Also, if necessary, because the gift ‘promote[d] humane feelings and ... improve[d] public morality’: at 217 (Holland J).

needs from arising, did meet the public benefit test.<sup>242</sup> Further, in *Victorian Women Lawyers' Association Inc v Federal Commissioner of Taxation*, French J considered the public benefit requirement and the fourth head of charity's requirement of a purpose 'beneficial to the community'.<sup>243</sup> His Honour found that the Association's purpose of preventing discrimination by 'remov[ing] barriers and increas[ing] opportunities for participation by and advancement of women in the legal profession in Victoria' was beneficial to the community.<sup>244</sup>

Accordingly, provided evidence can be adduced, the courts appear capable of determining that preventative means can effect a particular purpose and result in a net benefit. The flipside of this requirement is that the need to establish an overall benefit would also act to circumscribe the range of indirect activities which an entity could undertake.

## 2 *Efficiency Gain from Indirect Activities*

Not only have the courts shown a willingness to evaluate indirect benefits, there is also an efficiency argument for permitting preventative activities. This correlates with the tax policy criterion of 'efficiency', which concerns the economic cost of a tax measure and is typically maximised if the effect of the tax measure on economic decisions is neutral.<sup>245</sup> Neutrality may be affected because the desire to obtain DGR status may distort decisions about the means (direct or indirect) used to achieve a purpose, or the organisational structure adopted. In addition, donor choices may be distorted. However, as discussed in Part III(A), different responses are required to individual welfare issues. As indicated, in some instances, preventative activities may, tax considerations aside, be preferable. Switching support that would otherwise exist for preventative activities to direct activities may therefore detract from efficiency.

The way PBI status is currently administered provides a tax disincentive to carrying out preventative activities. That is because organisations are rewarded with DGR status and other tax concessions if they avoid preventative activities, or else only carry them out as an ancillary or minor component of their overall activities. As noted previously, obtaining DGR status is very important in assisting organisations to seek funding, particularly from intermediaries such as private or public ancillary funds which are restricted to distributing to DGRs.<sup>246</sup> This means that choices by PBIs about what means they use to achieve their purpose are likely to be distorted, reducing efficiency.<sup>247</sup> In addition, given the benefits of gift deductibility,<sup>248</sup> donor choices about potential donees, may be

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<sup>242</sup> *DV Bryant Trust Board v Hamilton City Council* [1997] 3 NZLR 342, 350 (Hammond J).

<sup>243</sup> (2008) 170 FCR 318, 349.

<sup>244</sup> *Ibid* 352.

<sup>245</sup> Australia's Future Tax System Review Panel, above n 10, pt 1, 17.

<sup>246</sup> Productivity Commission, above n 4, 177.

<sup>247</sup> See, eg, Scales, Mauldon and McGovern, above n 116, 284 (in relation to the approaches adopted by charitable social welfare organisations generally to address needs), 292–3.

<sup>248</sup> See, eg, Elen Seymour, 'The Henry Review and Charitable Purpose: Workable Solutions or Another Band-aid?' (2010) 3 *Journal of the Australasian Law Teachers Association* 127, 131.

distorted.<sup>249</sup> Some organisations can reduce these distortions by separating their ‘PBI function’ into a separate part of the same entity (with a sufficiently separate identity to constitute an institution),<sup>250</sup> or a separate, but affiliated, legal entity.<sup>251</sup> However, the additional establishment and ongoing administrative costs in time and money required to maintain a separate entity or identity (when compared with operating a single entity or operation) may mean that the distortions are not entirely eliminated.

Further, as suggested in Part III(A) and as referred to by the Industry Commission, if multi-service PBIs are able to carry out ancillary preventative activities and retain PBI status, whereas more narrowly focused organisations carrying out only preventative activities are not entitled to tax concessions, then distortions will also be introduced for the choice of organisational structure for activities.<sup>252</sup>

In addition to any efficiency gain, adopting a more neutral definition of PBI would potentially result in a more robust structure for the DGR provisions, since a broader range of permitted activities should allow the PBI category to better adapt to changing social conditions.

### C Balancing Revenue Sustainability against the Promotion of PBI Objects

Broadening the activities that PBIs can undertake is likely to have a revenue cost for government, although, as noted by the Commission of Inquiry into Certain Aspects of the Tax Structure of South Africa, the evidence for increased philanthropy from broader categories of DGRs tends to be anecdotal.<sup>253</sup> This fiscal role of the PBI concept is reflected in the tax policy criterion of ‘sustainability’, involving an ability to satisfy ongoing governmental revenue needs while delivering a ‘durable’ structure.<sup>254</sup>

The Industry Commission estimated in 1995 that extending DGR status to the broader class of all non-profit organisations which relieve poverty or benefit the community through the advancement of social welfare (therefore permitting preventative activities, amongst others),<sup>255</sup> would be likely to reduce government revenue by around \$10 million per year.<sup>256</sup> However, the calculation was based

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249 Productivity Commission, above n 4, 177.

250 An institution need not be a separate legal entity: *Joyce v Ashfield Municipal Council* (1959) 4 LGRA 195, 200–1 (Owen J), 207 (Herron J). As to the need for a separate identity, see: Australian Tax Office, *Income Tax and Fringe Benefits Tax: Public Benevolent Institutions*, TR 2003/5, 4 June 2003, [92], citing *Case X33* (1990) 90 ATC 308, [20]–[21] (Senior Member Beddoe). To maintain a separate identity, the Commissioner suggests that ‘[c]onstituent documents, separate accounts and records, separate premises, staff and management help to indicate a separate identity’: Australian Tax Office, *Income Tax and Fringe Benefits Tax: Public Benevolent Institutions*, TR 2003/5, 4 June 2003, [92].

251 See, eg, *Cairnmillar* (1990) 90 ATC 4752.

252 Scales, Mauldon and McGovern, above n 116, 64, 282.

253 Katz et al, above n 199, 4. See also Australia’s Future Tax System Review Panel, above n 10, pt 2, 60.

254 Australia’s Future Tax System Review Panel, above n 10, pt 1, 17.

255 And which satisfy certain incorporation requirements: Scales, Mauldon and McGovern, above n 116, 286.

256 *Ibid* 286–7.

on a pre-existing tax expenditure for donations of \$160 million.<sup>257</sup> Updating the calculation based on the Tax Expenditures Statement 2010 estimate of a pre-existing gift deductibility tax expenditure of \$760 million for 2010/2011,<sup>258</sup> would result in a cost of around \$50 million, which is 0.015 per cent of projected taxation revenue for 2010/2011.<sup>259</sup> The *CDI Report* also recommended adopting an extended definition for DGR purposes (and potentially other tax concessions), by using the term 'Benevolent Charity' instead of PBI.<sup>260</sup> The new category was expressly intended to include all existing PBIs as well as organisations providing indirect relief, and all entities, not just institutions.<sup>261</sup> While the recommendation bears some similarities to the expansion argued for in this paper, the cost of the recommendation was not estimated, with the question whether concessions should be targeted to sub-categories within the range of Benevolent Charities left for government.<sup>262</sup>

The Productivity Commission used a different method to calculate the potential cost of providing gift deductibility to all endorsed charities, indicating that the cost of an expansion to all charities other than religious or education/research charities would be approximately \$202 million in the 2006/2007 financial year.<sup>263</sup> Narrowing consideration to the donations received by community or welfare organisations as discussed in the report *Giving Australia: Research on Philanthropy in Australia* (\$1.53 billion),<sup>264</sup> then making similar assumptions as the Productivity Commission about the split between claimed and unclaimed donations (66 per cent claimed)<sup>265</sup> and a 32 per cent tax rate for all donors, gives a revenue cost of \$166 million (0.05 per cent of projected taxation revenue for 2010/2011).<sup>266</sup>

While these calculations are based on more significant broadenings of deductibility, so overstating the cost, they do not properly account for any increase in giving. Nor do they include the cost of expanding the FBT exemption for PBIs, which is a significant tax expenditure, amounting to \$920 million in 2010/2011.<sup>267</sup> However, if these rough approximations do reflect the true cost of increasing access to PBI status, the cost remains a relatively low percentage of total taxation revenue. Further, it must be remembered that over 50 per cent of the funding for social service organisations is currently already provided in the

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257 Ibid 277.

258 See above n 28, 7, 61, 137.

259 As to projected tax revenue, see Australian Government, *Budget Strategy and Outlook: Budget Paper No 1 2011–2012* (10 May 2011) 5–35.

260 Sheppard, Fitzgerald and Gonski, above n 8, 258.

261 Ibid 256–7.

262 Ibid 258.

263 Productivity Commission, above n 4, H3, H5–H6.

264 Department of Family and Community Services and Indigenous Affairs (Cth), 'Giving Australia: Research on Philanthropy in Australia' (Report, January 2006) 22, 26. Figures are for calendar year 2004 for donations from individuals and financial year 2003/2004 for donations from businesses.

265 Productivity Commission, above n 4, H5–H6.

266 As to projected revenue, see Australian Government, *Budget Strategy and Outlook: Budget Paper No. 1 2011–2012* (10 May 2011) 5–35.

267 Department of the Treasury (Cth), above n 28, 61, 137.

form of direct government funding, some of which could potentially be reduced.<sup>268</sup> The 2010/2011 Federal Budget indicates spending of \$122.5 billion in 2010/2011 for social security and welfare and housing and community amenities alone (without including any public order and safety or health spending).<sup>269</sup> Looking solely at direct funding from all levels of government for not-for-profits, the Productivity Commission has indicated that total funding in 2006/2007 was in excess of \$25.5 billion.<sup>270</sup> More efficient implementation of PBI Objects could potentially help to reduce this expenditure.

Additionally, it has been suggested in the UK context that permitting a broad range of DGRs may actually detract from social welfare objectives by undermining a progressive tax-transfer system. This is on the basis that money that would have been collected by taxation and spent as the public decides is directed to ends which are disproportionately chosen by higher income earners and which do not properly reflect the broad range of welfare objectives promoted by the legislation.<sup>271</sup> This assumes that higher income earners are more likely to take advantage of the concessions based on evidence that higher income individuals tend to make greater donations.<sup>272</sup> However, in the Australian context, the range of purposes within which donations can be directed would not have changed and would continue to be far narrower than in other jurisdictions such as the UK, where donation concessions are based on the broader concept of charitable status.<sup>273</sup>

Moreover, to the extent greater donations are achieved, the donor also donates some of their own money, potentially increasing the net transfer from private to public purposes<sup>274</sup> and, therefore, the achievement of welfare objectives.<sup>275</sup> The Productivity Commission recommended further research to

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268 Productivity Commission, above n 4, 74; Scales, Mauldon and McGovern, above n 116, 286–7.

269 Australian Government, *Budget Strategy and Outlook: Budget Paper No 1 2011–2012* (10 May 2011) 6–5.

270 Productivity Commission, above n 4, 72.

271 Chesterman, 'Foundations of Charity Law in the New Welfare State', above n 212, 254–5. See also, Katz et al, above n 199, 7–8; Scales, Mauldon and McGovern, above n 116, 282.

272 Myles McGregor-Lowndes and Emma Pelling, 'An Examination of Tax Deductible Donations Made By Individual Australian Taxpayers in 2008–09' (Working Paper No CPNS 54, Australian Centre for Philanthropy and Nonprofit Studies, May 2011) 48; Department of Family and Community Services and Indigenous Affairs (Cth), above n 264, 9.

273 See, eg, *Corporation Tax Act 2010* (UK) c 4, ss 189–191, 203, 471; HM Revenue and Customs, *Detailed Guidance Notes for Charities: Chapter 3 – Gift Aid* [3.11] <<http://www.hmrc.gov.uk/charities/guidance-notes/chapter3/sectionc.htm>>; *Income Tax Act 2007* (UK) c 3, ss 414, 431, 520; HM Revenue and Customs, *Gift Aid: The Basics* <[http://www.hmrc.gov.uk/charities/gift\\_aid/basics.htm](http://www.hmrc.gov.uk/charities/gift_aid/basics.htm)>. Cf Chesterman, 'Foundations of Charity Law in the New Welfare State', above n 212, 257. In addition, the mechanics of the UK concession are different to those in Australia. For non-corporate donors, the gift aid provisions operate so that it is the charity rather than the donor that claims a tax rebate, unless the donor is a higher rate taxpayer in which case the donor may also claim a rebate based on the difference between the basic and higher tax rates.

274 Scales, Mauldon and McGovern, above n 116, 280–1.

275 Thomas Silk, 'A Comparative Study of Nonprofit Legal Systems in Ten Asia Pacific Societies: Findings and Commentary' in Thomas Silk (ed), *Philanthropy and Law in Asia: A Comparative Study of the Nonprofit Legal Systems in Ten Asia Pacific Societies* (Jossey-Bass, 1999) 7, 28.

confirm whether tax concessions do induce additional giving in Australia.<sup>276</sup> However, the Productivity Commission's review of the international research on the price elasticity of giving, while not wholly supportive, did indicate that tax concessions are likely to result in a greater amount donated than the tax revenue foregone and that this effect is likely to be more pronounced for higher income earners.<sup>277</sup> Some of the research also found this effect in the specific context of donations to social welfare organisations.<sup>278</sup> Accordingly, where broadening is limited to means rather than ends, it is suggested that overall welfare objectives will be supported rather than impaired.

The issue is then how to maintain the appropriate balance between a broader notion of PBI (which permits welfare objectives to be achieved more efficiently) and revenue sustainability. This paper submits that the targeting requirement identified by Priestly and Mahoney JJA in *ACOSS* applies equally to preventative activities and could be used as a means of protecting revenue sustainability without imposing an artificial distinction between direct and indirect activities. The targeting requirement was the key reason that their Honours found the Australian Council of Social Service was not a PBI because it did not target its activities toward those in need of relief, but rather benefited the community as a whole.<sup>279</sup>

It is acknowledged that retaining such a limit would eliminate many organisations which carry out broad indirect activities (such as community education) aimed at systemic issues. However, there is a difference between the effect of the targeting requirement and that for direct relief as the former focuses on the class of beneficiaries, rather than the means adopted to assist them. For instance, secondary or tertiary preventative activities delivered to high-risk groups or people who are currently in need might be equally targeted when compared with the provision of shelter to those experiencing homelessness, even if a less direct means. Further, a practical example of the way that the targeting requirement could act to limit, yet still permit, indirect activities and reduce the revenue cost is provided by Alternatives to Violence Project Western Australia ('AVP') and the Clontarf Foundation. Neither is currently endorsed as a PBI.

AVP, which is an 'educational institution' listed on the register of harm prevention charities, offers workshops to the general community, as well as in prisons and schools: 'AVP offers workshops based on experiences that help us to become more aware of the violence in our lives and how we can find creative, rather than destructive, ways of resolving conflicts'.<sup>280</sup>

In contrast, the Clontarf Foundation forms partnerships with selected schools to create football academies aimed at Indigenous students:

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276 Productivity Commission, above n 4, G23.

277 Ibid G29.

278 Ibid G30.

279 *ACOSS* (1985) 1 NSWLR 567, 575 (Priestly JA, Mahoney JA agreeing). See also Australian Tax Office, *Income Tax and Fringe Benefits Tax: Public Benevolent Institutions*, TR 2003/5, 4 June 2003, [44].

280 Alternatives to Violence Project WA, *FAQ* <<http://avpwa.org/faq.html>>.

The Clontarf Foundation believes that failure to experience achievement when young, coupled with a position of under privilege can lead to alienation, anger and then to more serious consequences.

As a prelude to tackling these and other issues, participants are first provided with an opportunity to succeed and hence to raise their self esteem. The vehicle for achieving this outcome is football ...

*DEVELOP POSITIVE ATTITUDES:*

Develop self esteem and positive attitudes towards health, education and employment.<sup>281</sup>

The Clontarf Foundation Information Brochure includes a range of statistics which indicate that, on average, young Indigenous males experience a number of disadvantages compared with non-Indigenous males.<sup>282</sup>

Based on the publicly available information, the Clontarf Foundation's activities appear to involve targeted prevention, whereas those for the AVP do not, as they embrace the whole community. On the broader interpretation of PBI advocated in this paper, the Clontarf Foundation may therefore qualify as a PBI and it is perhaps for this reason that only the Clontarf Foundation is a DGR, although as a specifically listed DGR, rather than under the PBI category.<sup>283</sup> While this may reflect the current perception that a direct relief requirement exists, it is suggested that the specific listing supports the principle that DGR status ought to be provided to such entities.

It is submitted that the targeting requirement should go some way toward reducing erosion of the revenue base. However, the collection of further data on the activities, receipts and expenditures of the not-for-profit sector, and social welfare organisations in particular, would assist in providing a better indication of the likely cost and range of targeted, indirect, activities.

In addition, as PBIs must satisfy the conditions to be a charitable institution, the category already has other inbuilt restrictions. For instance, charities must not have a purpose which is against public policy (for instance, because it is illegal), or be political parties.<sup>284</sup> This may prevent organisations adopting more extreme forms of indirect activities.

## VI CONCLUSION

As demonstrated in Part II, despite assertions to the contrary, there is no currently binding requirement that PBIs provide direct relief. Accordingly, for the reasons set out in Parts III and IV the courts should accept that PBIs can

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281 Clontarf Foundation, *Clontarf Foundation Information Brochure* (July 2011) 2, 4.

282 *Ibid* 2.

283 *ITAA97* s 30-25(2) item 2.2.32.

284 See, eg, *Re Lowin; Perpetual Trustee Co Ltd v Robins* [1967] 2 NSW 140, 145–6 (Wallace P and Holmes JA); *Royal North Shore Hospital of Sydney v A-G (New South Wales)* (1938) 60 CLR 396, 426 (Dixon J) (this aspect of Justice Dixon's judgment was not questioned in *Aid/Watch* (2010) 241 CLR 539); Australian Tax Office, *Income Tax and Fringe Benefits Tax: Charities*, TR 2011/4, 12 October 2011, [269], [309], [312].

engage in preventative activities. In particular, developments in charity law, such as *Word Investments*,<sup>285</sup> have emphasised that the means by which particular ends are achieved must be distinguished from that end. As PBIs are required to have a PBI Object, just as charities must be for a charitable purpose, this paper argues that the charity law developments should be adopted, recognising that preventative activities simply form part of a range of responses to the specific PBI needs requiring relief.

Indeed, given the tenuous authority on which the 'direct relief' requirement is based, it will be interesting to see whether the introduction of a new gatekeeper to PBI status, in the form of the ACNC, may result in a less restrictive interpretation being adopted in guidance materials produced by the ACNC.

However, as questioned in Part V, allowing preventative and other indirect activities might upset the balance between revenue sustainability and the promotion of the legislatively targeted PBI Objects, which is the policy served by the PBI category. This paper makes two comments. First, as shown in Part V(B), the benefits of indirect activities, such as preventative assistance, can potentially be determined, so it is possible to show that PBI Objects can be advanced by preventative activities. Moreover, avoiding distortions between direct and indirect activities and the structures adopted to carry out those activities, should result in efficiency gains, thereby providing greater support for the targeted welfare objectives and potentially saving direct government expenditure in this area.

Second, while broadening the activities that PBIs can undertake is likely to have a significant revenue cost for government, as discussed in Part V(C), that cost is likely to be a relatively small percentage of total government tax revenue. Further, maintaining narrow targeting requirements for relief should materially reduce the erosion of the revenue base. The need to demonstrate that indirect activities will result in a net benefit in achieving PBI Objects along with existing restrictions on charities, such as that their purposes cannot be against public policy (for instance, because the purpose is illegal), or that they cannot be political parties, would also serve to reduce the range of indirect activities that might be adopted and hence the loss of tax revenue.

It is hoped that the Tax Concession Working Group will give consideration to these issues when examining the structure of not-for-profit tax concessions and that it will not assume that PBIs are, or should be, limited to the provision of direct relief.

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285 (2008) 236 CLR 204.