PARTIES:	MPWETYERRE ABORIGINAL CORPORATION, ANTHEPE HOUSING ASSOCIATION INC, ILYPERENYA ASSOCIATION INC, YARRENYTY ALTERE ASSOCIATION INC, APER ALWERRKNGE ASSOCIATION INC, ILPERLE TYATHE ASSOCIATION INC, MT NANCY HOUSING ASSOCIATION INC, KARNTE ABORIGINAL CORPORATION, AKNGWERTNARRE ASSOCIATION INC, EWYENPER ATWATYE ASSOCIATION INC, ILPARPA ABORIGINAL CORPORATION, NYEWENTE ASSOCIATION INC, and ILPIYE-ILPIYE ASSOCIATION INC AND ALICE SPRINGS TOWN COUNCIL
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT EXERCISING TERRITORY JURISDICTION
FILE NO:	AS No 28 of 1994
DELIVERED:	Darwin, 14 May 1996
HEARING DATES:	15 and 16 September 1994
JUDGMENT OF:	Kearney J

REPRESENTATION:

Counsel:

Appellant:	D J Bleby QC
Respondent:	J E Reeves

Solicitors:

Appellant:	Turner & Deane
Respondent:	Poveys

Judgment category classification: B
Judgment ID Number: kea96007
Number of pages: 43

kea96007

IN THE SUPREME COURT OF
THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

AS No.28 of 1994

BETWEEN

MPWETYERRE ABORIGINAL CORPORATION,
ANTHEPE HOUSING ASSOCIATION INC,
ILYPERENYA ASSOCIATION INC,
ANTHELK EWPAYE ASSOCIATION INC,
YARRENYTY ALTERE ASSOCIATION INC,
APER ALWERRKNGE ASSOCIATION INC,
ILPERLE TYATHE ASSOCIATION INC,
MT NANCY HOUSING ASSOCIATION INC,
KARNTE ABORIGINAL CORPORATION,
AKNGWERTNARRE ASSOCIATION INC,
EWYENPER ATWATYE ASSOCIATION INC,
ILPARPA ABORIGINAL CORPORATION,
NYEWENTE ASSOCIATION INC, and
ILPIYE-ILPIYE ASSOCIATION INC
Appellants

AND:

ALICE SPRINGS TOWN COUNCIL
Respondents

CORAM: KEARNEY J

REASONS FOR DECISION

(Delivered 14 May 1996)

The appeal

General

This is an appeal from a decision of 14 March 1994 of the Local Government Tribunal (Mr Hook SM) constituted under s185 of the Local Government Act of 1985 ("the old Act"), repealed on 1 June 1994. Section 198(1) of the old Act provided that -

> "… a person aggrieved by the decision of the Tribunal may appeal to the [Local Government] Appeal Tribunal against an order or decision of the Tribunal on a question of law."

It appears to be common ground that in hearing this appeal, I sit not as the Local Government Appeal Tribunal constituted under s199 of the old Act, but as the Supreme Court. This comes about, despite s12 of the Interpretation Act, by virtue of the combined effect of the "as if" provision in ss267(1) and 240(1) of the current Local Government Act of 1993 ("the current Act") which came into force on 1 June 1994 before the appeal was heard. The Local Government Tribunal continues to exist, under s225(1) of the current Act. Appeal from that Tribunal is (as it was under the old Act) limited to a "question of law only"; see s240(1). Accordingly, since under s199 of the old Act the Appeal Tribunal was constituted by a Judge of the Supreme Court, and under s240(1) of the current Act appeal lies from the Tribunal "to the Supreme Court", there is no

difference in substance between the old Act and the current Act as regards the appeal.

The question in issue before the Tribunal was whether certain lands separately occupied by the 14 appellants in the Alice Springs Town Council area, are rateable lands for the purposes of the old Act. The respondent had rated the appellants' lands, and disallowed their appeal. The Tribunal disallowed the appellants' appeal, because it considered none of them were public charities or public benevolent institutions. The present appeal is against that decision.

I note at the outset a question which may go to the substance of the appeal. The rateability provisions under the current Act are not expressed in precisely the same language as they were under the old Act. Section 97(1) of the old Act provided that a council "shall rate all land within its municipality but may not rate" -

> "…
>
> (d) land used or occupied for the purposes of a public hospital, benevolent institution or charity."

It was the meaning and application of this provision which was in issue before the Tribunal, and is in issue on this appeal. Some argument before the Tribunal was directed to the point whether the word "public" qualified "benevolent institution" and "charity" as well as "hospital". Section

58(2) of the current Act provides that amongst lands which "shall not be rated" by a Council is:

> "…
>
> (d) land used or occupied for the purposes of a public hospital, *public* benevolent institution or *public* charity." (emphasis mine)

The difference in the wording of the two provisions does not, I consider, effect any material change in substance. In that connection I note that Mr Bleby QC of senior counsel for the appellant conceded that both a "benevolent institution" and a "charity" for the purposes of s97(1)(d) of the old Act required a "public" component, proof of which the appellants had to discharge. I consider that Mr Reeves of counsel for the respondent is correct in his submission that "public" in s97(1)(d) modifies all of the words which follow it.

It is clear that s97(1)(d) of the old Act is the controlling provision for the determination of this appeal; it determines whether at the time in question the subject lands should have been entered in the rate book.

The appellant's submissions

(a) *The significance of the fact that the appellants are incorporated under statutes*

The appellants are all corporate bodies. The eleven with "Inc." in their names are incorporated under Part II of the Associations Incorporation Act (NT) (the Territory

Act) while the three styled "Corporation" are incorporated under the Aboriginal Councils and Associations Act 1976 (C'th) (the Commonwealth Act).

Part II of the Territory Act permits the incorporation of an "association", defined in s4(1) inter alia as -

> "an association, society, institution or body formed or carried on for a religious, educational, benevolent or charitable purpose … the activities of which are carried on in whole or in part in the Territory."

Such a body "does not include a trading association", which is defined in s4(1) as one "formed or carried on for the purpose of trading or securing pecuniary benefit to its members". It is clear that Part II provides for the incorporation of what in a broad sense may be regarded as 'charitable bodies' while Part III provides for the incorporation of trading associations.

Mr Bleby noted the various provisions in the Territory Act designed to ensure that a body which does not qualify as an "association" under s4(1) is not incorporated under Part II, and provisions to ensure that charitable objects and purposes of associations are fulfilled; see, for example, s22 relating to winding-up. By way of contrast, he pointed to the different and more particular provisions in Part III of the Territory Act relating to "trading corporations"; see, for example, ss25T(1)(i) and (j), 25AG. He also analysed the Commonwealth Act, where

similar distinctions are drawn. He noted, for example, that nowhere in the rules of those appellants incorporated under the Commonwealth Act, were there rules of the type required by s44 of that Act when the body was "to be carried on wholly or partly for the purpose of securing pecuniary profit to its members."

Mr Bleby placed some weight - not a great deal - on the very fact that the appellants were incorporated under these provisions, as supporting his contention that each of them is a "[public] benevolent institution" within the meaning of s97(1)(d) of the old Act. I do not consider that their incorporation under these provisions is a matter of significance, per se.

I consider that the application of s97(1)(d) raises two questions: whether the appellants fell within the description of one of the bodies there set out; and, if so, whether they were using or occupying their lands for the purposes of such a charitable body. In discussing these questions it is desirable that some factual and historical matters established by the evidence first be stated.

(b) *The appellants' functions, and their relationship with the Tangentyere Council*

At pp12-15 of his decision of 14 March 1994 his Worship explained the background to the coming into existence of the appellants as follows:

"The history of the establishment of the Town Camps is set out in [an Exhibit]:

'Some town camp sites have been traditional camping areas over a long period for various [Aboriginal] groups during ceremonies; others were where Aboriginal drovers camped, while in town.

Town camps further developed when people came back to the outskirts of Alice Springs from reserves such as Hermannsburg, Santa Teresa, Amoonguna and Jay Creek, after being forcibly removed from Alice Springs in the 1940's and 1950's.

In 1968 Aboriginal people were finally granted equal pay conditions under the NT Cattle Industry Award. Many Aboriginal families were then forced off the pastoral leases on which they had lived, in most cases, for many generations. Denied the food supplies they had previously been given instead of wages, many people had to head to Alice Springs to survive. They ended up living on existing town camps or creating new ones.

The living conditions of the people were appalling; no permanent shelter, no piped water, no electricity, no toilet facilities.

Fifteen years ago the vast majority of Aboriginal people living in town camps around Alice Springs had no legal rights to their land, no permanent housing and received none of the services other Alice Springs residents could expect.

The Northern Territory Land Rights Act [that is, the Aboriginal Land Rights (Northern Territory) Act 1976 (C'th)] in its final form did nothing for town campers, as it only applied to people living outside town boundaries.

Tangentyere Council started in late 1977 as an Aboriginal response to the appalling living conditions and the lack of land tenure endured by growing numbers of town campers in Alice Springs.

Tangentyere set out to acquire secure residential leases from the Northern Territory Administration, secure ownership being necessary to obtain Federal Government financial assistance for housing, water and electricity for town campers. By 1982, fourteen leases had been obtained. Since then, only two further leases have been granted.

> Today there are more than 170 houses on the 18 Alice Springs town camps. Over 1200 people live on the camps, about a quarter of the town's Aboriginal population.
>
> Languages groups represented amongst town campers include Eastern, Western and Southern Arrernte, Kayteye, Alyawarre, Anmatyerre, Walpiri, Luritja, Pintibi and Pitjantjatjara.
>
> Town camps are not a stepping stone for some Aboriginal people on their way to assimilation and mainstream society. People live on the town camps because they choose to. *The camps provide residents with a culturally familiar living environment and allow people to retain as much as possible of their cultural and social values*.
>
> Facilities and amenities have greatly improved on town camps, and it is expected education, employment and training, and the economic independence of town campers will also improve now that the physical needs of many town campers have been met.
>
> Some town campers may subsequently choose to move into public or private housing; however, for most of them, town camps will continue to be their chosen homes for themselves and their future generations.'" (emphasis mine)

His Worship proceeded at pp15-16 to describe the 14 camps of the appellants:

> "The several Town Camps are in order [of the appellants' names] - Abbott Camp; Drive In Camp; Old Timers Camp; Charles Creek Camp; Larapinta Valley Camp; Palmer's Camp; Walpiri Camp; Mount Nancy Camp; Karnte Camp; Morris Soak Camp; Hidden Valley Camp; Ilparpa Camp; and Trucking Yards Camp [and Golder's Camp]
>
> …
>
> Abbott's Camp [or B.P.] is situated on South Terrace within the town area proper. The camp consists of five houses. … As at December 1992

there were some 36 named tenants … Drive In Camp is situated on the western side of the Stuart Highway, behind the old Drive-in site to the south of the town. The camp consists of seven houses. As at December 1992 there were 31 named tenants. [The history and social characteristics of this camp are further described in Exhibit 21, pp30-31.] Old Timers Camp is situated on the eastern side of the Stuart Highway, to the south of the town. The camp consists of seven houses and five tin sheds. As at December 1992 there were 18 named tenants. [The history and social characteristics of this camp are further described in Exhibit 21, pp27-28]

…

Charles Creek Camp is situated on the northern side of the town, to the east of the Stuart Highway. The camp consists of 30 houses and 14 tin sheds. As at December 1992 there were 99 named tenants. [The history and social characteristics of this camp are further described in Exhibit 21, pp17-21.]

Larapinta Camp is situated on the western side of the town, at the foot of the ranges. The camp consists of 20 houses and 10 tin sheds. As at December 1992 there were 62 named tenants.

Palmer's Camp is situated to the north of Alice Springs on the eastern side of the Stuart Highway. The camp consists of five houses and one tin shed. As at December 1992 there were 14 named tenants. [The history and social characteristics of this camp are further described in Exhibit 21, at p14.]

Walpiri Camp is the most northerly camp, situated on the western side of the Stuart Highway. The camp consists of six houses and six tin sheds. As at December 1992 there were 27 named tenants. [The history and social characteristics of this camp are further described in Exhibit 21, at p13.]

Mount Nancy Camp is situated on the eastern side of the Stuart Highway, close to Palmer's Camp. The camp consists of thirteen houses and two tin sheds. As at December 1992 there were 36 named tenants. [The history and social characteristics of this camp are further described in Exhibit 21, at p15-17.]

Karnte Camp is situated to the south of Alice Springs, on the western side of the Stuart Highway

> near the old Drive-in site. The camp consists of twelve houses and four tin sheds. As at December 1992 there were 25 named tenants. [The history and social characteristics of this camp are further described in Exhibit 21, at p32-33.]
>
> Morris Soak Camp is on the western side of Alice Springs, on Lovegrove Drive. The camp consists of eight houses and 10 tin sheds. As at December 1992 there were 43 named tenants. [The history and social characteristics of this camp are further described in Exhibit 21, at p21-25.]
>
> Hidden Valley Camp is situated on the eastern side of Alice Springs … The camp consists of eighteen houses and eighteen tin sheds. As at December 1992 there were 85 named tenants.
>
> Ilparpa Camp is the most southerly of the camps, situated on the western side of the Stuart Highway, south of the old Drive-in site. The camp consists of ten houses and one tin shed. As at December 1992 there were 30 named tenants. [The history and social characteristics of this camp are further described in Exhibit 21, at pp28-29.]
>
> Trucking Yards Camp is on the western side of Alice Springs at the western end of Smith Street. The camp consists of thirteen houses and eight tin sheds. As at December 1992 there were 60 named tenants."

His Worship had also described Golder's Camp at p16, viz:

> "Golder's Camp [or Ilpiye-Ilpiye] is situated on the eastern side of Alice Springs, to the east of Sadadeen Road. The camp consists of nine houses and three tin sheds. As at December 1992 there were 20 named tenants. [The history and social characteristics of this camp are further described in Exhibit 21, at p31]"

The evidence showed that each of the appellants was formed for the purpose of operating in and about its particular camp site. It is clear that in general each camp formerly encompassed a separate or predominant language group.

The social organisation of the camps was usefully analysed in Exhibit 21 prepared by Dr Paul Memmott. He points to the various factors determining the location of a camp. These include the directives or permissions given by the traditional owners of the land, the Arrernte people, and the direction of the home country of the immigrant group. As to the latter, Heppell and Wigley, writing in 1981, said at pp55-61:

> "Thus … camps are not scattered randomly through the town. The western [Arrernte] camps are close to their own sacred sites at Ilparpa and Ntapa as well as to the west of the town at Ootnarungatcha [Trucking Yard Camp]; eastern [Arrernte] camps are at Sadadeen [Hidden Valley camp] and other locations to the east of the township; the Walpiri are to the north at [Ilparle Tyathe] and to the east of the Stuart Highway; the [Alyawarre] and [Ammatyerre] are also to the north but east of the Stuart Highway at Charles [Creek] [Anthelk Ewpaye] and Mt. Nancy; and Pitjantjatjara are to the south at Little Sisters [Inarlenge] and Old Timers [Ilyperenya]".

This distribution of the camps corresponds roughly with the sociographic distribution of these language groups in the Territory and South Australia. Messrs Heppell and Wigley said at pp51-52 of the social character of the camps in the mid to late 1970's -

> "Each camp is a small community based on ties of kinship and friendship. The residents are generally from the same country in the sense that there is a defined territorial base which is shared by people who identify as members of the group residing there, and who have mutual interests, are relatively homogenous and interdependent. There are psychological, social and territorial aspects to this residence pattern. The residents of the

> camps maintain traditional ties with kinsmen in traditional country …"

Dr Memmott noted other determinants of location of the camps: the religious relation of the outside group to a local Dreaming site in Alice Springs, and -

> "a tendency for different tribal or language groups to camp separately, particularly if there is a history of enmity or conflict between specific groups."

The evidence before the Tribunal showed that over time the pattern of linguistic distribution between camps had become quite complex. There is always a core of permanent residents, and an ever-changing number of visitors related to them; and there is a large degree of movement between camps by unemployed persons, as well as radial movement to and from the camps and bush communities.

It is clear - indeed, a notorious fact in Alice Springs - that conditions of poverty and disease remain in the camps, despite efforts over the years at amelioration. Dr Moodie said at pars4, 14, 15, 16 and 19 of his affidavit of 9 March 1990 (Exhibit 12):

> "4. The population of the town camps varies from between 1,000 and 1,500. In my work as Medical Officer and Senior Medical Officer I observed that Aboriginal children dwelling in the town camps suffer a high rate of infection. They suffer from diarrhoeal disease; skin infections, including scabies; chronic eye disease including trachoma and other forms of conjunctivitis; meningitis; kidney infections; ear and upper respiratory tract infections; hepatitis and pneumonia. I observed that adults living in the camps suffer a high rate of communicable diseases

such as respiratory tract infections, kidney infections and sexually transmitted diseases. Liver, gut and nervous system problems from alcohol and cardio-vascular disease, diabetes and high blood pressure are common. *Life expectancy of town campers is less than 50 years and the admission rate to hospital is high.* My observations, experience and knowledge acquired in my professional capacity lead me to the opinion that *the general standard of health of the residents of town camps is very substantially below that of an Australian population of Caucasian origins. It is also substantially below that of other Aboriginal groups in Central Australia.*

…

14. In the [Central Australian Aboriginal] Congress study, conducted in July 1985 in relation to 85 Aboriginal people from five of the town camps, some alarming results appeared. The five camps were Charles Creek, Mount Nancy, Little Sisters, Karnte and Larapinta Valley. Young adults and children were surveyed.

15. Of the 85 people in the Congress study, 45 percent had no functioning shower and in one camp, Karnte, there were no houses. The rate of infected ears in all camps for those with showers was 23 percent and for those without showers it was 47.4 percent. The rate of trachoma for those with showers was 23 percent, the rate for those without showers was 65.2 percent. The rate of trachoma plus nasal discharge and/or infected ears was 10.6 percent for those with showers. This figure quadrupled to 47.4 percent for those without a shower.

16. The Karnte Camp, with only one shower and no houses, had rates for infected ears, trachoma and trachoma plus nasal discharge and/or infected ears [at] 78 percent, 56 percent and 56 percent, compared to the average for those with showers at 23 percent and 10.6 percent.

…

> 19. Before I arrived in Alice Springs [in 1982] a large number of Aborigines lived on the fringe of Alice Springs. In the late 1970s and early 1980s a programme of building houses and amenities on the town camps and in the bush communities commenced. When I arrived in Alice Springs in 1982 I became familiar with this programme and the work of Tangentyere Council Incorporated ("Tangentyere")/ Before Tangentyere was established, most "fringe dwellers" had no shelter or access to water supplies and the essential services. My work in Alice Springs and in particular with the town camp dwellers showed that with the provision of housing and other essential services, the health of Aboriginal people has improved, although the current status of Aboriginal health remains poor. Infant mortality remains three times higher for Aboriginal people compared to non-Aboriginal Australians, and Aboriginal Australians die twenty years younger, on average, than non-Aborigines. I am satisfied that the health status of the Aboriginal people living in the town camps would be worse without Tangentyere. The average life expectancy of Aboriginal women in the town camps is lower than that of Aboriginal men. It is my opinion and it is generally accepted amongst health professionals and public health experts, particularly those working amongst and with disadvantaged groups, that this is an indicator of poverty and lower socio-economic status. In highly industrialised nations with a high standard of living, women on average have greater longevity than men. In poor countries, women's life span is generally less than that of men, due to a higher burden of disease."

I note that Mr Reeves pointed out that the appalling conditions in the town camp, the poor health of the Aboriginal campers, and their high unemployment rate, had never been in issue, nor had the claim that they were deserving of special consideration.

Mr Bleby stressed the content of par18 of Dr Moodie's affidavit, viz:

> "18. It is my opinion arising out of my experience in working in Alice Springs and with the town camp dwellers, and it is generally accepted by experts, that the social relationships of Aboriginal people of Alice Springs have been affected by the arrival of non-Aboriginal people. An alien culture and foreign social mores are now dominant in many aspects of Aboriginal life. It was apparent to me in my work in Alice Springs, and is generally accepted by experts and those working with and amongst Aboriginal people, that the impact of this culture and Anglo-Australian law has altered to a substantial degree the way in which Aboriginal people traditionally lived. *Aboriginal people in Alice Springs are effectively caught between two cultures. They are in transition between the traditional, nomadic life style and a yet to be determined, but to some extent settled, quasi-urban life style*. In this transition, new social controls and order are emerging. However, the transitional state is one of turmoil surrounding social relationships and social identity." (emphasis mine)

Mr Bleby submitted that these facts pointed to the importance of how housing for town campers was organised; it was designed to meet some of those problems outlined in par18. In that connection he submitted that the formation of the housing associations was a culturally acceptable self-determinative means of distributing money and services to improve the health of the members of the communities described by Dr Moodie.

Mr Bleby referred to the publication "Living on the Edge" (July 1989), part of Exhibit 1, which indicates the

function and purpose of the Tangentyere Council and its interaction with the housing associations. It explains the functions carried out by Tangentyere at that time, at par3.3.3.1. (pp34 and 37):

> "In discussing town camps role in providing housing to traditionally-orientated Aboriginal people it is inadequate to simply present the bare figures, namely the number of dwellings built and of numbers of people awaiting accommodation. It is essential to provide the context of town camps, and the strategies which have been implemented to ensure that housing for traditionally-orientated Aboriginal people is provided in a manner which takes into account cultural and social factors. Of equal importance are the ongoing services and support to assist town campers to manage the housing stock and the transition to European style housing.
>
> Tangentyere Council emerged in 1977 as a response to the poor living conditions experienced by town campers. It was established as a co-ordinating body to assist town campers with lease applications and to provide basic services and materials: wood, water and garbage collection. The granting of leases resulted in the increased need for further support to assist town campers maintain and manage physical improvements on the leases.
>
> Over a decade of operating its functions have increased and now include a range of services directly related to the administration, provision, and maintenance of housing stock on town camps:
>
> - Design and construction of dwellings
> - Landscaping of private and common areas on leases
> - Repairs and maintenance
> - Rent collection
> - Book-keeping for each town camp
> - Accounting and administration of government grants
> - Lease applications
>
> … Town camps are located around the outskirts of Alice Springs and generally approximate the areas on which respective Aboriginal groups first

squatted. Since 1977/78 some 145 dwellings have been built on the 15 town camps. …

Conscious of the need to assist traditionally orientated Aborigines to deal with the demands of living in permanent accommodation, Tangentyere has also established the following support services:

- Home Makers' Service
- Old Peoples' Service
- Youth Worker
- Community Development Officers
- Women's Officer
- Banking and Food Credit Service

…

Whilst waiting lists for each town camp are maintained by Tangentyere Council it is the town camp executive which decides who will be housed when a vacancy occurs or a new dwelling is planned. Considerations as to whether the family housed is perceived to be responsible as tenants, and the nature of their kin relationship are taken into account. Very few households not already residing on camps will be housed. Households who fall into the first two categories are given preference for housing because of their kin relationships with others living in town camps. Only in cases where existing town camp residents are not interested in a dwelling will Aboriginal households living off town camps be considered.

The right of the town camp executive to select tenants on the basis of their suitability to the town camp is no different to the procedures used by the Department of Lands and Housing in determining the suitability of a tenant based on rent payment history and whether they are capable of maintaining a dwelling in good order, or other community housing organisations selecting tenants on the basis of how they will fit into the organisation."

It appeared from the evidence of Mr Durnan, the Community Development Division manager of the Tangentyere Council, that the camps constituted the only accommodation

in Alice Springs for many Aboriginal visitors. They constituted a significant transient population in the camps. The evidence showed, as Mr Bleby put it (transcript p18):

> "… a close connection [is] maintained between town campers and occupiers of traditional lands, so there is a constant flow of people in and out for temporary or permanent purposes and it is a two-way flow.
>
> There is just no alternative accommodation for those visitors apart from the town camps, that's what Mr Durnan said at page 63 in giving his oral evidence. … there is a significant transient population of visitors - it varies from time to time, moves from one camp to another and indeed a lot of the problems of alcohol abuse, violence, overcrowding and so on, the evidence showed were related to the influx of visitors of that type.
>
> … it is the town campers who decide through their executive, that is of their own associations, what their concerns are and how Tangentyere responds to those concerns.
>
> The individual associations were formed as part of that integral scheme of provision of housing for the overall improvements of the health and well being of the Central Australian Aboriginal population, to enable the town campers to participate in that process of education, of improvement in their own conditions and to provide a vehicle … for the formal land holding as we know it by way of permanent leases and other methods of land holding which are … not necessarily part of the Aboriginal heritage."

Mr Bleby submitted that in providing housing accommodation for the large floating population of non-member visitors, the associations were fulfilling a charitable purpose. Further, they also fulfilled a charitable purpose in relation to the permanent dwellers in

the camps, because those persons were neither nomadic or urban but were culturally disadvantaged, and the associations represented their method of determining their own cultural development. In that respect, he submitted, the associations were unique.

Mr Reeves submitted that there was a very clear distinction between the Tangentyere Council and the associations; he refused the evidence of Mr Durnan, at pp64, 73, 88 and 90, as to what the Council did. It was fallacious, in his submission, to say that because the Council had been described as a 'public benevolent institution', it followed that the associations were, too.

(c) The constitutions of the appellants

Mr Bleby noted that the constitutions of the appellants (see Exhibit 1) were now expressed in almost identical terms. Nearly all of them had been modified to achieve that result between the time the associations were first rated by the Council and their appeal by way of rehearing came before the Tribunal. His Worship ruled that the constitutions in Exhibit 1 set out the rules relevant for his consideration; I respectfully consider that he was correct in that view, and in deciding the issues before him on the rules as they then stood. In any event, his ruling to that effect is not sought to be controverted. The identical objects and purposes clause in the constitutions is as follows:

> "The central objects of the Association are to relieve the poverty, sickness, destitution, distress, suffering, misfortune or helplessness of Aboriginal people in Central Australia …"

Mr Bleby stressed the width of these purposes which went beyond concern limited to the problems of the members of the associations. Mr Reeves submitted that while the objects clause had been expanded beyond the limit in the old constitution to the concerns of "the members of the Association", the membership provision (see Clause 7 on p20) was now more restrictive. The constitutions then proceeded to provide the means by which these purposes were to be given effect, in clause 5.2 viz:

> "In recognition of the severe problems encountered by Aboriginal people in Central Australia, and the unfortunate circumstances in which they find themselves, the Association shall advance its central objects by the following means:
>
> (a) obtaining land, housing and other community facilities for the members of the Association and other needy Aboriginal people.
>
> (b) acting and/or promoting programs in accordance with Aboriginal law that advance the living conditions, health, economic status, education, training, and well-being of the members and other needy Aboriginal people.
>
> (c) acting and/or promoting programs to develop social cohesion and community development in accordance with Aboriginal law on the town camp.
>
> (d) acting and/or promoting programs to improve the environment in accordance with Aboriginal law of the town camp.
>
> (e) developing relationships with other groups or organisations with similar aims.
>
> (f) assisting Aboriginal groups or organisations with similar aims and needs."

Mr Bleby submitted that these means were intended to provide for the cultural existence of members of the appellants by a process of self-determination.

He referred to restraints on the use of an association's property in clause 6. Membership was provided for in clause 7:

> "The members of the Association shall comprise adult Aboriginal persons who:
>
> (a) apply to the Association for membership; and
>
> (b) who are residents of the town camp; and
>
> (c) who the Association recognises as being members of a family group with traditional and/or long-standing attachments to the town camp.
>
> or who:
>
> (d) apply to the Association for membership and
>
> (e) who the Association decides to admit to membership and
>
> (f) who are:
>
> * residents of the town camp; or
> * frequent visitors to the town camp; or
> * used to be residents of the town camp."

Mr Bleby noted that the effect of these qualifications for membership was that a person could be a resident of a town camp, without being a member of the association. Membership was open to any Aboriginal person who fell within the qualifications. Mr Reeves submitted that Clauses 7(c) and 7(f) were more restrictive than in the old constitution where Clause 8(b) provided that membership was

open to "adult Aboriginal people resolved by the Committee to be members", while 8(a) also allowed as members "adult Aboriginal people normally and permanently resident" at the particular camp.

Mr Bleby referred to clause 7.4, cessation of membership; clause 8.3, dealing with appointments of officials at meetings, indicating that membership is not restricted to a single group; clause 15, dealing with the application of the association's funds. I note that the Australian Tax Office has accepted the associations as public benevolent institutions for the purposes of s78(1)(a) of the Income Tax Assessment Act (C'th). Clause 16 required that the income and property of the association be applied solely to the promotion of its objects and prohibited its transfer to members or their relatives. Clause 23 provided that on winding up assets were not to be distributed amongst members but were to be transferred to an Aboriginal association with similar objects, which had been approved under s78(1)(a) of the Income Tax Assessment Act.

I note that the rules of the three associations which were incorporated under the Commonwealth Act were very similar to those outlined above.

Mr Bleby referred to the constitution of the Tangentyere Council Inc (Exhibit 20). It had objects similar to those of the associations, to be attained by

different means. Mr Reeves submitted that the Council's work was very different to that of the associations. The Council's "member communities" included the appellant associations. The Council was the body through which capital for housing for the associations was obtained. It had been held to be a public benevolent institution in *Tangentyere Council Inc v The Commissioner of Taxes* (1990) 99 FLR 363, a judgment set aside on appeal (1992) 107 FLR 470 but not on grounds which went to the merits of the decision. Its membership, as far as the appellants were concerned, depended on their membership; see clause 6(2). The constitution was so framed as to ensure representation of the associations on the executive. I accept that the Tangentyere Council has the function of an "umbrella" or co-ordinating body of its members communities, including the appellants. I note the evidence of Mr Durnan relating to the child care assistance activities of the Council, and its night patrol. Mr Reeves submitted that this evidence did not show that the Council took intoxicated persons to one of the appellant associations for refuge.

The associations charge rent for their housing, under tenancy agreements and rules similar to those of the Housing Commission. Income and expenditure of the associations is shown in the financial statements in Exhibit 6; expenditure is mainly on repairs and maintenance of their housing stock. Mr Reeves' submission was to the

same effect, and he characterised the associations' work in that regard as a private activity, not a public activity. The associations are not self-supporting; there is always a large external subsidy required.

The funds expended are not applied for the benefit of the members of the associations as such, but for the benefit of those who are able to utilise the benefit of the camps.

(d) The relevant authorities

Mr Bleby relied on *Aboriginal Hostels Ltd v Darwin City Council* (1985) 75 FLR 197 and the *Tangentyere Council Inc* case. He submitted that applying what was held in these authorities showed that the appellants fell within the definition of the bodies referred to in s97(1)(d) of the old Act.

In *Aboriginal Hostels Ltd* the issue was much the same as in this case. The company there was very much an instrument of the Commonwealth Government. Mr Bleby noted that, like the associations, the hostels catered for Aboriginals who had nowhere else to go. As to benefits being confined to members of an organisation, Mr Bleby noted that in the case of the appellants the benefits were not confined to members of the associations - visitors, transients, and permanent residents who did not become members of the associations also received benefits, the

class of beneficiary being defined by reference to their racial origins.

Mr Bleby stressed that the objects of the association should be looked at and not necessarily what the associations did, in order to determine whether they were 'charitable'. I accept that, but I note that to determine the issue under s97(1)(d) of the old Act requires an examination of the purposes for which the associations used or occupied their lands; in other words it is a 2-step process.

Nader J at pp211-3 dealt with the purposes for which Aboriginal Hostels Limited used or occupied its land, viz:

> "It is clear that an object of providing accommodation to all transients of whatever race would not be charitable: after all, the most expensive hotels do just that. What I regard as determinative in this case is that the transient person is Aboriginal. The fact that the purposes of accommodation are in respect of Aboriginal persons gives a special character to those purposes which renders an otherwise neutral purpose, charitable. Precisely the same observation applies to single persons and families. …
>
> The predominant purposes of the company's objects are in respect of Aboriginals as defined: see above. The other purposes expressed in the objects that are not explicitly related to Aboriginals are clearly ancillary to those that are. I would not have regarded authority as necessary for the proposition that "Australian Aborigines are notoriously in this community a class which, generally speaking, is in need of protection and assistance": see *Re Mathew* [1951] V.L.R. 226 at 232 and *Re Bryning* [1976] V.R. 100. it is true that those cases might well be regarded as lacking in persuasive force in the present circumstances in Darwin by their considerable separation in time and

place. As Lush J. said in *Re Bryning* (at 101): "That decision (*Mathew*) does not lead to the result that Aborigines are to be classified perpetually as in need of protection and assistance." However, any ordinary informed person living in Darwin knows that Aboriginal persons in the Northern Territory are, in general, in considerable need of special consideration and assistance. There are several statutes both local and Commonwealth the purposes of which are to relieve the condition of Aboriginal persons and which give implicit recognition to its existence. I recognise that there is much debate as to the best ways to go about assisting Aboriginal persons. Some people are quite strongly opposed to particular methods adopted, such as the granting of land rights. But, I think that no right thinking person could quarrel with the general proposition that Aboriginals are in need of special consideration and assistance. One situation in which it is apparent even to a casual visitor to the Northern Territory that a special need for assistance exists is where Aboriginal persons are in an urban environment: there the inability to manage is aggravated by the pervasiveness of a culture which has not come to terms with them and with which they have not come to terms, except in so far as there is by and large a tacit agreement to live separately. The provision of accommodation for the purposes referred to in the Charter must tend to relieve Aboriginal people of a significant disability. The notorious reality is that, in general, they cannot, or feel they cannot, utilise the hotels and other places of accommodation used by non-Aboriginal persons. Although it may not be correct to regard this activity as being for the relief of poverty or for one of the expressed traditional charitable purposes, I regard it as sufficiently analogous to those purposes to be held to be a charitable purpose. The fact that some payment must be made for the accommodation or that some of the purposes referred to in the Charter are not per se charitable does not detract from the general proposition.

…

The evidence shows that a very high proportion of the persons making use of the subject hostels have been unemployed persons.

> … there is no factual basis in these proceedings to enable me to make a finding as to the proportion of unemployed Aboriginals who are unemployed by choice, on the one hand, or unemployed by virtue of circumstances over which they have no control, on the other. Secondly, … even Aboriginals of the first category, when they come to Darwin into a non-traditional, non-tribal social environment need to be provided with adequate food and shelter. It is in such an environment that the plight of Aboriginal people is, as I said earlier, notorious. This case is about hostels in Darwin: a case about a hostel situated at a distance from an urban centre on traditional tribal land where persons have freely chosen to live might involve quite different considerations." (emphasis mine)

In this case there was much evidence adduced which would support the view to which his Honour subscribed that the Aboriginal people "are notoriously in this community a class which, generally speaking, is in need of protection and assistance" (p211). There was ample evidence of the high proportion of unemployed persons, and persons on CDEP payments, among the residents of the town camps.

Mr Bleby submitted that it followed from the evidence in this case that applying the approach in *Aboriginal Hostels Ltd* led to the conclusion that the appellants were charitable organisations, and there was nothing to suggest that they used their lands for any other than their charitable purposes; it followed, in his submission, that they were non-rateable.

As to *Tangentyere Council Inc*. Mr Bleby submitted that the reasoning of the learned trial judge in the 1990 decision was highly persuasive and should be applied. It

had not been referred to by the Tribunal in its judgment. Mr Bleby analysed his Honour's decision closely. That was a payroll tax case, not a rating case, but I accept that the same test as to whether the appellants are "public benevolent institutions" would apply. This term is of wider scope than "public charitable institutions". His Honour concluded at p365 that "public benevolent institution" was "not a term of art" and -

> "… it is for the Court to look at the whole of the circumstances in order to reach a decision as to whether the taxpayer is or is not, in accordance with the ordinary English usage of the day, a public benevolent institution."

As to the "public" aspect, his Honour noted "public control is not essential", the main criterion being "the extensiveness of the class benefited by the institution" (p365). His Honour referred at p366 to some of the factors to be considered, viz:

> " … the constitution of the appellant, the membership of the managing and government body thereof, the sources of its moneys, the public accountability of the appellant, the class or classes of recipients of its benevolence, the characteristics of the class or classes of recipients of its benevolence, the scope and nature of the work done by the appellant, whether fees are payable by the recipients of the appellant's work or charges made by the appellant and if so the nature of those fees or charges, and whether the overall work of the appellant is beneficial to the public at large."

His Honour accepted a 1985 report at pp367-8, viz:

> ""2.1 Tangentyere Council services 19 Aboriginal town camps with a total permanent population of 1,071. This core population comprises

stable family groups, traditionally orientated and retaining customary values which emphasise social above material and financial obligation. They are characteristically heavily unemployed, poorly accessed by Government Departments in the delivery of services, including social security; are, in economic terms, the poorest sector of the Alice Springs community; spend at least half their income on food and much of the remainder on other necessities such as clothing, bedding, transport etc., and are financially overstretched in paying for necessities but are required also to fulfil obligations to visiting kinsmen. While seeking to achieve social stability within the urban context, this core group remains closely integrated into the cultural and ceremonial life of the region.

2.2 In addition to this core group, the town camper population includes a large floating population of men and women visiting Alice Springs as a regional centre, staying with kinsmen in the town camp and placing a heavy strain on camp facilities, domestic appliances and household budgets with resultant high repairs and maintenance costs on house and camp facilities and reduced family income to meet the attendant costs of housing.

2.3 The inability of many Commonwealth and Northern Territory Government Departments to effectively deliver services and entitlements to town campers exacerbates their situation. For example, failure to maximise town campers access to training opportunities maintains low levels of skills, high levels of unemployment and low incomes in the camps. Language problems, movement between town and bush and lack of information and experience in the process of application for benefits, all inhibit access to social security entitlements. A consequence is that many town camp tenants find it difficult to obtain and maintain an income high enough or stable enough to ensure that rentals, electricity, water and other house bills are paid.

TANGENTYERE COUNCIL'S HOUSING PROCESS

2.4 Tangentyere Council was primarily established as a mechanism, not for the construction of physical architectural structures (a task that could be achieved by NTHC or DOHC or any private contractor), but to provide housing services to a client group with quite specific housing needs that existing housing organisations had been unable to meet.

2.5 For these specific needs Tangentyere Council has developed a housing *process* which seeks to maximise town camper involvement in all stages of their rehousing to the point where Housing Associations and individual tenants may become self-managing. Essential to this process is a range of services, provided by the Council, designed to assist in the resolution of day to day housing problems which, if left untreated, could jeopardise stable house tenancies.

2.6 The incremental housing process, developed by Tangentyere Council, involves:

(a) assisting town campers in the negotiation of special purpose leases for their future housing programme;

(b) initiating improvements to existing camp areas (including improved camp security, services and ablution facilities) while housing funding is being negotiated;

(c) involving town campers in the design and physical layout of their proposed housing development in consultation with the Council's Design Group;

(d) constructing houses and using the construction process as an avenue for employment and training of young, unemployed town campers;

(e) developing, with the active co-operation of tenants, a landscaped environment around new housing, providing a setting which adds psychological and social support, rather than added stress, to the inhabitants; improving general health and living conditions through, for example, dust suppression; fulfilling lease covenants and providing a major channel of

employment and training for chronically unemployed young town campers;

(f) providing management assistance to the 15 legally incorporated Housing Associations in fulfilling the legal requirements of their incorporations, the repairs and maintenance of their housing stock, together with rental collection and tenancy support services to maintain stable tenancies.

2.7 In fulfilling these functions Tangentyere Council is, perhaps, the closest an Aboriginal housing organisation has come to providing housing on a similar basis, with a similar structure and support system to State Housing Authority provision - though here on a smaller scale and tailored to the specific needs of a client group which SHA's have traditionally characterised as 'bad risk' and failed to house successfully."

It is clear that this accurately reflects in general terms the position as at the time of rating.

At p369 his Honour said:

"The evidence in the present case is overwhelming that the permanent and transient residents of the Alice Springs town camps and the relevant remoter communities constitute an appreciable needy class in the Northern Territory community."

At p370 his Honour accepted the evidence of Dr Moodie, to which I have already referred. In discussing and rejecting a submission to the effect that the objects of the council's activities could be seen to be "disadvantaged … by [their own] choice", his Honour said at p371:

"The objects of the [Council's] activities are fringe dwellers (I do not use that expression in any pejorative sense); they are culturally ambivalent to such a degree that they are on the one hand socially ill-prepared to live a western

> urban existence and on the other, to live a traditional or tribal existence in the bush. This is but one reason they need special attention and care. This predicament has been - more or less - the lot of the "town campers" since just after World War II. As such, they have and have had a cultural and social existence discrete from urban and traditional or tribal Aborigines, and they live and have lived in circumstances over which they have no control other than via the appellant. I have already noted that their adult life expectancy is less than urban Aborigines and traditional or tribal Aborigines in the bush; and the argument overlooks the substantial number of children involved. Their increased susceptibility to disease is not by choice any more then is the general social disruption and disorder created by the many uninvited intruders into the town camps, among them alcohol and substance abusers, who, the evidence shows, create bedlam, even in dry camps. Their specialist housing needs are unavailable other than through the appellant. By any standards many "town campers" live in squalor. This submission of the respondent cannot be accepted."

His Honour's conclusion accurately reflects the evidence in this case.

His Honour went on to say at p371:

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

As to this passage I note that his Honour's views were expressed before the constitutions of the appellants were changed. His Honour said at p372:

> "The appellant's principal activities have enabled and enable the town campers to have employment,

> shelter, facilities and amenities required by them but otherwise not available to them. The activities of the appellant generally contribute to town camper's physical and social well-being and improvement. The recipients of the appellant's benefits are underprivileged and invariably in poor circumstances physically, emotionally and financially.
>
> …
>
> Helping those who cannot help themselves to retain and observe their customary values, traditions and culture, western or not, is benevolent, at least in the sense that it is for their social and spiritual welfare and the welfare of society as a whole. There is evidence, which I accept, that health is related to culture. It was not suggested that the values, traditions and culture of the town camp occupants were inimicable to society at large. Benevolence in the relevant sense is not confined to practical and material interests and needs: *Maughan v Commissioner of Taxation (Cth) [(1942) 66 CLR 388].*"

Mr Bleby summed up his submissions on the effect of

Tangentyere Council Inc at transcript p57:

> "It is the number and characteristics of the beneficiaries alone that can determine the issue, …
>
> Secondly, the organisation doesn't lose its character as a public benevolent institution because either it engages in other incidental activities, or because it is in part self-supporting by way of fees or rents. Thirdly, enabling self-help is consistent with the common law understanding of a public benevolent institution, and that is of some importance.
>
> But most importantly perhaps Tangentyere itself has been held to be a 'public benevolent institution' and there is no change of any significance on the evidence led in this case from what was before his Honour in the Tangentyere case. The only significant changes have been the changes in the constitutions, which if anything have only served to unify and emphasise the interdependence of the associations and Tangentyere themselves as being complementary in the total scheme."

He submitted that in reality the associations *were* Tangentyere Council; they were heavily interdependent. They were part of the general benevolent scheme to provide for community self-determination in how housing would be provided, to whom, and what standard.

(e) The errors of law relied upon

It will be recalled that under s198(1) the appeal lies "on a question of law".

At p35 of his judgment his Worship said:

> "[Citing from *Aboriginal Hostels Ltd* at p209] 'The character that marks the potential beneficiary must not be a relationship to a particular person or persons such as one of blood or employment'.
>
> There has been much made of relationships of the various members of the several associations. Mr Justice Nader [in *Aboriginal Hostels Ltd* at p211] spoke of "an ordinary informed person living in Darwin …"; the same may be said of Alice Springs. Any informed person in Alice Springs is aware that certain tribal groups or clans do not, in usual circumstances, live together. This means that persons from area A tend to reside as a group completely separate from persons from area B. Such a group may in the aboriginal sense be related, not by blood or marriage, but by traditional or cultural ties. *The evidence before me does not show that such relationships are close enough to be classified as 'family' in the sense used in the decided cases on the subject."* (emphasis mine)

As Mr Bleby noted, his Worship's conclusions last emphasised amounted to a finding in the appellant's favour. Mr Reeves did not contest it. However, at pp38 and 39 his

Worship ultimately found against the appellants by reference to their lack of 'public' membership, viz:

> "Certain associations [under their old constitutions] required residents to apply for membership and for a membership fee. In no case [that is, under either the old or the new constitutions] was there automatic or open membership. [I interpose that this is clearly correct; see pp19 and 20.] The new constitution in each case goes further. Members of the particular association must be adult Aboriginal persons who apply for membership and are residents of the town camp and who the association recognises as being members of a family group with traditional and/or long standing attachments to the town camp; or who apply for membership and who the association decides to admit to membership and who are residents of the town camp or frequent visitors thereto or used to be residents of the town camp - see Clause 7.1 [p20].
>
> The only monies received by the several associations is for the maintenance or upgrade of the assets, or of payments for debts relating thereto. [I note that this finding is supported by Exhibit 6, the financial statements, and that ATSIC made the grants of money on certain conditions in Exhibit 30.] The beneficiaries [of monies received] are the members who are a restricted class; even CDEP general work is towards maintenance and upgrade.
>
> I recognize that each camp entertains a considerable number of visitors which places a strain on the resources of the several associations. However, the decision to admit visitors or not is one for the members. [Mr Reeves referred to the evidence of Mr Durnan as support for this, see pp63, 66-7.] I note that the Four Corners Council (a council of senior initiated men based on the several camps) have set out guide lines for social behaviour of visitors.
>
> As I have stated any benefits received are received exclusively for the benefit of the respective members of the association. There is no public benefit, see *Thompson's case [(1954) 102 CLR 315]* and the *Income Tax Case [(1930) VLR 211].* There is no charity or benevolent institution in the case of

> any one of the several Associations. The several appeals are disallowed."

His Worship's reasoning appears to be that membership of an association is in effect 'closed'; and so only a closed membership benefits, and the association is insufficiently 'public' in nature. He did not elaborate in what he meant by a "restricted class"; Mr Reeves submitted that his Worship meant they were restricted by cultural and traditional ties, stressing that on appeal the question was whether there was any evidence on which the finding could have been made. He referred to the evidence of Mr Durnan at pp130, 138 to the effect that extended members of a particular family were the residents at each camp, as warranting his Worship's conclusion that the beneficiaries were "members who are a restricted class".

Mr Bleby submitted that this was an error in law, since in fact benefits flow to persons who are *not* members, and membership of an association is not compulsory for a camp resident. Membership is "restricted", only in the sense of members of the Aboriginal race; this is a class of beneficiaries which Nader J in *Aboriginal Hostels Ltd* indicated is regarded as a class "notoriously … in need of protection and assistance." He submitted that his Worship's approach, while recognising the impact of "visitors" on the camps, did not sufficiently take account of the resources and benefits which flow from the

associations to such transients. Further, even if the benefits were restricted, no account was taken of the significance of the purpose being the relief of poverty; see *Dingle v Turner* (1972) AC 601.

The other error of law relied on by Mr Bleby stemmed from pp34 and 39 of his Worship's judgment, viz:

> (p34) "Whilst I am of the view that the CDEP is an excellent programme available only to Aboriginals, it is not, in my opinion, charity. The whole purpose behind the programme is to give a sector of the population the chance of employment. Persons now have some chance between unemployment benefits and working with the possibility of attaining skills in a particular area. The programme is open to all Aboriginal persons within the area of Alice Springs. Much of the work undertaken is within the various town camps, however, much of the work is not within camps. The suggestion that CDEP is a form of benevolence fails for the same reasons as stated above. People may be trained, they may be educated but such training or education takes place under the auspices of the programme, not in the form of charity or benevolence. It is not a question of law but of fact.
>
> (p39) The only monies received by the several associations is for the maintenance or upgrade of the assets or for payments of debts relating thereto. The beneficiaries are the members who are a restricted class; even CDEP general work is towards maintenance and upgrade."

Mr Bleby submitted that here his Worship's approach appeared to be that whether or not the associations were charitable was to be determined by the source of their funds, which his Worship considered were non-charitable. Mr Bleby submitted that the source of an association's funds was merely one element, and the proper determinant of its character were the objects of its expenditure.

Further, his Worship's finding was contrary to that of Angel J's conclusion at p371 of *Tangentyere Council Inc*. viz:

> "The evidence discloses that the housing associations are both conduits for welfare disbursed by the appellant and recipients of capital improvements and matters of maintenance which directly and physically benefit the occupants of the town camps."

His Worship had not adverted in his judgment to the decision of Angel J.

The respondent's submissions

I have already noted several of Mr Reeves' submissions on various points. He submitted that the issue was not whether the Aboriginal persons in the camps were deserving of assistance, but whether the associations had been able to establish before his Worship the necessary element of public benefit so as to qualify as public benevolent institutions or public charities.

He noted that the appeal was limited to questions of law, and submitted that his Worship had made crucial findings of fact as to the lack of the necessary 'public' element; he submitted that these findings determined all the issues sought to be raised by the appellants, because they were findings of fact as to which it could not be said

there was no evidence to support them or that they were so unreasonable as to constitute an error of law.

Mr Reeves submitted that many issues had been ventilated before his Worship on which he had not ruled, because of the way in which he had approached the case. The central thrust of his decision was that the associations were not 'public'. It followed, in his submission, that even if the appellants succeeded, the appropriate order would be to remit the case to the Tribunal so that undecided questions of fact could be decided.

(a) Errors of Fact and Law

Mr Reeves referred to various decisions from the Workers' Compensation jurisdiction, where the right of appeal is similarly restricted to questions of law: see *Tiver Constructions Pty Ltd v Clair* (1992) 110 FLR 239; *HR Products Ltd v Collector of Customs* (1990) 20 ALD 340 at 341-2, per Lee J. I accept the analysis of the distinction between questions of fact and questions of law there set out.

(b) The Findings of Fact and the Evidence

Mr Reeves referred to the findings at p38 and 39 of his Worship's judgment and submitted that those findings were unassailable on the basis of the evidence to which he

referred which supported them, in the light of the proper approach as outlined in the above authorities. He submitted that the reason that his Worship had reached his ultimate decision was clearly that he had concluded that there was no 'public' element in the associations. Mr Reeves pointed to the contrast between the purposes clause in the old constitutions and the new purposes clause in the new constitution.

He submitted that in changing the objects in their constitutions in 1992, the appellants had in effect purported to establish a trust of the lands formerly held beneficially by them. He submitted that that purpose was not achieved by the simple change of the objects and purposes in the constitution; he submitted that their lands were "prescribed property" in terms of s4(1) of the Associations Incorporation Act, and he pointed to the restraint on this position in s26A of that Act.

He submitted that the associations received funds from ATSIC and rent from their residents, and expended those funds on housing or its maintenance.

He submitted that there was evidence from Mr Durnan to support the finding at judgment p39 that 'any benefits received are received exclusively for the benefit of the respective members of the association'. However, that evidence related to the old constitution.

Similarly, Mr Reeves referred to evidence from

Mr Durnan which supported his Worship's finding a p39 that there was "no public benefit". He stressed that it was important to note what the associations in fact did, and that Mr Durnan had characterised them as 'private associations'.

In summary, Mr Reeves submitted that there was ample evidence to support his Worship's conclusions at pp38-9, and it followed that no question of law arose.

(c) The Appellant's Questions of Law

Mr Reeves submitted that *Aboriginal Hostels Ltd* was distinguishable for various reasons. In that case it was necessary to determine whether the purpose of the body, as fixed in its Memorandum and Articles of Association, was the provision of housing for Aboriginal visitors to Darwin; this was one of the recognised charitable purposes. In the present case the question was whether the associations were public bodies, they having changed their character. The bodies in question in the two cases were very different. Mr Reeves submitted that in the present case there was no constructive trust; ATSIC had never purported to make its grants to the associations on trust, and the provisions of the Associations Incorporation Act requiring ministerial consent prevented that occurring by a mere change in objects. Further, the objects of the trust in *Aboriginal Hostels Ltd* were much wider: it included all of the

members of the Aboriginal community who visited Darwin. Mr Reeves stressed the factual differences between the two cases.

Mr Reeves also sought to distinguish *Tangetyere Council Inc*. He submitted that the decision in that case was not binding on his Worship, in part because his Honour said that his determination involved a question of fact, and he was in any event dealing only with a 'public benevolent institution'. Mr Reeves pointed to the different number of people involved, and the different activities. Further, as between the associations themselves, he pointed to their individual differences.

Mr Reeves took me to some of the submissions he had made to the Tribunal, including detailed submissions on the 'public' nature required. He submitted that it was not open to this in Court to find that the campers were living in poverty, or to enquire into that. He submitted that the differences between the appellants was so great that each had to be examined separately; consequently, if the appeal succeeded, the case should be remitted to the Tribunal which should be asked to do that.

In summary, Mr Reeves stressed that any question of law had to relate to the question whether his Worship was right in concluding that the associations lacked the necessary public element required for a public charity or a public benevolent institution.

Mr Bleby replied at length and in detail. I need not set out his rebutting submissions.

Conclusions

It can be seen that the appeal was argued in great detail. It is sufficient, however, to say that I accept Mr Bleby's submissions. I consider that his Worship's conclusion that "any benefits received exclusively for the benefit of the respective members of the association" was contrary to the evidence placed before me, and constitutes an error of law. His resulting conclusion that "there is no public benefit" is similarly vitiated.

On 9 April last, I allowed the appeal against the decision of the Tribunal of 14 March 1994, and quashed and set aside that decision which had disallowed an appeal from the respondent's decision disallowing an appeal against the appellants' entry in the Rate Book. These are the reasons for allowing the appeal. I said on 9 April that I would hear the parties on the terms of the order which should be made; I now do so.