Northern Land Council v Commissioner of Taxes [2002] NTCA 11

PARTIES:	NORTHERN LAND COUNCIL v THE COMMISSIONER OF TAXES
TITLE OF COURT:	COURT OF APPEAL OF THE NORTHERN TERRITORY
JURISDICTION:	CIVIL APPEAL FROM THE SUPREME COURT EXERCISING TERRITORY JURISDICTION
FILE NO:	AP 3 of 2002 (20002126)
DELIVERED:	28 November 2002
HEARING DATES:	1 & 2 August 2002
JUDGMENT OF:	Martin CJ, Mildren & Thomas JJ

REPRESENTATION:

Counsel:

Appellant:	Mr Basten QC and Mr Glaken
Respondent:	Mr Durak SC and Ms Kelly

Solicitors:

Appellant:	Northern Land Council
Respondent:	Clayton Utz

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

Northern Land Council v Commissioner of Taxes [2002] NTCA 11
No. AP 3 of 2002 (20002126)

BETWEEN:

THE NORTHERN LAND COUNCIL
Appellant

AND:

COMMISSIONER OF TAXES
Respondent

CORAM: MARTIN CJ, MILDREN & THOMAS JJ

REASONS FOR JUDGMENT

(Delivered 28 November 2002)

Martin CJ:

[1] I have had the benefit of draft reasons for decision of Mildren J with which I am in general agreement. His Honour's review of the factual background and law relieves me of the need to go into detail.

[2] However, I wish to add some comments. Whether a particular organisation is a public benevolent institution depends upon a variety of factors which may not remain constant. Furthermore, as the legislation under consideration demonstrates, a PBI may employ people who are not exclusively engaged in its work as such. The test for the purposes of obtaining exemption under the Act is to be applied from time to time.

[3] In the case of the respondent, its constitution, governance and functions are supplied by an Act of the Commonwealth. Its continuing status, and indeed, its existence, is dependent upon the will of that legislature. Its range of functions is such that it is not difficult to foreshadow a change of emphasis and scope of work which it undertakes. For example, assisting those who claim to be traditional Aboriginal owners to make and pursue applications under s 11 of the Aboriginal Land Rights (Northern Territory) Act is likely to fall into disuse.

[4] It is to be hoped that the undoubted disadvantage of many indigenous people of the Territory and elsewhere, recognised by the judiciary and parliaments, will ameliorate to such an extent that the ready conjunction of notions such as poverty, suffering, distress or misfortune (and the like) will no longer be generally applicable.

[5] Determining the benefits which the respondent dispenses and to whom they are extended are enquiries not resolved for all time by this case.

[6] Although the appeal to this Court must be allowed it only deals with the respondent's status and not with the quantum of its liability. The latter question is yet to be dealt with on the appeal to the Supreme Court. The assessment remains on foot, and it is up to the parties to arrange for that aspect of the appeal to the Supreme Court to be brought on for hearing.

[7] I agree with the orders proposed by Mildren J and would certify the matter fit for two counsel.

Mildren J:

[8] The question raised by this appeal is whether or not the appellant, the Northern Land Council, is a public benevolent institution for the purposes of s 9(a) of the Pay-roll Tax Act 1978 (NT) (the Act).

[9] Section 9(a) of the Act exempts from pay-roll tax that is otherwise payable under s 6, wages paid or payable:

> by a religious or public benevolent institution, or by a public hospital, to a person during a period in respect of which the institution or hospital, as the case may be, satisfies the Commissioner that the person is exclusively engaged in the religious work, work of a public benevolent nature or work of the hospital of a kind ordinarily performed in connection with the conduct of public hospitals, as the case may be.

[10] The proceedings before the learned trial judge were commenced by way of an appeal against a determination of the Commissioner pursuant to s 35 of the Act and in that proceeding the appellant also sought declaratory relief in the general jurisdiction of the Court. The issues raised by the Commissioner's determination and by the appeal, concerned both limbs of s 9(a) of the Act, i.e., whether the appellant is a public benevolent institution and if so, whether the wages paid by the appellant were to persons exclusively engaged in work of a public benevolent nature. By order of the Master, the question of whether the appellant is a public benevolent institution was ordered to be heard and determined separately as a preliminary issue. The learned trial judge decided that question in favour of the respondent and gave judgment accordingly.

[11] The learned trial judge considered that in answering the question to be determined "a useful guide is the similarity of the notion of a benevolent institution and the popular notion of a charity". His Honour said that:

> the authorities emphasis the need for a public benevolent institution to be concerned with the relief of disability of one kind or another and to be so concerned in the sense that relief is freely or voluntarily given, (which is) ... an eleemosynary element which appears to be the key to the characterisation of a body as a benevolent institution.
>
> ... unless the "intrinsic character of the object which (the body) promotes" (*Royal Australian College of Surgeons v FC of T* (1943) 68 CLR, 436 at 447.2) or the "predominant and characteristic purpose and activity" (*Commissioner of Pay-toll Tax v Cairnmiller Institute* [1992] 2 VR 706 at 713-4) of the body involves the *voluntary* relief of disability, the body will not be a public benevolent institution however beneficial its activities may be.

[12] His Honour also accepted a submission of the Commissioner that "ultimately it is a jury question and that the Court will be guided by matters of impression and degree."

[13] After considering the evidence, the authorities, the relevant legislation and the submissions of the parties in some detail, his Honour concluded that:

> the applicant [Northern Land Council] is not a charity within the popular meaning of that word and I have reached the conclusion that it is not a public benevolent institution. I am in broad agreement with the respondent's submissions above. The appellant Land Council's "predominant and characteristic purpose and activity is not to assist disadvantaged Aboriginal people, but as a statutory body to perform its functions under the relevant legislation. The fact that performance of these statutory functions assists disadvantaged Aboriginal people is a consequence rather than the object of the legislation. The fact is that the appellant Land Council was not formed to act charitably or benevolently in the eleemosynary sense. I agree that its discriminatory role in dealing with Aboriginal persons and the primacy accorded traditional owners is inconsistent with the

> dispensing of benefits according to need, what may be generally regarded as charity or benevolence. (sic).
>
> The appellant is part of a statutory mechanism put in place to remedy past injustice. It has acquired a prominence and significance in representing Aboriginal interests in the north of the Northern Territory which is inconsistent with the notion that it voluntarily dispenses some form of welfare. Its formation and continuing activities are, I think removed from any "hand out" notion involved in the concept of charity or benevolence. Not all who benefit from the appellant's activities are objects of compassion or in states of distress.
>
> Not all of the appellant's functions as prescribed by s 23 *Land Rights Act* are necessarily benevolent; that is, I do not construe each of its functions as necessarily benevolent in itself or ancillary or incidental to functions which themselves are benevolent ... It is well established that if each function of an institution is either benevolent in itself or necessarily incidental to other functions which themselves are benevolent, then the institution is a benevolent institution whereas if a function is non-benevolent and not merely incidental or ancillary to a main benevolent purpose or function the institution will not be benevolent.

[14] The appellant challenges a number of these principal findings as either errors of law or fact, or both, although as I understand it, the appellant does not challenge the approach of the submission of the Commissioner that there are some factors relied upon by the learned trial judge which, whilst not conclusive, when taken as a whole might be indicative of a negative conclusion. However, what the appellant says is that the relevant factors, properly understood and taken as a whole, leads to an affirmative conclusion and that some of the factors referred to by the learned trial judge were either irrelevant or neutral in the circumstances of this case.

[15] I agree with the opinion of the learned trial judge expressed in *Tangentyere Council v Commissioner of Taxes* (1990) 99 FLR 363 at 364, that the term 'public benevolent institution' is not a term of art, but a compound expression which takes its meaning from ordinary English usage of the day. I would add to that, "and from the legislative context in which it finds itself if that context throws particular light on the intended meaning." In *Perpetual Trustee Co v Federal Commissioner of Taxation* (1931) 45 CLR 224, both the context of the expression and the legislative history of the provisions of the Estate Duty Assessment Act 1914-1928 (Cth) were relied upon by Starke J (at 231-2) and by Dixon J (at 233) as showing that the meaning was narrower than 'charitable institution' in its technical legal sense. Therefore, a public benevolent institution (PBI) may be a charity in the legal sense, but not every such charity is a PBI. Whilst there is nothing in the history of the Pay-roll Tax Act 1978 (NT) which throws any light on the matter, the expression finds itself in the same company as religious institutions and public hospitals and there is no reason to depart from this view.

[16] In the *Perpetual Trustee Co* case, supra, Starke J said at 232 that a PBI was in the context in which it was found and in ordinary English usage "an institution organised for the relief of poverty, sickness, destitution, or helplessness." Dixon J expressed the matter negatively, at 233-4, when he said that "I am unable to place upon the expression 'public benevolent

institution' in the exemption a meaning wide enough to include institutions which do not promote the relief of poverty, suffering, distress or misfortune.

Evatt J said, at 235-6, that:

> ... a characteristic of most of these organisations is the absence of any charge for services or the fixing of a purely nominal charge. 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.

McTiernan J who dissented in the result said, at p 241, that:

> ... while I do not think that the legislature intended strictly to confine the exemption to gifts to an institution of a strictly eleemosynary character, yet it may be difficult to bring within the scope of the exemption ... a gift to an institution which is of a public character, but does not exist for the relief of distress or misfortune occasioned by poverty.

[17] Subsequent decisions of the High Court provide further guidance. Although an institution is not subject to public ownership and control, this does not necessarily compel the conclusion that it is not a public benevolent institution. It is a question of fact and degree in each case which depends not so much on how it was established or financed, but upon the character of the institution and the nature of the services rendered: per Starke J in *The Little Company of Mary (SA) Incorporated v The Commonwealth and Another* (1942) 66 CLR 368 at 386: *Maughan v Federal Commissioner of Taxation* (1942) 66 CLR 388 at 395-6 per McTiernan J. An institution which aims at benefiting an appreciable, but not necessarily appreciable

needy, section of the community is a public institution: per Williams J with whom Rich J agreed in *Maughan v Federal Commissioner of Taxation*, supra, at 397-98; *Lemm v Federal Commissioner of Taxation* (1942) 66 CLR 399 at 410, 41l; per Williams J with whom Rich J agreed. A constitution which provides for those members of the public who are sufficiently interested in the work of the institution to subscribe to its funds and thereby become annual members and as such eligible to vote at the election of the controlling body, creates a control which is public in its nature: *Maughan v Federal Commissioner of Taxes*, supra, at 397.

[18] Decisions of state appellate courts in more recent times offer further illumination. In *Australian Council of Social Services Inc v Commissioner of Pay-roll Tax* (1985) 1 NSWLR 567, the New South Wales Court of Appeal held that:

> 'benevolence' in the composite phrase 'public benevolent institution' carries with it the idea of benevolence towards persons in need of benevolence, however manifested. Benevolence in this sense ... (is) 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. (per Priestley JA, at 575, with whom Mahony JA agreed.)

[19] In *Commissioner of Pay-roll Tax v Cairnmiller Institute* [1992] 2 VR 706 at 709, the Court of Appeal of Victoria held that the relief of poverty is not an essential prerequisite because the relief of suffering, distress or misfortune is also a characteristic of a benevolent institution. In order to qualify as a benevolent institution, it is not necessary to show that the services provided

are only to those in financial need or without charge or for a small charge. At 712, the Court observed that it is no less benevolent to assist an AIDS sufferer because that person can afford to pay, for the issue is not the relief of poverty, but the relief of distress.

[20] In *The Royal Society for the Prevention of Cruelty to Animals, Queensland Inc.*, (1993) 1 Qld.R. 571, the Court of Appeal of Queensland held that the benevolence must be directed towards the public or a section of it, so that a body which provides those benefits to animals or otherwise indirectly for the benefit of mankind, is not within the meaning of the expression.

[21] In a number of cases, individual judges have expressed differing views on whether or not the expression is similar to the present popular meaning of 'public charity': see *The Royal Society for the Prevention of Cruelty to Animals, Queensland Inc.*, supra, at 574 per Fitzgerald P and at 582 per Thomas J, where it was held that this was "not to the point"; c.f. *Metropolitan Fire Brigades Board v Commissioner of Taxation*, 27 FC R 279 at 283 where the Full Federal Court held, after referring to the speech of Lord Wilberforce in *Ashfield Municipal Council v Joyce* [1978] AC 122 at 137, that the notions, whilst not identical, were similar.

[22] An institution may have independent or collateral objects and powers which enable its funds to be devoted to purposes which are not benevolent which can have the result of the institution losing the status it would otherwise possess as being a benevolent institution. The distinction to be drawn is

between objects and powers which are independent and collateral, even if subsidiary, which have a disqualifying effect and those which are 'merely ancillary, incidental, dependent or concomitant' which do not: see *Maclean Shire Council v Nungera Co-operative Society Ltd* (1995) 86 LGERA 430 at 432-3 (per Handley JA with whom Priestly and Sheller JJA agreed.)

[23] The learned trial judge placed emphasis on the need for the appellant to establish that it was formed to act charitably in the popular sense, or benevolently in the eleemosynary sense. I do not accept that, in order to succeed, it is necessary for the appellant to establish either of these propositions. In my view, whilst proof of those matters may well assist in reaching a conclusion favourable to the appellant, the absence of either or both of those factors is not determinative for the following reasons. As to the question of whether or not the appellant is a charity in the popular sense, I consider that consideration of this question diverts attention from the true question. In particular, I agree with Thomas J in *The Royal Society for the Prevention of Cruelty to Animals, Queensland Inc,* supra, at 582 that this is "not to the point". As Lord MacNaughton said in *The Commissioners for Special Purposes of the Income Tax v Pemsel* [1891] AC 531 at 583, "... no one as yet has succeeded in defining the popular meaning of the word 'charity'." The uncertainty of the term has often been remarked on: see *Ashfield Municipal Council v Joyce,* supra, at 135 and the cases therein referred to. As to whether benevolence is limited to benevolence in the

eleemosynary sense, which I take to mean "by the giving of welfare assistance", it is plain from a number of decisions that this is not essential if by welfare assistance one is speaking of the provision of money, housing, food, medicine, or other basic essentials. The provision of services to relieve distress may be sufficient for example, even if the services are not provided only to those in financial need or without charge or for a small charge: *Commissioner of Pay-roll Tax v Cairnmiller Institute*, supra, *Commissioner of Taxation v Launceston Legacy* (1987) 15 FCR 527; *Tangentyere Council Incorporated v Commissioner of Taxes* (1990) 99 FLR 363 at 372. The fact that not all those who are assisted are needy, or in states of distress, or objects of compassion, is also not necessarily conclusive, so long as the section of the public to whom assistance is directed may be so described as a class and so long as that class may be described as disadvantaged and appreciable: *Lemm v Commissioner of Taxation*, supra, at 411 per Williams J (with whom Rich and McTiernan JJ agreed); *Tangentyere Council Incorporated v Commissioner of Taxes*, supra, at 366, 374; *Gumbangerrii Aboriginal Corporation v Nambucca Council* (1996) 131 FLR 115 at 121; *Aboriginal Hostels Ltd v Darwin City Council* (1985) 75 FLR 197 at 212.

[24] The findings of the learned trial judge were that the appellant was subject only to limited and defined executive control by the Commonwealth government. There is no challenge to this finding. The Commissioner did not submit that the appellant was a part of government performing

governmental functions: cf. *Metropolitan Fire Brigades Board v Commissioner of Taxation* (1990) 27 FCR 279; *Mines Rescue Board v Commissioner of Taxation* (2000) 101 FCR 91. Such a contention could not be made in any event. It is clear from the provisions of the Aboriginal Land Rights (Northern Territory) Act 1976 that the Minister has no power to give directions to the appellant on the exercise of its functions and no power to interfere with the core revenue of the appellant. At best, in limited circumstances, the Minister may do that which a Land Council is empowered or required to do where the Land Council fails to act in certain circumstances (ss 12B(4); 12C; 19(9A); 19(9B) and 20(5)).

[25] A factor pointed to by the respondent and apparently accepted by the learned trial judge as pointing to the conclusion that his Honour arrived at, is the suggestion that the appellant's services were not provided to traditional owners, or to other Aboriginal persons who benefit from them, voluntarily on the basis of assessed need, but on the basis of entitlement. In *Noy & Ors v Tapgnuk & Ors and The Northern Land Council* (1997) 6 NTLR 118 at 122-123, this Court held that s 23(1)(f) of the Aboriginal Land Rights (Northern Territory) Act which provides for a Land Council to provide legal aid in pursuing land claims, merely confers a discretionary power, not a right. It is difficult to see how, in the light of the reasoning in that case, any of the functions conferred on a Land Council by s 23 of the Act confer rights as opposed to powers. An exception to this is the obligation under ss 35(1), (2), (3), (4) or (6) of the Act to pay monies to the bodies to which, or

persons to whom, the amounts are eventually to be paid and in this respect, ss 35(7), (8) and (9) make it clear that a Land Council holds these monies on trust for the ultimate recipients, but this role is in my opinion incidental or ancillary to the functions of Land Councils as expressed in s 23.

[26] Certain facts were admitted by the respondent for the purposes of this case:

1. that Aboriginal people in the Northern Territory are in a disadvantaged position and in need of protection and assistance;

2. that the principal operations and activities of the appellant are conducted for the benefit of Aboriginal people in the Northern Territory;

3. that Aboriginal people in the Northern Territory are an appreciable section of the community.

As the learned trial judge observed, those admissions were properly made. There was also evidence led before his Honour to establish that the relevant traditional owners were a disadvantaged and appreciable section of the community. The respondent accepts that we should so find.

[27] It was submitted by counsel for the appellant, Mr Basten QC, in the resolution of the ultimate question, the proper questions to be asked are, as set out by Campbell J in *O'Farrell v Bathurst Municipal Council* [1923] 40 WN (NSW) 78 at 80, viz: "What are the benefits which the institution dispenses, and to whom are the benefits extended..." Counsel for the respondent, Mr Durak SC, at first seemed to accept the correctness of this

approach, but later he pointed out that *O'Farrell's* case dealt with the question of whether the institution was "public" rather than whether it was benevolent. Reference to the text in *O'Farrell's* case bears out Mr Durak's contention: see also the discussion by Angel J in *Tangentyere Council Inc. v Commissioner of Taxes,* supra, at 365-6. In my opinion, the correct approach to the ultimate question of whether or not the appellant is a PBI is principally answered by reference to the terms of its "constituting documents", which in this case are the relevant provisions of the Aboriginal Land Rights (Northern Territory Act, 1976 and the relevant provisions of the Native Title Act 1993 (Cth); *Toomelah Co-operative Ltd v Moree Plains Shire Council* (1996) 90 LGERA 48; *Gumbangerrii Aboriginal Corporation v Nambucca Council,* supra.

[28] An examination of the provisions of the Aboriginal Land Rights (Northern Territory) Act 1976, shows that the core functions of Land Councils are concerned with providing legal aid to persons claiming to be traditional owners of land who wish to claim land under the Act (s 23(1)(f)), to protect the interests of traditional owners and other Aboriginals interested in Aboriginal Land in the area of the Land Council (s 23(1)(f)); to assist in the protection of sacred sites on land (whether or not Aboriginal land) in the area of the Land Council (s 23(1)(ba)); and to provide assistance of various kinds in relation to the management of Aboriginal land and to negotiate with others in respect thereof on behalf of the traditional owners and other Aboriginals interested in the land (see ss 23(1)(a); 23(1)(c); 23(1)(d);

23(1)(e), 23(1)(ea), 23(1)(fa) s 23(1)(h) and 23(3)). To a large extent, these latter functions can be seen as the provision of legal aid in negotiating legal outcomes on behalf of traditional owners and in the provision of advice and negotiating skills on behalf of traditional owners and other Aboriginals interested in the land or affected by a proposed use and as a protective shield against the cultural dominance of non-Aboriginal persons and bodies.

[29] Similar core functions are to be found in the Native Title Act 1993: see ss 203BB, 203BE, 203BF, 203BG and 203BH.

[30] It was submitted that the purpose of these provisions and whether or not the core functions of Land Councils were beneficial in nature, could be discerned from an examination of the objects and purposes of the relevant legislation taken as a whole. We were referred to the second reading speech of the Minister (Hansard, House of Representatives, 4 June 1976, at pps 3081 to 3084 (AB 968-71)). Some of the principal matters referred to by the Minister were:

(1) that the Act, "will allow and encourage Aborigines in the Northern Territory to give full expression to the affinity with land that characterised their traditional society and gave a unique quality to their life."

(2) "Traditional Aborigines associate identifiable groups of people with particular 'countries' or tracts of territory in such a way that the link was publicly reputed to express both spiritual and physical communication between living people and their 'dream time' ancestors and between the

country as it now is and the 'ancestral' country which had been given its names, its physical features, its founding stocks of food and water, and its owners and possessors by the ancestors themselves. It is believed that ancestors left in each 'country' certain vital powers that, used properly by the right people, make that 'country' fruitful and ensure a good life for people forever ... In the Northern Territory Aboriginal communities still wanting to maintain and live by their culture and social forms involving land in the sense I have described will be enabled by this Bill to do so."

(3) The Minister quoted a statement by a former Prime Minister as follows: "We are deeply concerned to enable them ... to have some security in their relationship with the land and, in particular, to give continuing Aboriginal groups and communities the opportunity of obtaining an appropriate title under Australian law over lands on reserves which they are interested in to use and develop for economic and social purposes." The Minister concluded that the Bill would achieve that aim.

(4) The Minister pointed to, as one of the objectives, the right of all Australians to enjoy freedom of choice and diversity in the way people want to live their lives, and securing land rights to Aborigines in the Northern Territory was "a significant expression of this objective" which would be pursued "in a way consonant with the rights of other Australians."

[31] It is clear that the Act primarily focuses on traditional owners in that it is only the traditional Aboriginal owners who can claim land under the Act, it

is only the traditional Aboriginal owners who are eligible to be appointed as members of a Land Trust, that Land Councils, in carrying out their functions have to obtain the consent of the traditional Aboriginal owners under ss 23(3), 48(4) and 48A(a) and it will be the traditional Aboriginal owners who will mainly benefit financially from monies received from the use of Aboriginal Land (see s 35(4)). This was a matter relied upon by the learned trial judge and urged upon us as pointing to the conclusion that the benefits provided by the appellant were not beneficial in nature in that the primacy accorded to traditional Aboriginal owners is inconsistent with the dispensing of benefits according to need which is an element necessary for the characterisation of a body as a public benevolent institution.

[32] I do not accept this submission. The definition of "traditional Aboriginal owner" in s 3 of the Act means:

> ... a local descent group of Aboriginals who:
>
> (a) have common spiritual affiliations to a site on the land, being affiliations that place the group under a primary spiritual responsibility for that site and for the land; and
>
> (b) are entitled by Aboriginal tradition to forage as of right over that land.

[33] In the light of the Minister's second reading speech, it is clear that this Act was not merely about addressing the wrongs of the past, but that it was designed to enable a class of people with strong spiritual affiliations and responsibilities to a site to live a traditional lifestyle, according to their

cultural and spiritual beliefs if that is what they choose to do. This has been recognised by some authorities as "beneficial" in the relevant sense. In *Tangentyere Council Incorporated v The Commissioner of Taxes,* supra, at 372, Angel J said:

> 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 for the welfare of society as a whole.

See also the observations of Stein J in *Toomelah Co-operative Ltd v Moree Plains Shire Council,* supra, at 57-59. We were referred to *Williams' Trustees v Inland Revenue Commissioners* [1947] AC 447 where the House of Lords rejected a claim by a trust established to foster Welsh culture in London. That case is readily distinguishable on its facts as the class of individuals in that case was a fluctuating body of private individuals. This is not so in this case as, inter alia, the Land Council is empowered by the Act to maintain a register of the traditional owners (s 24) who must in any event have been identified during the process of a land claim or native title hearing and in order for the Land Trusts to have membership. The decision is also distinguishable on the grounds suggested by Stein J in *Toomelah Co-operative Ltd v Moree Plains Shire Council,* supra, at 58-59. I consider that traditional owners are a class for the purposes of this legislation and that it is plain that they have special needs and responsibilities which makes it appropriate to differentiate them from other Aborigines which, without the assistance of the appellant, they would be unable to procure or maintain.

[34] A further matter urged upon us by the respondent was that the essential purpose of the appellant's functions, whilst of great benefit to the Aboriginal traditional owners and other Aboriginal was not designed to relieve poverty, sickness, destitution, helplessness or distress, or to provide relief designed to overcome or reduce disadvantage because the appellant's functions were to a large extent administrative in nature, in that the functions are performed as an integral part of and for the essential purpose of providing the special system of land tenure by which the wrongs of the past are remedied. I have already dealt with that contention to some extent in discussing the argument concerning traditional Aboriginal owners, but it is necessary to refer to some other matters. In some cases, the core functions of Land Councils may be seen and recognised as designed to relieve poverty: for example the provision of legal aid advice and assistance in making land claims, native title claims and in negotiating contracts, etc: see the oft cited observations of Nader J in *Aboriginal Hostels Ltd v Darwin City Council* (1985) 75 FLR 197 at 211; c.f. *Legal Aid Commission of Victoria v Commissioner of Pay-roll Tax* (1992) 92 ATC 2053. In other cases, the needs are more fundamental and lie in the preservation of Aboriginal spirituality, culture and tradition and protecting Aborigines from the cultural dominance of non-Aboriginal society. This cultural dominance is well known and has been recognised by the Courts, particularly in relation to authority figures (see for example *R v Anunga* (1976) 11 ALR 412), but there is also a well recognised need to ensure that advantage is not taken and misunderstanding

is avoided by others not familiar with Aboriginal culture of common cultural traits such as gratuitous concurrence (see *Dumoo v Garner* (1997) 7 NTLR 129 at 142). Many traditional Aborigines do not speak English well and have had little formal education. Most non-Aborigines have little understanding of what is and what is not offensive to many Aboriginal people. It is for these reasons that the Act envisaged that a Land Council was necessary to provide the support and assistance traditional Aboriginal owners and other Aboriginal persons living on Aboriginal land in accordance with s 71 of the Act clearly needed if their culture, spirituality, traditions and freedom of choice were to be respected and protected. Those needs are recognisably beneficial in relieving distress and helplessness and in my opinion, that is the essential nature to which the core functions of the appellant are directed.

[35] One of the reasons given by the learned trial judge for his conclusion that the appellant is not a PBI was that the appellant's predominant purpose and characteristic was not to assist disadvantaged Aboriginal people, but as a statutory body to perform its functions under legislation and the fact that the performance of these functions assists disadvantaged Aboriginal people is a consequence rather than the object of the legislation. I have already expressed in detail why I do not accept this view, but there are some further matters on this topic, which were raised in argument by counsel for the respondent, which still need to be addressed. One matter urged upon us was that Land Councils perform a range of essentially administrative functions

with respect to Aboriginal land and the primary purpose of such Councils is to provide a convenient administrative structure for traditional owners to acquire and hold Aboriginal land and for others to negotiate to retain or acquire interests (including mining interests) in such land, for the management of Aboriginal land and for the distribution of revenues from Aboriginal land. Land Councils do not make land claims; they assist traditional owners to make land claims by providing assistance, including arranging legal assistance (s 23(1)(f). Land Councils do not hold Aboriginal land which is required to be held by Land Trusts, although they do supervise and provide administrative and other assistance for Land Trusts (s 23(1)(h)). Land Councils are not there to enable others to retain or acquire interests in Aboriginal land, but they do negotiate on behalf of traditional Aboriginal owners and other Aboriginals interested where there are others wanting to acquire or retain such interests. This is not an administrative function. It is the case that Land Councils receive and distribute payments due to Aboriginal traditional owners, whether under mining royalty agreements or other kinds of agreements relating to the use of Aboriginal land, but that is a form of direct assistance to the traditional Aboriginal owners who are, for obvious reasons, unable to do this for themselves and to ensure, no doubt, that contracts are not made directly with traditional Aboriginal owners contrary to s 48J of the Act and that contracts made with traditional Aboriginal owners are observed and performed by third parties in accordance with their terms. I am unable to see why these functions are not

beneficial in the relevant sense, given the circumstance that Aboriginals and traditional Aboriginal owners do not otherwise have the means to do this for themselves.

[36] A submission was made on behalf of the respondent that the representative nature of Land Councils, whose members are chosen pursuant to s 29 of the Act by the Aboriginals living in the area of the Land Council, is indicative that Land Councils are not PBIs. In my opinion, the fact that a Land Council's members are chosen by the persons whose interests the Land Council is meant to serve merely reinforces the fact that the appellant is a "public" body; it does not detract from the status of the appellant as a PBI; c.f. *Maughton v Federal Commission of Taxation,* supra, at 397; *Lemm v Commissioner of Taxation*, supra, at 410-411. I do not see how this is otherwise relevant to the question.

[37] Another matter relied upon was the method of funding of the appellant which, it was submitted, was "effectively funded by the very people it is intended to benefit". I am unable to accept this contention. The appellant's source of funding is from the Consolidated Revenue Fund. It may be that the ultimate source of this revenue is from mining royalties, but if that be so, the relevant royalties are those received or receivable by the Commonwealth or the Northern Territory in respect of a mining interest on Aboriginal Land: see ss 63(2) and (4), and ss 64(1), (2), (3) and (7). There is nothing in the Act which vests the ownership of minerals in the

Aboriginal land in a Land Trust; indeed the contrary is the case: see s 12(2). This contention is plainly wrong.

[38] A matter referred to by the learned trial judge as being a function which was not benevolent in itself or ancillary or incidental to functions which themselves are benevolent is the function conferred by s 23(1)(ea) to:

> assist Aboriginals in the area of the Land Council to carry out commercial activities (including resource development, the provision of tourist facilities and agricultural activities) in any manner that will not cause the Land council to incur financial liability or enable it to receive financial benefit.

I do not see why this is not benevolent in relieving poverty or helplessness. The Land Council provides assistance for Aboriginals in its area; it is to gain nothing for itself, nor incur liabilities in doing so. Clearly the purpose of the provision is to assist Aboriginals to become economically independent and to provide employment opportunities. The lack of employment opportunities for Aboriginals living on Aboriginal land in the Northern Territory is notorious and is a cause of despair and hopelessness – a factor which in turn leads to crime and drunkenness as anyone familiar with conditions in the Territory will be all too familiar with. I have no doubt that this function is beneficial and respectfully disagree with the learned trial judge.

[39] Finally, there is one matter which was not argued before us which I wish to mention and that is this. Section 9(a) of the Pay-roll Tax Act exempts from

pay-roll tax wages paid or payable by a public benevolent institution to a person during a period in respect of which the institution satisfies the Commissioner that the person is exclusively engaged in work of a public benevolent nature. As previously observed, this is a two-fold test. The Estate Duty Assessment Act 1941-1928 (Cth) upon which the decisions of the High Court were concerned did not contain a two-fold test in order to obtain the exemption. All of the leading cases (except one) which have dealt with the distinction to be drawn between ancillary powers which do not affect the status of a PBI and independent and collateral objects which do not affect such status, were cases which did not require proof of a two-fold test. In *Royal Australian College of Surgeons v Federal Commissioner of Taxation* (1943) 68 CLR 436, s 23(e) of the Income Tax Assessment Act exempted the income of a "religious, scientific, charitable or public educational institution" from income tax. *Congregational Women of New South Wales v Thistlethwayte & Others* (1952-53) 87 CLR 375 at 442-4 concerned whether a gift by will was to a charity and therefore not invalid, as was *Stratten v Simpson* (1970) 125 CLR 138 at 159-60; *Cronulla Sutherland Leagues Club Ltd v Commissioner of Taxation* (1990) 23 FCR 82 dealt with an exemption under s 23(g)(iii) of the Income Tax Assessment Act which required proof that the club was "established for the encouragement or promotion of an athletic game or sport". *Maclean Shire Council v Nangera Co-operative Society Ltd*, supra, which applied and followed these authorities, dealt with a rating exemption in respect of "land

which belongs to any public benevolent institution ... and is used or occupied by the institution ... for the purposes thereof", is admittedly a two-fold test, but of a wholly different character from s 9(a) of the Pay-roll Tax Act. It is at least open to argument that all of these authorities are distinguishable and that the requirement for the tax-payer to satisfy the Commissioner that the wages of a person exclusively engaged in work of a public benevolent nature implies that, in order to be a PBI, the activities of the PBI need not be exclusively beneficial, as otherwise the second limb of the test in s 9(a) would have no work to do. However, I do not rely on this in reaching my conclusion as the matter was not argued.

[40] In my opinion, the appeal should be allowed.

Orders

[41] The question now is what orders should be made? Counsel for the appellant submitted draft minutes of order which I have considered. The appellant seeks, inter alia, an order setting aside the assessment and remitting to the respondent the assessment of pay-roll tax, if any, payable by the appellant for further consideration according to law. Counsel for the respondent, Mr Durak SC, opposed the first of these orders because he was unable to find "a clear basis in the pay-roll tax legislation for an amended assessment". Further discussion between the Court and counsel left it unclear what the respondent's position was with respect to the question of remission and, in particular, whether the proceedings should be remitted

either to Angel J, or to some other Judge of the Court, or to the Commissioner.

[42] The Taxation (Administration) Act has a provision (s 97) enabling the Commissioner to amend an assessment. However, that Act does not generally apply to the Pay-roll Tax Act (see the definition of "this Act" in s 4(1) of the Taxation Administration) Act.) Also, for reasons which are not clear, s 4 of the Pay-roll Tax Act, which provided that the Commissioner of Taxes appointed pursuant to the Taxation (Administration) Act has the general administration of the Pay-roll Tax Act, was repealed by s 29 of *Act No. 37 of 1980*. Nevertheless, the Commissioner of Taxes exercises certain powers and functions under the Pay-roll Tax Act: see, for example, ss 12 and 13 of the Act, and s 3(1) which defines "the Commissioner". Although the Commissioner has power under s 19(1) to assess the amount of wages paid or payable and to calculate the tax payable thereon, and to issue default assessments under ss 19(2) and 19 (2B) of the Pay-roll Tax Act, I am unable to find any provision similar to s 97 of the Taxation (Administration) Act which would enable the Commissioner to issue an amended assessment. The Commissioner has power to allow an objection under s 34, but once the objection is disallowed, it would appear that he has no power to reduce the assessment to nil if he subsequently changes his mind.

[43] As already noted previously, the Commissioner disallowed the objection to the assessment relying on both limbs of s 9(a), and the appeal relates to both limbs. Only one of those limbs was considered by Angel J.

[44] In the circumstances, I consider that the proper course is not to set aside the assessment at this stage. I understand that the reason for the Commissioner's disallowance of the objection was based on the same grounds in relation to both limbs of s 9(a) and it is now desired that the Commissioner reconsider the second limb of s 9(a) on the basis of further facts not previously considered, which the commissioner contends can be relied upon on the further hearing of the appeal: see *Federal Commisioner of Taxation v Wade* (1951) 84 CLR 105. If the Commissioner and the appellant can reach agreement, it may be that the appeal to the Supreme Court can be disposed of by consent orders. If no agreement can be reached, the Court can still dispose of the remaining ground, and I agree with the Chief Justice that it is up to the parties to arrange for that aspect of the appeal to the Supreme Court to be brought on for hearing.

[45] I would therefore propose the following orders:

1. The appeal be allowed and the judgment and orders made by Angel J on 21 December 2001 be set aside.

2. Delare that from 1 July 1977 until 21 December 2001, the appellant was and has been a public benevolent institution for the purposes of s 9(a) of the Pay-roll Tax Act.

3. The respondent is to pay the appellant's costs of the appeal and of the proceedings in the Supreme Court to date to be taxed.

4. Certify fit for two counsel.

Thomas J:

[46] The appeal raises the issue as to whether the appellant, the Northern Land Council, is a public benevolent institution for the purposes of s 9(a) of the Pay-roll Tax Act 1978 (NT). The primary Judge held that it is not.

[47] Section 9(a) of the Pay-roll Tax Act 1978 provides as follows:

> Section 6 does not apply to wages paid or payable -
>
> by a religious or public benevolent institution, or by a public hospital, to a person during a period in respect of which the institution or hospital, as the case may be, satisfies the Commissioner that the person is exclusively engaged in the religious work, work of a public benevolent nature or work of the hospital of a kind ordinarily performed in connection with the conduct of public hospitals, as the case may be;
>
> … …
>
> that are prescribed by the Regulations.

[48] The Northern Land Council was established by the Aboriginal Land Rights (Northern Territory) Act Part III.

[49] Section 23 of the Aboriginal Land Rights (Northern Territory) Act sets out the functions of the Land Council. These functions are extensive and predominantly concern management of Aboriginal land which includes consultation with traditional owners and other interested Aboriginal persons, to assist Aboriginal persons claiming to have a traditional land claim or who

wish to carry out commercial activities on Aboriginal land. It also includes functions in relation to the protection of sacred sites, access to Aboriginal land and schemes for the management of wildlife on Aboriginal land.

[50] The Northern Land Council also has functions conferred on it as a representative Aboriginal Torres Strait Islander Body under Part 10 of the Native Title Act. Under s 203BB of that Act the Northern Land Council facilitates and assists in the recognition of native title for Aboriginals.

[51] This matter came to the Supreme Court by way of appeal from the decision of the Commissioner of Taxes (Northern Territory). The issue for determination on appeal to his Honour was whether the Land Council is a public benevolent institution for the purposes of the Act.

[52] The expression "public benevolent institution" was considered by the High Court in *Perpetual Trustee Company Limited v The Federal Commissioner of Taxation* (1931) 45 CLR 224 Starke J at 232 to mean, "in my opinion, an institution organized for the relief of poverty, sickness, destitution, or helplessness". Dixon J said at 233:

> The words 'benevolent institution' are commonly used in combination to denote bodies organized for the relief of poverty or of distress.

[53] The Aboriginal Land Rights (Northern Territory) Act 1976 is described as:

> An Act providing for the granting of Traditional Aboriginal Land in the Northern Territory for the benefit of Aboriginals, and for other purposes.

[54] Section 23 of the Act sets out the functions of the Land Council and provides as follows:

> (1) The functions of a Land Council are:
>
> (a) to ascertain and express the wishes and the opinion of Aboriginals living in the area of the Land Council as to the management of Aboriginal land in that area and as to appropriate legislation concerning that land;
>
> (b) to protect the interests of traditional Aboriginal owners of, and other Aboriginals interested in, Aboriginal land in the area of the Land Council;
>
> (ba) to assist Aboriginals in the taking of measures likely to assist in the protection of sacred sites on land (whether or not Aboriginal land) in the area of the Land Council;
>
> (c) to consult with traditional Aboriginal owners of, and other Aboriginals interested in, Aboriginal land in the area of the Land Council with respect to any proposal relating to the use of that land;
>
> (d) where the Land Council holds in escrow a deed of grant of land made to a Land Trust under s 12:
>
> (i) to negotiate with persons having estates or interests in that land with a view to the acquisition of those estates or interests by the Land Trust; and
>
> (ii) until those estates or interests have been so acquired, to negotiate with those persons with a view to the use by Aboriginals of the land in such manner as may be agreed between the Land Council and those persons;
>
> (e) to negotiate with persons desiring to obtain an estate or interest in land in the area of the Land Council:
>
> (i) where the land is held by a Land Trust- on behalf of traditional Aboriginal owners (if any) of that land and of any other Aboriginals interested in the land; and
>
> (ii) where the land is the subject of an application referred to in para 50 (1)(a)- on behalf of the traditional Aboriginal owners of that land or on behalf of any other Aboriginals interested in the land;
>
> (ea) to assist Aboriginals in the area of the Land Council to carry out commercial activities (including resource development, the provision of tourist facilities and agricultural activities), in any manner that will not cause the Land Council to incur financial liability or enable it to receive financial benefit;

(f) to assist Aboriginals claiming to have a traditional land claim to an area of land within the area of the Land Council in pursuing the claim, in particular, by arranging for legal assistance for them at the expense of the Land Council;

(fa) to negotiate, and enter into agreements, as necessary, for the purposes of s 70(4);

(g) to compile and keep:

(i) a register recording the names of the members of the Land Council; and

(ii) a register recording the names of the members of the Land Trusts holding, or established to hold, Aboriginal land in its area and descriptions of each area of such Aboriginal land; and

(h) to supervise, and provide administrative or other assistance for, Land Trusts holding, or established to hold, Aboriginal land in its area.

(2) A Land Council may, with the approval of the Minister, perform any functions that may be conferred on it by a law of the Northern Territory, including, without limiting the foregoing, functions in relation to:

(a) the protection of sacred sites;

(b) access to Aboriginal land; and

(c) schemes for the management of wildlife on Aboriginal land.

(3) In carrying out its functions with respect to any Aboriginal land in its area, a Land Council shall have regard to the interests of, and shall consult with, the traditional Aboriginal owners (if any) of the land and any other Aboriginals interested in the land and, in particular, shall not take any action, including, but not limited to, the giving of consent or the withholding of consent, in any matter in connexion with land held by a Land Trust, unless the Land Council is satisfied that:

(a) the traditional Aboriginal owners (if any) of that land understand the nature and purpose of the proposed action and, as a group, consent to it; and

(b) any Aboriginal community or group that may be affected by the proposed action has been consulted and has had adequate opportunity to express its view to the Land Council.

(4) The reference in paragraph (1)(e) to an estate or interest in land includes a reference to a licence in respect of that land.

[55] Paragraph 769 of the report prepared by the Aboriginal Land Rights Commission, the "Woodward Report", states (AB 962):

> 769. There will be no immediate and dramatic change in the Aborigine's manner of living. In truth, the granting of land rights can only be a first step on a long road towards self sufficiency and eventual social and economic equality for Aborigines.

[56] The recommendations from this report formed the basis of the then proposed Aboriginal Land Rights (Northern Territory) Bill 1975.

[57] In the Second Reading Speech, Mr Les Johnson, the then Minister for Aboriginal Affairs, stated on 16 October 1975 at p 2225 (AB967):

> In proposing this legislation, the Government endorses Mr Justice Woodward's view that cash compensation in the pockets of this generation of Aboriginals would be no answer to the legitimate land claims of a people with a distinct past who want to maintain their separate identity in the future. This legislation will at last give Aboriginal ownership in our law over land which, according to their traditional law, belongs to them, and they to it. Future generations of Aboriginals will continue to reap the benefits of the land base this Bill will provide for the Aboriginal people of the Northern Territory.

[58] On 4 June 1976 the subsequent Minister for Aboriginal Affairs stated at p 308 (AB 968):

> … The Bill gives effect to that policy and, further, will provide Aborigines in the Northern Territory with the opportunity to claim and receive title to traditional Aboriginal land outside reserves. The Government believes that this Bill will allow and encourage Aborigines in the Northern Territory to give full expression to the affinity with land that characterised their traditional society and gave a unique quality to their life.
>
> Most of us now appreciate more sensitively than in the past that traditional Aborigines think, feel and act about land according to a plan of life a world apart from ours. Traditional Aborigines

> associate identifiable groups of people with particular 'countries' or tracts of territory in such a way that the link was publicly reputed to express both spiritual and physical communication between living people and their 'dream time' ancestors and between the 'country' as it now is and the 'ancestral' country which had been given its names, its physical features, its founding stocks of food and water, and its owners and possessors by the ancestors themselves. It is believed that ancestors left in each 'country ' certain vital powers that, used properly by the right people, make that 'country' fruitful and ensure a good life for people forever. Everywhere there was a plan of life – a good and satisfying life – based on an identifiable and unmistakable group of people forming a descent group or 'clan', living with relation to an identifiable territory publicly recognised as the 'country' of the group because of the actions of ancestors who had left in each 'country' sacred memorials – the totems and totemic sites of which we hear so much – as proof of entitlement for, and to guide and discipline, their descendants. The depth of appeal that an Aboriginal's 'country' has for him can be gauged by the pictures he may paint, the songs he may sing, the stories he may tell and the dances he may perform. His 'country' – no matter how stricken a wilderness it may seem to others – is to him a Canaan, from which his spirit came and where he wants his bones to rest. In the Northern Territory Aboriginal communities still wanting to maintain and live by their culture and social forms involving land in the sense I have described will be enabled by this Bill to do so.

[59] The argument for the appellant is that the question of whether a body is a public benevolent institution for the purposes of s 9(a) of the Act is to be answered by an inquiry as to the benefits provided by the body and the person to whom the benefits are provided. The submission for the appellant is that if the benefit provided promotes the relief of a disadvantage and appreciable section of the community, the body providing the benefit answers the description of a public benevolent institution.

Factual Background

[60] On 7 August 1997, the Corporate Services Manager for the Northern Land Council wrote to the Commissioner of Taxes advising that the Northern Land Council

> … will not be submitting a Pay-Roll Tax return for the month of July 1997 on the basis that the NLC considers that it is a Public Benevolent Institution (PBI) and that during July (and all other periods), all wages were paid to persons exclusively engaged in work of a public benevolent nature.

[61] On 11 August 1997, a default assessment notice issued on behalf of the Commissioner for Taxes in accordance with s 19(2)(a) of the Northern Territory Pay-roll Tax Act.

[62] On 27 August 1997, the Northern Land Council paid the amount of $20,093.75 in response to the Default Assessment at the same time giving the Commissioner an objection in writing to the assessment on the same ground as those set out in letter dated 7 August 1997.

[63] On 31 December 1999, the Commissioner of Taxes by letter to the Northern Land Council disallowed the objection inter alia giving the following reasons (AB1209 – AB1210):

> I have carefully considered the objection lodged by the Northern Land Council ("the Council) pursuant to section 34 of the Pay-roll Tax Act (NT) ("the Act"). Based on all the information placed before me (in particular the information relating to the statutory functions of the Council and the activities it performs) and the submissions in support of the grounds of objection, I have disallowed the objection for the following reasons.

> Section 9 of the Act provides, in effect, that wages paid or payable by a public benevolent institution to a person during a period in respect of which the institution satisfies the Commissioner that the person is exclusively engaged in work of a public benevolent nature are exempt from pay-roll tax.
>
> The relevant exemption set out in subsection 9(a) will only apply if two limbs (or, in the alternative, one subject qualified by a matter) are satisfied:
>
> 1. the wages must be paid or payable by a public benevolent institution; and
> 2. the wages must be paid to a person exclusively engaged in work of a public benevolent nature.
>
> As you are no doubt aware, the Commissioner of Taxes has no power to decide whether the Council is a public benevolent institution (see *Commissioner of Taxes v Tangentyere Council Incorporated* (1992) 107 FLR 470). Conversely, the Commissioner does have the requisite power to decide whether the second limb of subsection 9(a) is satisfied.
>
> The two limbs are inextricably linked in that the first limb requires a public benevolent institution (which does not include an organisation that performs governmental functions) to, amongst other things, provide direct aid to relieve poverty, sickness, suffering, distress, misfortune, destitution, or helplessness, and the second limb ensures that the pay-roll tax exemption only applies to wages paid or payable to employees engaged in activities (that are not governmental in nature) that provide direct aid to relieve poverty, etc or activities that are incidental thereto (eg. administrative or executive functions that facilitate the provision of direct aid).
>
> After having considered the statutory framework under which the Council is established and operates, and the Council's operations (being governmental in nature), it is my view that all of the Council's employees are not 'exclusively' engaged in 'work of a public benevolent nature', and accordingly, all the wages paid or payable by the Centre to its employees are subject to pay-roll tax.

[64] On 28 January 2000, the Northern Land Council commenced proceedings in the Supreme Court as an appeal against the Commissioner's decision of 31 December 1999.

[65] This appeal was lodged pursuant to s 35 of the Pay-roll Tax Act 1978. The appeal against the determination of the Commissioner also sought declaratory relief.

[66] On 8 August 2001, the Commissioner of Taxes filed a statement of facts, issues and contentions and stated at paragraph 1:

> The Commissioner agrees that Aboriginal people in the Northern Territory of Australia, as a class, are generally in need of protection and assistance and the performance by the NLC of its functions is of benefit to them.

[67] On 1 August 2001, the Northern Land Council filed a Notice to Admit Facts.

[68] On 15 August 2001, the Commissioner of Taxes filed a Notice of Dispute which did not dispute the following:

> Paragraph 9(1) Aboriginal people in the Northern Territory are in:
>
> (a) a disadvantaged position
>
> (b) need of protection and assistance.
>
> Paragraph 11. The principle operations and activities of the Land Council are conducted
>
> (1) for the benefit of:
>
> (a) Aboriginal people in the Northern Territory
>
> (b) traditional Aboriginal owners of land in the Northern Territory
>
> (c) other Aboriginals interested in Aboriginal land in the Northern Territory.
>
> Paragraph 12(1). Aboriginal people in the Northern Territory;
>
> are an appreciable section of the community.
>
> The Commissioner of Taxes disputed that Paragraph 9(2) traditional Aboriginal owners of land in the Northern Territory and (3) other Aboriginals interested in Aboriginal land in the Northern Territory; are in

(a) a disadvantaged position

(b) need of protection and assistance

and further disputed 12(2) and (3) that they are an appreciable section of the community.

[69] On 19 June 2001, the Master made an order that:

> The question whether the appellant is a public benevolent institution for the purposes of subsection 9(a) of the Pay-roll Tax Act 1978 (NT) be heard and determined separately and as a preliminary issue at the hearing of the appeal scheduled for 30 and 31 August 2001.

[70] Following a hearing on this issue, his Honour the primary Judge concluded that the Northern Land Council is not a public benevolent institution, and gave judgment for the Commissioner.

[71] In submissions to this Court, counsel for the appellant drew our attention to certain findings made by the trial Judge which counsel for the appellant summarised as follows:

> In the course of his reasons for judgment the primary judge made certain findings, including:
>
> (1) The restoration of traditional Aboriginal land under the Land Rights Act seeks to ameliorate the harmful social consequences that flow from the dispossession of traditional Aboriginal owners from their land.
>
> (2) The functions of the Land Council are directed to benefiting the Aboriginal community in the Northern Territory generally and the traditional Aboriginal owners of Aboriginal land in particular.
>
> (3) The underlying objects of the Land Council are to assist in the restoration and management of land for the benefit of Aboriginal people living in its area of responsibility.
>
> (4) The underlying objects of the functions conferred on the Land Council under the Native Title Act concern the restoration of

land to dispossessed Aboriginal people and the management of such land once restored.

(5) Insofar as the activities of the Land Council involve the representation of Aboriginal interests in policy development, that function is incidental to the principal functions of the restoration of Aboriginal land and the management of Aboriginal land.

(6) Any ministerial control over the Land Council is limited and defined and the responsible Minister has no general power to give directions to the Land Council on the exercise of its functions.

(7) The Land Rights Act confers on the Land Council a funding and coordinating role in respect of Aboriginal Councils, Incorporated Aboriginal Associations and other eligible Aboriginal bodies and establishes a system whereby these organizations are the conduit for welfare dispensed by the Land Council.

[72] The primary Judge referred to and quoted from submissions on behalf of the respondent putting forward six reasons why the Northern Land Council could not be a public charity. In his reasons for judgment, his Honour the trial Judge, quoted the respondent's further submission in full. I have summarised these submissions as follows:

(1) The Northern Land Council was not formed to act as a charity. The respondent says that the evidence makes it plain that the Land Rights Act was introduced not to assist disadvantaged Aborigines, but to recognise the title of traditional owners. This was a matter of justice, not charity.

(2) The benefits provided by the Northern Land Council are prescribed by statute where the recipients have a right to the performance of a body's functions, that performance is not charitable.

(3) The Northern Land Council regards its own primary role as one of providing representation for Aboriginals in its area in connection with land and it is so regarded by others.

(4) There would be something odd and inappropriate, even patronising and possibly offensive to everyone about the suggestion that their own representative body, funded from mining royalty equivalent in relation to their land, should be treated as charity.

(5) Members of the Aboriginal community might greet the statement that the Land Council was a "benevolent institution" with amazement, perhaps with indignation.

(6) The essential requirement of a public charity is that it dispenses aid to all members of the relevant class of beneficiaries irrespective of all other factors other than need. That is not the basis on which land rights are granted. They are granted only to some and "critical to the whole scheme of the legislation is the concept of "traditional aboriginal owners". The Northern Land Council provides benefits to the wider Aboriginal community but the privacy given to the rights of traditional owners is a major obstacle to the recognition of the Northern Land Council as analogous to a charity

[73] In their written submissions the appellant identifies the matters they contend are errors on the party of the primary Judge. They are:

3.1 There are two principal steps in the reasoning of the primary judge which the Land Council submits led his Honour into error. They are:

- First, that a useful guide for the construction of the phrase 'public benevolent institution" in s. 9(a) of the Act is the popular notion of a charity.
- Secondly, that it is necessary for a public benevolent institution to provide relief freely or voluntarily, not apparently in the sense of doing so on a not for profit basis, but in the sense that the body has no obligation to so do and thus chooses freely to provide relief.

3.2 Incidental to that process of reasoning was the characterisation by the primary judge of the relief given by the Land Council to disadvantaged people as being a consequence of the performance of statutory functions rather than as the object and activity of the Land Council. As part of that characterisation, the primary judge spoke of the restoration and management of Aboriginal land not being done according to needs of those who benefit from that function, but without considering whether those who do benefit from that function are in need.

[74] In *ACOSS v Commissioner of Pay-roll Tax* (1985) 1 NSWLR 567 at 575, Priestley JA held that a public benevolent institution is:

> … an institution which in a public way conducts itself benevolently towards those who are recognizably in need of benevolence …

[75] I agree with the submission made by counsel for the appellant that the restoration and management of traditional Aboriginal land for the benefit of Aboriginal people addresses the disadvantaged position of Aboriginal people arising from dispossession and homelessness (*Gerhardy v Brown* (1985) 159 CLR 70 at 134). The restoration of land, and with it the promotion of cultural and spiritual integrity, have been recognised as benevolent purposes (*Toomelah Co-op v Moree Plains Shire Council* (1996) 90 LGERA 48 at 59).

[76] In *Commissioner of Pay-roll Tax v Cairnmillar Institute* [1992] 2 VR 706 at 714:

> It is common knowledge that the contemporary welfare state creates or exists in its own web of social distress with some of which the State itself does not effectively deal. It is unsurprising that the State should acknowledge a debt, by way of relief from taxation, to non-government organisations that are dedicated to the assistance of those caught in the web whom it does not help and who cannot help themselves. …

[77] There is no authority to the effect that a body that performs statutory functions, independent of government is not a public benevolent institution. The question that is determinative of it being a public benevolent institution is whether the Northern Land Council performs functions designed to provide relief to a disadvantaged and appreciable section of the community.

[78] The primary Judge found that the functions of the Northern Land Council benefited Aboriginal people generally in the area for which the Land Council is responsible and that Aboriginal people as a whole were in a disadvantaged position. This finding combined with the fact that traditional Aboriginal owners are a disadvantaged and appreciable section of the community is sufficient to find that the Northern Land Council is a public benevolent institution.

[79] The respondent submits that the appellant has stated the issue too narrowly. On the respondent's submission the issue is whether the appellant is a public benevolent institution in the light of a range of matters which include but are not limited to its functions and activities. The respondent maintains this

requires a holistic approach in which consideration must be given not only to what the organisation does but also to such matters as its designation as a Land Council its intended role as part of the machinery for correcting past injustices and conferring land rights on Aboriginal people, the manner in which its officers are appointed and the means by which it is funded.

[80] The respondent accepts that traditional Aboriginal owners were shown on the evidence before the trial Judge to be disadvantaged. However, the respondent argues that this is not the point. On the respondent's case the point is that the primacy accorded to traditional owners is inconsistent with the dispensing of benefits "according to need" which is an essential element necessary for the characterisation of a body as a public benevolent institution.

[81] The respondent recognises that Aboriginal people in this community are members of a class who, generally speaking, suffer from significant disadvantages and are in need of assistance. It also recognises that the functions and activities of the appellant are beneficial to Aboriginal people. However, the respondent maintains this does not automatically mean the appellant is a public benevolent institution, it is necessary to look at its "predominant and characteristic purpose and activity" (*Royal Australian College of Surgeons v Federal Commissioner of Taxation* (1943) 68 CLR 436, Rich J at 447:

> … The inclusion of an institution in the exemption clause depends upon the intrinsic character of the object which it promotes and not

> upon the scope of the benefits which may result from its transactions. …

[82] The respondent then carried out an analysis of the functions of the Northern Land Council and submitted that its primary purpose was to provide a convenient administrative structure for traditional owners to acquire and hold Aboriginal land and for others to negotiate to retain or acquire interests (including mining interests) in such land, for the management of Aboriginal land and for the distribution of revenues from Aboriginal land.

[83] The core of the respondent's argument is that these functions are of great benefit to the Aboriginal traditional owners and other Aboriginals but the essential purpose of the appellant is not to relieve poverty, sickness, destitution, helplessness or distress or to provide relief designed to overcome or reduce disadvantage.

[84] I do not accept this submission. Aboriginal persons are disadvantaged by being dispossessed of their land which has placed them in a position of destitution, helplessness and distress. It is not merely a system whereby the wrongs of the past are remedied. The respondent acknowledges that a predominant purpose of the appellant is to do justice by returning land to Aboriginals who have been dispossessed. Without the assistance provided by the Northern Land Council, Aboriginal traditional owners and other Aboriginal persons would have very little, if any, chance of establishing their rights. The fact that the functions of the Northern Land Council may also be beneficial to non-Aboriginal people who wish to secure continuance

of existing rights or occupation of Aboriginal land for example, missions, government, national parks and others does not detract from the essential purpose of the appellant which is to relieve Aboriginal people of destitution, helplessness or distress.

[85] I would allow the appeal. I have had the benefit of reading a draft of the orders proposed by Mildren J. I agree with the orders proposed by Mildren J.
