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Australian Charities and Not-for-profits Commission
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By email: CIS@acnc.gov.au

Dear ACNC

Commissioner's Interpretation Statement: Public Benevolent Institutions

Thank you for the opportunity to provide comment on the draft Commissioner's Interpretation Statement: Public Benevolent Institutions (CIS 2016/03). We welcome the Australian Charities and Not-for-profits Commission's (ACNC) commitment to consulting on and providing guidance on the interpretation of matters of importance for charities, in this instance the meaning and scope of the charity subtype of Public Benevolent Institution (PBI).

Not-for-profit Law is a service of Justice Connect, providing free and low cost legal assistance to small and medium not-for-profit community organisations across Australia with increased assistance for those working in Victoria and New South Wales. Our service 'helps the helpers' by providing legal information, advice and training to not-for-profit community organisations. We are committed to improving access to legal help for not-for-profit community organisations, and on improving the legal landscape in which they operate. Our policy and law reform work is focused on effective and appropriate regulation of the Australian not-for-profit sector, helping organisations be more efficient and effectively run, and ensuring that reform takes into account impacts on the sector.

Preliminary comments

The Exposure Draft considers important matters for those entities seeking endorsement as a PBI, as well as those charities already registered that may be subject to a future review in line with this updated interpretation.

The issue of PBI eligibility is a common question amongst organisations seeking our assistance, most of which are smaller charities with limited resources. Of our 1,221 legal advices to not-for-profit organisations over the last two years, many have substantially involved a discussion on PBI. In this respect, common questions include:

- Whether PBI is the most appropriate category when compared with the Overseas Aid Gift Deductibility Scheme (OAGDS) or Health Promotion Charity (HPC) categories.
- The prospects of obtaining PBI as a peak/umbrella body or a broad community support service.
- Whether a group's activities will meet the types of benevolent relief required by the ACNC (eg, whether education/training, advocacy, community engagement are allowable).
- Whether the beneficiaries of a service will meet a class of individuals sufficiently deemed to be in need of relief (eg, whether recipients are too broadly classified, or if a cause arouses sufficient compassion in the community).
- Procedural advice on drafting purposes, mandatory clauses and assisting with the completion of the Schedule when applying for PBI endorsement.

Access to tax concessions is also one of the most commonly accessed areas for visitors to our online Information Hub (www.nfplaw.org.au), with approximately 10% of the 20,000 plus monthly visitors viewing our resources dedicated to tax concessions, including PBI matters.

We acknowledge the work of the ACNC in the development of concise guidance on the interpretation of PBI in a format that is written in plain language. We support the use of examples that provide a practical application of the guidance which in our view reflects the common questions raised by those seeking to determine the application of PBI to their circumstances. In this regard we feel the Exposure Draft is more accessible than the current Tax Ruling 2003/05, and we support moves to have this Ruling withdrawn once the Exposure Draft is finalised.

In our view the Exposure Draft appropriately refers to and applies the law and is a sound example of the ACNC fulfilling its legislative role to assist registered entities in complying with and understanding the regulatory framework. While we endorse the Exposure Draft, we make the following comments in relation to specific areas of the publication which we think would benefit from further clarification or explanation, informed by our experiences in working with small to medium not-for-profit organisations.

The 'public' component (section 4)

Section 4 of the Exposure Draft contemplates the issue of the 'public' requirements of a PBI. It relies on the decision in *Maughan v Federal Commissioner of Taxation*¹ when stating that the main criterion of 'public' is the extensiveness of the class of individuals the entity benefits, with other criteria (including receipt of public funds, public control and accountability and connection with government) being relevant though not decisive.

We are of the view that this point could benefit from a further expansion. We note that Appendix A to the Exposure Draft only contains one working example of this 'public' component² which concludes that a 'closely held' entity may not meet the requisite public element of a PBI. This example appears to draw on the principle noted in the Federal Court's decision in *Pamas Foundation (Inc) v DFC of T*³, however there is no additional guidance in the body of the Exposure Draft on when a closely held entity will satisfy the requirement of public control and accountability. We believe this additional guidance would be of benefit to would-be PBIs, and we would like to see more direction or perhaps an additional example in Appendix A, to illustrate the approach of the Commission.

In our experience, this issue is particularly problematic for family-run entities and charitable Proprietary Limited companies with a sole director. While the ACNC may not deem these examples as appropriate for PBI endorsement, we nonetheless believe this approach should be addressed in the Exposure Draft in greater detail. This could possibly include a further interpretation on the phrase 'public control and accountability', whether or not this interpretation aligns with the views set out in *Maughan*.

CASE STUDY:

A not-for-profit entity providing welfare services to asylum seekers contacted NFP Law after it was notified by the ACNC that it is likely they would be rejected for PBI registration. The group had been incorporated as a proprietary limited company with a single director after receiving earlier advice from a practitioner.

The group had been notified by the ACNC that its application was unlikely to succeed, partially on the basis that its governance arrangement (a sole director Pty Ltd) did not meet the definition of an institution. Only after receiving

¹ (1942) 66 CLR 388

² Example 5

³ (1992) 23 ATR 189

support and changing to a legal structure more suited to a not-for-profit entity, the organisation was able to be registered as a PBI.

It would be useful if the current guidance was extended to canvass the ACNC's view on closely held entities of this nature (e.g. family-controlled entities and sole shareholder Pty Ltds). This guidance could greatly assist to educate both practitioners and organisations of the requirements before they incorporate and seek endorsement as a PBI.

The 'benevolent' component (section 5)

People in need (5.1)

As noted in the Exposure Draft, the decision of *Australian Council of Social Service Inc v Commissioner of Pay Roll Tax*⁴ highlights the distinction between benevolence for the benefit of a community as a whole (even if it results in the reduction of poverty and distress) and the concept of support for those who are recognisably in need of benevolence. This point is further made at 5.6.2.1 with reference to the need for concrete objects of benevolent relief.

Whilst we acknowledge this distinction, we have identified an increasing trend amongst entities that are established to support a community as a whole, that can be recognised as having an identified need of benevolent relief. This is particularly evident in light of the potential for PBI to be extended to organisations with beneficiaries outside of Australia. In this case, entities working in developing countries with clearly documented disadvantage and a degree of need meeting the interpretation at section 5.3 may grapple with this distinction.

We feel that the Exposure Draft could benefit from recognition that, in some instances, people in need and the concept of a community as a whole will not always be mutually exclusive, noting that these examples will be distinguished from support for the 'broader general community'. While we understand this is already the method in which the ACNC interprets this requirement, we suggest that the Exposure Draft nevertheless clarify this issue further for the benefit of organisations in this class.

Degree of Need (5.3)

The commentary on 'degree of need' at section 5.3 of the Exposure Draft is a helpful interpretation, however we believe the statement at 5.3.4 is out of place. Here, the Exposure Draft discusses the circumstances in which education and training activities will allow for PBI endorsement (with reference to the recipient). Section 5.3 focusses on the requisite degree of need amongst beneficiaries and we suggest that either 5.3.4 be re-phrased to focus on this point, or be moved to another section that is more relevant to a discussion on activities (such as 5.1 or 5.4).

Nature of Relief (5.4)

We note the Exposure Draft's observation that benevolent relief 'need not be practical and material in nature', as long as it is directed towards the relief of poverty and distress. In our view this section could be clarified further, or illustrated by way of a practical example in the Appendix to the Exposure Draft.

While it is clear that promoting social and cultural objectives can be benevolent where the need flows from poverty and helplessness, in our view there is scope to provide extra guidance to the increasing number of organisations who seek our advice on whether non-material activities will meet this test. For example, it would be useful for the

⁴ (1985) 1 NSWLR 567) emphasised

Exposure Draft to provide further clarity on the application of this principle to organisations promoting more indirect activities such as mindfulness, meditation, spiritualist healing and yoga, often with social and cultural goals linked to empowering individuals in positions of helplessness.

Operating Overseas (5.8)

We welcome the inclusion of the statement that organisations will not be precluded from registration if it has a main purpose of providing benevolent relief to people residing outside of Australia, further clarifying the Australian Taxation Office's most recent approach to the 'in-Australia' condition for certain deductible gift recipients and income tax exempt entities.

We note the consequence of this clarification is that a number of organisations may now seek registration as a PBI, particularly organisations that may have otherwise have had to pursue DGR endorsement under OAGDS. This trend will put increasing pressure on the ACNC to have clearer, more detailed guidelines on the distinction between the provision of direct relief and activities of a preventative nature (for example, some forms of community development or enhancement of infrastructure). In addition, the onus will be on the ACNC to clarify any additional criteria that may need to be met for those PBI applicants with overseas beneficiaries in light of increased risks associated with funds leaving Australia.

The 'Institution' component (section 6)

Newly formed entities (6.3)

The Exposure Draft states that an organisation that is not operating and does not have concrete plans to operate in the foreseeable future will not meet the definition of an institution. This is reflective of the approach of TR2003/05 which notes that the decision on whether an entity is an institution involves a consideration of factors such as activities, size, permanence and recognition.

We are regularly contacted by newly-incorporated entities with benevolent objectives who find themselves in a cycle of being unable to attract seed philanthropic funding (and therefore begin activities) in the absence of DGR, however have difficulties in receiving this endorsement due to a lack of activities and permanence. In our experience, many of these entities have well-developed plans for future activity, however in the absence of PBI endorsement, are unable to secure the funds needed to deliver on its purpose.

While we appreciate the challenges in granting PBI endorsement to a start-up entity without a proven record of benevolent activity, we would like to see more guidance in the Exposure Draft on how newly formed organisations will be assessed against this criteria (in addition to those indicators listed at 7.1). This could include further elaboration on the evidence required to demonstrate 'concrete plans to operate in the foreseeable future', and/or a practical example on this point included at Appendix A.

CASE STUDY:

NFP Law assisted a start-up organisation, with the purposes of establishing an educational support program for children with special needs that are not coping well in mainstream school system.

The entity had established itself as a Company Limited by Guarantee and had a strong business plan, budget, and in-principle financial support. In order to receive seed philanthropic funding needed to establish the service, the entity required endorsement as a Deductible Gift Recipient (DGR) and applied under the category of PBI.

Initially, the organisation was informed that while the entity could be registered as a charity (under the 'Advancing Education' category) it would not be eligible for PBI endorsement as it did not meet the definition on 'institution' given it was still in strategic planning mode rather than in operation.

Only after withdrawing its initial application and seeking external support, the entity was able to convince the ACNC that it did have concrete plans to operate in the foreseeable future, and was subsequently granted PBI endorsement.

Clearer guidance on what constitutes 'concrete plans to operate in the foreseeable future' could assist in these instances, and allow for start-up organisations to have a clear idea about what is expected of them if they are to seek PBI in the early stages of the entity's life cycle.

Concluding comments

Our comments in this submission focus specifically on clarifying the areas of confusion amongst the organisations we work with at Justice Connect. We are pleased that the ACNC has delivered guidance that is succinct and in plain language, and believe the Commissioner's Interpretation Statement, once published, will be of significant benefit to those seeking clarification on the application of PBI.

We thank you for the opportunity to make a submission to this consultation. Please contact us if we can assist any further information about these important issues.

Yours sincerely



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