



Law Council
OF AUSTRALIA

Legal Practice Section

8 September 2020

Joanna Austin
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Australian Charities and Not-for-profits Commission
Canberra ACT 2600

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Dear Sir/Madam

COMMISSIONER'S INTERPRETATION STATEMENT: THE HUNGER PROJECT CASE

1. The Australian Charities and Not for Profits of the Law Council of Australia's Legal Practice Section welcomes the opportunity to make a submission to the Australian Charities and Not for Profits Commission (**ACNC**) in relation to the Commissioner's Interpretation Statement: The Hunger Project Case.
2. The Committee would welcome the opportunity to discuss this submission with the Commission. In the first instance, please contact Charities & Not for Profits Chair, Jennifer Batrouney AM QC on jennifer_batrouney@vicbar.com.au

Yours sincerely

Michael Tidball
Chief Executive Officer



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Commissioner's Interpretation Statement: The Hunger Project Case

Australian Charities and Not for Profits Commission

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About the Law Council of Australia

The Law Council of Australia exists to represent the legal profession at the national level, to speak on behalf of its Constituent Bodies on national issues, and to promote the administration of justice, access to justice and general improvement of the law.

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

The Law Council was established in 1933, and represents 16 Australian State and Territory law societies and bar associations and the Law Firms Australia, which are known collectively as the Council's Constituent Bodies. The Law Council's Constituent Bodies are:

- Australian Capital Territory Bar Association
- Australian Capital Territory Law Society
- Bar Association of Queensland Inc
- Law Institute of Victoria
- Law Society of New South Wales
- Law Society of South Australia
- Law Society of Tasmania
- Law Society Northern Territory
- Law Society of Western Australia
- New South Wales Bar Association
- Northern Territory Bar Association
- Queensland Law Society
- South Australian Bar Association
- Tasmanian Bar
- Law Firms Australia
- The Victorian Bar Inc
- Western Australian Bar Association

Through this representation, the Law Council effectively acts on behalf of more than 60,000 lawyers across Australia.

The Law Council is governed by a board of 23 Directors – one from each of the constituent bodies and six elected Executive members. The Directors meet quarterly to set objectives, policy and priorities for the Law Council. Between the meetings of Directors, policies and governance responsibility for the Law Council is exercised by the elected Executive members, led by the President who normally serves a 12 month term. The Council's six Executive members are nominated and elected by the board of Directors.

Members of the 2020 Executive as at 1 January 2020 are:

- Ms Pauline Wright, President
- Dr Jacoba Brasch QC, President-elect
- Mr Tass Liveris, Treasurer
- Mr Ross Drinnan, Executive Member
- Mr Greg McIntyre SC, Executive Member
- Ms Caroline Counsel, Executive Member

The Secretariat serves the Law Council nationally and is based in Canberra.

About the Section

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

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

The Section's objectives are to:

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

Members of the Section Executive are:

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

Acknowledgement

The Law Council is particularly grateful for the expertise of its Australian Charities & Not for Profits Committee of the Legal Practice Section.

Executive Summary

1. The Charities & Not for Profits Committee (**the Committee**) of the Legal Practice Section makes this submission in furtherance of the Law Council's objective of promoting the administration of justice, access to justice and the general improvement of the law.
2. The submission contains legal views about the correctness of the Commissioner's Interpretation Statement Public Benevolent Institutions (**PBI CIS**) and Commissioner's Interpretation Statement: The Hunger Project Case (**Hunger Project CIS**) and does not purport to represent the views of any particular organisations in the charity sector.
3. This submission focuses on two areas within the PBI CIS and Hunger Project CIS and one area that is omitted, which the Committee suggests should be included in the PBI CIS.
4. First, when an institution has a purpose of relieving PBI needs. (as discussed in the PBI CIS primarily in paragraphs 5.1.1 – 5.1.2, 5.2 – 5.5, 5.7 and 5.9), the Committee makes the following recommendations:
 - The PBI CIS needs to expand on the concept of people 'in need' in the modern context and clarify the cohorts to whom the concept applies.
 - The PBI CIS should be updated to articulate when prevention activities are benevolent.
 - The PBI CIS should be revised to clearly articulate the principles for establishing the dominant purpose of an entity and distinguishing activities that contribute to the dominant purpose or that are purposes in their own right.
 - Example 2 in the PBI CIS should be amended to clarify that such advocacy activities are encompassed within the modern notion of a PBI.
5. Second, when an institution targets its activities toward those in need (discussed in the PBI CIS primarily in paragraphs 5.1.2 – 5.1.6, 5.6 and 5.9), the Committee makes the following recommendations:
 - The PBI CIS should provide further guidance on the concept of community development.
 - The PBI CIS should provide more guidance on when Indigenous community development activities (in the form of economic development) address Indigenous disadvantage and on when they are sufficiently targeted towards those in need.
 - Paragraph 5.6.3 of the PBI CIS and paragraph 6.5 of the Hunger Project CIS should reflect the fact that the Hunger Project case expressly sought to provide an inclusive and not an exclusive definition of PBI.
 - Paragraph 5.6.3.2 should be deleted from the PBI CIS and paragraph 6.5.2 should be deleted from the Hunger Project CIS.
 - Example 2 should be amended to state that Benevolent Care is a PBI and that the 5 dot points are not purposes but activities which are a manifestation of the exercise of Benevolent Care's benevolence.

6. Third, in relation to registration of a PBI under the *Australian Charities and Not-for-profits Commission Act 2012* (Cth) (**ACNC Act**), the Committee makes the following recommendation:
 - The PBI CIS should clarify that an entity can be registered with the PBI subtype and with another subtype, so long as the purposes that form the basis for that other subtype are incidental or ancillary to the PBI purposes.

A Purpose of Relieving PBI Needs

How does the concept of 'in need' apply in the modern context?

7. The PBI CIS states at paragraph 5.9.6 that there are different gradients of 'need', however it does not explain what this means aside from pointing to the legal test that the need must be 'of such seriousness' as will arouse community compassion and thus engender the provision of relief.¹

8. Specifically, the PBI CIS states

5.9.6 A PBI's benevolence must be targeted at people in need. There are different gradients of "need". To qualify as a PBI, the need must be of such seriousness that the community's compassion is aroused as set out in paragraph 5.3. The Australian Charities and Not for Profits Committee (ACNC) takes the view that those that have "significant needs" will generally be considered "people in need". The ACNC also accepts that the term "at risk" can refer to people who are already in need. This will be the case if the risk factors they experience or their condition is such that the community's compassion is aroused – for example, if they are suffering from illness or disability, or are in poverty. The following cases illustrate these points:

5.9.6.1 In Maughan, facilities were provided to boys in necessitous circumstances in slum areas to, amongst other things, "keep them off the streets". Homeless young people who live on the streets will generally be considered "people in need". Young people who are at risk of homelessness may also be "people in need" if they experience risk factors that commonly lead to homelessness and their condition is such that the community's compassion is aroused. This is likely to be the case if the young people experience addictions or mental illnesses requiring treatment, are in necessitous circumstances and have a lack of social support.

5.9.6.2 In an international development and relief context, people in receipt of relief or humanitarian assistance work (work which is provided during and in the aftermath of humanitarian crises), will generally be considered "people in need". Additionally, people who are in receipt of development assistance will also be considered "people in need", where that assistance is provided to necessitous people in developing countries. Development assistance is understood as being activities that improve the long-term well-being of people in developing countries, which build their capacity and provide long-term sustainable solutions to needs stemming from poverty and distress. Development assistance is thus preventative in that it stops such needs recurring. It is equally "relief" in the PBI context because it relieves the needs of the people assisted.

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

¹ Per McGarvie J in *Pay-roll Tax, Commissioner of (Vic) v The Cairnmillar Institute* (1990) 90 ATC 4752.

- Is it appropriate to define ‘need’ by reference to who arouses community compassion? What if an AFL player experiencing illness arouses community compassion and an asylum seeker fleeing a war-torn country does not?
 - Is this legal test being used in practice? Or is the test more objective? Are there other considerations that are more pertinent to defining the concept of ‘need’?
 - If there is a gradient of ‘need’, what is its purpose? Is it used to determine who is ‘in need’ by comparing against groups that are ‘more in need’? If so, can examples be provided of types of cohorts who are ‘in need’ and where they sit on the gradient? When will they no longer be ‘in need’?
10. The reason for updating the commentary in this manner is that the legal test of PBI must be considered in the context of 2020. The Full Federal Court in *Hunger Project* made this requirement plain when stating:

*Whilst past judicial statements concerning the ordinary meaning of a word or expression can often assist in divining the meaning of the word or expression, the common understanding of the meaning of an expression may change over time depending on the particular expression in question. When the question is whether a particular institution is a public benevolent institution, the answer depends on the common or ordinary understanding of the expression at the relevant time. The question is not to be approached as a legal question to be dealt with by the mechanical application of past authority, irrespective of the present current understanding of the expression in the currently spoken English language: *Ambulance Service (NSW) v Deputy Commissioner of Taxation* (2002) 50 ATR 496 at [40]-[42].²*

Recommendation

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

Prevention and relief

11. In paragraphs 5.9 and 5.9.6, the PBI CIS accepts that a purpose of preventing poverty or distress from arising can be benevolent. However, the PBI CIS does not articulate when prevention activities are benevolent, when they are not, and why.

² *Commissioner of Taxation v Hunger Project Australia* [2014] FCAFC 69 [38].

12. It would be beneficial for the PBI CIS to be updated to articulate when prevention activities are benevolent, with specific reference to the following:

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

Recommendation

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

Purposes and activities

13. The Committee submits that the issue of (a) the dominant purpose of an entity, and (b) whether an 'activity' is to be classified as a 'separate purpose' or merely an activity to achieve or promote its dominant purpose, should not be contentious, particularly when an entity has a clearly drafted governing document.

14. While a number of factors the ACNC will consider when determining purpose are listed in section 7 of the PBI CIS, paragraph 7.2.3 accurately states that the overall focus should be on an organisation's purposes, rather than its activities in isolation, and that the activities are relevant insofar as they are a signpost to the organisation's purposes.

15. However, the main PBI CIS discussion of purpose does not provide adequate case references for support of its contention, or to facilitate understanding and operationalisation of the concept. Relevant excerpts from the PBI CIS state:

5.5.2 *It is the view of the ACNC Commissioner that the correct enquiry is as to whether any purposes that are not benevolent are incidental or ancillary, rather than enquiry as to whether the purposes are “minor”.*

7.2.2 *The focus should be on the substance of an organisation’s purposes and activities, rather than its structure.³*

7.2.3 *The focus overall should be on an organisation’s purposes, rather than its activities in isolation.⁴ The activities are relevant insofar as they are a signpost to the organisation’s purposes.*

16. The PBI CIS be revised to clearly articulate the principles for establishing the dominant purpose of an entity and distinguishing activities that contribute to the dominant purpose or that are purposes in their own right. The reasoning for this approach is set out below.

What is the purpose of the entity?

17. The Australian charity law jurisdiction hails the High Court decision in *Federal Commissioner of Taxation v Word Investments Ltd*⁵ (**Word Investments**) as the authority for determining charitable purposes. While the High Court in that case adopted a holistic examination involving an examination of constitutions, formation and motivation, as well as activities, the description of its actual execution is to be found in the *early Word Investments* judgements⁶ and superior court cases that have followed the *Word Investments* decision.

18. Justice Sundberg in the Federal Court in *Word Investments* declared that:

In determining whether an institution is charitable, it is necessary to consider the institution’s essential object, which is itself to be determined by a consideration of the purpose of its formation, its constitution and its activities.⁷

19. In *Victorian Women Lawyers’ Association v Federal Commissioner of Taxation*⁸ (**Victorian Women Lawyers’ Association**), referring to *Word Investments*, the court noted:

These authorities demonstrated that the question as to the true nature or character of the entity is to be assessed having regard to its objects, purposes and activities (at [11]). Allsop J formulated the task of characterisation thus (at [14]):

The relevant task, as stated in the Surgeons’ Case is to assess the true character or nature of the entity by reference to its objects, purposes and

³ *Commissioner of Taxation v Hunger Project Australia* [2014] FCAFC 69, [63] – [64] regarding the reasoning of the majority of the High Court of Australia in *Federal Commissioner of Taxation v. Word Investments* (2008) 236 CLR 204.

⁴ *Federal Commissioner of Taxation v Word Investments* (2008) 236 CLR 204

⁵ (2008) 236 CLR 204.

⁶ *Taxation Appeals Division v Federal Commissioner of Taxation* [2005] AATA 941; (2005) 60 ATR 1265; 2005 ATC 202; [2007] ALMD 578; *Commissioner of Taxation v Word Investments Ltd* [2006] FCA 1414; (2006) 64 ATR 483; 2006 ATC 4715; [2007] ALMD 1406; *Commissioner of Taxation v Word Investments Ltd* [2007] FCAFC 171; (2007) 164 FCR 194; 69 ATR 1; 243 ALR 44; 2007 ATC 5164; [2008] ALMD 2975.

⁷ Para 27.

⁸ [2008] FCA 983; (2008) 170 FCR 318.

*activities. It is an integrated, holistic enquiry directed to whether a body of facts and circumstances satisfies a legal category or conception.*⁹

20. At paragraph 146 Justice French went on to confirm:

*In making that assessment the primary focus must fall on its formal objects as stated in its constitution. But they are to be read in light of the history of its formation, together with the activities it has undertaken since its formation.*¹⁰

21. Important in this is the key role of an entity's formal expression of its purpose. This is not but one factor to be considered and weighed up by the ACNC, but the key expression of purpose of an entity in relation to which activities can be viewed. A similar view was expressed in *Co-operative Bulk Handling Ltd v Commissioner of Taxation*¹¹:

*...in considering the activities of an organisation, the relevant question is as to the ultimate purpose for which the activities are pursued ... The critical question for present purposes is not as to the nature of the activities, but rather as to the purpose of [sic] which those activities are carried on...*¹²

22. These passages point to coming to an understanding of the 'soul' or 'reason for being' of the organisation in order to discover an organisation's purposes. It is a judgement call after weighing all the evidence. This is to be distinguished from a quantitative or qualitative weighing or classifying of activities by time, money, labour or effort and the setting of a metrified tipping point.

23. Recent United Kingdom cases follow this approach,¹³ while New Zealand jurisprudence has recently embraced a quantitative methodology as well as a descriptive evaluation in a purpose assessment.¹⁴ This has not been followed to date in Australia.¹⁵

24. To operationalise such a search for the purpose of an organisation, the Committee suggests where possible a hierarchical path of inquiry. Remembering that:

- depending on the legal form and the era, the investigation may not comprehensively need to examine all elements; and
- lower level material will not usually be conclusive of a purpose, but merely supporting it or alerting the inquirer to probe motivation more closely.

25. The Committee propose the following path of inquiry:

(a) examination of the constitutional documents, specifically:

- the purpose or object clauses;

⁹ *Victorian Women Lawyers' Association v Federal Commissioner of Taxation* [2008] FCA 983; (2008) 170 FCR 318 at para 130. The authorities referred to are Allsop J in *Word Investments Ltd* [2007] FCAFC 171; 164 FCR 194. His Honour referred to *Royal Australian College of Surgeons v Federal Commissioner of Taxation* [1943] HCA 34; (1943) 68 CLR 436 and the analysis of the judgments in that case by Lockhart J in *Cronulla Sutherland Leagues Club Ltd v Commissioner of Taxation* (1990) 23 FCR 82 at 90-93.

¹⁰ *Victorian Women Lawyers*, [146].

¹¹ [2010] FCA] 508.

¹² *Ibid* [27], [90].

¹³ Refer, *The Countryside Alliance -Application For Registration Decision Of The Commission -23 March 2017* para 15-17.

¹⁴ Juliet Chevalier-Watts, *The public benefit requirement in charity law: the mystery of the balancing act*, *Trust & Trustees*, 21:4 (2015) 371-388; *Re Education New Zealand Trust* HC WN CIV-2009-485-2.301; *Draco Foundation (NZ) Charitable Trust* WN CIV 2010-485-1275.

¹⁵ *CC/WA v Commissioner of State Revenue (WA)* [2012] WASAT 146 Para 99.

- the not-for-profit and distribution clauses.
- (b) examination of the genesis of the enterprise, its duration and continuity; and
- (c) examination of the activity of the organisation and what that activity reveals about the reason for being or the organisation by various measures such as:
 - annual report narrative;
 - annual financial statements;
 - staff, member and volunteer engagement;
 - governance documents such as mission and vision statements, board agendas, reports, guidelines; and
 - the organisation's own description of itself and its purposes and activities in non-constitutional documents.

26. Of key importance is that the enquiry to be undertaken as articulated at point (c) above must not be undertaken in isolation or devoid of context. Indeed, great caution should be exercised in searching for an entity's purpose in the material it publishes on its website. A charity pursuing its purpose may have very clear reasons for using specific language in public facing materials, that do not define the purpose of the charity. A clear example of this is a PBI working with abused women that does not want to use the language of victimhood on its website or its public mission statement but may instead prefer language of empowerment and possibility. This should not be viewed by the ACNC as affecting the principal purpose of the charity.

What is the dominant purpose?

27. It should be noted that the High Court majority in *Word Investments* found that all the constitutional objects were for the purpose of advancing religious charitable purposes. Deciding between multiple purposes did not arise.¹⁶ However, if in *Word Investments* the court found two purposes, one purpose to generate profits through a funeral business and religious purposes: how would a court decide whether it was a primarily a profit making business with a subsidiary religious purpose or a religious purpose with a subsidiary profit making purpose?

28. The *Word Investments* decision itself provides some assistance in this regard, with the majority noting: 'the charitable purposes of a company can be found in a purpose of bringing about the natural and probable consequence of its immediate and expressed purposes, and its charitable activities can be found in the natural and probable consequence of its immediate activities'.¹⁷ This statement helps set the contours of the range of activities or purposes that are in furtherance of – and hence incidental or ancillary to – a dominant charitable purpose. That is, would the natural and probable consequences of the activities or purposes help to achieve the dominant charitable purpose?

29. Of course, consequences might also flow from a dominant charitable purpose into activities and, potentially, purposes, such that incidental purposes or activities arise from and are consequential upon a dominant charitable purpose. As noted in *Latimer v Commissioner of Inland Revenue*:

¹⁶ Para 19.

¹⁷ Para 38.

*The distinction is between ends, means and consequences. The ends must be exclusively charitable. But if the non-charitable benefits are merely the means or the incidental consequences of carrying out the charitable purposes and are not ends in themselves, charitable status is not lost.*¹⁸

30. In summary, the process is an informed judgement of the materials before the court. Although not explicit in the judgements, items (a) and (b) of the proposed path of inquiry appear to be critical and then supported by an analysis of item (c).

Recommendation

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

Advocacy as an activity not a purpose

31. It follows from the above discussion that advocacy, as it is an activity, does not necessarily amount to a purpose in and of itself, but is rather a means of achieving the entity's purpose. However, the PBI CIS mentions advocacy only twice. Once in Example 2 in Appendix A and once in paragraph 5.1.4. In both cases, advocacy is linked (along with other features) to an entity not being a PBI.

32. It is noted that advocacy activities do not necessarily preclude PBI status,¹⁹ and as such, the PBI CIS would read as a more balanced document if advocacy was included in an example where an entity was found to be a PBI. For instance, Example 2 in Appendix A currently lists as 'purposes' a series of activities:

Benevolent Care Ltd is a public company limited by guarantee. The company pursues the following purposes:

- *conducting research into the causes of youth unemployment;*
- *engaging in advocacy and lobbying with government and others to influence the policy debate;*
- *raising awareness in the community about the incidence of youth unemployment and the flow-on effects;*
- *convening forums with the general public and experts to discuss issues regarding youth unemployment; and*
- *working with employment agencies to improve youth engagement.*

Benevolent Care Ltd is not a PBI because its purposes are not the provision of benevolent relief, its benevolence is not sufficiently targeted at the relief of people in need and it lacks clear mechanisms for delivering relief. Refer to paragraphs 5.1.3 and 5.1.4 above for more detail.

33. It is submitted that each of the 'purposes' listed in the dot points are activities, not purposes, and that these activities are encompassed within the modern notion of what is a PBI. The Full Court in *Hunger Project* concluded that a PBI is an institution 'which conducts itself in a public way towards those in need of benevolence, **however that**

¹⁸ [2004] 1 WLR 1466 (Privy Council) at para 36.

¹⁹ See, e.g., the Northern Land Council, whose activities included acting as a representative body for Indigenous Australians in *Northern Land Council v Commissioner of State Taxes* [2002] ATC 5117.

exercise of benevolence may be manifested'.²⁰ Unemployed youth are clearly in need a benevolence. The five dot points in the above example are a manifestation of benevolence towards those in need. Benevolent Care is a PBI.

Recommendation

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

Conducting the Organisation Towards Those in Need – The Targeting Requirement

Community development

34. The PBI CIS outlines at paragraph 5.1.6 that an entity may still be a PBI when it is providing relief to the community at large where the vast majority of people in that community are 'people in need'. To illustrate this, the PBI CIS provides an example of a PBI operating in a developing country. However, the PBI CIS does not expand on this concept or provide guidance on determining which communities have a vast majority of 'people in need'.

35. In addition, the PBI CIS acknowledges that addressing Indigenous disadvantage will generally amount to providing assistance to people in need, but that the targeting requirement still applies:

5.3.2 An organisation with a purpose of addressing Indigenous disadvantage will ordinarily be considered to be providing assistance to "people in need".²³ To qualify as a PBI, the organisation must provide services targeted at those needs.

36. The PBI CIS does not expand on when economic development purposes might fit within addressing Indigenous disadvantage or how it is that organisations might target services in this way.

37. Ian Murray has analysed the activities of Prescribed Bodies Corporate that hold or manage native title rights for Indigenous communities.²¹ Economic development purposes and activities are very common, including the fostering of business development by members of the Indigenous community. Several cases dealing with purposes of addressing Indigenous disadvantage suggest that business start-up and development advice and general assistance would often be consistent with PBI status and that financial support by way of seed-funding grants might often be possible too.²²

38. The key issue is that these activities involve the provision of economic benefits to individual members of an Indigenous community. The question is whether the provision of economic benefits to individuals is itself a purpose, or instead a means to an overarching purpose of community development or of relieving Indigenous disadvantage. Clearly in the vast majority of cases it will be a means to a community development/relief of disadvantage end.

²⁰ Hunger Project at [66].

²¹ Ian Murray, 'Public Benevolent Institutions for Native Title Groups: An Underappreciated Model?' (2015) 43(3) *Federal Law Review* 423-54.

²² *Trustees of the Indigenous Barristers' Trust v FCT* (2002) 127 FCR 63 (FCA), 67, 79 (Gyles J); *Northern Land Council v Commissioner of Taxes* [2002] ATC 5117 (NTCA), 5126 (Mildren J).

39. In *Trustee of the Indigenous Barristers' Trust v Federal Commissioner of Taxation*, an Australian court identified the entrenched disadvantage faced by Indigenous Australians and held that the provision of education, equipment, premises and seed-funding to an Indigenous individual to help him establish practice as a barrister was consistent with a PBI purpose of relieving disadvantage. A view which recognises the extreme and intergenerational need in Indigenous communities and the complex response required to address it has also been adopted in some cases such as *Northern Land Council v Commissioner of Taxes*²³ and *Maclean Shire Council v Nungera Cooperative Society Ltd*.²⁴

40. It is possible to make sense of these decisions by returning to the Australian High Court decision of *Word Investments*. While a charity case, as discussed in paragraphs 28 to 29 above, it provides insight into when activities might evidence a separate non-charitable purpose. The High Court accepted that activities can indirectly achieve a charitable purpose and quoted from an earlier charity case, stating:²⁵

In *Baptist Union of Ireland (Northern) Corporation Ltd v Commissioners of Inland Revenue* [(1945) 26 TC 335 at 348] MacDermott J said:

... the charitable purpose of a trust is often, and perhaps more often than not, to be found in the natural and probable consequences of the trust rather than in its immediate and expressed objects.

Similarly, the charitable purposes of a company can be found in a purpose of bringing about the natural and probable consequence of its immediate and expressed purposes, and its charitable activities can be found in the natural and probable consequence of its immediate activities.

41. The emphasis in this statement is on the consequences of activities in setting the contours of the range of activities that are in furtherance of an overarching charitable purpose.²⁶

42. Accordingly, economic development benefits should be sufficiently targeted to a purpose of relieving Indigenous disadvantage/Indigenous community development (rather than “private” benefit) where community development/relief of disadvantage is the natural and probable consequence of the economic development benefits.

43. Of course, as the ACNC has recognised, to relieve poverty in Indigenous communities through economic development requires a multi- pronged approach to meeting complex intergenerational need.

Recommendations

- **The PBI CIS should provide further guidance on the concept of community development, with particular reference to:**
 - **How this concept applies to the provision of education and the operation of schools. It is clear that an entity providing education in**

²³ [2002] ATC 5117.

²⁴ (1994) 84 LGERA 139.

²⁵ *Word Investments* [38].

²⁶ *Ibid* [26]. See also Ian Murray, ‘Looking at the Charitable Purposes/Activities Distinction through a Political Advocacy Lens: A Trans-Tasman Perspective’ (2019) 19(1) Oxford University Commonwealth Law Journal 30, 36-8.

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

- Making clear that operating a school in a remote Indigenous Australian community is also targeting a community ‘in need’ as is a school in an inner-city suburb where the demographic is disengaged students who often do not complete high school.
- Making clear that providing vocational training in a low sociodemographic area with high rates of unemployment and underemployment is sufficiently targeted.
- The number of people that have to be ‘in need’ for it to be ‘the vast majority’.
- The PBI CIS should provide more guidance on when Indigenous community development activities (in the form of economic development) address Indigenous disadvantage and on when they are sufficiently targeted towards those in need.

Hunger Project case and targeting

44. It is submitted that the PBI CIS and Hunger Project CIS contain several erroneous statements and implications about the reasoning in *Hunger Project*. Specifically, paragraph 5.6.3 and example 2 of the PBI CIS and paragraph 6.5 of the Hunger Project CIS imply that a PBI must have clear mechanisms for delivering its benevolent relief.

45. The Committee submits that *Hunger Project* does **not** require all PBIs (that provide indirect relief) to have clear mechanisms for delivering the benevolent relief. This is for the following reasons:

- It is implicit in paragraph 5.6.3 of the PBI CIS, which states that an organisation ‘can be’ a PBI if it meets certain requirements, but does not preclude an organisation from being a PBI if it does not.
- The Full Federal Court in *Hunger Project* emphasised that its decision and definitions of PBI used in the case were intended to be inclusive and to merely identify one instance of when an organisation is a PBI, not to set a test that must be followed by all PBIs:

*In our opinion, whilst there is no single or irrefutable test or definition, the ordinary meaning or common understanding of a public benevolent institution includes (to adapt the words of Starke and Dixon JJ in Perpetual Trustee) an institution which is organised, or conducted for, or promotes the relief of poverty or distress. To adapt the words of Priestley JA in ACOSS, such an institution conducts itself in a public way towards those in need of benevolence, **however that exercise of benevolence may be manifested.***

The ordinary contemporary meaning or understanding of a public benevolent institution is broad enough to encompass an institution, like HPA, which raises funds for provision to associated entities for use in programs for the relief of hunger in the developing world. The fact that such an institution does not itself directly give or provide that relief, but does so via related or associated entities, is no bar to it being a public benevolent institution. Such an institution is capable of being

considered to be an institution organised or conducted for the relief of poverty, sickness, destitution and helplessness.²⁷ (emphasis added)

- The Full Federal Court in *Hunger Project* did not adopt Perram J's requirement that the objects of a PSI's benevolence (i.e. the people benefitted) be sufficiently 'concrete', that is that the objects be 'those who are recognisably in need of benevolence' rather than the provision of relief in an 'undirected' or 'abstract' way to a 'general' class of persons and that concreteness was also established by the fact that 'The applicant's principal object of relieving hunger is achieved through its close relationships with The Hunger Project entities in program countries'.²⁸ Instead, the Full Federal Court's conclusion is expressed in broader terms and in any event, Perram J's reasons do not explicitly require a clear mechanism for delivering benevolent relief.
- *Australian Council for Overseas Aid v FCT*²⁹ provides an example of a case where a peak body that provided services to its PBI member organisations (including advocacy and liaison with government agencies), was found to be a PBI primarily on the basis of its relationship of collaboration with its members:

The position here, however, is that the taxpayer has in effect been set up as a co-ordinating and educating agency by public institutions which are themselves in the main public benevolent institutions in order to perform tasks which they themselves could perform without losing their identity as such. The taxpayer is not a separate institution or organization carrying on an independent business in the course of which it serves persons other than its members. It appears to me that the taxpayer and its members should be looked at as a whole enterprise which is predominantly benevolent and of which the taxpayer is an integral part. The fact that the taxpayer does not constitute the whole of the activity does not appear to me to be critical. In this practical arrangement and division of function it seems that nearly everything which the taxpayer does is done in the course of and for the furtherance of the relief of poverty even though it is done in conjunction with other institutions. I do not see anything in the Perpetual Trustee case which runs counter to the proposition that an institution may promote or be organized for the relief of poverty even though it performs only one of a number of several steps in the benevolent process, provided it is clear that the relation of that institution to the other institutions involved in the process is such as to show they have a common benevolent purpose, albeit they contribute to it in different ways.³⁰

That the path between Australian Council for Overseas Aid's (**ACFOA**) actions and ultimate assistance to those in need in overseas countries was not always a clear cut one is suggested by the acceptance of the following government liaison activities:

It seems that in these days overseas aid may often involve quite intricate dealings with governments at home and abroad as well as with various semi-government and other institutions both here and overseas. Difficult matters in the area of trade and transport may crop up in the course of giving aid. It would thus be surprising if a public

²⁷ *FCT v Hunger Project Australia* [2014] FCAFC 69, [66]-[67].

²⁸ *Hunger Project Australia v Commissioner of Taxation* [2013] FCA 693 (17 July 2013) [70]-[71]. [126].

²⁹ *Australian Council for Overseas Aid v FCT* (1980) 49 FLR 278.

³⁰ 281-2 (Connor ACJ).

*benevolent institution could perform its role without having to rely upon various agencies.*³¹

ACFOA's constitution also provided for advocacy activities:

*(ii) To provide for consultation and co-operation with the Australian and State Governments and the United Nations and its specialized agencies in the field of overseas aid, both at home and abroad. (iii) To represent the interests of members and to make common representations on their behalf to the Australian and State Governments, other national governments, the United Nations and its specialized agencies, and to other domestic and international organizations. (iv) To enter into arrangements with governments within Australia, other national governments and international or other agencies for the investigation or furtherance of activities within the purposes of the council.*³²

- In *Hunger Project*, the Full Federal Court's use of the term 'promotion' would seem to encompass encouragement. Cases on the meaning of charity have accepted that ancillary activities can be for the furtherance of a purpose, even if they are not guaranteed to achieve that purpose. For instance, the operation of a restaurant selling food and non-alcoholic drinks can be viewed as achieving a 'temperance' purpose in the same way as the direct reclamation of alcoholics.³³ Further, the courts have proved capable, when considering whether a charity's purposes meet the 'public benefit' requirement that they provide a real benefit for a section of the public, of evaluating whether indirect activities may advance charitable purposes in a real or substantial way.³⁴ Indeed, *Aid/Watch Inc v Federal Commissioner of Taxation*³⁵ indicates that advocacy and campaigning by way of 'the generation by lawful means of public debate', at least in relation to government activities concerning one of the four heads of charity, could be for the public benefit.³⁶

Recommendations

- **Paragraph 5.6.3 of the PBI CIS and paragraph 6.5 of the Hunger Project CIS should reflect the fact that the Hunger Project case expressly sought to provide an inclusive and not an exclusive definition of PBI.**
- **Paragraph 5.6.3.2 should be deleted from the PBI CIS and paragraph 6.5.2 should be deleted from the Hunger Project CIS.**

Advocacy and targeting

46. The *Hunger Project* discussion above suggests that advocacy activities are a manifestation of an exercise of benevolence toward those in need of relief. The relevance of this point is illustrated by the degree of virtual connectedness of modern

³¹ Ibid, 281.

³² 279.

³³ *Commissioners of Inland Revenue v Falkirk Temperance Cate Trust* (1926) 11 TC 353, 368-9 (Lord Blackbun).

³⁴ See, e.g., *Victorian Women Lawyers' Association Inc v Federal Commissioner of Taxation* (2008) 170 FCR 318, 352; *DV Bryant Trust Board v Hamilton City Council* [1997] 3 NZLR 342, 350 (Hammond J); *Attorney-General (New South Wales) v Sawtell* [1978] 2 NSWLR 200, 209-11.

³⁵ (2010) 241 CLR 539.

³⁶ Ibid 557 (French CJ, Gummow, Hayne, Crennan, Bell JJ).

society, a trend that has been enhanced by COVID-19. Accordingly, Example 2 in Appendix A of the PBI CIS should be amended to state that Benevolent Care is a PBI, and that the five dot points are not purposes but activities which are a manifestation of the exercise of Benevolent Care, benevolence.³⁷

47. Paragraph 5.1.3, which is referred to in Example 2, cross-references *Australian Council of Social Service Inc v Commissioner of Pay-roll Tax*.³⁸ In that case, Priestly JA indicated that an institution will not be a PBI where it concerns itself ‘in an abstract sense, with the relief of poverty and distress, [yet] manifests that concern by promotion of social welfare in the community generally’. This was in the context of Australian Council of Social Service (**ACOSS**) having activities directed not only to those suffering from poverty, but also to the general community. In particular, Priestly JA referred to an uncontested statement by Rath J at first instance:

*The relief of poverty is of paramount concern in all the activities [of the Association] but this relief is sought to be achieved in the promotion of social welfare in the community generally. Thus the promotion that is the essential activity of [the Association] is seeking wellbeing not only for the poor but also for others.*³⁹

48. This passage can be clearly distinguished from Benevolent Care in Example 2. Benevolent Care is **not** concerned with ‘social welfare in the community generally’, it is concerned with the social welfare of unemployed youth. As unemployed youth are ‘in need of benevolence’ the test set out in Hunger Project is satisfied. The five dot points in Example 2 in Appendix A of the PBI CIS are not purposes but the manifestation of the exercise of Benevolent Care’s benevolence.

Recommendation

- **Example 2 in the PBI CIS should be amended to state that Benevolent Care is a PBI and that the 5 dot points are not purposes but activities which are a manifestation of the exercise of Benevolent Care’s benevolence.**

Registration of PBIs with Another Charity Subtype

49. The PBI CIS does not discuss registration of PBI’s under the ACNC Act and the Committee has heard suggestions that the ACNC is reluctant to register an entity with the PBI subtype and another subtype at the same time unless that other subtype is advancing social and public welfare.
50. The Committee submits that the PBI CIS clarify that an entity can be registered with the PBI subtype and with another subtype, so long as the purposes that form the basis for that other subtype are incidental or ancillary to the PBI purposes
51. The starting point is to consider the relevant provisions in the ACNC Act and, because the term ‘charity’ is used, the *Charities Act 2013* (Cth) (**Charities Act**).
52. The ACNC Act provides the schema for the registration of entities as *charities* (type) and then *subtypes* (within the ‘charity’ type). This schema is set out in Chapter 2 of the ACNC

³⁷ See Hunger Project FCFA at [66].

³⁸ (1985) 1 NSWLR 567.

³⁹ (1985) 1 NSWLR 567, 574.

Act. It is helpful to see this schema visually as it is set out in the table at subsection 25-5(5) of the ACNC Act:

Entitlement to registration		
Item	Column 1	Column 2
	Type of entity	Corresponding subtype of entity
1	Charity	Entity with a purpose to which paragraph (a) of the definition of charitable purpose in subsection 12(1) of the <i>Charities Act 2013</i> applies (advancing health)
2		Entity with a purpose to which paragraph (b) of the definition of charitable purpose in subsection 12(1) of the <i>Charities Act 2013</i> applies (advancing education)
3		Entity with a purpose to which paragraph (c) of the definition of charitable purpose in subsection 12(1) of the <i>Charities Act 2013</i> applies (advancing social or public welfare)
4		Entity with a purpose to which paragraph (d) of the definition of charitable purpose in subsection 12(1) of the <i>Charities Act 2013</i> applies (advancing religion)
5		Entity with a purpose to which paragraph (e) of the definition of charitable purpose in subsection 12(1) of the <i>Charities Act 2013</i> applies (advancing culture)
6		Entity with a purpose to which paragraph (f) of the definition of charitable purpose in subsection 12(1) of the <i>Charities Act 2013</i> applies (promoting reconciliation, mutual respect and tolerance between groups of individuals that are in Australia)
7		Entity with a purpose to which paragraph (g) of the definition of charitable purpose in subsection 12(1) of the <i>Charities Act 2013</i> applies (promoting or protecting human rights)
8		Entity with a purpose to which paragraph (h) of the definition of charitable purpose in subsection 12(1) of the <i>Charities Act 2013</i> applies (advancing the security or safety of Australia or the Australian public)

Entitlement to registration		
Item	Column 1	Column 2
	Type of entity	Corresponding subtype of entity
9		Entity with a purpose to which paragraph (i) of the definition of charitable purpose in subsection 12(1) of the <i>Charities Act 2013</i> applies (preventing or relieving the suffering of animals)
10		Entity with a purpose to which paragraph (j) of the definition of charitable purpose in subsection 12(1) of the <i>Charities Act 2013</i> applies (advancing the natural environment)
11		Entity with a purpose to which paragraph (k) of the definition of charitable purpose in subsection 12(1) of the <i>Charities Act 2013</i> applies (purposes beneficial to the general public and analogous to the other charitable purposes)
12		Entity with a purpose to which paragraph (l) of the definition of charitable purpose in subsection 12(1) of the <i>Charities Act 2013</i> applies (advancing public debate)
13		Institution whose principal activity is to promote the prevention or the control of diseases in human beings
14		Public benevolent institution

53. Subsection 25-5(4) of the *ACNC Act* expressly provides that an entity may be registered for more than one subtype. The Note to that section specifically contemplates this for PBIs:

(4) To avoid doubt, an entity may be entitled to registration as more than one subtype of entity.

Note: An entity could be registered as an entity with a purpose that is the relief of poverty, sickness or the needs of the aged, and also be registered as a public benevolent institution.

54. The potential for an entity to be registered with more than one subtype reflects the fact that charities may have more than one purpose. By section 5 of the *Charities Act*, 'charity' is defined as follows (emphasis added):

charity means an entity:

(a) that is a not-for-profit entity; and

- (b) all of the purposes of which are:
- (i) charitable purposes (see Part 3) that are for the public benefit (see Division 2 of this Part); or
 - (ii) purposes that are incidental or ancillary to, and in furtherance or in aid of, purposes of the entity covered by subparagraph (i); and

Note 1: In determining the purposes of the entity, have regard to the entity's governing rules, its activities and any other relevant matter.

Note 2: The requirement in subparagraph (b)(i) that a purpose be for the public benefit does not apply to certain entities (see section 10).

- (c) none of the purposes of which are disqualifying purposes (see Division 3); and
- (d) that is not an individual, a political party or a government entity.

55. The language of the definition of 'charity' is of 'purposes' plural, not 'purpose' singular, although it is well accepted that charities may exist for a single charitable purpose. Therefore, the plain language of the *Charities Act* contemplates that a charity may have more than one charitable purpose. This interpretation is supported by the clear acceptance in the definition of charity that a charity can have multiple purposes in the sense of having incidental or ancillary purposes and other charitable purposes. It is also consistent with the fact that courts have recognized charities as being able to exist for more than one charitable purpose. For some examples, see, e.g. *Public Trustee (The Community Foundation of South Australia) v Attorney-General (SA)*⁴⁰ (no issue raised with a community foundation existing for *the relief of poverty, for the advancement of education, or for any other purpose beneficial to the Community*); *Flynn v Mamarika*.⁴¹

56. Therefore, multiple charitable purposes and subtypes, including for entities registered with the PBI subtype should be more clearly contemplated in the revised PBI CIS. Of course, for an entity to be eligible for registration with the PBI subtype, its dominant purpose must be a PBI purpose, as set out in paragraphs 27 to 30 of this submission. Thus, any non-PBI subtype purposes would need to be incidental or ancillary to the PBI purpose.

Recommendation

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

⁴⁰ [2019] SASC 172.

⁴¹ [1996] NTSC 16