Attachment B - Why is defining Public Benevolent Institutions so fraught and possible policy solutions

Prepared by the Charities and Not-for-profits Committee of the Legal Practice Section of the Law Council of Australia

History and whether the PBI is still fit for purpose

1. The complexity of the Deductible Gift Recipients (**DGR**) regime in Australia is significant compared to like jurisdictions.[1] The complexity compounds administration costs to the Australian Tax Office (**ATO**) and Australian Charities and Not-for-Profits Commission (**ACNC**), donors and recipients, as well as barriers to access by small organisations, and increased opportunity for tax abusive behaviours. Importantly, decisions made by the ACNC determine whether entities are eligible for DGR status so that donors can receive a tax benefit and entities become eligible to receive grants from private ancillary funds and public ancillary funds.

2. The most common type of DGR, Public Benevolent Institutions (**PBIs**), compound the issue of complexity with the term being interpreted in a way that reflects a view of social welfare that is not only outdated, but contrary to contemporary best practice social policy and welfare delivery. This term was introduced into the legislation in the 1920s and considered by the High Court in the 1930s – the time of the Great Depression.

3. An examination of the Australian history of the tax treatment of charities[2] and other not-for-profit entities reveals there has been no clear policy direction. Rather concessions grew as a result of *ad hoc* decision making and were often introduced as a result of a personal view held by an influential politician of the day. This largely explains the complexity and often inconsistent treatment of different types of entities and leads to Australian gift deduction measures being more complex and more anomalous in comparison with other OECD countries.

4. A wider policy review is required to provide clear principles and guidance on entities that should properly be conferred DGR status so that an otherwise worthy organisation is not denied the concession because it is not within a category that attracts political support from the administration or executive of the day.

5. The concept of PBI is no longer fit for purpose in contemporary Australia and will increasingly give rise to further inequity, complexity and costs. Some of the profound contributing issues are:

    (a) The High Court has clearly indicated that the meaning of PBI was to be determined from the ordinary and contemporary meaning of the words.[3] The ordinary and contemporary meaning of ‘public’, ‘benevolent’ and ‘institution’, as a compound phrase or individually, has altered significantly since the 1930s, and largely fallen out of common usage. The reference to ‘public’ is also not clear but probably means widely available. Public perception of the

[1] Organisation for Economic Co-operation and Development (OECD), *Taxation and Philanthropy* (26 November 26) <https://www.oecd.org/ctp/taxation-and-philanthropy-df434a77-en.htm>.
[2] Ann O'Connell, *'Charitable Treatment? — A Short History of the Taxation of Charities in Australia*' in John Tiley (ed), *Studies in the History of Tax Law* (Hart Publishing, 2012) vol 5, 91.
[3] *Perpetual Trustee Co Ltd v Federal Commissioner of Taxation* (1931) 45 CLR 224, 231. Affirmed in *Commissioner of Pay-roll Tax (Vi.) v Cairnmillar Institute* 90 ATC 4752, 4757.

term ‘institution’ is tainted by the term being associated with churches, schools and religious orders at the centre of the Royal Commission into Institutional Responses to Child Sexual Abuse, none of which fall within the PBI definition. ‘Benevolence’ is a concept from an age long past, evoking notions of soup kitchens and in the age of neoliberal marketisation is unrecognisable.

(b) For a significant section of the public, and probably for the majority of the Australian community, the words ‘public benevolent institution’ and the requirement that those needing its aid should arouse ‘pity and compassion’[4] is paternalistic and reflects an outdated view of disadvantage and disability. People with disability would prefer respect from the community and recognition of their equal rights, rather than compassion and pity. The PBI notions jar with the flagship Australian policy response in The National Disability Insurance Scheme’s (**NDIS**’s) underlying philosophy. Such 1930s notions are no longer a definitional touchstone, and given the trajectory of community thought, will increasingly become irrelevant.

(c) For decision makers, the notions used in the PBI definition are subjective. For example, what one person would regard as ‘compassion’, and what another person would not regard as a proper object of compassion is, as one adjudicator noted ‘an emotive inquiry into the possible reaction of some within the community’.[5] One merely has to examine what is regarded by the Australian community as worthy of crowdfunding support on social media to appreciate the issues involved.

(d) The view taken by some decision makers that PBIs should not have a dominant preventative or advocacy purpose and should provide direct relief are out of touch with current trends of service provision to those in need. Prevention is considered to be equally as important as treatment, cure or direct assistance. It accords neither with the needs of those that the organisation seeks to assist, nor with the accepted best practice of how to meet those needs. Prevention in most circumstances is more cost-effective for governments and citizens than cure. Advocacy is a common and appropriate method used to bring about social change and ensure long term results.

(e) Further, these restrictions and the regulatory policy shift to PBIs not to be a ‘presence ringfenced’ within an organisation, but rather a separate endorsed entity with their own Australian Business Number (**ABN**), creates greater administration costs in split organisations, risk of regulatory default and internal disputation to take advantage of PBI status and concessions for part of the work of the organisation as a body politic. A broader approach would thus reduce costs and avoid conflicting approaches.

(f) The meaning of PBI was first considered by the High Court in 1931,[6] and there appears to be judicial consensus that fundamental changes can then only be made by the High Court in the absence of a statutory solution. The PBI issue has not been before the High Court since 1942.[7] Charitable organisations are reluctant to pursue litigation given its costs, their scarce resources and public reputational harm that they might suffer. There is no test case funding, and

[4] *Commissioner of Pay-roll Tax (Vi.) v Cairnmillar Institute* 90 ATC 4752, [675] (McGarvie J)
[5] *Legal Aid Commission of Victoria v Commr of Pay-roll Tax (Vic.)* 92 ATC 2053.
[6] *Perpetual Trustee Co Ltd v Federal Commissioner of Taxation* (1931) 45 CLR 224.
[7] *Lemm v Federal Commissioner of Taxation* (1942) 66 CLR 399 and *Maughan v Federal Commissioner of Taxation* (1942) 66 CLR 388.

apparent ACNC reluctance for cost capping agreements when the charity has pro bono representation.[8] Short of a High Court pronouncement or statutory intervention, the definitional disconnect between the law and contemporary best practice social policy and social welfare prevention and provision will only become increasingly dysfunctional.

Possible policy solutions

6. Such concerns have not been lost on government inquiries over the last three decades.

7. The Industry Commission Report of 1995 recognised that a number of organisations providing a range of important indirect services to those in need were missing out on some taxation concessions because they did not meet the 'direct relief' requirement. For this reason, the Commission recommended that tax deductibility be extended to all 'community social welfare organisations' that 'relieve poverty or benefit the community through the advancement of social welfare'.[9]

8. The Charity Definition Inquiry (**CDI**) recommended in 2001 that the category of public benevolent institution be replaced by a subset of charity to be known as a Benevolent Charity, that is a charity whose dominant purpose is to benefit, directly or indirectly, those whose disadvantage prevents them from meeting their own needs.[10]

9. Again, the issues were recognised in the Productivity Commission 2010 Report,[11] endorsing the CDI Report recommendations, and stating in Recommendation 7.3:

> *The Australian Government should progressively widen the scope for gift deductibility to include all endorsed charitable institutions and charitable funds. Consistent with the Australian Taxation Office rulings on what constitutes a gift, payments for services should not qualify as a gift.*

10. The Productivity Commission reasoned that gift deductibility should be widened to include all tax endorsed charities in the interests of equity and simplicity.

11. Further, in 2013, the Not-For-Profit Sector Tax Concession Working Group recommended that:

> *DGR status should be extended to all charities that are registered with the ACNC, but use of tax deductible donations should be restricted to purposes and activities that are not solely for the advancement of religion, or the advancement of education through child care and primary and secondary education, except where the activity is sufficiently related to advancing another charitable purpose.*[12]

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[8] *Australians for Indigenous Constitutional Recognition Ltd v Commissioner of Australian Charities and Not-for-Profits Commission* [2021] FCA 435

[9] Industry Commission 1995, *Charitable Organisations in Australia,* Report No. 45, AGPS Melbourne, xxxii-xxxiii

[10] The Treasury (Cth), *Report of the Inquiry into the Definition of Charitable, Religious and Community Service Not-for-profit Organisations* (2001) 258.

[11] Productivity Commission, *Contribution of the Not-for-Profit Sector* (Research Report, 11 February 2010), 178-179.

[12] Not-For-Profit Sector Tax Concession Working Group, *Fairer, simpler and more effective tax concessions for the not-for-profit sector* (Final Report, May 2013) rec 6 <https://treasury.gov.au/sites/default/files/2019-03/NFP-Sector-WG-Final-Report.pdf>.

12. It went on to note that there is a high cost to regulators, participants and the Australian community as a result of the current donation tax structure, which is very specific, with many anomalies arising from ad hoc decisions. The vagaries of the current structure also result in many worthy organisations being unable to access the benefits, which raises questions of equity and equality.