



## **Submission to the ACNC's Public Consultation on Updated Commissioner's Interpretation Statements**

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## Contacts

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### **About UnitingCare Australia**

UnitingCare Australia is the national body for the Uniting Church's community services network and is an agency of the Assembly of the Uniting Church in Australia.

We give voice to the Uniting Church's commitment to social justice through advocacy and by strengthening community service provision.

We are the largest network of social service providers in Australia, supporting 1.4 million people every year across urban, rural and remote communities.

We focus on articulating and meeting the needs of people at all stages of life and those that are most vulnerable.

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## Introduction

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This submission has been prepared with the assistance of MinterEllison in consultation with UnitingCare Australia and organisations within the UnitingCare network.

## Submission

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### 1. Purpose

- 1.1 The updated draft Commissioner's Interpretation Statement: Public Benevolent Institutions (**Draft PBI CIS**) states that to be a public benevolent institution (**PBI**):
- (a) a charity's main purpose must be to provide benevolent relief;<sup>1</sup> and
  - (b) any other purpose must be ancillary or incidental to its purpose of benevolent relief.<sup>2</sup>
- 1.2 We consider that these statements do not represent the correct meaning of a PBI developed under relevant case law.

#### Main purpose test

- 1.3 The Draft PBI CIS explains the 'main purpose' test as follows:

*34 ... In Perpetual Trustee Co Ltd v Federal Commissioner of Taxation,<sup>35</sup> the members of the High Court stated that a PBI is an organisation that is 'organised' for the relief of poverty, sickness, destitution or helplessness<sup>36</sup> or 'promoted' or 'conducted for'<sup>37</sup> the relief of poverty, distress, suffering or misfortune. Essentially, these phrases suggest the focus should be on the main purpose for which the charity exists. In subsequent relevant court and tribunal decisions, when referring to the purpose of a charity or PBI, 'main'<sup>38</sup> is used interchangeably with 'dominant'<sup>39</sup>, 'essential'<sup>40</sup> or 'predominant'<sup>41</sup>. In this document, we use 'main purpose' for consistency.*

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<sup>35</sup> *Perpetual Trustee Co Ltd v Federal Commissioner of Taxation* (1931) 45 CLR 224.

<sup>36</sup> *Perpetual Trustee Co Ltd v Federal Commissioner of Taxation* (1931) 45 CLR 224, 232 (Starke J).

<sup>37</sup> *Perpetual Trustee Co Ltd v Federal Commissioner of Taxation* (1931) 45 CLR 224, 232-3 (Dixon J).

<sup>38</sup> See, for example, *Maughan v Federal Commissioner of Taxation* (1942) 66 CLR 388, 398 (Williams J).

<sup>39</sup> See, for example, *Maughan v Federal Commissioner of Taxation* (1942) 66 CLR 388, 395 (McTiernan J).

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<sup>1</sup> At [34].

<sup>2</sup> At [35].

<sup>40</sup> See, for example, *Federal Commissioner of Taxation v Launceston Legacy* (1987) 75 ALR 122, 129 (Northrup J).

- 1.4 The Draft PBI CIS conflates the terms 'organised', 'promoted' and 'conducted' used in *Perpetual Trustee Co Ltd v Commissioner of Taxation* (**Perpetual Trustee**)<sup>3</sup> to suggest that the focus is on an organisation's main purpose.
- 1.5 This is not the correct test found in the case law.
- 1.6 The most recent judicial authority which has considered the meaning of a PBI is *Global Citizen Ltd and Commissioner of the Australian Charities and Not-for-profits Commission*<sup>4</sup> (**Global Citizen**). In *Global Citizen*, the Commissioner of the Australian Charities and Not-for-profits Commission (**ACNC**) (**Commissioner**) argued that the relevant test is the main purpose test<sup>5</sup> and the Tribunal members, Deputy Present McCabe and Senior Member O'Connell, did not apply this test in concluding that Global Citizen Ltd is a PBI – the Tribunal members adopted the words used by the High Court in *Perpetual Trustee* (i.e. 'organised', 'promoted' or 'conducted' for the relief of poverty/need).
- 1.7 In respect of the main purpose test submitted by the Commissioner, the Tribunal members in *Global Citizen* noted the following:
- 80. It is useful to consider the case law concerning purpose in relation to PBIs. First, it is important to note the High Court in [Perpetual Trustee] did not refer to 'purpose'. The test propounded in that case was whether the entity was 'organised' for the relief of poverty, sickness, destitution or helplessness (per Starke J at 232) or 'promoted' or 'conducted for' the relief of poverty, distress, suffering or misfortune (per Dixon J at 232-3). In [Public Trustee v Federal Commissioner of Taxation (1934) 51 CLR 75], Williams J simply referred to 'purpose' (at 411). In [Maughan v Federal Commissioner of Taxation (1942) 66 CLR 388], McTiernan J (at 395) referred to the 'dominant object' of the entity and Williams J (at 398) referred to the 'main object'.*
- 1.8 In their conclusion, the Tribunal members clearly adopted the reasoning of the High Court in *Perpetual Trustee* rather than the main purpose test argued by the Commissioner. They state:
- 127. We are satisfied GCL is organised for the purpose of relieving poverty. It undertakes a range of activities, together with other entities in the GC Network, and in collaboration with other entities both in Australia and overseas, so that monies are directed to international organisations that are involved in the direct delivery of aid and assistance in the relief of poverty. The role of GCL and other GC Network entities has been acknowledged by those international actors and within government. **Given the reasoning evident in the modern authorities, we accept GCL can appropriately be described as an institution that is 'organised' for, or 'conducted for' or that 'promotes' the relief of poverty. It is therefore entitled to be registered as a charity with the subtype PBI under s 25-5(5) of the ACNC Act.***
- (Our emphasis.)
- 1.9 The 'organised/promoted/conducted for' test has consistently been adopted by the Courts as the relevant test for PBIs.<sup>6</sup>

<sup>3</sup> (1931) 45 CLR 224.

<sup>4</sup> [2021] AATA 3313.

<sup>5</sup> See [79].

<sup>6</sup> For example, see *Commissioner of Taxation v Hunger Project Australia* [2014] FCAFC 69.

- 1.10 Accordingly, we submit that the Draft PBI CIS should not refer to a main purpose test but should refer to the 'organised/promoted/conducted for' test.

Ancillary or incidental purposes

- 1.11 In the context of the Commissioner's main purpose test, the Draft PBI CIS states that a PBI cannot have any purpose which is not ancillary or incidental to its purpose of benevolent relief. The Draft PBI CIS states:

*35. For a charity's main purpose to be providing benevolent relief, any other purpose must be ancillary or incidental to its purpose of benevolent relief.<sup>42</sup> A purpose is ancillary or incidental if it is not of substance in its own right, but is something that 'tends to assist, or naturally goes with,' the achievement of the main purpose of benevolent relief.<sup>43</sup>*

*36. If a charity has a purpose other than providing benevolent relief, and that purpose is of substance in its own right, it is regarded as an independent purpose, not an ancillary or incidental purpose. This is the case even if the charity pursues that purpose only to a 'minor' extent.<sup>44</sup>*

*37. If a charity has an independent purpose that is not benevolent relief, it is not entitled to registration as a PBI. For example, if a charity has an independent purpose of advancing religion or advancing the natural environment, it is not entitled to registration as a PBI.*

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<sup>42</sup> See, for example, *Maclean Shire Council v Nungera Co-operative Society Ltd* (1995) LGERA 430, 432-433 (Handley JA); *Federal Commissioner of Taxation v Launceston Legacy* (1987) 75 ALR 122, 138 (Northrop J); *Northern Land Council v Commissioner of Taxation* [2002] NTCA 1, 7 [22] (Mildren J); *Womens Life Centre Inc v Commissioner of the Australian Charities and Not-for-profits Commission* (2021) 112 ATR 967, [32] (the Tribunal).

<sup>43</sup> *Navy Health Ltd v Federal Commissioner of Taxation* (2007) 163 FCR 1, 29 [65] (Jessup J).

<sup>44</sup> *Navy Health Ltd v Federal Commissioner of Taxation* (2007) 163 FCR 1, 29 [65] (Jessup J).

- 1.12 In *Global Citizen*, although the Tribunal members ultimately did not adopt the main purpose test in concluding that Global Citizen Ltd is a PBI, they did consider the meaning of 'main' in responding to the Commissioner's submissions in relation to the main purpose test.
- 1.13 The Tribunal members explained two interpretations to the term 'main' in relation to an object or purpose:
- (a) the ordinary meaning, which does not preclude an entity from having other objects or purposes, provided the benevolent purpose is predominant;<sup>7</sup> and
  - (b) the alternative view, which is that any other purpose must be incidental or ancillary to the benevolent purpose (termed the 'exclusivity of purpose test').<sup>8</sup>

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<sup>7</sup> See [81].

<sup>8</sup> See [83] and [88].

- 1.14 The ACNC adopts the exclusivity of purpose test in the Draft PBI CIS. We submit that this test does not apply to PBIs. This was the view of the Tribunal members in *Global Citizen*. They said:

*88. ... Our analysis of the authorities suggests we should not apply an 'exclusivity of purpose' test in relation to PBIs. It is interesting to note that when the Commissioner of Taxation was responsible for determining PBI status before arrangements changed in 2012 he took the view that 'any other purposes and operations must be incidental to the public benevolence or of minor extent and importance'.<sup>71</sup>*

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71 Australian Taxation Office, Taxation Ruling TR 2003/5 *Income Tax and Fringe Benefits Tax: Public Benevolent Institution* at [22].

- 1.15 We submit that the Commissioner should not apply an interpretation to the meaning of PBI which is contrary to the Tribunal members' reasoning in *Global Citizen*.
- 1.16 As noted in *Global Citizen*,<sup>9</sup> the exclusivity of purpose test appears to come from charity law and the principle is now expressed in subsection 5(b) of the *Charities Act 2013* (Cth) (**Charities Act**) where a charity is defined to mean an entity all the purposes of which are charitable purposes or purposes that are incidental or ancillary to, and in furtherance or in aid of, charitable purposes.
- 1.17 The *Australian Charities and Not-for-profits Commission Act 2012* (Cth) (**ACNC Act**) does not prescribe the same requirement for an entity to meet the description of a PBI<sup>10</sup> (i.e. it does not require an entity to have all benevolent purpose or purposes that are incidental or ancillary to, or in furtherance of, benevolent purposes).
- 1.18 Section 25-5 of the ACNC Act relevantly provides:

...

(2) An entity is entitled to registration as a subtype of entity if:

- (a) it meets the conditions in subsection (3); and
- (b) it meets the description of that subtype of entity in column 2 of the table in subsection (5); and
- (c) it is entitled to registration as the type of entity that corresponds to that subtype of entity (as set out in that table); and
- (d) it is registered as that type of entity.

(3) The conditions are as follows:

- (a) the entity is a not-for-profit entity;
- (b) the entity is in compliance with the governance standards and external conduct standards (see Part 3-1);
- (c) the entity has an ABN;
- (d) the entity is not covered by a decision in writing made by an Australian government agency (including a judicial officer) under an Australian law that provides for entities to be characterised on the basis of them engaging in, or supporting, terrorist or other criminal activities.

...

(5) The table is as follows:

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<sup>9</sup> At [83].

<sup>10</sup> Section 25-5(5) of the ACNC Act.

*Entitlement to registration*

<i>Item</i>	<i>Column 1 Type of entity</i>	<i>Column 2 Corresponding subtype of entity</i>
1	Charity	Entity with a purpose to which paragraph (a) of the definition of <b>charitable purpose</b> in subsection 12(1) of the Charities Act 2013 applies (advancing health)
...		
14		Public benevolent institution
1.19		If the legislator intended for the exclusivity of purpose test to apply to PBIs, it would have included such a test in section 25-5 of the ACNC Act in the same way that it included that test for charities in subsection 5(b) of the Charities Act. However, the legislator did not include any exclusivity of purpose test for PBIs and so it follows that that the ACNC should not apply that test for PBIs.
1.20		In the Draft PBI CIS the ACNC seeks to apply principles from cases concerning charitable status to PBIs. For example, in explaining the exclusivity of purpose test at paragraphs 35 to 37 of the Draft PBI CIS, the Commissioner quotes and relies on the case <i>Navy Health Ltd v Federal Commissioner of Taxation</i> <sup>11</sup> ( <b>Navy Health</b> ). This case concerned whether Navy Health Limited was a charitable institution under the <i>Fringe Benefits Tax Assessment Act 1986</i> (Cth) and did not consider the meaning of a PBI. Accordingly, this case should be not be considered in the context of explaining the meaning of a PBI.
1.21		The Tribunal members in <i>Global Citizen</i> cautioned that: <p style="margin-left: 40px;"><i>85 ... While a PBI is a type of charity, it is important to distinguish between cases and principles that apply to determining charitable status on the one hand and those that apply to determining PBI status on the other. Although it may be appropriate to consider charity cases in interpreting the term PBI – as we have done - it must be done with caution and mindful of the differences in the concepts. The fact that charitable purpose or purposes must be exclusively charitable does not mean a PBI must have exclusively benevolent purposes.</i></p>
1.22		The Draft PBI CIS states that any other purpose of a PBI must be ancillary or incidental to its purpose of benevolent relief and, referring to <i>Navy Health</i> , states that an ancillary or incidental purpose is a purpose that it is not of substance in its own right. As set out above, we consider that a PBI can have other purposes that are not ancillary or incidental to its purpose of benevolent relief. Therefore, this phrase 'substance in its own right' should not be referred to the Draft PBI CIS – the phrase is not relevant to PBIs.

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<sup>11</sup> (2007) 163 FCR 1.



## 2. PBIs and religious purpose/motive

- 2.1 The second sentence in paragraph 38 of the Draft PBI CIS states that if the founders of a charity are motivated by religious faith but the charity's main purpose is providing benevolent relief, it may be eligible to be registered as a PBI.
- 2.2 As explained at paragraphs 1.3 to 1.10 above, we disagree with the ACNC's use of a main purpose test. We submit that the relevant test for PBIs is whether an entity is organised, conducted or promoted for relief of persons in poverty or need.
- 2.3 We otherwise agree with the second sentence in paragraph 38 of the Draft PBI CIS in that an entity and its founders can be inspired or motivated by religious faith and be eligible to be registered as a PBI.
- 2.4 It is often the case that religious beliefs inspire and inform the nature of and approach to an organisation's relief work. We submit that in this scenario, the organisation does not have an independent purpose of advancing religion but is merely motivated by religious faith.
- 2.5 This approach is consistent with the authorities which consider the charitable purpose of advancing religion. For example, in *Roman Catholic Archbishop of Melbourne v Lawlor*,<sup>12</sup> Dixon J said that:

*In order to be charitable the purposes themselves must be religious; it is not enough that an activity or pursuit in itself secular is actuated or inspired by a religious motive or injunction: the purpose must involve the spread or strengthening of spiritual teaching within a wide sense, the maintenance of the doctrines upon which it rests, the observances that promote and manifest it...*

- 2.6 In any event, if an entity does have an independent religious purpose, we submit that it can still be a PBI.
- 2.7 In respect of PBIs having religion purposes, paragraph 38 the Draft PBI CIS states that if a charity has an independent purpose of advancing religion it is not entitled to registration as a PBI.
- 2.8 As explained at paragraphs 1.11 to 1.21 above, we submit that an entity can be a PBI and have an independent charitable purpose separate to its benevolent relief purpose. Put differently, an entity can have a purpose of advancing religion which is not ancillary or incidental to its benevolent relief purpose. Accordingly, we disagree with paragraph 38 of the Draft PBI CIS where it states that if a charity has an independent purpose of advancing religion it cannot be registered as a PBI.
- 2.9 There are two key cases which support this view.

### Hobart City Mission case

- 2.10 In the 1945 Taxation Board of Review *Case 101 (Hobart City Mission case)*,<sup>13</sup> the Members of the Taxation Board of Review (Chairman Gibson and Members Hannan and Hamilton) considered whether the Hobart City Mission (**Mission**) was a PBI. They reviewed

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<sup>12</sup> (1934) 51 CLR 1.

<sup>13</sup> (1945) 12 CTBR 677.

the constitution of the Mission and its annual reports, and heard evidence of the City Missioner.<sup>14</sup> We summarise the key aspects of this evidence below:

- (a) The objects of the Mission were described in its constitution as *'to promote the extension of Evangelical religion without denominational distinction, and render relief to the poor in necessitous circumstances'*.<sup>15</sup>
- (b) The Board noted that the annual reports of the Mission showed the religious standpoint was of great concern to its management committee.<sup>16</sup> Four pages of one of the reports (following the foreword) explained the religious aspect of the work of the Mission (including bible classes, services and meetings of the Women's Fellowship and the Christian Endeavour Society). Other parts of the report related principally to the relief provided by the Mission (including distributions of articles such as beds, garments, shoes, firewood, glasses and maternity parcels to persons urgently in need of assistance). One of the reports stated that *'the material side of the work provides opportunities to bring before those who are needy and distressed the One who is able to supply all their needs – the Lord Jesus Christ'*.<sup>17</sup>
- (c) The City Missioner described the primary work of the Mission as providing material relief for those in need and referred to the religious work of the Mission as secondary to its relief work.<sup>18</sup> The Board of Review understood from the City Missioner that the granting of material aid was not conditional upon attendance at religious services or adherence to any particular form of religious belief.

2.11 Having considered the evidence explained above and summarising the key authorities about the meaning of a PBI<sup>19</sup> (being the key authorities still relevant today, for example, *Perpetual Trustee*), the Members of the Board of Review held that the Mission was a PBI by stating the following:

*34. But for the religious interests of the Mission there could not be any reasonable doubt that it would properly be described as a "public benevolent institution". On the facts as they appear in evidence, we are satisfied that **the relief work is not merely ancillary and subordinate to the religious aspect, but is at least of equal importance** for the purposes of this case. We regard the City Missioner as a witness of truth, and we accept his statement (which is supplemented by the particulars in the annual reports) that **the giving of relief to those in poverty and distress is not a secondary task of the Mission, but is one to which the energies of the City Missioner and the Mission Sister are mainly directed**. Even if we were of the opinion that both phases of the Mission's work – the religious and the material – were of equal importance and we called for an equal division of the time of the two officials, we think it would be open to us to find in favour of the taxpayer's claim. **In view, however, of the volume of relief work, the time devoted to it and other circumstances, including the substantial amount of public recognition and practical aid, we have little difficulty in arriving at the conclusion that the Hobart City Mission is a public institution which promoted the relief of poverty, distress or misfortune, and is therefore, a "public benevolent institution"**.*

*35. It may be added – although it is not a vital factor in our decision – that the religious aspect cannot reasonably be divorced from the material. Poverty or*

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<sup>14</sup> Para [2].

<sup>15</sup> Para [3].

<sup>16</sup> Para [10].

<sup>17</sup> Para [17].

<sup>18</sup> Para [24].

<sup>19</sup> Para [33].

*helplessness is not always the result of adverse external forces: it is often due to moral anaemia, the cure for which is to be found in a wholesome outlook on life. Consequently, even where a man's physical needs are urgent and paramount, it may be found necessary to awaken spiritual forces within him if he is not to become a permanent subject of material assistance. Seen in this light, the religious work of the Mission is a valuable, if not indispensable, accompaniment to its efforts in alleviating misfortune of various kinds.*

(Our emphasis.)

- 2.12 The Hobart Mission City case is instructive because it demonstrates that an institution can have independent purposes of both advancing religion and providing benevolent relief and be regarded as a PBI. The Mission's objects in its constitution (see paragraph 2.10(a)) appear to set out two distinct independent purposes:
- (a) *to promote the extension of Evangelical religion without denominational distinction – being a purpose of advancing religion; and*
  - (b) *render relief to the poor in necessitous circumstances – being a purpose of providing benevolent relief.*
- 2.13 Being confronted with a dual purpose entity, the Board reasoned that the Mission was a PBI on the basis that the Mission's relief work was at least of equal importance to its religious phase of work. The Board acknowledged the '*volume of relief work, the time devoted to it and other circumstances, including the substantial amount of public recognition and practical aid.*'
- 2.14 The key principle from the *Hobart City Mission* case therefore is that where an entity has two independent purposes, one of advancing religion and one of providing benevolent relief, it is sufficient that the entity's activities in furtherance of its relief purpose are at least of equal importance (e.g. in terms of volume of activities, time devoted to the activities and the amount of public recognition and practical aid) to its religious activities in order for it to be a PBI.

#### St Columban's Mission Society case

- 2.15 In the Taxation Board of Review Case T13 (**St. Columban's Mission Society case**),<sup>20</sup> the Members of the Taxation Board of Review (Chairman Brady and Members Stewart and Trowse) considered whether the St Columban's Mission Society (**Society**) was a PBI. They reviewed the constitution of the Society, a newsletter of the Society and proposals passed by the General Chapter of the Society at a 1976 meeting, and heard evidence from Father A, a member of the Society. We summarise this evidence below:
- (a) The key clauses of the constitution of the Society were:
    - (i) clause 2, which provided that the Society was '*founded under the inspiration of the Holy Spirit for the glory of God and the sanctification of its members that take as their special task the duty, which weighs upon the whole Church, of preaching the Gospel to the nations*';
    - (ii) clause 3, which stated that the Society is '*exclusively [a] missionary Society (not a religious institute) at the service of the universal Church, especially for work undertaken under the direction of the S.C.E.P., on which as a Society it directly depends*';

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<sup>20</sup> 86 ATC 188.

(iii) clause 4, which stated that the Society's work involved:

*(a) Establishing the Church among peoples or groups who do not yet believe in Christ;*

*(b) Aiding the young churches until they attain sufficient maturity to evangelize their own people;*

*(c) Helping to renew churches no longer able to evangelize their own people.*

(iv) clause 5, which set out in detail the work of the Society.

(b) The newsletter of the Society showed how donations and bequests made to the Society had been spent.

(c) The proposals passed at 1976 meeting of the General Chapter of the Society explained the plans of the Society including the following:

*Our special role as an exclusively missionary Society is in crossing boundaries of language, culture and faith to establish the Church and to assist local churches in bringing the knowledge and love of Jesus Christ to the unevangelized. In the light of the tremendously urgent challenges of our age, Christ calls us:*

*1) ...*

*2) to bring about full Christian liberation to the poor and the oppressed of the countries in which we work;*

(d) Father A gave evidence explaining the medical and nutritional programs that the Society had across the world. He stated that in the work of the Society, '*they try to service the whole person, not just the spiritual, but also the social side of man*'.

2.16 Having considered the evidence explained above and summarising the key authorities about the meaning of a PBI (being the key authorities still relevant today, for example, *Perpetual Trustee*), the Members of the Board held that the Society was not a PBI by stating the following:

*7. In seeking to identify the functions of the Society from an examination of the documentary evidence and of the oral evidence given by Father A, it seems to us that the Society's dominant function in the years in issue was the evangelization of peoples, particularly in foreign lands, and as part of that function it sought to meet the basic human needs of those peoples. Accordingly, we view the benevolent works of the Society as being purely subsidiary to its spiritual role. We accept Father A's evidence that the Society sought "to serve the whole person, not just the spiritual but the social side of man", but the emphasis is very much on evangelization, the specific mission of members of the Society being (to quote from the Society's own Constitutions): "to cross boundaries of language, culture and faith in order to spread the Good News of Jesus Christ". It is worth noting in this context that members of the Society are priests; they are not social workers, of whom it might be said that they could well be the more appropriate people to have as members if the main objective of the Society on its various mission fields was simply to cater for and satisfy human needs.*

*8. Our finding on that issue contrasts sharply with one of the grounds stated in the taxpayer's notice of objection, wherein it was stated that:*

*“The work of the St Columban's Mission Society is to aid the sick and the poor in underprivileged countries.”*

*In our view, it would be more accurate to say that a work of the Society is to aid the sick and the poor in underprivileged countries, for we see that work as being very much subsidiary to its dominant function of evangelization...*

...

*10. Examining the work of the Columban Mission Society in the light of the above observations of Mr. Justice Starke, it cannot be said of it, in our view, that it was a body organised for the relief of poverty, sickness, destitution or helplessness. **Essentially, we see it as a confraternity of men banded together with the objective of evangelizing non-Christian peoples. Whilst the Society displayed a laudable interest in the welfare of the indigenous peoples of the various lands where it undertook missionary work, that interest was patently subsidiary, in our view, to its function of evangelization.** The proposals of the Chapter would seem to indicate that members of the Society working on the mission fields now tend to identify themselves more closely with the poor and the needy than perhaps they did in previous times. However, in our view, those proposals only indicate a planned change in emphasis which might, or might not, be implemented either in whole or in part (see para. 6 supra). **They do not disturb the basically spiritual nature of the Society's objectives and activities.** In any event, the extent, if any, to which those proposals are binding on the Society's members remain in some doubt. Also, pursuing the same sort of enquiry that was in Mr. Justice Starke's mind in the Perpetual Trustee case, we cannot help but feel that the member priests of the Society would be surprised to learn that they formed part of a public benevolent institution rather than of a religious order (see also the comments of Latham C.J. in *The Little Company of Mary (S.A.) Inc. v. The Commonwealth and Anor (1942) 66 C.L.R. 368 at p. 379*).*

...

***12. In our view, it could not be said of the Columban Mission Society, on the evidence adduced before us, that its relief works were anything other than a subordinate activity.** Also, unlike the City Mission, its membership comprised only priests, brothers and students preparing for the priesthood (in other words, its members were Religious or young men studying to become Religious). It might be argued that, because the Society's Constitutions had been drawn up by its own priestly members, there was a tendency to highlight its spiritual functions to the detriment of its more humanitarian-type functions. However, the evidence does not lead one to believe that there had been any diminution in the Society's spiritual role. We consider that its “dominant purpose” (to use the words of Lord Atkin in *Girls' Public Day School Trust Ltd. v. Ereaut (1931) A.C. 12 at p. 32*) has always been that of evangelization of non-Christian peoples.*

(Our emphasis.)

- 2.17 The Board's reasoning in the *St Columban's Mission Society* case supports and continues the reasoning of the Board in the *Hobart City Mission* case. In the *St Columban's Mission Society* case, the Board encountered another organisation with both religious and benevolent relief purposes. However, in this case, the Society's relief work was a 'subordinate activity' to its evangelisation activities and therefore, the Society was not a PBI.

Example 3 in the Draft PBI CIS

- 2.18 The Draft PBI CIS currently includes the following example:



Example 3

*The Christian Church of Carrara was established to operate a church that holds weekly public worship services and holds bible study classes and prayer meetings. In furtherance of the Christian faith, the church also runs a food bank and soup van ministry for the homeless in its neighbourhood on Tuesday nights. The objects clause of the church's constitution emphasises the advancement of the Christian religion.*

*The Christian Church of Carrara is unlikely to be a PBI. Although it provides some benevolent relief, its main purpose appears to be advancing religion. However, if the food bank and soup van were organised in a separate charity, that charity may be a PBI. Refer to paragraphs 34 to 38 above for further detail.*

- 2.19 We consider that this example does not apply the correct principles from the case law set out above and would confuse charities.
- 2.20 A more useful example would be an example similar to the facts of the *Hobart City Mission* case where an organisation's constitution refers to religious purposes and benevolent relief purposes. We suggest example 3 be replaced with the following:

The objects clause of the constitution of the Carrara Mission states that the Mission is established to provide benevolent relief to persons in need and to advance the Christian faith.

The Mission runs a food bank and soup van ministry for the homeless in its neighbourhood. The Mission also operates a church that holds weekly public worship services and holds bible study classes and prayer meetings.

If Mission's activities in furtherance of its relief purpose (i.e. its food bank and soup van ministry) are at least of equal importance (e.g. having regard to the volume of relief work, the time devoted to it and amount of public recognition and practical aid) to its activities in furtherance of its religious purpose (i.e. the operation of its church), it would be regarded as a PBI.

- 2.21 Finally, we note that the Australian Taxation Office adopted the same position that we submit above in its withdrawn Taxation Ruling 2003/5 where it ruled:

*154. Religious organisations can be public benevolent institutions only where their primary purpose and predominant activity is the direct relieving of poverty, sickness, suffering, distress, misfortune and helplessness. An example was the Hobart City Mission: see Case 101 (1945) 12 CTBR 823. If the benevolent activities are subsidiary to, or coordinate with, the religious purposes they will not qualify (see paragraph 99).*

- 2.22 This extract is consistent with the view that both an organisation's purposes and activities must be considered when determining whether an organisation falls within the meaning of a PBI.

### **3. Commercial activities**

- 3.1 Paragraph 39 of the Draft PBI CIS states:

*39. A PBI may conduct commercial activities if they are merely a means by which the charity raises funds for its purpose of benevolent relief.<sup>46</sup> In this situation, the commercial activities are regarded as a means of supporting the achievement of a purpose of benevolent relief, rather than an independent commercial purpose.*

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<sup>46</sup> See, for example, *Borough of Leicester v Moran* (1904) 4 SR (NSW) 361.

3.2 We submit that the ACNC should provide further guidance and clarification of the circumstances in which commercial activities would be regarded as an independent commercial purpose. The current ACNC guidance is insufficient.

3.3 We note that the explanatory memorandum to the Charities Bill 2013 (Cth) states:

*Commercial purposes*

*1.37 An entity which has a purpose of carrying on a commercial enterprise to generate surpluses as an end in itself cannot be charitable.*

*1.38 Where an entity's governing documents allow for purposes wider than those capable of being characterised as charitable the entity cannot be charitable.*

*1.39 An entity undertaking commercial or business-like activities can still be charitable if its purposes are all charitable and it carries on a commercial enterprise to generate surpluses in order to further that charitable purpose rather than as an end in itself. The fact that the activities undertaken by the entity are not intrinsically charitable does not affect the characterisation of the entity as charitable.*

*1.40 An entity may be charitable where the purpose of the entity is charitable and the commercial activities directly carry out the charitable purpose. An example is an entity that conducts a business activity solely for the purpose of providing training and employment opportunities for people with disabilities who would otherwise find it difficult to obtain training and employment.*

*1.41 An entity may be charitable where the commercial operations are merely incidental to the carrying out of the charitable purpose. An example is an entity which runs a home for disadvantaged boys that also provides training through its farm.*

*1.42 An entity may also be charitable where the activities undertaken by the entity are themselves intrinsically charitable but are being carried on in a way that is commercial. An example is the preparation and sale of law reports. However, a commercial enterprise that is not operated in a commercially viable manner may demonstrate that the entity has another purpose, for example, a purpose of supporting its clients or subsidising the goods and services it provides to these clients.*

*1.43 Where a commercial entity operates for, or is owned by, a charity, it is not automatically charitable. It is the purpose of the entity itself, not of the owning charity, that must be determined. Charitable status cannot be attributed to an entity merely on the basis that it is associated with a charity. Control, ownership, the use of surplus funds, or a trust relationship, are not sufficient on their own to change a commercial entity into a charity. This does not mean that the extent of any relationship with a charity is irrelevant, but a simple 'look through' approach, which ignores the features and circumstances of the relevant entity itself, is not a relevant test for determining whether the entity is a charity.*

*1.44 An entity may hold passive investments to receive a market return to further its charitable purposes, or to meet reasonable operational expenses, and this will not affect its charitable status.*

3.4 We submit that a PBI would not be regarded as having an independent commercial purpose if:



- (a) it undertakes commercial activities the surplus from which increases the funds available to the PBI to assist it in undertaking other activities in furtherance of its benevolent purpose; or
- (b) the activities it undertakes are intrinsically benevolent activities (i.e. relief work) and are being carried on in a way that is commercial.
- 3.5 We agree with the first sentence in paragraph 39 of the Draft PBI CIS that a PBI may conduct commercial activities as a means by which it raises funds for its purpose of benevolent relief.
- 3.6 However, we query whether the reference to *Borough of Leicester v Moran*<sup>21</sup> (**Moran**) in footnote 46 is appropriate in this context. That case considered whether St Martha's Industrial Home (**Home**) was a benevolent institution within the meaning of *Municipalities Act 1897* (NSW). The Home was used as a home for destitute and orphan girls. Some of the girls at the home paid a fee for using the home and others did not. Simpson CJ in Eq said that the Home received a '*substantial, as opposed to a nominal sum, from fees and sale of work, not enough however, to cover the expenses of carrying on the institution. The deficiency is made good, and somewhat more than made good, by voluntary donations, so that the mortgage debt on the Home has to some extent reduced.* Simson CJ in Eq referred to the case *Cawse v The Committee of the Nottingham Lunatic Hospital*<sup>22</sup> in which it was found that The Committee of the Nottingham Lunatic Hospital was a 'hospital' under the Acts considered in that case '*although in some years the fees taken from which patients might more than cover the expenses*'. In *Moran*, Simson CJ in Eq relied on this case to conclude that the Home was a benevolent institution. This case is authority for the proposition that a PBI can charge fees for relief services and can make a surplus from charging those fees.
- 3.7 We consider that the correct authority for the proposition that a PBI can undertake commercial activities is *Hunger Project Australia v Commissioner of Taxation*<sup>23</sup> where Perram J accepted the application of the principles in *Commissioner of Taxation v Word Investments* to PBIs.<sup>24</sup>

#### 4. Advocacy, awareness-raising and education

##### Paragraph 27 of the Draft PBI CIS

- 4.1 Paragraph 27 of the Draft PBI CIS makes the following comment about PBIs providing advocacy services:

*27. So, a charity that provides general advice, information, research or advocacy services to the whole community or a part of the community is unlikely to have a purpose of benevolent relief.*<sup>28</sup>

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28 *Australian Council of Social Service Inc v Commissioner of Pay-roll Tax* (1985) 1 NSWLR 567, 575 (Priestley JA; Mahoney JA agreeing).

- 4.2 The Draft PBI CIS cites *Australian Council of Social Service Inc v Commissioner of Pay-roll Tax*<sup>25</sup> (**ACOSS case**) for the proposition that a charity that provides general advice, information, research or advocacy services to the whole community or a part of the

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<sup>21</sup> (1904) 4 SR (NSW) 361.

<sup>22</sup> [1891] 1 Q.B. 585.

<sup>23</sup> [2013] FCA 693 [119]-[125].

<sup>24</sup> (2008) 236 CLR 204.

<sup>25</sup> (1985) 16 ATR 394.

community is unlikely to have a purpose of benevolent relief. We consider that the ACOSS case is not authority for this proposition propounded by the Commissioner.

- 4.3 The activities of Australian Council of Social Service Inc. (**ACOSS**) were described by Priestly JA in the ACOSS case as follows:<sup>26</sup>

*The association did not give direct relief to poverty, destitution, sickness, helplessness or distress. The association's activities were directed towards providing indirect aid for the relief of poverty or distress by performing advisory, informative, research and advocacy functions. Its activities were directed at changing the circumstances which either create or aggravate poverty or distress. The association did this by providing to its member organisations information and advice on social matters and by providing research assistance in regard to ascertaining factual material relevant to a variety of matters concerned with social welfare work. The association also conducted its own research into similar matters. Some of these were aspects of poverty, income security, unemployment, welfare provisions, and child welfare. The association also conducted policy studies and had an advocacy function aimed at improving or altering the circumstances which result in poverty and distress. In the course of its work the association produced many publications.*

- 4.4 The key passage of Priestly JA's judgment in which he concluded that the Association was not a PBI (with Street CJ and Mahoney JA agreeing) is set out below:<sup>27</sup>

*It seems to me that there might well be some force in this submission as to the proper application of the Perpetual Trustee case but even if that is so, on the facts of this case, it does not assist the appellants. To me, the word "benevolent" in the composite phrase "public benevolent institution" carries with it the idea of benevolence exercised towards persons in need of benevolence, however manifested. Benevolence in this sense seems to me to be 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. Thus it seems to me that "public benevolent institution" includes an institution which in a public way conducts itself benevolently towards those who are recognisably in need of benevolence but excludes an institution, which although concerned, in an abstract sense, with the relief of poverty and distress, manifests that concern by promotion of social welfare in the community generally. On this approach, even if the appellants' submission that public benevolent institutions are not limited to those who give direct relief to poverty and distress is correct, a matter now unnecessary to be decided, the association could not, in my opinion, be brought within even the wider conception of the words.*

- 4.5 In *The Hunger Project Australia v Commissioner of Taxation* [2013] FCA 693, Perram J said the following about the decision of Priestly JA in ACOSS:

*70 In my view, his Honour did not decide whether the requirement of directness was sound or not although he indicated a preference for the view that it was not. Instead, what his Honour did was to formulate a requirement that the objects of the entity's benevolence had to be concrete, that is, they had to be 'those who are recognisably in need of benevolence' and he eschewed the notion that general, but undirected or abstract, benevolence would suffice. He concluded that the Association failed that test.*

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<sup>26</sup> (1985) 16 ATR 394, 398.

<sup>27</sup> (1985) 16 ATR 394, 402.

- 4.6 On appeal in *Commissioner of Taxation v Hunger Project Australia* [2014] FCAFC 69, the Court also said:

*56 Because ACOSS exercised benevolence at large and for the benefit of the community as a whole, his Honour concluded that it was not a public benevolent institution. Accordingly his Honour did not need to decide whether public benevolent institutions are limited to those who give direct relief. That said, his Honour's understanding of the meaning of the expression as articulated does not incorporate or suggest any such limitation.*

- 4.7 We consider that paragraph 27 of the Draft PBI CIS does not accurately reflect the principles that arise from ACOSS. The relevant principles from ACOSS are that:

- (a) the objects of an entity's benevolence must be concrete, that is, they must be those who are recognisable in need of benevolence (Priestly JA at 402 in ACOSS and Perram J in *Hunger Projects* at [70]); and
- (b) general, but undirected or abstract benevolence, is not sufficient (Priestly JA at 402 in ACOSS and Perram J in *Hunger Projects* at [70]).

- 4.8 In the ACOSS case, ACOSS's objects were focussed on the general social welfare of Australians and its advisory, informative, research and advocacy activities were aimed at improving or altering the circumstances which result in poverty and distress for Australians. ACOSS was not accepted as a PBI because its intended beneficiaries were not recognisably in need of benevolence – its objects and activities were directed towards all Australians.

- 4.9 Accordingly, we consider that where an entity undertakes advocacy, awareness-raising and education activities that are focussed on a group of people recognisably in need of benevolence, such activities will not disqualify an entity from being a PBI.

- 4.10 This was recently recognised by the Tribunal members in *Global Citizen*, for example where they said:

*97. An issue that was not directly addressed by the parties in argument is whether the educational/advocacy aspects of the GC Model are 'purposes' or merely 'activities'. The difference between purposes and activities is not always clear. A purpose or object is something that one strives toward or the reason that something exists. The Macquarie Dictionary defines purpose as 'the object for which anything exists or is done, made, used, etc; an intended or desired result; end or aim'. An activity is defined as the state of action; or doing. In terms of a charity, an activity is what the entity actually does day-to-day and over time.*

*98. We are satisfied the evidence of Ms Meredith, Mr Moss and Mr Sheldrick establishes the educational and advocacy activities of GCL are what GCL does to achieve its purpose of relieving poverty. In that sense, we are satisfied GCL has only one purpose - the relief of global poverty - and that it engages in educational and advocacy activities to achieve that purpose. This conclusion is consistent with the reasoning in Word Investments. As we have already explained, that case was concerned with charitable rather than benevolent purposes but it appears to warn against treating activities as purposes. The High Court rejected the characterisation of Word's purpose as 'profit-making' saying:*

*It is therefore necessary to reject the Commissioner's arguments so far as they submitted that Word had a 'commercial object of profit from the conduct of its business' which was 'an end in itself' and was not merely incidental or ancillary to Word's religious purposes. Word endeavoured to make a profit,*

*but only in aid of its charitable purposes. To point to the goal of profit and isolate it as the relevant purpose is to create a false dichotomy between characterisation of an institution as commercial and characterisation of it as charitable.*

...

*123. This uncontested evidence suggests that advocacy, awareness-raising and educational activities are common methods employed by entities tackling the issue of global poverty (and other global issues).*

Paragraph 19 of the Draft PBI CIS

4.11 Paragraph 19 of the Draft PBI CIS states:

*19. For example, in *Hunger Project Australia v Commissioner of Payroll Tax*,<sup>16</sup> a charity raised funds in Australia to send to partner entities in developing countries to relieve hunger in those countries. The Court accepted that the charity had a purpose of relieving poverty of people in developing countries because it was clear that the funds it raised for the purpose of relieving poverty would be used for that purpose, albeit by the partner entity.<sup>17</sup> Similarly, in *Global Citizen v Australian Charities and Not-for-profits Commission (Global Citizen)*,<sup>18</sup> the charity lobbied governments and philanthropists to persuade them to provide financial support to other entities engaged in specific activities to relieve poverty. The charity demonstrated that, following its lobbying activities, governments had committed financial support to activities that relieve poverty. The Administrative Appeals Tribunal accepted that the charity had a purpose of relieving global poverty.<sup>19</sup> The AAT noted that *Global Citizen's* activities 'go beyond mere advocacy for policy change.'<sup>20</sup>*

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<sup>16</sup> *The Hunger Project Australia v Federal Commissioner of Taxation* (2013) 94 ATR 855.

<sup>17</sup> *The Hunger Project Australia v Federal Commissioner of Taxation* (2013) 94 ATR 855 [126] (Perram J).

<sup>18</sup> *Global Citizen Limited v Commissioner of the Australian Charities and Not-for-profits Commission* [2021] AATA 3313 (McCabe DP; O'Connell SM).

<sup>19</sup> *Global Citizen Limited v Commissioner of the Australian Charities and Not-for-profits Commission* [2021] AATA 3313 [98] (McCabe DP; O'Connell SM).

<sup>20</sup> *Global Citizen Limited v Commissioner of the Australian Charities and Not-for-profits Commission* [2021] AATA 3313, [125] (McCabe DP; O'Connell SM).

- 4.12 Firstly, we note that the first case reference in this paragraph incorrectly identifies the Respondent as the Commissioner of Payroll Tax rather than the Commissioner of Taxation.
- 4.13 More substantively, we consider that the Draft PBI CIS should provide more detail about the circumstances in which a PBI can undertake advocacy work drawing from the decision in *Global Citizen*.
- 4.14 As noted in the Draft PBI CIS,<sup>28</sup> the Tribunal members accepted that *Global Citizen Ltd* has a purpose of relieving global poverty, demonstrated by its lobbying work for financial commitments from governments and philanthropists.

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<sup>28</sup> At [19].

4.15 In respect of Global Citizen Ltd's advocacy work directed at non-financial commitments, Global Citizen Ltd argued that '*legislative and policy changes are necessary to address the issues of global poverty and that addressing matters such as aid budgets is the only way to bring about real and substantial change*'.<sup>29</sup>

4.16 The Tribunal members considered that they did not need to decide on whether Global Citizen Ltd's advocacy for changes in government policy would be concrete enough to amount to relieving poverty because Global Citizen Ltd's other activities (i.e. its activities seeking financial commitments from government) was found to be sufficient. The Tribunal members said:

*125. One of the issues raised in the case was whether advocating for changes in government policy (eg, concerning levels of aid or legislative change relating to gender discrimination) would be concrete enough to amount to relieving poverty. We do not need to decide this matter because it is clear the activities of GCL go beyond mere advocacy for policy change. The activities of GCL in seeking specific financial commitments from government and philanthropists to particular projects is sufficient to satisfy this nexus. We should add there is nothing unusual in this for charities: as Rev Tim Costello and Paul Ronalds, CEO of Save the Children (Australia), said in their evidence that advocacy and awareness-raising are becoming increasingly important tools in their efforts to address issues of poverty.*

4.17 The Tribunal member's comments confirm an important point for PBIs, that is, a PBI can undertake advocacy work (e.g. advocating for legislative change or government policy) provided that its other activities are sufficiently concrete to amount to relieving poverty or another need (e.g. direct relief work).

4.18 We submit that this point should be included in the Draft PBI CIS and a further example should be included in the Draft PBI CIS which addresses this point.

4.19 PBIs may undertake a combination of direct relief work and advocacy work where the advocacy work includes advocating for legislative change or government policy to assist in relieving the needs of the persons to whom the PBI provides direct relief. The Draft PBI CIS should state that in such circumstances, the advocacy work of the PBI does not disqualify it from being a PBI.

4.20 Current examples 1, 7 and 10 in the Draft PBI CIS consider scenarios where an organisation does not undertake any direct relief work. We submit that an example should be included where an entity undertakes both direct relief work and advocacy work, such as the following:

PBI Ltd is a public company limited by guarantee. Its constitution states that the principal purpose of PBI Ltd is to provide care for aged, sick and infirm persons. PBI Ltd furthers its purpose by operating aged care facilities. PBI Ltd also advocates to government to introduce legislation to improve aged care quality standards and government subsidies.

PBI Ltd is a PBI because, while the case law is unclear about whether advocating for changes to government policy could be concrete enough to amount to the provision of relief (e.g. see *Global Citizen* at [125]), when advocacy is combined with PBI Ltd's other activities of operating aged care facilities, the advocacy work does not disqualify PBI Ltd from being a PBI.

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<sup>29</sup> See para [124].

## 5. Aged care facilities and retirement villages

- 5.1 Part 9 of the Current PBI CIS provides non-for-profit aged care facilities as an example of organisations that may be PBIs.<sup>30</sup>
- 5.2 Further, the Current PBI CIS contains the following example:

### Example 8

*Montego Aged Care Services Ltd has been operating a 100 bed aged care facility for the last 25 years. The Board of the organisation wishes to embark on a new expansion program to build 50 independent living units (ILUs) on land adjacent to the aged care facility. Occupants of the ILUs have access to lifestyle services in the village hub including a library, general store and social activities, as well as a 24 hour emergency call system for medical emergencies. The ILUs will be designed for independent older people who do not have significant health needs and are able to afford the fees to secure a place. The Board of the organisation sees the development as an opportunity to raise funds which can be used to fund services and renovations to the aged care facility.*

*The ACNC takes the view that an organisation with a purpose of operating ILUs alone is not generally a PBI because the occupants of ILUs are not generally in poverty or distress that arouses the community's compassion.*

*At present Montego Aged Care Services Ltd is likely to be a PBI. It will remain so as long as its main purpose remains the provision of relief to the older persons living in the aged care facility. If its main purpose becomes the provision of ILUs and serving the occupants of ILUs, it will no longer be entitled to PBI status. The ACNC will take into account a range of indicators in determining an organisation's main purpose (see paragraph 7.1 above). In the above scenario, it is likely that Montego Aged Care Services Ltd will remain a PBI because it appears that its main purpose is the provision of relief to the occupants of the aged care facility. Refer to paragraphs 5.3.1 and 7.1 above for more detail.*

- 5.3 These references to aged care facilities have not been included in the Draft PBI CIS.
- 5.4 We consider that removing these references to aged care facilities will create uncertainty in relation to the ACNC's view on aged care facilities in the context of the PBI charity subtype.
- 5.5 There is a significant body of case law which supports the view that organisations which operate aged care facilities are PBIs.
- 5.6 In *Perpetual Trustee*, Evatt J noted that housing and relief of the aged was an example of activities of a PBI:<sup>31</sup>

*There are, however, very many bodies which readily answer the description of "benevolent institutions." The Benevolent Society of New South Wales provides food and clothing for those in poverty and distress, the Scarba Home takes care of deserted babies, many organizations of Church and State provide for the maintenance, **housing and relief of the aged** poor, orphans and those suffering from bodily or mental disease. A characteristic of most of these organizations is the absence of any charge for services or the fixing of a purely nominal charge.*

(Our emphasis).

<sup>30</sup> Page 17.

<sup>31</sup> (1931) 45 CLR 224, 235-236.

- 5.7 In *Lemm v Federal Commissioner of Taxation*,<sup>32</sup> the High Court found that a home for aged women was a PBI. Further, in *Re Income Tax Acts No. 1*,<sup>33</sup> Lowe J stated that the Commissioner properly conceded that an institution which provided housing to aged Freemasons and their wives was a 'benevolent asylum'.<sup>34</sup>
- 5.8 Accordingly, we submit that the Draft PBI CIS should include an example of an aged care facility being regarded as a PBI such as the example we propose at paragraph 4.20 above.

## 6. Do you think there are any issues with withdrawing Commissioner's Interpretation Statement: The Hunger Project Case?

- 6.1 We consider that the Commissioner's Interpretation Statement: The Hunger Project Case (**Hunger Project CIS**) should not be withdrawn or if it is withdrawn, that the Draft PBI CIS should contain the detail that was included in the Hunger Project CIS.
- 6.2 The Hunger Project CIS provides valuable insight into the ACNC's interpretation on various matters which arose in *The Hunger Project Australia v Commissioner of Taxation* [2013] FCA 693 and *Commissioner of Taxation v Hunger Project Australia* [2014] FCAFC 69 (together the **Hunger Project decisions**) that does not appear in the Draft PBI CIS.
- 6.3 In particular:
- (a) at paragraphs 3.3 and 3.4, the Hunger Project CIS explains the correct *ratio decidendi* from *Australian Council of Social Service Inc v Commissioner of Pay-roll Tax*<sup>35</sup> (**ACOSS**) which was discussed in the *Hunger Project* decisions. This explanation is not included in the Draft PBI CIS and is useful in applying the principles from **ACOSS**;
  - (b) at paragraph 6.3, the Hunger Project CIS explains that the *Hunger Project* decisions establish that fundraising is sufficient to constitute 'activity' within the meaning of 'institution'. This explanation is not included in the Draft PBI CIS and is relevant in determining whether an entity is an institution;
  - (c) paragraph 6.5 of the Hunger Project CIS explains that a PBI is an institution that is 'organised, or conducted for, or promoting the relief of poverty or distress'. As discussed at paragraphs 1.3 to 1.10 above, this is the correct test to determining whether an entity is a PBI rather than the main purpose test contained in the Draft CIS PBI; and
  - (d) paragraph 6.5.3 of the Hunger Project CIS explains that the *Hunger Project* decisions found that 'there are a number of ways in which an institution may be organised, or conducted for, or promoting the relief of poverty or distress under a collaborative relationship or common purpose'. This connects with paragraph 5.6.4 of the Current PBI CIS which states that the ACNC takes the view that a PBI may provide relief via, or in coordination with, related or associated entities that are not PBIs for the fulfilment of benevolent purposes only. These statements are not contained within the Draft CIS PBI and provide important information about how PBIs are permitted to carry out their activities in collaboration with other entities.

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<sup>32</sup> (1942) 66 CLR 399.

<sup>33</sup> [1930] VLR 211.

<sup>34</sup> [1930] VLR 211, 220.

<sup>35</sup> (1985) 16 ATR 394.

**7. The Commissioner's Interpretation Statements include an introductory statement. The Statement has been revised in the updated versions. Which introductory statement do you consider more appropriately reflects the position of Commissioner's Interpretation Statements as guidance documents?**

7.1 There are two aspects of the current introductory statement which we consider should be included in the revised version.

7.2 First, the current introductory statement provides:

*If the law or an Interpretation Statement changes, we will apply the new position from the date of the change, not retrospectively in a way that could disadvantage a charity.*

7.3 This statement (or a similar statement) is not contained in the proposed revised introductory statement.

7.4 Charities need clarity about when the ACNC will seek to apply the positions that it sets out in its interpretation statements. The ACNC should note in its Interpretation Statements the date from which the ACNC will apply its interpretations set out in its Interpretation Statements in the same way that the Australian Taxation Office includes a date of effect for its public rulings.

7.5 The ACNC should not seek to apply changes to the law or its interpretation statements retrospectively. This would interfere with the work of charities that have made every effort to comply with the prevailing law and ACNC approach.

7.6 If the ACNC were to apply changes to its interpretation statements retrospectively, such a practice would be contrary to the objects of the *Australian Charities and Not-for-profits Commission Act 2012* (Cth):

- (a) to support and sustain a robust, vibrant, independent and innovative Australian not-for-profit sector; and
- (b) to promote the reduction of unnecessary regulatory obligations on the Australian not-for-profit sector.

7.7 Second, the current introductory statement provides:

*While we do not have the power to produce binding rulings, we will ensure that organisations that rely on the Interpretation Statements are treated fairly, consistent with our objects and regulatory approach.*

7.8 This statement (or a similar statement) is not contained in the proposed revised introductory statement.

7.9 We submit that it is important that the ACNC makes it clear in the introductory statement that if a charity relies on the interpretation statements the ACNC will not take compliance action against the charity inconsistent with the interpretation statement. A statement to this effect would be consistent with paragraph 40 of the ACNC Regulatory Approach Statement, which states that *the ACNC makes decisions according to published policies and procedures. This ensures consistency so that charities and the public understand what to expect.*