

## CLAANZ PBI seminar – 25 October 2023

### Bridgid Cowling's speaking notes

#### Overall reflections

- Commissioner's Interpretation Statements are important tools for the sector.
- This re-drafting provides guidance that is clear and accessible with a number of welcome developments. In particular, as charities work to address unprecedented need on a national and global scale it is positive that the Commissioner has again committed, in this CIS, to not applying past judicial statements mechanically and recognises that how PBIs provide relief will change over time.
- Still some missed opportunities to provide contemporary guidance and some areas where I think the CIS could be improved because I anticipate confusion.

#### Shout outs/Welcomed developments

- First – I welcome that the CIS no longer suggests that it is binding on ACNC officers. This new framing removes unnecessary confusion because the Commissioner cannot, yet, issue binding rulings.
- Second – no more reference to a “main purpose of benevolent relief” or “main purpose of providing benevolent relief”. That phrase, found in earlier versions, caused a lot of unnecessary confusion. It encouraged a focus on whether a purpose was main or sole, and on whether the PBI had to provide relief even though there is no longer a directness requirement. To the ACNC's credit, the confusion that this caused is acknowledged at point 1 in the compendium.
- Third – the removal of the clear mechanisms test. It's difficult to predict what this will mean for the sector because it remains to be seen how the sufficiency of connection test, if it survives the appeal of the Equality Australia decision, will replace the old clear mechanisms test. I hope we see a move away from a focus on activities and outcomes and towards a focus on what a charity is organised, conducted or promoted **for**, true to the High Court formulation – as is picked up elsewhere in the CIS.
- Final – the compendium. The compendium provides transparency and accountability.

#### Areas for some reform

- There are remaining areas where I think there will be challenges for groups wanting to work out if the ACNC will treat them as PBIs. I have picked three key areas. Murray will speak about others.

- In relation to the explanation of public.

- a. The CIS retains the reference to a public institution not being controlled by people who are related to each-other (at [16.c]).

The reference given is *Maughan's case* and in my view that principle is not found in that case. A charity that has directors that are related to each-other can be public in the requisite sense.

- b. Secondly, paragraph 13 suggests that a PBI cannot choose who to help based on criteria that are unrelated to the need it aims to relieve and its capacity to provide relief.

Reference is to *Re Income Tax Acts No. 1*. The legal proposition in that case is not that a PBI cannot consider characteristics unrelated to the need to be met, but rather, that a PBI cannot be organised for the relief of need of an exclusive member-based body.

This is picked up well by Example 9 at the end of the CIS gives.

You can limit the focus of the need you seek to address. This is all confirmed in the examples given in paragraph [19] of the CIS.

Paragraph [13] could be clarified.

- Advocacy - paragraphs [64] – [67]

The CIS says: “The ACNC accepts that a PBI can, in some circumstances engage in some advocacy” [65]. The clear implication is that the ACNC does not accept that a PBI can engage in “a lot of” or “primarily” advocacy. Which is not correct. For example, advocacy was the principal activity of Global Citizen.

Indeed, while Equality Australia is juxtaposed against Global citizen as showing where advocacy activities are too far removed for a PBI, at [88] the majority actually said:

An entity that is organised to advocate for reform and change is (at least in this instance) too far removed from the traditional concepts of benevolence, even allowing for the evolution that has occurred in our understanding of that term.

To me this leaves open that there may be instances where an organisation that is organised to advocate for reform and change might **not** be too far removed from traditional concepts of benevolence. I think the ACNC ought not close that off in the CIS - as is perhaps done by example 7 at the end of the CIS.

In terms of implications for the sector these paragraphs perpetuate the idea that there might be qualifying and disqualifying activities which is simply not the case. Again, to quote the tribunal in EA “the concept [of PBI] certainly does not lend itself to a reductionist analysis in which the decision-maker treats a particular activity as qualifying or disqualifying.” Perhaps a reference to this excerpt from EA in the CIS would be helpful.

- Finally, I think the CIS has missed an opportunity in relation to commercial activities and paragraph [59] may well cause confusion for the sector.

Paragraph [59] says “A PBI may conduct commercial activities if they are merely a means by which it raises funds to be directed towards benevolent relief.”

However, a PBI can engage in commercial activities beyond fundraising. A classic example is work integrated social enterprises which seek to address disadvantage through providing job opportunities to people with disabilities, or those unable to access the mainstream workforce. A PBI can engage in commercial activities for reasons other than to raise funds. I am confident the ACNC and the Commissioner accept this to be true.

The absence of this acknowledgement in the CIS may cause confusion and concern unnecessarily.