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Philanthropy Enquiry
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Your Ref

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Dear Commissioners,

Submission in relation to Future Foundations for Giving Draft Report

1 Arnold Bloch Leibler welcomes the opportunity to make a submission in relation to the Productivity Commission's (**Commission**) Future Foundations for Giving Draft Report (**Draft Report**).

2 ABL has acted for charities and not-for-profit causes since the firm's inception 70 years ago. Our work with charities spans all practice areas, including tax, wealth creation and management, commercial and contractual negotiations, employment, competition law, governance, litigation, privacy, IP, workplace advisory and property. The firm acts for philanthropic families and foundations, not-for-profits and charities, working to improve civil society. In particular, we act for a number of schools across Australia, primarily in Victoria and New South Wales and predominantly independent schools, and in doing so have established numerous school building funds. We also act for a number of religious and education organisations.

3 We are regularly instructed to set up charitable entities, both for the grant makers and the grant seekers, particularly for Indigenous, environmental and general health, aid, harm prevention and cultural causes, and advise on their ongoing governance responsibilities. As such, we have a deep understanding of the needs of this sector.

4 This submission addresses:

(a) draft **Recommendation 6.1** and in particular the Commission's recommendation that DGR be extended to most charitable purposes but not to primary and secondary education or religious charities, such that the DGR categories of School Building Funds (item 2.1.10 of section 30-25 of the *Income Tax Assessment Act 1997* (Cth) (**ITAA 97**) and public funds for religious instruction (items 2.1.8, 2.1.9 or section 30-25 ITAA 97) would cease to exist. It is unclear whether the Commission's recommendation would extend to removing items 2.1.9A (ethics instruction), 2.1.11 (rural school hostels), or 2.1.13 (scholarship funds) of section 30-45 ITAA 97; however, it appears likely that they would also be covered by the recommendation; and

(b) draft **Recommendation 6.2**.

5 We have referred to currently existing DGR categories described in paragraph 4(a), collectively in this submission as 'education funds' or 'school building funds and education funds'.

Recommendation 6.1

6 The Commission's rationale for recommending removal of DGR status for education funds and not extending it in relation to primary and secondary education and religion appears focussed on (a) questions of equity and, (b) risk of private benefit.

Equity

7 It is not appropriate for us to make policy submissions on government funding of non-government education. These are obviously policy considerations beyond the application of tax law and legal advice in relation to it.

8 However, with specific reference to school building funds, the Commission indicates at pages 18 to 19 of the Draft Report that a quarter of school building funds are operated by government entities such as government schools. There is no reference for this data, but it does suggest that a significant number of government schools rely on school building funds in addition to any government funding they might receive. In other words, these funds are not only used and relied upon by affluent independent schools. They have much broader application and benefit than that. In addition, if tax deductibility is removed from school building funds, to be replaced by direct government funding, this may well result in an increase in government funding required for independent schools. The Draft Report does not, in our respectful view, adequately support its assertion that if there was no longer a DGR category for school building funds, the government would necessarily increase funding for less affluent government and non-government schools sufficient to supplement the loss in school building fund revenue. Such a result would, of course, depend on the policy positions taken by, and the priorities of, the relevant Government at the relevant time, which vagaries of course put the assertion in the realm of mere speculation.

9 In relation to the proposal within draft recommendation 6.1 that some charities which advance religion or education should be able to obtain DGR endorsement for their activities that have an equity objective, our view is that this is overly complex and counter to the goal of achieving a more simplified and streamlined DGR system. Pursuing this recommendation would encourage the creation of separate entities to undertake some but not all activities of an original charity, creating administrative burden and cost within the system. In addition, the draft recommendations necessitate a focus on activities rather than purpose, contrary to the fundamentals of charity law. This is addressed further at paragraph 22 and 23 below.

Private benefit

10 The Draft Report includes a three step process to determine whether a class of charitable activity should be within the DGR system. The third step is to consider the likelihood of being able to convert a tax-deductible donation into private benefit for the donor. In our view, based on our experience, the contention in the Draft Report that there is a greater risk of converting tax deductible donation to private benefit in primary and secondary education and religious charities is entirely without foundation.

11 Respectfully, the two examples discussed on pages 183 to 184 of the Draft Report are abstract, vague, unhelpful and in part inconsistent with the law. The Commission first contemplates that where a charity both charges fees and accepts tax deductible donations a donor could theoretically make donations with the hope that this would keep their fees lower. However, contrary to the Commission's speculation here, it is explicitly prohibited in Taxation Ruling TR 2005/13 (**the Gift Ruling**) for a tax deductible donation

to be a proxy for fees. We respectfully direct the Commission to example 28 of the Gift Ruling:

> [107]. In McPhail, the payment to a school building fund (a DGR) was not accepted as a voluntary payment because 'it was a payment made pursuant to a contract between the taxpayer and the School Council' in relation to school fees.[23] Under the arrangement, the parents qualified for lower school fees for their children should they take up the school's invitation to make payments to the building fund. The arrangement therefore involved a choice between full school fees and lower fees plus a 'gift' to the building fund. The High Court held there was no tax deductible gift.

12 The Commission further contemplates a situation where an exclusive members' club that only benefits its members might be DGR endorsed and, in that case, members receive private benefits from tax deductible donations they might make to the private club. We are completely unaware of any private clubs that have DGR status and only benefit their members, and the Commission does not provide any examples. In our view the risk of material private benefit in a private member club situation would be dealt with entirely adequately by the Gift Ruling.

13 To be tax deductible, a gift must have the following characteristics and features:

(a) there is a transfer of the beneficial interest in property;

(b) the transfer is made voluntarily;

(c) the transfer arises by way of benefaction; and

(d) no material benefit or advantage is received by the giver by way of return.[1]

14 It has long been accepted that donations to school buildings funds, where the benefit of the donation is obtained by the school and the entire student body, meets the definition of a gift and provides no impermissible private benefit to the donor. Further, an independent school is not a private members club that only benefits members. To be registered as a charity, it must be of public benefit.

15 With specific reference to school building funds, which appear to be of most concern to the Commission, there is also a practical perspective that is missing from the Draft Report. Practically, the only personal benefit a donor parent at a school is likely to obtain from a donation to a school building fund is one of legacy given the extended period of time involved from the commencement of a fundraising campaign to the completion of a new building project. It is theoretically possible that a youngest child may benefit if a donation is made when an eldest child is at a particular school, but our experience is that this would be the exception rather than the rule. School building fund expenditure and the benefits from that expenditure are usually reflected in improved facilities across of the board over an extended period of time, and in our experience, rarely benefits donor parents or their children, directly.

16 Anecdotally, it is commonly alumni and family of alumni who are the primary targets of, and donors to, fundraising campaigns. Donations from parents are not the only funds received by school building funds. Broader community organisations and other individuals form a significant part of the donor base. Donations to school building funds are made, in our experience, because of a personal connection with the recipient, a belief in the education provided at the school and an alignment of values. This is consistent with the findings in the Draft Report as to overall motivations for giving at Figure 3.13 on page 119. There is no reference in Figure 3.13 to donations being motivated by private benefit. Further, the Commission has not provided any evidence

[1] Gift Fund ruling [13].

to support the assertion that in the context of education there is a material private benefit risk.

17 We also strongly refute the Commission's conclusion on page 188 that "direct solicitation for donations from the people who are also charged fees is strongly indicative that the main beneficiaries from an organisation's service are likely to be the individual recipients of the service and that any broader community-wide benefits are likely to be incidental." Again, this is directly contradictory to the legal rules for operation of a gift fund. The gift fund rules, when properly applied, prevent any material benefit being obtained from a donor. We refer the Commission to Gift Ruling Example 26:

> 102. A private school's half-yearly fee accounts include an amount described as a 'donation to the school building fund' (a DGR). It is included in the same way as all other amounts on the account, there is no other indication that its payment is not required, and it is included in the total amount shown as due and payable. The amount shown as a 'donation' is not a voluntary payment; it is not a gift. If on the other hand the account shows the amount as being optional, and it is not included in the total amount shown as due and payable, it is considered a voluntary payment and in the absence of contrary features, regarded as a gift.

18 We are again unable to see any clear link between impermissible private benefit and tax deductibility of funds for the provision of religious instruction in schools – an education fund that would no longer exist under the Commission's recommendations. The Commission provides no evidence for this assertion and we respectfully suggest it be rejected. A donor to such a fund is likely to be connected to a particular religion, believe in it and value the provision of religious instruction in schools but that is hardly to be equated with impermissible private benefit. Indeed, many donors choose to donate to organisations and causes to which they are connected. Further, funds for religious instruction in government schools provide funding to government schools across the country and are by no means expended only in the area from which the donations are received. To suggest an impermissible private benefit in this situation is akin to saying a donor to a cancer research charity who has cancer and receives treatment of a kind developed by that research institution is at risk of receiving an impermissible private benefit from their donation. It is not an accurate application of the concept of impermissible private benefit.

19 More broadly the Draft Report recommends against extending DGR endorsement to charities that advance religion, in relation to their activities that do not have an equity objective. The Commission states at page 192 that:

> There is also a material risk of a nexus between donors to religious organisations and beneficiaries. Donations to a religious institution for purely religious activities (as opposed to other services that religious institutions may provide, such as relief from hardship) primarily benefit the people who regularly participate in the activities of the institution.

20 We respectfully disagree with this conclusion that there is a material risk in the context of religious charities that does not exist in relation to other charities.

21 The concept of private benefit is a charity law concept rooted in centuries of common law. We refute the contention of the Commission, that there is inherent private benefit in school building funds and education funds and more broadly in charities that advance primary and secondary education and religion.

Activities v purpose

22 In Chapter 6 of the Draft Report, the focus is very much on whether a class of charitable *activity* should receive DGR status. Activities in and of themselves are not charitable or otherwise. Rather, it is the purpose of an activity that is charitable or not, and activities are only relevant to the question of whether a charity operates for charitable

purpose.[2] We recognise that there are existing categories of DGR that determine eligibility by reference to activities (e.g. health promotion charities and harm prevention charities); however, charity registration is a pre-requisite for endorsement in these categories. Practically, this means the relevant activities have always been required to be carried out in furtherance of exclusively charitable purposes. It would be erroneous and overly simplistic to classify such activities as 'charitable' independent of such purposes.

23 We strongly recommend against any overhaul of DGR endorsement that is focussed on categorising the activities of charities. That would require a departure from the fundamental basis of charity law that purpose is key, not activities. Such a misalignment between charity law and the revenue law would create, rather than diminish, complexity.

Recommendation 6.2

24 Draft recommendation 6.2 is, in summary:

(a) to require the ACNC to register all charities with all applicable subtypes; and

(b) to develop a legislative definition of what is a public benevolent institution (**PBI**).

25 We are opposed to both recommendations.

26 Requiring the ACNC to register all charities with all applicable subtypes creates unnecessary administrative burden. While it is typically clear that a charity can be registered with a charitable subtype, it is often not clear whether it could also meet the definition of others. Charity law is nuanced. We see no value in adding the burden of requiring a charity to completely delineate which boxes it could potentially fit within. This will require additional ACNC resources to decide increasingly more difficult eligibility questions, which are unnecessary.

27 We also oppose the legislation of the definition of PBI. There is a clear High Court articulated definition. The ACNC has recently moved away from its confusing short hand definition of an organisation that has a "main purpose of benevolent relief" to adopt the High Court articulation of an institution that is organised, conducted or promoted for the relief of poverty, sickness, destitution, helplessness, suffering, misfortune, disability or distress.[3] This definition was articulated in 1931 and has been considered by the Federal Court and the Administrative Appeals Tribunal. It has also been considered by numerous state Supreme Courts as well as lower courts and tribunals. There is a substantive body of case law to assist in applying the High Court articulation of what is a PBI.

28 The Full Federal Court has clearly expressed that "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."[4] We see no need to legislate a definition in this context.

29 In addition, legislating a definition is more likely than not to create inconsistencies between common law concepts applied at state level and a legislated definition applied at the federal level. This has been the outcome of legislating a definition of charity at the federal level while the states continue to apply the common law. We strongly caution against creating that disharmony in relation to the concept of a public benevolent institution.

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[2] *Commissioner of Taxation v Word Investments* [2008] HCA 55 at [26].
[3] See Commissioners Interpretation Statement: Public Benevolent Institutions published on 31 August 2023 < https://www.acnc.gov.au/tools/guidance/commissioners-interpretation-statements/commissioners-interpretation-statement-public-benevolent-institutions> (accessed February 2024) at [1].
[4] *Commissioner of Taxation v Hunger Project Australia* (2014) 221 FCR 302, [38].

If you would like to discuss this submission further please contact Bridgid Cowling, Joey Borensztajn or Peter Seidel. We consent to this submission being published on the Treasury website.

Yours sincerely
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