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CHARITIES ALERT
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OPTIONS PAPER ON FUTURE REGULATION OF CHARITIES

The Federal Government has released an Options Paper (**paper**) with options for replacement arrangements following the abolition of the ACNC. Click here to access the paper.

The paper confirms what has been widely assumed, that key ACNC regulatory functions will return to the ATO and ASIC. The paper will be considered at consultation sessions with the charity sector being conducted in July and August. We are participating in one of the Sydney sessions, so if any clients have any views on issues in the paper or on regulation of the sector generally, please feel free let us know.

The paper considers options under the below four headings.

Proposed new reporting arrangements

The paper recognises that some level of accountability is appropriate for charities that receive government funding and/or tax concessions, and proposes a publicly accessible website containing:

- names of responsible persons;
- details of all funding received from government (Commonwealth, state and local). This is an enlargement of what had to be disclosed under the ACNC regime, and on its face will require disclosure of land tax, water and council rates exemptions/concessions, in addition to Commonwealth tax exemptions and concessions; and
- financial reports, although exemptions currently applying to small charities and basic religious charities would continue.

For charities that are companies limited by guarantee, the reporting obligations to ASIC that were switched off under the ACNC will be reinstated, including details of directors and secretaries and registered office. Consideration will also be given to exempting reporting where there is already reporting to another Commonwealth entity.

Determining charitable status

This will be returned to the ATO, with objections to ATO determinations being considered either within a separate area in the ATO or by an independent panel of external experts, in either case with a final avenue of appeal to the Administrative Appeals Tribunal.

Proportionate compliance framework

Current regulatory powers for enforcement and removing responsible persons, would be retained by the ATO and the Australian Prudential Regulation Authority. Powers that did not previously exist in relation to small unincorporated charities will be removed. Corporations Act provisions on

directors duties and obligations of charities that have been switched off will be reinstated. The government will need to be particularly careful about managing the transition back to ASIC regulation on these issues – we expect many charities have not come to grips with the current ACNC governance requirements, and there will need to be clarity on what rules applied at what times, particularly in the areas of duties of responsible persons/directors.

Transitional arrangements

The government is planning on legislation for the new arrangements being introduced later this year, although charities will have until 1 July 2015 to make their websites compliant.

Until we see the detail of what is finally proposed, it's difficult to make a judgement about how much less red tape for charities will be achieved post ACNC. On the face of it, most of what is now regulated, reported or disclosed will continue but without ACNC involvement. The transition out of ACNC is likely to be as confusing and irritating as its introduction, and no progress at all will have been made on duplications inherent in separate state and territory regulation of incorporated associations and of charitable fundraising.

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UPDATE ON THE HUNGER PROJECT – FULL FEDERAL COURT UPHOLDS PERRAM J'S DECISION IN THE FEDERAL COURT

On 13 June 2014, the Full Federal Court of Australia in *Commissioner of Taxation v The Hunger Project Australia* [2014] FCAFC 69 upheld Perram J's decision in the Federal Court. The Full Federal Court found that it was open to Perram J to conclude that Hunger Project Australia was a public benevolent institution (**PBI**), and dismissed the Commissioner's appeal.

For the facts of the case, and our analysis of Perram J's decision, click here for our article in the September 2013 edition of the Charities Alert.

Commissioner's arguments

In the appeal, the Commissioner argued:

- The ordinary meaning of 'public benevolent institution' is an institution that gives or provides relief **directly** to those in need.
- The context supports a construction of the expression which requires the direct provision of relief.
- A number of authorities support the Commissioner's contention in relation to the requirement of the direct provision of aid.
- Perram J erred in relying on *Federal Court Commissioner of Taxation v Word Investments* (2008) 236 CLR 204.

The decision

In relation to each of these arguments, the Full Federal Court held:

- The Commissioner's restrictive interpretation of the ordinary meaning of 'public benevolent institution' could not be supported by the authorities relied upon by the Commissioner.

- The Commissioner's submissions based on the statutory context were unpersuasive and misconceived.
- The authorities did not support the Commissioner's contention in relation to the requirement of direct provision of aid.
- Perram J did not err in relying on the Word Investments case.

The Full Federal Court held that the ordinary meaning of a PBI includes an institution which is organised, or conducted for, or promotes the relief of poverty or distress. An entity can still be a PBI if it raises funds for provision to associated entities for benevolent relief, even if the entity does not itself directly provide the relief.

Consequences of the decision

The decision has potentially wide ranging consequences, possibly expanding significantly the meaning of PBI (at least from what the Commissioner considered to be the meaning).

It seems to us that in the context of PBIs established as groups of companies limited by guarantee, the result is clearly appropriate.

Under the Commissioner's view, if one company provides health care services and also owns property to use in its activities and raises funds, it would be a PBI.

However, if that company restructured so that there were a holding company, separate operating companies for each facility, a separate land owning company and a separate fundraising company, the Commissioner's view would be that none of the holding, land owning or fundraising companies could be PBIs. The effect would be, for example, that the FBT exemption for staff employed by these companies would not apply, and the group could not seek donations to extend an existing health care facility as it would be owned by the land owning company.

We consider that such a view would be incorrect in law, and the Hunger Project decision shows that view is not correct.

We also consider that if the Commissioner eventually loses on any appeal to the High Court, the government should not amend the law to provide that a PBI must provide aid directly to those in need. At the very least, it should cater for entities that work together, even if some of the entities do not provide aid directly, and even if they are not part of a formal corporate group.

Also, the Full Federal Court held that it is important that to be a PBI, the institution must provide the relief through related or associated entities, even if it did not itself directly provide the relief.

For example, if an entity is set up simply to provide financial support to associated entities providing direct support, then it would seem to be a PBI based on the Full Federal Court decision.

The ATO's and the ACNC's responses to the decision

In the ATO's Non-profit News Service No. 412, the ATO stated that they are currently considering the implications of the Full Federal Court decision and will issue further advice on this matter.

We understand that the ATO is not intending to file any special leave application to appeal the Full Federal Court decision to the High Court.

The Australian Charities and Not-for-profits Commission (**ACNC**) stated in their Interpretation Statement (CIS 2013/01) that they will update their Interpretation Statement.

Click here for the ACNC's Interpretation Statement.

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UPDATE ON CHANGES TO FRINGE BENEFITS TAX CAPS FOR EXEMPTION AND REBATE

The Government recently amended the law to increase the annual fringe benefits tax (**FBT**) caps for employees of public benevolent institutions (**PBIs**) and health promotion charities, public and not-for-profit hospitals, public ambulance services and certain other tax exempt charities. These changes were introduced by the *Tax Laws Amendment (Temporary Budget Repair Levy) Bill 2014* and the related Bills. These Bills were passed by both Houses without amendments and received assent on 25 June 2014.

The effect of the change is that for PBIs and health promotion charities, the FBT exemption for benefits will increase to a grossed-up annual cap of $31,177 per employee (currently $30,000). For public and not-for-profit hospitals and public ambulance services, the FBT exemption for benefits will increase to a grossed-up annual cap of $17,667 per employee (currently $17,000).

The increase to the FBT caps applies from 1 April 2015 until 31 March 2017, and is to protect the cash value of the benefits received by employees of these entities, as the government has increased the FBT rate from 47% to 49% from 1 April 2015 until 31 March 2017.

Also, the FBT rebate rate will be aligned with the FBT rate from 1 April 2015. This means that for certain other tax-exempt entities, such as charitable institutions that are currently entitled to a 48% rebate of the FBT otherwise payable up to a grossed up cap of $30,000, the rebate rate will increase to 49% from 1 April 2015 until 31 March 2017, and then fall to 47% (not 48%) from 1 April 2017. The cap will be increased from $30,000 to $31,177 from 1 April 2015 until 31 March 2017.

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