

7 April 2020

Our ref: WD NFP

**URGENT**

Senator the Hon Zed Seselja  
Assistant Minister for Finance, Charities and Electoral Matters  
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Parliament House  
Canberra ACT 2600

By post and email: [REDACTED]

**Copy to:**

Dr Gary Johns (Commissioner) and Ms Anna Longley (Assistant Commissioner  
General Counsel), Australian Charities and Not for Profits Commission -  
[REDACTED]

Mr Tony Stuart, Chair, ACNC Advisory Board (by post)

Ms Jennifer Moltisanti (Assistant Commissioner, Not for Profit Centre, Private Wealth)  
Australian Taxation Office - [REDACTED]

Ms Jacky Rowbotham (Principal Advisor, Individuals and Indirect Tax Division) ATO -  
[REDACTED]

Mr David Pullen [REDACTED]

Dear Assistant Minister

**JobKeeper Payment – eligibility of charities and not-for-profits**

I write in relation to the recent announcements of the Government in relation to the JobKeeper Payment assistance package for employees during the time of the COVID-19 pandemic, particularly with respect to the eligibility of charities and not-for-profits.

The Queensland Law Society (**QLS**) is the peak professional body for the State's legal practitioners. We represent and promote over 13,000 legal professionals, increase community understanding of the law and assist the public by advising government on improvements to laws affecting Queenslanders.

The QLS Not for Profit Law Committee has substantial expertise in working with charities and not for profits. The Committee has identified concerns about the eligibility of charities and not for profits for the JobKeeper Payment in light of the particular role these organisations have in Australia and the way in which they operate financially.

### **The need for a different approach for charities and not-for-profits**

QLS welcomes the announcement on 5 April 2020 that charities registered with the Australian Charities and Not for Profits Commission will be subject to a 15% turnover decline test rather than a 30% reduction, and the removal of the upper turnover limit before being eligible for the JobKeeper Payment.<sup>1</sup>

However, we are concerned that there are still risks that charities will be unintentionally penalised by the “decline in turnover” test.

QLS considers that the eligibility of charities and many not for profits should not be assessed in the same way as business and need a different approach for many reasons, including:

- A significant proportion of charity income consists of funds reserved or allocated for special purposes. Charity funds are not “liquid” like the profits of a business that can be quickly redirected.
- Many charities have been given large reserved funds for either the drought or bushfires this year. The influx of significant funds might disqualify those organisations from eligibility. This disqualification would be compounded by the restriction that these funds can only be used for the purpose for which they were given, even though the organisation might otherwise be struggling financially due to the pandemic. There should be a carve-out for revenue received as a result of this fund raising.
- In a time of economic crisis, EOFY gift appeals will likely plummet this year as will probably Christmas appeals. Many fundraising events were cancelled during the bushfires and more have already (or will be cancelled) now with the present crisis.
- Some large charities have merged and amalgamated for efficiency reasons of a combined back office and are really a coalition of small charities. These organisations, do not have the large reserves of large \$1b companies. Further, any reserves are usually tied up in illiquid land and property assets and charities do not have access to the equity market. The charitable registration and tax concession conditions of charities also prevent over accumulating.
- For large scale charities that undertake a range of activities across multiple industries in pursuit of their charitable purpose, they are experiencing varied and inconsistent impacts of the current crisis and flow on effects to parts of their workforce. Even where in one part of a business, due to its industry revenue exposure, there is a likelihood that the loss in revenue might be closer to 100% for that part of the business, the overarching organisation may still not meet the modified percentage loss when measured across the whole of the portfolio. Further, as against comparable ‘for profit’ entities, there is unlikely to be ‘profits’ from other parts of the enterprise capable of cross subsidising the retention of workers given the constraints and commitments to charitable purpose. As a result, without additional considerations, there is risk that further ‘stand downs’ cannot be avoided in this scenario.

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<sup>1</sup> <https://ministers.treasury.gov.au/ministers/josh-frydenberg-2018/media-releases/making-it-easier-charities-access-jobkeeper>



It is understood that the legislation is likely to include a discretion on the part of the Tax Commissioner to consider additional information that the business can provide to establish that it has been significantly affected by the impacts of the Coronavirus.

The website indicates that this discretion might be applied where, for example, a business was not in operation a year earlier, or where its turnover a year earlier was not representative of their usual or average turnover, (e.g. because there was a large interim acquisition, it was newly established, or the turnover is typically highly variable). The Tax Commissioner will also have discretion to set out alternative tests that would establish eligibility in specific circumstances (e.g. eligibility may be established as soon as a business has ceased or significantly curtailed its operations).<sup>2</sup>

This discretion might provide some assistance for charities and not for profits, but QLS suggest that a more tailored and bespoke approach is required at the outset, so that not for profit organisations are not automatically required to seek special exemptions or discretionary relief to access this payment, in appropriate cases.

### **Recommendations for assessing eligibility of charities and not for profits**

QLS makes the following recommendations for a different approach to charities and not-for-profits:

1. Turnover could be measured at a usual business unit / division level, not just at an ABN level and certainly not at an entity level. Distinguishing through separate ABNs will work for some entities but not all.

It is common that charities will operate various business units / divisions under a single ABN and there could also be multiple ABNs under a single entity.

Different business units / divisions could be affected quite differently in terms of turnover at this time and staff may be employed under one ABN (often for historical reasons) but seconded to a different business unit / division. The 'employer' test should be what business unit / division the staff ordinarily or mainly work in rather than where reporting may currently occur for BAS purposes.

The ability of affected business units / divisions to access JobKeeper should be linked to downward turnover effect in the business unit / division.

The following 'case studies' are illustrative of live examples drawn from our member's experience where charities are actively having regard to accessibility of these measures in determining whether further 'stand downs' will be necessary.

**Case Study 1** – in the case of a charitable independent school, in addition to the usual primary and secondary education program that it operates, it also operates a before and after school care program and a substantive sports program. As a result of the current 'distancing' requirements with education programs substantially being run online, the staff associated with both the before and after school programs and the sports program, being substantially funded from other revenue streams, have no work to do and redeployment is not possible. Given these activities are only a small part of

<sup>2</sup> <https://www.business.gov.au/Risk-management/Emergency-management/Coronavirus-information-and-support-for-business/JobKeeper-payment>



## JobKeeper Payment – eligibility of charities and not-for-profits

the overall operations, the 15% reduction in revenue, if calculated across the whole entity, will not be met. In this example, potentially approximately 20 staff are at risk of facing stand down.

**Case Study 2** - a substantial charity undertakes services that include residential aged care; home and community care; social and affordable housing services; support services for children and young people at risk; and childcare services. Within the portfolio of activities, the childcare activities (long daycare, preschools, outside school hours care and occasional care) are substantially depleted as a result of the current 'distancing' requirements. Attendances currently have fallen between 50% and 80% of usual attendance. However the overall revenue of this area of activity (when fully functional) is less than 10% of the enterprise revenue and so the 15% reduction in revenue overall will not be met. There are approximately 800 staff at risk of facing stand down.

In both of these examples, if the 15% reduction of revenue were applied at the business unit / division level, then prospective stand downs will be avoided.

2. When assessing a charity's or not-for-profit's turnover (being the business unit / division of the charity or not-for-profit), a similar approach could be taken to the current approach in section 50.75 of the *Income Tax Assessment Act 1997* (Cth) by disregarding certain amounts. This would deal with the problem raised earlier about bushfire relief donations.

In determining whether an entity incurs expenditure and pursues objectives principally in Australia, section 50-75 disregards any distributions that the entity makes out of amounts (disregarded amounts) received:

- 'as a gift',
- by way of government grant, or
- from a DGR operated by the entity.

Taxation Ruling "TR 2019/6 - Income tax: the 'in Australia' requirement for certain deductible gift recipients and income tax exempt entities" provides further guidance on how these concepts are applied, particularly paragraphs 75 to 79:

"75. This means that where an entity distributes disregarded amounts offshore, this will not affect whether it satisfies the Division 50 in Australia condition.

76. For the purposes of section 50-75, the phrase 'as a gift' is considered to refer to circumstances which involve an element of benefaction. This covers money or property which is a 'gift' in the ordinary meaning of the word<sup>[34]</sup>, as well as receipts from fundraising by raffles, dinners, auctions, jumble sales<sup>[35]</sup>, the purpose of which are to benefit the entity in a material sense.<sup>[36]</sup> It excludes amounts received from commercial activities or contracts for services.

77. The phrase 'government grants' is not defined and so takes its ordinary meaning. Government grants include payments made by government to entities for specific purposes, whether or not the entity is placed under an obligation to ensure that the grant is applied for those purposes, but do not include payments made by government by way of a fee for services.



78. When and where a gift or government grant is distributed is a question of fact, to be determined based on the circumstances in each case.

79. Section 50-75 requires an entity to determine the extent to which a distribution is sourced from an amount received as a gift, by way of government grant or from a DGR. For these purposes, the entity can choose to appropriate distributions from a particular source<sup>3</sup>, provided it maintains records which clearly identify each source, and such a treatment is not inconsistent with any conditions attached to the gift or grant (see Example 12 of this Ruling)."

QLS is particularly mindful that even though not-for profit entities have been guaranteed government grant funding, this should not exclude not-for profit entities (including charities) from the JobKeeper Payment assistance.

Government grants (except for voucher schemes, the NDIS and aged care) do not cover all of the expenses of a not-for-profit. Not-for-profit entities need to subsidise government grant funding from client fees and donations. Both of these sources of income have already, and will continue, to rapidly decline in the current crisis.

The Productivity Commission report Contribution of the Not-for-Profit Sector, Research Report, Canberra (2010)<sup>3</sup> confirms that government agencies generally contribute to contracted service delivery, rather than providing full funding.

Comprehensive data was not available on the proportion of costs met by government, but available evidence suggested an average of around 70 per cent of the overall proportion of an entity's costs was met by government funding for contracted services, with the entity's fees and charges making up some of the difference (see pages 280-281 and Box 11.2).

Similar levels of government grant funding (as a proportion of overall costs) were identified in other State-based studies reported in the Productivity Commission Report (page 281, Box 11.2):

- In a Queensland study of the cost of providing disability and community services, on average governments grants comprised 74 per cent of total revenue of the NFP service.
- For NSW alcohol and drug residential rehabilitation services, predominantly provided by NFPs, a survey using 2003-04 data found that, on average, services received 71.3 per cent of revenue from government and 17.5 per cent from client fees, leaving a gap of 11.2 per cent. Excluding services with significant revenue from donations and fund raising, these figures are 77.7 per cent, 18.1 per cent and 4.2 per cent respectively.
- The ACOSS Community Sector Survey (2009) found 69.6 per cent of funding was from government, 8.5 per cent from client fees and the remaining 21.9 per cent from own source income (including donations, sponsorships and sales to the public).

Thank you for your consideration of these issues at this urgent time.

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<sup>3</sup> <https://www.pc.gov.au/inquiries/completed/not-for-profit/report/not-for-profit-report.pdf>

JobKeeper Payment – eligibility of charities and not-for-profits

If you have any queries regarding the contents of this letter, please do not hesitate to contact our Legal Policy team via [policy@qls.com.au](mailto:policy@qls.com.au) or by phone on (07) 3842 5930.

Yours faithfully

A black rectangular box redacting the signature of Luke Murphy.

Luke Murphy  
**President**