

CIS 2013/01

# Commissioner's Interpretation Statement: The Hunger Project case

The purpose of this Commissioner's Interpretation Statement is to provide guidance to ACNC staff, charities and the public on the application of the law as set out in *Commissioner of Taxation v Hunger Project Australia* [2014] FCAFC 69, affirming the decision of the Federal Court decision in *The Hunger Project Australia v Commissioner of Taxation* [2013] FCA 693.

## [The Hunger Project Australia v Commissioner of Taxation \[2013\] FCA 693](#)

**Court:** Federal Court of Australia  
**Judge:** Perram J  
**Date of judgement:** 17 July 2013

affirmed on appeal:

## [Commissioner of Taxation v Hunger Project Australia \[2014\] FCAFC 69](#)

**Court:** Full Court of the Federal Court of Australia  
**Judges:** Edmonds, Pagone and Wigney JJ  
**Date of judgement:** 13 June 2014

## 1. Questions in the case

- 1.1. Is the applicant, The Hunger Project Australia (HPA), a 'public benevolent institution' (PBI) within the meaning of s. 57A(1) of the *Fringe Benefits Tax Assessment Act 1986* (Cth)?
- 1.2. As HPA is principally a fundraiser rather than a direct performer of charitable works, two issues arise:
  - 1.2.1. To what extent does HPA directly perform charitable activities?
  - 1.2.2. Can an organisation which carries out charitable activities indirectly as a fundraiser qualify as a public benevolent institution within the meaning of s. 57A(1) of the *Fringe Benefits Tax Assessment Act 1986* (Cth)?

## 2. Summary of facts

- 2.1. HPA is a company limited by guarantee and a member of a global network of collaborating organisations all operating under the name 'The Hunger Project'.
- 2.2. The Hunger Project was founded in 1977 in the USA and has its global headquarters in New York. It is a network of organisations operating in various countries ('program countries' in the developing world and 'partner countries' in the developed world) around the world. The network is administered from the global offices. The principal aim of HPA (which is a shared aim of the global network) is to end world hunger, particularly in the developing world.
- 2.3. HPA is one of nine entities in partner countries.
- 2.4. The relationship between entities in the partner countries is governed by an agreement (the Global Chartering Agreement) made in 1986.
- 2.5. As a whole, the organisation is administered by a global board – at the moment HPA does not have a representative on the global board. The CEO of HPA has a voice in the global affairs of the organisation through two specific types of involvement and has involvement with some aspects of the strategic decision-making of the global organisation. HPA is also involved in the process by which The Hunger Project formulates its international strategies.
- 2.6. The global office coordinates the fund-raising in partner countries with expenditure of those funds on hunger relieving programs in program countries.
- 2.7. HPA's purposes are charitable. Its exclusive object (as set out in its Memorandum of Association) is:

*“The relief of poverty, sickness, suffering, distress destitution and helplessness with a particular emphasis on directly aiding and developing those suffering from chronic and persistent hunger in certified developing countries as approved by the Australian Minister for Foreign Affairs from time to time.”*

*“The Hunger Project Australia will work towards the sustainable end of hunger by identifying what is missing in achieving (t)he goal of ending hunger and creating strategic initiatives to provide it.”*
- 2.8. Its subordinate objects include soliciting donations and raising funds for the purpose of making charitable donations and cooperating with other entities having similar objects.
- 2.9. HPA is administered by a board of directors. Day-to-day work is carried out by the CEO and four members of staff under her direction who:

- 2.9.1. raise money in Australia
  - 2.9.2. co-operate with entities in other partner countries ('partner entities') to support programs delivered in program countries (by 'program entities'), and
  - 2.9.3. co-operate with program entities in program countries to implement these programs.
- 2.10. There is evidence of HPA's *ad hoc* involvement in various programs run by The Hunger Project in various program countries. While useful, this involvement largely does not involve the direct performance of charitable activities.
- 2.11. By far the most substantial of these activities is fundraising:
- "The correct characterisation of its activities is that it is predominantly engaged in fundraising and to a lesser extent in providing strategic guidance. Its direct charitable activities are negligible when viewed in the overall scheme of its operations"* [para 44 of decision in first instance].
- 2.12. HPA undertakes fundraising in Australia on an independent basis. It reports a forward estimate each year to the global office. The global office also receives estimates of required/proposed expenditure from program entities. The global office tries to coordinate funding requests with partner agency budgets – but each partner entity retains control over the transfer of funds to program entities.
- 2.13. HPA is principally a fundraising entity – other members of The Hunger Project perform the charitable activities to in fact relieve hunger.

### 3. Issues decided at first instance

- 3.1. HPA does not pursue relieving hunger in any substantive way beyond fundraising.
- 3.2. Perram J found that HPA is not substantially engaged in directly providing charitable work and its activities are predominantly in fundraising.
- 3.3. Perram J notes [para70] that in the *ACOSS decision*,<sup>1</sup> Priestly JA (with whom Mahoney J concurred) indicated a preference for the view that directness was not required (although did not make a decision on this issue). Instead, Priestly JA focussed on a requirement that the objects of the entity's benevolence (the beneficiaries) had to be concrete. They had to be 'those who are recognisably in need of benevolence' – general but undirected or abstract benevolence would not suffice. As *ACOSS* promoted social welfare in the community generally, and not only for those recognisably in need of benevolent relief, it failed the test. The *ACOSS decision* therefore did not establish or follow a directness test

---

<sup>1</sup> *Australian Council of Social Service v. Commissioner of Pay-roll Tax* (1985) NSWLR 567

(this test was articulated by Street CJ in the minority and in dissent on this point).

3.4. Perram J [para 71] found that HPA passes the concreteness test set out in *ACOSS* because:

*"...its involvement in the relief of hunger is concrete, it being a member of a structure of organisations that in fact relieve hunger..."*

3.5. After considering a list of other authorities, Perram J [para 89] concluded that judicial opinion had not decisively determined whether the directness test is a requirement for public benevolent institutions. His Honour then turned to determining this question on principle.

3.6. In deciding this question, Perram J [paras 119 – 124] found the reasoning in the *Word Investments decision*<sup>2</sup> persuasive. *Word Investments* was founded as a fundraising organisation to earn profits that were then given to a closely associated charitable institution. In that case, the Court did not accept that this prevented *Word Investments* from itself being classified as a charitable institution. In other words, there was no compelling reason to distinguish between two divisions of a charitable institution with a specific charitable purpose, and two separate charitable institutions with that same specific charitable purpose. His Honour notes that it is:

*"...difficult to discern the redeeming features of an approach which focussed entirely on the form an organisation took rather than its substance"*.

3.7. Applying the same principle as the *Word Investments decision* to determining public benevolent institution status, Perram J found no reason why an organisation should lose its status just because its fundraising activities is devolved into a separate entity.

3.8. Perram J concludes [para 126] that there is no directness requirement for public benevolent institutions. His Honour finds that HPA's objects are not abstract and are sufficiently concrete (applying the *ACOSS* decision), and that HPA's principal object of relieving hunger is achieved through its close relationship with The Hunger Project entities in program countries. For these reasons, his Honour concludes that HPA is a public benevolent institution.

## 4. Issues decided on appeal

4.1. On appeal, the Full Federal Court comprising Edmonds, Pagone and Wigney JJ (the Appeal Court) found that the primary judge was correct to reject the argument that the ordinary meaning of the expression 'public benevolent institution' requires a direct dispensing of relief [para 26].

---

<sup>2</sup> *Commissioner of Taxation v Word Investments* (2008) 236 CLR 204

- 4.2. The Appeal Court found that the judgements in *Perpetual Trustee*<sup>3</sup> do not support such a restrictive interpretation of the ordinary meaning of the expression 'public benevolent institution' [para 28].
- 4.3. In responding to questions of statutory interpretation raised by the appellant, the Appeal Court found that the primary judge was correct in determining that the terms of section 8(5) of the *Estate Duties Assessment Act 1914* (Cth) does not restrict taking the ordinary meaning of the expression public benevolent institution [para 42].
- 4.4. Importantly, the Appeal Court confirmed that the definition of public benevolent institution does not have a technical legal meaning and must be given its ordinary meaning, based on the common understanding of the expression that may change over time:

*"...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. The question is not to be approached as a legal question to be dealt with by the mechanical application of past authority, irrespective of the present current understanding of the expression in the currently spoken English language"* [para 38].

- 4.5. In this context, the Appeal Court found [para 39]:

*"...It is unlikely that global aid networks comprising separate fundraising entities such as the Hunger Project were prevalent when Perpetual Trustee was decided. Even if it was the case that the common understanding of a public benevolent institution in 1931 involved the institution directly dispensing relief, we can see no reason why that common understanding may not have changed over time to encompass organisations that may be structured in ways that separate fund raising entities from entities that dispense relief or aid using those funds"*.

- 4.6. The Appeal Court agreed with the primary judge that the judgement of Rath J in the *ACOSS decision* (at first instance) and the obiter comments of Street CJ on appeal in *ACOSS* do not provide a persuasive basis for finding that a public benevolent institution must distribute aid directly.
- 4.7. The Appeal Court [para 64] found no error with the primary judge's reliance on the reasoning in *Word Investments*, when his Honour reasoned by analogy that:

*"...an approach to determining whether a particular institution is a public benevolent institution which focused on the structure of the organisation, as opposed to the substance of its objectives and activities, would be erroneous."*

## 5. Conclusion

- 5.1. The Appeal Court concluded [para 66-67]:

*"...In our opinion, whilst there is no single or irrefutable test or definition, the ordinary meaning or common understanding of a public benevolent institution includes (to adapt the words of Starke and Dixon JJ in*

---

<sup>3</sup> *Perpetual Trustee Co Ltd v Federal Commissioner of Taxation* (1931) 45 CLR 224

*Perpetual Trustee) an institution which is organised, or conducted for, or promotes the relief of poverty or distress. To adapt the words of Priestley JA in ACOSS, such an institution conducts itself in a public way towards those in need of benevolence, however that exercise of benevolence may be manifested.*

*The ordinary contemporary meaning or understanding of a public benevolent institution is broad enough to encompass an institution, like HPA, which raises funds for provision to associated entities for use in programs for the relief of hunger in the developing world. The fact that such an institution does not itself directly give or provide that relief, but does so via related or associated entities, is no bar to it being a public benevolent institution. Such an institution is capable of being considered to be an institution organised or conducted for the relief of poverty, sickness, destitution and helplessness.”*

## 6. How the ACNC will apply the case when making decisions

- 6.1. The decision in this case, affirmed on appeal, is binding and must be followed by the ACNC unless the law changes in the future.
- 6.2. In our view, this case does not change the definition of ‘institution’ [para 112 of decision in first instance]. In other words, ‘a fund, without more, cannot be an institution’. It still needs structure, permanence and activities (it cannot be a mere trust or fund). In this case, there were significant activities carried out by HPA, and Perram J goes into detail about them and the structure and permanence of HPA.
- 6.3. However, the case does establish that fundraising – being the principal activity of HPA – is sufficient to constitute ‘activity’ within the meaning of ‘institution’. Active fundraising is still distinct from merely administering a trust or a fund.<sup>4</sup>
- 6.4. To be a public benevolent institution, there is no requirement that the charity must itself directly give or provide the benevolent relief. Such a charity can provide relief via related or associated entities and still be a public benevolent institution. That is, there is no ‘directness’ requirement (compared with the previous ATO Taxation Ruling 2003/5 at [61], [62], [65]). In the case of HPA, there is no requirement that the entity raising the funds for the purpose of benevolent relief must directly provide that relief.
- 6.5. While there is no single or irrefutable test or definition, this case found that a public benevolent institution is an institution that is organised, or conducted for, or promoting the relief of poverty or distress which has:
  - 6.5.1. **concrete objects of benevolent relief** –the beneficiary group must be recognisably in need of benevolent relief. General, undirected or abstract objects like benefitting the whole community are insufficient. (In the case of a fundraising institution, there must be an recognisable group that would benefit from the charitable work being funded)

---

<sup>4</sup> *Re Trustees of the Allport Bequest v Commissioner of Taxation* [1988] FCA 147

6.5.2. **clear mechanisms for delivering the benevolent relief** – the way in which the charitable work leads to benevolent relief must be clear. (In the case of a fundraising institution, there must be a clear way to deliver the benevolent relief for which the funds are raised), and

6.5.3. **a relationship of collaboration or a common public benevolent purpose** – based on the analogy of the reasoning in *Word Investments*. 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 (such as through their organisational structure, shared planning and processes). As in *Word Investments*, the focus is on the substance of the objectives and activities, rather than the form. (In the case of fundraising, an institution that raises funds for associated entities but does not itself provide relief is no bar to it being a public benevolent institution.)

## 7. Further observations

7.1. It is worth noting that the subordinate objects of ‘soliciting donations and raising funds for the purpose of making charitable donations and cooperating with other entities having similar objects’ may be seen as providing the power to undertake activities to fulfil the primary objective of relieving hunger<sup>5</sup>.

7.2. It may be fair to say that HPA raises funds only and entirely in support of The Hunger Project (global) strategies. It has no other independent business. It has no alternative or additional purposes. Indeed it would not exist but for the delivery of services, by program entities, to achieve its object of relieving hunger in the developing world<sup>6</sup>.

Version	Date of effect	Brief summary of change
Version 1 - Initial statement	28/8/2013	Initial statement endorsed by the Commissioner on 28/8/2013
Version 2 – Amendment	21/07/2014	Amended to reflect decision on appeal. Approved by the Commissioner on 21/07/2014

<sup>5</sup> *Commissioner of Taxation - Word Investments* [2008] HCA 55 per Gummow, Hayne, Heydon and Crennan JJ at para31]

<sup>6</sup> *Australian Council for Overseas Aid v Federal Commissioner of Taxation* (1980) 49 FLR 278; 80 ATC 4575 49 FLR 278 per Connor ACJ)