

ALERT

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Federal Court of Appeal affirms the change to the definition of a public benevolent institution

A recent Federal Court of Appeal (FCA) decision, *Commissioner of Taxation v Hunger Project Australia [2014] FCAFC 69* has dismissed the Commissioner of Taxation's (Commissioner) appeal against the primary judge's decision, settling the law concerning the meaning of the words 'public benevolent institution' (PBI) and the requirement for a charity to directly provide relief in order to be endorsed by the ATO as a PBI and receive a range of tax benefits.

An Alert regarding the prior decision can be viewed [here](#).

Background

The respondent, Hunger Project Australia (HPA), is a company that operates various member entities worldwide. While its exclusive objective is the relief of poverty, sickness, suffering, destitution and helplessness, its most substantial activity is fundraising. Funds raised are disseminated to member entities and expended on hunger relief programs in developing countries. The Commissioner rejected HPA's application for endorsement as a PBI on the grounds that it was not involved in the 'direct provision of relief'.

Adopting the ordinary meaning of the expression 'public benevolent institution', the primary judge found that there was no reason why an institution would not be a PBI because it did not directly provide relief.

Appeal

The issue for the FCA to consider was whether, in order to be classified as a PBI, an entity must *directly* provide relief to those in need.

The Commissioner advanced the following arguments, which were rejected unanimously by the court:

- The ordinary meaning of 'public benevolent institution' is an institution that gives or provides relief directly to those in need. The Commissioner placed significant reliance on the judgment of McTiernan J in *Perpetual Trustee Co Ltd v Federal Commissioner of Taxation*¹ (**Perpetual**). The Commissioner argued that a fundraising entity does not 'give relief' and

¹ (1931) 45 CLR 224



therefore does not satisfy the ordinary meaning of the word. For a number of reasons, the court did not accept that the Perpetual judgment gives any indication of what the ordinary meaning of the expression is. Read in context, the judgment actually emphasised that there did not appear to be any definite understanding of what the expression means. Further, even if the judgment did support this definition of the ordinary meaning of the expression, it was made in 1931, and the judges noted that the common understanding of an expression is likely to change over the course of 80 years.

- The Commissioner claimed that numerous statutes explicitly deal with fundraising entities and PBIs together, clearly indicating that the two entities should be treated in an identical way. The Commissioner argued that, therefore, it would have been easy for parliament to provide for an analogous extension in the Fringe Benefits Tax Assessment Act (FBTAA) if it intended for the two types of entities to be treated the same under this scheme. The judges described this argument as 'at best unpersuasive and at worst misconceived'². They found it difficult to see how the terms of a completely different Act could assist in determining the ordinary meaning of a term in the FBTAA.
- The Commissioner argued that the primary judge erred in considering *Federal Commissioner of Taxation v Word Investments*³ (**Word Investments**) because it considered a different statutory expression contained in different legislation. The Commissioner argued that the words 'charitable institution' have a technical legal meaning but

that PBI does not and should therefore be given its ordinary meaning. The Commissioner also contended that the facts in *Word Investments* are far removed from the facts of this case, so it should not have been relied upon. The court rejected this argument and found that, in *Word Investments*, the primary judge did not equate the different meanings of charitable institution and public benevolent institution, but construed the expression used in the FBTAA in accordance with its ordinary meaning.⁴

Implications

The significant consequence of this case is the establishment of a precedent that identifies a clear understanding of the ordinary meaning of the words 'public benevolent institution'. At every opportunity, the court rejected the argument that an entity that focuses on fundraising should not be classified as a PBI. By making this decision, the court has indicated that the direct relief requirement that the ATO has been applying in its assessment of charitable entities as a matter of course need no longer be applied. This means that a charitable organisation will be permitted to divide its operations into entities that separately operate the fundraising and direct provision of charity operations of the organisation, without risking the fundraising entity losing PBI status (even if these entities operate across different countries). It is important to note, however, that the entity to which the funds are dispersed must provide charitable relief.

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² Commissioner of Taxation v Hunger Project Australia [2014] FCAFC 69 at para 40

³ (2008) 236 CLR 204

⁴ Commissioner of Taxation v Hunger Project Australia [2014] FCAFC 69 at para 65.