THE 'DIRECT' REQUIREMENT FOR A PUBLIC BENEVOLENT INSTITUTION – DOES *THE HUNGER PROJECT* CASE CONFIRM IT NEVER APPLIED?

Fiona Martin[*] and Ian Murray[#]

1. INTRODUCTION

On 17 July 2013, Perram J handed down his decision in *The Hunger Project Australia v Commissioner of Taxation* ('*Hunger Project Case*'),[1] which confirms, despite at least a decade of Australian Taxation Office (ATO) practice, that there is no requirement for public benevolent institutions (PBIs) to provide 'direct' relief. This note examines the decision and the prior understanding of the PBI concept in order to comment on the potential implications for PBIs and for government. These implications are important because the term 'PBI' is used in a range of Commonwealth, state and territory and local government legislation to provide tax concessions and exemptions to a particular class of not-for-profit entities. Those concessions include a fringe benefits tax exemption, as in the *Hunger Project Case*, as well as deductible gift recipient status, amongst others. The *Tax Expenditures Statement 2012* indicates

[*] Associate Professor, School of Taxation and Business Law, UNSW, Australia.
[#] Assistant Professor, University of Western Australia and Consultant, Ashurst Australia.
[1] [2013] FCA 693.

that the fringe benefits tax exemption for PBIs, alone amounted to foregone tax revenue of AUD 1.41 billion for 2011/12.[2]

In evaluating the *Hunger Project Case*, Part 4 of this note explores the potential widening of the range of entities that might qualify as PBIs. In particular, it examines the likely breadth of any expansion and whether the 'concreteness' or 'targeting' requirement referred to in the case might still impose a workable boundary on the PBI concept. Additionally, the note investigates the relevance of the 'in Australia' geographic nexus test to the *Hunger Project Case* and to the potentially larger class of PBI entities.

2. MEANING OF 'PUBLIC BENEVOLENT INSTITUTION'

The term '*PBI*' is used in a range of Commonwealth, state and territory and local government legislation to provide tax concessions and exemptions to a particular class of not-for-profit entities.[3] PBIs generally benefit from the concessions available to charities, such as the income tax exemption and goods and services tax (GST) concessions,[4] as they are typically charities.[5] In addition, PBIs can qualify as deductible gift

[2] Department of the Treasury (Cth), 'Tax Expenditures Statement 2012' (January 2013) 7, 138-9.

[3] See, eg, Mark Lyons, *Third Sector: The Contribution of Nonprofit and Cooperative Enterprise in Australia* (Allen & Unwin, 2001) 20; Australia's Future Tax System Review Panel, *Australia's Future Tax System: Report to the Treasurer* (Final Report, 2 May 2009) Pt 2 Vol 1 207.

[4] See, eg, *Income Tax Assessment Act 1997* (Cth) (ITAA97) s 50-1 item 1.1; *A New Tax System (Goods and Services Tax) Act 1999* (Cth) ss 38-250, 38-255, 38-260, 38-270, 40-160.

[5] At the Commonwealth level, simultaneous charity status is mandated by the requirement for a PBI to be a charity registered under the *Australian Charities and Not-for-profits Commission Act 2012* (Cth); *Fringe Benefits Tax Assessment Act 1986* (Cth) (FBT Act) 57A(1); *ITAA97* s 30-45(1) item 4.1.1 (a 'registered public benevolent institution' is a subtype of registered charity).

recipients under the ITAA97,[6] which means that donors can potentially claim an income tax deduction for gifts or contributions to a PBI.[7] PBI status also entitles an entity to treat fringe benefits provided in respect of the employment of an employee as exempt benefits,[8] generally up to a cap.[9] It was this fringe benefits tax concession that was in issue in the *Hunger Project Case*. To round out the relevance of the PBI concept, for state, territory and local government purposes, PBI characterisation is frequently used as a gateway to concessions in relation to land tax,[10] pay-roll tax,[11] stamp duty,[12] and council rates,[13] not all of which apply to all charities.[14]

There is no statutory definition of 'PBI' in the FBT Act, nor, generally, in the other tax legislation referred to above. Instead, the task of construction has been left to the judiciary; with the

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For a discussion of the relevant authorities and commentary on this issue, see Ian Murray, 'Looking for Direct Assistance in the Phrase "Public Benevolent Institution": Time to Abandon the Search' (2012) 35(1) *University of New South Wales Law Journal* 103, 109-11, 129-30.

[6] ITAA97 s 30-45(1) item 4.1.1.

[7] See ibid s 30-15(1) items 1, 7, 8.

[8] FBT Act s 57A(1).

[9] Broadly, the cap is $30,000 per employee, based on what would otherwise have been the grossed up value of the benefits provided: ibid s 5B(1A). Regsitered charities in the form of an institution which are not PBIs would generally only be entitled to a fringe benefits tax rebate: item 1 of the table in *FBT Act* s 65J(1).

[10] See, eg, 'public charitable or benevolent institution'; *Land Tax Assessment Act 2002* (WA) s 37.

[11] See, eg, *Pay-roll Tax Assessment Act 2002* (WA) s 40(2)(c).

[12] See, eg, motor vehicle duty exemption in relation to a 'charitable organisation', which is defined to include a 'public benevolent institution': *Duties Act 2008* (WA) s 247(1)(a).

[13] See, eg, *Local Government Act 1993* (NSW) s 556(1)(h).

[14] See, eg, G E Dal Pont, *Law of Charity* (LexisNexis Butterworths 2010) 148–53.

first and enduringly applied[15] decision that of the High Court in *Perpetual Trustee Co v Federal Commissioner of Taxation* (*Royal Naval House Case*).[16] In this case the High Court considered the meaning of PBI as it was used in s 8(5) of the *Estate Duty Assessment Act 1914* (Cth) to grant a tax concession in a similar manner to the granting of tax concessions for PBIs under the FBT Act.

Justice Starke put the matter this way, when delivering the leading judgment of the majority:[17]

> Now we have to consider the expression 'public benevolent institution.' It cannot be said that this expression has any technical legal sense, and therefore it is to be understood in the sense in which it is commonly used in the English language. There is no definition in the Act of the composite expression, nor is it to be found in any dictionary. It is, however, found in the Act under consideration in association with such institutions as public hospitals and with funds established and maintained

[15] See, eg, *Public Trustee of NSW v Federal Commissioner of Taxation* (1934) 51 CLR 75, 100 (Starke J), 103–4 (Dixon J, Rich J agreeing), 106 (McTiernan J); *Commissioner of Pay-roll Tax (Vic) v Cairnmillar Institute* (1990) 90 ATC 4752, 4756–8, 4761 (McGarvie J); *Commissioner of Pay-roll Tax (Vic) v Cairnmillar Institute* [1992] 2 VR 706, 708-9, 711 (Gobbo J, Brooking and Tadgell JJ agreeing); *Tangentyere Council Inc v Commissioner of Taxes (NT)* (1990) 90 ATC 4352, 4353–4 (Angel J); *Metropolitan Fire Brigades Board v Federal Commissioner of Taxation* (1990) 27 FCR 279, 281–2; *Maclean Shire Council v Nungera Co-operative Society Ltd* (1994) 84 LGERA 139, 141 (Handley JA, Priestly and Sheller JJA agreeing); *Northern Land Council* (2002) 171 FLR 255, [15]-[16] (Mildred J, Martin CJ agreeing), [52] (Thomas J). See also ATO, *Income Tax and Fringe Benefits Tax: Public Benevolent Institutions*, TR 2003/5, 4 June 2003, [27]-[28]; Ann O'Connell, 'The Tax Position of Charities in Australia: Why Does It Have To Be So Complicated?' (2008) 37 *Australian Tax Review* 17, 27.

[16] (1931) 45 CLR 224.

[17] Justice Starke's description was referred to favourably in *Aid/Watch Incorporated v Federal Commissioner of Taxation* (2010) 241 CLR 539, 548 [16] (French CJ, Gummow, Hayne, Crennan, Bell JJ) (*Aid/Watch*).

> for the relief of persons in necessitous circumstances in Australia. In the context in which the expression is found, and in ordinary English usage, a 'public benevolent institution' means, in my opinion, an institution organized for the relief of poverty, sickness, destitution, or helplessness.[18]

Justice Evatt further noted that 'those who receive aid or comfort … are the poor, the sick, the aged and the young. Their disability or distress arouses pity, and the institutions are designed to give them protection'.[19] Justice McTiernan, in dissent, did use the word 'direct' in reference to relief.[20] However, the comments are not binding and nor was it necessary to consider indirect activities in the *Royal Naval House Case*.

As discussed previously by Murray,[21] the case law focuses on the meaning of the phrase 'public benevolent institution' and emphasises that it does not have a set technical meaning, rather than on a catalogue of elements.[22] Nevertheless, to illuminate the meaning of the whole phrase, it is helpful to identify the

[18] (1931) 45 CLR 224, 231-232. See also at 233-4 (Dixon J), 235–6 (Evatt J).
[19] (1931) 45 CLR 224, 236 (Evatt J).
[20] (1931) 45 CLR 224, 242 (McTiernan J).
[21] Murray, above n 5, 108-9.
[22] See also *Public Trustee of NSW v Federal Commissioner of Taxation* (1934) 51 CLR 75, 103 (Dixon J); *Tangentyere Council Inc v Commissioner of Taxes (NT)* (1990) 90 ATC 4352, 4353 (Angel J). On appeal, Angel J's decision was set aside on procedural grounds, but his reasoning as to PBI status was not questioned: see *Commissioner of Taxes (NT) v Tangentyere Council Inc* (1992) 107 FLR 470; Dal Pont, above n 14, 36.

elements, in addition to being 'public',[23] that were raised by the majority. These are:[24]

- the entity must be an institution;
- the entity must have the object of providing relief to people with the requisite needs (that is, a targeting requirement); and
- the requisite needs to which relief must be targeted are poverty, sickness, destitution, helplessness, distress, misfortune, or other needs which arouse pity.[25]

Accordingly, the majority judgments did not expressly require that relief be provided in the form of direct assistance to people with the requisite needs, although the relief requirement did focus attention on the persons who would benefit.[26]

The factors discussed above are largely consistent with the test which has been applied for some time by the ATO and

[23] It was accepted that the Royal Naval House was 'public'; *Perpetual Trustee Co v FCT* (1931) 45 CLR 224, 233 (Dixon J), 235 (Evatt J), 237 (McTiernan J). Justice Starke did not expressly comment on this element.

[24] See, eg, Dal Pont, above n 14, 37; *Indigenous Barristers' Trust* (2002) 127 FCR 63, [10] (Gyles J). As to the specific elements listed, see especially Murray, above n 5, 108-9.

[25] Subsequent cases, recognising that need may be relative, have indicated that the needs must be 'sufficiently serious to arouse pity or compassion within the community'; *Commissioner of Pay-roll Tax (Vic) v Cairnmillar Institute* (1990) 90 ATC 4752, 4761 (McGarvie J) (McGarvie J's conclusion and reasons were affirmed on appeal). See also *Commissioner of Pay-roll Tax (Vic) v Cairnmillar Institute* [1992] 2 VR 706, 711 (Gobbo J, Brooking and Tadgell JJ agreeing); *Lemm v Federal Commissioner of Taxation* (1942) 66 CLR 399, 410 (Williams J, Rich and McTiernan JJ agreeing).

[26] A number of subsequent cases have also emphasised that relief must be targeted to particular persons: *Commissioner of Pay-roll Tax (Vic) v Cairnmillar Institute* (1990) 90 ATC 4752, 4758 (McGarvie J); *Indigenous Barristers' Trust* (2002) 127 FCR 63, [19] (Gyles J).

which is now set out in TR 2003/5.[27] This Ruling states that a PBI exhibits six characteristics:

- it addresses needs that require benevolent relief;
- it assists those in need (and not the community generally and only people not animals) through its activities;
- it engages in the direct provision of services;
- it is public in nature;
- it is an institution; and
- it is 'in Australia' (if deductible gift recipient status is sought).[28]

Other than the 'in Australia' requirement,[29] it is item 3, the direct provision of services, that differs from the *Royal Naval House Case* factors. Of course, the ATO view is now less relevant for federal tax purposes, as the Australian Charities and Not-for-profits Commission (ACNC) now determines PBI status (as discussed in Part 4.1), rather than the ATO.[30]

3. THE HUNGER PROJECT CASE

The case concerned whether The Hunger Project Australia (HPA) was a PBI and so entitled to the FBT exemption discussed above. HPA is a company limited by guarantee located in Australia whose principal activity is fundraising in

[27] ATO, above n 15, 3-5 [7] – [21].
[28] Ibid 6 [25].
[29] Discussed further in Part 4.3 below.
[30] As a result of the requirement for a 'registered public benevolent institution'; FBT Act s 57A(1); ITAA97 s 30-45(1) item 4.1.1. Nevertheless, the Commissioner of Taxation is still responsible for administering endorsement conditions, such as the 'in Australia' requirement.

Australia to support the activities of the worldwide 'The Hunger Project'. The Hunger Project comprises a global network of entities collaborating together with the object of ensuring a sustainable end to world hunger. Different member entities, in different countries carry out different functions. Although a crude generalisation, the variety of activities can be summarised as:

- global coordination of fund-raising and expenditure by the United States based entity;
- fundraising (and some involvement in the development of global strategy and strategic guidance to developing country entities) by entities in developed countries, such as Australia; and
- expenditure of funds on hunger relief programs by entities in developing countries (ie, 'direct' relief).

HPA appealed to the Federal Court from the Commissioner of Taxation's (the Commissioner) objection decision that HPA was not entitled to endorsement as a PBI. The ATO had accepted that HPA's principal aim, being the provision of relief from hunger, was a charitable purpose, but was of the view that in order for HPA to be a PBI it must engage directly in activities to effect that purpose.

Justice Perram was required to consider two issues. First, the extent to which HPA directly provided relief. Second, whether it was necessary for HPA to carry out activities which directly relieved hunger in order to be a PBI.

3.1 HPA did not carry out direct activities

His Honour found that HPA carried out three groups of day to day activities, as well as a fourth activity of assisting to develop the global strategies for the Hunger Project. The 'most

substantial' ordinary activities were fundraising.[31] The other two sets of activities involved cooperating with other developed country entities to provide high level support for hunger relief programs. For instance, by playing a part in reviewing and approving draft budgets for proposed programs and providing funding for those programs; and cooperating with developing country entities in relation to the implementation of specific hunger relief projects.[32]

The third category of activities included conduct such as arranging for reviews of the effectiveness of programs, arranging for volunteers to visit developing country entities to assist with matters such as communications and reporting, providing advice on strategic or operational matters to developing country entities and, in one instance, the establishment of a monitoring program to address integrity risks for certain seed capital funding. Only the final instance was found to be an activity which directly provided relief, such that Perram J found HPA's direct relief activities to be 'negligible' when compared with its overall activities.[33]

3.2 No direct relief requirement

Justice Perram found that he was not bound by any previous decisions to decide whether or not a directness requirement exists. After considering the questions of principle, Perram J held that there is no direct relief requirement for a PBI. That is, a PBI need not 'engage directly in the activities making up the object of its benevolence'.[34]

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[31] *The Hunger Project Australia v Commissioner of Taxation* [2013] FCA 693, [8].
[32] Ibid [42].
[33] Ibid [43]-[44].
[34] Ibid [126].

In terms of prior authority, Perram J referred to the *Royal Naval House Case* as discussed above, noting that only the reasons of McTiernan J expressly identified the concept of direct relief.[35] In addition, Perram J considered a number of subsequent decisions in which the issue of direct relief had been raised by single judges or members, most particularly, *Australian Council of Social Service v Commissioner of Pay-roll Tax* ('*ACOSS*').[36] Street CJ's judgment in ACOSS, along with that of Rath J at first instance, is the key authority identified in TR 2003/5 in support of the need for direct relief.[37] *ACOSS* had determined that the Australian Council of Social Service Inc, the peak body for the Australian community services and welfare sector, was not a PBI for New South Wales pay-roll tax purposes.

Ultimately, Perram J concluded that Street CJ's reasons did not form part of the ratio decidendi of *ACOSS* and that the majority reasons in *ACOSS* did not endorse the approach of Rath J.[38] Further, Perram J found that, other than an Administrative Appeals Tribunal decision,[39] the discussion of direct relief in the other cases cited by the Commissioner was either unnecessary for the decision in the relevant case, or involved judges

[35] Ibid [64].
[36] (1985) 1 NSWLR 567.
[37] ATO, above n 15, 15-16 [61]-[62]. The Ruling also refers to *Trustees of the Allport Bequest v Federal Commissioner of Taxation* (1988) 19 ATR 1335, 1341 (Northrop J).
[38] *The Hunger Project Australia v Commissioner of Taxation* [2013] FCA 693, [89]. For a more in-depth discussion of the reasoning in *ACOSS*, see Murray, above n 5, 111-113.
[39] *Re Melbourne Western Region Commission Incorporated v Commissioner of Taxation* [1991] AATA 49.

expressly deciding that they did not need to reach a conclusion on the issue.[40]

As to principle, the key bases for Perram J's decision were:

- When considering the mischief which the term PBI was intended to address,[41] the term PBI should not be interpreted as a broadened or narrowed form of the concept of 'charitable institution', which it replaced in the *Estate Duty Assessment Act 1928* (Cth),[42] but rather as a completely new concept to be understood in the context of its ordinary English meaning. That conclusion was bolstered by reference to analogous comments made by the High Court in *Aid/Watch Incorporated v Federal Commissioner of Taxation*.[43] According to Perram J, the ordinary usage of the expression did not require that the institution directly perform activities which effected relief.[44]
- The ATO's various arguments based on the legislative context in which the term PBI was found in the *Estate Duty Assessment Act 1928* (Cth) and the FBT Act were found to be unpersuasive on the basis that the context

[40] *The Hunger Project Australia v Commissioner of Taxation* [2013] FCA 693, [89]-[90].
[41] Being the adoption of a technical legal interpretation of the term 'charitable institution'.
[42] Since an interpretation of the term PBI based on the 'popular' meaning of charity would be both broader and narrower, in some respects, than the technical legal meaning of a charitable institution; *The Hunger Project Australia v Commissioner of Taxation* [2013] FCA 693, [105].
[43] *Aid/Watch* (2010) 241 CLR 539, 548 [16] (French CJ, Gummow, Hayne, Crennan, Bell JJ)
[44] *The Hunger Project Australia v Commissioner of Taxation* [2013] FCA 693, [106].

could also be interpreted in a way consistent with the lack of a direct relief requirement.[45]

- The reasoning of the High Court in *Commissioner of Taxation v Word Investments Ltd*[46] (*Word Investments Case*) was considered by Perram J to constitute 'at least one good reason' not to find a direct activities limit for PBIs (authors' emphasis).[47] His Honour applied the High Court's emphasis on substance over form in the *Word Investments Case*.[48] The High Court had rejected drawing a distinction between the situation where a charitable institution conducts activities to effect its charitable purpose as well as investment and fundraising in support of those primary activities; and the situation where the activities are separated into two distinct entities, one that engaged in charitable activities and the other that undertook investment and fund raising in support of those activities.[49] His Honour applied this reasoning to the PBI issue in front of him, stating:

> If the law is affronted by the proposition that a charitable institution might lose its exempt status for its fund raising activities if they be devolved into a separate entity (and *Word Investments* holds that it is) I cannot see why it would be any less affronted if a public benevolent institution lost exempt status for its fund raising activities by doing the same thing. There is no relevant difference.[50]

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[45] Ibid [107]-[116].
[46] (2008) 236 CLR 204.
[47] *The Hunger Project Australia v Commissioner of Taxation* [2013] FCA 693, [119].
[48] Ibid [107]-[124].
[49] Ibid [120]-[121] quoting *Commissioner of Taxation v Word Investments Ltd* (2008) 236 CLR 204, 225 [37] (Gummow, Hayne, Heydon and Crennan JJ).
[50] Ibid [124].

However, Perram J did confirm the existence of a limit on the scope of purposes that a PBI may have. He referred to the judgments of Priestly and Mahoney JJA in *ACOSS* as requiring 'the benevolent objects of an organisation to be more than merely abstract' or, in other words, 'sufficiently concrete'.[51] That is, the parties who ultimately benefit from the PBI's activities must be 'those who are recognisably in need of benevolence', rather than the provision of relief in an 'undirected' or 'abstract' way to a 'general' class of persons.[52] In the case of HPA, Perram J held that its involvement in the relief of hunger was 'concrete', as it was a member of a network of organisations that did actually relieve hunger.[53]

4. EVALUATION OF THE DECISION

It is important to remember that 'the ways in which many PBIs go about achieving their objectives today are different from the ways in which the typical PBI operated in 1931',[54] when the *Royal Naval House Case* was decided. Indeed, there are a range of possible responses to social welfare issues.[55] Indirect activities, such as research, advocacy and law reform initiatives which are aimed at systemic issues, as well as intermediary services by peak bodies, represent alternative responses.[56] The broad role of government in service provision has also meant that many not-for-profits work alongside the

[51] Ibid [126].
[52] Ibid [70] (Perram J) quoting *ACOSS* (1985) 1 NSWLR 567, 575 (Priestly JA, Mahoney JA agreeing).
[53] Ibid [71], [126].
[54] *Commissioner of Pay-roll Tax (Vic) v Cairnmillar Institute* (1990) 90 ATC 4752, 4757 (McGarvie J).
[55] See, eg, Judith Healy, *Welfare Options: Delivering Social Services* (Allen & Unwin, 1998) 15.
[56] See, eg, Productivity Commission (Cth), 'Contribution of the Not-for-profit Sector' (Research Report, 11 February 2010) 7; ibid 15.

state in achieving their objects and so expand their indirect activities in relation to systemic issues.[57] In the context of government funding risks for charities and limited access to donations for entities that are not endorsed as deductible gift recipients,[58] it may also be argued that organisations engage in fundraising for other members of a charitable group in order to sustain their overarching charitable mission.

It appears that Perram J, in the *Hunger Project Case*, has reconsidered the need for a 'direct' requirement for a PBI in the 21st century context. Further, given the sparse authority that the ATO has relied on for years to support a direct relief requirement, it might be more apt to say that Perram J has finally confirmed that the PBI concept has never included such a requirement. The real issue is whether there will be many entities carrying out indirect activities which will be able to satisfy the confirmed need for 'sufficiently concrete' objects, or, in other words, sufficiently targeted purposes. This potential for a broadening of the range of PBI entities is explored in Part 4.1 below. Further, Parts 4.2 and 4.3 examine the impact of the decision in the context of tax concessions additional to the fringe benefits tax exemption and the 'in Australia' nexus requirements.

4.1 Broadening of the range of PBI entities

As explored above, PBIs enjoy additional tax benefits from those available to charities. The point of adopting a different concept to 'charity' appears aimed at support for selected social welfare objectives, while also ensuring an appropriate balance

[57] Michael Chesterman, *Charities, Trusts and Social Welfare* (Weidenfeld and Nicolson, 1979) 84, citing Lord Wolfenden, *The Future of Voluntary Organisations: Report of the Wolfenden Committee* (Joseph Rowntree Memorial Trust and Carnegie United Kingdom Trust, 1978) 43.

[58] Eg, merely being endorsed as a charity does not ensure DGR status; peak bodies are generally not eligible for DGR status.

between fiscal requirements and the achievement of those objectives.[59] The use of such targeting, rather than the broad 'charity' category, particularly in relation to donation concessions, sets Australia apart from a number of other OECD common law countries,[60] such as the United States, the United Kingdom, Canada and New Zealand. Accordingly, a broadening of the range of PBI entities resulting in the PBI concept overlapping to a far greater extent with that of 'charity' would bring the utility of this approach into question. It would also raise potential revenue implications for government.

There are two comments that can be made. First, Perram J's judgment clarifies that PBIs are not to be seen as merely a subset of charities.[61] This point marks a departure from the way that the Commissioner of Taxation interpreted the term PBI and, most likely from the manner in which most commentators interpreted the term.[62] This suggests that PBIs may include some entities that are not charities.[63] This will primarily be relevant

[59] Terry Carney and Peter Hanks, 'Taxation Treatment of Charities: Distributional Consequences for the Welfare State' in Richard Krever and Gretchen Kewley (eds), *Charities and Philanthropic Institutions: Reforming the Tax Subsidy and Regulatory Regimes* (Australian Tax Research Foundation, 1991) 49, 51, 77. See also Myles McGregor-Lowndes, Cameron Newton and Stephen Marsden, 'Did Tax Incentives Play Any Part in Increased Giving?' (2006) 41 *Australian Journal of Social Issues* 493, 495; O'Connell, above n 15, 30. See also Ian Sheppard, Robert Fitzgerald and David Gonski, Department of the Treasury (Cth), 'Report of the Inquiry into the Definition of Charities and Related Organisations' (Final Report, 28 June 2001) 244.

[60] See, eg, Kerry O'Halloran, Myles McGregor-Lowndes and Karla W Simon, *Charity Law & Social Policy: National and International Perspectives on the Functions of the Law Relating to Charities* (Springer, 2008) 245.

[61] *The Hunger Project Australia v Commissioner of Taxation* [2013] FCA 693, [105].

[62] ATO, above n 15, 5 [24], 30 [126]–[127]. For a review of the commentary on this issues, see, eg, Murray, above n 5, 109-11, 129-30.

[63] *The Hunger Project Australia v Commissioner of Taxation* [2013] FCA 693 (17 July 2013) [104] (Perram J). Note that the 'public' requirement of a PBI

for non-Commonwealth purposes, because, as noted above, the federal fringe benefits tax exemption and deductible gift recipient status require the PBI also to be a registered charity.

Second, the additional entities referred to above that may qualify as PBIs, must still meet the PBI requirements referred to in Part 2, especially the 'sufficiently concrete' element confirmed in the *Hunger Project Case*. Just what does concreteness require, however? It is submitted that this requirement is the same as the 'targeting' requirement identified from the *Royal Naval House Case* and discussed in section 2 above, as well as previously by Murray.[64] By reference to Priestly JA in *ACOSS*,[65] this is likely to mean that an entity that is merely concerned with the relief of poverty or distress through the more general promotion of social welfare in the community will not be a PBI.

In addition to fundraising entities, advocacy and peak organisations might also be able to demonstrate that they use indirect activities to target the relief of needs requiring benevolence appropriately.[66] Advocacy activities carried out on behalf of a sufficiently well-defined group of people may well pass this test, so that an entity carrying out such activities might be a PBI if its purposes are limited to relief of the requisite PBI needs. It is this further limit on the needs to be relieved that would eliminate an entity such as Aid/Watch Inc which has the protection of the environment as a key purpose.[67] Intermediary

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does not invoke the same 'public benefit' test as applies at common law to charities; Dal Pont, above n 14,37.

[64] Murray, above n 5.

[65] (1985) 1 NSWLR 567, 575.

[66] See, eg, Ian Kellock, Bronwyn Kirkwood and Katrina Fong, 'The Hunger Project: Direct Provision of Relief not Essential for PBIs' [2013] *Charity & Not for Profit Tax Bulletin* 2.

[67] For Aid/Watch Inc's purposes, see *Aid/Watch* (2010) 241 CLR 539, 558 [53] (Heydon J).

services by peak bodies might also fulfil the PBI requirements, at least where the relationship between the peak body and the members is as close as that between HPA and other members of the global 'The Hunger Project'.[68]

Organisations carrying out broad indirect activities aimed at systemic issues and which are not linked to a specific group of people (for instance, community education, research or law reform) are likely to be too abstract to be sufficiently concrete. However, secondary or tertiary preventative education delivered to high-risk groups or people who are currently in need might be equally targeted when compared with the provision of shelter to those experiencing homelessness.

Of further relevance to whether the *Hunger Project Case* will result in a wider range of PBI entities is that, for federal tax concessions, it is now the ACNC that determines PBI status, rather than the ATO.[69] Given the Commissioner of Taxation's overarching regulatory goal is to safeguard tax revenue, there has always been the potential for an actual or perceived conflict between this goal and the goal of supporting PBIs through the concessions intended to be available to them.[70] Interestingly,

[68] In the context of intermediaries, the connection between HPA and The Hunger Project appears broader than that involved in *Australian Council for Overseas Aid v Federal Commissioner of Taxation Australian* (1980) 49 FLR 278. This case was the one previous example that the ATO had accepted of an intermediary entity being a PBI; ATO, above n 15, 4 [17], 16-17 [63]-[65].

[69] As a result of the requirement for a 'registered public benevolent institution'; FBT Act s 57A(1); ITAA97 s 30-45(1) item 4.1.1. The ATO retains its remit to regulate compliance with endorsement conditions, such as the 'in Australia' requirement.

[70] Chia, Harding, O'Connell and Stewart make a similar point for the regulation of not-for-profits in the context of the ACNC being housed within the ATO as a separate statutory office: Not-for-Profit Project Tax Group, *Regulating the Not-for-profit Sector Working Paper* (July 2011) University of Melbourne<http://www.law.unimelb.edu.au/files/dmfile/MicrosoftWord-RegulatingtheNot-for-ProfitSectorWorkingPaperfinalversion2.pdf> 15. As to

despite the fact that the Commissioner of Taxation is appealing the *Hunger Project Case*, the ACNC has stated that it will now test eligibility for PBI status without requiring an entity to provide direct relief.[71] More specifically in the context of fundraising, the ACNC has indicated that the concrete objects test will be met where:

- 'there is a clear way to deliver the benevolent relief for which the funds are raised'; and
- 'the fundraising institution and the institution that delivers services have a relationship of collaboration and a common public benevolent purpose' which can be demonstrated in various ways.[72]

4.2 Access to additional tax concessions

The *Hunger Project Case* concerned the meaning of PBI for the purposes of fringe benefits tax. This is clearly significant as the fringe benefits tax exemption for PBIs was recently estimated as the largest measured philanthropic tax concession at the federal level, equating to AUD 1.41 billion.[73] However, as identified in Part 2 of this note, the PBI concept is used to provide access to a range of tax concessions, in particular, deductible gift recipient status, as well as pay-roll, land tax, stamp duty or council rates concessions that are not available generally to charities. The decision is therefore potentially of concern to all levels of government. Furthermore, the support to

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perceived conflicts of interest in relation to the ATO and the regulation of not-for-profits, see, eg, The Treasury (Cth), 'Scoping Study for a National Not-for-profit Regulator' (Final Report, April 2011) 66; Productivity Commission, above n 56, 144 (citing submission received from Australian Women's Health Network).

[71] Australian Charities and Not-for-profits Commission, *Commissioner's Interpretation Statement: The Hunger Project Case*, CIS 2013/01, 4 [26].

[72] Ibid 4 [28].

[73] Department of the Treasury, above n 2, 7, 138-9.

PBIs may extend beyond the revenue benefits of the concession itself. DGR status, for instance, is important in seeking donations, particularly from intermediaries such as private or public ancillary funds, which are restricted by legislation,[74] or by self-imposed rules, to distributing only to DGRs.

4.3 In Australia requirements

Some caution should be exercised by fundraising entities wishing to emulate HPA. 'In Australia' conditions are relevant to PBIs for income tax exempt status and deductible gift recipient status,[75] but not the fringe benefits tax exemption. In broad terms, the conditions impose a geographic nexus test which requires that:

- for income tax exempt purposes, the entity 'has a physical presence in Australia and, to that extent, incurs its expenditure and pursues its objectives principally in Australia' (the 'in Australia' test);[76] and
- for DGR status, the ATO considers that the entity must 'be established in and operating in Australia' and 'have its purposes and beneficiaries in Australia'.[77]

Typically, fundraising entities which raise donations in Australia and distribute the amounts to overseas affiliates with

[74] Productivity Commission (Cth), above n 56, 177.

[75] ITAA97 s 30-15 item 1 special condition (a) of the table; ITAA97 s 50-50.

[76] See, eg, ATO, *Endorsement to Access Charity Tax Concessions: In Australia Test* (3 December 2012) http://ato.gov.au/Non-profit/Gifts-and-fundraising/In-detail/Endorsement/Charities/Endorsement-to-access-charity-tax-concessions/?anchor=P124-8914#P124-8914>.

[77] ATO, *The Endorsement Process for Deductible Gift Recipients: What Does In Australia Mean?* (14 January 2013) <http://www.ato.gov.au/Non-profit/Gifts-and-fundraising/In-detail/Deductible-gift-recipient/Getting-started/The-endorsement-process-for-deductible-gift-recipients/?anchor=P94-5772#P94-5772>. The DGR provisions do not contain a definition of the requirement like the income tax exempt provisions.

the objective of assisting people overseas, might have difficulty satisfying these tests if they wish to access DGR status as a PBI and also to obtain income tax exempt charity status. However, there are exceptions for both DGR[78] and income tax exempt purposes[79] and, although not considered in the *Hunger Project Case*, it appears that HPA accessed such exceptions. First, it seems that HPA did not rely on its PBI characterisation to obtain DGR status. HPA operates a deductible gift recipient fund, The Hunger Project Relief Fund, which is declared to be a developing country relief fund and so implicitly removed from the in Australia test.[80] In addition, the Australian Business Register entry indicates that HPA is endorsed as an income tax exempt charity.[81] That might be possible on the basis that distributions of amounts from The Hunger Project Relief Fund are disregarded in considering whether HPA is 'in Australia' for income tax exemption,[82] since disregarding such distributions

[78] Exceptions apply where the DGR is individually named and permitted or under certain externally focussed deductible gift recipient categories. See, eg, ibid.

[79] Exceptions apply where the charity is an institution that is a deductible gift recipient referred to in item 1 of the table in s 30-15 of the ITAA97, or is prescribed by name in regulations and is a foreign institution which is exempt from income tax in its home jurisdiction or is an institution with a 'physical presence in Australia but which incurs its expenditure and pursues its objectives principally outside Australia': ITAA97 s 50-50.

[80] Australian Business Register, *ABN Lookup: Current details for ABN 45 002 569 271* (30 May 2013) <http://abr.business.gov.au/SearchByAbn.aspx?abn=45002569271>; AusAID, Commonwealth of Australia, *List of Approved Funds* (2 October 2012) <http://www.ausaid.gov.au/ngos/Pages/approved_funds.aspx>. As to the exception for developing country relief funds, see ITAA97 s 30-80(1) item 9.1.1. This is not the only exception, although it is the main one.

[81] Australian Business Register, above n 80.

[82] ITAA97 s 50-75(2).

would leave primarily Australian-based decision making and expenditure.[83]

The use of exceptions by HPA is likely to limit the impact of the decision for PBIs focussed on overseas objects. Further, following the *Word Investments Case*, the then federal government announced reforms to tighten the 'in Australia' test to reduce the ability to distribute funds overseas, particularly by using a second Australian conduit entity.[84] Following the change in federal government, it is unclear what will occur with the in Australia reforms, as the *Tax Laws Amendment (Special Conditions for Not-for-profit Concessions) Bill 2012* (Cth) lapsed with the proroguing of Parliament. The Parliamentary Joint Committee on Corporations and Financial Services Report suggests that the Liberal/National coalition did not support the then form of the amendments.[85]

5. CONCLUSION

By confirming that there is no direct relief requirement to qualify as a PBI, the *Hunger Project Case* raises the possibility that a broader class of entities may now be able to access the tax concessions linked to that characterisation. For instance, fundraising, advocacy, peak and targeted education bodies

[83] As to the application of the test, see, eg, *Commissioner of Taxation v Word Investments Ltd* (2008) 236 CLR 204, 239 [73] (Gummow, Hayne, Heydon and Crennan JJ).

[84] Chris Bowen, Assistant Treasurer, 'Government's Interim Response to High Court's Decision in *Word Investments* Case' (Press Release, No 43, 12 May 2009).

[85] Parliamentary Joint Committee on Corporations and Financial Services, Parliament of Australia, *Inquiry into the Australian Charities and Not-for-profits Commission Bill 2012; the Australian Charities and Not-for-profits Commission (Consequential and Transitional) Bill 2012; and the Tax Laws Amendment (Special Conditions for Not-for-profit Concessions) Bill 2012* (2012) 66.

might conceivably qualify, depending on the range of their objects. Outside the federal level, some, likely limited, non-charities might also be eligible, given Perram J's analysis that PBIs are not a subset of charities. Significantly, while the *Hunger Project Case* concerned the federal fringe benefits tax exemption, PBI status brings with it a range of tax concessions at all levels of government in Australia. This will have revenue implications for those governments, as well as potentially reducing the executive's control of policy by widening legislative support for not-for-profits.

However, the extent of the implications is likely to depend largely on the degree to which the 'concreteness' or 'targeting' requirement operates to impose a workable boundary on the PBI concept. The ACNC appears to be adopting a middle of the road approach by accepting that direct relief is no longer needed, but emphasising the importance of a clear link between activities and the delivery of relief, in order to demonstrate concrete objects of benevolence. Accordingly, while important, the *Hunger Project Case* does not appear likely to result in a flood of new PBIs.

Further, entities providing funds or assistance overseas to indirectly achieve relief of PBI needs may also have to consider the 'in Australia' requirements for tax endorsement. It is difficult to see how an entity could obtain the DGR concessions due solely to its PBI status while undertaking activities similar to HPA's activities. As noted above, the existing 'in Australia' requirements may even be tightened.

Finally, before acting on the basis of the *Hunger Project Case*, not-for-profits should consider the potential for the decision to be overturned by way of appeal or by legislative reform. The Commissioner filed a notice of appeal on 7 August

2013,[86] so it appears likely that the Full Federal Court will consider the issue in the near future. Further, the *Hunger Project Case* may also bolster calls for statutory reform of the PBI concessions and perhaps of not-for-profit tax concessions, such as targeted DGR status, more broadly. Over recent years there have been several discussions of the fringe benefits tax exemption for PBIs and of the desirability of broadening the availability of DGR status.[87] However, with the formation of a new federal government it seems premature to comment on whether these discussions might result in fringe benefits tax or DGR changes which ameliorate the *Hunger Project Case*.

[86] The appeal file number is NSD1604/2013.

[87] See, eg, Australia's Future Tax System Review Panel, *Australia's Future Tax System: Report to the Treasurer* (Final Report, 2 May 2009) Pt 1, 88; Not-for-profit Sector Tax Concession Working Group, 'Fairer, Simpler and More Effective Tax Concessions for the Not-for-profit Sector' (Discussion Paper, November 2012) 23-5, 42-5; Productivity Commission (Cth), above n 56, LVII.