

Request for comments: Commissioner's Interpretation Statements

We would particularly welcome comments on the following matters:

1. We propose withdrawing Commissioner's Interpretation Statement: The Hunger Project Case because the amended Commissioner's Interpretation Statement: Public Benevolent Institutions sufficiently covers the principles established in *The Hunger Project Australia v Federal Commissioner of Taxation* (2013) 94 ATR 855 and *Commissioner of Taxation v Hunger Project Australia* [2014] FCAFC 69.

Do you think there are any issues with withdrawing Commissioner's Interpretation Statement: The Hunger Project Case'?

2. The Commissioner's Interpretation Statements include an introductory statement. The Statement has been revised in the updated versions.

Current published version:

Commissioner's Interpretation Statements provide guidance to ACNC staff, charities and the public on how the ACNC understands the law that applies to charities. These statements reflect our current understanding of the law and are binding on ACNC staff.

While we do not have the power to produce binding rulings, we will ensure that organisations that rely on the Interpretation Statements are treated fairly, consistent with our objects and regulatory approach. If the law or an Interpretation Statement changes, we will apply the new position from the date of the change, not retrospectively in a way that could disadvantage a charity. In most cases, we will also allow a period of time for charities to respond to any change.

The purpose of this Commissioner's Interpretation Statement is to provide guidance on the ACNC's view on [subject matter].

New revised version:

The purpose of this Commissioner's Interpretation Statement is to provide guidance about [subject matter].

Commissioner's Interpretation Statements provide guidance to ACNC staff, charities and the public on how the Commissioner understands the law that applies to charities.

ACNC officers will apply the law as described in relevant Commissioner's Interpretation Statements when making decisions. If the law changes, we will update any Commissioner's Interpretation Statement affected by the change. If a change to the law will affect a charity's registration, we will give the charity an opportunity to respond to the change before we consider any regulatory action.

This Interpretation Statement was initially published on [date of publication]. The current version was published on [date of publication] and reflects the Commissioner's understanding of the law regarding [subject matter] on that date.

Which introductory statement do you consider more appropriately reflects the position of Commissioner's Interpretation Statements as guidance documents?

3. On the meaning of 'institution':

In *Pamas Foundation v Commissioner of Taxation* (1992) 35 FCR 117, Beaumont and Lee JJ, in finding that Pamas Foundation was not a 'religious institution' stated (at 125-126):

The context in which the expression "religious institution" appears includes the juxtaposed term "public benevolent institution" which tends to suggest that the word "institution" is to be given a meaning greater than a structure controlled and operated by family members and friends.

The fact that the Foundation is a body corporate by virtue of its incorporation under the provisions of the Associations Incorporation Act does not mean that as a corporation it is also an institution. The Foundation has a small and exclusive membership which is limited to Dr Staer, his family and some close friends. The scale of its activities is relatively small. Looking at the whole of the circumstances, in our opinion, the Foundation is not a religious institution to which s 3 of the Debts Tax Administration Act applies. We would dismiss the appeal accordingly.

In *KinCare Community Services Ltd v Chief Commissioner of State Revenue* (NSW) [2019] NSWSC 182, Payne J quoted the paragraph above when determining whether KinCare Community Services Ltd was a PBI, and stated that, in relation to the characteristics of an institution, "*Pamas* correctly states the law" (at [212]).

To help explain and clarify the meaning of 'institution', should the principles expressed in *Pamas* be included in the two revised Commissioner's Interpretation Statements?

4. On whether an institution is 'public':

In *Maughan v Federal Commissioner of Taxation* (1942) 66 CLR 388 Williams J stated (at 397):

The question whether an institution is subject to some form of public control is a factor to be taken into account in determining whether it is a public institution (*The Little Company of Mary (S.A.) Inc v The Commonwealth*). But public control is not essential (the main criterion is the extensiveness of the class it is the object of the

institution to benefit) and, in order to be of a public nature, the control need not be, in my opinion, that of some government body.

Williams J went on to state (at 397):

A constitution which provides for those members of the public who are sufficiently interested in the work of the institution to subscribe to its funds and thereby become annual members and as such eligible to vote at the election of the controlling body creates a control which is public in its nature.

What weight does the law give to factors other than extensiveness of the beneficiary class when determining whether an entity is 'public' in the sense of a Public Benevolent Institution? Should this be covered in the Commissioner's Interpretation Statement: Public Benevolent Institutions?