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LOUISE McBRIDE

TAX LAWS AMENDMENT BILL (PUBLIC BENEFITS TEST) BILL 2010 INQUIRY STATEMENT BY MS LOUISE MCBRIDE (BARRISTER-AT-LAW)

Chairman

I wish to thank the Committee for the invitation to appear at today's hearing as part of the Inquiry into the Tax Laws Amendment Bill (Public Benefits Test) Bill 2010.

I would like to thank the Committee for allowing me to have standing at this Inquiry.

In commencing my opening statement, I wish to place on the record certain points that may be of assistance to the Committee.

I am not a Scientologist.

I do not practice Scientology.

I appear today in my professional capacity as a Barrister with over 25 years of experience in taxation law in Australia.

During my career, I have served as a Board Member of the Takeovers Panel, the Export Finance Insurance Corporation, the Corporations and Markets Advisory Committeeand the Commonwealth Superannuation Scheme and the Public Sector Superannuation Scheme.

I wish to advise the Committee I have been retained by the Church of Scientology to provide advice on the impact of the proposed Bill, in particular, the constitutional and administrative law legal issues surrounding the proposed Bill.

As outlined in the submission to the Economics Legislation Committee, this Private Members Bill is inherently flawed.

As Senator's are aware the Bill proposes to remove the common law presumption for charitable institutions and require those institutions and religious institutions to demonstrate in some way that they are providing a public benefit.

The advice outlines in broad terms the following points:

1. The Bill is a bill that imposes taxation and is therefore subject to the limits imposed by s.53 and 55 of *The Commonwealth of Australia Constitution Act 1900* ("The Constitution"). As a bill imposing taxation where none was imposed before the Bill is contrary to the initiation provisions of the first paragraph of s.53 of the Constitution. Only the House of Representative may initiate bills imposing taxation laws, as such, the Bill is in breach of the Constitution. Furthermore only a Minister of the

Government or a Parliamentary Secretary may introduce such a Bill into the House (SO 293);

2. The Bill is a tax bill, as that term is understood. As a former Chief Counsel of the Attorney General's Department has advised (advice dated 30 August 1993 re Taxation (Deficit Reduction) Bill 1993) Bills dealing with taxation include:

    1. "Provisions imposing taxation;
    2. Other provisions dealing with the imposition of taxation (e.g. provisions removing or adding exemptions or deductions, increasing or reducing rates or otherwise defining a taxable amount) and;
    3. Provisions not dealing with the imposition of taxation (e.g. provisions for the assessment, collection and recovery of tax and provisions providing for penalties).

3. The Bill as currently drafted makes it mandatory for regulations to establish when particular aims and beliefs of an individual religious or charitable entity are for the benefit of the public at large. It is doubtful that the power of the Parliament to delegate legislation extends to allowing the Minister to make mandatory regulations, which in essence will determine a religious or charitable entities ongoing entitlement to a tax concession. To the extent of any inconsistence between the existing common law and any public benefit test the Commissioner of Taxation would be required to follow the public benefit test not the existing common law. As the Bill is currently drafted the substantive provisions of the law would be determined outside the Parliamentary process by the executive branch of Government. The Bill is subject to challenge on the basis that it is *ultra vires*.

4. By requiring mandatory regulations that formulate relevant criterion on which the "identifiable benefit" can be weighted against any determent or harm "caused" by a religious or charitable entity and making that the criterion upon which a taxation concession depends, the Minister, while acting within the scope of the power delegated may include in the regulations provisions that detract from the basic right of religious freedom, which is guaranteed under s.116 of the Australian Constitution (the "Constitution"). The Bill when read with the Explanatory Memorandum ("EM") accompanying the Bill, is in breach of s.116 of the Constitution as it interferes with the "fourfold guarantee of religious freedom";

5. The Bill is in breach of the rule of law as it is not a legitimate or desirable use of Parliament's power to delegate legislation, particularly as the body of the Bill is proposed to be contained in regulations. As Regulations may not be amended by either House of Parliament but are required to be withdrawn in entirety the detail contained in the Regulations will be denied the normal process of Parliamentary debate and amendment;

6. Given that religions and charities are already tax exempt the implication is the Bill will operate retrospectively; the High Court has already held Scientology is a religion and it has been granted charitable status by the Australian Tax Office. If this legislation is to operate retrospectively or its intent is an entirely new regime a great deal more time and public consultation needs to occur. Retrospective legislation is abhorrent to the principles of the rule of law and good government.

7. The EM in the second paragraph, targets a particular group or organisation. The use of legislation to target a specific person or group has not been viewed positively by the High Court. Using legislation to target a group on the basis of unsubstantiated allegations because a Senator or the Parliament may dislike that group files in the face of the main tenant of the rule of law and good Government that laws must apply equally to all. Using the EM and a Senate inquiry to target one particular group is abhorrent and sets a negative precedent for future discriminatory legislation. Prima facie the Bill and EM are contrary to the Guidelines for the Review of Legislation Pertaining to Religion or Belief prepared by the Advisory Panel of Experts on Freedom of Religion and Belief of the Office of Democratic Institutions and Human Rights of the Organisation for Security and Cooperation in Europe, because the state has an obligation and duty to remain impartial. But for Parliamentary Privilege, the EM in the second paragraph would amount to group libel and false implication libel it does no credit to the Australian Parliament and should be referred to the Senate Privileges Committee under resolution 5 of the *Privilege Resolutions of 1988.*

Before turning to address these points in greater detail for the benefit of the Committee, I believe that it is important to note that several of these points have been acknowledge in submissions received as part of the Inquiry process.

As outlined by Treasury, "there is no clear head of power that would allow the Commonwealth to legislate generally with respect to charities".

Namely, the Federal Treasury and the Rule of Law Institute of Australia have addressed several of the key themes surrounding the points relating to the technical aspects of the Bill.

I would now like to address the points outlined in the submission.

1. CONSTITUTIONAL ISSUES

One of the main principles of the financial initiative of the Crown is that a proposal for the imposition or for the increase, or alleviation, of a tax or duty, or for the alteration of the incidence of such a charge, shall not be made except by a

Minister in the House of Representatives.[1]

As Senator's are aware, the Senate cannot originate or amend a taxation bill.

In other words there is a prohibition on private Members of the House introducing a bill which not only imposes tax but to any bill that would increase or alleviate the sum of tax payable.

No member other than a Minister or Parliamentary Secretary in the House of Representatives may introduce a Bill which effectively amounts to an increase or extends the incidence of tax.

However, that is precisely what Senator Xenophon has done by introducing into the Senate Tax Laws Amendment (Public Benefit Test) Bill 2010.

As outlined in the submissions and set out above, the Bill is a tax bill, as that term is understood and advised upon by a former Chief Counsel of the Attorney General's Department.

Given this, in my view the constitutional validity of the Bill should be referred to the Senate Standing Committee on Legal and Constitutional Affairs. Furthermore, the Economics Legislation Committee should request the Attorney General's Department provide evidence to the Committee that the Bill can proceed as a Private Members Bill before the Senate given that it is a law imposing taxation within the meaning of s.53 of the Constitution.

2. THE BILL LACKS THE DETAIL REQUIRED OF TAXATION BILLS

In the event that the Senate Standing Committee on Legal and Constitutional Affairs reports that the Bill be allowed to proceed in the Senate as a Private Members Bill, the Bill as currently drafted lacks the appropriate detail required of taxation bills.

Tax bills are required to be considered in detail clause by clause for good reason, so that the Parliament can consider and debate the impact of the Bill and reasoned amendments may be moved by a Member of Parliament.

The proposed Bill and accompanying Explanatory Memorandum ("EM") provide no detail as to the financial impact of the Bill.

Given that religious and charitable institutions have never been subjected to Federal Government income tax it is reasonable to assume the Bill will have the effect of raising significant amounts of revenue but no cost benefit analysis has been undertaken.

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[1] Standing Order 293

3. POWER OF DELEGATION

The Bill as currently drafted[2] makes it mandatory for regulations to establish when particular aims and beliefs of an individual religious or charitable entity are for the benefit of the public at large.

It is doubtful that the power of the Parliament to delegate legislation extends to allowing the Minister to make mandatory regulations, which in essence will determine a religious or charitable entities ongoing entitlement to a tax concession[3].

While subject to disallowance by either House of Parliament, the substantive provisions affecting the rights of religions and charities would be determined by the executive branch of Government, outside the Parliamentary process.

In addition if a conflict arose between the common law and public benefit test the Commissioner would be required to follow the public benefit test as it would have the force of law in its own right.

The *Charities Act 2006 (UK)*, which the EM cites as a model for the proposed Bill, does not impose a duty on the relevant authority (the Charity Commission of England and Wales) to make mandatory regulations.

Rather the Charity Commission is required to issue guidance in pursuance of its public benefit objective and must carry out public and other consolation before giving or revising any guidance[4].

By requiring mandatory regulations that formulate relevant criterion on which the "identifiable benefit " can be weighted against any determent or harm "caused" by a religious or charitable entity and making that the criterion upon which a taxation concession depends, the Bill is *ultra vires* and is open to challenge by the Courts.

The Bill provides regulations "must" as opposed to "may" formulate a test – without containing criteria or limitations as to what could be considered relevant in applying the 'public benefit test"5.

In this Bill Parliament has done more than delegate a legislative function it has abdicate it[6].

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[2] s.50-51(1) of the Bill

[3] *Giris Pty Ltd v Federal Commissioner of Taxation* (1969) 119 CLR 365

[4] *Charities Act* 2006 ss.3and 4

5 *Swan Hill Corporation v Bradbury* (1937) 56 CLR 746 at 757 per Dixon J, *Turner v Owen* (1990) 96 ALR 119 per French J at 142 and Pincus J at 127

[6] *Giris Pty Ltd v Federal Commissioner of Taxation* (1969) 119 CLR 365 per Barwick C.J, at 373.

As the Full Federal Court in *Turner v Owen*7 held when considering a provision of the *Customs (Prohibited Imports) Regulations (Cth),* which prohibited the importation of 'Goods which, in the opinion of the Minister, are of a dangerous character and a menace to the community, the regulations constituted an unlawful delegation to the Minister of the power to determine what goods should be prohibited from importation. French J stated:

> *"On any functional analysis of the regulation it effectively places the power of prohibition in the hands of the Minister. The words 'dangerous character and menace to the community' are not indicative of a factual criterion or class description limited by any intelligible boundary. They are almost entirely normative. They may be applied with equal facility to offensive weapons, non-biodegradable plastic bags, or publications espousing political ideas with which the Minister disagrees. They are legislative in character … They ask the Minister to do what the Governor- General is supposed to do that is to prohibit."*

The Bill deals with issues of important principle and the Parliament needs to be fully informed of the detail as the Minister, while acting within the scope of the power delegated may include in the regulations provisions that detract from the basic right of religious freedom, which is guaranteed under s.116 of the Australian Constitution.

Removing a long held widely available exemptions from taxation amounts to no more than taxation by stealth.

The Parliament is entitled to understand the amount of revenue expected to be raised by the proposed measures and the negative impact, if any, the measures may have on the Australian community in general.

Detail normally contained in the EM accompanying Bills removing or limiting tax concessions or deductions is missing from the EM and the Second reading speech of Senator Xenophon.

The impact of the alternation to religious institutions would need to be quantified through a period of public consultation and put before the Parliament to debate and consider.

Further the Bill is silent on the issue of administration. Unlike the *Charities Act 2006 (UK),* Australia does not have a Charity Commission[8] and the Bill does not propose the establishment of such a Commission. In the UK the functions of the Charity Commission are performed on behalf of the Crown, the Commission is not subject to the direction or control of any Minister or Government department.

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7 *Turner v Owen* (1990) 96 ALR 119 per French J at 142 and Pincus J at 127
[8] *Charities Act* 2006 (UK) Part 2 Regulations of Charities chapter 1 s6(1) 1A

Given the Bill before the Committee is silent on the issue it presupposed that the legislative discretion of Parliament under s.51 (ii) of the Constitution extends to authorising the Commissioner of Taxation to form the opinion, based on a test contained in regulations not before the Parliament, that each individual religion and charity has been able to demonstrate, as a matter of fact, that its particular aims are for the "public benefit" at large.

Expert theological evidence would have difficulty demonstrating the intrinsic worth of religion in the physical as opposed to spiritual realm, to expect the Commissioner to do so without discernible criteria by reference to which the propriety of the exercise could be challenged is unreasonable.

Even a superficial analysis of the United Kingdom experience in administering the "public benefit" test found in the *Charities Act* 2006 demonstrates the high degree of complexity involved to establish a workable benchmark against which all religions and charities are to be measured.

The process of developing, consulting on and issuing guidelines in the jurisdictions that have enacted a public benefit test has taken many years and in some cases is still unsettled[9].

Essentially, in the UK, as in other jurisdiction that have adopted a public benefit test, the common law presumption that an entity that falls within the description of a religion or charity is for the public benefit has been removed.

If the common law in relation to religious and charitable intuitions is to be codified in Australia and the presumption of benefits associated with religion and charities is to be removed much greater thought and Parliamentary debate is required.

A statutory test requires substantial legislative guidance to assist the Commissioner which is lacking in the proposed Bill. Rather the operation of the test would be determined by regulations made by the Minister outside of Parliament.

Given that regulations cannot be amended in the Senate but are required to be rejected in totality[10], which in practice rarely occurs, it is not appropriate for such significant amendments to be delegated to regulations, as there are no procedural restraints on rushed regulations.

Even if the regulations were very clearly drafted the Commissioner would still be required to make a judgment on what activities are providing a public benefit when weighted against any determent or harm caused by the religion or charity.

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[9] See the Treasury's Submission on International Comparisons

[10] *Thomas Borthwick & sons (pacific) Ltd v Kerin and Others*(1989) 87 ALR 527

4. PART VIA

One only has to look at the degree of difficulty the Commissioner and ultimately the Australian courts have had in administering the general anti- avoidance provisions contained in Part VIA of the *Income Tax Assessment Act, 1936* to realise that even if regulations could establish a set of objective criteria against which the religious or charitable entities aims and actives could be measured to determine a "public benefit", it will be very difficult to ensure the test is not applied subjectively.

As the test in terms of proposed 50-51(2) requires:

1. an identifiable benefit;
2. that when balanced against any detriment or harm;
3. outweighs that detriment or harm, and;
4. is available to the public at large.

The implications arising from the administration of such a test are massive and can only result in disputes and litigation between religious and charitable bodies and the Commissioner.

Again Part IVA of the 1936 Act provides a convenient and salient example of how difficult it is to conclude, which is always subjective, what a taxpayers "dominate purpose" was, once the Commissioner has determined (again subjectively) that a "tax benefit" has been or would but for the 1936Act be obtained, by a taxpayer having regard to each of the objectively identified criteria contained in the legislation[11].

To attempt to impose similar objective tests upon highly subjective matters, i.e. the benefits or determents associated with religions and charities, is a task the Commissioner could not hope to perform; as Latham CJ said[12]:

> "There is probably no subject in the world about which opinions differ so much as the nature of religion, and to frame a definition of it which would satisfy everyone must obviously be impossible".

The same is true in terms of framing a definition of an identifiable benefit and measuring that in any meaningful way against any detriment or harm associated with the religious or charitable institution.

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[11] see the High Courts judgments in *Federal Commissioner of Taxation v Hart* (2004) 217 CLR 216; *Federal Commissioner of Taxation v Spotless Services Ltd* (1996) 186 CLR 404 ; *Federal Commissioner of Taxation v Peabody* (1994) 181 CLR 358

[12] *Adelaide Company of Jehovah's Witnesses Inc v The Commonwealth* (1943)67 CLR 116

As Lord Hoffman pointed out in *Environmental Agency v Express Car Co Ltd*[13]an answer to the question of whether A has caused B will differ according to the purpose for which the question is asked.

Any proposal to insert such significant policy changes into the *Income Tax Assessment Act* 1997 deserves and requires the same level of scrutiny and debate afforded to all other Bills that seek to impose a tax by limiting or removing a tax concession.

The Bill also does not envisage the creation of a Charity Tribunal, which exists in the UK [14]and has jurisdiction to hear and determine appeals and applications in respect of decisions, orders or directions made by the Charities Commission.

Presumably on the assumption that the current procedures contained in the *1953* will sufficiently address such objections and applications.

For the same reasons articulated above it is difficult to envisage the Australian Taxation Office and the *Administrative Decisions Tribunal* would have the necessary skill set to make such determinations.

Given the purpose of the Bill is to amend the *Income Tax Assessment Act 1997* a great deal more detail and thought is required.

The Bill is poorly conceived and inadequately addresses the numerous issues that will invariably result if a "public benefit" must be demonstrated by means of evidence cognisable by the Commissioner and ultimately challenged in the Courts.

5. THE UK CHARITIES ACT

I would now like to turn to the UK Charities Act, which has been used as the basis for the proposed Bill currently under examination by the Committee.

It is important to bring to the attention of the Committee the following:

- Under the *Charities Act*2006 (UK) the question of public benefit is decided by a impact on the public and that that impact is beneficial. The UK does not require a weighting of any benefit against any determent or harm.

- In the UK the benefit must be proved at the time the decision is made by the Commissioner. The fact that something was once considered beneficial is no longer determinative of the issue.

- Even if the element of public benefit is not disproved and is found to be incapable of proof one way or the other the onus of establishing "public

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[13] [1999] 2 AC 22 at 29

[14] Charities Act 2006 (UK) Chapter 2 Part 1A s. 2A,2B,2cC, 2D

benefit " has not been discharged and the institution will not be registered.

- Finally the institution must demonstrate the benefits of the organization are not limited to a private class of individual, not extending to the public generally. For example: bodies established for certain denominational institutions have been held in the UK not to benefit the public at large.

As the Commonwealth Treasury highlights in their submission to the Inquiry that public benefits test in the UK has implications for many fee charging charities.

The Treasury notes that independent schools as well as charitable hospitals and aged care facilities have been impacted. Independent schools have been required to demonstrate free or subsidized access to people cannot afford access to a service or facility, offer financial assistance such as scholarships and bursaries or provide other significant public benefits such as community use of school facilities.

If the intention of the legislature in Australia is to follow the UK example it is a matter for proper Parliamentary debate and scrutiny and is not suitable subject matter for delegated regulations.

6. CONCLUSION

In concluding, it is also important to recognise that if this Bill is successful it has the potential to be retrospective, which opens a separate discussion for consideration by the Parliament and the people of Australia.

Retrospectivity has been highly contentious in Australia.

Finally, I wish to thank the Committee for the invitation to appear at today's Inquiry.

I would also like to acknowledge the assistance of the Clerk of the Senate, the Privileges Committee, the Scrutiny of Bills Committee and the Attorney-General's Department.

Further, I would also like to thank the Committee Secretariat for their assistance in the lead-up to today's hearings.

Mr Chairman, I conclude my opening statement and am happy to take questions regarding the submission and the proposed Bill.

Thank you.