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**SENATE INQUIRY INTO CHARITIES**

**AND PUBLIC BENEFIT**

**AN INQUIRY ARISING FROM**

***TAX LAWS AMENDMENT (PUBLIC***

***BENEFIT TEST) BILL 2010***

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## *Executive Summary*

This Submission is provided early in the Inquiry process in an endeavour to assist in identifying and scoping issues. The submission argues that if there is a case for moving to a legislated proof of public benefit as a basis for entitlement to income tax favours for charities the matter requires proper debate. The reporting times in this case are too short to enable that debate. The submission sets out a number of issues around which that debate might focus. The discussion set out in this submission sets out seven reasons why the *Tax Laws Amendment (Public Benefit Test) Bill 2010* should not become law in Australia, at least at this time.

- The Bill is motivated, at least in part, as a response to criminal purposes. The proper forum for complaints regarding criminal activity is law enforcement agencies not tax reform legislation.
- It has been the common law position since at least the 1871 decision of *Cocks v Manners* that organisations that are ‘adverse to the very foundation of all religion’ or ‘subversive of all morality or religion’ are not entitled to the status of charities. On this basis alone the Scientology cults status as a charity could be revoked.
- The Australian Taxation Office (“ATO”) Ruling TR2005/21 at paragraph 100 and 101 summarises another aspect of Charity law to the effect that purposes that are illegal or against public policy are not charitable. If the actual purposes of Scientology organisations, are illegal or against public policy the fact that, incidentally, they are also religious organisations will not preserve their exempt status. This is because the purpose they are pursuing is not recognized by the common law as being charitable.
- It follows from the above that the Australian Taxation Office (“ATO”) may well have ground to revoke the charity status *now* of Scientology organisations. It would then be for those organisations to challenge the ATO decision in the courts.
- England and Wales, have legislation requiring public benefit to be proved by all charitable organisations including religious organisations but Scientology was denied charity status in those countries before that legislation came into effect. The Charities Commission for England and Wales rejected the application for a Scientology organisation to be registered as a charity in those jurisdictions on 9 December 1999. In 1999 those countries, like Australia today, did not have a legislatively mandated public benefit requirement. The legislatively mandated public benefit requirement did not come into law in the England and Wales until the *Charities Act 2006* came into operation. In such a context it is difficult to argue that a public benefit test is required in Australia when England and Wales were able to deny charity status to Scientology organisations on the basis of the common law which is still applied in Australia today.

- Public benefit is a conceptually difficult concept. In jurisdictions where there is now legislated mandatory proof of public benefit by charities it is yet to be established whether there is any significant difference at a practical level from the position at common law. If there is, what is it? If sufficient nett public benefit must be proved in the way required by the proposed Bill, how is public benefit to be measured? Is it to be the task of ATO revenue officers? What skills do they have in their training to assess the public benefit of the spiritual? These are issues that must be addressed at the practical level remembering that Australia, unlike Scotland, England and Wales, does not have a charities Commission. If the onus is to be on the charity to prove public benefit how does it do this? Is public worship enough? If so then why move beyond the common law. If not what more is required?
- The Henry Review and the Productivity Commission Research Report 'Contribution of the not-for-profit Sector' both raise issues regarding the tax concessions extended to the not-for-profit sector. The issues raised in this Bill are best addressed in the context of that broader inquiry. Any changes to the status requirements for religious organisations and charities should be a part of overall package of taxation law reform that improves the enabling and regulatory environment of the sector. Ideally concerns will be addressed with adequate time for deliberation and public discussion.

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## ***Introduction***

This Submission is provided early in the Inquiry process in an endeavour to assist in identifying and scoping issues. The submission argues that if there is a case for moving to legislated proof of public benefit as a basis for entitlement to income tax favours for charities the matter requires proper debate. The reporting times in this case are too short to enable that debate. The submission sets out a number of issues around which that debate might focus.

The existing common law is set out first. The Australian Taxation Office (“ATO”) Ruling on point is discussed next. The status of Scientology Organisations in England and Wales, where there is already a public benefit test is raised next. Scientology organisations in England and Wales do not enjoy charity status there and were ruled as not being charities in 1999 – before a statutory public benefit test was introduced there. The need for the proposed Bill is therefore questioned if, as stated concerns regarding Scientology is the progenitor. It is then asked whether the police might not be the proper forum for the criminal complaints alleged, and if not, then whether the ATO could not revoke charity status under the law as it stands. It is suggested this could possibly be done and that this might lead to a more immediate, more effective and less costly outcome tailored to the particular concern raised regarding Scientology.

As the Bill proposes a public benefit test some of the challenges associated with public benefit identified by academics are raised, then the way public benefit has been legislated in Ireland and Scotland is touched upon. In conclusion, the question is asked: why, if overlapping issues have been raised in the context of both the Productivity Commission Report and the Henry Review, the subject matter of this inquiry should not be directed into the broader reform agenda for the tax laws applying to the not for profit sector?

## ***Background***

On 13 May 2010 the Senate referred the *Tax Laws Amendment (Public Benefit Test) Bill 2010* for inquiry and report. The Senate provided little more than one month for the public response. The Bill provides at section 2:

The amendment made by this Schedule applies in relation to income years that commence on or after 1 July 2010.

The Explanatory memorandum sets out illegal purposes and purposes that are seemingly contrary to public policy pursued by Scientologists as reasons for the proposed amendment stating:

This Bill follows allegations from former members of the Church of Scientology about coerced abortions, false imprisonment, breaches of Occupational Health and Safety laws, stalking, harassment and extortion, to name but a few.

Given this, the tax exempt status of the Church of Scientology should be subject to a Public Benefit Test as to whether or not it is appropriate that it is afforded taxpayer support.

Similarly, any and all organisations which receive tax exempt status should be subject to this test.

The Explanatory Memorandum concludes:

Charities are granted tax exempt status on the assumption that their aims and activities are in the interest of the community and to the benefit of the public, however it has become apparent that some organisations may be abusing this privilege.

This Bill and its Public Benefit Test is proposed to “significantly mitigate the risk’ of this abuse of privilege occurring.

## ***The Common law***

It has been the common law position since at least the 1871 decision of *Cocks v Manners*<sup>1</sup> that organisations that are ‘adverse to the very foundation of all religion’<sup>2</sup> or ‘subversive of all morality or religion’<sup>3</sup> are not entitled to the status of charities.

It follows that even if Scientology, falls within the scope of a religion for the purposes of charity law it does not mean that it is a charity entitled to exemption from income tax if the purposes it pursues fall foul of these tenets basic to religion and morality. In reasoning consistent with this limitation, the United States Supreme Court, considered the racist practices of Bob Jones University in 1983 as being enough to extinguish an entitlement to exemption for a university that might otherwise have enjoyed the status of a charitable organisation in that country.<sup>4</sup>

Second, the common law also excludes from the class of charities organisations pursuing purposes that are illegal or against public policy. These are discussed in the context of the ATO Ruling in the section below.

Third, we also mention at this early stage that the pursuit of business purposes is not charitable at common law. There is a suggestion, not explored in this submission that Scientology is a business.

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<sup>1</sup> (1871) LR 12 Eq 574. In that case Wickens, VC also held that benefiting others was central to charity ‘whether the word “charitable” is used in its popular sense or in its legal sense’.

<sup>2</sup> *In Re Watson, Decd Hobbs v Smith and Others* [1973] 1 WLR 1472, 1473.

<sup>3</sup> *Thornton v Howe* (1862) 31 Beav. 14.

<sup>4</sup> *Bob Jones University v United States*, 461 US 574, 591 (1983) discussed in Rob Atkinson, ‘Nonprofit Symposium: Theories of the Federal Income Tax Exemption for Charities: Thesis, Antithesis, and Syntheses’ (1997) 27 *Stetson Law Review* 395, 426.

## ***ATO Ruling TR2005/21***

The ATO has issued a Ruling on matters germane to this discussion. The relevant ATO Ruling is TR2005/21. The Ruling does not discuss the common law principle traceable to *Cocks v Manners* mentioned above nor the *Bob Jones University case*. That does not mean, though, that the ATO could not rely upon these cases to form a view that an organisation was not a charity. The issue in the context of Scientology does not appear to have been considered in an Australian context. The Ruling at paragraph 212 declares that the advancement of religion is a charitable purpose and then states that Scientology is a religion entitled to this exemption. The issue of whether the purposes pursued by Scientology organisations might breach the more general principles of the common law mentioned above appears to remain open for further inquiry. We mention at this early stage that in England and Wales the Charities Commission took a different view from the ATO in relation to Scientology. If the Senate is concerned about this, now might be the time for that inquiry.

If that inquiry was to be pursued the ATO might also take cognizance of its published Ruling to the effect that purposes that are illegal or against public policy are not charitable. The Ruling summarises the law in this way at paragraphs 100 and 101 (references removed):

100. A purpose contrary to public policy is not charitable. If a purpose is either unlawful or a lawful purpose is to be carried out by unlawful means it is also not charitable. For example, a school for thieves might, in a sense, advance education, but it is not a charitable institution.

101. The issue turns on purpose. The mere fact that an organisation or its employee has breached a law would not, in itself, show that the organisation has a non-charitable purpose. Instances of illegality in relation to occupational health and safety, employee entitlements and regulatory requirements would be unlikely to point towards a non-charitable purpose. Toward the other extreme would be a planned and coordinated campaign of violence.



If the actual purposes of Scientology organisations, are illegal or against public policy the fact that, incidentally, they are also religious organisations will not preserve their exempt status. This is because the purpose they are pursuing is not recognized by the common law as being charitable. We also mention at this threshold stage that the Charities Commission for England and Wales were not willing to recognize Scientology as a religion.

### ***The position in the United Kingdom and Elsewhere***

England and Wales have legislation requiring public benefit to be proved by all charitable organisations including religious organisations.<sup>5</sup> That legislation came into effect in 2006. Prior to that legislation the charitable status of organisations in England and Wales was determined solely with reference to common law. This is still the position is in Australia today.

The Bill sets out concerns regarding scientology as the progenitor for this intended legislation. What, then, is the charity status of Scientology organisations in England and Wales? A review of the situation in England and Wales shows that the Church of Scientology (England and Wales) was denied charitable status in December 1999<sup>6</sup>. As the statutory public benefit test was not introduced into law until the *Charities Act 2006*, the Charities commission relied on the common law to

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<sup>5</sup> *Charities Act 2006*.

<sup>6</sup> James Meek, *Sect loses Battle to become Charity* 'The Guardian' Friday 10 December 1999 available at <http://www.guardian.co.uk/uk/1999/dec/10/jamesmeek> last accessed 23 May 2010.

come to this conclusion. The decision, of the Commissioners was that Scientology is not a religion and also that it is not for public benefit.<sup>7</sup>

If the common law could be applied to deny charity status of Scientology organisations in England and Wales under the common law, it is at least arguable that statutory amendment is not required to deny charity status to the Church of Scientology in Australia under the common law in Australia today. A threshold question for the Australian Parliament, if it is considering passing this legislation, is how the passage of this Bill will improve upon the the position already existing at common law. At least in relation to Scientology that is clear.

### ***Two Administrative Solutions***

If Senators are aware of 'coerced abortions, false imprisonment, breaches of Occupational Health and Safety laws, stalking, harassment and extortion' by Scientologists these are criminal activities and the primary proper forum for these complaints is with the police. Arguably the Taxation legislation is not the right forum.

If it is assumed that the Taxation legislation is the proper forum because the Scientology organisations exist for the purpose of pursuing these illegal purposes or at least purposes that are contrary to public policy then the existing common law is arguably adequate. In England and Wales the relevant authority was able to rely upon it to deny charity status there and the same common law applies in an Australian context in 2010.

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<sup>7</sup> *Charities Commission Decision of the Commissioners Application by the Church of Scientology (England and Wales) for Registration as a Charity*  
<http://www.charitycommission.gov.uk/Library/start/cosdecsum.pdf>

If Scientology organisations are exempt under Division 50 of the *Income Tax Assessment Act 1997* (Cth) (“ITAA 1997”) as charities then the ATO may revoke their entitlement to income tax exempt status as their purposes are not charitable and they are not entitled to exemption.

If the Commissioner of Taxation is satisfied that the Senators’ concerns have substance the ATO could revoke the relevant Scientology organisations entitlement to income tax exemption. It would then be for the Scientology organisation to contest the Commissioner's decision in the courts. This might lead to a more immediate, more effective and less costly outcome tailored to the particular concern.

### ***A Public Benefit Test?***

The Bill proposes the insertion of a Public Benefit test as a new section 50-51 insertion into Division 50 of the *Income Tax Assessment Act 1997*. The Bill provides at section 50-51 subsection 2 that:

- (2) The public benefit test must include the following key principles:
  - (a) there must be an identifiable benefit arising from the aims and activities of an entity;
  - (b) the benefit must be balanced against any detriment or harm;
  - (c) the benefit must be to the public or a significant section of the public, and not merely to individuals with a material connection to the entity.

Public benefit is a concept central to charitable purpose but, it is deeply problematic. In this section first some of the challenges associated with public benefit identified by academics are raised, then the way public benefit has been legislated in Ireland and Scotland is touched upon. The final section asks why the

inquiry should not be directed more broadly into a quest for justification of all exemption, not just religion and charity.

At common law public benefit is subject to different tests for different charitable purposes.

The following passage from the opinion of Lord Simmonds for the majority in *Oppenheim's case* summarises the law and illustrates the difficulties:

It is a clearly established principle of the law of charity that a trust is not charitable unless it is directed to the public benefit. This is sometimes stated in the proposition that it must benefit the community or a section of the community. Negatively it is said that a trust is not charitable if it confers only private benefits. In the recent case of *Gilmour v. Coats* [1949] A.C. 426, this principle was reasserted. It is easy to state and has been stated in, a variety of ways, the earliest statement that I find being in *Jones v. Williams* (1767), Ambler 651, in which Lord Chancellor Hardwicke is briefly reported as follows: "Definition of charity: a gift to a general public use, which extends to the poor as well as to the rich...." With a single exception, to which I shall refer, this applies to all charities. We are apt now to classify them by reference to Lord Macnaghten's division in *Pemsel's case* and, as I have elsewhere pointed out, it was at one time suggested that the element of public benefit was not essential except for charities falling within the fourth class, "other purposes beneficial to the community". This is certainly wrong except in the anomalous case of trusts for the relief of poverty with which I must specifically deal. In the case of trusts for educational purposes the condition of public benefit must be satisfied. The difficulty lies in determining what is sufficient to satisfy the test, and there is little to help your Lordships to solve it.<sup>8</sup>

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<sup>8</sup> *Oppenheim v Tobacco Securities Trust Co Ltd* [1951] AC 297, 305.

This problem of lack of essential character troubled the *Ontario Law Reform Commission* which reviewed the concept and concluded that the concept is vague and that it is applied variously to purposes, effects and people.<sup>9</sup> The *Goodman Report* pointed out 'a highly successful commercial venture' can be 'of immense benefit to the community.'<sup>10</sup> John Colombo, discussing the problem in the context of United States revenue law has observed that 'practically any transaction undertaken by an exempt charity will result in benefit to some private party outside of the charitable class'.<sup>11</sup> What then is the public benefit which the proposed Bill requires to now be proved? Arguably little can be said beyond the conclusion that it is a central but poorly theorised concept in the common law. In a context where it must now be proved statutorily it is arguable little has changed from the common law position to assist regulators. In the body of law known as negligence, there are tests of remoteness and foreseeability used to theorise a continuum of possibilities. The doctrine of charitable purpose itself and the proposed Bill offers no such conceptual tool. In relation to 'balancing' benefit and detriment, one author has stated that at least in the United States, 'no one even knows what to balance' and 'charities [are] completely at sea'.<sup>12</sup> The list of factors which must be taken into account in the proposed Bill might not solve these deeper problems identified by jurists over the decades. It might only compound what is already a difficult issue.

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<sup>9</sup> See Ontario Law Reform Commission, *Report on the Law of Charities* (1996).  
<sup>10</sup> National Council of Social Service, 'Report of an Independent Committee of Inquiry to Examine the Effect of Charity Law and Practice on Voluntary Organisations (Goodman Report)' (1976) 2; See also *Metropolitan Borough of Battersea v British Iron and Steel Research Association* [1949] 1 KB 434 (Jenkins L J).  
<sup>11</sup> John Colombo, 'In Search of Private Benefit' (2006) 58(5) *Florida Law Review* 1063, 1065.  
<sup>12</sup> John Colombo, 'In Search of Private Benefit' (2006) 58(5) *Florida Law Review* 1063, 1065.

The trend which is emerging in common law countries like Australia of adding to the heads of charitable purpose by statute<sup>13</sup> but maintaining a 'closed system' of listed charitable purposes rather than an 'open system' based on broad concepts,<sup>14</sup> arguably has taken the idea of public benefit in the context of charitable purpose into areas of incredible complexity. As Peter Smith observed in commentary on the position in England and Wales: 'now we are faced with thirteen heads rather than four, it may be difficult to correlate a particular test of public benefit with one of the new heads.'<sup>15</sup> Smith also noted that the problem does not end there. If it is intended to apply one conception of public benefit across all of the new heads for England and Wales he observed as follows:

... this would, I suggest, cause grave problems and inequities in its application and could create a fundamental distortion and reappraisal of what might or might not be charitable in the future. Gifts for religious purposes, I would suggest, may be particularly susceptible to any such realignment of the public benefit criterion.<sup>16</sup>

Smith's reference to religion and public benefit is an important one. The Australian, Denis Ong has observed: 'How can it ever be possible to prove that any religious (supernatural) purpose is capable of conferring earthly (natural) benefits'.<sup>17</sup> The proposed amendment would require taxation office officials to perform these assessments in Australia as there is not, in this jurisdiction a Charities Commission or other body to perform that function. Arguably the task of assessing the public benefit of spiritual practices is well removed from the skills of revenue collection.

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<sup>13</sup> *Extension of Charitable Purpose Act 2004.*

<sup>14</sup> Wino Van Veen, 'Public Benefit from a Comparative Perspective' in Paul Bater, Frits Hondius and Penina Kessler Lieber (eds), *The Tax Treatment of NGOs: Legal, Ethical and Fiscal Frameworks for Promoting NGOs and their Activities* (2004) 239, 248.

<sup>15</sup> Peter Smith, 'Religious Charities and the Charities Act 2006' (2007) 9(3) *The Charity Law & Practice Review* 57, 70.

<sup>16</sup> Peter Smith, 'Religious Charities and the Charities Act 2006' (2007) 9(3) *The Charity Law & Practice Review* 57, 70.

<sup>17</sup> Denis Ong, *Trusts Law in Australia* (3<sup>rd</sup> ed, 2007) 349.

Australians may reasonably ask what specific skills Revenue collection officers have that make this a task for which the ATO is suited. If the ATO is not the appropriate authority to assess the public benefit of the advancement of religion, then the issues raised by this bill might better be addressed in a wider enquiry that considers more generally whether Australia needs a Commission for the third sector.

Both Scotland and Ireland have legislation that sets out the criteria for assessment of public benefit and the Charities Commission discharges this function for England and Wales.<sup>18</sup> The Irish legislation, which substantially follows the Scottish model, provides a public benefit test. The relevant section provides:

**The “public benefit” test**

3.—(1) This section applies in connection with the requirement in section 2(1)(b) that a purpose falling within section 2(2) must be for the public benefit if it is to be a charitable purpose.

(2) In determining whether that requirement is satisfied in relation to any such purpose, it is not to be presumed that a purpose of a particular description is for the public benefit.

(3) In determining whether an institution provides or intends to provide public benefit, regard must be had to—

(a) how any—

(i) benefit gained or likely to be gained by members of the institution or any other persons (other than as members of the public), and

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<sup>18</sup> *Charities Act 2008* (NI) s 3; *Charities and Trustees Investment Act 2005* (Scotland) 10, s 8; *Charities Act 2006* (Eng.&W) s 4. The Charities Commission released further guidelines in December 2008. See The Charity Commission for England and Wales, *Charities and Public Benefit: The Charity Commission's General Guidance on Public Benefit* (2008).

(ii) detriment incurred or likely to be incurred by the public,

in consequence of the institution exercising its functions compares with the benefit gained or likely to be gained by the public in that consequence, and

(b) where benefit is, or is likely to be, provided to a section of the public only, whether any condition on obtaining that benefit (including any charge or fee) is unduly restrictive.<sup>19</sup>

When both the Northern Ireland and Scottish Explanatory Memoranda are referred to for guidance there is nothing of substance to assist the judges or regulators in deciding how this duty is to be discharged.<sup>20</sup> The factors to be taken into account are simply listed. It will therefore be necessary for judicial officers and regulators to develop criteria by which they discriminate between organisations that are charities and those that are not. If Australia is to follow this model then it must be asked whether this process actually improves determination of charitable status significantly beyond the present common law.

### ***If there is to be an inquiry should its scope be broader?***

Charities have existed and have enjoyed favourable treatment since time immemorial. Luxton pointed to Julius Caesar's gift of the gardens beyond the river to the people of Rome as evidence of charitable giving existing in ancient Rome.<sup>21</sup> Elaine Abery has observed that the favouring of charities is at least as old as Ezra's

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<sup>19</sup> *Charities Act 2008* (NI) s 3. The Scottish legislation is in similar terms. See *Charities and Trustees Investment Act 2005* (Scotland) 10, s 8.

<sup>20</sup> See Explanatory Memorandum to *Charities Act 2008* (NI) and Explanatory Memorandum *Charities and Trustees Investment Act 2005* (Scotland).

<sup>21</sup> Peter Luxton, *The Law of Charities* (2001) 4.



return of the exiled Jews.<sup>22</sup> Colombo and Hall pointed to evidence of tax favour for charities in ancient Greece, ancient Rome and in ancient Egypt.<sup>23</sup> They began their work with the words: 'Exempting charities from various forms of taxation is a practice that appears as old as western civilization itself'.<sup>24</sup> The exemption has applied in the United Kingdom since William Pitt introduced income taxation.<sup>25</sup> The challenge arising with this is that when Parliaments pass into law this favoured status, they are 'generally silent about the dispositive reasons.'<sup>26</sup>

The broader challenge to be considered is arguably why societies have extended these favours and what principles underpin Division 50 of the *Income Tax Assessment Act* 1997. Charities exist and are favoured but we do not know why. There are various contested views.<sup>27</sup> This might be a better starting point for an inquiry.

Taxation law reform is a significant agenda in Australia at the moment. The Productivity Commission Report on the not-for-profit sector and the Henry Review both address the issues of income tax exemption which is the subject of this proposed Bill and this inquiry. The issues are significant and the question should be asked whether the issues raised here should be addressed in the context of reform of the whole of division 50 or in the seemingly piecemeal way proposed by this Bill.

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<sup>22</sup> Elaine Abery, 'Charities: A Target for Ralph' (2000) 29 *Australian Tax Review* 224, 224 referencing *The Holy Bible New International Version* (1984) Ezra 7:24 .

<sup>23</sup> John Colombo and Mark Hall, *The Charitable Tax Exemption* (1995) 1, 14.

<sup>24</sup> John Colombo and Mark Hall, *The Charitable Tax Exemption* (1995) 3.

<sup>25</sup> J Warburton, D Morris and N F Riddle, *Tudor on Charities* (2003) 305.

<sup>26</sup> Penina Kessler Lieber, 'United States Tax Treatment of Nonprofit Organisations' in Paul Bater, Frits Hondius and Penina Kessler Lieber (eds), *The Tax Treatment of NGOs: Legal, Ethical and Fiscal Frameworks for Promoting NGOs and their Activities* (2004) 173, 180.

<sup>27</sup> Penina Kessler Lieber, 'United States Tax Treatment of Nonprofit Organisations' in Paul Bater, Frits Hondius and Penina Kessler Lieber (eds), *The Tax Treatment of NGOs: Legal, Ethical and Fiscal Frameworks for Promoting NGOs and their Activities* (2004) 173, 180-181.

### ***Additional information***

Some of the ideas touched upon in this Submission are explored in greater detail in the author's Doctoral thesis which is available at <http://eprints.qut.edu.au/31742/>.

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