Submission to the Senate Standing Committee on Economics: Inquiry into the Tax Laws Amendment (Public Benefit Test) Bill 2010

The Bill is motivated, at least in part, as a response to alleged criminal activites and claimed criminal purposes. The proper forum for complaints regarding criminal activity is law enforcement agencies not tax reform legislation. Allegations of criminal behaviour should be referred to the police rather than addressed under a taxation measure of general application.

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.

No lessor body than the High Court of Australia has ruled that Scientology is a bona fide religion. Despite the claims of a handful of disgruntled and highly biased ex-members, the Church of Scientology arguably has a better record of upholding and improving moral standards within and outside its four walls than other major religions.

There is currently a presumption of public benefit for religious and certain other charitable purposes. In order to displace this presumption it is not necessary to show that the purpose is detrimental to the public, but only that it is non-beneficial to the public.

The public benefit presumption has worked well as a mechanism for avoiding undue litigation about the question of public benefit. However it remains open to the courts to find that the presumption has been displaced and that income tax exempt status should therefore not be granted.

It does not appear that broader implications for the charitable sector generally have been considered and particularly, in the short term at least, the cost to many diligently governed charities to apply limited resource to buy professional advice on the implications of such a change on their organisation, should not be underestimated.

I am concerned that the removal of the public benefit presumption will lead to legitimate charities increasingly becoming embroiled in litigation or the threat of litigation concerning the question of public benefit. Urgent broad brush changes often prove to be very expensive in the fixes required later.

I am also concerned that the public benefit test proposed under the Bill is to be formulated by regulation rather than by reference to the common law or under primary legislation which is subject to parliamentary debate.

If a legislative test for public benefit is to be adopted then the test should be set out in the legislation and not delegated to the regulation maker, the Treasury Department, which is not subjected the same robust debate as that which occurs in our houses of parliament, nor, based on personal experience, is it fair or consistent.

I submit that the potential administrative costs associated with complying with the measure proposed by the Bill (both to the charitable sector and to the ATO) are likely to outweigh any benefit that might be achieved.

Accordingly I recommend to the Inquiry that the Bill be rejected in principle.